

## Unfriendly Unilateralism

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*This Article examines a category of conduct that I call “unfriendly unilateralism.” One state deprives another of a benefit (unfriendly) and, in some cases, strays from its own obligations (noncompliant), outside any structured international process (unilateral). Such conduct troubles many international lawyers because it looks more like the nastiness of power politics than like the order and stability of law. Worse, states can abuse the conduct to undercut the law. Nevertheless, international law tolerates unfriendly unilateralism for enforcement. A victim state may use unfriendly unilateralism against a scofflaw in order to restore the legal arrangement that existed before the breach. Unfriendly unilateralism is tolerated here, despite its unsavory attributes, because the formal processes for enforcing international law are often deficient. Unfriendly unilateralism can compensate for that procedural deficiency and help make the law effective.*

*This Article argues that unfriendly unilateralism can play a similarly vital role in lawmaking. The Article makes both a positive and a normative claim. The positive claim is that, in practice, states use unfriendly unilateralism not only to enforce but also to help generate law. Unfriendly unilateralism variously helps create new norms, prevent the erosion of existing norms, reconcile competing objectives, and strengthen or recalibrate regimes. Unfriendly unilateralism sometimes performs these functions even when the conduct itself is unlawful—that is, when the conduct is noncompliant and unexcused for enforcement. The Article’s normative claim is that such unchecked and even unlawful exercises of state power can be good for international law. Lawmaking allows the legal order to stay relevant and adapt to change. However, the formal processes for making international law, like those for enforcing it, can be deficient. Unfriendly unilateralism can compensate for that procedural deficiency and help instigate or support collective decisions.*

### INTRODUCTION

For several years now, states have been targeting Iran with various unfriendly acts: an oil embargo,<sup>1</sup> frozen assets,<sup>2</sup> travel bans,<sup>3</sup> and trade<sup>4</sup> and financial<sup>5</sup> restrictions. Some of these acts have been mandated or authorized

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1. See Annie Lowrey & David E. Sanger, *U.S. Bets on Changing Iran’s Tune with New Sanctions Aimed at Lifeblood*, N.Y. TIMES, June 30, 2012, at A6.

2. See, e.g., S.C. Res. 1737, ¶ 12, U.N. Doc. S/RES/1737 (Dec. 23, 2006) [hereinafter S.C. Res. 1737].

3. See, e.g., S.C. Res. 1803, ¶ 5, U.N. Doc. S/RES/1803 (Mar. 3, 2008). [hereinafter S.C. Res. 1803].

4. See, e.g., S.C. Res. 1737, *supra* note 2, ¶¶ 3–4, 6.

5. See, e.g., Mark Landler, *United States and Its Allies Expand Sanctions Against Iran*, N.Y. TIMES, Nov. 21, 2011, at A6; Mark Landler, *Clinton Urges Gulf States to Maintain Iran Sanctions*, N.Y. TIMES, Jan. 10, 2011, at A4.

by the U.N. Security Council.<sup>6</sup> Others have not; they have instead been taken unilaterally.<sup>7</sup> Of these unfriendly and unilateral acts—what I call “unfriendly unilateralism”—a handful have not complied with the acting states’ substantive obligations.<sup>8</sup> What should we make of this conduct?

Most international lawyers conceive of unfriendly unilateralism as an enforcement tool. The International Atomic Energy Association (“IAEA”) determined in 2003 that Iran had violated the Nonproliferation Treaty by failing to report some nuclear activity.<sup>9</sup> In 2006, the IAEA referred Iran’s case to the U.N. Security Council.<sup>10</sup> The Council then directed Iran to cooperate with the IAEA and stop enriching uranium.<sup>11</sup> Between 2006 and 2010, the Council imposed increasingly stringent sanctions on Iran for its continued noncooperation and enrichment.<sup>12</sup> By most accounts, then, the unfriendly unilateralism has been part of a broader effort to enforce Iran’s nonproliferation obligations.<sup>13</sup>

6. See S.C. Res. 1737, *supra* note 2, ¶¶ 3–4, 6, 7, 12 (trade restrictions and asset freezes); S.C. Res. 1747, ¶¶ 4–5, U.N. Doc. S/RES/1747 (Mar. 24, 2007) [hereinafter S.C. Res. 1797] (asset freezes and arms restrictions); S.C. Res. 1803, *supra* note 3, ¶¶ 5, 7–8 (travel bans, trade restrictions, and asset freezes); S.C. Res. 1929, ¶¶ 8, 10–13, 18–19, U.N. Doc. S/RES/1929 (June 9, 2010) [hereinafter S.C. Res. 1929] (travel bans, trade restrictions, asset freezes, and arms restrictions).

7. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO-08-58, IRAN SANCTIONS: IMPACT IS UNCLEAR AND SHOULD BE EVALUATED (2007) (reviewing U.S. actions); Helene Cooper & Steven R. Weisman, *West Tries a New Tack to Block Iran’s Nuclear Agenda*, N.Y. TIMES, Jan. 2, 2007, at A3 (reporting on unilateral financial restrictions).

8. Compare, e.g., S.C. Res. 1737, *supra* note 2, ¶ 12, Annex (requiring states to freeze assets of particular persons or entities), with Council Common Position (EC) No. 2007/140/CFSP of 27 Feb. 2007, art. 3, 2007 O.J. (L 61) 49 (freezing additional assets), and Martin Dawidowicz, *Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council*, 77 BRIT. Y.B. INT’L L. 333, 351 (2007) (“[T]he freezing of foreign State assets constitutes a *prima facie* illegal measure requiring justification under general international law.”).

9. See Int’l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report by the Director General*, ¶ 47, IAEA Doc. GOV/2003/75 (Nov. 10, 2003); IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, Bd. of Governors Res., pmbl., ¶ f, IAEA Doc. GOV/2003/81 (Nov. 26, 2003); Treaty on the Non-Proliferation of Nuclear Weapons art. III(1), opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

10. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, Bd. of Governors Res., IAEA Doc. GOV/2006/14 (Feb. 4, 2006).

11. S.C. Res. 1696, ¶ 2, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, *supra* note 2, ¶¶ 1–2.

12. See S.C. Res. 1737, *supra* note 2, ¶¶ 3–4, 6, 7, 12 (trade restrictions and asset freezes); S.C. Res. 1747, *supra* note 6, ¶¶ 4–5, U.N. Doc. S/RES/1747 (Mar. 24, 2007) (asset freezes and arms restrictions); S.C. Res. 1803, *supra* note 3, ¶¶ 5, 7–8 (travel bans, trade restrictions, and asset freezes); S.C. Res. 1929, *supra* note 6, ¶¶ 8, 10–13, 18–19, (travel bans, trade restrictions, asset freezes, and arms restrictions).

13. See, e.g., Christian DeFrancia, *Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures*, 45 VAND. J. TRANSNAT’L L. 705, 745 (2012); Coralie Pison Hindawi, *The Controversial Impact of WMD Coercive Arms Control on International Peace and Security: Lessons from the Iraqi and Iranian Cases*, 16 J. CONFLICT & SECURITY L. 417, 421 (2012) (resisting “the use of additional coercive measures . . . to enforce the obligations created under a treaty regime”); Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT’L L. 337, 345 (2007) (focusing on the “choices made by those states in a position to enforce the norms”); Tanya Ogilvie-White, *International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance*, 18 EUR. J. INT’L L. 453, 457 (2007) (“The key question is whether . . . [states agree] that NPT nonproliferation obligations should be more rigorously upheld and cheats punished.”).

Conceiving of unfriendly unilateralism as enforcement has deep roots in the legal literature and now drives the black letter doctrine on state responsibility.<sup>14</sup> The doctrine regulates unfriendly unilateralism differently, depending on whether the unfriendly act complies with existing law. But in any event, a state that suffers from another state's breach may use unfriendly unilateralism against that other state in order to restore the pre-breach arrangement. Unfriendly unilateralism is tolerated here, despite its potential to undercut the other state's sovereign prerogatives or the rule of law more generally, because the formal processes for enforcing international law are often weak or absent. Unfriendly unilateralism can compensate for that procedural deficiency and help make the law effective.

This Article argues that unfriendly unilateralism can play a similarly vital role in lawmaking. The Article advances both a positive and a normative claim. The positive claim is that, in practice, states use unfriendly unilateralism not only to enforce but also to help generate law. Unfriendly unilateralism variously helps develop new norms, prevent existing norms from eroding, reconcile competing objectives, and strengthen or recalibrate regimes.<sup>15</sup> Unfriendly unilateralism sometimes performs these lawmaking functions even when the conduct itself is unlawful—that is, when the conduct is noncompliant and unexcused for enforcement.<sup>16</sup> The Article's normative claim is that such unchecked and even unlawful exercises of state power can be *good* for international law. Because the lawmaking process is always ongoing, inaction can be quite destructive for the legal order. It can prevent positive legal developments or cause the law to erode or become idle. Unfriendly unilateralism can help overcome inaction and instigate or reinforce collective decisions.

To be sure, lawmaking might occur through formal channels or without unfriendly unilateralism. But it also might not. Formal processes for making international law, like those for enforcing it, lag behind its substantive ambitions.<sup>17</sup> Substantively, international law touches almost every aspect of

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14. The doctrine on state responsibility establishes default norms that almost always govern. See U.N. Int'l Law Comm'n, *The Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, pt. 4, art. 55 and accompanying commentary, in Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 140–41, U.N. Doc. A/56/20; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter *Draft Articles*]. However, a handful of regimes further circumscribe the right to use unfriendly unilateralism. See, e.g., *infra* note 32 and accompanying text (trade law); Case 232/78, Comm'n v. France, 1979 E.C.R. 2729 (European Union law).

15. Regimes are “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.” Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983); see also ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 19 (1977) (defining regimes as “networks of rules, norms, and procedures that regularize behavior and control its effects”).

16. See, e.g., *infra* notes 119–22, 138–47, 156–64, 192–97, and accompanying text (discussing cases in which the unfriendly unilateralism is unlawful).

17. This point is evident in multiple strands of scholarship. First, the literature on lawmaking recognizes that consent-based processes sometimes underperform. See, e.g., JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 215

public governance and faces demands to do more. Some of its most pressing challenges—on issues like nuclear nonproliferation, environmental protection, and human rights and security—require regulating states that are uninterested in being regulated or participating meaningfully in international governance. However, the formal processes for making international law generally require state consent or participation.<sup>18</sup> Intransigent states can easily obstruct these processes to frustrate the law’s substantive agenda.<sup>19</sup> Unfriendly unilateralism is a potential solution because it can stimulate or compensate for the legal system’s deficient processes.<sup>20</sup>

Conceiving of unfriendly unilateralism as lawmaking reveals, for example, that the recent measures against Iran have largely not been about enforcement. After all, the evidence that Iran’s nuclear program violates its substantive obligations under the Nonproliferation Treaty is inconclusive.<sup>21</sup>

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(2010); 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, 105. Second, the literature on fragmentation addresses the challenges to developing coherent norms, where multiple regimes intersect. *See generally* Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, ¶ 143, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) (discussing “the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of practice”); Filippo Fontanelli et al., *Introduction*, in SHAPING RULE OF LAW THROUGH DIALOGUE: INTERNATIONAL AND SUPRANATIONAL EXPERIENCES 21, 23 (Filippo Fontanelli et al., eds., 2010) (discussing “the absence of constitutional devices governing the connections between the various legal regimes”). Third, the literature on “global public goods” highlights that international law’s formal processes are structurally biased against overcoming collective action problems. *See* William D. Nordhaus, *Some Foundational and Transformative Grand Challenges for Social and Behavioral Sciences: The Problem of Global Public Goods* 2 (Oct. 3, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1889357](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889357).

18. *See, e.g.*, S.S. Lotus (Fra. v. Tur.), 1927 P.C.I.J. 10 (Sept. 7) (“The rules of law binding on states . . . emanate from their own free will . . . .”); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 4 (2005) (“[International law] is based on the consent (express or implied) of states.”). *But cf.* Helfer, *supra* note 17 (discussing exceptions to the general rule).

19. *Cf.* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 193 (2d ed. 1979) (“[M]atters that cry for remedy remain unregulated, or inadequately regulated, because, in a system that essentially can legislate only unanimously and with the consent of the regulated, there are conflicts in values, in judgment, or in perceived national interests.”).

20. *See infra* Section III.B; *cf.* Guzman, *supra* note 17 (arguing for nonconsensual lawmaking to overcome intransigence and status quo bias); Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism and International Law*, 1 TRANSNAT’L ENVTL. L. 31, 38 (2012) (defending unilateralism more generally on the ground that “relying on formal treaty negotiations may be too little too late to prevent dangerous climate change”). *But cf.* Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 174 (Michael Byers & Georg Nolte eds., 2003) (“[T]he mere fact that some goals that appear desirable under a substantive conception of justice might be achieved faster and more easily within a hegemonic order does not justify the existence of such an order instead of a multilateral system based on equality.”)

21. *See Open Hearing on Current and Projected National Security Threats to the United States Before the S. Select Comm. on Intelligence*, 112th Cong. 5 (2012) (statement of James R. Clapper, Director of Nat’l Intelligence) (reporting that “Iran has the scientific, technical, and industrial capacity to eventually produce nuclear weapons” but that the U.S. intelligence community still does not know if Iran will “eventually decide to build nuclear weapons”); IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, at 9, IAEA Doc. GOV/2012/23 (May 25, 2012) (discussing “concerns about the possible military dimensions of Iran’s nuclear programme”) (emphasis added). To be clear, the Nonproliferation Treaty prohibits non-nuclear states from manufacturing or acquiring nuclear weapons but not from enriching uranium. NPT, *supra* note 9, art. II.

Rather, states have been using unfriendly unilateralism to support a broad and coordinated lawmaking effort. The goal has been to pressure Iran into accepting stricter substantive standards and more rigorous oversight.<sup>22</sup> Assessing the unfriendly unilateralism as enforcement—and especially applying the doctrine on state responsibility to ask whether any state may use unfriendly unilateralism to restore the pre-breach arrangement<sup>23</sup>—misses the point. This Article’s lawmaking account better captures what states have been up to.

This account also crystallizes the normative inquiry: should Iran’s non-proliferation obligations be strengthened entirely through formal channels or without unfriendly unilateralism? The structured processes at the IAEA and Security Council are fairly mature, relative to those that operate in other areas of international law. Yet even these processes might be insufficient, on their own, to achieve the prescriptive agenda. Indeed, years after states began using unfriendly unilateralism—that is, acting outside the IAEA and Council to increase the pressure on Iran—the Council finally *encouraged* this unfriendliness. In June 2010, the Council authorized a broad range of unfriendly conduct that had previously been unilateral and at times noncompliant.<sup>24</sup> The conduct seems to have been useful, at least in the eyes of the Council.<sup>25</sup>

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The treaty’s prohibition on weapons is sometimes interpreted expansively, to include even acquiring the relevant knowledge, but this interpretation is contested and has not been applied in other cases. See DANIEL H. JOYNER, *INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION* 16–18 (2009).

22. See, e.g., S.C. Res. 1737, *supra* note 2, pmb1., ¶ 21 (encouraging efforts to negotiate “a long-term comprehensive agreement which would allow for the development of relations and cooperation with Iran”); S.C. Res. 1747, *supra* note 6, Annex II (“We propose a fresh start in the negotiation of a comprehensive agreement with Iran.”).

23. Compare, e.g., N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42 VAND. J. TRANSNAT’L L. 1393, 1422–33 (2009) (arguing that state parties to the Nonproliferation Treaty may unilaterally enforce it), with Pierre-Emmanuel Dupont, *Countermeasures and Collective Security: the Case of the EU Sanctions Against Iran*, 17 J. CONFLICT & SECURITY L. 301, 334–35 (2012) (disagreeing).

24. See S.C. Res. 1929, *supra* note 6, ¶ 13 (prohibiting trade in or in services relating to “any further items if the State determines that they could contribute to enrichment-related, reprocessing or heavy water-related activities or to the development of nuclear weapon delivery systems”).

25. The conduct might have been useful for various reasons. First, it increased the pressure on Iran to accept a more rigorous nonproliferation regime. Second, it might have reinforced the legitimacy of the decisions by the IAEA and Security Council. This legitimacy arguably was at risk in some circles because the IAEA and Council have “devot[ed] so much critical attention to Iran . . . , and not to other non-nuclear states who have for decades engaged in precisely the same production of knowledge and capabilities.” Daniel Joyner, *Iran’s Nuclear Program and the Legal Mandate of the IAEA*, JURIST—FORUM (Nov. 9, 2011), <http://jurist.org/forum/2011/11/dan-joyner-iaea-report.php>; cf. Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003*, 59 INT’L ORG. 495, 523 (2005) (“Once the dominant powers have come to rely in part on a legitimated institution in the international system, . . . their influence thereafter relies on a perpetual effort to police and maintain the legitimacy of the institution.”). Third, the conduct demonstrated that multiple states endorsed the prescriptive effort against Iran and were willing to overlook any procedural irregularities. For example, the IAEA referral to the Security Council was irregular in that the IAEA did not first find that Iran had violated a substantive obligation under the Nonproliferation Treaty. See Statute of the Int’l Atomic Energy Agency, art. XII(C), *opened for signature* Oct. 26, 1956, available at <http://www.iaea.org/About/statute.html>; IAEA, *Text of the Agreement Between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Prolifera-*

This Article makes three contributions to the existing literature. First, it resists the conventional view that unfriendly unilateralism's principal legal function is or should be to enforce law. Although others have recognized that unfriendly unilateralism *can* play a lawmaking role, no study has systematically examined its use in lawmaking.<sup>26</sup> And none has resisted the enforcement perspective as myopic or even counterproductive. Second, this Article demonstrates that using unfriendly unilateralism in lawmaking can benefit the international legal order. Unfriendly unilateralism can help keep international law relevant by instigating or giving effect to collective decisions. Third and perhaps most far-reaching, this Article sheds light on the perennial question of how international law relates to power politics. Many international lawyers assume that the exercise of state power—if unchecked through formal channels and especially if unlawful in substance—is antithetical to the rule of law.<sup>27</sup> This Article demonstrates, however, that unilateral and even unlawful exercises of state power can sometimes buttress the rule of law.

