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# Mandatory Multilateralism

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# MANDATORY MULTILATERALISM

*By Evan J. Criddle and Evan Fox-Decent**

ABSTRACT

*This Article challenges the conventional wisdom that states are always free to choose whether to participate in multilateral regimes. International law often mandates multilateralism to ensure that state laws and practices are compatible with sovereign equality and joint stewardship. The Article maps mandatory multilateralism's domain, defines its requirements, and examines its application to three controversies: the South China Sea dispute, the United States' withdrawal from the 2015 Paris Agreement, and Bolivia's case against Chile in the International Court of Justice.*

## I. INTRODUCTION

With skepticism about international norms and institutions on the rise around the world, many commentators have argued that multilateralism faces an uncertain future.[1] Major fractures have appeared in international legal order, including Britain's messy divorce from the European Union[2] and the United States' controversial decisions to reject the Trans-Pacific Partnership,[3] withdraw from the 2015 Paris Agreement and the UN Human Rights Council,[4] and undermine the World Trade Organization (WTO) by sidestepping its

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[1] *See, e.g.*, Ian Buruma, *The End of the Anglo-American Order*, N.Y. TIMES MAG. (Nov. 29, 2016), *at* https://www.nytimes.com/2016/11/29/magazine/the-end-of-the-anglo-american-order.html; *see generally* G. John Ikenberry, *The End of Liberal International Order?*, 94 INT'L AFF. 7 (2018) (discussing these trends).

[2] *See* William Magnuson, *Is Brexit the Beginning of the End for International Cooperation?*, CONVERSATION (Mar. 30, 2017), *at* http://theconversation.com/is-brexit-the-beginning-of-the-end-for-international-cooperation-70865.

[3] *See* Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), *at* https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html.

[4] *See* Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 745 (2018) (discussing the United States' withdrawal from the UN Human Rights Council); Kristina Daugirdas & Julian Davis Mortenson,

dispute-resolution mechanism and blocking appointments to its Appellate Body.[5] This emerging backlash against multilateral norms and institutions is not limited to the Global North. In recent years, several states in Latin America and the Caribbean have withdrawn or have threatened to withdraw from the compulsory jurisdiction of the Inter-American Court of Human Rights,[6] and Burundi and the Philippines have pulled out of the International Criminal Court, raising the prospect of further defections.[7] While the path forward remains unclear,[8] for now many states are reassessing the strategic value of multilateral cooperation and are recalibrating their international commitments across a wide variety of contexts.

This Article provides a new lens for critically evaluating the current backlash against multilateral norms and institutions. In the past, legal scholars and political scientists have developed sophisticated theories to explain the political dynamics and social norms that inform states' decisions to participate in, or withhold their participation from, multilateral norms and institutions.[9] This Article, in contrast, poses a different question: when does international law *require* multilateralism?

Framing the question in this way may strike some readers as counterintuitive. Although international lawyers recognize that international legal norms and institutions are products of multilateral action, some accept a strong version of voluntarism and assume that states are always free to decide for themselves whether they will participate in cooperative international legal regimes or proceed unilaterally.[10] Perhaps in part for this reason, legal scholars have not studied systematically the extent to which international law requires states to

Contemporary Practice of the United States, 111 AJIL 1036 (2017) [hereinafter *Paris Agreement*] (discussing the United States' plans to withdraw from the Paris Agreement).

[5] *See* Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. ONLINE 6 (2018) (discussing these aspects of "the Trump Administration's strategy to undermine the WTO"); Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L LAW ONLINE 37 (2018) (observing that the Trump administration's attacks against the WTO could result in "a long-term decline of multilateralism" in international trade law).

[6] *See* Ximena Soley & Silvia Steininger, *Parting Ways or Lashing Back? Withdrawals, Backlash, and the Inter-American Court of Human Rights*, 14 INT'L J. L. IN CONTEXT 237 (2018) (discussing the Dominican Republic, Peru, Trinidad and Tobago, and Venezuela); *see generally* Laurence R. Helfer, *Populism and International Human Rights Institutions: A Survivor's Guide* (iCourts Working Paper Series No. 133, 2018) (analyzing these and other populist challenges to the international human rights system).

[7] *See* Philipe Villamor, *Philippines Plans to Withdraw from International Criminal Court*, N.Y. TIMES (Mar. 14, 2018), *at* https://www.nytimes.com/2018/03/14/world/asia/rodrigo-duterte-philippines-icc.html; Manisuli Ssenyonjo, *State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia*, 29 CRIM. L. FORUM 63 (2018).

[8] Some observers characterize the current backlash against multilateral norms and institutions as a natural course correction. *See, e.g.*, Harlan Grant Cohen, *Multilateralism's Life-Cycle*, 112 AJIL 47 (2018). Others consider recent events to be merely the inevitable growing pains of regulatory globalization—a brief setback in multilateralism's indomitable forward march. *See, e.g.*, Gary Pinkus, James Manyika & Sree Ramaswamy, *We Can't Undo Globalization, But We Can Improve It*, HARV. BUS. REV. (Jan. 10, 2017), *at* https://hbr.org/2017/01/we-cant-undo-globalization-but-we-can-improve-it. We prescind from commenting on the causes and likely duration of the backlash. For our purposes, the populist backlash against international institutions is sufficient to underscore the importance of apprehending the nature of multilateralism and its international legal obligations.

[9] *See, e.g.*, RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); Cheryl Shanks, Harold K. Jacobson & Jeffrey H. Kaplan, *Inertia and Change in the Constellation of International Governmental Organizations, 1981–1992*, 50 INT'L ORG. 593 (1996).

[10] We discuss voluntarism in Part III. Notable critiques of voluntarism include HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 43–71 (1927); J.L. BRIERLY, THE BASIS OF OBLIGATION IN

cooperate with their peers in developing international norms and institutions.[11] In this Article, we make the case that multilateralism is often mandatory under contemporary international law, and we explain when, why, and how this is so.

A brief note on terminology may be helpful at the outset to clarify what we mean by "multilateralism" sometimes constituting a "mandatory" feature of international law. We use the term "multilateralism" throughout this Article to denote *the coordination of national policies and practices among multiple states in a manner that reflects due regard for the participant states' respective legal rights and authority to represent their people internationally.* Multilateralism, under this definition, has both a nominal dimension and a qualitative dimension.[12] Nominally, international coordination qualifies as "multilateral" if it includes multiple states. Although legal scholars typically distinguish "multilateralism" from "bilateralism,"[13] the crucial distinction for this Article is between actions that states are entitled to take on their own or unilaterally, and actions they are required to take in concert with other states or with due regard to the legitimate interests of the people represented by other states. In other words, the key distinction for present purposes is between unilateral and non-unilateral action, where non-unilateral action is joint activity undertaken by two or more states. Multilateralism in the sense we use it thus embraces the full spectrum of international cooperation from thin bilateralism to robust omnilateralism.[14] For our purposes, any form of cooperation involving two or more states is *potentially* a case of multilateralism.

Cooperation involving two or more states is *actually* an instance of multilateralism if, in addition to the nominal criterion, the means and ends of the cooperative endeavor satisfy a qualitative criterion: the cooperative activity must reflect due regard for participant and third-party states' respective legal rights and authority.[15] By "authority" we mean states' standing to govern and represent their people, and also their standing to address jointly with other states matters of common concern to humanity. International "cooperation" that is based on one state unilaterally dictating the terms of interaction to another is not a case of multilateralism for these purposes. Lastly, we define multilateralism as "mandatory" when states lack discretion under international law to make public policy decisions unilaterally in relation to matters of global concern.[16]

INTERNATIONAL LAW AND OTHER PAPERS 144 (1958); ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARD A NEW *JUS GENTIUM* 16–20 (2010).

[11] Legal scholars have, however, considered the extent to which international obligations can be imposed without state consent. *See, e.g.*, Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AJIL 1 (2014); Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747 (2012); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71 (2008). This Article's focus is conceptual and normative rather than empirical, and therefore does not address the extent to which states comply with mandatory multilateralism. Nonetheless, we hope the arguments developed here will inspire empirical work in this area.

[12] *Cf.* John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT'L ORG. 561, 565–66 (1992) (distinguishing "nominal" from "qualitative" multilateralism, but offering different definitions for each).

[13] *See, e.g.*, Bruno Simma, *From Bilateralism to Community Interests in International Law*, 250 RECUEIL DES COURS 217 (1994).

[14] For a discussion of the spectrum of multilateral cooperation, see Stewart M. Patrick, *The New "New Multilateralism": Minilateral Cooperation, but at What Cost?*, 1 GLOB. SUMMITRY 115 (2015). By "omnilateralism" we mean multilateralism in which all states either participate in lawmaking or are entitled to become parties to international agreements of potentially universal scope.

[15] We will have more to say about the substantive and procedural requirements associated with "due regard" in Part IV.

[16] We reserve for another day consideration of the question whether, or to what extent, international law requires states to cooperate with non-state actors, and vice versa.

As this Article will show, mandatory multilateralism has become a pervasive feature of contemporary international law. Various international courts and tribunals, such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), arbitral tribunals administered under the Permanent Court of Arbitration (PCA), and the WTO's Dispute Settlement Body, have affirmed that international law requires multilateral decision making (or good faith, best efforts to achieve it) in a variety of settings.[17]

The main objectives of this Article are to (1) identify areas of international law where mandatory multilateralism is present as a matter of positive law; (2) develop a theoretical account premised on sovereign equality and joint stewardship[18] to explain and justify this law from an internal, legal point of view; (3) specify mandatory multilateralism's salient obligations for states; and (3) show how mandatory multilateralism applies to a significant range of contemporary international disputes. Our methodology is to take the relevant international norms at face value—i.e., as they are understood by the parties and legal institutions to whom they ordinarily apply[19]—and then use legal principles of sovereign equality and joint stewardship to illuminate the first-order or primary rules from a perspective internal to international law. The sources of these norms are mainly treaties. We will suggest, however, that some may be customary international law or general principles of international law, and all are present in judicial opinions. The organizing ideals of sovereign equality and joint stewardship are themselves general principles of international law. We are not, therefore, challenging international law's "doctrine of sources," although we will challenge the voluntarist view that states are always free to decide for themselves whether they will engage in international cooperation.

More positively, our argument is that a robust set of legal norms now require and govern international cooperation, these norms apply across a broad range of subject areas, and they impose a common set of substantive and procedural requirements wherever they apply. Although these norms are expressed in traditional sources of international law, such as treaties and customs, they are justifiable as institutional expressions of sovereign equality and joint stewardship—principles which have become constitutional foundations of the international legal system. The requirements of mandatory multilateralism are therefore justifiable independently of the particular treaties, customs, or other sources where they find expression.

Part II begins by identifying several domains in which mandatory multilateralism is now the norm. We group these areas into five general categories: (1) territorial disputes, (2) conflicting entitlements, (3) common resources, (4) international peace and security, and (5) international human rights and international criminal law. Whenever a controversy subject to international law falls into one of these categories, the law forbids states from imposing their will unilaterally on their peers. Our methodology in this Part is descriptive and interpretive: we identify domains in which existing international law imposes legal norms that either embody or require mandatory multilateralism.

[17] We discuss a number of these settings in Part II.

[18] Joint stewardship refers to collective state governance of multilateral regulatory regimes established by international law over matters of transnational and sometimes global concern, such as the deep sea floor or endangered species. We discuss joint stewardship *infra*, at Part III.

[19] By "the parties and legal institutions" we mean to refer to states that are bound by international norms through treaty or custom, as well as international tribunals that have jurisdiction to adjudicate disputes concerning the application of those norms. The point of this qualification, however, is to take up an internal point of view regarding international law, not to deny the obvious fact that litigants are bound to disagree on the meaning and applicability of the norms purported to govern their dispute.

Part III argues that mandatory multilateralism is explained by international law's principles of sovereign equality and joint stewardship. Our method is not to derive or deduce mandatory multilateralism from these principles, but rather to use the two principles to explain norms of extant positive law that require and regulate multilateralism. This is an interpretive and value-laden exercise, but one that draws on sovereign equality and joint stewardship as organizing principles immanent to international law. Sovereign equality provides for states' mutual independence from each other within an international legal order structured in part by a prohibition on unilateralism. Similarly, when international law assigns collective responsibility and joint authority to states to regulate certain global public goods on behalf of humanity (e.g., the deep ocean floor, endangered species, international peace and security), joint stewardship dictates that states must regulate those goods multilaterally rather than unilaterally. Mandatory multilateralism is thus an institutional expression of the prohibition against unilateralism, and it gives effect to the principles of sovereign equality and joint stewardship. These principles illuminate why certain international disputes qualify for mandatory multilateralism, while others do not. As we shall see, attention to the principles of sovereign equality and joint stewardship reveal mandatory multilateralism as a context-sensitive structural feature of the international legal order.

Where mandatory multilateralism applies, it imposes a variety of substantive and procedural requirements, which we outline in Part IV. Substantively, mandatory multilateralism requires states to pursue equitable solutions to international controversies with an eye to balancing their own legal rights and authority, on the one hand, with the legal rights and authority of other individual states and the international community collectively, on the other. Within mandatory multilateralism's domain, states also bear procedural obligations to investigate and consult with other interested states, negotiate in good faith, and if negotiations stall, submit to third-party dispute resolution. In cases where states are unable to agree on a negotiated solution or a forum for arbitration, they must maintain a continuous dialogue and refrain from taking steps that would prejudice the outcome of negotiations. These duties are explained by international law's basic commitment to sovereign equality and joint stewardship, while their particular sources, as noted already, include the conventional international law sources of treaty and customary law, as well as judicial opinions. Our methodology in this section is descriptive, inasmuch as it begins with existing international law, but also interpretive, since we use the organizing principles of sovereign equality and joint stewardship to explain the extant legal norms of mandatory multilateralism.

Mandatory multilateralism offers important lessons for a wide variety of current international controversies. Part V offers three illustrations: the South China Sea dispute;[20] the United States' pending withdrawal from the 2015 Paris Agreement;[21] and Bolivia's efforts to compel Chile to negotiate over territorial access to the Pacific.[22] In each of these settings, mandatory multilateralism limits state discretion to go it alone. First, mandatory multilateralism requires states to resolve territorial disputes in the South China Sea through consultation,

[20] For an introduction to the scope and stakes of this dispute, see Council on Foreign Relations, *Territorial Disputes in the South China Sea*, *at* https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/territorial-disputes-in-the-south-china-sea.

[21] *See* Daugirdas & Mortenson, *Paris Agreement*, *supra* note 4.

[22] *See generally* Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile) (Int'l Ct. Just.), *at* http://www.icj-cij.org/en/case/153.

negotiation, and third-party dispute resolution, and it strengthens the legal case against China's militarization and island building within the Sea. Second, although mandatory multilateralism might not require the United States to remain a party to the Paris Agreement, it prohibits the United States from ignoring the global impacts of its climate policies and withdrawing entirely from multilateral engagement. Because mitigating the effects of climate change is "a common concern of humankind" that is subject to the international community's joint stewardship,[23] the United States must continue to cooperate with other states to pursue an equitable, global plan of action. Third, we use a recent case between Bolivia and Chile in the ICJ to illustrate mandatory multilateralism's limits. As we will explain, the theory of mandatory multilateralism that we develop explains why international law requires coastal states like Chile to cooperate in facilitating landlocked states' access to the sea,[24] but it does not demand that they entertain negotiations over the possible transfer of their own territory to landlocked states.[25] Taken together, these three case studies demonstrate mandatory multilateralism's far-reaching (but not unlimited) implications for contemporary interstate relations. Our method throughout these case studies is largely descriptive, but at times we will point to possible normative implications of taking mandatory multilateralism seriously, implications that may go beyond current orthodox understandings of international law.

## II. The Domain of Mandatory Multilateralism

International lawyers tend to take for granted that the content of international law arises from multilateral practices.[26] The primary sources of international law are all multilateral by definition: treaties are concluded with the consent of multiple international actors,[27] customary international law arises from widespread state practice and *opinio juris*, and "general principles of law recognized by civilized nations" are norms common to national legal systems throughout the world. Although a state may undertake certain international obligations by unilateral declaration,[28] it cannot unilaterally impose obligations on others without their consent.[29] Thus, international law's traditional "doctrine of sources" embraces multilateral lawmaking, affirming that all states are entitled to participate and have their interests taken into account in the design of international legal norms and institutions that govern them.

[23] UN Framework Convention on Climate Change, pmbl., May 9, 1992, 1771 UNTS 107 (entered into force Mar. 21, 1994), *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf [hereinafter UNFCCC].

[24] *See* UN Convention on the Law of the Sea, Art. 125(1), UN Doc. A/CONF. 62/122 (1982) [hereinafter UNCLOS].

[25] *See* Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, at 54, para. 175 (Int'l Ct. Just. Oct. 1, 2018) [hereinafter *Obligation to Negotiate Access*].

[26] *See* José Alvarez, *Multilateralism and Its Discontents*, 11 Eur. J. Int'l L. 393, 394 (2000) (characterizing multilateralism as the "shared secular religion" of international lawyers).

[27] *See* Vienna Convention on the Law of Treaties, Art. 2(a), May 23, 1969, 1155 UNTS 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]; Vienna Convention on the Law of Treaties Between States and International Organizations, Art. 2(a), UN Doc. A/CONF.129/15 (1986).

[28] *See, e.g.*, Nuclear Tests Case (Austl./Fr.), Judgment, 1974 ICJ Rep. 253, para. 43 (Dec. 20) ("It is well recognized that declarations made by way of unilateral acts . . . may have the effect of creating legal obligations.").

[29] *See* Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto, at 379, UN Doc. A/61/10 (2006) ("No obligation may result for other States from the unilateral declaration of a State.").

In many contexts, state participation in multilateral legal norms and institutions is optional. The principle of self-determination generally supports giving peoples considerable discretion to choose for themselves the extent to which they embrace multilateralism. Accordingly, states get to decide for themselves whether to opt into multilateral regimes like the European Union and the World Trade Organization.[30] If states prefer isolationism to engagement, they are free to reject foreign investment, spurn international trade, and resist the "entangling alliances" of mutual defense treaties and common markets.[31]

From these general features of international law, some international lawyers might mistakenly infer that states are always free to decide for themselves whether, and on what terms, they will cooperate with their peers. But this inference neglects the extent to which international law now mandates multilateral engagement. There are at least five settings in which multilateralism typically is mandatory under international law today: (1) disputes involving rivalrous claims to territorial jurisdiction; (2) disputes involving conflicting legal entitlements; (3) the administration of common resources; (4) threats to international peace and security; and (5) grave breaches of international human rights and international criminal law. In each of these contexts, international cooperation is compulsory under international law: states must cooperate with one another in good faith to achieve or promote multilateral solutions.

*Territorial Disputes*

It is well established that some territorial disputes trigger mandatory multilateralism. When the border between two states lacks clear definition, neither state is entitled to impose its preferred solution on the other unilaterally.[32] Mandatory multilateralism also applies to international disputes over maritime delimitation.[33] When states with opposite or adjacent coasts disagree about the delimitation of their exclusive economic zones (EEZs) or continental shelves, they must resolve their dispute "by agreement on the basis of international law" or through third-party arbitration.[34] In addition, multilateralism is mandatory when a coastal state sets the outer boundaries of its maritime jurisdiction relative to the high seas and deep sea floor. Recognizing that a coastal state's determination of the outer limits of its maritime

[30] *See* Consolidated Version of the Treaty on the European Union, Art. 49, Mar. 30, 2010, 2010 OJ (C 83) 13 (outlining application procedures for states to join the European Union); WTO Agreement, Art. XII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154 (providing conditions for accession to the WTO).

[31] PRESIDENT THOMAS JEFFERSON, FIRST INAUGURAL ADDRESS (Mar. 4, 1801).

[32] *See* Arbitration Between the Republic of Croatia and the Republic of Slovenia, PCA Case No. 2012-04, Final Award, at 108, para. 334 (June 29, 2017) (describing mutual state consent as "the fundamental principle applicable to the establishment of land boundaries between sovereign States"); Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Trial Chamber*, 100 AJIL 808, 811 (2006) ("[T]he belief by one state that it has legal title to the territory of another does not legitimate the unilateral use of force. . ." (citation omitted)).

[33] *See* North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), 1969 ICJ Rep. 3, 46, para. 85 (Feb. 20) [hereinafter *North Sea Continental Shelf Cases*] (holding that maritime "delimitation must be the object of agreement between the States concerned . . . in accordance with equitable principles").

