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INTERNATIONAL LAW AS A COUNTERWEIGHT TO POWER ASYMMETRIES IN INTERNATIONAL POLITICS

This panel was convened at 11:00 a.m., Thursday, March 28, 2019, by its moderator Michael Byers of the University of British Columbia, who introduced the panelists: Brian Egan of Steptoe & Johnson LLP; Victoria Hallum of the New Zealand Ministry of Foreign Affairs and Trade; Jan Paulsson of Three Crowns LLP; and Danielle Yeow Ping Lin of the Singapore Attorney General's Chambers.

Introductory Remarks by Michael Byers*

I have the great honor of moderating this panel on international law as a counterweight to power asymmetries in international politics. We have a perfect panel to dig into these issues, not so much from an academic perspective, but from the perspective of practitioners with real-world examples that academics like me can then take and use for the purposes of our analysis. I am joined by Victoria Hallum from the Ministry of Foreign Affairs and Trade of New Zealand, Danielle Yeow Ping Lin from the Attorney General's Chambers in Singapore, Jan Paulsson, who is one of the world's leading private practitioners, and Brian Egan, who was the Legal Adviser at the U.S. State Department at the end of the Obama Administration.

We will start with Victoria because she comes from a relatively small country. Victoria, does international law function as a counterbalance to power or is this just a naïve view on the part of academics like me?

Remarks by Victoria Hallum**

My reflection on this, based on over twenty years of practice, is that setting up international law in opposition to power is just too simplistic. As Oscar Schachter identified, power is incorporated within international law and international law is a means of marshaling and channeling that power, whether that be through customary international law or treaty regimes. This is not surprising when we remember that we are fundamentally dealing with a consent-based system. The international legal system can be likened to a bank that requires regular sustained deposits of power to continue to function. Now, unfortunately, we have been observing some pretty significant withdrawals from the bank at the moment, so the bank of international law is looking a bit shaky. But I still think there is a lot that we can do about it.

I am not saying that international law is simply an instrument of the powerful. There are two reasons why it is not. Firstly, power can be a pretty blunt and ineffective tool to deal with many circumstances. I think there are pretty massive gaps where power does not suffice and does not create solutions. In these areas, the powerful and the powerless alike have a shared interest in creating a stable and predictable rules-based approach to problems. Daniel Bethlehem identified these areas very well in a lecture he gave called "The End to Geography." He set out six interconnected areas where you need something more than power to resolve issues: shared spaces and global

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commons; issues to do with the movement of people both voluntary and not; challenges to human, animal, and plant health; trade and financial flows and the interconnectedness that comes with it; cyberspace; and cross-boundary challenges to security, particularly from nonstate actors.

Secondly, the sum of the international system is greater than its individual parts. There is a degree of layeredness and interconnectedness amongst the different treaty regimes, especially when they are backed up by institutions and dispute settlement systems. The system as a whole operates a bit like plywood and has more strength and resilience than one might at first think.

So while we are observing some challenges to the rules-based order, I think the system has a kind of muscle memory and will endure, for a period of time at least. In summary, I would say international law does not function so much as a counterbalance to power, but it is a useful way of channeling and focusing the power of states to solve transboundary problems.

Michael Byers

I want to ask Danielle a question that follows from Victoria's points, and that is, how can less powerful states like Singapore make that "plywood" even more resilient? How can small states use international law to equalize or at least reduce the power imbalances that exist in the international system?

Remarks by Danielle Yeow Ping Lin*

Thank you, Victoria, for the very pertinent comments, which resonate with me. I would like to start off with this: We hold on to the dogma, and hopefully, others as well, that all states are equal regardless of their size, geopolitical power, and that the rule of law applies. Such a perspective is critical for a small state such as Singapore. Having said that, I do wonder whether at a certain level, all states or all actors within the state necessarily feel that way. From that perspective, what can we collectively do to ensure that the system remains robust, with a certain level of discipline within it? So, I would say the overriding approach for us is similar to the title of a book written by our former foreign minister, Professor Jayakumar: *Be at the Table, or Be on the Menu*. Are we merely price-takers, or do we join the international community in setting the rules?