The Article proceeds as follows. Part I defines unfriendly unilateralism and explains why so many international lawyers find it troubling. Part II demonstrates that, despite its unsavory attributes, unfriendly unilateralism has long been tolerated for enforcement. Part II then presents an alternative, lawmaking account of unfriendly unilateralism. It argues that focusing so heavily on enforcement drowns out and potentially inhibits the use of unfriendly unilateralism in lawmaking. Part III builds on the lawmaking account in order to advance the Article's positive and normative claims:

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*tion of Nuclear Weapons*, art. 19, IAEA Doc. INFCIRC/214 (Dec. 13, 1974); Permanent Mission of the Islamic Republic of Iran, *Explanatory Note by the Permanent Mission of the Islamic Republic of Iran to the IAEA on the Director's General Report on Implementation of Safeguards in the Islamic Republic of Iran*, Nov. 18, 2011, attached to IAEA, *Communication Dated 8 Dec. 2011 Received from the Permanent Mission of the Islamic Republic of Iran to the Agency Regarding the Report of the Director General on the Implementation of Safeguards in Iran*, IAEA Doc. INFCIRC/833 (Dec. 12, 2011). In addition, the process was irregular in that the Security Council imposed obligations on Iran, and the IAEA exercised intrusive oversight authority, without Iran's consent or a finding that Iran had violated the Nonproliferation Treaty's substantive obligations. See, e.g., *supra* note 11 and accompanying text (discussing new obligation not to enrich uranium); S.C. Res. 1747, *supra* note 6, Annex II ("Iran will . . . implement[ ] the Additional Protocol."); Daniel H. Joyner, *The Security Council as a Legal Hegemon*, 43 GEO. J. INT'L L. 225, 241–48 (2012) (describing the application of oversight arrangements that Iran had not accepted); Daniel Joyner, *Iran's Nuclear Program and the Legal Mandate of the IAEA*, JURIST—FORUM (Nov. 9, 2011), <http://jurist.org/forum/2011/11/dan-joyner-iaea-report.php> (arguing that the IAEA exceeded its mandate by analyzing the possible military dimensions of Iran's program).

26. The scholarship that acknowledges any lawmaking role discusses it generically or for a few limited contexts. See JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 28 (2005) (acknowledging potential role in customary lawmaking); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 7 (2001) (describing U.S. actions against Burma as "contribut[ing] importantly to the definition and incorporation of rights into the international system"); Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 113, 116 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter *AGGRESSIVE UNILATERALISM*] (describing role of U.S. trade restrictions in strengthening trade law).

27. See *infra* notes 230–37 and accompanying text.

unfriendly unilateralism performs a host of lawmaking functions that help maintain the international legal order. And tolerating it in lawmaking can be preferable to the alternative—a legal order that is incapable of making or giving effect to collective decisions. Part IV addresses some likely objections to these claims. And Part V discusses the normative, doctrinal, and institutional implications.

### I. UNFRIENDLY, UNILATERAL, SOMETIMES NONCOMPLIANT

To many, unfriendly unilateralism smacks more of the nastiness of power politics than of the order and stability of law. The conduct is simultaneously unfriendly, unilateral, and in some cases noncompliant. These attributes all have deeply negative connotations in the legal literature, though their precise meanings are unfixed. Each is associated with states exploiting power to undercut the foundational principle of sovereign equality or the rule of law more generally. And without question, unfriendly unilateralism can be abused. This Article argues, however, that it can also be beneficial. To set the stage for that argument, this Part of the Article defines the above three attributes and explains when and why each attribute might make state conduct problematic. As it turns out, none of the attributes necessarily makes conduct unlawful or, given the inherent limitations of the international legal order, undesirable.

A state acts *unilaterally* when it does not channel through a formal international process the decision to act.<sup>28</sup> The legal system's formal processes are typically structured so that multiple states consent to or oversee a decision. These processes both reflect and help preserve the principle of sovereign equality. With multiple states participating in a decision, the risk of any one state intruding too heavily on the others' sovereign prerogatives is limited.<sup>29</sup> That risk is heightened when decisions are made unilaterally because unilateral decisions are not subject to the structured consent or oversight of other states.

Yet unilateral decisions are still common in international law. Michael Reisman has explained that the legality of a unilateral decision depends on

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28. See W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 3 (2000) (defining unilateral actions). "Unilateralism" is sometimes used more loosely than I use it here, to describe conduct that is overly self-interested or uncooperative. See, e.g., Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L L. 19, 20 (2000). In much of the literature, "[u]nilateralism undeniably has a strong pejorative connotation." *Id.*; see also Daniel Bodansky, *What's So Bad about Unilateral Action to Protect the Environment?*, 11 EUR. J. INT'L L. 339, 339 (2000) ("[U]nilateralism often seems tantamount to a dirty word."). For qualified defenses of unilateralism, see, for example, *id.*; Christine Chinkin, *The State That Acts Alone: Bully, Good Samaritan or Iconoclast?*, 11 EUR. J. INT'L L. 31 (2000).

29. *But cf.* Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002) (demonstrating that power sometimes shapes consent-based processes).

the extent to which it circumvents a formal alternative.<sup>30</sup> Unilateralism is increasingly suspect as formal processes become more available, effective, and established as the default for making particular decisions.<sup>31</sup> Consider the enforcement process at the World Trade Organization (“WTO”). This process is widely understood to be both effective and exclusive. Thus, a state that tries to enforce trade law unilaterally, by deviating from its own trade obligations, acts unlawfully.<sup>32</sup> Comparable processes are rare in international law, so outside of the trade regime, unilateral enforcement is still usually lawful.<sup>33</sup> Moreover, even the WTO process is the default for making only *some* decisions to restrict trade. A state may unilaterally deviate from its trade obligations for reasons other than enforcement, like to protect its domestic market from goods being dumped at less than fair value.<sup>34</sup> Unilateral antidumping does not circumvent a formal alternative because, unlike for enforcement, states have not established a default and effective international process for making antidumping decisions.

Adding unfriendliness to unilateralism increases the risk that the conduct will intrude on another state’s sovereign equality. *Unfriendliness* deprives a specific state of some benefit.<sup>35</sup> It resembles a stick, as opposed to a carrot.<sup>36</sup> Unfriendliness that involves a threat or use of armed force is separately regulated under the U.N. Charter and outside the scope of this Article.<sup>37</sup> The focus here is on non-forcible unfriendliness, like the economic and travel restrictions against Iran. Unfriendliness exploits a position of power over the target and so can bully the target into accepting that which it otherwise would not. Unfriendly unilateralism can also undercut the rule of law. It can

30. Reisman, *supra* note 28.

31. *Id.*; cf. Bodansky, *supra* note 28, at 341 (explaining that a formal process will often be the default where conduct “directly impacts on another state”).

32. See Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 23, Apr. 15, 1994, 1869 U.N.T.S. 401 (Understanding on Rules and Procedures Governing the Settlement of Disputes), [hereinafter DSU].

33. See *infra* Section II.A; cf. Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 304 (2002) (“[W]hen sovereign states enter into international agreements, they typically do not provide for the mandatory resolution of disputes.”).

34. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade arts. 1, 2.1, 3.1, 3.5, Nov. 16, 1979, Let/1075; General Agreement on Tariffs and Trade, art. VI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

35. Unfriendliness is sometimes used more broadly than I use it here. For example, the U.N. General Assembly’s *Declaration on Principles of International Law Concerning Friendly Relations* closely links unfriendliness to the use of force and suggests that the term includes any interference in another state’s affairs, or any subversion of the principles of sovereign equality or self-determination. G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082 (Oct. 24, 1970).

36. The distinction between carrots and sticks depends on the starting point. Carrots improve the target state’s position relative to the starting point. Sticks worsen that position. Thus, carrots can easily turn into sticks, as when a state gives and then terminates financial aid. Though both can feel coercive, carrots are rarely, if ever, treated as problematic. See Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT’L L. 1, 28–31 (1989).

37. U.N. Charter art. 2(4), ch. VII. The distinction between forcible and nonforcible measures is legally relevant but still fuzzy at the margins. On the margins, see GREGORY F. TREVERTON, COVERT ACTION: THE LIMITS OF INTERVENTION IN THE POSTWAR WORLD 136–43 (1987).



detract from cooperative processes that help build consensus organically and thus legitimize legal norms.<sup>38</sup>

Some actors claim that unfriendly unilateralism is inherently coercive and unlawful, unless it can somehow be excused.<sup>39</sup> This claim is typically articulated at such a high level of generality that it captures much conduct that is common in statecraft and plainly lawful.<sup>40</sup> Nevertheless, there appears to be fairly broad support for limiting unfriendly unilateralism that is extraordinarily severe.<sup>41</sup> Severe unfriendliness can be quite destructive to the target, so it should not be entirely within a single state's discretion.

Finally, unfriendly unilateralism is sometimes *noncompliant*—that is, inconsistent with the acting state's substantive legal obligations. Noncompliance is ordinarily unlawful and undesirable.<sup>42</sup> It can disrupt interstate

38. The language of legitimacy is pervasive in the scholarly literature but inconsistently used. As I use the term, legitimacy depends on how actors perceive a particular norm or act—specifically, whether they view it as appropriate. These perceptions might be shaped but are not entirely determined by law. On the general point that collective processes help legitimize norms or conduct, see Inis L. Claude, Jr., *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367, 368–69 (1966). On the point that unfriendliness “tend[s] to generate resentment and resistance,” “reduc[ing] the likelihood that the [target] will comply without coercion in the future,” see Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 384–85 (1999) [hereinafter Hurd, *Legitimacy*]. For varied definitions of legitimacy, see, for example, *id.* at 381; Claude, *supra*, at 368–69; Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. OF MGMT. REV. 571, 574 (1995); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988).

39. For an overview, see Barry E. Carter, *Economic Coercion*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, www.mpepil.com (last updated Sept. 2009). For a recent pronouncement, see G.A. Res. 186, U.N. GAOR, 66th Sess., Supp. No. 49, U.N. Doc. A/RES/66/186 (Dec. 22, 2011).

40. See, e.g., G.A. Res. 53/141, ¶ 2, U.N. Doc. A/RES/53/141 (Mar. 8, 1999) (rejecting “unilateral coercive measures . . . as tools for political or economic pressure against any country”); G.A. Res. 42/173, ¶ 2, U.N. Doc. A/RES/42/173 (Dec. 11, 1987) (condemning “economic measures that have the purpose of exerting, directly or indirectly, coercion on the sovereign decisions of developing countries”); G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082, (Oct. 24, 1970) (condemning “measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind”); see also U.N. Secretary-General, *Economic Measures as a Means of Political and Economic Coercion against Developing Countries* 1, U.N. Doc. A/48/535 (Oct. 25, 1993) (“There is no clear consensus in international law as to when coercive measures are improper . . . .”); Robert B. Lillich, *Economic Coercion and the “New International Economic Order”: A Second Look at Some First Impressions*, in ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER 107, 112 (Robert B. Lillich ed., 1976) (“[T]he prohibitions found in the various U.N. resolutions are pitched on such a high level of abstraction as to be virtually meaningless.”).

41. See, e.g., *supra* notes 39–40 and accompanying text; Comm. on Econ., Soc., and Cultural Rights, *General Comment 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, 17th Sess., Nov. 15–Dec. 5, 1997, ¶ 3, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997); cf. *Draft Articles*, *supra* note 14, art. 20, cmt. 4 (explaining that one state's wrongful act will not be excused by another state's consent, if that consent is coercively induced); Daniel W. Drezner, *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*, 13 INT'L STUD. REV. 96 (2011) (explaining that concerns about coercion have led to a shift even in multilateral sanctions, from comprehensive to more targeted measures).

42. International legal scholars are overwhelmingly disdainful of noncompliance. See, e.g., PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES*, at xviii (2005) (“[T]he rules of international law . . . are necessary and . . . they need to be complied with if actions are to be treated as legitimate.”); Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 192 (2006) (describing the “assumption—now ubiquitous in international law scholarship and political rhetoric—that compliance is sacrosanct and the international rule of law inviolable”); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L

relations, deprive others of their reliance interests, impede shared objectives, and undercut the credibility of legal commitments.<sup>43</sup> However, all legal systems, including the international one, tolerate or excuse some noncompliance.<sup>44</sup> Tolerating or excusing it might be undesirable in absolute terms but might avoid even greater harms or satisfy greater interests. As I explain in the next Part, international law sometimes excuses unfriendly unilateralism that is noncompliant in order to satisfy an enforcement interest. Unfriendly unilateralism that *complies* can also satisfy that interest. But as a matter of positive law, compliant conduct need not be excused.<sup>45</sup>

To be clear, the positive law classifies unfriendly unilateralism into three categories. First, unfriendly unilateralism that complies is discretionary. These acts are termed “retorsions.” Second, acts that do not comply but are excused for enforcement are called “countermeasures.” The acting state’s noncompliance is justified by the target’s own noncompliance. Third, unfriendly unilateralism that does not comply and cannot be excused is unlawful. I call these acts “disobedient measures” in order to distinguish them from lawful countermeasures. I elaborate on the law’s three categories of unfriendly unilateralism below. My point here is that, although the positive law turns heavily on whether unfriendly unilateralism complies, the concerns with unfriendly unilateralism extend more broadly. Retorsions comply but are still unilateral and unfriendly. Moreover, because many substantive

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L. 607, 620 (2003) (“When a faction tries to use power to subvert the rule of law, the lawyer must defend it . . . .”); Gilbert Guillaume, *Terrorism and International Law*, 53 INT’L & COMP. L.Q. 537, 548 (2004) (“[C]ompliance with the law . . . is the underlying condition for the legitimacy of [state] action.”). An extensive literature now studies when and why states comply with international law, and how to induce more compliance. This literature is largely explanatory, but much of it reveals a normative intuition against noncompliance. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 109 (1995) (identifying “the elements of a management strategy for improving compliance”); THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 21, 207 (1990) (discussing the “widely regretted fact that there is not more obedience” and offering the promise of “constructing—even one day perfecting—a system of rules and institutions that will exhibit a powerful pull to compliance”); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1977) (“How do we transform occasional or grudging compliance with global norms into habitual obedience?”). But see, e.g., Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, “Legalized Noncompliance,” and Related Issues*, 110 MICH. L. REV. 243, 247 (2011) (“We see no reason why any nation should comply with [international law] absent some independent normative argument for compliance.”).

43. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 43 (May 24) (asserting that noncompliance undercuts the “edifice of law”); FRANCK, *supra* note 42, at 24 (explaining that noncompliance undercuts habits of compliance); HENKIN, *supra* note 19, at 317 (explaining that compliance creates “[h]abits of accepting and observing law”). But cf. George W. Downs & Andrea W. Trento, *Conceptual Issues Surrounding the Compliance Gap*, in INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP 19, 25–26 (Edward C. Luck & Michael W. Doyle eds., 2004) (critiquing idea that noncompliance undercuts future legal arrangements).

44. For examples in international law, see U.N. Charter art. 103; *Draft Articles*, *supra* note 14, arts. 22–25. For examples in U.S. criminal law, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213–20 (1982).

45. *Draft Articles*, *supra* note 14, at 128; see also CHRISTIAN J. TAMS, *ENFORCING OBLIGATIONS ERGA IN INTERNATIONALEM LEGE* 8 (2005) (“[T]he distinction is crucial as a matter of law.”). To be clear, conduct that otherwise complies might become noncompliant by virtue of its severity.

obligations are imprecise, the question of whether the relevant states complied, and thus of how to classify the unfriendly unilateralism, is often indeterminate.<sup>46</sup> One goal of this Article, then, is to look beyond the law's classification scheme and to examine unfriendly unilateralism more holistically.

## II. TWO PERSPECTIVES ON UNFRIENDLY UNILATERALISM

International lawyers have long conceived of unfriendly unilateralism as an enforcement tool.<sup>47</sup> They tolerate it, despite its unsavory attributes, because the legal order's formal enforcement processes are commonly weak or absent. Unfriendly unilateralism compensates for that procedural deficiency and helps make the law effective.<sup>48</sup> This enforcement perspective is now solidified by the doctrine on state responsibility. It marginalizes a second perspective, which recognizes that unfriendly unilateralism can be a tool not only for enforcing but also for generating international law.

### A. *The Dominant Perspective: Enforcement*

#### 1. *Theoretical Underpinnings*

Unfriendly unilateralism enforces international law by pressuring a scoff-law to comply with the violated obligation or provide adequate reparation. Further, using unfriendly unilateralism in one case might induce compliance in future cases.<sup>49</sup> Defecting is simply less appealing if it risks an unfriendly response than if it does not.

Since the eighteenth century, scholars have debated how far this enforcement rationale goes—specifically, when to excuse unfriendly unilateralism that is noncompliant.<sup>50</sup> The literature offers essentially three approaches. The narrowest approach would permit countermeasures as self-help reme-

46. See, e.g., *infra* notes 123–26, 164–79 and accompanying text.

47. See, e.g., EVELYN SPEYER COLBERT, RETALIATION IN INTERNATIONAL LAW 1–103 (1948) (reviewing historical practice); OMER YOUSIF ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW 6–24 (1988) (same). Naturally, modern compliance theorists also assess unfriendly unilateralism as an enforcement tool—that is, a way to induce compliance. See, e.g., CHAYES & CHAYES, *supra* note 42, at 88; ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 42–49 (2008).

48. *Draft Articles*, *supra* note 14, at 128 (explaining that countermeasures “are a feature of a decentralized system in which injured States may seek to vindicate their rights”).

49. See, e.g., Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 20 (1986) (explaining that enforcement can induce compliance by creating a widespread sense of obligation or desire to maintain satisfying results for the group); Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes*, 10 CHI. J. INT'L L. 91, 95 (2009). For evidence that unfriendly unilateralism can induce compliance, even when the unfriendly act itself is noncompliant, see ROBERT AXELROD, THE EVOLUTION OF COOPERATION 27–54 (1984); Keohane, *supra*, at 9.