[34] Maritime Delimitation in the Area Between Greenland and Jan Mayen Case (Den. v. Nor.), 1993 ICJ Rep. 59, para. 48 (June 14); *see also* Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 ICJ Rep. 246, 299, para. 112 (Oct. 12) [hereinafter *Gulf of Maine*] ("No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement . . . [or] by recourse to a third party possessing the necessary competence.").

jurisdiction also demarcates the boundaries of the high seas and the deep sea floor, where the international community has a shared interest, international courts have held that this decision "has always an international aspect" and "cannot be dependent merely upon the will of the coastal State."[35] In short, all states are entitled to participate and have their interests duly respected in maritime delimitation decisions that may affect their legal rights. These applications of mandatory multilateralism constitute a "fundamental norm" of international maritime law.[36]

*Conflicting Entitlements*

Mandatory multilateralism also applies when states assert conflicting entitlements under international law. Consider, for example, the position of states that claim rights to border-straddling natural resources, such as international watercourses and hydrocarbon deposits. In these settings, a state that exercised its sovereign right to exploit a natural resource within its own territory could undermine its neighbor's ability to access or exploit the same resource. Recognizing this problem, the UN General Assembly has called upon states to resolve disputes over shared resources by exchanging information, consulting, and negotiating with one another, with the objective of establishing a multilateral regime to promote conservation and ensure due regard for their respective rights.[37] States have incorporated the General Assembly's multilateral framework for shared resources into international treaties,[38] and publicists have recognized that the requirements qualify as customary international law.[39]

States need not have precisely the same legal entitlements to trigger mandatory multilateralism. International courts and tribunals have held that conflicts between asymmetric rights likewise require international cooperation under international law. For example, in the 1974 *Fisheries Jurisdiction Cases*,[40] the ICJ addressed a conflict between Iceland's "preferential" right to use its own coastal fisheries and other states' secondary rights, based on historical practice, to fish along the Icelandic coast. The Court rejected Iceland's assertion that the priority

[35] *See* Fisheries Case (U.K./Nor.), Judgment, 1951 ICJ Rep. 116, 132 (Dec. 18).

[36] *Gulf of Maine*, 1984 ICJ Rep. at 299, paras. 111–12.

[37] *See* Charter of Economic Rights and Duties of States, Art. 3, GA Res. 3281 (XXIX), 29 UN GAOR Supp. (No. 31), at 52, UN Doc. A/9631 (1974) [hereinafter Charter of Economic Rights and Duties] ("In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others."); GA Res. 3129 XXVII, para. 2, 28 UN GAOR Supp. (No. 30), at 48, UN Doc. A/9030 (1973) [hereinafter GA Res. 3129] (affirming the same).

[38] *See, e.g.*, Case Concerning Pulp Mills (Arg. v. Uru.), Judgment, 2010 ICJ Rep. 14, 76, para. 184 (Apr. 20) [hereinafter *Pulp Mills*] (concluding that the 1975 Statute of the River Uruguay cannot be satisfied "through the individual action of [either Uruguay or Argentina], acting on its own," but rather "requires co-ordination"—including information exchange, consultation, and negotiation—"for the sustainable management and environmental protection of the river").

[39] *See* The Law of the Non-Navigational Uses of International Watercourses, Art. 3, para. 34, *in* Report of the International Law Commission on the Work of Its Thirty-Second Session, [1980] 2 Y.B. INT'L L. COMM'N 114–18, paras. 16–36, UN Doc. A/CN.4/SER.A/1980/Add.1 [hereinafter International Watercourses] (concluding that the duty to negotiate over shared resources "flows from customary international law in the light of its current development"); Gunther Handl, *Binational Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered*, 26 NATURAL RES. J. 405, 411 (1986) ("Today it is generally accepted that if a utilization of a natural resource in one jurisdiction affects a similar or different utilization in another, states are subject to mutually operating restraints as a matter of customary international law.").

[40] (U.K./Ice.), Judgment, 1974 ICJ Rep. 3 (July 25) [*Fisheries-Iceland*]; (Ger./Ice.), Judgment, 1974 ICJ Rep. 175 (July 25) [*Fisheries-Germany*].

accorded to its right under customary international law meant that it was "free, unilaterally, and according to its own uncontrolled discretion, to determine the extent of [its] rights" vis-à-vis other states.[41] Instead, Iceland had to "take into account and pay regard to" others' secondary fishing rights,[42] seeking to reconcile those rights with its own "by agreement."[43] Should the states fail to come to terms on a mutually satisfactory solution, they would have to resolve their "disagreement, through the means for peaceful settlement of disputes provided for in Article 33 of the Charter of the United Nations."[44] Thus, the asymmetric nature of the states' respective fishing rights did not excuse either state from their obligation under international law to pursue a multilateral solution.

Following the *Fisheries Jurisdiction Cases*, international courts and tribunals have affirmed repeatedly that mandatory multilateralism applies to other disputes involving conflicting legal entitlements.[45] For example, in the 2009 *Dispute Regarding Navigational and Related Rights*,[46] the ICJ recognized that Nicaragua was entitled under international law to regulate navigation on the San Juan River, but it nonetheless concluded that Nicaragua could not restrict Costa Rica's secondary rights to use the river for transportation without notifying and consulting with Costa Rica to better understand how proposed regulations would impact Costa Rican nationals.[47] Nicaragua also could not impose visa requirements on Costa Rican vessels, the Court held, because this practice would subject Costa Rica's transit rights to Nicaragua's unilateral discretion.[48] The ICJ explained that these substantive and procedural requirements were based, in part, on the "very subject matter" of the regulations: "navigation on a river in which two States have rights, the one as sovereign, the other to freedom of navigation."[49] To honor the states' respective rights, international law required Nicaragua and Costa Rica to proceed in a spirit of multilateral cooperation, each consulting the other and according due regard to the other's legal interests.

*Common Resources*

Mandatory multilateralism also applies to resources that international law designates as "common areas," "common heritage," or "common concerns" of mankind.[50] The concept

[41] *Fisheries-Iceland*, 1974 ICJ at 27, para. 62; *Fisheries-Germany*, 1974 ICJ Rep. at 196, para. 54.

[42] *Id.*

[43] *Fisheries-Iceland*, 1974 ICJ Rep. at 26, para. 57; *Fisheries-Germany*, 1974 ICJ Rep. at 194, para. 49.

[44] *Id.* In a similar spirit, the UN Convention on the Law of the Sea provides that states must "cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of [highly migratory] species." UNCLOS, *supra* note 24, Art. 64.

[45] *See, e.g.*, Artic Sunrise Arbitration (Neth./Russ.), Case No. 2014-02, Award on the Merits, paras. 211, 230 (Perm. Ct. Arb. 2015) [hereinafter *Arctic Sunrise Arbitration*] (holding that Russia's right "to ensure the safety both of navigation and of the artificial islands, installations and structures" within its EEZ must be exercised with "due regard to the rights and duties of other States," and that this right does not justify boarding a foreign vessel in the EEZ without the flag state's consent).

[46] Dispute Regarding Navigational and Related Rights (Costa Rica/Nicar.), Judgment, 2009 ICJ Rep. 213 (July 13) [hereinafter *Dispute Regarding Navigational and Related Rights*].

[47] *Id.* at 251–52, paras. 94–97.

[48] *Id.* at 257–58, paras. 112–15; *cf. Artic Sunrise Arbitration*, Case No. 2014-02, at paras. 233, 244.

[49] *Dispute Regarding Navigational and Related Rights*, 2009 ICJ Rep. at 252, para. 95.

[50] For an introduction to these concepts, see Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 550 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007).

of common resources originates in the international law of the sea. For centuries, international jurists have affirmed that the high seas constitute a global commons (*res communis*) outside the scope of national jurisdiction.[51] International law therefore prohibits states from regulating activities on the high seas unilaterally. As the 1982 UN Convention on the Law of the Sea (UNCLOS) explains, states must "cooperate with each other in the conservation and management of living resources in the areas of the high seas" by entering "into negotiations" to establish multilateral frameworks for guaranteeing the sustainable exploitation of fisheries and other living resources.[52] By virtue of their placement outside the scope of any individual state's sovereign jurisdiction, the natural resources in these common areas can only be administered properly through norms and institutions that reflect the collective governance of the entire international community.

Since the 1950s, the concept of common areas has expanded from the law of the sea to other important domains. "Outer space, including the moon and other celestial bodies," constitutes a common resource of mankind under international law,[53] with the consequence that states must conduct activities in outer space in accordance with "the principle of co-operation," giving "due regard to the corresponding interests of all other States."[54] States have also preserved Antarctica as a global commons for peaceful exploration and scientific study,[55] with decisions made through a multilateral consultative process.[56] Like the high seas and deep ocean floor, these resources are designated by law as common areas subject to collective administration by the entire international community, and they trigger mandatory multilateralism.

The international community has endeavored, with mixed success, to designate a variety of other resources as "common heritage" resources that trigger mandatory multilateralism for the purpose of ensuring equitable distribution of a resource. For example, UNCLOS provides that minerals at the bottom of the high seas are the "common heritage of mankind," and therefore subject to an international condominium (*res publica omnium*) under multilateral

[51] *See, e.g.*, *Fisheries-Iceland*, 1974 ICJ Rep. at 96–97 (de Castro, J., separate opinion) (explaining that the high seas "belong to the community of peoples, or to mankind"); *see generally* SUSAN J. BUCK, THE GLOBAL COMMONS: AN INTRODUCTION (1998); HUGO GROTIUS, THE FREEDOM OF THE SEAS 22–44 (James Brown & Scott eds., Ralph Van Deman Magoffin trans., 1916) (1609).

[52] UNCLOS, *supra* note 24, Art. 118. As of January 1, 2019, UNCLOS has 168 parties. For a current list, see https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#1. Even non-parties tend to recognize that the vast majority of UNCLOS's provisions reflect customary international law. *See, e.g.*, President Ronald Reagan, Statement on United States Ocean Policy, 1983 Pub. Papers 378 (Mar. 10, 1983) (acknowledging that most UNCLOS provisions "confirm existing maritime law and practice and fairly balance the interests of all states"). The ICJ also has accepted key provisions of UNCLOS as customary international law, including articles that deal with maritime delimitation, fisheries, the continental shelf, and the high seas. *See* J. Ashley Roach, *Today's Customary International Law of the Sea*, 45 OCEAN DEV. & INT'L L. 239 (2014) (collecting cases).

[53] *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Art. II, Jan. 27, 1967, 18 UST 2410, 610 UNTS 205 [hereinafter Outer Space Treaty].

[54] *Id.* Art. IX. There is deep tension between this and other requirements of the Outer Space Treaty, on the one hand, and the idea that one nation might develop a military "space force" to assert dominance of outer space, on the other. *See* Betsy Klein, *Trump: Space Force and Air Force Will Be "Separate but Equal,"* CNN (June 18, 2018), *at* https://www.cnn.com/2018/06/18/politics/trump-space-force-air-force/index.html.

[55] *See* Antarctic Treaty, Art. IV, Dec. 1, 1959, 12 UST 794, 402 UNTS 71. Although territorial claims have been made for much of the continent, "these have been frozen since the adoption of the Antarctic Treaty." Brunnée, *supra* note 50, at 561.

[56] *See* Antarctic Treaty, *supra* note 55, Art. IX.

administration.[57] Hence, when a state harvests mineral deposits from the deep sea floor, other members of the international community are entitled under UNCLOS to an equitable share of the proceeds.[58] Other resources that have been designated by treaty as humanity's common heritage include important cultural works, such as great monuments of architecture, art, and history.[59] In each of these settings, some states have resisted efforts to apply the common heritage concept, fearing the limitations that this designation would place on their freedom to act unilaterally.[60] Yet, for present purposes, this practice only serves to underscore that states recognize that once a resource acquires common heritage status, the designation triggers mandatory multilateralism under international law.

In a similar spirit, aspects of the global environment have been characterized as "common concerns of humanity" that trigger requirements of international cooperation.[61] Painting with a broad brush, the Rio Declaration on Environment and Development proclaims that states bear a sweeping obligation to "cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystems."[62] International treaties, however, tend to define common concerns of humanity more narrowly, leaving room for states to exercise a substantial measure of independent judgment within their respective jurisdiction. For example, the UN Framework Convention on Climate Change (UNFCCC) describes "*change* in the Earth's climate and its *adverse effects*" (not the atmosphere or the climate writ large) as a "common concern" of humanity that requires "the widest possible cooperation by all countries and their participation in an effective and appropriate international response."[63] Similarly, the Convention on Biodiversity identifies the "*conservation* of biological diversity" (not animal life per se) as "a common concern of humankind."[64] By explicitly

[57] UNCLOS, *supra* note 24, Art. 136; *see also* Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (And What Is to Be Done About It)*, 42 TEX. INT'L L.J. 241, 244 (2007) (distinguishing the *res publica omnium* regime for deep sea minerals from the *res communis* regime for the high seas).

[58] *See* UNCLOS, *supra* note 24, Art. 140 (providing that such "[a]ctivities in the [seabed and ocean floor below the high seas] shall . . . be carried out for the benefit of mankind as a whole" and distributed according to the principles of "equitable sharing" and non-discrimination).

[59] *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, pmbl. (May 14, 1954) (explaining that states must respect and protect important cultural works because "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind").

[60] *See* Brunnée, *supra* note 50, at 563 (noting that "the very countries most likely to" exploit the deep seabed "have consistently resisted the application of the concept").

[61] *See, e.g.*, Adoption of the Paris Agreement, pmbl., FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015); The World Conservation Union & International Council of Environmental Law, Draft International Covenant on Environment and Development, Art. 3 & cmt. at 38–39 (4th ed. 2010) (characterizing the global environment as a "common concern of humanity" and stating that this status "implies acceptance of both the right and the duty of the international community as a whole to have concern for the global environment").

[62] Rio Declaration on Environment and Development, Principle 7, adopted June 14, 1992, UN Doc. A/CONF.151/26 (1992). For similarly broad pronouncements describing the global environment as a common concern triggering mandatory multilateralism, see MOX Plant Case (Ireland/U.K.), ITLOS No. 10, para. 82 (Dec. 3, 2001) [hereinafter *MOX Plant Case*] (characterizing the "duty to cooperate" in protecting the global environment as "a fundamental principle" of "general international law"); *id.* at 135 (Wolfrum, J., separate opinion) ("The obligation to cooperate with other States whose interests may be affected is a *Grundnorm* of [UNCLOS], as of customary international law for the environment.").

[63] UNFCCC, *supra* note 23, pmbl. (emphasis added); *see also* Brunnée, *supra* note 50, at 564–565 (emphasizing this limitation).

[64] UN Conference on Environment and Development: Convention on Biodiversity, pmbl., *opened for signature* June 5, 1992, 31 ILM 822 (emphasis added).

specifying in treaties that these and other issues constitute common concerns of humanity, the international community has signaled that states' sovereign rights to exploit resources within their domestic jurisdiction are coupled with a concomitant obligation to cooperate with other states in advancing sustainable development and preventing catastrophic environmental harm. These advances in international environmental law provide further evidence that when common resources of humanity are at stake, international cooperation becomes mandatory under international law.

*International Peace and Security*

International peace and security is a fourth area where multilateralism is mandatory under international law. A principal purpose of the United Nations is to "maintain international peace and security" by facilitating "effective collective measures for the prevention and removal of threats to the peace."[65] To further this purpose, the UN Charter empowers the Security Council to coordinate the international community's collective response to emerging threats.[66] Individual member states, in turn, are obligated to cooperate with the Security Council to achieve these collective objectives. Integral to this multilateral framework is the requirement that states "settle their international disputes by peaceful means"[67] and "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[68] If states cannot resolve their disputes peacefully through negotiation or arbitration, they are obligated to refer the matter to the Security Council.[69] States must also "give the United Nations every assistance in any action it takes" to maintain international peace and security and "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."[70] The mandatory nature of these duties is underscored by Article 2(6) of the Charter, which charges the United Nations with ensuring that even "states which are not Members of the United Nations" do not imperil "the maintenance of international peace and security."[71] States that flout their duties to cooperate with the United Nations in suppressing threats to international peace and security expose themselves not only to international censure, but also to possible international sanctions and other coercive measures, as directed by the Security Council.[72]

[65] UN Charter Art. 1.

[66] *See id.* Arts. 39–42 (providing for the Security Council to determine what measures are necessary to maintain or restore international peace and security).

[67] *Id.* Art. 2(3); *see also id.* Art 33(1) ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.").

[68] *Id.* Art. 2(4).

[69] *Id.* Art. 37.

[70] *Id.* Art. 2(5); *see also* Art. 48(1) (providing that "action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine"); *id.* Art. 49 ("The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.").

[71] *Id.* Art. 2(6).

[72] *Id.* Arts. 39–42.

Some international lawyers might object that the Charter's multilateral aspirations for the use of force are undermined by Article 51, which contemplates that states may defend themselves from attack without awaiting Security Council authorization.[73] In principle, however, a state's "inherent right" of self-defense under Article 51 is consistent with the Charter's commitment to mandatory multilateralism.[74] Self-defense is permissible only when international peace and security have already been ruptured by an actual or imminent armed attack, and only until the Security Council intercedes.[75] The Charter also provides that an act of "self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council" to prescribe a multilateral response.[76] Moreover, self-defense is constrained by customary requirements of necessity and proportionality, which compel states to take into account the impact of their defensive measures on foreign interests. Thus, even when states act in self-defense, international law channels their response through multilateral norms and processes.

*International Human Rights and International Criminal Law*

International human rights and international criminal law norms comprise a possible fifth category of mandatory multilateralism. According to the Charter, a core purpose of the United Nations is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[77] Although states are primarily responsible for protecting and fulfilling human rights within their own jurisdictions, under the Charter they also "pledge themselves to take joint . . . action in co-operation with the [United Nations]"[78] to secure "universal respect for, and observance of, human rights and fundamental freedoms for all."[79]

In the United Nations' infancy, states worked in cooperation with the General Assembly and the UN Economic and Social Council (ECOSOC)[80] to codify international human rights in landmark agreements, such as the Universal Declaration of Human Rights (UDHR),[81] the International Covenant on Civil and Political Rights,[82] and the International Covenant on Economic, Social and Cultural Rights.[83] Over the past several decades, international

[73] *See id.* Art. 51 ("Nothing 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. . . .").

[74] *Id.*

[75] *Id.* Although the Charter does not expressly address imminent attacks, conventional wisdom holds that Article 51 permits self-defense in response to imminent attacks. *See, e.g.*, CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 161 (3d ed. 2008); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 168 (3d ed. 2001).

[76] UN Charter Art. 51.

[77] *Id.* Art. 1(3).

[78] *Id.* Art. 56.

[79] *Id.* Art. 55.

[80] *See id.* Art. 60 (assigning responsibility to the General Assembly and ECOSOC to discharge this coordination function).

[81] Universal Declaration of Human Rights, UNGA Res. 217 A (III), UN Doc. A/810 (1948) [hereinafter UDHR].

[82] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

[83] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3.

cooperation has evolved significantly, with the Security Council using its authority under Chapter VII of the Charter to mandate collective responses (e.g., economic sanctions, travel restrictions, military action) to serious breaches of international human rights and international criminal law norms (e.g., genocide and crimes against humanity).[84] When the Security Council addresses a humanitarian crisis in this manner, conventional wisdom now holds that states must cooperate with the Security Council's efforts to promote universal respect for international human rights and international criminal law.[85]

Customary international law may also be in the process of developing positive duties of cooperation for addressing serious breaches of international human rights and international criminal law. In its influential Articles on State Responsibility for Internationally Wrongful Acts (the Articles), the UN International Law Commission (ILC) has endorsed the view that states must "cooperate to bring to an end through lawful means any serious breach" "of an obligation arising under a peremptory norm of general international law."[86] The ILC's commentary accompanying the Articles acknowledges that reasonable minds might fairly question whether "[customary] international law at present prescribes a positive duty of cooperation," and it concedes that the Articles' articulation of this duty "may reflect the progressive development of international law."[87] Nonetheless, the ILC's commentary stresses that "in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law."[88] As evidence of state practice and *opinio*

[84] *See, e.g.*, SC Res. 2085, para. 9 (Dec. 20, 2012) (authorizing "the deployment of an African-led International Support Mission in Mali" to support local authorities' efforts to protect civilians); SC Res. 1970 (Feb. 26, 2011) (imposing sanctions in response to crimes against humanity in Libya); SC Res. 1962, pmbl., paras. 3, 14, 15 (Dec. 20, 2010) (authorizing military action for the protection of civilians in Côte d'Ivoire).