This very important question leads me to the next point: How can we be at the table? Is it realistic for small states to be there? I would like to think yes, indeed it is. International law, no different from domestic law, embodies values and policy choices that are continually contested and negotiated. One would approach this in the same way that one would approach any discussion or debate on the domestic agenda where there are different views. How do we work around differing views and players? How do we gather others to come to our point of view?

I would say that there are a couple of steps. First, active involvement in shaping new and emerging norms. I very much like what Victoria said when she mentioned cybersecurity, cross-border challenges to security, and trade. These are very important areas. But how can we see ahead of the curve? How do we participate in new norms? For example, Singapore was very much involved in the development of the Singapore Mediation Convention under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). Another important area is the digital economy. In this regard, Singapore is one of the seventy-eight World Trade Organization (WTO) members that have agreed to start negotiations on a new framework for e-commerce. Second, to be effective in looking ahead to new norms, we need to be able to scan for new trends and challenges and to think ahead of the curve. We have to engage with the private sector because

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they are players as well, if not in the traditional sense of state-to-state relations or international dispute settlement. But a lot of the work that the government does cannot be done in a vacuum, especially in areas such as cyberspace, where many of the tools and mechanisms rest within the private sector. So we have to anticipate and be responsive to new needs. We have to build up credibility and relevance to be a trusted bridge-builder, even on issues that perhaps may not be core to national interests but nonetheless are important in maintaining the involvement of a small state in the international community. So, whenever we can, we want to play a trusted mediator role, to be a bridge-builder, and to come up with different perspectives if possible.

We recognize that a variety of mechanisms are needed. One does not just look at norms in the sense of binding rules. There is a lot of potential in new areas, and more controversial areas, where there may be more comfort in looking to soft law, guidelines, or other cooperative mechanisms.

We can also play a role in the interpretation and application of existing global rules by contributing to state practice. For example, we are third parties in over fifty WTO cases. We see a need, especially when they involve systemic issues, for us to come in as a third party. For example, we have made interventions in the *Tobacco Plain Packaging* case, and we recently made interventions on the interpretation of the National Security Exception.

We also use and respect international dispute settlement bodies, as we have done with our neighbor in resolving territorial disputes in a peaceful and calm manner.

Another point concerns what I call multipolar hubs. We need to be very flexible in looking at where we can work with interested and like-minded parties on specific issues. You may not be the world power in everything but in certain areas, you can lead together with others; you can create little centers. We have found this to be very effective in the bilateral arena, in the regional arena within the Association of Southeast Asian Nations (ASEAN), at the multilateral level, and also at the plurilateral level. These are very creative pragmatic ways forward.

Ultimately, we have to look at international relations and international law as being part of an ecosystem. Soft power is absolutely something that is important. The lawyers can only do so much. I like to tell my client ministry colleagues that the lawyers are tools. Ultimately, how do you garner and deploy soft power? Where is the diplomacy? What is the network you are cultivating? Who are your friends? And where are you engaging with other stakeholders, including civil society, elsewhere?

Michael Byers

Brian, you have just heard from two of your colleagues from small states. My question for you is: Does international law actually constrain the exercise of power by militarily, economically, politically stronger states, at least in situations where powerful states really want a certain outcome? Or is it simply that international law provides a reason for all of us to think it matters because sometimes powerful states just do not care so much and therefore allow other outcomes to arise?

Remarks by Brian Egan*

I think the answer is clearly yes, that international law does constrain powerful states—for a couple of reasons that Victoria and Danielle mentioned. One is that international law is a consent-based system and I think powerful states play in this space because they see advantages to doing so but understand the tradeoff, which is that you are constraining yourself in signing on to something. I think you can see, in the current U.S. administration's objections to the actions of some

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international organizations, that they believe these rules matter, that they would rather not comply with the rules and are pulling out in some cases. And you can debate whether or not it is a good idea, but it shows that they believe that the rules do matter, if the United States is going to sign on.