50. For a historical overview, see Georg Nolte, *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations*, 13 EUR. J. INT'L L. 1083 (2002).

dies, available only to states that have themselves been injured by the breach. For example, the International Court of Justice (“ICJ”) adopted this approach in *Nicaragua v. United States*.<sup>51</sup> The court found that, even if Nicaragua intervened unlawfully in other Central American states, that conduct would not have excused the United States’ noncompliance; the United States would not have been discretely injured by the breach.<sup>52</sup> The broadest approach would permit countermeasures not just as self-help remedies but also as a form of public enforcement. Third states that have not themselves been injured might use countermeasures to vindicate a victim state’s rights.<sup>53</sup> This broader approach might have excused U.S. countermeasures in *Nicaragua*.

The last approach is a compromise. It would permit third states to use countermeasures in response to especially egregious violations.<sup>54</sup> In its modern variant, this approach focuses not just on the severity of a violation but also on its kind—in particular, whether the scofflaw violated a so-called erga omnes obligation. The ICJ has defined erga omnes obligations as those that are owed to “the international community as a whole” such that “all states . . . have a legal interest in their protection.”<sup>55</sup> The court has never explained how obligations become erga omnes,<sup>56</sup> but it has attached that label to fundamental obligations on the use of force and human rights.<sup>57</sup> If all states have a legal interest in these obligations, then (the reasoning goes) any

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

52. *Id.* ¶ 249.

53. See, e.g., CORNELIUS VAN BYNKERSHOEK, DE FORO LEGATORUM LIBER SINGULARIS ch. XXII, at 554 (Gordon J. Laing trans., 1946) (1744); ELLERY C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 46–50 (1921).

54. See HUGO GROTIUS, ON THE LAW OF WAR AND PEACE bk. 2. ch. 20 ¶ 40 (Stephen C. Neff ed., Francis W. Kelsey trans., 2012) (“[States] have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard any persons whatsoever.”); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 65 (A. Pearce Higgins ed., 8th ed. 1924) (“When a State grossly and patently violates international law in a matter of serious importance, it is competent to any State . . . to hinder the wrongdoing from being accomplished, or to punish the wrong-doer.”); Elihu Root, *The Outlook for International Law*, 10 AM. J. INT’L L. 1, 9 (1915) (“[V]iolations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation.”).

55. *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

56. There are two dominant theories for identifying erga omnes obligations. One is substantive, focusing on the “importance of the rights involved.” *Id.*; see also TAMS, *supra* note 45, at 128–57. The other is structural, asking whether the obligation runs primarily between pairs of states or between a state and the broader community. See Claudia Annacker, *The Legal Régime of Erga Obligations in International Law*, 46 AUSTRIAN J. PUB. INT’L L. 131, 136 (1993–94).

57. *Barcelona Traction*, 1970 I.C.J. ¶ 34. Some claim that other obligations also qualify. See, e.g., Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶¶ 114–19 (Sept. 25) (separate opinion of Vice-President Weeramantry) (environmental obligations); Tarcisio Gazzini, *The Legal Nature of WTO Obligations and the Consequences of their Violation*, 17 EUR. J. INT’L L. 723 (2006) (trade obligations); Huang Jiefang, *Aviation Safety, ICAO and Obligations Erga Omnes*, 8 CHINESE J. INT’L L. 63 (2009) (obligations on aviation safety).

state may use countermeasures for serious or systemic violations. Otherwise, gross violations that affect core communal interests might go without redress.<sup>58</sup>

The broader the justification for countermeasures, the more available they are for enforcement—but the more they butt up against the above three concerns. First, concerns about unilateralism. The acting state singlehandedly resolves the dispute and secures a remedy, exercising quasi-judicial and police powers over another sovereign.<sup>59</sup> Second, concerns about unfriendliness. Countermeasures might escalate disputes<sup>60</sup> or enable strong states to bully the weak.<sup>61</sup> Third, concerns about noncompliance. If countermeasures are too liberally permitted, states might evade their obligations under the pretense of prior violations.<sup>62</sup> These three concerns run so deep that some commentators have warned that all but the narrow approach would invite vigilantism and chaos.<sup>63</sup> Most commentators assume that even the narrow approach carries a serious risk of abuse.<sup>64</sup> The enforcement perspective balances that risk against the interest in enforcing the law.<sup>65</sup>

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58. See, e.g., Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 297 (1994); Giorgio Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts*, in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 151, 156 (Joseph H. Weiler et al., eds., 1989). But see, e.g., Special Rapporteur on State Responsibility, *Fourth Report on the Content, Forms and Degrees of International Responsibility*, Int'l Law Comm'n, ¶ 100, U.N. Doc. A/CN.4/366 (Apr. 14–15, 1983) (by Willem Riphagen) (“[T]he presence of a collective interest . . . should imply a collective decision-making machinery as regards reprisals . . .”).

59. See, e.g., 1 EMMERICH 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* ¶ 348 (James Brown Scott ed., Charles G. Fenwick trans., 1916) (1758) (arguing that third-state countermeasures entail the arbitrary exercise of judicial authority over the sovereign disputants); ELISABETH ZOLLER, *PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES* 59 (1984) (asserting that using countermeasures to punish would be “the very negation of sovereignty”).

60. See, e.g., Michael Akehurst, *Reprisals by Third States*, 44 BRIT. Y.B. INT'L L. 1, 15–16 (1970) (asserting that third-state countermeasures “would certainly cause a very disturbing increase in international tension”); James Crawford, *Counter-Measures as Interim Measures*, 5 EUR. J. INT'L L. 65, 65 (1994) (asserting that countermeasures “can tend to exacerbate disputes”).

61. *Draft Articles*, *supra* note 14, at 128 (explaining that the risk of abuse “is exacerbated by the factual inequalities between States”); Special Rapporteur on State Responsibility, *Fifth Report on State Responsibility*, Int'l Law Comm'n, ¶ 33, U.N. Doc. A/CN.4/453 (May 12, 28, June 8, 24, 1993) (by Gaetano Arangio-Ruiz); Christian Tomuschat, *Are Counter-Measures Subject to Prior Recourse to Dispute Settlement Procedures?*, 5 EUR. J. INT'L L. 77, 78 (1994) (“[T]ime and again concern was voiced that countermeasures were essentially an instrument for powerful States to enforce their interests . . .”).

62. See, e.g., Mary Ellen O'Connell, *Controlling Countermeasures*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 49, 49–53 (Maurizio Ragazzi ed., 2005); Yoshiro Matsui, *Countermeasures in the International Legal Order*, 37 JAPANESE ANN. INT'L L. 1, 4–6 (1994).

63. See D.N. Hutchinson, *Solidarity and Breaches of Multilateral Treaties*, 59 BRIT. Y.B. INT'L L. 151, 202 (1988); Stephen McCaffrey, *Lex Lata or the Continuum of State Responsibility*, in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, *supra* note 58, at 244; Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 433 (1983).

64. See, e.g., *Draft Articles*, *supra* note 14, at 128 (adopting the narrow approach but lamenting that countermeasures are still “liable to abuse”).

65. See, e.g., Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS 345, 423 (1994) (“[O]ne has to balance . . . the need to protect the

Part of that balance is also in play when the state that uses unfriendly unilateralism complies with its substantive obligations. But because retorsions need not be excused under the positive law, they receive little attention in the legal literature. Retorsions are treated as legally relevant to the extent that they help enforce the law.<sup>66</sup>

## 2. Doctrinal Solidification

The enforcement perspective on unfriendly unilateralism drives the doctrine on state responsibility, which the International Law Commission (“ILC”) codified in the 2001 Draft Articles on State Responsibility.<sup>67</sup> These draft articles are not themselves binding but are widely viewed as reflecting customary international law. International courts and tribunals apply the draft articles.<sup>68</sup> Textbooks and treatises incorporate them.<sup>69</sup> And international lawyers use them to appraise concrete cases.<sup>70</sup>

The draft articles adopt the narrow approach on countermeasures.<sup>71</sup> First,

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fundamental rules of the system . . . [against] the danger that powerful States overstep the limits of the law.”)

66. See, e.g., LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 532–33 (5th ed. 2009) (listing retorsions as among the measures “[a] state injured by another state’s violation of an international obligation is entitled to take . . . against the offending state as a means of inducing that state’s compliance”); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 186 (1991) (explaining that retorsions “may have a greater impact on the law-violator” than countermeasures) (emphasis added); MALCOLM N. SHAW, *INTERNATIONAL LAW* 1128 (6th ed. 2008) (defining retorsion as “a method of retaliation against the injurious legal activities of another state”) (emphasis added); TAMS, *supra* note 45, at 8 (defining retorsions as “enforcement measures that are always available to all states”); Nigel White & Ademola Abass, *Countermeasures and Sanctions*, in *INTERNATIONAL LAW* 509, 537–38 (Malcolm D. Evans ed., 2010) (explaining that retorsions are “usually taken in response to unlawful acts” and “arguably should be viewed as a residual remedy in the case of a State injured by a breach”).

67. See *Draft Articles*, *supra* note 14.

68. See, e.g., *Archer Daniels Midland Co. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, ¶¶ 125–80 (Nov. 21, 2007), available at <http://icsid.worldbank.org/ICSID/Index.jsp> (search “Archer Daniels”); *Corn Prods. Int’l v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶¶ 144–92 (Jan. 15, 2008), available at <http://icsid.worldbank.org/ICSID/Index.jsp> (search “corn products”) [hereinafter *Corn Products*].

69. See, e.g., DAMROSCH ET AL., *supra* note 66, at 532–41; W. MICHAEL REISMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 960–82 (2004); SHAW, *supra* note 66, at 794–96; White & Abass, *supra* note 66, at 534–35.

70. See, e.g., HJORTUR B. SVERRISSON, *COUNTERMEASURES, THE INTERNATIONAL LEGAL SYSTEM, AND ENVIRONMENTAL VIOLATIONS* (2008); MATH NOORTMANN, *COUNTERMEASURES IN INTERNATIONAL LAW: FIVE SALIENT CASES* (2005).

71. See *Draft Articles*, *supra* note 14, at 128, 135. In addition to the substantive constraints on countermeasures discussed in the text, the draft articles codify certain procedural constraints. See *Draft Articles*, *supra* note 14, art. 52(1) (requiring advance notice, an offer to negotiate, and a request to comply); *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, ¶ 84 (Sept. 25) (requiring a request to comply). These procedural constraints give the target an opportunity to defend or alter its conduct before being subjected to countermeasures. However, the procedural constraints are entirely within the acting state’s control and lifted if they might impinge on the acting state’s remedy. See *Draft Articles*, *supra* note 14, art. 52(2) (advance notice unnecessary if would operate to detriment of injured state); *Air Services Agreement of Mar. 27, 1946 between the United States of America and France*, (U.S./Fr.) 18 R.I.A.A. 417, ¶¶ 91–92 (1978) (explaining that taking countermeasures during negotiations can be lawful, especially where the countermeasures accelerate the dispute’s resolution and thereby limit the damage from the initial breach).

countermeasures are lawful only if they are taken in response to a breach.<sup>72</sup> A state acts noncompliant at its own risk if the law or facts are uncertain.<sup>73</sup>

Second and consistent with *Nicaragua*, countermeasures are self-help remedies, available only to states that have suffered a discrete legal injury.<sup>74</sup> The draft articles do not permit third-state countermeasures for erga omnes violations but recognize that the law is in flux and might be moving in that direction.<sup>75</sup> Since the ILC adopted the draft articles, several scholars have demonstrated that third states regularly use countermeasures, without repercussion, in order to redress serious erga omnes violations.<sup>76</sup> Unlike the draft articles, then, the practice seems to tolerate a modest exception for third-state countermeasures in cases of erga omnes violations.

Third, countermeasures must have a remedial aim. They must be designed to restore the status quo that was ruptured by the breach.<sup>77</sup> Countermeasures are impermissible as punishment<sup>78</sup> or to create new legal arrangements.<sup>79</sup> And they must be proportional to the injury.<sup>80</sup> Disproportionate measures are an excessive remedy and might reveal a punitive aim.<sup>81</sup>

72. *Draft Articles*, *supra* note 14, at 130 (describing previous violation as “fundamental prerequisite”); *see also Gabčíkovo-Nagymaros*, 1997 I.C.J. ¶ 83 (“[Countermeasures] must be taken in response to a previous international wrongful act . . .”); *Corn Products*, *supra* note 68, ¶ 185 (“[A] prior violation of international law is an absolute precondition . . .”).

73. *Draft Articles*, *supra* note 14, at 130.

74. The draft articles define “injured states” as: (1) states that have an individual right to the performance of the obligation, as in a bilateral treaty, (2) states that are specifically affected by the breach, or (3) all states to which the obligation is owed, if the breach radically alters all of their positions. *Draft Articles*, *supra* note 14, at 117–18. The idea that violating an obligation does not legally injure all states to which the obligation is owed or entitle all of them to a remedy has deep roots in international law. *See, e.g.*, Vienna Convention on the Law of Treaties, art. 60, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT] (identifying states that may suspend or terminate a treaty in response to a material breach); *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment (Second Phase), 1966 I.C.J. 6, ¶¶ 49–51 (July 18) (Eth. v. S. Afr.; Liber. v. S. Afr.); Special Rapporteur on State Responsibility, *Third Report on State Responsibility*, Int’l Law Comm’n, ¶ 98, U.N. Doc. A/CN.4/354 (Mar. 12, Mar. 30, May 5, 1982) (by Willem Riphagen) (explaining that most multilateral obligations are “bilateralized” in that they run primarily between pairs of states).

75. *Draft Articles*, *supra* note 14, at 139.

76. ELENA KATSELLI PROUKAKI, *THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY* 206 (2011) (reviewing practice and concluding that “in many of the cases where states resorted to countermeasures . . . the issue of legitimacy under international law was never raised”); *see also TAMS*, *supra* note 45, at 208–51 (same); Dawidowicz, *supra* note 8, at 350–417 (same).

77. *Draft Articles*, *supra* note 14, art. 49; *see also Gabčíkovo-Nagymaros*, 1997 I.C.J. ¶ 87 (“[The] purpose must be to induce the wrongdoing State to comply with its obligations under international law . . .”).

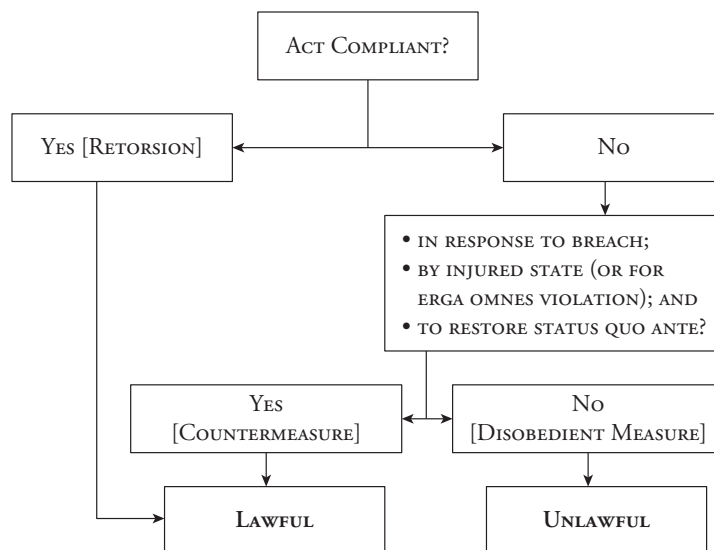
78. *Draft Articles*, *supra* note 14, at 130 (“Countermeasures are not intended as a form of punishment . . .”).

79. *Id.* at 130–31 (“Their aim is the restoration of a condition of legality . . . , and not the creation of new situations . . .”); *cf. Gabčíkovo-Nagymaros*, 1997 I.C.J. ¶ 87 (“[T]he measure must be reversible.”).

80. *Draft Articles*, *supra* note 14, art. 51; *see also, e.g.*, Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (*Naulilaa Case*) (Port. v. Ger.), 2 R.I.A.A. 1011, 1026–28 (1928) (holding that destruction of Portuguese installations in Angola was a disproportionate response to a border skirmish).

81. *Draft Articles*, *supra* note 14, at 135.

The doctrine on unfriendly unilateralism thus can be represented as follows:



The doctrine's apparent purpose is to identify when unfriendly unilateralism is lawful. But note that the doctrine cannot provide a concrete answer when the substantive obligations themselves are imprecise. Consider an example. In 1995, Norway closed its ports to an Icelandic ship as retaliation for Iceland's increased fishing in the Barents Sea Loophole, a region in the high seas with fish that straddled Norway's exclusive economic zone. The Surveillance Authority of the European Free Trade Association ("EFTA") found that, by closing its ports, Norway had strayed from its EFTA obligations.<sup>82</sup> Nevertheless, the authority declined to hold Norway responsible.<sup>83</sup> The authority was unsure whether Iceland had violated a vague duty to cooperate on maritime conservation under the U.N. Law of the Sea Convention ("UNCLOS").<sup>84</sup> States were at the time specifying that UNCLOS duty in a

82. See Eur. Free Trade Ass'n (EFTA) Surveillance Auth., Letter of Formal Notice to the Norwegian Mission to the E.U. on the Failure to Comply with Art. 36 of the EEA Agreement, ¶ 52, EFTA Doc. No. 96-4652-D (Sept. 3, 1996) ("Norway breached its obligations under Article 36 of the EEA Agreement . . ."); Agreement on the European Economic Area, art. 36, Mar. 17, 1993, 1994 O.J. (L 1) 3 (entered into force Jan. 1, 1994) ("[T]here shall be no restrictions on freedom to provide services within the territory of the Contracting Parties . . .").

83. EFTA Surveillance Auth., Letter to Ambassador Einar Bull, Norwegian Mission to the European Union, at 3, EFTA Doc. No. 98-3393-D (May 14, 1998) [hereinafter Final EFTA Decision] ("[T]he underlying dispute is one between Norway and Iceland relating to Icelandic fishing in international waters . . . for which the Authority has no competence.")