[85] *See* UN Charter Art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."). The UN General Assembly and Human Rights Council have affirmed repeatedly that international human rights trigger positive duties of international cooperation. *See, e.g.*, Human Rights Council Res. 35/8, para. 8, UN Doc. A/HRC/RES/35 (July 14, 2017) (emphasizing "the duty of States to cooperate with one another in accordance with the Charter of the United Nations in the promotion of universal respect for and observance of human rights and fundamental freedoms"); 2005 UN Secretary-General, Implementing the Responsibility to Protect, para. 10, UN Doc. A/63/677 (2009) (embracing this principle); World Summit Outcome, GA Res. 60/1, para. 139 (Oct. 24, 2005) ("The international community, through the United Nations," bears "responsibility . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."); GA Res. 48/121 (Dec. 20, 1993) (endorsing the Vienna Declaration and Programme of Action, A/Conf.157/23 (July 12, 1993), which affirms "the commitment contained in Article 56 of the Charter of the United Nations to take joint and separate action, placing proper emphasis on developing effective international cooperation for the realization of the purposes set out in Article 55, including universal respect for, and observance of, human rights and fundamental freedoms for all"); GA Res. 47/131, para. 3 (Dec. 18, 1992) (calling upon UN "Member States to base their activities for the protection and promotion of human rights, including the development of further international cooperation . . . , on the Charter . . . and other relevant international instruments").

[86] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 40–41, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 113, UN Doc. A/56/10 (2001); *see also id.* Art. 41, cmt. 3 ("What is called for in the case of serious breaches, is a joint and coordinated effort by all States to counteract the effects of these breaches."). According to the ILC, this duty to cooperate in suppressing serious abuses complements states' Charter-based duty to contribute to multilateral action through the United Nations. *See id.* cmt. 2 ("Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation."). Accordingly, even when the Security Council fails to take action, the *Articles* suggest that states are duty-bound to cooperate with one another to safeguard human rights as well as the individual and collective interests protected under international criminal law.

[87] *Id.* Art. 41, cmt. 3.

[88] *Id.*

*juris* continues to accumulate in the future, the ILC's conclusion that customary international law requires states to cooperate with one another to address serious abuses, though somewhat vague and controversial today,[89] may eventually become the prevailing view.[90]

Even if a positive duty of cooperation never crystallizes in customary international law, the fact remains that states are already subject to duties of mandatory multilateralism when it comes to promoting international human rights and enforcing international criminal law. Under the Charter, all states have committed to take action, individually and jointly in cooperation with the United Nations, for the purpose of promoting universal respect for human rights. At a minimum, therefore, states bear an obligation to cooperate with the Security Council's multilateral initiatives to suppress "the gravest breaches of international law."

* * * *

As these examples illustrate, mandatory multilateralism has become an important feature of international law that arises in diverse subfields, from territorial disputes to environmental protection to the prevention of mass atrocities. Where mandatory multilateralism applies, states are legally obligated to cooperate with their peers to address issues of global concern through consultation, negotiation, and, if necessary, third-party dispute resolution. Mandatory multilateralism is reflected in the Charter's requirement that states peacefully resolve any disputes that are "likely to endanger the maintenance of international peace and security,"[91] but its reach extends well beyond such disputes. Even if no threat to international peace and security is immediately foreseeable, international law still requires states to cooperate with one another to resolve disputes concerning undefined borders, conflicting entitlements, common resources, or serious breaches of international human rights and international criminal law. As the ICJ has explained, the duty to cooperate arises in these settings from the "very subject-matter" of the disputes,[92] and not simply because hostilities are likely to follow.

The emergence of mandatory multilateralism requires some explaining. Why does international law sometimes mandate multilateralism rather than let states decide for themselves? In Part III, we develop an interpretive theory that explains why multilateralism is sometimes mandatory under international law. We argue that mandatory multilateralism is not an anomalous feature of a few isolated international regimes; rather, it emanates from two

[89] *See* Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 254 (2014) ("The claim that [the responsibility to protect] demands action by all outside states simultaneously has some authoritative support but remains almost entirely aspirational."); Mehrdad Payandeh, Note, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 480–85 (2010) (questioning whether the responsibility to protect concept has received sufficient definition to qualify as customary international law).

[90] *Cf.* Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ Rep. 47, 221, para. 430, 225, para. 438 (Feb. 26) (holding that parties to the Genocide Convention bear a duty of "due diligence" to use all lawful tools at their disposal to prevent genocide abroad, and faulting Yugoslav federal authorities for violating this obligation); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, at 5, para. 4 (Mar. 21, 2006) ("In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, . . . States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.").

[91] UN Charter Art. 33(1).

[92] *Dispute Regarding Navigational and Related Rights*, 2009 ICJ Rep. at 252, para. 95.

foundational and organizing principles of contemporary international law: sovereign equality and joint stewardship.[93]

## III. The Foundations of Mandatory Multilateralism

This Part develops an interpretive theory of mandatory multilateralism. We argue that mandatory multilateralism is implicit in principles of sovereignty equality and joint stewardship, and that as a consequence mandatory multilateralism may be seen as an emerging institutional feature of international law that brings the institutions of international law into the deepest conformity possible with its fundamental normative principles. At a practical and doctrinal level, the theory we develop in this Part explains why multilateralism is mandatory in some contexts, such as those discussed above in Part II, but not in others. The methodology throughout is not to derive mandatory multilateralism from first principles, but rather to use those transversal and organizing principles to explain the presence of mandatory multilateralism in the domains outlined in Part II.

### *Sovereign Equality*

International law's venerable principle of sovereign equality—*par in parem non habet imperium*—means literally "equals do not have authority over one another."[94] Analogizing to the moral status of individuals in the state of nature, Vattel offered a classic statement of the principle:

> Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature,—nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.[95]

For Vattel, might can never make right—"Strength or weakness . . . counts for nothing"—and so "a small Republic is no less a sovereign state than the most powerful Kingdom." In the interwar period, Edwin DeWitt Dickinson developed a similar view, deriving sovereign equality from the formal international legal personality of states and arguing that "[i]nternational persons are equal before the law when they are equally protected in the enjoyment of their rights and equally compelled to fulfill their obligations."[96] This conception of sovereign equality, and the conception on which we rely, is formal rather than substantive in that it goes to questions of legal status and standing rather than, say, the allocation of resources. Nonetheless, we shall see that this formal conception has concrete, substantive implications.

[93] *See, e.g.*, *Gulf of Maine*, 1984 ICJ Rep. at 299–300, paras. 111–13.

[94] Oxford Reference, *at* http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100306400.

[95] 3 Emer de Vattel, The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns 75, § 18 (Bela Kapossy & Richard Whatmore eds., 2008) (1797).

[96] Edwin DeWitt Dickinson, The Equality of States in International Law 3, 102 (1920); *see also* Lassa Oppenheim, 1 International Law: A Treatise 238, § 115 (Hersch Lauterpacht ed., 6th ed. 1947) ("The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their International Personality.").

The movement of sovereign equality from Vattel to modernity was far from smooth and continuous. In the nineteenth and early twentieth centuries, the United States and European powers either explicitly or implicitly placed national interests ahead of aspirations for an international order premised on equality.[97] For example, President Theodore Roosevelt famously rejected sovereign equality and viewed the United States as the world's policeman.[98] Similarly, although the Peace Conferences held at The Hague in 1899 and 1907 were formally organized around the idea of sovereign equality, in practice the Great Powers dominated.[99] Great Power domination was also evident in the Peace Conference at the end of World War I, and in the design and creation of the United Nations after World War II,[100] notwithstanding President Franklin Delano Roosevelt's "Good Neighbor Policy," which articulated "nothing less than a full-throated rejection of the long-held American right to intervene in the affairs of its southern neighbors."[101] Nowhere is Great Power dominance more evident than in the structure of the UN Security Council, with five permanent and veto-empowered members drawn from the victors of World War II.[102] Nonetheless, the UN Charter and the international legal order it inaugurated gave the principle of sovereign equality new significance.

Article 2(1) of the Charter stipulates that the United Nations itself "is based on the principle of the sovereign equality of all its Members."[103] Various elements of this principle were later specified and enshrined in the UN General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration).[104] The Friendly Relations Declaration expressly provided that all states are "judicially equal" and that each "enjoys the rights inherent in full sovereignty."[105] In effect, the Declaration took a middle path between Eastern-bloc and non-aligned states that viewed international cooperation as a general requirement of customary international law, and Western states that viewed international cooperation to be legally binding only if codified in a treaty.[106] In addition to a rich conception of sovereign equality, the Friendly Relations Declaration affirmed "[t]he principle of equal rights and self-determination of peoples," the "duty of

[97] ROBERT A. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA (1974) (chronicling resistance to sovereign equality prior to and during the creation of the United Nations). The point of this paragraph is to acknowledge the historical background and power politics that at times frustrated the entrenchment of sovereign equality as an organizing principle of international law, but without prejudice to the constitutional role sovereign equality would eventually come to play as an organizing principle.

[98] *Id.* at 50–51.

[99] *Id.* at 54–61.

[100] *Id.* at 67–139.

[101] OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 187 (2017).

[102] UN Charter Art. 23.

[103] *Id.* Art. 2(1).

[104] UN General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

[105] *Id.*

[106] Bogdan Babovic, *The Duty of States to Cooperate with One Another in Accordance with the Charter, in* PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION 281–83 (Milan Sahovic ed., 1972).

States to co-operate with one another in accordance with the Charter," and that "States shall settle their international disputes by peaceful means."[107] Put slightly differently, the Declaration deployed the principle of sovereign equality to reconcile international law's commitments to the autonomous self-determination of free and equal peoples, on the one hand, and a Charter-based legal framework within which international cooperation and peaceful dispute resolution is to take place, on the other.

The principle of sovereign equality also figures prominently in numerous international judgments. The ICJ has held that the rule of sovereign immunity "derives from the principle of sovereign equality of States," such that "[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality."[108] The foundational status of the principle was implicitly affirmed in Judge Charles Andre Weiss's dissent in the Permanent Court of International Justice's (PCIJ) *Case of the S.S. Lotus.*[109] Judge Weiss reasoned that "the rule sanctioning the sovereignty of States" is one "which is paramount and which does not even require to be embodied in a treaty" because if this rule is not valid "no international law would be possible, since the purpose of [international] law precisely is to harmonize and reconcile the different sovereignties over which it exercises sway."[110] Although the judges of the PCIJ divided over the outcome of the case, all accepted the principle that the international community's "different" sovereignties are equal sovereignties.

To be sure, sovereign equality does not entail that sovereigns all possess the same primary rights and obligations at international law. Much of international law arises from treaties that states can elect to enter into or not at their discretion. Thus, states can choose whether or not to acquire the rights and assume the obligations that flow from the ratification of such treaties. But sovereign equality does entail, as U.K. Preuss puts it, that "no state is superior to any other state, and all states are equals with respect to their status in the plurality of states . . . . [T]hey are equally independent. Therefore, the states' equality can rightly be regarded as a 'corollary of sovereignty.'"[111]

Prior to the League of Nations and the United Nations,[112] relations between states were horizontal (at least formally, in a *de jure* sense), and so the equal independence of states could be understood purely in terms of each state's horizontal independence from others. However, with the development of the United Nations and other post-World War II international institutions, relations between states have attained a measure of constitutionalization in part because supra-state entities exercise international lawmaking or adjudicative powers over states within their respective jurisdictions.[113] In this context, horizontal independence is

[107] Friendly Relations Declaration, *supra* note 104, pmbl.

[108] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), 2012 ICJ Rep. 99, para. 57 (Feb. 3); *see also* OPPENHEIM, *supra* note 96, at 196, § 115 ("The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their International Personality.").

[109] The Case of the S.S. Lotus, 1927 PCIJ (Ser. A) No. 10 (Sept. 7) [hereinafter *Lotus*].

[110] *Id.* at 44 (dissenting, but not on this point).

[111] U.K. Preuss, *Equality of States – Its Meaning in a Constitutionalized Global Order*, 9 CHI. J. INT'L L. 17, 26 (2008).

[112] *But see id.* at 42 (arguing that under the League "submission of disputes to the judgment of international courts . . . was strictly voluntary," and so "the League's mode of decisionmaking" was not "collective" but rather "a mere mechanism of coordinating the obligations of independent states").

[113] For discussion of these developments, see the essays collected in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2012).

still significant, but with collective decision making over certain matters now allocated to hierarchically superior institutions such as the Security Council and the WTO, the principle of sovereign equality needs also to reflect the equal status of states in their vertical relations to international institutions. A shared concern in both horizontal and vertical relations is the status of smaller or weaker states with formal *de jure* equality but lacking *de facto* status and influence. As Brad Roth puts it: "To speak . . . of 'sovereign equality' . . . is to speak principally of the sovereignty of weak states."[114] That is, although the conception of equality at issue is formal rather than substantive, the legal equality it affords enables weaker states to make legal claims that can have substantive effects.

International legal materials—treaty law, customary law, judicial decisions, and scholarship—disclose two distinct approaches to sovereign equality. The conventional view reflects a predominantly voluntarist model under which states are bound to resolve disputes through multilateral means only if they have ratified a treaty so as to undertake specific obligations. An alternative view—the view defended here—is a constitutionalist model according to which states, within certain domains calling for international cooperation, are subject to positive multilateral obligations—e.g., obligations to negotiate in good faith and resort to a third-party if necessary—to which they may not have formally consented. We discuss these models in turn, and then discuss the *Lac Lanoux* Arbitration as a case study.

*Voluntarism*

The voluntarist view of sovereign equality gives pride of place to the thought that sovereigns exercise power without being subject to the authority of any other sovereign—as "uncommanded commanders."[115] As the PCIJ put it in the *Status of Eastern Carelia* case, "[i]t is well-established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or any other kind of pacific settlement."[116] On this view, sovereigns are supreme within their jurisdiction and independent in their relations to other sovereigns. The voluntarist view captures some of international law's prohibition on unilateralism in that no sovereign state is entitled to dictate terms to another, for such an entitlement would mark a compromise of the formal principle of sovereign equality. For voluntarists, the equal independence of states implies that state consent is the *sine qua non*—the necessary and sufficient normative condition—of international obligation.

Voluntarists typically use the so-called "*Lotus* principle" as their doctrinal touchstone.[117] The principle is drawn from the *Lotus* majority judgment,[118] the essence of which Prosper Weil summarizes as "whatever is not explicitly prohibited by international law is

[114] BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER 13 (2011).

[115] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958) (critiquing John Austin's command theory of law according to which law consists in commands backed by force of an uncommanded commander).

[116] Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (Ser. B) No. 5, at 27 (July 23) [hereinafter *Status of Eastern Carelia*].

[117] Some more radical political voluntarists are skeptics regarding international law, arguing that treaties and customary law are not really law but rather expressions of, at most, political or moral obligations. *See, e.g.*, John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 4–7 (2000).

[118] *Lotus*, 1927 PCIJ (Ser. A) No. 10.

permitted."[119] The PCIJ held that "[t]he rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . . Restrictions upon the independence of States cannot therefore be presumed."[120] The Court also declared that states under international law enjoy "a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[121] Thus, Weil claims, the *Lotus* principle is grist for the mill of a "consensualist and voluntarist conception of international law," a conception under which states "are bound by a rule of law only because, and to the extent that, they have consented to it. Freedom to act remains the basic principle."[122]

A significant weakness of this approach is that the institutional practices of international law have increasingly eclipsed voluntarism's normative commitments. As discussed in Part II, mandatory multilateralism has proliferated across numerous settings. In cases of territorial disputes and conflicting entitlements, for example, the requirement to resolve disputes through impartial third-party processes can be explained by the anti-unilateralist principle that no person may be judge and party to the same cause (*nemo iudex in sua causa*). The very idea of one party holding a legal entitlement to adjudicate its dispute with another would flagrantly violate the principle of sovereign equality. In short, voluntarism cannot account for many fields of international law in which mandatory multilateralism is the norm.

There are significant conceptual problems with voluntarism, too. Recall that an attraction of the voluntarist theory is that it purports to subscribe to international law's prohibition on unilateralism under which no state can impose terms on another: no state can impose terms on another because no state can be bound except by its own voluntary acts. Put another way, states are only subject to legal rules or norms to which they consent, from which it follows that consent is the only means of establishing a rule or norm under voluntarism. Yet, by ceding to non-consenting states a potentially unlimited liberty-right of action—the absolute discretion of the uncommanded commander—voluntarism cedes to these states the liberty-right to decide for themselves the terms on which they will interact with others, regardless of whether the counterparty consents. If a recalcitrant state refuses to agree to fair and equal terms consistent with sovereign equality, voluntarism lacks the resources to censure that state from a legal point of view. Under voluntarism, the recalcitrant state will have breached no legal rule to which it was subject. Thus, while voluntarism prohibits one state from creating obligations for another without the other's consent, voluntarism alone provides no legal resources to condemn a predatory state that seeks to infringe, for example, another state's territorial integrity or political independence.

Our point is not to equate voluntarism with unilateralism, but rather to explain why voluntarism, taken seriously, may permit unilateralism within the conception of the international legal order it endorses. It follows that voluntarism cannot explain sovereign equality

[119] Prosper Weil, *"The Court Cannot Conclude Definitively"* . . . Non Liquet *Revisited*, 36 COLUM. J. TRANSNAT'L L. 109, 112 (1998).

[120] *Lotus*, 1927 PCIJ (Ser. A) No. 10, at 18.

[121] *Id.* at 19. *But see* An Hertogen, *Letting* Lotus *Bloom*, 26 EUR. J. INT'L L. 901, 904 (2016) (arguing that *Lotus* has been misinterpreted and that the key to understanding the case lies in the Court's commitment to the "coexistence of independent communities").

[122] Weil, *supra* note 119, at 113.

because sovereign equality denotes an equal right to external and internal self-determination —a right to equal independence—and this formal equality right implies (as we explain immediately below) substantive reciprocal duties of non-interference and non-domination.

*Constitutionalism*

A constitutional model of sovereign equality avoids this pitfall while affirming a robust prohibition on unilateralism. On a constitutional reading of sovereign equality, international law both empowers states as international legal actors as well as constrains them in their dealings with other states and non-state actors, including citizens and non-citizens. There is now a considerable literature on the constitutionalization of international law, some of which characterizes this approach to international law as a "mindset" or "sensibility,"[123] while others note that international constitutionalism shares with its democratic national counterparts core commitments to human rights, democracy, and the rule of law.[124] For our purposes, the constitutional perspective offers a congenial framework within which international law empowers states by recognizing them as the *de jure* governors of their people at the domestic level and as the *de jure* representatives of their people in international affairs. This recognition enables states to establish political and legal order nationally and to enter into binding treaties and otherwise represent their people internationally. In their international dealings, however, states are subject to reciprocal limits of a constitutional nature that reflect the equal status of both their sovereign powers and independence vis-à-vis one another.

The dissenting opinion of Judge Bernard Loder in *Lotus* provides an especially clear account of this constitutional conception of sovereign equality. Judge Loder asserts that states relate to each other on terms of "mutual independence."[125] It follows from the "independence and sovereignty" of states "that no municipal law . . . can apply or have binding effect outside the national territory." [126] To emphasize that he takes this "fundamental truth" to be constitutional in nature—that is, partially constitutive of the structure of international legal order—Loder underlines that it "is not a custom but the direct and inevitable consequence of its premis[e]" (i.e., the "independence and sovereignty" of different states).[127] For states to be sovereign they must be independent, and for them all to be independent, they must be independent mutually or equally. At the heart of Loder's opinion, then, is the constitutional insight that sovereignty implies independence, and that universal independence implies mutual or equal independence. Independence is a necessary condition of sovereignty,

[123] *See, e.g.*, Jan Klabbers, *On Responsible Global Governance*, *in* TOWARDS RESPONSIBLE GLOBAL GOVERNANCE 11, 29 (Jan Klabbers, Maria Varaki & Guilherme Vasconcelos Vilaça eds., 2018) (characterizing the constitutionalist idea of responsible governance as a "sensibility"); Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 J. THEORETICAL INQ. L. 9 (2007).