Just thinking of my own experience, there are two examples where international law did matter and, I would say, constrained the activities of powerful states. One was the Iran nuclear agreement, the Joint Comprehensive Plan of Action (JCPOA), which of course the United States is no longer part of. It was an example of soft law, as Danielle said, a non-legally binding instrument, but one where the United States gave up something that was pretty important to the U.S. government, which was the right to impose sanctions against other countries for doing business with Iran, in exchange for something the U.S. government believed was pretty important, which was assurances related to Iran's military nuclear program. The sanctions relief that the United States put on the table was controversial; it was constraining, and the United States, when they decided that the sanctions relief was too constraining, pulled out of the deal. I disagree with the decision to pull out, but I respect the transparency behind it. Another example is the decision by the Obama administration not to intervene militarily in response to the horrific chemical weapons attacks in Syria in 2013. The decision not to intervene, which was criticized by many in the United States and elsewhere as the wrong decision, was influenced in part by international law and the constraints on the use of force.

Michael Byers

Thank you. Jan, where do international courts and tribunals fit in this landscape that your colleagues have just described? Do they level the playing field? Do they give less powerful states opportunities for leverage or at least resistance?

Remarks by Jan Paulsson*

All of us in the room, to the extent that we address the topic this morning, could be said to be testing the veracity of a very, very old saying: The law is like a spider's web. It catches the small insect, but the larger ones break through. Is that really true? And, I suggest, it is not necessarily so. Small states can, in some instances, be very powerful and can be more powerful than some large states in the way they use their influence. Large states sometimes throw their weight around. They cannot help themselves. "I have got the weight, I will use it." It does not make them very popular. It does not make them followed. Those states that are influential tend to do so with talent and human resources. Human resources require investment and education, so it is not surprising that the powerful small states are relatively wealthy ones. Let us consider other small states—the poor small states.

Michael has invited us to reflect on our own personal experiences, which is very egocentric, but you have given us that license. So, let me tell you, I come from parents from a small country, Sweden, who brought me up in another small country called Liberia. Perhaps because I grew up in West Africa, for the first twenty years of my career I tended to represent African states in their international disputes. I will name them so you will believe that I know what I am talking about. In subtropical Africa—I represented Guinea, that is the one with the capital of Conakry, Liberia, Ivory Coast, Ghana, skipping Benin and Togo, and Nigeria, Chad to the north, all the way around, South Africa, Cameroon, where I did four very large arbitrations, and seventeen or

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eighteen in Kenya over the course of twenty years. Most of these states became independent in the 1960s. I was working for them not so long thereafter.

One thing I will say, in answer to the question of levelling the playing field. The actors in these states see that international courts and tribunals, and international law itself can very much level the playing field—in ways that perhaps surprise the other side, who is tempted to take advantage of institutional weakness and immaturity.

So, what is one able to see? I will give you just a couple of examples of what can be achieved. If you do the hard work of trying to win the case, look at the facts, and show how that can be done, you can expose powerful actors from abroad who might be overconfident in their superiority. They seem to have been in every country. They seem to know what they are doing. They are very powerful multinationals and so forth. But perhaps they have yielded to the temptation of cutting corners when they thought they could. A cool painstaking examination may demonstrate chicanery. I recall a major industrial dispute in Kenya in which an international tribunal held that the largest industrial corporation of a prominent European country had engaged in deceit. Now, their representatives were both surprised and embarrassed to find their enterprise held guilty of misconduct with the result of invalidating a contract which suddenly lost all of its value. And it came as a big surprise to the Kenyans because they had not expected that a determined presentation to a tribunal located in a distant land could yield such dividends. This is a different way of thinking of it then, "Well, what we have to do in these circumstances is let us force them into local courts." But if "our local courts" suffer from institutional stresses and immaturity, perhaps they will not be acknowledged by foreigners, and therefore not likely to resolve the problem. At the international level, small countries often seek to defeat international jurisdiction instead of embracing it. This is a pet peeve of mine. Advocates who represent weaker states too often feel that they have achieved a victory by avoiding the international forum, when in fact that only means that the actual problem, therefore, remains unresolved. The case has not been heard. Why is that a victory? Sometimes you would be better off to say, "Well, we could raise a jurisdictional objection but let us forget about it. As long as we believe it's a neutral forum which will give us a fair shake let us have the confidence that we can win our case on the merits." This creates and inspires a great deal of confidence. This also assists sometimes in accepting tolerable losses—a consideration that people sometimes lose sight of. I see a lot of African civil servants, having engaged in international arbitration, say "Well, we did not get all we asked for. We had to pay something, but it was not as costly as it might have been if we had to settle on a political basis—and not as costly as having disrupted relations with a partner with whom we believe we could have advantageous relations. And we feel now that we are talking as equals, so this was a good thing to do." So yes, definitely, the legal institutions that exist can level the playing field. But they can only do so if they are perceived as legitimate and that is another very large question. It is a constant battle to ensure that you are never going to a place which does not have those hallmarks of what makes something legitimate.