84. *Id.* at 2 ("[I]t is disputable whether Iceland . . . did breach international law. . ."); United Nations Convention on the Law of the Sea, art. 117-19, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; see also Moritaka Hayashi, *Illegal, Unreported, and Unregulated (IUU) Fishing: Global and Regional Responses*, in BRINGING NEW LAW TO OCEAN WATERS 95, 96 (David D. Caron & Harry N. Scheiber eds., 2004) (on duty's vagueness).



supplemental agreement on straddling fish stocks, but this supplemental agreement had not yet entered into force.<sup>85</sup> If Iceland violated UNCLOS, Norway's conduct might well have been lawful. Otherwise, Norway acted disobediently. The doctrine on state responsibility cannot resolve the question. What the doctrine does is frame the legal analysis and focus lawyers on a discrete set of enforcement-related questions.

### B. *The Muted Perspective: Lawmaking*

Focusing so heavily on enforcement marginalizes the role that unfriendly unilateralism plays in lawmaking. The lawmaking literature recognizes that states are not just recipients of international law, obligated to comply with its terms. They also actively *create* law. And they create law in part through their unilateral and even disobedient actions.<sup>86</sup> However, the lawmaking perspective receives almost no attention when states couple unilateralism with unfriendliness. Unfriendly unilateralism is almost always assessed in enforcement terms and without accounting for its lawmaking potential. Moreover, as Part III of the Article explains, to recognize that unfriendly unilateralism has lawmaking potential is only to begin to appreciate the work that it does in the international legal order.

#### 1. *Theoretical Underpinnings*

Unilateralism's role in lawmaking is most evident in the literature on custom. Customary international law develops from an interactive process in which different actors make and respond to one another's legal claims.<sup>87</sup> These actors might persistently advance conflicting claims, in which case the law remains unsettled, or they might converge around the same claim and create custom. The process is continuous.<sup>88</sup> Even after a customary norm emerges, its content or efficacy fluctuates as relevant actors engage with the

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85. See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 2, *opened for signature* Dec. 4, 1995, 2167 U.N.T.S. 3 (entered into force Dec. 11, 2001) [hereinafter Straddling Fish Stocks Agreement] ("The objective of this Agreement is to ensure the long-term conservation and sustainable use of . . . fish stocks through effective implementation of [UNCLOS].").

86. See ANTHONY D.A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 97–98 (1971) (explaining that every breach of a customary norm is the seed for a new norm); Arthur A. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 30–31 (1988) (same).

87. See KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 56–58 (2d ed. 1993); Myres S. McDougal, Editorial Comment, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 357 (1955) (describing "a process of continuous interaction . . . in which the decision-makers . . . unilaterally put forward claims . . . and in which other decision-makers weigh and appraise these competing claims . . . and ultimately accept or reject them").

88. See W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 108, 113 (1981) [hereinafter Reisman, *Lawmaking*]; Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 784 (2001) ("Customs can generally change and harden over time because custom is a fluid source of law.").

norm over time. Thus, repeated defections that go unaddressed demonstrate that a norm has changed or eroded—or at least that global actors are not sufficiently committed to making it effective.<sup>89</sup> Such cycles can beget more defections and eventually push norms into desuetude.<sup>90</sup> By contrast, responding to defections with strong and widespread condemnation can have the opposite effect. It can help strengthen a theretofore tenuous norm.

Although that process is most commonly associated with custom, it describes international lawmaking more generally.<sup>91</sup> As some of the literature on “soft law” explains, legally relevant norms can be soft along three dimensions: in content, authority, or effect.<sup>92</sup> What often gets overlooked is that, because the lawmaking process is continuous, softness along any dimension can fluctuate over time. Any interaction that puts a particular norm at issue communicates not only whether states have complied but also, and more critically, what the norm requires going forward and to what extent it reflects an operative legal commitment.<sup>93</sup>

The point is worth spinning out. A norm is soft in content if it is imprecise. In the Norway-Iceland dispute, the UNCLOS duty to cooperate was soft in content. Over time, that treaty norm could, like a customary norm, remain ambiguous or develop a shared meaning. A norm is soft in authority when it has not been produced by a formal lawmaking process and is not clearly binding.<sup>94</sup> Such norms might still be law-like if they are given some

89. See SHAW, *supra* note 66, at 89 (“Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate.”); Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 951–63 (2005) (arguing that valid international legal rules are infrequently violated).

90. See FRANCK, *supra* note 42, at 24 (explaining that noncompliance undermines a norm’s “compliance pull,” making it less likely that others will comply); Glennon, *supra* note 89, at 960 (“[A]t some point state practice that is inconsistent with a norm is simply too thick to justify the conclusion that states really accept the norm as obligatory . . . . At this point the rule has fallen into desuetude.”); Root, *supra* note 54, at 9 (“International laws violated with impunity must soon cease to exist . . .”).

91. Cf. VCLT, *supra* note 74, art. 31(3)(b) (providing for treaty interpretations to reflect “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

92. Many scholars focus on only one of these dimensions. For scholars who identify all three, see Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421 (2000); Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS 135, 136 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992) [hereinafter Reisman, *Soft Law*]. The phrase “soft law” is controversial. See, e.g., Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT’L L. 167, 168 (1996). But for the reasons described in the text, the phrase remains conceptually useful.

93. JOHN GERARD RUGGIE, *CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION* 98 (1998) (“Precisely because state behavior within regimes is interpreted by other states, . . . [state interactions] are absolutely critical component parts of any explanation involving the efficacy of [regime] norms.”); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1, 4–5 (1984) (encouraging analysts to appraise events as norm-indicators).

94. See, e.g., Wolfgang Reinicke & Jan Martin Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-Binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 76 n.3 (Dinah Shelton ed., 2000) (“[S]oft law as used herein means normative agreements that are not legally binding.”).

legal effect. For example, Norway and the EFTA Surveillance Authority both treated the straddling fish stocks agreement as legally relevant, even though the agreement was not yet binding.<sup>95</sup> The agreement became authoritatively harder when it finally entered into force, but it could have hardened along this dimension even if it had never entered into force. It still could have reflected states' expectations on the UNCLOS duty.<sup>96</sup> Indeed, the Draft Articles on State Responsibility are not themselves codified in any binding text. They become authoritatively harder as relevant actors repeatedly invoke and apply them as law.<sup>97</sup> Finally, norms are soft in effect when actors have not committed sufficient resources for implementation or enforcement.<sup>98</sup> Some human rights norms are authoritatively hard—that is, codified in binding texts—but effectively soft. A state can unilaterally harden these norms simply by doing more on implementation or by subjecting its conduct to third-party review.<sup>99</sup>

Because lawmaking occurs in a broad range of settings, the role of unilateralism varies.<sup>100</sup> Unilateralism might not play any role or might be hard to identify in highly structured settings, like those of international organizations.<sup>101</sup> Rather, unilateralism tends to be more overt in decentralized arenas. One well-known example is the law on the continental shelf. This law emerged through a series of independent and unilateral claims, beginning with the 1945 U.S. Truman Proclamation.<sup>102</sup> Other states soon advanced

95. Norwegian Mission to the E.U., Letter to EFTA Surveillance Authority, ¶ 45–50, EFTA Doc. No. 96-7009A (Nov. 29, 1996); Final EFTA Decision, *supra* note 83, at 2–3.

96. See ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 215, 220 (2007) (contesting the “assumption that [treaties] are necessarily more authoritative” than non-binding instruments and explaining that, “even when not incorporated directly into a treaty, [a non-binding instrument] may represent an agreed understanding of the terms of the treaty”); cf. HENKIN, *supra* note 19, at 218 (explaining that, as political interests in an exclusive economic zone shifted, it became “a foregone conclusion” that the zone either would be written into a future convention or “would emerge as the law in fact” without a convention).

97. See *supra* notes 68–70 and accompanying text.

98. See, e.g., David Trubek et al., ‘Soft Law,’ ‘Hard Law’ and EU Integration, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 65, 67 (Gráinne de Búrca & Joanne Scott eds., 2006). Some literature assesses whether a norm is hard in effect by whether the norm’s interpretation or application has been delegated to a centralized body. Abbott & Snidal, *supra* note 92, at 421. However, decentralized actors can also make norms effective.

99. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) (establishing an optional, third-party review process).

100. See BOYLE & CHINKIN, *supra* note 96, at 2 (“Law-making processes take place in many arenas . . .”).

101. See generally JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 184–268 (2006).

102. Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945). The “continental shelf” is the seabed and subsoil in the area adjacent to a state’s territorial sea, to a certain depth below sea level. See UNCLOS, *supra* note 84, art. 76; Convention on the Continental Shelf, art. 1, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311. On the development of this regime, see ZDENEK J. SLOUKA, *INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF: A STUDY IN THE DYNAMICS OF CUSTOMARY RULES OF INTERNATIONAL LAW* 32 (1968).

similar claims, leading to a treaty in 1958<sup>103</sup> and eventually the ICJ's declaration that the treaty reflected "received or at least emergent rules of customary international law."<sup>104</sup> U.S. unilateralism catalyzed that decentralized process for making international law.

Unilateralism is often only discursive and not accompanied by any unfriendly act.<sup>105</sup> But states sometimes use unfriendliness to reinforce their unilateral claims.<sup>106</sup> Take another example from the law of the sea. In the late 1940s and early 1950s, coastal states began unilaterally claiming the exclusive right to fish in designated areas beyond their coasts.<sup>107</sup> Iceland was especially assertive. Between 1958 and 1975, it claimed an increasingly expansive fishing zone and harassed U.K. ships that entered the zone.<sup>108</sup> After the ICJ found that the United Kingdom could lawfully fish beyond twelve miles of Iceland's coast,<sup>109</sup> Iceland claimed for itself a 200-mile zone.<sup>110</sup> Iceland's conduct against the United Kingdom—which was unfriendly, unilateral, and at times disobedient—was part of a broader effort to change the law. It helped prompt the negotiation of UNCLOS, which finally stabilized the exclusive economic zone at 200 miles.<sup>111</sup>

## 2. Doctrinal Marginalization

Unfriendly unilateralism's potential in lawmaking is completely marginalized by the doctrine on state responsibility. The doctrine is concerned only with an enforcement-related inquiry: did the disputing states comply with the law that existed at the time of their dispute? That focus obscures unfriendly unilateralism's lawmaking role because lawmaking is an extended process. It depends not just on the disputing states' first moves but

103. Convention on the Continental Shelf, *supra* note 102.

104. North Sea Continental Shelf (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), 1969 I.C.J. 3, 39 (Feb. 20).

105. See, e.g., CHAYES & CHAYES, *supra* note 42, at 118; THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7 (1995); IAN JOHNSTONE, THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS 22–27 (2011); Harold Hongju Koh, Address, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 644–45 (1998).

106. Cf. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1568 (2000) ("There are some things we can express only with deeds because words alone cannot adequately convey our attitudes."); Hudec, *supra* note 26, at 138 ("Retaliation is primarily a symbolic act, a way of making clear the seriousness of the government's objection . . .").

107. See R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 228 (2d ed. 1988).

108. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, ¶¶ 23–29 (July 25) (describing Iceland's claims between 1958 and 1972) [hereinafter Fisheries Jurisdiction]; Richard R. Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 WIS. L. REV. 37, 53 (describing Iceland's conduct against U.K. vessels).

109. Fisheries Jurisdiction, *supra* note 108, ¶ 79.

110. See GARY KNIGHT & HUNGDAH CHIU, THE INTERNATIONAL LAW OF THE SEA 598 (1991) ("In . . . 1975, Iceland extended her fishing limits from 50 to 200 miles, setting off another round in the [dispute with the U.K.]"); see also Fisheries Agreement relating to the Extension of the Icelandic Fishery Limits to 200 Nautical Miles, Belg.-Ice., Nov. 28, 1975, 15 I.L.M. 1 (acknowledging Iceland's claim); Fisheries Agreement relating to the Extension of the Icelandic Fishery Limits to 200 Nautical Miles, Ger.-Ice., Nov. 28, 1975, 15 I.L.M. 43 (same).

111. UNCLOS, *supra* note 84, arts. 55–56.

also on the broader context in which their dispute erupted and was resolved.<sup>112</sup> That context is completely off the doctrinal radar screen.

To appreciate the difference, consider again the U.K.-Iceland dispute on the exclusive economic zone. The doctrinal inquiry ends upon determining that, to the extent that Iceland acted unlawfully, U.K. countermeasures would have been lawful. The lawmaking perspective continues the analysis. It asks, for example, about the viability of the United Kingdom's legal position, given the competing claims on the law. In the event, Iceland acted as part of an energetic movement, motivated mostly by newly decolonized states, to shift the law.<sup>113</sup> No matter whether U.K. countermeasures would have been lawful at a specific moment, preserving the U.K. legal position would have required an intense global campaign—and probably still would have failed.<sup>114</sup> Asking only how the dispute fit within the law as it was elides the question of what the dispute portended for the law going forward. The doctrine is similarly myopic for assessing Norway's unfriendly unilateralism against Iceland. Given that Norway's conduct was noncompliant, the doctrine asks only whether Norway itself suffered a discrete injury and acted to restore the status quo ante. That inquiry misses what Norway was up to. More than reinstating the law as it was, Norway was supporting emerging expectations on what the law would become.

The doctrine not only obscures unfriendly unilateralism's role in lawmaking but also affirmatively inhibits states from using unfriendly unilateralism for that purpose. Only retorsions are permissible for lawmaking. Countermeasures must restore a preexisting legal arrangement, and disobedient measures are categorically prohibited. Thus, a state acts noncompliant at its own risk if, as in the Norway-Iceland dispute, the target defected from a still nascent norm. Its noncompliance is disobedient if the target acted lawfully but intransigently or in bad faith. By contrast, the lawmaking perspective highlights that, in precisely those kinds of cases, unfriendly unilateralism can play a salutary role. It can catalyze further lawmaking or solidify a theretofore tenuous norm.

### III. UNFRIENDLY UNILATERALISM IN LAWMAKING

Assessing state practice from the lawmaking perspective, rather than from the enforcement one, reveals that unfriendly unilateralism can perform a whole host of prescriptive functions. It variously helps: (1) preserve substantive norms, (2) reconcile the law's competing objectives, (3) strengthen re-

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112. See Shaffer & Bodansky, *supra* note 20, at 8 (“Unilateral action is not a one-step dance . . . [but rather] part of a dynamic process of action and reaction.”).

113. See WINSTON CONRAD EXTAVOUR, *THE EXCLUSIVE ECONOMIC ZONE* 127–62 (1979) (reviewing practice).

114. See HENKIN, *supra* note 19, at 212–27 (describing the political forces that made change almost inevitable).

gimes by prompting stricter substantive obligations or more rigorous implementation mechanisms, and (4) recalibrate regimes for changed circumstances. Further, unfriendly unilateralism can be an especially versatile and potent lawmaking tool. Most of the literature on lawmaking recognizes that unilateral action can help make law by modeling a new norm. For example, this is what the U.S. Truman Proclamation did for the law on the continental shelf. Unfriendly unilateralism is unique in that the acting state usually does *not* model the new norm. Rather, its unfriendly act can pressure the target into accepting or helping to develop an entirely different norm. Unfriendly unilateralism thus can help make law no matter whether the conduct itself is or remains unlawful.

I take no position on whether using unfriendly unilateralism in any particular case is desirable. My normative claim is pitched at a higher level of generality: using unfriendly unilateralism—including disobedient measures—in lawmaking sometimes benefits the international legal order itself. Because the lawmaking process is always ongoing, inaction can be worse for the legal order than is unfriendly, unilateral, and even disobedient action. Inaction can inhibit positive legal developments or cause the law to erode or become idle. By contrast, unfriendly unilateralism can catalyze or support collective decisions. It thus can compensate for shortcomings in the legal order's formal lawmaking processes, enabling the law to stay relevant and adapt to change. As Louis Henkin once said, “[t]he survival and authority of international law depends on its capacity for necessary change.”<sup>115</sup>

#### A. Lawmaking as Maintaining the Legal Order

##### 1. Preserving Substantive Norms

Unfriendly unilateralism plays a lawmaking role even in classic enforcement scenarios; using it against a scofflaw helps preserve the violated norm. This point appears in some of the enforcement literature: if enforcement induces compliance, then the violated norm remains operative.<sup>116</sup> The point is worth underscoring, however, for three reasons. First, most of the enforcement literature defines unfriendly unilateralism as self-help.<sup>117</sup> This language wrongly suggests that unfriendly unilateralism benefits only the acting state. Yet if the violated norm is multilateral, preserving it carries a systemic benefit. Second, even disobedient measures can induce compliance and thus help preserve a violated norm. Third, some scholars dismiss enforcement as unnecessary for or ineffective at inducing compliance.<sup>118</sup> Un-

115. *Id.* at 100.

116. See Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 99 (1997) (explaining that U.S. enforcement “helps to preserve (or as the case may be, to advance) the core content of the norms”).

117. See, e.g., *Draft Articles*, *supra* note 14, at 136.

118. See, e.g., FRANCK, *supra* note 42, at 3 (unnecessary); CHAYES & CHAYES, *supra* note 42, at 3–9 (unnecessary or ineffective); Akehurst, *supra* note 60, at 14–15 (same).

friendly unilateralism can help preserve a norm even if it fails at enforcement and has *no* effect on compliance. Using unfriendly unilateralism signals that the violated norm remains operative and has not fallen into desuetude.