[124] *See, e.g.*, Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223, 226 (2006) (discussing Christian Tomuschat's constitutionalist account of international law as supporting human rights and the rule of law); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework Analysis*, 15 EUR. J. INT'L L. 907 (2004) (specifying human rights, democracy, and the rule of law as global constitutionalism's core values).

[125] *Lotus*, 1927 PCIJ (Ser. A) No. 10, at 35, para. 106.

[126] *Id.* at 35, para. 105; *see also* The Antelope, 23 U.S. 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.").

[127] *Lotus*, 1927 PCIJ (Ser. A) No. 10, at 35.

while sovereign equality is a necessary condition of universal independence. One sense in which all sovereigns are *equal* is that none are entitled to dictate terms to others unilaterally, and conversely, none can be made to suffer such terms. This is also the reason sovereign states (in principle) are *independent*: none depends on the permission of another to exercise domestic or international public functions.

Independence under constitutionalism denotes a form of freedom or liberty. In our view, the liberty of independence has two constitutive elements: a liberal principle of non-interference and a republican principle of non-domination.[128] The principle of non-interference prohibits states from wrongfully interfering with each other through any unilateral act that infringes the legal interests or authority of other states. We define "unilateral act" as one performed by an actor who explicitly or implicitly asserts an entitlement to determine solely the legality of the act. Military aggression is a vivid example of wrongful interference, since one state violates the territorial integrity of another through the unilateral use of force. But other unilateral acts would count as well, including acts that would not count as a "use of force" under international law. For example, a state would violate the principle of non-interference by dictating the outcome of a border dispute, or by insisting on plainly unfair terms of participation in a necessarily collective endeavour, such as the protection of a migratory and endangered species. A simple refusal to negotiate a matter that calls for multilateralism is likewise a wrongful interference, since it contests the authority of other states to negotiate jointly fair terms of cooperation for all concerned.[129] Depending on the context, a refusal to negotiate may be indistinguishable from the position of a holdout who seeks unfair terms in a project of common concern that can succeed only if all or nearly all affected parties take part. A powerful holdout can dominate weaker parties who, in the circumstances, are better off taking an unfair deal rather than living with no deal at all.

The principle of non-intervention can be seen as a salient legal expression of the normative principle of non-interference. The most general formulation of this legal principle in the UN Declaration on Non-Intervention states that "[n]o state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[130] The Declaration specifically decries "armed intervention" as a prohibited form of conduct, as well as "the use of force to deprive peoples of their national identity" or efforts "directed towards the violent overthrow of the regime of another State."[131]

The Declaration makes clear, however, that the principle of non-intervention is wider than the principle of non-interference. Specifically, the Declaration avows that *threats* of unilateral

[128] We discuss this conception of freedom as independence as it pertains to human rights bearers in Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 310–11 (2009). The "liberal" and "republican" nomenclature is standard in writings on liberty that, on the one hand, distinguish liberal "negative" or non-interference conceptions of liberty from positive "freedom from" conceptions, and, on the other, distinguish non-interference accounts of liberty from republican or neo-Roman accounts that focus on the evil domination. *See, e.g.,* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958) (distinguishing negative and positive conceptions of liberty); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997) (developing a republican theory of freedom based on the ideal of non-domination).

[129] By "fair terms of cooperation" we have in mind something like the reciprocal terms on which free and equal persons might interact under Rawls's conception of justice as fairness. *See, e.g.,* JOHN RAWLS, JUSTICE AS FAIRNESS 6 (2001) (distinguishing social coordination from social cooperation).

[130] UN General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, para. 1, Dec. 21, 1965, A/RES/2131(XX).

[131] *Id.*, paras. 1–3.

acts—and not just unilateral acts themselves—are legally wrongful. The Declaration stipulates that "attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned."[132] States may not "use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind."[133] And finally, linking the prohibition of threats to self-determination and the protection of human rights, the Declaration provides that "[a]ll States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms."[134] Because the principle of non-interference explains exclusively the way actual and wrongful unilateral acts compromise freedom, it cannot explain how certain unrealized *threats* of those acts compromise freedom.[135] For an account of the wrongfulness of threats and their infringement of liberty, we need the republican principle of non-domination.

For republicans, domination consists in subjection to the arbitrary will of another and is the chief cause of unfreedom.[136] In the classic example of the slave and benevolent slave master, republicanism invites us to imagine a master who wishes only the best for her slave. She treats him like family, supports his hopes and aspirations, encourages his projects, and so on. At no time does the master act on the slave-owning prerogatives she possesses. In short, the master does not interfere with, but rather supports, the slave and his choices. Nonetheless, the slave is still unfree, republicans assert, because the master is entitled to crack the whip at any time, for any reason (including malicious or spiteful reasons), and to do so with impunity. Republicans point out that this asymmetrical power structure ordinarily leads to bowing, scraping, and a constant sense of unease (if not terror) on the part of the dominated party.[137] But the distinct evil of domination—the evil and unfreedom suffered by the slave of the benevolent master—is simply subjection to the looming threat of arbitrary force against which there is no recourse.

When the Declaration on Non-Intervention prohibits "threats" against a state's "personality," or against its "political, economic, and cultural elements," the Declaration puts into positive legal form the principle of non-domination. A state's personality is the law-created artificial entity to which the words and actions of the state's representatives are attributed when they act in the name of the state.[138] Consequently, certain threats against the state's personality may constitute existential threats. The threat of military aggression and

[132] *Id.*, para. 1.

[133] *Id.*, para. 2. References to "subordination" and securing "advantages" suggest that the coercion referred to in this provision relates more to the threat than the use of force.

[134] *Id.*, para. 6.

[135] One can attack the unilateral-act/threat-of-unilateral-act distinction by saying that a threat to act unilaterally is itself a unilateral act. *See* MATTHEW H. KRAMER, THE QUALITY OF FREEDOM, at ch. 2 (2003). The distinction we are making, however, is substantive rather than linguistic or semantic, and could be recast as "actual unilateralism" versus "promised-and-realizable-but-as-yet-unrealized unilateralism." For simplicity, we will stick with "act" and "threat" to mark these categories.

[136] *See, e.g.*, QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998); PETTIT, *supra* note 128.

[137] *See, e.g.*, PETTIT, *supra* note 128, at 133, 184.

[138] *See* THOMAS HOBBES, LEVIATHAN WITH SELECTED VARIANTS FROM THE LATIN EDITION OF 1668, at ch. 16 (Edwin Curely ed., 1994). *Compare* Quentin Skinner, *Hobbes and the Purely Artificial Person of the State*, 7 J. POL. PHIL 1 (1999); *with* David Runciman, *What Kind of Person Is Hobbes's State? A Reply to Skinner*, 8 J. POL. PHIL 268 (2000).

occupation is this kind of threat. And threats against a state's "political, economic, and cultural elements" are likewise threats of wrongful unilateralism. These may threaten to appropriate things that do not belong to the threatening state, or they may threaten valued public goods in order to impose terms on the weaker state (e.g., accept the terms we offer or we will block your water supply), or they may threaten to end or refuse negotiations with respect to a common resource or some other matter of common concern. The threats are arbitrary in the sense that they aim to secure through a unilateral assertion of will the "subordination" of another state or the gaining of "advantages" to which the dominating state has no entitlement.

Together, therefore, the principles of non-interference and non-domination explain the principle of non-intervention's prohibition of both unilateral acts and threats of unilateralism. The principle of non-intervention in turn lends content to the ideal of mutual independence of sovereign states. The realization of this ideal expresses in practice the core normative requirements of the concept of sovereign equality.

In some contexts, mutual independence and sovereign equality require international cooperation, without which some states would interfere with or dominate others. Mandatory multilateralism is the institutional framework that makes international cooperation possible in a way that respects the independence and sovereign equality of all states. For example, when coastal states confront unsettled questions of maritime delimitation, no individual state can claim the prerogative to resolve the question on its own without dominating other states by threatening to subject them to its unilateral will. Even if a state acted in perfectly good faith, establishing maritime boundaries that were objectively favorable to its neighbors, its unilateral decision making would undermine other states' formal and equal independence by arrogating to itself a prerogative and standing not held by others. Mandatory multilateralism resolves this and like problems of unilateralism by imposing positive duties of cooperation that safeguard the integrity of formal sovereign equality.

As should now be evident, running through all of these principles and concepts is the prohibition on unilateralism that Hans Kelsen connected directly to sovereign equality and proposed as the basis of international legal order. "Sovereignty in the sense of international law," Kelsen wrote, "can mean only the legal authority or competence of a State limited and limitable only by international law and not by the national law of another State."[139] To see how this might work in practice to underwrite positive duties of international cooperation, we discuss next the *Lac Lanoux* Arbitration[140] as a case study on mandatory multilateralism.

### *Case Study: The* Lac Lanoux *Arbitration*

*Lac Lanoux* concerned the rights of France and Spain respectively to the waters flowing from Lake Lanoux in the Pyrenees.[141] The lake is situated entirely in France, but its waters flow into the Carol River that enters Spanish territory after flowing some twenty-five kilometers through France.[142] The Treaty of Bayonne of 1866, completed by an Additional Act that same year, established the Franco-Spanish border and contained provisions that regulated the

[139] Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 208 (1944).

[140] Lake Lanoux Arbitration (Fr. v. Sp.), 24 ILR 101, 102–03 (1957) [hereinafter *Lake Lanoux Arbitration*].

[141] *Id.* at 101.

[142] *Id.* at 101–02.

use of common waters.[143] Article 8 provided that "standing and flowing waters . . . are subject to the sovereignty of the State in which they are located."[144] Article 11 contemplated a situation in which works in one state might affect waters in the other:

> When in one of the two States it is proposed to construct works or to grant new concessions which might change the course or the volume of a watercourse of which the lower or opposite part is being used by the riparian owners of the other country, prior notice will be given . . . so that, if they might threaten the rights of the riparian owners of the adjoining Sovereignty, a claim may be lodged in due time with the competent authorities, and thus the interests that may be involved on both sides will be safeguarded. [145]

France sought to divert some of the waters from Lake Lanoux to develop a hydroelectric project, undertaking to return the diverted waters to the Carol River (the natural destination of those waters) by means of an engineered tunnel.[146] Spain objected to the proposed project, arguing, inter alia, that Article 11 required France to obtain Spain's consent before proceeding with its project.[147] In response, France invoked Article 8 of the Treaty of Bayonne, which gives jurisdiction over "standing and flowing waters" to "the State in which they are located," and it insisted that in any event all the water diverted from the Carol River would be returned to it prior to the river crossing the frontier with Spain.[148] Nonetheless, as the International Law Commission has noted, throughout the ensuing dispute the states' respective obligations "to negotiate the apportionment of the waters of [the] international watercourse was uncontested, and was acknowledged by France not merely by reason of the terms of the Treaty of Bayonne and its Additional Act, but as a principle to be derived from the authorities."[149]

The Tribunal rejected, however, Spain's demand that France obtain its consent. The Tribunal concluded that if the Spanish position were upheld, it would have as its consequence, in the event an agreement was not reached, "that the state which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a 'right of assent,' a 'right of veto,' which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another."[150] Put slightly differently, the state with the veto would have unilateral power over the state "which is normally competent." Instead of according Spain a veto, the Tribunal opted for a compromise position, but one that still carried with it legal obligations.

The Tribunal held that France could not treat Spanish interests with indifference, but rather had an obligation to negotiate with Spain in good faith.[151] In this context, "the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delay, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or

[143] *Id.* at 102–05.
[144] *Id.* at 102–03.
[145] *Id.* at 103.
[146] *Id.* at 105.
[147] *Id.* at 120.
[148] *Id.* at 117–19.
[149] International Watercourses, *supra* note 39, at 117, para. 34.
[150] *Lac Lanoux Arbitration*, 24 ILR at 128.
[151] *Id.*

interests, and, more generally—in cases of violation of the rules of good faith."[152] The Tribunal stressed the "necessity to reconcile [conflicting interests] by mutual concessions,"[153] and that to this end "there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements."[154]

More specifically still, the Tribunal held that it would not be enough for the upstream state to engage in a box-ticking exercise "such as taking note of complaints, protests or representations made by the downstream State."[155] Instead, the Tribunal found that "the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own."[156] In the end, the Tribunal concluded that France had satisfied this obligation by negotiating in good faith and giving reasonable consideration to Spanish interests by agreeing to restore the waters diverted to the Carol River in a manner that would best accommodate Spanish agriculture.[157]

Because France's efforts were realized within a flexible but mandatory legal framework, Spain was not subject to unilateralism on the part of France, notwithstanding the fact that France alone was exercising sovereign rights over the waterway. Rather, Spain and France participated as equals in a process of mandatory multilateralism. Although Spain did not obtain a veto, it did obtain a right to meaningful consultation and accommodation, and that right provided a bulwark against unilateralism. More particularly, both the denial of the veto to Spain and the right to consultation and accommodation it obtained reflected the principles of non-interference and non-domination. Regarding the veto, the Tribunal worried that if Spain had such a right, Spain could dominate France's decision making over the use of its waterways.[158] Conversely, the detailed *dicta* on France's obligations to take account of Spanish interests demonstrate the Tribunal's preoccupation to ensure that France's dominion over an upstream waterway was not used to interfere arbitrarily with Spanish interests, or threaten such interference.[159] A major Spanish argument was that France's conversion of a natural waterway was wrongful because the conversion would make Spain dependent on France for waters from Lake Lanoux.[160] The Tribunal did not reject the Spanish argument on principle, but on the grounds that the facts did not bear it out: France would injure herself considerably by diverting waters from the tunnel.[161] In other words, France's only possible threat would be an empty threat, so there was no genuine prospect of France dominating or interfering with Spain. The process of mandatory multilateralism and its positive duties of cooperation provided for the mutual independence of both states.

[152] *Id.*
[153] *Id.* at 129.
[154] *Id.* at 130.
[155] *Id.* at 139.
[156] *Id.*
[157] *Id.* at 142.
[158] *Id.* at 128.
[159] *Id.* at 138–42.
[160] *Id.* at 113.
[161] *Id.* at 125–26.

*Joint Stewardship*

We next consider how the principle of sovereign equality is complemented by the idea of joint stewardship—a framework for apprehending cases where the care of a common concern is expressly consigned (usually via treaty) to multiple parties. In international law, joint stewardship may be understood as the possession and institutionalization of legal authority over a particular territory or subject matter by two or more international legal actors, usually states. Central to this conception of joint stewardship is, first, an idea of public and legal authority, and second, the thought that this form of authority may be exercised only through the cooperative efforts of two or more parties. On this understanding, private entities (e.g., private firms or organizations) cannot combine forces to provide joint stewardship, since private entities by definition are not public. Nor can a single public international actor (e.g., a single powerful state) exercise joint stewardship. Only multiple public international actors can do so.

International law typically uses treaties to allocate joint stewardship over matters of global concern, such as the high seas, Antarctica, outer space, and resources from the deep sea floor.[162] Understood to be part of a global commons over which no one state has exclusive jurisdiction, these common resources are subject to joint stewardship regimes that have both negative and positive dimensions. The negative dimension prohibits states from asserting or exercising exclusive jurisdiction over the relevant resources. Yet international law does not generally treat the resources in question as inaccessible to humanity. Rather—and this is the positive dimension—international law calls on states to negotiate in good faith the terms on which common resources may be used collectively. International cooperation is necessary in the context of common resources to ensure that no state is able to dominate its peers by subjecting these resources to its unilateral will.

Implicit to this positive dimension is international law's allocation to states of standing to represent their peoples in international negotiations and the creation of institutions that are premised on joint stewardship. While much has been written about the diminution of the state's salience in international law,[163] states remain the primary entities that international law authorizes to represent their people in international affairs. States thereby possess legal authority to enter into binding agreements such as UNCLOS. In the case of UNCLOS in particular, the treaty crystallizes joint stewardship through mandatory multilateralism, in part, by requiring states to seek agreement on maritime delineation "on the basis of international law . . . in order to achieve an equitable solution."[164] If states cannot reach agreement, they are required to pursue third-party dispute resolution.[165]

As we saw in *Lac Lanoux*, and as we will see in greater detail in Parts IV and V, the requirements of mandatory multilateralism include substantial duties to take seriously the interests of foreign nationals. These duties make sense only if the interests of other states' nationals are legally relevant to states whose principal responsibility is to advocate on behalf of their own nationals. We have argued elsewhere that it is possible to explain state duties to extraterritorial

[162] *See supra* Part II.

[163] *See, e.g.*, ROBERT MCCORQUODALE, INTERNATIONAL LAW BEYOND THE STATE: ESSAYS ON SOVEREIGNTY, NON-STATE ACTORS, AND HUMAN RIGHTS (2011) (discussing how international law has moved well beyond interstate law).

[164] UNCLOS, *supra* note 24, Art. 74(1).

[165] *Id.* Art. 74(2).

foreign nationals if we view states as occupying two positions as public fiduciaries.[166] The first is as a local fiduciary of their people—citizens and non-citizens—within their territory or with a special connection to it, such as extraterritorial citizens or permanent residents. The second position is as a global fiduciary of humanity. Under this conception of the state's dual roles, the state's main responsibility is to govern and represent its people. It is the state's global position as a fiduciary of humanity, however, that explains not merely the duties it owes to non-nationals (duties that may conflict with the interests of its people), but also the authority of the state to interact with them and their international representatives—other states—as a joint steward of humanity.

Eyal Benvenisti makes a similar claim, arguing that sovereigns can be understood to be "trustees of humanity," and as such may be understood to have "modest" duties to foreign nationals that include giving them a voice and taking their interests into account "if doing so is costless [to sovereigns] or . . . in cases of catastrophe." [167] In other words, in the standard case, a sovereign's duties to outsiders arise if the outcome reflects what Benvenisti calls a "*restricted* Pareto outcome—namely, an outcome from which 'one benefits and the other sustains no loss,' with no compensation."[168] He suggests that under the UDHR state parties are duty bearers, but because there is no allocation of responsibilities among them, "the entire system of state sovereignty is subject to the duty to respect human rights."[169] There is much to admire in Benvenisti's approach, though in our view sovereigns may owe duties to foreign nationals even if there is some cost, as there was in *Lac Lanoux*.[170] Indeed, the promise of

[166] *See* EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY, at chs. 6–8 (2016). For discussion of the way in which a fiduciary can owe duties to both discrete beneficiaries and a wider public, see Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, *in* FIDUCIARY GOVERNMENT 67 (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim & Paul B. Miller eds., 2018).

[167] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AJIL 295, 314 (2013); *see also* Evan Fox-Decent, *From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment Through a Fiduciary Prism*, *in* FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST 253 (Ken Coghill, Charles Sampford & Tim Smith eds., 2012) (arguing that states are joint trustees of the atmosphere on behalf of humanity); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331, 380–82 (2009) (discussing state obligations to respect the human rights of resident non-citizens, extraterritorially detained foreign nationals, and refugees); Fox-Decent & Criddle, *supra* note 128, at 301 (arguing that "human rights are best conceived as norms arising from a fiduciary relationship that exists between states (or statelike actors) and the citizens and noncitizens subject to their power").

[168] Benvenisti, *supra* note 167, at 320 (emphasis in original). By "with no compensation" Benvenisti means that the sovereign cannot be made to suffer a loss and then compensated after the fact, which is how the ordinary Pareto criterion works. His "restricted" criterion is intended to be less onerous on sovereigns asked to take account of foreign interests.

[169] *Id.* at 307 (citing UDHR, *supra* note 81, pmbl.).

[170] Benvenisti disagrees, arguing that the restricted Pareto criterion "was probably . . . an influential consideration" in *Lac Lanoux* because "France benefited . . . whereas Spain sustained no loss." *Id.* at 323. Benvenisti arguably misapplies his criterion to the case. The criterion is intended to comfort sovereigns called on to take account of foreign nationals' interests, such as sovereigns of coastal states petitioned to allow access through maritime straits. In *Lac Lanoux*, the proper subject of the "no loss" proviso is France, since France alone has sovereign rights over the waterways within its territory, and France alone is called on to exercise those rights in a manner respectful of foreign interests. The appropriate question under Benvenisti's theory is whether *France* would sustain any loss by ensuring that its diversion of the waterway did not impair Spanish interests. It is evident from the facts that France incurred significant cost in order to accommodate Spanish interests. France installed an engineered tunnel to return the diverted water to its natural destination. The negotiations alone extended over decades. It is hard to see how the "no loss" criterion could explain the legal requirement of ongoing and costly negotiations, or (had France done nothing to accommodate Spain) an arbitral award that France provide infrastructure to protect the interests of downstream Spanish nationals.

giving outsiders a voice may prove illusory if reasonable outsider claims can be rightfully denied because they impose a minor cost on the putative duty-bearer.