Michael Byers

Victoria, you come from a fairly small country. Have you been able to use courts and tribunals to level the playing field with more powerful actors?

Victoria Hallum

Yes, in fact, we have. New Zealand has utilized state-to-state dispute settlement fourteen times and the record is: nine successes; three settled before a binding dispute settlement process was needed; and two losses. I think that is a pretty good record.

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Those fourteen cases are: three International Court of Justice cases (the two phases of the *Nuclear Test* cases against France and the *Whaling* case where Australia was the principal party and New Zealand was a very involved intervener); the two separate parts of the *Rainbow Warrior* affair; the *Southern Bluefin Tuna* case against Japan; and eight WTO trade cases.

The *Rainbow Warrior* case is a particularly good case study of a small state achieving a rebalancing of the playing field via dispute settlement. The dispute arose when French government agents blew up a Greenpeace vessel, the *Rainbow Warrior*, that was moored in Auckland harbor and killed a Dutch national who was sadly on board at that time. The New Zealand authorities apprehended the two agents, prosecuted them under New Zealand criminal law, and then sentenced them to a term of imprisonment.

There were two different international parts of the case. First, there was an agreement to submit the matter to the UN secretary-general for a binding ruling in 1986. Then, in 1990 when New Zealand considered that France had not abided by the terms of the UN secretary-general's decision, there was an arbitration. Although both of those cases might not have fully satisfied the New Zealand public at the time, my view is that they both upheld international law and provided a satisfactory result.

The first decision by the UN secretary-general was that the French prime minister should convey a formal and unqualified apology to the prime minister of New Zealand, pay $7 million in compensation, and stop opposing New Zealand's butter exports. In turn, New Zealand would transfer the French agents to the island of Hao in French Polynesia, where they would spend three years, and agree to compulsory and binding adjudication of any future dispute.

Now that turned out to be a good thing because when the two French agents returned to France before the end of the three-year period, New Zealand had recourse to that binding dispute settlement. The arbitration tribunal found that France had breached the terms of the agreement and recommended, in order to promote close and friendly relations between the two countries, that a fund be set up called the New Zealand–France Friendship Fund. So, we did get a result by having recourse to international law, and it was positive in the long run for both parties because we have a very warm and close relationship with France to this day.

But I think there is also a darker narrative running through international dispute settlement more generally, which comes down to the question of consent. In the first *Nuclear Test* case, for instance, New Zealand had a positive result in the form of provisional measures ordering France to stop nuclear testing in the atmosphere. But when New Zealand wanted to return to the International Court of Justice twenty years later when underground testing was taking place, the Court found that the case was inadmissible, because France had withdrawn its consent to the compulsory jurisdiction of the court. Likewise, in the *Whaling* case there was a good result, but Japan then adjusted its acceptance of the compulsory jurisdiction of the International Court of Justice so there could be no further cases. New Zealand remains committed to binding dispute settlements, wherever possible, but I do acknowledge international dispute settlement is a patchwork approach with lots of gaps.