Disobedient measures can induce compliance, just as retorsions and countermeasures can. In other words, an acting state need not suffer a discrete injury or respond to an *erga omnes* violation in order for its noncompliance to help preserve the violated norm. The United Kingdom famously defended this claim after Albania ignored the ICJ's judgment in *Corfu Channel*.<sup>119</sup> A tripartite commission comprised of the United Kingdom, France, and the United States had in its possession and offered to transfer to the United Kingdom some Albanian gold. The transfer would have been disobedient for France and the United States because those states had not been discretely injured by Albania's breach. The United Kingdom nevertheless defended the transfer with a claim like the one for *erga omnes* obligations: because all states have an interest in ICJ judgments being operative, any state may "do what [it] can to ensure that judgments . . . are carried out."<sup>120</sup> This claim was never addressed by the ICJ<sup>121</sup> but has strong support in the literature on the enforcement of international judgments.<sup>122</sup>

The claim is equally compelling in other contexts. For instance, in the late 1980s, the International Whaling Commission ("IWC") adopted a moratorium on commercial whaling.<sup>123</sup> Under the Whaling Convention, any state could lawfully disregard the moratorium simply by objecting to it.<sup>124</sup> Further, had any state continued commercial whaling, its conduct would not have discretely injured the United States. Nevertheless, the United States took or threatened trade restrictions against states that intended to continue commercial whaling. Some of the trade restrictions might well have been disobedient. Steve Charnovitz has explained that, although the relevant trade law was imprecise at the time, authoritative trade bodies likely would have viewed the U.S. restrictions as unlawful.<sup>125</sup> Still, the United States ap-

119. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

120. Oral Argument of Sir Gerald Fitzmaurice, *Monetary Gold Removed from Rome in 1943* (It. v. France, U.K. & U.S.), 1954 I.C.J. Pleadings 124, 126 (June 15, 1954).

121. *Monetary Gold Removed from Rome in 1943* (It. v. France, U.K. & U.S.), 1954 I.C.J. 19, 34 (June 15) (dismissing on jurisdictional grounds the follow-up case to *Corfu Channel*).

122. See, e.g., C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 690 (1971); 1 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–2005*, 232–34 (2005); Akehurst, *supra* note 60, at 15–16; Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 6–12 (1960).

123. 2 PATRICIA BIRNIE, *INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING* 615 (1985) (reprinting moratorium).

124. International Convention for the Regulation of Whaling art. V(3)(c), Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T. 361 (entered into force Nov. 10, 1948) ("[Any] amendment . . . shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn.").

125. Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. INT'L L. REV. 751, 775–807 (1994).

pears to have induced other states—including those that whaled lawfully—to abide by the moratorium.<sup>126</sup>

Yet even when unfriendly unilateralism does *not* induce states to comply, it can still help preserve the violated norm. Recall that violations followed by inaction can contribute to the norm's erosion.<sup>127</sup> When Norway openly resumed commercial whaling in 1993,<sup>128</sup> several states condemned its conduct but none took meaningful action.<sup>129</sup> In less than a decade, the moratorium became more aspirational and less effective. By contrast, responding with unfriendly unilateralism would have reinforced the moratorium. As the literature on *erga omnes* obligations demonstrates, states periodically use unfriendly unilateralism to respond to serious human rights violations or uses of aggressive force.<sup>130</sup> In these cases, unfriendly unilateralism rarely remedies a specific violation or deters future violations.<sup>131</sup> Consider the unfriendly measures that Western states took in response to the Soviet invasion of Afghanistan.<sup>132</sup> These measures did not induce a Soviet withdrawal, and their deterrent effect is at best speculative.<sup>133</sup> Or consider the trade restrictions that African states imposed on South Africa in the 1960s, in order to protest apartheid.<sup>134</sup> South African apartheid lasted three more decades.<sup>135</sup> Unfriendly unilateralism is meaningful in these cases because it expresses a

126. See David Caron, *The International Whaling Commission and the North Atlantic Maritime Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT'L L. 154, 158 (1995) (“[I]t appears quite likely that *but for* such sanctions several states . . . would have opted out of the moratorium and continued commercial whaling.”); Charnovitz, *supra* note 125, at 765 (“Less than a month after [the United States certified Norway for retaliation], Norway announced that it would suspend commercial whaling. . . .”); Gene S. Martin, Jr. & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DENV. J. INT'L L. & POL'Y 293, 306–07 (1998) (describing U.S. retaliation, followed by “the U.S.S.R.’s announcement that it had ceased all commercial whaling”). The United States also had modest success inducing compliance with other IWC norms. See Caron, *supra*, at 157; Charnovitz, *supra* note 125, at 806 (reviewing practice and concluding that U.S. retaliations have “been reasonably effective in increasing adherence to certain international conservation standards”); Martin & Brennan, *supra*, at 315 (reviewing practice and concluding that U.S. retaliations “unquestionably have had a salutary effect on the ability of the IWC to achieve its conservation objectives”); Gerry J. Nagtzaam, *The International Whaling Commission and the Elusive Great White Whale of Preservationism*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 375, 412 (2009).

127. See *supra* notes 89–90 and accompanying text.

128. See Tamara Jones, *Rough Seas for Defiant Whalers*, L.A. TIMES, July 6, 1993, at A1; *Norway Whalers Catch Must of 1993 Commercial Quota*, REUTERS EUR. BUS. REP., July 2, 1993.

129. Message to Congress on Whaling Activities in Norway, WEEKLY COMP. PRES. DOC. 2000, 2001 (Oct. 4, 1993) (presidential decision not to act, even though “Norway’s action is serious enough to justify sanctions”); Caron, *supra* note 126, at 166–68.

130. See *supra* note 76 and accompanying text.

131. See TAMS, *supra* note 45, at 229 (reviewing countermeasures for *erga omnes* violations and concluding that “[t]heir actual effects were often rather trivial”).

132. See Dawidowicz, *supra* note 8, at 364–65; Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1, 27–47 (1983).

133. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 173 (2d ed. 1990) (“It is unknown what effect, if any, economic sanctions had on Soviet calculations with respect to adventures in other parts of the world.”).

134. See Dawidowicz, *supra* note 8, at 353–54 (describing trade embargo and flight and port bans).

135. See Steven Mufson, *South Africa 1990*, 70 FOREIGN AFF. 120, 127 (1990).



commitment to the violated norms. It helps sustain the belief that the violations are impermissible—that the norms are not purely aspirational, even if they also are not fully effective.

## 2. Reconciling Competing Objectives

In other cases, unfriendly unilateralism helps reconcile competing objectives within the law. Reconciling these objectives *ex ante* can be extraordinarily difficult in large multilateral settings.<sup>136</sup> Moreover, although centralized bodies might exist to help reconcile the objectives *ex post*, such bodies usually are embedded in a single regime and predisposed to *that* regime's principal objectives.<sup>137</sup> They might not give competing objectives sufficient weight. In any event, once a particular balance is struck, recalibrating the balance to accommodate new facts or sensibilities can again be cumbersome. What sometimes happens, then, is that one objective comes to displace another. Using unfriendly unilateralism can help establish a more meaningful balance.

For instance, unfriendly unilateralism helped give environmental interests more weight within the trade regime. The General Agreement on Tariffs and Trade ("GATT") allows states unilaterally to restrict trade to "protect human, animal or plant life or health" or for "the conservation of exhaustible natural resources."<sup>138</sup> In a series of cases—most notoriously, *Tuna/Dolphin*—GATT panels interpreted those provisions narrowly, largely prohibiting unilateral trade restrictions to protect the global environment.<sup>139</sup> These panels were motivated by "an intuition that trade measures to protect the environment might open the door to 'green' protectionism, thereby threatening [free trade]."<sup>140</sup> In other words, the GATT panels were more interested in protecting the trade regime's own objectives than in enabling states to preserve the global environment. The panels thus struck a balance that heavily favored free trade over the global environment.<sup>141</sup>

136. See Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 794–95 (2001).

137. See generally Martti Koskeniemi, *The Politics of International Law—20 Years Later*, 20 EUR. J. INT'L L. 7, 9 (2009) (explaining that "the creation of special regimes of knowledge and expertise" leads to "struggle[s] between competing expert vocabularies, each equipped with a specific bias").

138. GATT, *supra* note 34, arts. XX(b) & (g).

139. Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1991), 30 I.L.M. 1594 (1991); Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS29/R (Jun. 16, 1994), 33 I.L.M. 936 (1994); *cf.* Report of the Panel, *Thailand—Restrictions on Importation of and International Taxes on Cigarettes*, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200 ¶ 24 (1990) (requiring least-GATT-inconsistent alternative for health objective); Report of the Panel, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 (Mar. 22, 1988), GATT B.I.S.D. (35th Supp.) at 114 (1989) (requiring that conservation restrictions be focused primarily on domestic production or consumption).

140. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 493 (2002).

141. See, e.g., Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL'Y 711 (1996). GATT bodies proposed that states seeking to protect the global environment do so either through multilateral negotiations or by

The United States had long used unilateral trade restrictions for the global environment and continued to do so after *Tuna/Dolphin*.<sup>142</sup> The U.S. restrictions varied. Some were like the ones on commercial whaling and targeted particular states.<sup>143</sup> Others applied more generally. For example, the U.S. restrictions in *Tuna/Dolphin* prohibited tuna imports from any state that lacked adequate safeguards for dolphin-safe fishing.<sup>144</sup> All of these restrictions—both the targeted and the generally applicable—were part of a broader effort to create more space for the environment within the trade regime.<sup>145</sup> WTO bodies eventually responded by giving states some discretion to use trade restrictions for the global environment.<sup>146</sup> Of course, this shift cannot be credited to the United States alone. But multilateral efforts to strike a new balance between trade and the environment required a consensus and were going nowhere.<sup>147</sup> U.S. unilateralism—including unfriendly and disobedient unilateralism—played an important role.

### 3. *Strengthening Legal Regimes*

Unfriendly unilateralism can also help strengthen legal regimes. In these cases, a regime begins as only modestly effective at achieving its stated objectives. Unfriendly unilateralism helps overcome pockets of intransigence and stimulate a process for reform. In the end, the regime better satisfies its objectives, with stricter substantive obligations or more serious implementation devices.

Consider the *Air Services* arbitration, which arose out of the U.S.-France aviation agreement and is commonly cited for the doctrine on countermeasures.<sup>148</sup> The aviation agreement permitted each country's airlines to transfer passengers from one aircraft to another aircraft en route to the final destina-

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offering new concessions. For a review and critique of this proposal, see Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995).

142. See Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999) (examining *Tuna/Dolphin's* aftermath).

143. See *supra* notes 123–26 and accompanying text.

144. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100–711, sec. 4(a), § 101(a)(2), 102 Stat. 4755, 4765; Act of July 17, 1984, Pub. L. No. 98–364, tit. I, § 101(a)(2), 98 Stat. 440, 440.

145. For evidence that the WTO was under considerable pressure to accommodate environmental interests, see, for example, Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment: Toward Environmental Reform*, 89 AM. J. INT'L L. 423 (1995); Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563 (2000).

146. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp & Shrimp Products*, ¶ 121, WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp & Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001).

147. See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 269–71 (1997).

148. *Air Services Agreement* of Mar. 27, 1946 (U.S./Fr.), 18 R.I.A.A. 417 (1978); see also *Draft Articles*, *supra* note 14, at 75, 128–30, 134–36 (repeatedly citing case to support draft articles); White & Abass, *supra* note 66, at 513 (“In ILC terms the paradigm is [*Air Services*].”).

tion. But the aviation agreement expressly permitted such transfers only in France or the United States; the agreement was silent about transfers in third countries.<sup>149</sup> France interpreted the silence as a lack of authorization and prohibited a U.S. airline from conducting a third-country transfer en route to Paris. Moreover, France refused to alter its interpretation unless the United States offered concessions of equivalent value. Meanwhile, the United States refused to bargain for rights that it believed it already had. It interpreted the silence to permit third-country transfers, consistent with the agreement's purpose of providing air travel "at the cheapest rates consistent with sound economic principles."<sup>150</sup>

France had no need to resolve the dispute expeditiously because prohibiting the service disadvantaged only the United States.<sup>151</sup> The United States thus responded with the threat of unfriendly unilateralism. It ordered the suspension, within thirty days, of all Air France flights to Los Angeles. This order galvanized France to resolve the dispute.<sup>152</sup> The day before the U.S. suspension was to go into effect, France and the United States agreed to an interim arrangement on third-country transfers and to submit their interpretive dispute to arbitration.<sup>153</sup> In the end, the arbitral tribunal accepted the U.S. interpretation and then found that, because France deviated from that interpretation, the U.S. suspension would have been a lawful countermeasure.<sup>154</sup> With that outcome, the regime better satisfied its goal of enabling economically efficient air services. Yet no matter how the dispute was resolved, a U.S. suspension would *not* have satisfied the requirements for countermeasures; it would not have reinstated the preexisting legal arrangement because that arrangement was silent on third-country transfers. Rather, the U.S. order helped fill the silence and develop the law, by catalyzing a process for reform.<sup>155</sup> Even the paradigm case on countermeasures is ultimately about generating new law, not reinstating the status quo ante.

The *Air Services* case is unusual in that a threat of unfriendly unilateralism led to an arbitral decision that helped reform the regime. The process for reform is usually more decentralized. Unfriendly unilateralism prompts an intransigent or uninterested state to take seriously the negotiations and help find a mutually agreeable solution. The 1995 fishing dispute between Canada and the European Union ("EU") is illustrative. The Northwest Atlantic Fisheries Organization ("NAFO") had just allocated the catch of a

149. *Air Services*, 18 R.I.A.A. ¶ 13, 45–46.

150. *Id.* ¶ 13 (quoting agreement) (internal quotations omitted).

151. Lori Fisler Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT'L L. 785, 799 (1980) ("[D]elay worked in favor of France since France benefited from the status quo as it had defined it when it barred the Pan Am service.").

152. *Id.* ("One result of the U.S. action was that France had substantially more interest in a speedy resolution of the dispute. . . .").

153. *Air Services*, 18 R.I.A.A. ¶ 9 (reprinting agreement to arbitrate).

154. *Id.* ¶ 99.

155. *Id.* ¶ 95 (explaining that the U.S. order "set the procedure in motion" for resolving the interpretive dispute).

halibut fish stock, giving sixty percent to Canada and thirteen percent to the EU.<sup>156</sup> The EU objected,<sup>157</sup> making the allocation nonbinding under the NAFO treaty.<sup>158</sup> The EU then claimed for itself a sixty-nine percent share.<sup>159</sup> Though the EU's conduct did not violate binding law, it undermined NAFO's overall purpose of cooperatively allocating the halibut catch.<sup>160</sup> Canada responded by arresting and bringing to port a Spanish ship and by harassing a few other European ships on the high seas.<sup>161</sup> Canada's conduct was disobedient,<sup>162</sup> but it catalyzed serious negotiations.<sup>163</sup> Within six weeks, Canada and the EU agreed to new allocations and stricter oversight mechanisms.<sup>164</sup> In the end, NAFO's conservation interests were better satisfied.

Canada similarly used unfriendly unilateralism to prompt more serious negotiations with the United States under their Pacific Salmon Treaty.<sup>165</sup> The treaty allocated the Pacific salmon catch, but its initial allocations were, according to the U.S. State Department lawyer who participated in the negotiations, "necessarily short-term."<sup>166</sup> The treaty's key innovation was a bilateral commission that, operating by consensus, would manage fishery conservation and recommend annual allocations.<sup>167</sup> However, the United States immediately refused to accept new allocations because any change in

156. See *Fisheries: EU Formally Objects to NAFO Turbot Quota as Canada Warns Against*, EUR. REP. 2021, Mar. 3, 1995 [hereinafter *EU Objects*]; *Fisheries: EU and Canada on the Brink of a Fish War*, EUR. REP. 2022, Mar. 7, 1995.

157. See *EU Objects*, *supra* note 156.

158. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries art. XII(1), Oct. 24, 1978, 1 U.S.T. 477, 1135 U.N.T.S. 369 [hereinafter *NAFO Treaty*] (entered into force Jan. 1, 1979).

159. See *EU Objects*, *supra* note 156.

160. See *NAFO Treaty* art. II, *supra* note 158 (establishing NAFO "to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources").

161. See JOSÉ A. DE YTURRIAGA, *THE INTERNATIONAL REGIME OF FISHERIES: FROM UNCLOS 1982 TO THE PRESENTIAL SEA* 242–44 (1997).

162. See *UNCLOS*, *supra* note 84, art. 92 (subjecting high-seas vessels to exclusive jurisdiction of flag state). Canada seemed to appreciate that its conduct was legally suspect. On the same day that it decided to exercise authority over foreign vessels on the high seas, it withdrew from the ICJ's compulsory jurisdiction. See *Fisheries Jurisdiction (Spain v. Can.)*, Judgment, 1998 I.C.J. 432, ¶ 14–15 (Dec. 4).

163. John Carvel, *Trawler Freed as Truce Declared in Fish War*, *GUARDIAN* (London), Mar. 16, 1995, at 3 (reporting that, in exchange for Canada releasing the vessel, "the two sides would meet next week at an emergency meeting . . . at which the whole controversy . . . could be thrashed out"); Allan Thompson, *European Union, Canada Set for Negotiations on Fish Stocks*, *TORONTO STAR* (Can.), Mar. 16, 1995, at A12 (quoting EU official as explaining that vessel's release "'clears the way to begin the process of negotiation'").

164. *Agreed Minute on the Conservation and Management of Fish Stocks*, Can.-Eur. Community, Apr. 20, 1995, 34 I.L.M. 1260; *EU/Canada: EU and Canada Celebrate Easter Deal on Fishing Rights*, EUR. REP. 2034, Apr. 19, 1995.

165. *Treaty Concerning Pacific Salmon*, U.S.-Can., art. III(1), Jan. 28, 1985, T.I.A.S. No. 11,091 (entered into force Mar. 17, 1985).