In some cases, such as international refugee law, states interact with other states to set global or regional policy,[171] while at the operational level they may interact directly with asylum-seeking outsiders. In other cases, however, joint stewardship arises where international law (ordinarily treaty law) designates a matter of global concern, such as the protection of endangered species, as a common concern for humankind. In these contexts, joint administrative authority is shared by all states, and all states stand in a symmetrical relation of sovereign equality to one another. Because joint authority is shared by states over collective regimes that govern global public goods, states can only exercise joint authority on behalf of humanity (or, at least, on behalf of the transnational group implicated by the relevant transnational good). And because international law regards states as equals within collective regulatory regimes, joint stewardship in this context necessarily takes the form of mandatory multilateralism.

We can bring the contribution of joint stewardship to mandatory multilateralism into sharper relief by comparing it to the role played by sovereign equality. As discussed above, the principle of sovereign equality provides for the mutual independence of states by imposing reciprocal limits on their interactions with one another. The principle supplies a bulwark against unilateralism by prescribing non-domination and non-interference as juridical ideals to frame interstate relations. Mandatory multilateralism is a unified institutional expression of those anti-unilateralist ideals in contexts that call for international cooperation but which are not subject to a comprehensive regulatory regime (e.g., *Lac Lanoux*). Joint stewardship, in contrast to sovereign equality, attends to international regimes that are premised on collective administration by the entire international community or a substantial and multinational segment of it. Mandatory multilateralism in these settings expresses at the institutional level a form of joint stewardship that protects states, nationals, and foreign nationals from domination and abuse at the hands of individual states. It follows that if participation in a multilateral regulatory regime is truly mandatory, then a failure to participate on equal terms constitutes a unilateral assertion of will and an arrogation by the recalcitrant state of a prerogative not shared by others.

*Explaining Mandatory Multilateralism*

Sovereign equality is ultimately a necessary and sufficient condition of mandatory multilateralism in contexts where states need to cooperate to ensure their mutual independence, but which are not subject to a comprehensive regulatory regime. Joint stewardship, in contrast, provides necessary and sufficient conditions for mandatory multilateralism in contexts where international law has established a comprehensive regulatory regime to administer a

[171] *See, e.g.*, New York Declaration for Refugees and Migrants, GA Res. 71/1, para. 11 (Sept. 19, 2016) ("We acknowledge a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people–centred manner. We will do so through international cooperation . . . ."). Admittedly, the present weakness of the international refugee law regime, which imposes on states a duty of *non-refoulement* rather than a duty to grant asylum, serves as a reminder that it can take time for multilateral legal regimes to embody fully the norms of their underlying presuppositions. *See* Convention Relating to the Status of Refugees, Art. 33(1), July 28, 1951, 189 UNTS 150 (entered into force Oct. 4, 1954) (enshrining the duty of *non-refoulement*).

matter of global or transnational concern. These organizing principles illuminate the scope of mandatory multilateralism.

Some international disputes do not trigger mandatory multilateralism because international law supplies a controlling rule of decision or assigns decision making authority exclusively to one side. For example, states are entitled to veto foreign appropriations of their territory[172] and foreign infrastructure projects that would impede their transit through international straits.[173] States can waive rights of this kind. Other entitlements, however, are not subject to waiver or abridgment under any circumstances. In international law, these rules include *jus cogens* norms, such as the prohibitions against torture and genocide.[174] Where applicable, indefeasible entitlements such as these leave no room for further multilateral deliberation, although heated debate attends the questions of which norms count as peremptory and the content of those norms.[175] Thus, when international disputes are governed by dispositive norms, international law does not mandate additional international deliberation or interest-balancing. Parties to such disputes may have thin legal duties to communicate with other states and resolve their disputes peacefully, but they are not ordinarily obligated to negotiate toward a mutually acceptable solution.[176] Negotiation is unwarranted in these cases because, through its allocation of rights or recognition of other dispositive norms, international law eschews unilateralism by imposing a public legal order of reciprocal limits on all.

Many international controversies cannot be resolved, however, through the application of straightforward entitlements. In some cases, international law neither supplies specific rules nor entitles one side or the other to resolve the issue unilaterally, thus leaving the parties with only the organizing principles of sovereign equality and joint stewardship as guides. This explains why some territorial disputes qualify for mandatory multilateralism: states can claim territorial jurisdiction backed by property-like rules only after negotiation or third-party dispute resolution because unilateral action by either side would constitute a wrongful usurpation of joint international lawmaking power. A usurpation of this kind would violate sovereign equality by arrogating to one party a prerogative not held by another, and it would infringe joint stewardship because it would deny the equal lawmaking capacity implicit to joint stewardship. Sovereign equality and joint stewardship also explain why disputes involving conflicting legal entitlements are subject to mandatory multilateralism under international law. When two states seek to exercise their rights or powers in conflicting ways or hold overlapping entitlements to the same shared resource, neither is in a position to exercise their own rights without wrongfully interfering with the other's rights. A state that asserted

[172] UN Charter Art. 2(4).

[173] *See* UNCLOS, *supra* note 24, Art. 38 (providing for transit rights through international straits); Case Concerning Passage Through the Great Belt (Fin. v. Den.), Order on Provisional Measures, 1991 ICJ Rep. 12, 18, para. 26 (July 29) (provisionally rejecting the proposition "that interference with the right [to transit passage] might be justified on the grounds that the passage . . . might be achieved by other means, which may moreover be less convenient or more costly").

[174] RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 702 cmts. d–i, § 102 cmt. k (1987).

[175] *See, e.g.*, A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1493 (2003) (observing that state delegations at the Vienna Conference on the Law of Treaties in 1969 "offered widely differing lists of rules meeting the requirements of *jus cogens*; of the twenty-six delegations . . . no more than thirteen agreed with respect to any one rule").

[176] In Part V, we discuss *Bolivia v. Chile* as an example: Chile is under no obligation to negotiate cession of its territory to Bolivia.

the prerogative to act unilaterally under these circumstances would subject the other state to domination even if it never exercised the asserted prerogative.

International law's solution to this dilemma is mandatory multilateralism: states must negotiate or submit to third-party dispute resolution. This duty to cooperate in pursuing multilateral solutions to conflicts of international entitlements "constitutes a special application of a principle which underlies all international relations"—the principle of sovereign equality.[177] And, in some cases such as *Lac Lanoux*, the injunction against unilateralism means that even when it is just one state alone exercising sovereign rights, the state is not entitled to do as it pleases but rather is legally required to take account of the legitimate interests of extraterritorial foreign nationals affected by its action.

In other contexts, mandatory multilateralism emanates from the principle of joint stewardship because particular international regimes commit rights or powers to the entire international community. Hence, multilateralism is mandatory for common resources,[178] the UN Charter's collective security regime, the promotion of international human rights, and the enforcement of international criminal law, because each of these regimes is premised on the international community's joint stewardship over global public goods, which are matters of legitimate concern to all humanity. International law thus requires multilateral cooperation whenever unilateral state action would compromise sovereign equality or joint trusteeship by subjecting states to wrongful interference or domination.

## IV. The Requirements of Mandatory Multilateralism

Having clarified mandatory multilateralism's theoretical foundations, we are now in a position to identify its legal sources and make sense of its discrete legal requirements. In this Part, we draw upon decades of decisions from the ICJ, ITLOS, arbitral tribunals administered by the PCA, and the WTO's Dispute Settlement Body to outline mandatory multilateralism's legal requirements.[179] We argue that where mandatory multilateralism applies, states bear an overarching legal duty to accord "due regard" to others' rights and authority under international law.[180] In the jurisprudence of international courts and tribunals, this duty of due

[177] *North Sea Continental Shelf Cases*, 1969 ICJ Rep. at 47, para. 86 (citing UN Charter Art. 33). To the extent that international law commits certain natural resources, such as international lakes and rivers, to the environmental stewardship of adjacent states, mandatory multilateralism in these contexts also reflects the principle of joint stewardship.

[178] *See, e.g.*, UNCLOS, *supra* note 24, Art. 157(3) (providing that decision making by the International Seabed Authority, which coordinates mining operations in the deep seabed, a common heritage resource, "is based on the principle of the sovereign equality of all its members"); Rio Declaration on Environment and Development, Principle 12, UN Conference on Environment and Development, UN Doc. A/Conf.151/5/Rev.1 (1992) [hereinafter Rio Declaration] ("Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.").

[179] For reasons of space, the cases discussed in this Part are drawn from the first three categories of mandatory multilateralism: jurisdictional disputes, conflicting legal entitlements, and common resources. Within international human rights regimes, principles of proportionality and due process arguably supply content to mandatory multilateralism's requirements. Principles such as these elicit due regard for foreign nationals touched by sovereign power, and they help to explain the European Court of Human Rights' understanding of itself as the guardian of a "constitutional instrument of European public order (ordre public)." Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) para. 75 (1995).

[180] *See, e.g.*, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Rep. 2015, para. 219; *Arctic Sunrise Arbitration*, Case No. 2014-02, at

regard is often linked to legal concepts such as "good faith" and "abuse of right," signaling that states must avoid exercising their own rights in a manner that causes arbitrary or disproportionate injury to others.[181]

In the discussion that follows, we argue that mandatory multilateralism's overarching duty of due regard has two dimensions, one substantive and the other procedural.[182] The substantive dimension requires states to pursue an equitable balance between conflicting legal interests. The procedural dimension ensures that all states have an opportunity to participate and have their preferences taken into account in decisions that impact their legal interests.[183] In particular, when mandatory multilateralism applies, states must diligently investigate, consult with one another, negotiate in good faith toward an equitable solution, and, if negotiations stall, pursue third-party dispute resolution. These substantive and procedural requirements are essential to respect states' sovereign equality and joint stewardship under international law.

### *The Substantive Dimension: Equitable Balancing*

Mandatory multilateralism demands, first, that states accord due regard to the rights of other states and the international community by seeking an equitable balance among the relevant legal interests. Within the domain of mandatory multilateralism, states must pursue "an objectively positive interaction with another [state]'s interests and with those of the international community,"[184] for the purpose "of reconciling them in as equitable a manner as possible."[185] To satisfy this obligation, each state must "take into consideration the various interests involved, . . . seek to give [other states] every satisfaction compatible with the pursuit of its own interests, and . . . show that it is genuinely concerned to reconcile the interests of the other . . . State with its own."[186]

The duty of due regard finds clearest expression in international maritime law, where it has been codified in UNCLOS and other agreements.[187] In the *Fisheries Jurisdiction Cases*, the ICJ

paras. 228, 230, (Perm. Ct. Arb. 2015); Chagos Marine Protected Area Arbitration (Mauritius/U.K.), Case No. 2011-03, Award, para. 534 (Perm. Ct. Arb. 2015) [hereinafter *Chagos*]; *Fisheries-Germany*, 1974 ICJ Rep. at 198, para. 60. We here make common cause with Benvenisti who avers "[a]s trustees of humanity, national decision makers have an obligation to take into account the interests of others when devising policies." Benvenisti, *supra* note 167, at 314.

[181] *See, e.g.*, World Trade Organization, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, paras. 158, 160, AB-1998-4, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle Appellate Body Report I*]; WTO, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art. 21.5 by Malaysia, Report of the Panel, paras. 5.51–.60, WT/DS58/RW (June 15, 2001) [hereinafter *Shrimp/Turtle Panel Report II*]; *see generally* ROBERT KOLB, GOOD FAITH IN INTERNATIONAL LAW 142–45 (2017) (discussing international "abuse of right" as including "manifest disproportion of interests" and "arbitrary action"); *id.* at 198–99 (describing the applications of good faith in international jurisprudence).

[182] *See, e.g.*, *Chagos*, Case No. 2011-03, at para. 534 (observing that the duty of "due regard" for another state's interests "entails, at least, both consultation and a balancing exercise with its own rights and interests").

[183] *See Gulf of Maine*, 1984 ICJ Rep. at 299–300, paras. 111–13 (characterizing "the application of equitable criteria" (i.e., substantive multilateralism) and consensus-based decision making or third-party dispute resolution (i.e., procedural multilateralism) as the "fundamental norm[s]" of international maritime delimitation).

[184] Julia Gaunce, *On the Interpretation of the General Duty of "Due Regard,"* 32 OCEAN Y.B. 27 (2018).

[185] *Fisheries-Germany*, 1974 ICJ Rep. at 200, para. 62; *see also North Sea Continental Shelf Cases*, 1969 ICJ Rep. at 139–40, para. 38 (Ammoun, J., dissenting) (observing that equity is a general principle of law common to all of "the great legal systems of the modern world").

[186] *Lake Lanoux Arbitration*, 24 ILR 101, at 139, para. 22.

[187] *See, e.g.*, UNCLOS, *supra* note 24, Art. 58(3) ("In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal

invoked the duty of due regard as the primary basis for rejecting Iceland's assertion that the state's preferential fishing rights within its coastal waters would justify the wholesale exclusion of fishing vessels from other states.[188] Emphasizing Iceland's legal obligation to accord due "regard to the position" of other interested states,[189] the Court held that Iceland must "bring[] about an equitable apportionment of the fishing resources based on the facts of the particular situation, and having regard to the interests of other States which have established fishing rights in the area."[190] This inquiry was "not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law" and therefore sensitive to the "preferential" character of Iceland's fishing rights under international law.[191]

An international tribunal likewise affirmed the duty of due regard's context-sensitive character in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*.[192] In its submissions to the tribunal, Mauritius challenged the United Kingdom's unilateral declaration of a marine protected area (MPA) around the Chagos Archipelago. Mandatory multilateralism applied to this declaration, in Mauritius's view, because the proposed MPA would impact Mauritius's legal rights as a coastal state.[193] Accordingly, Mauritius asserted that the United Kingdom was obligated under UNCLOS to accord "due regard" to Mauritius's interests as a neighboring coastal state.[194] The tribunal endorsed this argument, observing that "'due regard' calls for [a state] to have such regard for the rights of [another] as is called for by the circumstances and by the nature of those rights."[195] This duty

> does not impose [on the United Kingdom] a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required . . . will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches.[196]

The tribunal thus underscored that due regard requires a context-sensitive balancing of the equities of a given case, taking into account the nature and importance of the relevant legal interests.

State . . . ."); *id.* Art. 87(2) (providing that states' freedoms in the high seas "shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas"); Convention on the High Seas, Art. 2, Apr. 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82 (providing that state freedoms on the high seas "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas").

[188] *See Fisheries-Iceland*, 1974 ICJ Rep. at 27–28, para. 62, 29, para. 68 (applying Article 2 of the 1958 Geneva Convention).

[189] *Id.* at 28, para. 62.

[190] *Id.* at 33, para. 78.

[191] *Id.*

[192] *Chagos*, Case No. 2011-03, Award, at para. 534.

[193] *Id.*, paras. 7–8.

[194] *Id.*, paras. 518–19.

[195] *Id.*, para. 519.

[196] *Id.*; *see also* South China Sea Arbitration, PCA Case No. 2013-19, Award, paras. 741–42 (July 12, 2016) [hereinafter *South China Sea Arbitration*] (discussing these aspects of the *Chagos* judgment); *North Sea Continental Shelf Cases*, 1969 ICJ Rep. at 46–47, para. 85 (holding that maritime delimitation "must be arrived at in accordance with equitable principles, . . . taking all the circumstances into account").

The WTO also has applied equitable balancing within mandatory multilateralism's domain. In the *Shrimp/Turtle Dispute*, the WTO addressed a potential conflict between two legal entitlements under the 1994 General Agreement on Tariffs and Trade: the United States' legal right to take measures to conserve and protect natural resources, and other WTO members' right to nondiscriminatory market access. Rather than allow one side to trump or veto the other, the WTO's Appellate Body concluded that the parties must maintain an

> equilibrium . . . , so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, [however], is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[197]

This equitable balancing was necessary, according to the Appellate Body, to accord due regard to the legal interests of all WTO members, thus affirming their sovereign equality by prohibiting either side from dominating or otherwise imposing inequitable terms on the other.

Equitable balancing applies equally to other contexts within the domain of mandatory multilateralism.[198] Under international law, disputes over land and maritime borders invite equitable balancing.[199] Equitable principles likewise apply to states' joint stewardship of common resources, as reflected, for example, in the principle of "common but differentiated responsibilities" in international climate law.[200] Increasingly, states also accept that they must use equitable principles to address rivalrous claims to international watercourses and other shared resources.[201] Equitable balancing does not appear expressly in international law governing the last two categories of mandatory multilateralism—threats to international peace and security and serious breaches of international human rights and international

[197] *Shrimp/Turtle Appellate Body Report I*, *supra* note 181, para. 159. Reflecting on this balancing act, a WTO dispute settlement panel later explained that "the position of the line itself depends on the type of measure imposed and on the particular circumstances of the case." *Shrimp/Turtle Panel Report II*, *supra* note 181, para. 5.51. Ultimately in this case, the WTO's Appellate Body concluded that the United States' revised certification process was sufficiently flexible to facilitate the requisite balancing. *See* WTO, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art. 21.5 by Malaysia, Recourse to Art. 21.5 of the DSU by Malaysia, Report of the Appellate Body, paras. 123, 134, AB-2001-4, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp/Turtle Appellate Body Report II*]. This conclusion was predicated on the expectation that U.S. regulators would engage in further dialogue with their Malaysian counterparts during certification review, and that they ultimately would need to perform the delicate balancing exercise themselves if they hoped to defend their decisions successfully before the Appellate Body in the future.

[198] *See Fisheries-Iceland*, 1974 ICJ Rep. at 69–70 (Dillard, J., separate opinion) (observing that "[t]he obligation to pay due regard to the interests of other States . . . is, of course, a norm of law which lies upon all States" and "can be triggered by any State whose interests are allegedly infringed by another State involving thereby an obligation to come to some kind of peaceful arrangement").

[199] In the case of land borders, equitable principles serve a modest role as an interstitial gap-filler when the principle of *uti possidetis juris* does not offer clear answers. *See, e.g.*, Case Concerning the Frontier Dispute (Burk. Faso/Mali), 1986 ICJ Rep. 554, 633 paras. 149–50 (Dec. 22). Equitable principles find wider application in international maritime delimitation, where states often write on a clean slate. *See supra* text at notes 33–36.

[200] *See* UNFCCC, *supra* note 23, Art. 3(1) ("The Parties should protect the climate system . . . on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.").

[201] *See, e.g.*, Agreement on the Nile River Basin Cooperative Framework, Arts. 3(4), 4, *available at* http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf (providing that apportionment of Nile waters would be based on the "principle of equitable and reasonable utilization").

criminal law—but it is arguably implicit in norms such as the customary *jus ad bellum* requirement of proportionality.[202] Across all of these contexts, international law requires states to use equitable criteria for the purpose of achieving an equitable result.[203]

In short, the primary purpose of mandatory multilateralism's substantive dimension is to safeguard sovereign equality and joint stewardship. As Robert Kolb has observed, when states apply equitable balancing in good faith, it "inhibits the capacity of a subject to draw advantages [from] non-loyal and incorrect conduct infringing reciprocity and equality" (reinforcing sovereign equality) and "protects certain common interests against attacks by excessively individualistic [state] claims and pretentions" (reinforcing joint stewardship).[204] By requiring states to exercise their rights in a manner that reflects due regard for other states' interests and collective interests of the international community, mandatory multilateralism "tempers individualistic voluntarism" in a manner that affirms sovereign equality and joint stewardship.[205]

*The Procedural Dimension*

Mandatory multilateralism also imposes procedural duties of investigation, consultation, negotiation, and third-party dispute resolution.

*Investigation*

Mandatory multilateralism's first procedural requirement is the duty to investigate diligently how a state's laws, policies, and practices may impact the legal interests of other states and collective interests of the international community. Without such an investigation, the substantive duty of due regard would be practically meaningless; a state could not evaluate the equities of a particular controversy effectively without first making a good faith effort to identify and evaluate all of the relevant legal interests.