Michael Byers

Jan, when you are advising a relatively less-powerful state with regards to potential litigation or arbitration, are there certain political or economic conditions you look for in the situation that may be more amenable to going to the law? For instance, what if your client is complaining about behavior that is common in a powerful state's international practice, with the result that there are multiple countries subject to this behavior and that your client is possibly a test case of relevance to a larger community? Does that make resorting to litigation or arbitration more attractive, as opposed to a situation where the small state is very much on its own? What kind of factors, not

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legal factors, but political-economic factors, might make the recourse or arbitration or adjudication more attractive?

Jan Paulsson

I have never been in the business of building up test cases. The first question you ask a client anywhere is: What are your true objectives? You try to identify the dangers of pure domestic politics, including the more harrowing dangers of corruption. You try to speak to people who are not interested in pure politics and those who will not operate for private gain and see what is it that you really wish to achieve. Sometimes, in dealing with other states and very often dealing with international economic partners, you can come out of a dispute having lost but having behaved in an honorable way, and just by accepting the tolerable defeat emerge as a winner. Because reputationally, it gives the others who are observing this and perhaps the very party that defeated you, a feeling of confidence and a desire to continue relations with you.

By the way, I was living in France at the time of the *Rainbow Warrior* case. The behavior of President Mitterrand, and more particularly his defense minister who staunchly protected the agents sent to New Zealand, and their manipulations in trying to avoid the terms of the detention in Hao were quite shocking: a cynical pursuit of unprincipled nationalism which certainly had a reputational cost. You might tear the spider's web but in so doing be seen as a bully.

Michael Byers

Political scientists are particularly interested in the role of reputation with regards, not just to international politics, but also to international law. So, thank you for that point.

I wish to turn to Danielle now and shift from international courts and tribunals to international treaties and treaty regimes. Do treaties play a similar role in terms of constraining or channeling power? You have mentioned this, but you might wish to elaborate on whether treaty regimes are particularly amenable to certain kinds of issues where power has less traction than others. Where do treaties fit in this law-versus-power dynamic that we are talking about today?

Danielle Yeow Ping Lin

Your question is not amenable to a simple answer. I think treaties are kind of an external manifestation of certain standards and rules that the international community is prepared to live and abide by. In the area of trade, I think you see a tension between what I call a real mixed bag of interests. Because in any country, not just in Singapore, there are areas of offensive interests. Increasingly today, however, we see the intersection between international trade policy and domestic policy in a very clear light that perhaps might not have been obvious before. Let me explain. In Singapore, we have a number of trade agreements that were entered into as long as ten to twenty years ago under a different environment. In today's environment, we see how certain actors have used the trade regime with inadvertent or perhaps unanticipated effect on domestic policies. The policy space that we see, for example, between trade and health—with tobacco being a case in point.

So how do treaties come into play? I think treaties allow states to set the rules. But increasingly, we may have to revisit and review treaties. Treaties are not static and may need to be kept fit for purpose. This is a reflection of the dynamic nature of global politics. Things can shift very quickly. Treaties are important in providing predictability as well as a level playing field and rules for everyone.

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As a legal adviser to the government, this is an issue I engage with policy colleagues on. Do not think only about the immediate issues and interests of the day. Are you able to create, within treaties, a dynamic mechanism which will allow you and your counterparts to revisit the treaty to allow it to fit the purposes of tomorrow?

You ask which area is more amenable to treaties. And I could perhaps answer it this way. In which areas are treaties less amenable? As I mentioned earlier, new emergent areas such as cyberspace are perhaps more difficult. The UN Group of Government Experts has been trying to put together a list of recommended norms on state-to-state relations on the use of cyberspace, from cyber warfare to cyber operations. It was a tremendous achievement in the committee to even come to the point of accepting that international law applies to cyberspace. The next issue, then, was what are these precise rules that govern cyberspace? Do the traditional rules apply? The committee came up with a list of eleven non-binding norms, which was sensible because the landscape is changing very fast. The technology is moving quickly and often ahead of what governments are aware of. This is an area where treaties are not amenable to everyone, where I think it may be better to come to a better understanding first and adopt confidence-building measures. Levelling up capacity, since there are very different levels of understanding, knowledge, and capacity. If we set the rules too early, we may create a monster that does not work. And there will always be suspicion between those that are more advanced in setting the rules, and those who have yet to catch up. That, I think, would be a recipe for disaster.