166. Joy A. Yanagida, *The Pacific Salmon Treaty*, 81 AM. J. INT'L L. 577, 578 (1987).

167. *Treaty Concerning Pacific Salmon*, *supra* note 165, arts. II, IV; see also Yanagida, *supra* note 166, at 585–88.

the bilateral regime would create domestic legal and political challenges.<sup>168</sup> In obstructing the commission from doing its work, the United States unquestionably undercut the treaty's overall purpose and structure. But because the treaty's substantive obligations were imprecise, the United States did not clearly violate the treaty's letter.<sup>169</sup>

Canada twice used unfriendly unilateralism to pressure the United States to take seriously the Pacific salmon negotiations. In 1994, Canada imposed a fee on U.S. commercial fishing vessels that transited Canada's Inside Passage.<sup>170</sup> Canada's fee was inconsistent with longstanding practice and perhaps disobedient.<sup>171</sup> Nevertheless, the fee broke the U.S. domestic logjam and prompted more serious negotiations.<sup>172</sup> After these negotiations also failed,<sup>173</sup> Canada stood by while over 100 Canadian-flagged vessels blockaded a U.S. passenger ferry in Canadian port for three days.<sup>174</sup> Though the United States reacted noisily,<sup>175</sup> it recognized that the blockade "jump started the negotiations."<sup>176</sup> Canada and the United States worked together to appoint two special envoys on the Pacific Salmon Treaty, and the envoys' work set the foundation for finally amending the treaty in 1999.<sup>177</sup> Com-

168. See Yanagida, *supra* note 166, at 577–78, 585–88 (explaining that jurisdiction over U.S. fisheries is splintered among federal, state, and tribal authorities; "[r]elations among [the different U.S.] groups are characterized by vigorous competition"; and U.S. action on the commission required a consensus among those competing U.S. actors).

169. See Treaty Concerning Pacific Salmon, *supra* note 165, art. III (establishing duties to cooperate and try to prevent overfishing); *Id.*, Memorandum of Understanding Regarding Implementation of Pacific Salmon Treaty, art. III, ¶ 1(b) (establishing duty to allocate catch equitably); see also UNCLOS, *supra* note 84, art. 66(4) (establishing duty to cooperate).

170. See Coastal Fisheries Protection Regulations, C.R.C., c. 413 (Can.) (1978), amended by SOR/94-444 (Can.) (1994); News Release/Communique, Can. Dep't of Fisheries & Oceans, License Fee Announced for U.S. Vessels, No. NE-HQ-94-5QE (June 9, 1994).

171. See Colin B. Picker, *Fishing for Answers in Canada's Inside Passage: Exploring the Use of the Transit Fee as a Countermeasure*, 21 YALE J. INT'L L. 349, 370–88 (1996) (arguing that the fee did not comply with Canada's obligations but should be understood as a countermeasure); but see Ted L. McDorman, *The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure*, 17 LOY. L.A. INT'L & COMP. L. REV. 477, 497–503 (1995) (arguing that the fee complied with Canada's obligations).

172. See *Gore's Assurance on Salmon Lifts Block on Stalled Talks*, VICTORIA TIMES-COLONIST (Can.), July 3, 1994, at A2; Thomas W. Haines, *Lifting of Boat Fee Paves Way for Fish Talks to Resume*, SEATTLE TIMES, July 3, 1994, at A1; Brian Tobin, *License Fee Got Message Through to Americans*, VICTORIA TIMES-COLONIST (Can.), July 29, 1994, at A5.

173. See Brad M. Caldwell, *The Pacific Salmon Treaty: A Brief Truce in the Canada/U.S.A. Pacific Salmon War*, 57 ADVOC. 379, 385–89 (1999).

174. *Id.* at 388; Paul L. Evans, *Treaty Past, Treaty Present: An Interdisciplinary Analysis of the Pacific Salmon Treaty Through Examination of the Values, Culture and Political Structures that Provide Definition 66* (Nov. 14, 2000) (unpublished M.A. thesis, Oregon State University) (on file with Valley Library, Oregon State University).

175. The U.S. Senate passed a resolution calling on the President to "use all necessary and appropriate means to compel the Government of Canada to prevent any further illegal or harassing actions" against U.S. nationals transiting Canadian waters. S. Res. 109, 105th Cong., 143 CONG. REC. S7965-02 (1997) (enacted).

176. Jack Branswell, *Blockade May Help Win Pact*, VICTORIA TIMES-COLONIST (Can.), Aug. 5, 1997, at A1 (quoting U.S. Secretary of Commerce William Daley).

177. Agreement Relating to and Amending Annexes I and IV of the Treaty of Jan. 28, 1985, as Amended, U.S.-Can., June 30, 1999, T.I.A.S. No. 630.

pared to the original, the amended treaty better achieves its goals of conservation and equitable allocations,<sup>178</sup> though it too has problems.<sup>179</sup>

Finally, consider a more controversial example. In the era predating the WTO, the United States regularly imposed or threatened to impose trade restrictions on states that violated the GATT or had, in the U.S. view, unreasonable trade policies.<sup>180</sup> The U.S. restrictions, termed “Section 301 actions” for the relevant provision of the U.S. Trade Act, were widely criticized as bullying.<sup>181</sup> But as Robert Hudec has explained, these actions were “an important element in the process of GATT legal reform” and “made a constructive contribution to breaking legal deadlocks and stimulating improvements in GATT law.”<sup>182</sup>

Section 301 actions helped strengthen the trade regime in three respects. First, the actions regularly prompted bilateral negotiations that led to specific market openings.<sup>183</sup> These openings advanced the regime’s objective of trade liberalization and often benefited third states.<sup>184</sup> Second, 301 actions helped broaden the regime’s coverage to include the trade in services and

178. First, the 1999 amendment regulates more fisheries. Second, the original treaty depended on the parties agreeing to annual harvest plans. The failure to agree triggered vague requirements of equity and conservation. By contrast, the 1999 amendment avoids the need for annual agreement by establishing precise, long-range harvest plans. Third, the 1999 amendment establishes an “abundance-based” fishing regime, which defines the harvest as a function of the salmon population. Such abundance-based fishing is generally more responsive to conservation needs than is harvesting a fixed amount each year, without regard to the size of the population. Fourth, the 1999 amendment establishes funds for habitat restoration, stock enhancement, and research; and it strengthens information-sharing. For more details on the 1999 amendment, see Karol de Zwager Brown, *Truce in the Salmon War: Alternatives for the Pacific Salmon Treaty*, 74 WASH. L. REV. 605 (1999); Jason Dunn, *The 1999 Pacific Salmon Treaty Agreement*, 11 COLO. J. INT’L ENVTL. L. & POL’Y 164 (2000).

179. See Austin Williams, *The Pacific Salmon Treaty: A Historical Analysis and Prescription for the Future*, 22 J. ENVTL. L. & LITIG. 153, 174–75 (2007) (“[T]he Pacific Salmon Treaty remains unable to distribute equitably the benefits of Pacific salmon between the United States and Canada and fails to guarantee habitat conservation.”).

180. See Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1988).

181. See Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM*, *supra* note 26, 1, 1–2; Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL’Y INT’L BUS. 263, 265 (1992) (“[Officials of other states] often react with indignity . . . and maintain that the very existence of Section 301 is objectionable.”); “U.S. Comes Under Attack Over Trade Policy at GATT Council Meeting, Defends Super 301,” 6 INT’L TRADE REP. (BNA) No. 26, at 830 (June 28, 1989).

182. Hudec, *supra* note 26, at 116; see also THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, *RECIPROCIITY AND RETALIATION IN U.S. TRADE POLICY* 331 (Inst. for Int’l Econ. ed., 1994) (“American arm-twisting provided an important incentive for its trading partners to negotiate rules that strengthened the international trading system and discouraged US unilateralism.”).

183. See Michael P. Ryan, *Strategy and Compliance with Bilateral Trade Dispute Settlement Agreements: USTR’s Section 301 Experience in the Pacific Basin*, 12 MICH. J. INT’L L. 799, 809 (1991); Sykes, *supra* note 181, at 268.

184. BAYARD & ELLIOTT, *supra* note 182, at 334; Sykes, *supra* note 181, at 295. Some worried that, when Section 301 actions extracted concessions in areas not covered by the GATT, states would divert trade to the United States from third states, thus disadvantaging those third states. See Bhagwati, *supra* note 181, at 35–36. However, an extensive review of Section 301 actions concluded that any trade diversion was insignificant. BAYARD & ELLIOTT, *supra* note 182, at 331, 335.

intellectual property.<sup>185</sup> Third, 301 actions were a critical impetus for establishing the WTO enforcement process.<sup>186</sup> In the pre-WTO era, trade disputes were arbitrated, but the dispute resolution process operated by consensus. Any state, including the scofflaw, could block a decision authorizing enforcement.<sup>187</sup> Now, a WTO decision authorizing enforcement is effective unless all states, including the victor, object.<sup>188</sup> WTO dispute resolution is widely praised for making the entire regime more effective.<sup>189</sup>

The *Air Services*, fishing, and trade cases all follow a similar pattern: unfriendly unilateralism pressured an intransigent state to take seriously an existing regime and to try to find a mutually agreeable approach for achieving the regime's objectives. Contrary to the doctrine on state responsibility, these cases are not about remedying one-off defections or restoring preexisting law. They are about changing that law and, in the end, strengthening the regime.

#### 4. *Recalibrating Legal Regimes*

States sometimes use unfriendly unilateralism not to advance but to retreat from regime objectives. That such a retreat can ever benefit a regime might seem counterintuitive. But it can help keep states invested in the regime even after their original bargain becomes untenable.<sup>190</sup> States that participate in complex regimes inevitably confront unanticipated challenges to compliance, so occasional transgressions are to be expected. Unfriendly unilateralism is a tool for *other* states to respond. Specifically, other states can use unfriendly unilateralism to adjust the regime's overall balance of rights and obligations, thus re-stabilizing the regime on terms that all parties are willing to tolerate. Here again, unfriendly unilateralism is not about rein-

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185. Hudec, *supra* note 26, at 130 (describing this development); Geza Feketekuty, *U.S. Policy on 301 and Super 301*, in *AGGRESSIVE UNILATERALISM*, *supra* note 26, 91, 102 (“[F]oreign concern about potential 301 actions outside of the GATT framework in areas such as services and intellectual property has served to increase the interest of many countries in a successful conclusion of the Uruguay Round negotiations in these areas.”).

186. See ALAN OXLEY, *THE CHALLENGE OF FREE TRADE* 75 (1990) (“One of the primary interests of the European Community in the Uruguay Round was to secure greater commitment from the United States to use GATT procedures . . . rather than resorting to unilateral action. . . .”); Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 *MINN. J. GLOBAL TRADE* 1, 13–14 (1999).

187. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT* 830 (3d ed. 1995).

188. DSU, *supra* note 32, art. 9.

189. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 97 (2d ed. 1997); MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 103–39 (2d ed. 2006).

190. This insight builds on the literature on so-called “flexibility provisions.” This literature demonstrates that treaty provisions that allow states unilaterally to change or deviate from particular commitments can deepen the cooperative relationship. States might accept more onerous obligations if they know that they have a lawful way out. See e.g., Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 *INT’L ORG.* 477 (2008). The argument in the text is that states that are committed to a relationship are more likely to stay committed if they can meaningfully adjust the regime in response to transgressions.

stating the preexisting arrangement. The recalibration might last indefinitely. Unlike the cases just examined, however, the recalibration makes the regime *less* effective overall. This outcome can still be preferable to the alternatives: requiring innocents either to terminate the legal relationship or to accept the scofflaw's new terms.<sup>191</sup>

The Canada-Brazil dispute on aerospace subsidies illustrates the point. The WTO found that each country gave unlawful subsidies to its aerospace industry.<sup>192</sup> Brazil initially modified but did not terminate its subsidies,<sup>193</sup> so the WTO authorized Canada to impose trade restrictions on Brazil as countermeasures.<sup>194</sup> These restrictions were not in Canada's economic interest, in part because Brazil might have responded by retaliating against *Canada's* subsidies.<sup>195</sup> Thus, Canada began matching Brazil's subsidies on an order-by-order basis. Canada defended its matching subsidies, which were disobedient, on the ground that they simply mirrored Brazil's.<sup>196</sup> For years, each country continued to give heavy subsidies to its aerospace industry.<sup>197</sup> This equilibrium was suboptimal from a WTO perspective but limited the extent to which the subsidies dispute infected the broader trade relationship.

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191. The process of transgression plus recalibration is imperfect for other reasons, as well. First, in multilateral regimes, the transgression might disadvantage many states, even as the recalibration benefits only the acting state. See Andrea Bianchi & Lorenzo Gradoni, *Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law*, Int'l Centre for Trade & Sustainable Dev. Programme on Dispute Resolution, Issue Paper 5, at 14 (2008) (identifying this problem in trade law). Renegotiating the entire arrangement would better protect all states but might be infeasible. See Koremenos et al., *supra* note 136. Second, any unilateral recalibration might be disproportionate to the original violation. Tolerating the recalibration thus might inhibit economically efficient transgressions. See Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S202–03 (2002). But third-party mechanisms might be unavailable or ill-equipped to oversee the recalibration.

192. Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999); Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug. 2, 1999).

193. Appellate Body Report, *Brazil—Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW (July 21, 2000). Brazil modified its subsidies program a second time, after its initial modification was deemed insufficient. A WTO panel found that the second modification was lawful on its face. Panel Report, *Brazil—Export Financing for Aircraft, Second Recourse by Canada to Article 21.5 of the DSU*, ¶ 6.2, WT/DS46/RW/2 (July 26, 2001) (“[I]t is legally possible for Brazil to operate the [subsidies] programme in such a way that it [is lawful].”). However, the panel acknowledged that the program might still be unlawful as applied. *Id.* ¶ 6.3.

194. Decision by the Arbitrators, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/ARB (Aug. 28, 2000).

195. See 1 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC, AND POLITICAL ANALYSIS 1363 (Patrick F.J. Macrory et al. eds., 2005); Kyle Bagwell, Petros C. Mavroidis, & Robert W. Staiger, *The Case for Tradable Remedies in WTO Dispute Settlement*, 14 (World Bank, Policy Research Working Paper No. 3314, 2004).

196. Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R (Jan. 28, 2002) (finding Canada's subsidies unlawful); *id.* ¶ 7.182 on page 46 (describing Canada's matching defense); Decision by the Arbitrator, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 3.29, WT/DS222/ARB (Feb. 17, 2003) (same).

197. See MARC D. FROESE, CANADA AT THE WTO: TRADE LITIGATION AND THE FUTURE OF PUBLIC POLICY 90–92 (2010).



Similarly, the United States recently recalibrated its aviation relationship with Argentina. After the 2002 devaluation of the Argentine peso, Argentina permitted its airlines to pay in pesos for the use of Buenos Aires Ezeiza airport.<sup>198</sup> U.S. airlines still paid in dollars, so they paid three times as much.<sup>199</sup> That disparate treatment violated the bilateral aviation agreement and disadvantaged U.S. airlines in the U.S.-Argentine market.<sup>200</sup> But for domestic legal and political reasons, Argentina was unwilling to change its behavior.<sup>201</sup> The United States thus used unfriendly unilateralism to recalibrate the aviation relationship. The United States required Argentina's principal airline to deposit in escrow, on a per-flight basis, the difference between what it and U.S. airlines paid at Ezeiza.<sup>202</sup> The new arrangement—under which each country's airlines paid more in the other country—was to remain in effect indefinitely. It allowed the aviation relationship to continue relatively uninterrupted, notwithstanding Argentina's seemingly intractable breach.<sup>203</sup>

Of course, states might recalibrate the regime by using the threat of unfriendly unilateralism to extract concessions for the transgression. Two WTO cases demonstrate the dynamic, even though neither involved unilateralism. In *United States—Upland Cotton*, the WTO authorized Brazil to take countermeasures for the United States' unlawful cotton subsidies.<sup>204</sup> The subsidies were entrenched in U.S. domestic politics and unlikely to change in the near term. Thus, Brazil used the threat of countermeasures to extract a concession. Now, the United States subsidizes its own cotton industry and compensates Brazil's.<sup>205</sup> In the *EC—Hormones* dispute, U.S. and Canadian countermeasures were ineffective at inducing Europe to lift its unlawful prohibition of hormone-treated beef.<sup>206</sup> The parties eventually recalibrated their relationship. Europe still prohibits hormone-treated beef,

198. See *Aerolíneas Argentinas S.A. v. U.S. Dep't of Transp.*, 415 F.3d 1, 2 (D.C. Cir. 2005).

199. *Id.* at 3.

200. Air Transport Services Agreement, U.S.-Arg., art. VII, Oct. 22, 1985, T.I.A.S. No. 11,262.

201. See *Aerolíneas Argentinas*, 415 F.3d at 2.

202. *Id.* at 3–4.

203. In 2011, Argentina finally resolved its domestic impediments to compliance, and the parties reinstated their original agreement. See *Aerolíneas Argentinas, S.A.*, Order 2011-10-21, Docket DOT-OST-2003-15092 (U.S. Dep't of Transp. Oct. 26, 2011), available at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2003-15092-0466> (order to show cause, preliminarily terminating escrow payments); *Aerolíneas Argentinas, S.A.*, Order 2011-11-15, Docket DOT-OST-2003-15092 (U.S. Dep't of Transp. Nov. 14, 2011), available at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2003-15092-0467> (order terminating payments).

204. See WTO Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 19 November 2009*, ¶ 87, WT/DSB/M/276 (Jan. 29, 2010); Decision by the Arbitrator, *United States—Subsidies on Upland Cotton*, ¶ 6.1, WT/DS267/ARB/1 (Aug. 31, 2009) (authorizing countermeasures).

205. Memorandum of Understanding between the U.S. and Braz. Regarding a Fund for Technical Assistance and Capacity Building with Respect to the Cotton Dispute (WT/DS267) in the World Trade Organization, U.S.-Braz., Apr. 20, 2010, T.I.A.S. 10-420, available at <http://www.state.gov/documents/organization/143669.pdf>; see also John Baffes, *Cotton Subsidies, the WTO, and the 'Cotton Problem'* (World Bank, Policy Research Working Paper No. 5663, 2011).

206. See Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶¶ 9–11, WT/DS320/AB/R (Oct. 16, 2008).

but it permits the United States and Canada more market access for high-quality beef.<sup>207</sup>

The unfriendliness in these cases is not about restoring a pre-breach status quo. The acting state intends for its recalibration to last indefinitely, at least into the medium term and without any obvious end point. It recalibrates the relationship to establish a new equilibrium, after the original one has been upset.