The duty of diligent investigation finds clearest expression in the ICJ's *Fisheries Jurisdiction Cases*.[206] In a pivotal passage, the ICJ explains how international maritime law has transitioned, in Wolfgang Friedmann's words, from a "law of co-existence" to a "law of co-operation":[207]

> It is one of the advances in maritime international law . . . that the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. Consequently, both Parties have the obligation to keep under

[202] *See* William C. Banks & Evan J. Criddle, *Customary Constraints on the Use of Force: Article 51 with an American Accent*, 29 LEIDEN J. INT'L L. 67, 74–75 (2016) (discussing *jus ad bellum* proportionality).

[203] *See Gulf of Maine*, 1984 ICJ Rep. at 299–300, para. 112 (holding that maritime "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring . . . an equitable result); Continental Shelf (Tunis./Libya), 1982 ICJ Rep. 18, 59, para. 70 (Feb. 24) ("The result of the application of equitable principles must be equitable. . . . The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.").

[204] KOLB, *supra* note 181, at 23. Kolb characterizes this requirement as "good faith," rather than "due regard" or "equitable balancing." *Id.*

[205] *Id.* at 36–37.

[206] *Fisheries-Iceland*, 1974 ICJ Rep. 3; *Fisheries-Germany*, 1974 ICJ Rep. 175.

[207] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 61–62 (1964).

> review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them . . . .[208]

Although this passage focuses on customary norms of international maritime law, the Court's observations have broader applications to mandatory multilateralism writ large. To satisfy their general duty of due regard, states must take initiative to find equitable solutions that respect the applicable law and are based on the best available evidence. This requirement to undertake a diligent investigation is necessary to ensure that a state's laws, policies, and practices respect the principles of sovereign equality and joint stewardship.[209] Diligent investigation is therefore an essential component of the new international law of co-operation.

*Consultation*

In the passage excerpted above from the *Fisheries Jurisdiction Cases*, the ICJ also asserts that under customary international law states must "keep under review" and "examine together" how to equitably balance their respective interests and the collective interests of the international community.[210] This suggests a second procedural requirement: when operating within mandatory multilateralism's domain, states must consult with one another, exchanging relevant information in a spirit of cooperation. Other international tribunals have confirmed that this duty to consult arises when states assert conflicting rights under international law,[211] and many treaties require states to exchange information and pursue cooperative dialogue regarding matters within mandatory multilateralism's domain.[212] These deliberative requirements affirm sovereign equality and joint stewardship by ensuring that states are able to make informed decisions regarding matters that may affect their rights and the collective interests of the international community.

*Negotiation*

When states disagree about the best way to achieve an equitable solution within mandatory multilateralism's domain, they are legally obligated to pursue peaceful dispute-resolution via negotiation. Good faith negotiation honors the principles of sovereign equality and joint

[208] *Fisheries-Iceland*, 1974 ICJ Rep. at 31, para. 72; *Fisheries-Germany*, 1974 ICJ Rep. at 29, para. 64.

[209] In the context of threats to international peace and security and serious abuses of international human rights, international law arguably requires states to conduct a thorough investigation and use force abroad only on the basis of "compelling evidence." Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARV. J. L. & PUB. POL'Y 737, 756–57 (2004) (endorsing this standard advanced by U.S. policymakers as consistent with international law).

[210] *Fisheries-Iceland*, 1974 ICJ Rep. at 31, para. 72; *Fisheries-Germany*, 1974 ICJ Rep. at 28, para. 64.

[211] *See, e.g.*, *Chagos*, Case No. 2011-03, at para. 519 ("In the majority of cases, [due regard for other states' rights] will necessarily involve at least some consultation with the rights-holding State."); *id.*, para. 541 (recognizing that environmental concerns "require significant engagement with [other states] to explain the need for [measures infringing states' fishing rights] and to explore less restrictive alternatives"); *MOX Plant Case*, ITLOS No. 10, at para. 84 ("[P]rudence and caution require that [states] cooperate in exchanging information concerning risks . . . and in devising ways to deal with them, as appropriate.").

[212] *See, e.g.*, UN Charter Art. 51 (obligating states to report exercises of self-defense to the UN Security Council); UNCLOS, *supra* note 24, Arts. 61, 119, 200 (providing for sharing of "scientific information" and other "data" relevant to shared resources).

stewardship by ensuring that all interested parties can participate meaningfully and have their legitimate interests taken into account.

The ICJ has been afforded many opportunities to clarify what the duty of good faith negotiation entails. Some of these cases have involved treaties that expressly require states to endeavor to resolve disputes through negotiation before resorting to adjudication.[213] In other cases, however, the ICJ has held that a duty of good faith negotiation applies to matters within mandatory multilateralism's domain even in the absence of a specific treaty-based requirement because this reflects "a special application of a principle which underlies all international relations."[214] As we explained in Part III, the organizing principles that underlie the duty of good faith negotiation in these contexts are sovereign equality and joint stewardship.

The duty of good faith negotiation has several salient features that apply across all of the diverse contexts where it arises. First, it demands initiative and sustained commitment.[215] As international courts and tribunals have explained, good faith negotiation "entail[s] more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counterclaims."[216] Negotiations must be "meaningful" in the sense that each side demonstrates a willingness to pursue agreement, not merely to go through the motions.[217] Good faith negotiation also requires openness to "compromise, even if that mean[s] the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way."[218] Hence, the idea that one side would "insist upon the complete capitulation of the other side" is "inconsistent with . . . 'negotiation.'"[219] The duty to negotiate in good faith also entails a duty of due diligence.[220] States must undertake a "persevering quest for an acceptable compromise,"[221] demonstrating

[213] *See, e.g.*, *Pulp Mills*, 2010 ICJ Rep. at 40, para. 48; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, 263–64, paras. 99–103 (July 8); German External Debts Case (Greece/Ger.), 19 RIAA 27 (1972).

[214] *See, e.g.*, *North Sea Continental Shelf Cases*, 1969 ICJ Rep. at 47, para. 86; *see also Fisheries-Iceland*, 1974 ICJ Rep. at 41 (Singh, J., separate opinion) (asserting that in a dispute over conflicting legal entitlements to fisheries "negotiations appear necessary and flow from the nature of the dispute").

[215] *See Shrimp/Turtle Appellate Body Report II*, *supra* note 197, para. 133 (confirming that the duty of negotiation requires "serious, good faith efforts").

[216] Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Geor./Russ.), Prelim. Objections, 2011 ICJ Rep. 70, 132, para. 157 (Apr. 1).

[217] *Interim Accord Case*, 2011 ICJ Rep. at 685, para. 132 (internal citation and quotation marks omitted); *see also North Sea Continental Shelf*, 1969 ICJ Rep. at 47, para. 85(a) (explaining that the duty to negotiate is a duty "not merely to go through a formal process of negotiation," but rather "an obligation so to conduct themselves that the negotiations are meaningful").

[218] *German External Debts*, 47 ILR at 56, para. 62.

[219] *Id.*

[220] *See MOX Plant Case*, ITLOS No. 10, at para. 9 (Treves, J., separate opinion) ("It may be argued that compliance with procedural rights, relating to cooperation, exchange of information, etc., is relevant for complying with the general obligation of due diligence when engaging in activities which might have an impact on the environment.").

[221] Kuwait v. AMINOIL, 21 ILR 976, 1014, para. 70(i) (1982) (emphasis added); *see also* Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, PCIJ, Ser. A/B, No. 42, at 116 (holding that the duty of good faith negotiation is a duty "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements"); *see also Interim Accord Case*, 2011 ICJ Rep. at 685, para. 132 (internal citations omitted) (holding that a state must "pursue [negotiations] as far as possible, with a view to concluding agreements").

that they are "internally concerned with balancing the [relevant] rights and interests," rather than simply going through the motions.[222]

In the end, however, mandatory multilateralism's requirement of good faith negotiation does not obligate states to actually conclude an agreement resolving their disputes.[223] Sometimes states disagree in perfectly good faith about the terms of an equitable solution. To require states to accept an agreement that they genuinely believe is inequitable would subject them to the unilateral will of the other side, which is inconsistent with sovereign equality and joint stewardship. Accordingly, mandatory multilateralism does not require states to actually conclude international agreements, provided they persevere in pursuing an equitable resolution in good faith.[224]

International courts and tribunals are typically reluctant to find bad faith absent "clear and convincing evidence" that a state seeks "to prevent any reasonable agreement."[225] Bad faith might be established if a state arbitrarily breaks off or delays negotiations, declines to follow established procedures for negotiation, or refuses to consider counter-proposals or relevant equitable considerations.[226] Under any of these circumstances, a state's intransigent behavior would reflect unilateralism through covert means, which in turn would infringe sovereign equality and joint stewardship.

*Third-Party Dispute Resolution*

When multilateral cooperation is mandatory under international law, a negotiated agreement is the preferred solution for several reasons. First, as compared to international courts and tribunals, states have superior access to the kinds of information and expertise that would be necessary to determine an equitable solution to international disputes.[227] Second, when states resolve disputes through negotiated compromise, the choices they make together plausibly reflect exercises of collective self-determination. Third, it stands to reason that states will be more likely to accept a solution as equitable if they have participated in and consented to the solution. Consequently, international courts and tribunals usually give states every opportunity to conclude agreements resolving issues within mandatory multilateralism's domain.[228]

[222] *See Chagos*, Case No. 2011-03, at para. 528.

[223] *See Pulp Mills*, 2010 ICJ Rep. at 68, para. 150 (observing that the duty of good faith negotiation "does not imply an obligation to reach an agreement" (internal citation and quotation marks omitted); *Interim Accord Case*, 2011 ICJ Rep. at 685, para.132 (same); *Shrimp/Turtle Appellate Body Report II*, *supra* note 197, paras. 123, 134 (holding that the United States was not required to conclude a multilateral agreement "in order to avoid 'arbitrary or unjustifiable discrimination'" because such a requirement would give other WTO members, "in effect, a veto over whether the United States could fulfill its WTO obligations").

[224] *Cf.* Tacna-Arica Arbitration (Chile/Peru), 2 RIAA 921, 929 (1925) (observing that where two states have entered an agreement to negotiate a maritime delimitation, neither state is "bound to make an agreement unsatisfactory to itself provided it did not act in bad faith").

[225] *Id.* at 930; *see also* Application of the Interim Accord case (FYROM/Gr.), Judgment, 2011 ICJ Rep. 644, 685, para. 132 (Dec. 5) (endorsing these requirements).

[226] *See Interim Accord Case*, 2011 ICJ Rep. at 685, para. 132 (emphasizing these considerations); Lake Lanoux Arbitration (Sp./Fr.), Award of 16 Nov. 1957, 12 RIAA 281, para. 11 (same).

[227] *See Fisheries-Germany*, 1974 ICJ Rep. at 201, para. 65 (emphasizing this factor).

[228] *See, e.g.*, Gabčikovo-Nagymaros Project (Hung./Slovk.), 1997 ICJ Rep. 7, 78, para. 141 (Sept. 25) [hereinafter *Gabčikovo-Nagymaros Project*]; *North Sea Continental Shelf Cases*, 1969 ICJ Rep. at 46–47, para. 85.

If states are unable to resolve disputes regulated by mandatory multilateralism, they must pursue mediation, arbitration, adjudication, or some other form of third-party dispute resolution. Support for this principle can be found in Article 33 of the UN Charter, which charges states with resolving their disputes through peaceful means.[229] The General Assembly's Friendly Relations Declaration likewise describes the pursuit of peaceful third-party dispute resolution as an obligation incumbent upon all states.[230] Third-party dispute resolution promotes sovereign equality and joint stewardship by ensuring that states do not appoint themselves judge and party to the same cause.

Under international law today, states cannot compel one another to accept any particular forum for third-party dispute resolution without their consent; the choice of a particular forum for third-party dispute resolution must be the product of consensus between the relevant parties.[231] Once states agree on a particular mechanism and venue for third-party dispute resolution, however, they assume a concomitant duty to follow through in good faith.[232]

*Managing Entrenched Disputes*

States sometimes encounter serious roadblocks in their efforts to resolve their disputes through negotiation or third-party dispute resolution. Entrenched disputes between states are not always the product of bad faith. States may disagree in good faith about the ingredients of an equitable solution to their dispute, and they may fail to reach consensus on a mechanism for resolving the dispute (e.g., mediation, arbitration, adjudication) or on the specific institution to assist them in this process (e.g., ICJ, PCA, regional courts). As Monica Hakimi has shown, multilateral engagement sometimes illuminates points of disagreement between states, sparking new conflicts and intensifying old ones.[233] As long as such disagreements remain unresolved, international controversies can drag on without the expectation of an immediate resolution.

The *Gabčikovo-Nagymaros Case* offers a classic example of entrenched disagreement.[234] In 1993, Hungary and Slovakia sought the ICJ's assistance in resolving a dispute over Hungary's unilateral suspension of a joint-venture between the two countries to develop a system of locks and hydroelectric power plants on the Danube River.[235] Hungary argued that the

[229] *See* UN Charter Art. 33 (providing that when disputes arise that may "endanger the maintenance of international peace and security," states must, "first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to international agencies or arrangements, or other peaceful means of their own choice").

[230] *See* Friendly Relations Declaration, *supra* note 104, at 123 (declaring that "[e]very State shall settle its international disputes with other States by peaceful means," such as mediation, arbitration, and judicial settlement, and that if these mechanisms fail to broker a solution, "[t]he parties to a dispute have the duty . . . to continue to seek a settlement of the dispute by other peaceful means agreed upon by them").

[231] *See id.* ("International disputes shall be settled on the basis of the Sovereign equality of States and in accordance with the Principle of free choice of means."); *Status of Eastern Carelia*, 1923 PCIJ (Ser. B) No.5, at 7, 27, para. 33. In practice states may have strong incentives to submit to the compulsory jurisdiction of some tribunals, such as the WTO's Dispute Settlement Body, as a precondition for participation in welfare-enhancing cooperative regimes.

[232] *See* KOLB, *supra* note 181, at 195–241 (discussing duties of good faith in international adjudication and arbitration).

[233] *See* Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L L.J. 1 (2017).

[234] *Gabčikovo-Nagymaros Project*, 1997 ICJ Rep. 7.

[235] *Id.* at 10–17, paras. 1–14.

project negatively impacted its legal interest and the international community's collective interest in preserving the river's ecological health.[236] Slovakia contended, in turn, that Hungary's actions violated a treaty between the two countries.[237] After concluding that both parties had violated their international legal obligations, the ICJ sent the dispute back to the parties with the instruction to "find an agreed solution" through "good faith" negotiation.[238] For nearly two decades, however, the two sides made little progress in negotiations, raising the specter of perpetual deadlock.[239]

International law responds to entrenched disputes like the *Gabčikovo-Nagymaros Case* by imposing special requirements of mandatory multilateralism. First, states must continue to pursue new dispute resolution mechanisms in good faith until they find a successful avenue for achieving an equitable resolution.[240] Second, although states may take provisional steps to secure their legal interests once it becomes clear that an impasse has been reached,[241] they must notify other interested parties of such measures,[242] maintain a continuous process of dialogue to ensure that their provisional measures do not foreclose a multilateral solution,[243] and avoid any actions that would "establish a fait accompli capable of prejudicing the outcome of negotiations."[244] The last requirement is especially critical: to respect the principles of sovereign equality and joint stewardship, states must refrain from taking any actions unilaterally that would cause permanent and irreversible harm to other states' interests and collective interests of the international community.[245] In particular, they must avoid measures that might so aggravate international tensions as to imperil international peace and security.[246] Each of these requirements are necessary to reconcile sovereign equality and joint stewardship with the often-slow pace of international dispute resolution.

[236] *Id.* at 35–36, para. 40.

[237] *Id.* at 16, para. 13.

[238] *Id.* at 78, 82, paras. 142, 155(2)(B).

[239] In June 2017, Hungary resumed construction and Slovakia agreed to discontinue proceedings in the ICJ. *See* Gabčikovo-Nagymaros Project (Hung./Slov.), Press Release (July 21, 2017), *available at* http://www.icj-cij.org/files/case-related/92/092-20170721-PRE-01-00-EN.pdf [hereinafter Gabčikovo-Nagymaros Press Release].

[240] *See* Friendly Relations Declaration, *supra* note 104, at 123 ("The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.").

[241] *See Shrimp/Turtle Appellate Body Report II*, *supra* note 197, para. 123 (noting that provisional measures are permissible under international law because otherwise "any country party to . . . negotiations . . . would have, in effect, a veto over [other states]," which "would not be reasonable").

[242] *Cf. Dispute Regarding Navigational and Related Rights*, 2009 ICJ Rep. at 252, para. 95 (explaining that a duty to provide notice arises when one state regulates a resource over which another state also has rights).

[243] *See Shrimp/Turtle Appellate Body Report II*, *supra* note 197, para. 153(b) (concluding that regulatory standards imposed unilaterally by the United States were permissible on a provisional basis, provided that the parties continued to pursue "ongoing serious good faith efforts to reach a multilateral agreement").

[244] 1 HUGH THIRLWAY, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE 22 (2013) (observing that good faith presupposes a duty "to preserve the respective rights of either party"); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, 184, para. 121 (July 9) (concluding Israel's construction of a wall in the occupied Palestinian territory constituted an impermissible "'fait accompli' on the ground that [it] could well become permanent, in which case . . . it would be tantamount to de facto annexation").

[245] *See* Delimitation of the Maritime Boundary Case (Guy./Surin.), PCA 2004-04, para. 470 (Sept. 17, 2007) [hereinafter *Delimitation of the Maritime Boundary*] ("It should not be permissible for a party to a dispute to undertake any unilateral activity that might affect the other party's rights in a permanent manner.").

[246] *See* Friendly Relations Declaration, *supra* note 104, at 123 (declaring that in pursuing dispute resolution states must "refrain from any action which may aggravate a [dispute] so as to endanger the maintenance of

The various substantive and procedural requirements of mandatory multilateralism share a common logic. What unites these requirements is the idea that states under international law are formal equals and joint stewards of the international community's collective interests. International law does not obligate states to pursue common purposes across all fields and topics. But when cooperation is necessary because an important and transnational public good is at stake, international law does require states to pursue solutions that reflect sovereign equality and joint stewardship by giving due regard to other states' legal interests. This means that states must engage one another in an inclusive decision-making process that aims to achieve an equitable result.

*Objections to Mandatory Multilateralism*

The requirements entailed by mandatory multilateralism have attracted their share of critics. Some object that these requirements are question-begging[247] and "singularly unhelpful"[248] because they are too indeterminate to resolve international disputes. Broad substantive standards like "good faith," "due regard," and "equitable balancing" might provide general guideposts for negotiations, but they rarely dictate specific outcomes.[249] Likewise, procedural duties to negotiate cannot bear fruit if states cannot find common ground. The requirement to pursue third-party dispute resolution, in particular, has been criticized as "essentially circular, since if the parties are not agreed on reference to arbitration or judicial settlement the process of negotiation goes around and around, potentially without end."[250] Is mandatory multilateralism therefore an exercise in futility?

Generally speaking, we think not. Although equitable balancing may lack the precision of bright-line rules, it is not devoid of content. Nor is international negotiation based on equitable balancing destined to fail. In many settings, states have strong incentives to resolve their disputes peacefully, and mandatory multilateralism's substantive and procedural requirements can help to channel negotiations in a direction that brings the parties closer to agreement.[251] Even when states are unable to resolve their disputes expeditiously—as was the case in both the *Gabčikovo-Nagymaros Case* and the *Shrimp/Turtle Dispute*—mandatory multilateralism's requirement that states maintain a continuous dialogue may bolster the chances that

international peace and security"); *South China Sea Arbitration*, PCA Case No. 2013-19, at para. 1170 (observing that states bear "a duty to refrain from aggravating or extending a dispute during settlement proceedings," as recognized "in the widespread inclusion of express provisions to such effect in multilateral conventions providing for the settlement of disputes and its nearly routine inclusion in bilateral arbitration and conciliation treaties").

[247] *See North Sea Continental Shelf Cases*, 1969 ICJ Rep. at 172, 196 (Tanaka, J., dissenting) ("Reference to the equitable principle is nothing else but begging the question.").

[248] ANDREW GUZMAN, HOW INTERNATIONAL WORKS 50 (2008); *see also Fisheries-Iceland*, 1974 ICJ Rep. at 141 (Gros, J., dissenting opinion) (dismissing mandatory multilateralism as "devoid of all useful application").

[249] *See, e.g.*, LOUIS B. SOHN, JOHN E. NOYES, ERIK FRANCKX & KRISTEN G. JURAS, CASES AND MATERIALS ON THE LAW OF THE SEA 79 (2d ed. 2014) (asserting that "due regard" is "so indeterminate that its application by different decision makers will necessarily be unpredictable").