Michael Byers

Thank you. One thing I have noticed in my own research lately is the adoption of soft law instruments such as guidelines which are then incorporated into domestic legal systems as hard law. So, what we see as soft law might actually be hard law—in terms of its actual application to nonstate actors. These dynamics again, are moving at a very fast pace.

Back to Victoria now, with the same question about treaty regimes, about international law outside of the courts and tribunals. Do these regimes constrain the powerful, or do they only constrain the less powerful—with the powerful setting the terms of the treaty that then apply to everyone?

Victoria Hallum

There is a question as to whether the era of developing new, large, complex treaty regimes is over. As Danielle and you have suggested, perhaps we need different kinds of instruments to address the different problems that need to be solved by collaborative solutions. But we do have some really significant multilateral treaty regimes, and I wanted to touch on two of those. It is no surprise that both fall within the areas identified by Daniel Bethlehem in his article: The UN Convention on the Law of the Sea (UNCLOS) and the WTO Agreements.

UNCLOS is a great example of a treaty regime that was needed to address issues that could not be addressed by any individual state, no matter how powerful. It addressed a package of issues in a way that was really positive to small states. I am thinking here of the exclusive economic zone (EEZ) and the regime of islands, and what that meant for coastal states but particularly for small island developing states. The economic resources that have come to small island developing states (SIDS) through their EEZs are of massive importance. I also think you can see ongoing positive impact of UNCLOS in regional fisheries management organizations. Earlier this year, I attended the annual meeting of the South Pacific Regional Fisheries Management Organization, a fifteen-member regional organization covering a huge part of the South Pacific Ocean. It includes some large countries such as China, the United States, and the EU, and some very small ones such

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as Vanuatu, the Cook Islands, and the Faroe Islands. No organization is perfect, but to sit in those meetings and to hear the states debating and contesting allocation decisions and arguing which country's vessels need to be put on the illegal, unreported, and unregulated (IUU) fishing list is to observe international law in action—constraining power in an area where there is no other solution because these are high seas resources that require a shared approach to management.

As Danielle mentioned, we have to be open to keeping these regimes alive, flexible, relevant, and contemporary. One issue that New Zealand is concerned about is the impact of sea level rise on the maritime zones of the small island developing states. In response, we are looking at how it could be possible, in a way that respects the role of UNCLOS as a constitution for the oceans, to ensure that those hard-won gains for SIDS are not eroded by developments that nobody understood during the negotiation of UNCLOS.

As for the WTO Agreements, this is a treaty regime that has made a huge difference for New Zealand. We have had eight WTO disputes in the post-Uruguay era, and we have won them all. But I do not think it is just a country like New Zealand that benefits. I believe the United States has won 90 percent of cases it has pursued under the WTO dispute settlement system. But unlike UNCLOS, which is in reasonably good shape, there is a bit of a crisis in the WTO. Although the WTO has one of the best and most robust dispute settlement systems, it also has an Achilles heel, in that it is possible for one country to block the appointment of Appellate Body members. This is what we are seeing now. So, this is a real priority for New Zealand—to work with other countries to address the issue and keep the WTO dispute settlement system alive. We are working in a Canada-led group on reform, we have co-sponsored an EU-led paper on constructive solutions to the concerns the United States is voicing, and our representative at the WTO is facilitating discussions in Geneva. We like the WTO system as it is, but to save the system, we need to be open to rebalancing and adjusting, as Danielle has said.

Looking ahead, I doubt that any of us think it will be easy to conclude new complex treaty regimes. Perhaps the last of those is being negotiated in New York as we speak: the Implementation Agreement on Biodiversity Beyond National Jurisdiction (BBNJ). I am optimistic about this because there is already a clear framework under which the new treaty will sit and there is a clear need. But in other areas such as cyberspace, international law needs also to constrain the actions of nonstate actors, which is clearly very challenging. New Zealand has recently become aware in very tragic circumstances of the role that social media platforms can play in distributing and promoting the message of violent extremism. Would a new treaty regime to control Facebook and Google be the solution? Probably not. But we are determined to work with partners to come up with solutions to these issues and to look at how international can deal with new problems and nonstate actors in new and innovative ways.