### B. Correcting Procedural Deficiencies

The practice demonstrates that states sometimes use unfriendly unilateralism, including disobedient measures, to help make international law. The practice also reveals why lawmaking is so critical. If international law is to govern meaningfully, it must be capable of preserving, reconciling, strengthening, and recalibrating its various norms. Of course, such lawmaking might and ideally would occur through formal processes or without unfriendly unilateralism. But as international law already recognizes on enforcement, its formal processes are sometimes inadequate. Unfriendly unilateralism can be a useful corrective.<sup>208</sup>

Unfriendly unilateralism can compensate for different kinds of procedural deficiencies. Sometimes, unfriendly unilateralism reinforces a collective decision, in the absence of a meaningful alternative for making that decision effective. Recall that the International Whaling Commission lacked any formal mechanism for binding all states to the commercial whaling moratorium, let alone for inducing all states to comply. Unfriendly unilateralism helped make the moratorium effective.<sup>209</sup> Similarly, in the Norway-Iceland fishing dispute, unfriendly unilateralism supported emerging expectations on the duty to cooperate in UNCLOS. At the time of the dispute, Norway and Iceland had both been participating in multilateral negotiations on the straddling fish stocks agreement. However, this formal lawmaking process

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207. See Memorandum of Understanding between Canada and E.C. Regarding the Importation of Beef from Animals not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by Can. To Certain Products of the E.C., Mar. 17, 2011, in Joint Communication from the E.U. and Can., *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/26 (Mar. 22, 2011); Memorandum of Understanding between the United States of America and the European Commission Regarding the Importation of Beef from Animals not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Communities, May 13, 1999, in Joint Communication from the European Communities and the United States; *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/28 (Sept. 30, 2009) available at [http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc\\_145411.pdf](http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145411.pdf).

208. Cf. ALLEN BUCHANAN, HUMAN RIGHTS, LEGITIMACY, AND THE USE OF FORCE 301 (2010) (arguing that illegal acts of reform can be morally justified, in part because the international system is “more in need of improvement [than developed legal systems] and less endowed with resources for relatively expeditious lawful improvement”).

209. See *supra* notes 128–29 and accompanying text.

was protracted and incomplete.<sup>210</sup> Iceland exploited the delay to overfish and potentially to set the foundation for a long-term claim on Barents Sea fish.<sup>211</sup> The unfriendly unilateralism in these incidents supported not the acting state's own agenda but rather a widely shared and collective agenda. Moreover, the acting state did not circumvent but rather worked through the designated international process for pursuing that agenda. The designated process was just insufficient.

Even when formal processes are technically available, they might be ineffective or unreliable in specific kinds of cases. For example, states looking to address human rights atrocities *could* seek Security Council authorization before acting unfriendly. At least in some cases, these states could also file a formal complaint before a human rights court or treaty body. However, states rarely pursue those options.<sup>212</sup> The Security Council is unreliable in human rights cases, and the complaint mechanisms under the human rights treaties are cumbersome. Rather, the routine process for addressing gross human rights violations is anarchic. Varied global actors address these violations in multiple, disconnected arenas. States that use unfriendly unilateralism to preserve human rights norms usually tap into that anarchic process. Take a concrete example. In 2005, the United States and Europe acted unfriendly toward Uzbekistan after Uzbekistan refused to investigate mass killings in Andijan.<sup>213</sup> Though the United States and Europe acted unilaterally, they acted in concert with the U.N. General Assembly.<sup>214</sup> Their unfriendly unilateralism reinforced the General Assembly's collective decision that Uzbekistan had acted badly. The United States and Europe did not exhaust every available process before using unfriendly unilateralism, but neither did they undercut the ordinary human rights process.

The same might be said of the unfriendly unilateralism against Iran, although this is a more difficult case. Recall that, until 2010, when the Security Council authorized a broad range of unfriendly measures against Iran, several states were taking such measures unilaterally. Some might view this

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210. See *supra* note 85 and accompanying text. In addition, trilateral negotiations involving Norway, Iceland, and Russia had failed to resolve the dispute. See Robin R. Churchill, *The Barents Sea Loophole Agreement: A "Coastal State" Solution to a Straddling Stock Problem*, 14 INT'L J. MARITIME & COASTAL L. 467, 471 (1999).

211. See Straddling Fish Stocks Agreement, *supra* note 85, art. 7(2)(e), 11(b) (defining cooperation in part by each state's previous fishing patterns and dependence on a given stock).

212. See Christian J. Tams, *Individual States as Guardians of Community Interests*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 379, 383–85, 388 (Ulrich Fasstenrath et al. eds., 2011) (“[N]one of the universal human rights bodies has ever been seized with a single inter-State application.”).

213. See, e.g., Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 685, 121 Stat. 2361 (travel bans); U.S. DEP'T OF STATE, FY 2005 U.S. ASSISTANCE TO EURASIA, available at <http://www.state.gov/p/eur/rls/rpt/63182.htm> (aid restrictions); Council Common Position (EC) No. 2005/792/CFSP of 14 November 2005, arts. 1–3, 2005 O.J. (L 299) 72 (aid restrictions and suspension of meeting under the EU-Uzbek Partnership and Cooperation Agreement).

214. See G.A. Res. 60-174, ¶ 4(a), U.N. Doc. GA/RES/60/174 (Mar. 14, 2006); see also Cleveland, *supra* note 26 (describing unilateral but coordinated unfriendliness against Burma).

unfriendly unilateralism as circumventing the more formal processes at the IAEA and Security Council.<sup>215</sup> After all, the IAEA and Council *were* seized of Iran's case, and the Council *had* by 2006 required or authorized a discrete set of unfriendly acts against Iran. Even so, the states that used unfriendly unilateralism did not avoid the IAEA or Council. To the contrary, these states worked hard to obtain IAEA and Council decisions on Iran.<sup>216</sup> And the unfriendly unilateralism supported, rather than undercut, those collective decisions.<sup>217</sup> The IAEA, the Security Council, and the states that acted unilaterally were all pursuing the same agenda against Iran. They were trying to pressure Iran to stop enriching uranium and accept a more intrusive oversight arrangement.

In other cases, unfriendly unilateralism did not reinforce a collective decision that had already been made but rather catalyzed a stagnant or dysfunctional decisionmaking process. In the Canada-EU and Canada-U.S. fishing disputes, the designated processes for allocating fish had malfunctioned. The EU disregarded NAFO's allocation and then unilaterally claimed for itself a much larger share. The United States was intransigent on the bilateral commission for allocating Pacific salmon. Canada used unfriendly unilateralism only after those processes had failed and only to trigger collective decisions.<sup>218</sup> In particular, Canada did not purport to impose *its* preferred allocations on the targets. By contrast, the United States was more assertive in using Section 301 actions to help develop the trade regime. Some 301 actions advanced U.S. policies that had not yet been accepted by other states. Moreover, the United States sometimes used 301 actions to demand concessions without offering any concessions of its own. The United States thus left the impression that it sought not to instigate good-faith negotiations but rather to dictate its preferred norms.<sup>219</sup> Unsurprisingly, such 301 actions were especially controversial.<sup>220</sup>

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215. See Dupont, *supra* note 23, at 333–34; cf. *Summary Records of the Meetings of the 44th Session*, [1992] 1 Y.B. Int'l L. Comm'n 144, U.N. Doc. A/CN.4/SER.A/1992 (comments of Alain Pellet (France)) (arguing that Security Council action should terminate the right to take countermeasures).

216. See, e.g., David E. Sanger, *Administration Presses its Case Against Iran Abroad*, N.Y. TIMES, June 8, 2010, at A13 (discussing U.S. efforts at Security Council); Thom Shanker, *Security Council Votes to Tighten Iran Sanctions*, N.Y. TIMES, Mar. 25, 2007, at A11 (reporting on effort to achieve “a unanimous vote that would symbolize united world opinion against Iran's nuclear ambitions”); Steven R. Weisman, *Allies Resist U.S. Efforts to Pressure Iran on Arms*, N.Y. TIMES, Sept. 9, 2004, at A13 (“The United States has tried and failed five times to get the votes to refer the matter to the Security Council . . .”).

217. See *supra* note 25; cf. Letter dated May 2, 2008 from Alejandro Wolff, Deputy Permanent Representative of the United States of America to the United Nations, to the Chairman of the Security Council Committee, Annex at 2, UN Doc. S/AC.50/2008/34 (May 13, 2008) (encouraging states to take unilateral measures that are “complementary to those explicitly required by UNSCR 1803 to achieve the international community's ultimate objective”).

218. See *supra* notes 156–79 and accompanying text.

219. See Bhagwati, *supra* note 181, at 5.

220. See BAYARD & ELLIOTT, *supra* note 182, at 71 (explaining that critics resent “when the United States unilaterally determines that a foreign practice that violates no international agreement is ‘unreasonable,’ demands unilateral concessions, and unilaterally retaliates”); Bhagwati, *supra* note 181, at 3 (coining the term “aggressive unilateralism” to describe 301 actions for GATT-legal conduct).

Finally, unfriendly unilateralism sometimes just filled a procedural void. Consider the cases in which states used unfriendly unilateralism to recalibrate relationships that had already been unilaterally altered. A good formal alternative for achieving that end did not exist. Sure, the acting states could have tried to renegotiate with the scofflaws in order to find a new equilibrium. But the scofflaws had already claimed what they themselves wanted; they lacked much incentive to agree to changes that would operate only to their detriment. Moreover, although a third-party body was in some cases available to reinforce the original bargain, such bodies are not always equipped to restructure relationships.<sup>221</sup> In the Canada-Brazil dispute on aerospace subsidies, the U.S.-Brazil dispute on cotton subsidies, and the *EC-Hormones* dispute, WTO bodies authorized countermeasures to reinstate the law as it was. But that remedy was inapt because the scofflaws were intent on changing the law. Unfriendliness helped move the regime to a new and more stable third place.

#### IV. UNFRIENDLY, UNILATERAL, SOMETIMES NONCOMPLIANT (REDUX)

This Article has challenged the idea, which pervades the scholarly literature and drives the doctrine on state responsibility, that unfriendly unilateralism's principal legal function is to enforce law. Unfriendly unilateralism also helps generate law. And like for enforcement, using it for lawmaking can all things considered be *good* for the international legal order. Enforcement and lawmaking can both occur in formal channels or without unfriendly unilateralism. But they do not always. Unfriendly unilateralism can fill that procedural void and help keep the law relevant.

Still, some readers are likely to insist that unfriendly unilateralism should not be used in lawmaking, except insofar as the doctrine already permits. The doctrine on state responsibility strikes a delicate balance between the interest in preventing abuse and the interest in enforcement. The worry, then, is that tolerating more unfriendly unilateralism in lawmaking could: (1) increase the burdens on the principle of sovereign equality, or (2) tilt the international order toward power politics and away from the rule of law. However, that worry has never justified a blanket prohibition of unfriendly unilateralism, or even of unfriendly unilateralism that is noncompliant. Such conduct has long been tolerated for enforcement and is not inherently more troubling just because it is used for lawmaking.

##### A. *Preserving Sovereign Equality*

Some readers might worry that unfriendly unilateralism *is* inherently more troubling when it is used for lawmaking than when it is used for

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221. *Cf., e.g.,* Gabcíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶¶ 140–41 (Sept. 25) (“It is not for the Court . . . [but] for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty . . .”).

enforcement. With enforcement, the acting state simply pressures a target to comply with existing law. The target presumably has accepted the norm as law. By contrast, an acting state that uses unfriendly unilateralism in lawmaking seems to pressure the target both to accept the norm as law and to comply with the norm in the specific circumstances. The lawmaking scenario thus might appear to intrude more on the target's sovereign equality. However, that depiction of how unfriendly unilateralism works in lawmaking is deeply incomplete.

First, the lawmaking perspective demonstrates that conduct that can easily be characterized as enforcement is commonly also prescriptive. And the prescriptive component can be quite substantial. Consider a norm that is legally binding but only marginally effective. This arrangement might reflect not a failure in enforcement but rather a legislative compromise. States might never have agreed to the norm if it were to be fully effective.<sup>222</sup> Unilaterally increasing the level at which the norm is enforced would betray a legislative compromise and amount to active lawmaking. Likewise, a state that unilaterally enforces a new or contested interpretation of a norm is engaged in lawmaking. When Norway enforced a nascent interpretation of the UNCLOS duty to cooperate, and when the United States enforced its preferred interpretation of the U.S.-France aviation agreement, they were helping to develop the law. They were not simply giving effect to the law as it was.

Second, unfriendly unilateralism does not necessarily intrude less on the target's sovereign prerogatives when it can reasonably be labeled "enforcement" than when it cannot. Compare the United States' conduct in the *Air Services* case with Canada's conduct in the EU fishing dispute. Canada was not enforcing a legal obligation against the EU because the EU was entitled to opt out of NAFO's allocation. Still, it is not at all clear that Canada intruded more on the EU's sovereign prerogatives than the United States intruded on France's. Canada and the United States both advanced their own interests, but neither unilaterally made law or overrode its adversary's sovereign prerogatives. Unfriendly unilateralism simply pressured the adversary to negotiate more seriously and try harder to find a mutually agreeable solution.

Third and related, a state that uses unfriendly unilateralism cannot by itself create law. Because lawmaking is an interactive process, it depends on multiple actors accepting a given claim as law.<sup>223</sup> Canada did not alone es-

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222. See Reisman, *Soft Law*, *supra* note 92, at 137, 139.

223. See, e.g., North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 44 (Feb. 20); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 39 (1975) ("When acts or claims by some States encounter protests from other States, the acts (or claims) and protests often cancel each other out, with the result that no rule of customary law comes into being."); Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 22 (1986) ("[T]he persistent objector rule serves to soften the threat that the force of 'law' will impose a new and objectionable rule on the State that is content with the status quo."); Reisman,

establish the new legal rules on allocating North Atlantic halibut, just as Iceland did not alone establish the 200-mile exclusive economic zone in the law of the sea. These states used unfriendly unilateralism to stimulate an iterative process that legitimized certain norms as law. Had other states rejected, instead of accepted, those norms, the law might have shifted in an entirely different direction. Indeed, one reason that unfriendly unilateralism is not more common in lawmaking<sup>224</sup> might be that it risks antagonizing other states—which can *delegitimize* and thus undercut the lawmaking effort.<sup>225</sup> A state that exploits its power to impose its nationalistic agenda on the target, without hooking into some source of legitimacy, might get what it wants in a particular case but is unlikely to generate a stable and effective legal norm.<sup>226</sup>

Finally, even if unfriendly unilateralism is more offensive when it is used for lawmaking than when it is used for enforcement, the solution is not to adhere in all instances to the doctrine on state responsibility. Recall that the doctrine gives states full discretion over retorsions. These measures can be quite damaging to the target and corrosive to its sovereign equality. Imagine if the United States suddenly terminated the vast aid that it has for decades given Egypt.<sup>227</sup> The aid is not legally required, but terminating it would hurt Egypt more than would most proscribed acts.<sup>228</sup> Indeed, because the doctrine is so indulgent of retorsions and suspect of the alternatives, it

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*Lawmaking*, *supra* note 88, at 110 (explaining that the audience ultimately determines whether a norm is authoritative). Some skeptics of international law assume that the law simply mirrors the interests of powerful states—which, in cases of unfriendly unilateralism, would mean the interests of the acting states. See, e.g., KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); Stephen D. Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93, 95 (2000); but cf. Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 31 (2000) (“[Third World Approaches to International Law (TWAIL) seek] to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy . . . that subordinate[s] non-Europeans to Europeans.”). However, I along with most other legal scholars reject that view. See Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 86 (2006) (“Most commentators are confident that international law has at least some autonomous power.”).

224. States often refrain from using unfriendly unilateralism even when it would be lawful. See, e.g., CHAYES & CHAYES, *supra* note 42, at 32–33 (“[S]anctioning authority is . . . rarely used when granted.”); NOORTMAN, *supra* note 70, at 194 (reviewing five incidents to conclude that “states do not easily resort to countermeasures”); TAMS, *supra* note 45, at 230 (“[P]ractice [on erga omnes violations] . . . does not suggest that the recognition of a right to take countermeasures would necessarily lead to ‘mob violence’ or a ‘reign of chaos.’”).

225. See Hurd, *Legitimacy*, *supra* note 38, at 385 (explaining that unfriendliness “reduces the likelihood that the [target] will comply without coercion in the future.”).

226. See Claude, *supra* note 38, at 368, 375 (“Legitimacy . . . makes all rulers more effective.”); Krzysztof J. Pelc, *Constraining Coercion? Legitimacy and its Role in US Trade Policy, 1975-2000*, 64 INT'L ORG. 65 (2010) (demonstrating that legitimacy increases likelihood that target will comply); Alexander Thompson, *The Rational Enforcement of International Law: Solving the Sanctioners' Dilemma*, 1 INT'L THEORY 307 (2009) (explaining that legitimacy increases likelihood that third states will support an action).

227. See JEREMY M. SHARP, CONG. RESEARCH SERV., RL32260, U.S. FOREIGN ASSISTANCE TO THE MIDDLE EAST: HISTORICAL BACKGROUND, RECENT TRENDS, AND THE FY2011 REQUEST 24 (2010) (describing aid).

228. U.S. Dep't State, *Background Note: Egypt*, STATE.GOV (Mar. 19, 2012), <http://www.state.gov/r/pa/ei/bgn/5309.htm> (describing U.S. aid as “an important pillar of the bilateral relationship”).

creates the perverse incentive to use retorsions even when they are more damaging.<sup>229</sup> Accepting unfriendly unilateralism in lawmaking only insofar as the doctrine permits might be counterproductive, if the goal is to preserve states' sovereign equality.