[250] Southern Bluefin Tuna Cases (Austl./Japan; N.Z./Japan), ITLOS Nos. 3 & 4, Provisional Measures 321 (Aug. 27, 1999) (Shearer, J. ad hoc, separate opinion).

[251] To take one famous example, in the *North Sea Continental Shelf Cases,* the three parties (Denmark, Germany, and the Netherlands) concluded agreements establishing delimitation lines consistent with equitable balancing that "were more generous to Germany than would have been the case under the equidistance principle." JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 595 (4th ed. 2015).

a consensus-based solution will eventually emerge.[252] In the meantime, mandatory multilateralism disciplines negotiations by prohibiting some (injurious and irreversible) provisional measures and taking some proposals for (manifestly inequitable) solutions off the negotiation table.[253] If states attempt to bypass the requirements of mandatory multilateralism, international courts and tribunals can, and routinely do, bring them back into line, notwithstanding that such courts rely on state consent to acquire jurisdiction.

A more serious objection to mandatory multilateralism is that in practice it sometimes undermines sovereign equality and joint stewardship. During negotiations, powerful states may find that they can compel weaker states to accept disadvantageous deals that cement relationships of domination. In some contexts, even the requirement that states pursue an equitable result may be used to disproportionately benefit the powerful. Valentina Okaur-Bisant has observed, for example, that applying equitable principles to the apportionment of international rivers tends to "reward the countries . . . that are first in time to develop a shared river," thereby systematically disadvantaging poorer countries that are behind the development curve.[254] This observation underscores the risk that powerful states may exploit negotiation as a "hegemonic tool"[255] for dominating weaker states, thereby undermining sovereign equality and joint stewardship.

We readily acknowledge the force of this critique: like other institutions and norms of international law, mandatory multilateralism is vulnerable to abuse in the hands of powerful states.[256] We doubt, however, that mandatory multilateralism is *more* susceptible to abuse than the alternative. When mandatory multilateralism applies, it offers weaker states formal legal protections that they can assert to counter great power domination. Although mandatory multilateralism denies weaker states the right to veto powerful states' preferred solutions, the other side of the coin is that powerful states also may not lawfully impose their preferred solutions on weaker states unilaterally. Hence, if weaker states hold out for a more equitable deal, powerful states have three choices under international law: (1) they may offer to sweeten the deal; (2) they may declare a stalemate and impose (impermanent and reversible) provisional measures while continuing to pursue international dialogue; or (3) they may submit the dispute to a third-party for decision in accord with equitable principles. This limited menu of options gives weaker states leverage they can use to counteract, however imperfectly, powerful states' asymmetric bargaining position in international negotiations. Outside the domain of mandatory multilateralism, weaker states have no such protections.

[252] *See* Gabčikovo-Nagymaros Press Release, *supra* note 239 (noting the parties' agreement to request dismissal of the proceedings).

[253] *See Shrimp/Turtle Appellate Body Report I*, *supra* note 181, paras. 158–60, 168–72 (concluding that certain unilateral regulations imposed by the United States without serious, good-faith negotiations constituted "unjustifiable" and "arbitrary" discrimination under Article XX of GATT 1994).

[254] *See* Valentina Okaru-Bisant, *Institutional and Legal Frameworks of Preventing and Resolving Disputes Concerning the Development and Management of Africa's Shared River Basins*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 331, 353 (1998).

[255] Lauri Mälksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law*, EJIL: *TALK!* (July 15, 2016), *at* https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law ("Outside the West, international law is often portrayed as an hegemonic tool of the West.").

[256] *See* José A. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873 (2003); Detlev F. Vagts, *Hegemonic International Law*, 95 AJIL 843 (2001).

## V. Some Lessons of Mandatory Multilateralism

In this Part, we consider briefly how mandatory multilateralism might apply to three current global controversies: (1) conflicting state claims to the South China Sea, (2) the United States' pending withdrawal from the 2015 Paris Agreement, and (3) Bolivia's efforts to access the Pacific Ocean through Chile. We have chosen these disputes not simply because they are timely and important, but because each has a different structure and therefore illuminates different features of the way mandatory multilateralism can work in practice. The interstate South China Sea conflict over oceanic waterways invokes the UNCLOS regime and calls for a negotiated settlement of issues related to maritime delimitation over which no state can rightfully claim exclusive lawmaking authority. The United States' pending withdrawal from the Paris Agreement brings the norms of mandatory multilateralism to bear on a collective action problem: climate change. A common feature of these two cases is that they feature hegemonic powers whose actions are reviewable under legal regimes structured by mandatory multilateralism. The last case study, the conflict between Bolivia and Chile, shows in a single fact situation both the limits of mandatory multilateralism (or, conversely, the scope of a state's international autonomy) and its power to assist the efforts of a landlocked state to gain access to the seas and international commerce. In each of these contexts, we show how mandatory multilateralism "tempers individualistic voluntarism"[257] by constraining the manner in which states may lawfully exercise their sovereign powers.

### *Navigating Territorial Disputes: The South China Sea*

The South China Sea has been a locus of conflict for centuries. The struggle has intensified over the past several decades, as populations in the region have swelled, fisheries have dwindled, and technological innovation has opened the door to offshore drilling. Brunei, China, Malaysia, the Philippines, Taiwan, and Vietnam have each laid claim to parts of the South China Sea by establishing outposts on diminutive islands, reefs, and shoals.[258] Among these states, China has taken the most aggressive stance, arguing that virtually the entire Sea falls within its sovereign jurisdiction, including the Macclesfield Bank, Paracel Islands, Pratas Islands, Scarborough Shoal, and Spratly Islands, with their adjacent waters.[259] To reinforce these claims, China has constructed dozens of "island fortresses" in the South China Sea—in some cases building up shallow reefs and shoals to support naval ports, weapons systems, and even entire airstrips.[260] Other states have vigorously contested China's expansive claims.[261]

[257] Kolb, *supra* note 181, at 36–37.

[258] Katie Hunt, *South China Sea: What's at Stake*, CNN (Feb. 20, 2017), *at* https://www.cnn.com/2017/02/19/asia/south-china-sea-explainer/index.html.

[259] *See, e.g.*, People's Republic of China, Ministry of Foreign Affairs, Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Philippines, para. 4 (Dec. 7, 2014), *at* www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

[260] *See* Tom Phillips, *Photos Show Beijing's Militarization of South China Sea in New Detail*, Guardian (Feb. 6, 2018), *at* https://www.theguardian.com/world/2018/feb/06/photos-beijings-militarisation-south-china-sea-philippines; James Griffiths, *Duterte Follows Xi's Lead with Military Build-Up in South China Sea*, CNN (May 12, 2017), *at* https://www.cnn.com/2017/05/12/asia/philippines-south-china-sea-pagasa/index.html.

[261] Reuters, *Southeast Asia, China Adopt Framework for Crafting Code on South China Sea*, CNBC (Aug. 6. 2017), *at* https://www.cnbc.com/2017/08/06/asean-china-adopt-framework-for-crafting-code-on-south-china-sea.html.

In 2006, the Philippines initiated an arbitration against China under UNCLOS, seeking a determination that various maritime features claimed by China were insufficient to support EEZs and other maritime rights under international law.[262] When the tribunal rejected China's objections to jurisdiction,[263] China refused to participate further in the proceeding.[264] The tribunal ultimately issued an award on the merits endorsing the Philippines' central arguments.[265] China, however, declared this award "null and void" with "no binding effect on China,"[266] and it stepped up its own naval exercises and construction of artificial islands throughout the region.[267] In response, the United States and some other countries have conducted periodic "freedom of navigation" exercises in the South China Sea in pointed defiance of China's pretentions to sovereignty.[268] Tensions in the region thus continue to run high.[269]

Mandatory multilateralism has a variety of important applications to the South China Sea dispute. First, any maritime rights that states assert against one another must be anchored in multilateral legal norms, i.e., international treaties, customary international law, or general state practice. States may not rest their claims to the South China Sea on their own unilateral historical practices (no matter how longstanding), national laws (no matter how just), or preferred reformulation of international norms (no matter how desirable). Accordingly, China may not claim maritime zones in the South China Sea based solely on its people's historic fishing practices or the fact that it has unilaterally asserted jurisdiction over the Sea in the past.[270] Such considerations are insufficient to establish sovereignty under international

[262] *See South China Sea Arbitration*, PCA Case No. 2013-19, at 2–3, para. 8. The Philippines also asserted other arguments based on, inter alia, China's construction of artificial islands and its failure to protect the marine environment. *Id.*, para. 9.

[263] *See South China Sea Arbitration*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015).

[264] *See South China Sea*, Award, at para. 11. Scholars outside China have debated whether the tribunal erred in exercising jurisdiction. *Compare* Diane Desierto, *The Jurisdictional Rubicon: Scrutinizing China's Position Paper on the South China Sea Arbitration—Part I*, EJIL: *Talk!* (Jan. 29, 2015) (defending the tribunal's decision); Diane Desierto, *The Jurisdictional Rubicon: Scrutinizing China's Position Paper on the South China Sea Arbitration—Part II*, EJIL: *Talk!* (Jan. 30, 2015) (same); *with* Julian Ku, *Game Changer? Philippines Seeks UNCLOS Arbitration with China Over the South China Sea*, Opinio Juris (Jan. 22, 2013) (disputing the tribunal's conclusions on jurisdiction). Chinese scholars have uniformly condemned the tribunal's order on jurisdiction. *See* Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, 17 Chinese J. Int'l L. 207, 246–397, paras. 48–374 (2018) [hereinafter CSIL] (unanimously condemning the tribunal's conclusions on jurisdiction).

[265] *See generally South China Sea*, PCA Case No. 2013-19, Award, at 471–77.

[266] *See* Ministry of Foreign Affairs, Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines (Oct. 30, 2015), *at* http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml.

[267] *China Building a New Reef in South China Sea, Think Tank Says*, Reuters (Nov. 21, 2018), *at* https://www.reuters.com/article/us-china-southchinasea/china-building-on-new-reef-in-south-china-sea-think-tank-says-idUSKCN1NQ08Y.

[268] James Griffiths, *US Calls for Legally Binding Code of Conduct in South China Sea*, CNN (Aug. 7, 2017), *at* https://www.cnn.com/2017/08/07/politics/south-china-sea-us-australia-japan/index.html.

[269] *See* Ben Westcott, Ryan Browne & Zachary Cohen, *White House Warns China on Growing Militarization in South China Sea*, CNN (May 4, 2018), *at* https://www.cnn.com/2018/05/03/asia/south-china-sea-missiles-spratly-intl/index.html.

[270] *See* Douglas Guilfoyle, *A New Twist in the South China Sea Arbitration: The Chinese Society of International Law's Critical Study*, EJIL: *Talk!* (May 25, 2018) ("The basic problem in putting forward a special Chinese theory or practice of historic rights over an integrated ocean space is that such a theory *cannot unilaterally bind other*

maritime law.[271] Nor may China and its neighbors claim EEZs in the South China Sea based on rocks, artificial islands, or other features that do not qualify for EEZs under international maritime law.[272] To the extent that gaps in UNCLOS might leave some key issues unresolved, China cannot simply fill the gaps unilaterally with its own preferred views. Instead, it must engage with other states to develop new treaty-based or customary norms that reflect due regard for the relevant legal interests of other states and the international community. The same legal constraints apply equally to other states in the region.

Second, states must comply with mandatory multilateralism's procedural requirements of investigation, consultation, and good faith negotiation or third-party dispute resolution. For several years, the Association of Southeast Asian Nations (ASEAN) has convened its members to consult and negotiate with China for the purpose of brokering a consensus-based "code of conduct" for the South China Sea.[273] Although these negotiations are still ongoing, the draft code that is currently under consideration achieves only modest results. Critics have observed that the draft purports to be nonbinding, lacks a dispute-resolution mechanism, and—most importantly—does not establish norms or procedures to resolve the central questions of maritime delimitation that have divided the region.[274] This appears to be by design: China has worked behind the scenes to minimize and stall multilateral engagement to ensure that its militarization of the South China Sea eventually renders its claims to sovereignty a *fait accompli*.[275]

Such tactics are inconsistent with international maritime law's commitment to multilateralism. At a minimum, mandatory multilateralism dictates that China must respect the rights that other states in the region have under UNCLOS to claim jurisdiction over various maritime zones adjacent to their land territory and islands in the South China Sea. To the extent that respect for others' rights raises unresolved questions of maritime delimitation, China must take these questions to the negotiation table or to third-party dispute resolution rather than proceed unilaterally. Although mandatory multilateralism does not preclude hard-nosed negotiation, it does require states to negotiate in good faith, manifesting "a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way."[276]

*States.*"). *But see* CSIL, *supra*, note 264, at 450, 454–71, paras. 501, 510–36 (arguing that China's unilateral economic activity and governance establishes "historic rights" within the South China Sea).

[271] *See* Guilfoyle, *supra* note 270 (citing YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 58–59 (2d ed. 2015)).

[272] *See, e.g.*, *South China Sea Arbitration*, PCA Case No. 2013-19, at 259–60, paras. 643–46 (concluding that various maritime features claimed by China in the South China Sea are "rocks that cannot sustain human habitation or economic life on their own" and therefore do not qualify for an EEZ or continental shelf under UNCLOS).

[273] Reuters, *supra* note 261.

[274] *See, e.g.*, James Pomfret & Neil Jerome Morales, *South China Sea Code of Conduct Talks to Be "Stabilizer" for Region: China Premier*, REUTERS (Nov. 14, 2017), *at* https://www.reuters.com/article/us-asean-summit-southchinasea/south-china-sea-code-of-conduct-talks-to-be-stabilizer-for-region-china-premier-idUSKBN1DE05K (noting these criticisms).

[275] *See South China Sea Arbitration*, PCA Case No. 2013-19, at 462, para. 1177 (holding that China violated its obligations under UNCLOS by "effectively creat[ing] a fait accompli at Mischief Reef by constructing a large artificial island on a low-tide elevation located within the Philippines' exclusive economic zone and continental shelf"). There is arguably a parallel here with Israeli construction of settlements in the West Bank: in both cases, the ascendant power is attempting to create "facts on the ground" that can then be used to justify an assertion of sovereignty over the relevant territory. *See* Omar M. Dajani, *Israel's Creeping Annexation*, 111 AJIL UNBOUND 51 (2017).

[276] *German External Debts*, 47 ILR at 56, at para. 62.

The idea that one of the parties would "insist upon the complete capitulation of the other side" is "inconsistent with . . . 'negotiation.'"[277] Instead, international law requires a good faith effort to reach common ground based on multilateral norms. And if negotiation stalls, China must cooperate in good faith to find a mutually acceptable mechanism for third-party dispute resolution.

Third, as long as the South China Sea dispute drags on, states must refrain from taking steps that would irreversibly alter the status quo.[278] This means that they must suspend construction in disputed, environmentally sensitive areas pending the outcome of international negotiations or third-party dispute resolution.[279] They must also avoid actions that could undermine international peace and security in the region, including the threat or use of force against foreign vessels traveling peacefully through contested waters.[280] Respect for these requirements is essential to honor the principle of sovereignty equality, which China has celebrated as "crucial for the stability of international relations."[281]

China's actions persistently contravene the norms of mandatory multilateralism. Recalcitrance on the part of China, however, does not imply that the legal obligations of mandatory multilateralism are not really obligations or not really legal, or that the South China Sea controversy is inherently unsuited to their application. Rather, it confirms the findings of the arbitral tribunal that China's behavior is unlawful. The most that can be reasonably expected of an international legal framework is that it treats the parties within it equitably and recognizes justice claims grounded in law. The fact that there is no supranational coercive authority capable of compelling China to comply with international law is no more a knock against mandatory multilateralism than it is against the many other areas of international law that lack coercive executive power, such as human rights law, refugee law, trade law, labor law, and environmental law.

*Administering Common Resources: Climate Change*

In 2015, representatives from 196 states met near Paris to negotiate and draft an agreement that would address climate change at the global level.[282] These talks ultimately produced the Paris Agreement.[283] As of January 2019, 195 UNFCCC members (194 states and the European Union) have signed the Agreement, and 184 have become parties to it.[284] Its

[277] *Id.*

[278] *See Delimitation of the Maritime Boundary*, PCA 2004-04, at paras. 470, 480 (concluding that a state may not "undertake any unilateral activity that might affect the other party's rights in a permanent manner," including "acts that cause a physical change to the marine environment").

[279] *See* Asia Maritime Transparency Initiative, Update (June 29, 2017), *at* https://amti.csis.org/chinas-big-three-near-completion (observing that China has continued construction of military and dual-use facilities at Fiery Cross Reef, Mischief Reef, and Subi Reef, while negotiations are ongoing with other ASEAN countries).

[280] *See* Friendly Relations Declaration, *supra* note 104, at 123 (declaring that states must "refrain from any action which may aggravate a [dispute] so as to endanger the maintenance of international peace and security").

[281] *See* Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, para. 2 (June 25, 2016), *at* http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698.

[282] UNFCCC, *supra* note 23.

[283] Conference of the Parties to the United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement, Annex, Dec. 12, 2015, FCCC/CP/2015/L.9/Rev.1.

[284] Paris Agreement, United Nations Treaty Collection, *at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=_en&clang=_en.

principal aim is to promote the adoption of policies that will reduce greenhouse gas emissions, thereby "[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels."[285] A further objective is "[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development."[286] As the chief means of attaining these goals, the Agreement envisions all countries developing and continually updating "nationally determined contributions" (NDCs) to mitigate climate change.[287] NDCs are to be submitted to the United Nations every five years and then used to assess state parties' compliance with their ongoing commitments, as we explain further below.[288] Sensitive to the concerns of developing countries, the preamble affirms the principle of "equity and common but differentiated responsibilities and respective capabilities."[289] More concretely, the Paris Agreement provides a framework for preexisting commitments of $100 billion a year in climate finance for developing countries by 2020, and for further financial assistance subsequently.[290] Although the plan's success will depend on the willingness of countries to follow through on these commitments and to develop and adhere to meaningful NDCs, we have suggested in previous writing that the obligation of states to do so is explained by the idea that states, severally and jointly, are fiduciaries of humanity.[291]

We now consider the ways the legal regime established by the Paris Agreement reflects the norms of mandatory multilateralism, and then assess from this perspective the present U.S. administration's stated intention to withdraw from the Agreement. The UNFCCC and the Paris Agreement both acknowledge that mitigating climate change and its adverse effects is "a common concern of humankind."[292] Although the Paris Agreement is careful to protect developing countries with the principle of "common but differentiated responsibilities,"[293] all state parties are expected to participate in the Agreement's regime of international cooperation. Notably, however, whereas the Kyoto Protocol established legally binding emission-reduction targets for developed countries,[294] the Paris Agreement does not. Instead, the Paris Agreement requires all states to develop NDCs, either by themselves or jointly with others, including through the use of "internationally transferred mitigation outcomes" (typically, a developed country would finance realization of a developing country's NDC).[295] The Agreement calls for each party's successive NDC to "represent a progression beyond"

[285] Paris Agreement to the United Nations Framework Convention on Climate Change, Art. 2(a), Dec. 13, 2015, *in* Rep. of the Conference of the Parties on the Twenty-First Session, UN Doc. FCCC/CP/2015/10/Add.1, Annex (2016) [hereinafter Paris Agreement].

[286] *Id.* Art. 2(b).

[287] *Id.* Arts. 3–4.

[288] *Id.* Art. 4, para. 9.

[289] *Id.*, at pmbl.

[290] Joe Thwaites, Niranjali Manel Amerasinghe & Athena Ballesteros, *What Does the Paris Agreement Do for Finance?*, World Resources Inst. (Dec. 18, 2015), *at* https://www.wri.org/blog/2015/12/what-does-paris-agreement-do-finance.

[291] Criddle & Fox-Decent, *supra* note 166, at 348–49.

[292] UNFCCC, *supra* note 23, pmbl.; Paris Agreement, *supra* note 285, pmbl.

[293] *See* UNFCCC, *supra* note 23, Art. 3(1).