### B. *Blending Law with Power*

Readers still might worry that inviting unfriendly unilateralism—and especially disobedient measures—in lawmaking would undercut the rule of law. International lawyers generally accept that international law and power politics are intertwined,<sup>230</sup> but many assume that the two pull in opposite directions: the more decisions reflect unilateral power, the less rooted they are in law.<sup>231</sup> Thus, even lawyers who appreciate the enforcement value of unfriendly unilateralism bemoan that it is a “crude and unhappy way of responding to unlawful conduct.”<sup>232</sup> Most prefer for enforcement to be supervised by third parties,<sup>233</sup> because stripping discretion from individual states is said to “strengthen the primacy of the rule of law.”<sup>234</sup> Moreover, most assume that disobedience necessarily undercuts the rule of law.<sup>235</sup>

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229. Cf. KIMBERLEY N. TRAPP, *STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM* 203 (2011) (finding that states sometimes use retorsions where noncompliance would or might be unlawful).

230. See generally Steinberg & Zasloff, *supra* note 223 (reviewing legal literature).

231. See, e.g., FRANCIS FUKUYAMA, *AFTER THE NEOCONS: AMERICA AT THE CROSSROADS* 7 (2007) (describing the common internationalist goal of replacing power politics with law); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 110 (2d ed. 1997) (“[T]he history of civilization may be described as a gradual evolution from a power-oriented approach . . . towards a rule-oriented approach.”); SHAW, *supra* note 66, at 12 (“Power politics stresses competition, conflict and supremacy . . . [but] law aims for harmony and the regulation of disputes.”); Cherif Bassiouni, *The Permanent International Criminal Court, in JUSTICE FOR CRIMES AGAINST HUMANITY* 173–210 (Mark Lattimer & Philippe Sands eds., 2003) (celebrating the International Criminal Court as a move from politics to law); Andreas L. Paulus, *International Law After Postmodernism: Towards Renewal or Decline of International Law?*, 14 *LEIDEN J. INT’L L.* 727, 748, 751 (2001) (“[P]olitics without legal bounds . . . [is] a society subjected to the unfettered, unabashed, unashamed exercise of power.”); César Sepúlveda, *Methods and Procedures for the Creation of Legal Norms in the International System of States: An Inquiry into the Progressive Development of International Law in the Present Era*, 33 *GERMAN Y.B. INT’L L.* 432, 442 (1990) (“What the jurist should aspire to . . . is for the scope of international law to be increased and for political power to be reasonably restricted. . . .”).

232. James Crawford, *Counter-measures as Interim Measures*, 5 *EUR. J. INT’L L.* 65, 66 (1994).

233. See *infra* notes 253–57 and accompanying text.

234. Special Rapporteur on State Responsibility, *Fifth Report on State Responsibility*, *supra* note 61, at 16; see also, e.g., Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, 30 *U. PA. J. INT’L L.* 1133, 1140 (2009) (explaining that a dispute involving countermeasures “tends to be based on politics . . . rather than the legal merits”); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *N.Y.U. J. INT’L L. & POL.* 709, 723 (1999) (“[I]nternational jurisdictions [are] essential tools for . . . the furtherance of the international rule of law.”); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 *EUR. J. INT’L L.* 73, 90 (2009) (“Clearly, the emergence of the new international judiciary advances the rule of international law . . . .”); but cf. Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *TEX. INT’L L.J.* 405, 415 (2003) (underscoring that third-party mechanisms are not shielded from politics).

235. See, e.g., sources at *supra* notes 42–43.



This Article has resisted that view.<sup>236</sup> I have argued that unilateral and even disobedient exercises of state power can support international law.<sup>237</sup> They can help overcome inaction or give effect to collective decisions. To tolerate unfriendly unilateralism in lawmaking is not to accept an international order that is rooted in state power at the law's expense. It is to accept that the international order sometimes uses state power in order to make the law relevant or effective. Indeed, this is precisely why international law already permits unfriendly unilateralism for enforcement.

Still, readers might have two lingering and related objections. First, some might worry that unfriendly unilateralism benefits only a handful of powerhouse states. It does not. Iceland's position on the exclusive economic zone is now law, even though Iceland was by conventional standards less powerful than the United Kingdom.<sup>238</sup> Conventional standards for appraising power are often misleading because power depends on what each state wants and can offer in the relationship.<sup>239</sup> A powerhouse that is deeply invested in a legal relationship has more to lose from disrupting that relationship than does a small and disinterested state that can easily walk away.<sup>240</sup> Moreover, a weak state that is not itself in a position to use unfriendly unilateralism might well benefit from the actions of more powerful states.<sup>241</sup>

Second, readers might object that noncompliance necessarily undercuts the rule of law by eroding the strayed-from norm. It does not. Because unfriendly unilateralism is targeted at a specific state, the negative repercussions can be fairly limited. The acting state usually can communicate to the target the reason for the noncompliance. And where the acting state strays from a multilateral norm, it strays only against the target. It still complies in its relations with all other states. That pattern of behavior does not necessarily communicate a general retreat from the norm.

236. For a more general argument that illegal acts of reform can be consistent with a commitment to the rule of law ideal, see BUCHANAN, *supra* note 208, at 306–15.

237. Cf. Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INT'L L. J. 888, 941 (2009) (arguing that unilateralism by powerful states can benefit international law by "allowing states to capture some of the benefits, in terms of credibility, of legalizing cooperative rules as well as the welfare gains from having a market leadership mechanism through which legal rules can be modified over time").

238. See *supra* notes 107–11 and accompanying text; see also Louis Henkin, *Politics and the Changing Law of the Sea*, 89 POL. SCI. Q. 46, 47 (1974) ("Today the law [of the sea] is being molded by many states, principally weaker and poorer states. . . .").

239. See Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 51–60 (2012) (reviewing international relations literature on power).

240. See Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. INT'L L.J. 379, 383 (2010) ("[S]TATES WITH LITTLE TO GAIN FROM EXISTING RULES ARE 'POWERFUL' . . . PRECISELY BECAUSE THEIR OUTSIDE OPTIONS LIKELY PRESENT THEM WITH CREDIBLE THREATS TO WALK AWAY FROM EXISTING RULES OF COOPERATION.").

241. STOWELL, *supra* note 53, at 46–49.

## V. IMPLICATIONS

Blanket objections to the use of unfriendly unilateralism in lawmaking—or to the use of disobedient measures in lawmaking—do not hold. Yet my argument that unfriendly unilateralism sometimes is and should be used in lawmaking raises several follow-up questions. I identify below three questions that warrant further study, and I sketch some preliminary answers.

## A. Normative Implications

My claim that unfriendly unilateralism is sometimes desirable in lawmaking leaves open the question of *when* it is desirable. The doctrine on state responsibility limits the answer to retorsions. Retorsions are said to be tolerable because they comply with existing law. I have already argued that compliance is too crude a metric for assessing unfriendly unilateralism. Compliant conduct can be quite destructive to the target, and noncompliant conduct can, all things considered, be beneficial. Rather, a normative appraisal should also account for three other factors.

First, the appraisal should consider the nexus between the unfriendly unilateralism and more collective processes or decisions. As I have already argued, unilateralism is disparately justifiable. Unilateral decisions are troubling when they circumvent an established and effective process in order to advance the acting state's own agenda. Some U.S. Section 301 actions probably fall in that camp. The United States used these actions, outside any international process, in order to push for substantive norms that were still highly contested. By contrast, unilateral decisions are considerably less troubling when they compensate for deficiencies in the available international processes and advance a collective agenda. Good examples might include Canada's conduct in the fishing dispute with the EU, and the U.S. and European measures in response to Uzbekistan's human rights failings.

Second, the severity of the unfriendliness also matters. In most of the cases discussed above, the unfriendliness was extremely mild. Yet severe unfriendliness can be devastating to the target state or population. This unfriendliness should give decisionmakers pause, no matter whether the conduct complies or is unilateral.<sup>242</sup> For instance, almost all of the unfriendliness against Iran has, since mid-2010, been compliant or authorized by the

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242. See, e.g., Drezner, *supra* note 41 (reviewing concerns about the potential severity of multilateral sanctions); Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT'L L. 63, 75–78 (2002) (arguing that multilateral sanctions should be proportional even if they are otherwise lawful); W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Programmes*, 9 EUR. J. INT'L L. 86, 128 (1998) (arguing that severe unfriendliness should be necessary and proportional); cf. *Draft Articles*, *supra* note 14, at 130 (“[A] State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.”).

U.N. Security Council.<sup>243</sup> This unfriendliness is discomfiting, even if it ultimately is justifiable, because it has caused Iran considerable distress.<sup>244</sup>

Third, any normative appraisal should consider the substantive agenda being pursued. Unfriendly unilateralism might be especially justifiable when it advances communal interests, like the global environment or human rights and security. This idea already motivates the literature on enforcing *erga omnes* obligations. Yet regimes that are supposed to advance communal interests confront challenges not only to enforcement but also to law-making. Some states see no particular benefit to developing or strengthening these regimes and can stymie efforts for reform. Meanwhile, because the regimes are ultimately not designed to balance the interests of individual states, catering too much to particular holdout states is insensible.<sup>245</sup> States might justifiably use unfriendly unilateralism in order to overcome pockets of intransigence and advance these interests. In fact, many of the cases discussed above involve interests that can reasonably be characterized as communal.<sup>246</sup>

To be clear, the substantive interests at stake might be sufficiently weighty even if they are not in any meaningful sense communal. Recall Iceland's conduct to expand the exclusive economic zone. Establishing a 200-mile zone was not in all states' economic interests. At the time, developed states with advanced technologies benefitted from distant fishing off the coasts of newly independent, developing states.<sup>247</sup> Pushing for a 200-mile zone helped redistribute some of the world's maritime resources from those developed states to coastal, developing states. Such redistributive ends might help justify unfriendly, unilateral, and at times disobedient means.

### B. *Doctrinal Implications*

The doctrine on state responsibility, which focuses exclusively on the compliance question, is extremely unlikely to change through formal channels. The Draft Articles on State Responsibility took decades of work and are now part of the fabric of international law.<sup>248</sup> States have no apparent appetite for reopening the draft articles or negotiating an alternative instrument on unfriendly unilateralism. Nevertheless, this Article has exposed a gap between the black letter doctrine on state responsibility and the prac-

243. See *supra* note 24 and accompanying text.

244. See Thomas Erdbrink & Clifford Krauss, *Oil Backed Up, Iranians Put It On Idled Ships*, N.Y. TIMES, July 4, 2012, at A1; Joby Warrick, *Iran Faces Deepening Economic Turmoil*, WASH. POST, June 17, 2012, at A4.

245. See Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1533, 1542 (2008) (book review).

246. See *supra* notes 123–26, 130–35, 156–79, 138–47 and accompanying text (whaling, *erga omnes* obligations, fishery conservation, global environment, and climate change); *cf. supra* notes 7–8 and accompanying text (nuclear non-proliferation).

247. See EXTAVOUR, *supra* note 113, at 157–59.

248. See David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 817 (2002).

tice. States sometimes use disobedient measures in lawmaking, without repercussion. This Article thus raises the question of how to manage the gap between doctrine and practice.

Three basic strategies might be pursued. One is to try to bring the practice more in line with the doctrine. States that use disobedient measures violate law and can be held responsible, even if only by other states responding with unfriendly unilateralism. This first strategy reflects a commitment to legal rules as rules but not necessarily to the rule of law. Though disobedient measures can destabilize interstate relations or undercut substantive policy objectives, they also can have the opposite effect. They can help deepen interstate cooperation, bolster international law, and achieve shared policy goals. Applying the doctrine in all cases foregoes those potential rule-of-law benefits.

A second strategy is to modify the doctrine informally, through state practice over time. Recall, for example, that some scholars argue that an *erga omnes* exception on third-state countermeasures has developed or is developing informally.<sup>249</sup> A similar claim might be made for lawmaking. However, effectively translating such a claim into formal doctrine would require delineating, more precisely than is now possible, when measures that are currently disobedient should be lawful. Otherwise, the claim lacks discernable limits and appears to invite conduct that, even if ultimately justifiable, is far from ideal.

Perhaps the most appealing strategy, then, is to continue to tolerate the gap between doctrine and practice. States would occasionally use or acquiesce in disobedient measures even as they continue to endorse the doctrine. This strategy is preferable to the first because it allows states to seize on unfriendly unilateralism's lawmaking benefits. The practice reveals that even disobedient measures can bring those benefits. This strategy is also preferable to the second. It does not require delineating, in generally applicable terms, when measures that are now disobedient should be lawful. Instead, the strategy allows disobedient measures to be appraised case-specifically and puts on the acting state the onus of demonstrating that, in the circumstances, disobedience does more good than harm.<sup>250</sup> Finally, this third strategy is appealing because it recognizes that the ideals that animate the doctrine—about state cooperation and equality—should be endorsed discursively, even when they are unfeasible in practice.<sup>251</sup>

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249. See *supra* note 76 and accompanying text.

250. Some scholars have argued for a similar arrangement in the context of unilateral humanitarian interventions that involve armed force. See, e.g., Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 22 (1999).

251. See generally Michael Reisman, *Myth System and Operational Code*, 3 YALE STUD. WORLD PUB. ORD. 229 (1977) (discussing gaps between myth systems and operational codes).

### C. Institutional Implications

The gap between doctrine and practice puts particular pressure on third-party dispute resolution bodies. Recall that countermeasures are justified on the ground that international law's formal enforcement processes are often deficient.<sup>252</sup> This justification suggests that countermeasures are or should be more suspect when third-party bodies can meaningfully supervise enforcement. Indeed, when the ILC was developing the Draft Articles on State Responsibility, it proposed *requiring* states to exhaust available third-party options before resorting to countermeasures.<sup>253</sup> The proposal was rejected not as undesirable but as unrealistic.<sup>254</sup> The ILC's final commentary still opines that, where both options are available, third-party bodies "should substitute as far as possible for countermeasures."<sup>255</sup> Since then, third-party bodies have continued to proliferate, and they now participate more routinely in international decisions.<sup>256</sup> Some commentators thus contend that the ILC was just "ahead of its time"—that states should or even must exhaust third-party options before resorting to countermeasures.<sup>257</sup> By contrast, this Article questions the extent to which third-party dispute resolution bodies should replace unfriendly unilateralism.

Most such bodies are suited for classically judicial functions, like applying existing law, defining appropriate remedies, and participating in interstitial lawmaking. Disputes that ask whether a state violated its obligations or what remedy is due might be well suited for third-party resolution. For these disputes, third-party resolution might be preferable to unfriendly unilateralism.<sup>258</sup> But third-party resolution is likely to be inapt when disputes require fundamentally altering a legal relationship.<sup>259</sup> The parties them-

252. See *supra* note 48 and accompanying text.

253. See Rep. of the Int'l L. Comm'n, 44th Sess., May 4–July 24, 1992, ¶ 187, U.N. Doc. A/47/10, GAOR, 47th Sess., Supp. No. 10 (1992).

254. See *id.* ¶ 160 ("[I]t was unrealistic to expect cross-the-board acceptance of such a regime for the whole of international law . . .").

255. *Draft Articles*, *supra* note 14, at 136.

256. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 916 (2005) (describing significant increase in judicial caseload); Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789, 789 (2009) ("The use of courts for a variety of international disputes has now been normalized . . ."); Shany, *supra* note 234, at 75 ("[T]he number of international courts and other international law-applying institutions (such as arbitration institutions and quasi-judicial committees) has grown exponentially.").

257. MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW 259 (2008); see also NOORTMANN, *supra* note 70, at 4 (describing "an increasing skepticism" of countermeasures).

258. Even in these cases, the third-party body must be accepted as the appropriate decision-maker or embedded in a fairly robust regime for it to be effective. See, e.g., Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26, 47 (1997).

259. Many third-party mechanisms recognize their limits in these kinds of disputes. See, e.g., Final EFTA Decision, *supra* note 83, at 3 (declining jurisdiction over question arising under a separate regime); Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 56, WT/DS308/AB/R (Mar. 6, 2006) ("We see no basis . . . for [WTO bodies] to adjudicate non-WTO disputes."); *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, ¶¶ 140–41 (Sept. 25) ("It is not for the

selves must accept the new arrangement in order for it to function smoothly. Relying too heavily on third-party bodies might lead to a less effective or legitimate result than would using unfriendly unilateralism to instigate a decentralized process for reform.<sup>260</sup>

Further, third-party bodies that confront unfriendly unilateralism will be both expected and inclined to apply the formal doctrine on state responsibility. A third-party body that strays too far from the doctrine risks undermining its legitimacy and creating the impression that it acted *ultra vires*.<sup>261</sup> But applying the doctrine risks inhibiting unfriendly unilateralism that, though on the whole desirable, is disobedient. Here again, a third-party body might best decide a case by avoiding the merits and kicking the substantive decision back to the parties.

## VI. CONCLUSION

This Article has argued that unfriendly unilateralism not only enforces but also helps generate international law. Further, its lawmaking functions are vital to the international legal order. Lawmaking helps maintain the legal order and keep the law relevant. Though lawmaking usually occurs through formal processes or without unfriendly unilateralism, those alternatives are sometimes stagnant or ineffective. Unfriendly unilateralism is a potentially useful corrective.

Of course, unfriendly unilateralism is not an unalloyed good. The acting state exploits its power and might even stray from its legal obligations, without the structured oversight or input of other global actors. The conduct thus can be abused. An acting state might overwhelm the target's sovereign prerogatives or displace important legal interests. But that risk of abuse has never warranted an absolute ban on unfriendly unilateralism—or even on unfriendly unilateralism that is noncompliant. International law tolerates unfriendly unilateralism for enforcement because, here, the conduct is understood to do more good than harm. Enforcement is not always more valuable than lawmaking. And preserving the status quo is not always preferable to instigating change.

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Court . . . [but] for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty. . . .”).

260. See Shany, *supra* note 234, at 88 (“Whereas diplomatic dispute settlement is flexible and may generate imaginative solutions which are closely attuned to the cumulative interests of the parties to the dispute . . . [a third-party’s ability] to fix bilateral relations, solve the roots of the problem at hand, and generate compliance may be limited.”).

261. See Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in International Law*, 93 AM. J. INT’L L. 302, 305 (1999).