[294] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Art. 3, Dec. 10, 1997, UN Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

[295] Paris Agreement, *supra* note 285, Art. 6.

the prior NDC.[296] State parties are likewise legally required to submit their NDCs to the United Nations and a public registry, report on progress every two years, and have their progress reports reviewed by technical experts and peers.[297] The Agreement further envisions a "global stocktake" every five years to assess collective progress toward its objectives, with the first stocktake scheduled for 2023.[298]

The Paris Agreement seeks to strike a balance that takes into account state autonomy and self-determination, on the one hand, and the urgent need for a global response to climate change, on the other. State autonomy is respected through the use of NDCs that states are legally entitled to design and implement as they wish. The demands of climate change are reflected in the legal requirement on states to establish, implement, and report periodically on progress toward their NDCs. This activity is wedded to the annual Conference of Parties meetings under the UNFCCC framework. In this context, states retain an overarching obligation from the UNFCCC to "protect the climate system for the benefit of present and future generations of humankind,"[299] and to do so cooperatively, such as through the negotiated use of "internationally transferred mitigation outcomes."[300] Thus, explicitly and implicitly, the UNFCCC and the Paris Agreement require states to negotiate with one another in good faith, and on an ongoing basis, for the purpose of developing and implementing NDCs capable of achieving collectively the goals of the Paris Agreement. In the event of a dispute concerning the interpretation or application of the UNFCCC or the Paris Agreement, the controversy is remitted to the ICJ, arbitration, or conciliation.[301] The Paris Agreement thus embraces a form of mandatory multilateralism akin to the form established under UNCLOS, where contending parties are obligated to negotiate in good faith, resorting to third-party dispute resolution only if necessary.

The principle of sovereign equality is respected under the Paris Agreement because no state is entitled to dictate terms to another, and every state is ultimately responsible for the content of its NDC. The principle of joint stewardship is put into action by the Paris Agreement's delegation to states of the responsibility to craft meaningful NDCs to reduce greenhouse gas emissions and address the adverse effects of climate change. Joint stewardship assumes an institutional form by the Paris Agreement's use of the annual UNFCCC Conference of Parties to which every member belongs and has one vote, allowing the Conference to speak collectively on behalf of all.[302]

Arguably, the international community has elected to place climate change policy under joint stewardship precisely because the reduction and mitigation of atmospheric pollution

[296] *Id.* Art. 4, para. 4.

[297] *Id.* Art. 13.

[298] *Id.* Art. 14.

[299] UNFCCC, *supra* note 23, Art. 3 para. 1.

[300] Paris Agreement, *supra* note 285, Art. 6.

[301] *Id.* Art. 24, *referring to* UNFCCC, *supra* note 23, Art. 14.

[302] Paris Agreement, *supra* note 285, Art. 25. Of course, mandatory emission standards established under Kyoto could also be said to reflect sovereign equality (the equality of sovereigns to negotiate and enter treaties) and could be subject to joint stewardship via the UNFCCC Conference of Parties. Organizing principles can explain and justify any number of reasonable policies that fall within their ambit. Our thesis here is that NDCs operate within a multilateral framework that has significant mandatory components, notwithstanding the discretion left to states to craft their own NDCs, and therefore NDCs can be fairly characterized as operating within a regime of mandatory multilateralism that is helpfully explained by sovereign equality and joint stewardship.

poses a serious collective action problem. Self-interested states would prefer to free ride, letting others bear the cost of mitigation measures, while they themselves avoid those costs while benefitting from a relatively healthy environment. The logic of the prisoner's dilemma encourages states to pursue their narrow self-interest, since whether or not other states shoulder the burden of climate mitigation, a state will typically do better economically by avoiding the burden. But, of course, if a plurality of heavily polluting states adopted this policy, climate mitigation would be severely threatened if not doomed. The mandatory multilateralism of the Paris Agreement addresses this collective action problem by providing a framework for joint stewardship that makes the development and implementation of NDCs transparent, with the hope that national policymakers may be held accountable. Of course, this approach depends on policymakers caring about climate change and the Agreement's multilateral process.

The present U.S. administration has indicated that, as part of its "America First" policy, the United States will be withdrawing from the Paris Agreement.[303] Article 28 of the Agreement provides that a party may give notice of withdrawal "any time after three years from the date on which [the] Agreement has entered into force" for that party, but the withdrawal takes effect only one year after notification.[304] Withdrawal would make the United States a free rider on the mitigation efforts of others and would constitute a brazen assertion of unilateralism. The assertion would be brazen because, as noted, the Paris Agreement does not subject state parties to emission-reduction quotas or targets. States must merely develop some climate change mitigation policy in non-binding (but good faith) negotiations with others, and be willing to subject the policy's implementation to public review. Withdrawal from the Paris Agreement would be an outright rejection by the United States of international legal norms of mandatory multilateralism in the field of climate change. It would also constitute a serious impediment to collective action on the environment, in part because the United States is one of the world's largest carbon emitters, and in part because defections from collective action regimes and open free riding tend to breed resentment and further defections.

More significantly, however, it is arguable that in this context the substantive and procedural norms of mandatory multilateralism are binding independently of their codification in the Paris Agreement. The rationale for the theory proceeds from the premise that because states' carbon emissions spill over into the global atmosphere possessed in common by all, the only practical way to safeguard sovereign equality and avoid unilateralism is to charge states as co-equals with joint stewardship of the atmosphere. For this charge to be legally meaningful, states must have some obligation to take it seriously. The legal obligation to cooperate with other states in addressing the harmful effects of climate change derives from the issue's recognized status under the UNFCCC, which is (arguably) evidence of a customary rule that states have an obligation to mitigate climate change because the environment

[303] Jonathan Easley, *Trump Cements "America First" Doctrine with Paris Withdrawal*, HILL (June 2, 2017), *at* http://thehill.com/homenews/administration/336014-trump-cements-america-first-doctrine-with-paris-withdrawal. Multiple polls show that roughly seven out of ten Americans favor remaining in the Paris Agreement. *See, e.g.*, Robinson Meyer, *Most Americans Support Staying in the Paris Agreement*, ATLANTIC (May 31, 2017), *at* https://www.theatlantic.com/science/archive/2017/05/most-americans-support-staying-in-the-paris-agreement/528663.

[304] Paris Agreement, *supra* note 285, Art. 28, paras. 1, 2. The earliest possible effective withdrawal date for the United States is November 4, 2020, a day after the 2020 U.S. presidential election. The United States formally stated its intention to withdraw in an official note to the United Nations delivered on August 4, 2017. *See* UN Depositary Notification, C.N.464.2017.TREATIES-XXVII.7.d (Aug. 8, 2017).

is a "common concern of humankind."[305] Mandatory multilateralism in this context would require the United States to respect the object and purpose of the Paris Agreement by taking good faith steps to mitigate climate change. The United States would enjoy wide discretion to design and implement mitigation measures, much as state parties to the Paris Agreement enjoy broad authority over the development and implementation of NDCs. The United States would also, however, be under an obligation to exercise that discretion in a way that did not subvert the collective mitigation efforts of other states, and in a manner that demonstrated due regard for other states touched by its greenhouse gases. In addition, mandatory multilateralism would entail procedural obligations of investigation, consultation, negotiation, and third-party dispute resolution. Thus, even if the United States completes its withdrawal from the Paris Agreement, it may still be bound by substantive and procedural customary norms of mandatory multilateralism that call on the United States to have due regard for the environmental interests of other states.

This again raises the question of compliance. What if the United States withdraws and explicitly refuses to recognize the validity or applicability of any international legal obligations in this sphere? Such a move could have far-reaching, and potentially disastrous consequences for global efforts to combat climate change. Purely as a conceptual matter, however, the compliance problem does not appear any more or less pressing here than in other areas of international law. Moreover, issues of compliance go to the motivation of states to comply with international norms and the likelihood of their compliance with them, whereas our project has been to theorize norms that are already part of international legal practice. While practical concerns counsel publicists to take compliance seriously, elaborating the nature and implications of legal principles, as we have tried to do, is a separate inquiry.

A further issue raised by the prospect of customary norms of mandatory multilateralism concerns whether the persistent objector doctrine would apply, such that unwilling states can legally opt out of multilateral regimes. In our view, these states would be in the same legal position as states that attempt to negotiate a settlement of a dispute in good faith, but simply cannot reach amenable terms with the counterparty. Like these states, persistent objectors would remain subject to norms that prohibit them from adopting measures or positions that undermine the efforts of other states to develop an equitable multilateral framework. And they would remain subject to the obligation to continue to pursue good faith efforts to reach a mutually acceptable outcome. We admit that, as a general matter, holding states to a customary obligation to seek third-party dispute resolution is, at this point in the evolution of international law, more prescription than description. However, it is nonetheless a prescription wholly consonant with the principles of sovereign equality and joint stewardship that underlie mandatory multilateralism's other norms.

*Accommodating Landlocked States: The Dispute Between Bolivia and Chile*

Mandatory multilateralism also clarifies the legal position of landlocked states—a classic case of conflicting entitlements under international law. Article 125 of UNCLOS provides that landlocked states are entitled to "the right of access to and from the sea"—including "transit through the territory of transit States by all means of transport"—so that they can

[305] UNFCCC, *supra* note 23, pmbl.

enjoy the full range of rights associated with "the freedom of the high seas and the common heritage of mankind."[306] Article 125 also recognizes, however, that these rights are in tension with transit states' "full sovereignty over their territory."[307] Accordingly, Article 125 provides that transit states "have the right to take all measures necessary to ensure that the rights and facilities provided . . . for land-locked States shall in no way infringe their legitimate interests."[308] How does UNCLOS reconcile the resulting conflict between transit states' territorial sovereignty and landlocked states' right to access the seas? The solution contemplated is mandatory multilateralism. Article 125 provides: "The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through, bilateral, subregional or regional agreements."[309] Thus, UNCLOS recognizes that the legal entitlements of landlocked states and transit states can be harmoniously reconciled only through multilateral decision making.

Our account of mandatory multilateralism further illuminates the legal obligations enshrined in Article 125. It suggests that Article 125 is best read as obligating transit states to cooperate in good faith with landlocked states to determine the "terms and modalities for exercising freedom of transit." To satisfy this obligation, transit states must investigate and consult with landlocked states to fully understand and accommodate their legitimate interests. Transit states may not arbitrarily withhold—or threaten to withhold—safe passage through their territory. Landlocked states, in turn, must respect transit states' territorial integrity and political independence by accepting reasonable constraints on their passage through transit states. Article 125 thus places landlocked states and transit states under mutual obligations to establish cooperative and multilateral frameworks for facilitating oceanic access. Failure to reach agreement about specific "terms and modalities" is not necessarily a violation of Article 125, as long as the parties remain committed to, and actively engaged in, the pursuit of an equitable solution. If negotiations reach an impasse, mandatory multilateralism complements Article 125 by dictating that both sides must pursue third-party dispute resolution.

A long-running dispute between Bolivia and Chile illustrates both the limits and promise of mandatory multilateralism with regard to conflicts between landlocked and transit states. The dispute arises out of events that transformed Bolivia into a landlocked state: Chile's forcible seizure and annexation of Bolivia's coastal territory in the late-nineteenth century.[310] Following the seizure and annexation, Bolivia and Chile sought to normalize their relations through a series of agreements, and Bolivia continued to seek its own sovereign territorial

[306] UNCLOS, *supra* note 24, Art. 125(1). As discussed in Parts II and III, "freedom of the high seas" and the "common heritage of mankind" are predicated on sovereign equality and joint stewardship.

[307] *Id.* Art. 125(3).

[308] *Id.*

[309] *Id.* Art. 125(2). Benvenisti suggests that rights of transit of landlocked states, including those articulated in Article 125 of UNCLOS, can be explained by his "restricted Pareto concept" according to which "one benefits and the other sustains no loss." Benvenisti, *supra* note 167, at 322. As Article 125(2) makes clear, however, for the transit rights of landlocked states to be reconciled with the sovereign rights of the transit state, the legally mandated path forward is through good faith, multilateral decision making. And in some contexts, where the passage is relatively lengthy and requires infrastructure such as a railway and port facilities, as is the case with the corridor Chile provides Bolivia, there will necessarily be a cost. If Chile can rightfully refuse to negotiate access to the sea on the basis of this cost, Bolivia's access rights under Article 125 would be illusory.

[310] *See Obligation to Negotiate Access*, Memorial of the Government of the Plurinational State of Bolivia, Apr. 17, 2014, Vol. I, at 24–26, paras. 55–59, *available at* http://www.icj-cij.org/files/case-related/153/153-20140417-WRI-01-00-EN.pdf [hereinafter Bolivia Memorial]

outlet to the Pacific. In 1904, Bolivia and Chile concluded a Treaty of Peace and Friendship in which Bolivia formally recognized Chile's sovereignty over its former territory in exchange for financial compensation, but without expressly addressing Bolivia's desire for an independent corridor to the ocean.[311] Over the next century, Bolivia periodically renewed negotiations with Chile toward acquiring a corridor to the Pacific over which Bolivia would be sovereign, but without success. In 2013, Bolivia initiated proceedings in the ICJ, seeking to force Chile back to the negotiation table for the purpose of negotiating the surrender of a corridor to Bolivia.[312] Bolivia asserted that at various critical junctures in their diplomatic relations, Chile had undertaken a legal obligation to negotiate with Bolivia for the purpose of ending once and for all Bolivia's misfortunate status as a landlocked state.[313] Chile, however, vigorously rejected the notion that it had undertaken any such legal duty to negotiate a land surrender. Although Chile acknowledged that it had entertained Bolivian invitations to negotiate on a number of occasions, it categorically rejected the suggestion that its conduct reflected an intention to undertake a legal duty to negotiate with Bolivia in the future over the possible transfer of Chilean territory to Bolivia.[314]

To be clear, in proceedings before the ICJ, Bolivia did *not* assert its right under Article 125 to negotiate transit rights to the Pacific with Chile. Instead, Bolivia set its sights on a more ambitious target: securing a judgment that it was legally entitled to negotiate with Chile concerning the possible *acquisition of Chilean territory*.[315] Because the acquisition of foreign territory is not an issue that triggers mandatory multilateralism,[316] the success of Bolivia's strategy depended on the ICJ agreeing that Chile had, in fact, voluntarily undertaken an independent obligation to negotiate with Bolivia for these purposes. Had Chile undertaken such an obligation, then it would have borne a relatively modest duty to receive and consider proposals from Bolivia in good faith.[317] Chile would not, however, have been required to endorse or give any special weight to Bolivia's proposals. Unlike settings where mandatory multilateralism applies, triggering the more robust duty of due regard, Chile would have been free to decide for itself whether, or on what terms, it would agree to relinquish some of its coastal territory to Bolivia. Ultimately, however, the ICJ concluded in its judgment of October 1, 2018, that Chile had not voluntarily undertaken any such duty to negotiate with Bolivia for the purpose of granting Bolivia "sovereign access" to the Pacific.[318]

Chile bears more robust duties of cooperation when it comes to facilitating transit through its territory pursuant to Article 125. Because Bolivia's right to access the ocean under

[311] Treaty of Peace and Friendship Between Chile and Bolivia, Oct. 20, 1904, *excerpted in* Bolivia Memorial, *supra* note 310, at Vol. II, Annex 100.

[312] *Obligation to Negotiate Access*, Application Instituting Proceedings (Apr. 24, 2013), *available at* http://www.icj-cij.org/files/case-related/153/17338.pdf. The ICJ exercised jurisdiction over the dispute pursuant to Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogota) to which both Bolivia and Chile are members. *See Obligation to Negotiate Access*, Preliminary Objection, 2015 ICJ Rep. 592, 610, para. 54 (Sept. 24).

[313] *See* Bolivia Memorial, *supra* note 310, at 125–135, 138–51, 153–54, paras. 304–34, 346–87, 392–96.

[314] *See Obligation to Negotiate Access*, Counter-Memorial of the Republic of Chile, Vol. I, at 6–7, para. 1.13(b) (July 13, 2016), *available at* http://www.icj-cij.org/files/case-related/153/153-20160713-WRI-01-00-EN.pdf [hereinafter Chile Counter-Memorial].

[315] *See Obligation to Negotiate Access*, at [31], para. 85.

[316] As discussed in Part II, states are not entitled under international law to demand that other states relinquish territory. *See supra* text at note 172.

[317] *See supra* Part IV.

[318] *Obligation to Negotiate Access*, at 54, para. 175.

UNCLOS is in tension with Chile's right to territorial integrity, Article 125 requires the two states to reconcile their conflicting entitlements through multilateralism. Bolivia and Chile must therefore cooperate in investigating, consulting, negotiating, and, if necessary, pursuing third-party dispute resolution to establish equitable "terms and modalities" that balance their respective interests.[319] In pursuing multilateral solutions, each state must respect the other's legitimate interests and manifest an openness to compromise.

In many respects, the relationship between Bolivia and Chile already reflects the successful implementation of these principles. Pursuant to the 1904 Treaty of Peace and Friendship, Chile has connected Bolivia to the Pacific by constructing and maintaining a railway line and a highway between Bolivia's capitol, La Paz, and the Chilean port city of Arica.[320] Chilean lawmakers have worked with Bolivia to reduce regulatory red tape that would otherwise impede the free flow of people and goods across Chilean territory.[321] Bolivian cargo is exempt from Chilean taxes, and Chile allows Bolivia to exercise customs powers in Arica over cargo traveling to or from Bolivia.[322] Pursuant to agreements negotiated in 1955 and 1957, a Bolivian state-owned company operates a pipeline from Sica in Bolivia to Arica, facilitating the shipment of Bolivian oil across the high seas to markets around the world.[323] To be sure, Bolivia clearly believes that further concessions by Chile are necessary—including a permanent transfer of coastal territory between the countries—to strengthen Bolivia's political independence and facilitate its economic development.[324] Yet, these lingering grievances should not overshadow the substantial progress that the states have made over time in reconciling their conflicting interests through multilateral engagement. For generations, Bolivia and Chile have managed to cooperate productively—investigating, consulting, and negotiating with one another on a wide variety of issues—in a good faith effort to balance equitably their respective sovereign interests. The fact that such a robust partnership has taken root and flourished—even as the two states remain bitterly divided over Bolivia's aspiration to acquire a territorial corridor to the Pacific—is a testament to the promise of mandatory multilateralism.[325]

## VI. Conclusion

This Article has challenged conventional wisdom by showing that, in numerous contexts involving issues of transnational or global concern, states do not enjoy unfettered discretion to

[319] *See* UNCLOS, *supra* note 24, Art. 125(2); *cf. Obligation To Negotiate Access*, at 54, para. 176 (observing that finding a solution to Bolivia's "landlocked situation" is "a matter of mutual interest" for both states).

[320] Chile Counter-Memorial, *supra* note 314, at 43–45, 53.

[321] *Id.* at 52–54.

[322] *Id.* at 46.

[323] *Id.* at 50–51.

[324] *See* Gideon Long, *Bolivia-Chile Land Dispute Has Deep Roots*, BBC News (Apr. 24, 2013), *at* https://www.bbc.com/news/world-latin-america-22287222 (noting Chile's complaint that Chile had "reneged on agreements to give Bolivia access to ports further south on Chile's long Pacific coastline").

[325] *But see* Kishor Uprety, The Transit Regime for Landlocked States: International Law and Development Perspectives 113 (2006) (observing that because bilateral negotiations tend to favor transit states, the resulting agreements "often tend to appear like a generous gesture rather than a provision negotiated by equals," and arguing that this trend offends "general principles of international law" (i.e., sovereign equality) by making "the status of a country subject to, and conditional upon, the benevolence (or malevolence) of another State" (i.e., domination)).

decide whether to cooperate with their peers. When disputes involve undefined territorial borders or conflicting legal entitlements, the principle of sovereign equality requires states to pursue multilateral solutions. Likewise, the principle of joint stewardship requires multilateralism when states respond to controversies concerning common resources, threats to international peace and security, or serious breaches of international human rights law and international criminal law. In each of these contexts (and perhaps others we have not identified), mandatory multilateralism obligates states to cooperate with one another by seeking equitable solutions through investigation, consultation, negotiation, and, if necessary, third-party dispute resolution.

We have also applied mandatory multilateralism to three controversies that currently command the world's attention: the South China Sea Dispute, the United States' pending withdrawal from the Paris Agreement, and Bolivia's efforts to access the Pacific through Chile. These brief case studies are the tip of the iceberg. Our account of mandatory multilateralism has sweeping implications for a host of other disputes, including high-stakes international controversies involving environmental stewardship, the allocation of natural resources, and the protection of human rights. At a time when many states are reconsidering the value of international cooperation, it is important that they keep in view the limits of state discretion under international law—limits that safeguard their independence as equal members and joint stewards of international legal order.