Michael Byers

Brian, I want to come back to a comment you made earlier when you suggested that when a powerful country withdraws from an international agreement, this is almost a tribute to legality that is being paid. If it does not matter, why not just stay in? And we have seen the United States withdraw from a number of these treaties, including the Paris Climate Change Agreement and the Intermediate-Range Nuclear Forces Treaty. We have also seen the United States not join a treaty regime and then actively campaign against it, in the case of the Rome Statute of the International Criminal Court (ICC). Do you think this kind of behavior strengthens treaty regimes? Or does a particularly powerful state, when withdrawing, or not joining and then opposing, undermine the international institution? Are there general answers to these questions, or does it always depend on the particular circumstances?

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Brian Egan

A powerful state like the United States thinks a lot about its international obligations and commitments, and I absolutely believe that the international order is better off with the powerful states being part of them. So no, it does not strengthen the regime to have states withdraw.

However, it is important for states to take their obligations seriously. Take the Convention on the Rights of Persons with Disabilities. To the bafflement of many, the United States has not joined the treaty, although it is based primarily on U.S. law. We spent many hours debating internally with members of Congress about the merits of joining this treaty and the questions were always along the lines of: "Why should a non-government expert from Country X get to judge what is going on in my juvenile detention facility in Kansas?" And it is a fair question; one that you need to wrestle with when you are thinking of joining a treaty. But it leads me to the conclusion that Danielle and Victoria were suggesting, that it is going to be very difficult to find multilateral conventions that powerful states will join. I think this is because states recognize the importance of the commitments that they make in these treaties. It would be entirely cynical for states to join without any intention of complying, and that, I think, is where the balance lies.

Michael Byers

I am reminded of a conversation I had with John Bolton, back when Bill Clinton was still president. I was being one of these morally unrighteous Canadians, criticizing the United States for ratifying relatively few international treaties. His response has stayed in my memory ever since: "When we ratify treaties, we do so with the intent of adhering to them." And with that comment, Bolton was of course implicitly criticizing my country—for being a bit more casual with regards to implementation.

Brian Egan

Let me just say that we are very glad to have Canada criticize us. You are very polite in doing so but it is also very helpful.

Michael Byers

I would just like to suggest that, when the United States has a moment in its history when it is particularly disengaged from the international system, as it is today, this challenges other states to pull together and keep the system going. And I hope this is what we are seeing today: that countries like Canada that used to happily follow in the slipstream of benevolent U.S. power are having to step up and show some leadership themselves.

Audience Member

I would like to ask about UNCLOS and the South China Sea. What action would you suggest the international society take to reign in violations in that area?

Michael Byers

This question goes to the heart of the issue of powerful states and international law because we have an arbitral decision that is not being followed by a very powerful state. And it is perfect for this panel because it's topical and contentious. Jan?

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Jan Paulsson

I have an observation, not an answer. This is an example, not of a little insect that gets caught in the spider's web, but of one that is not bothered by the spider's web, or feels like not being bothered by it. Let us assume, as lawyers, that we have no position as to the Chinese maritime claims. Let us assume that we have no position whatsoever with respect to Russia's claim in Crimea. You just do not know. We are just looking at these claims being made. And what is the reaction of these two powerful states?

In this instance, it is a problem for each of them. China has to decide, does it default? The risk of default is the greater likelihood of an adverse decision. That adverse decision may be the fruit of a very substantial process which is very carefully considered and articulated—and can never be annulled. That is what China risks if it defaults. But default itself need not be inactive; we observe that a Chinese data center continually sends out information supporting the Chinese legal position unilaterally and exclusively, perhaps with very intelligent arguments. Of course, the credibility of such an effort might be affected by its unilateral character, and perhaps by intimations of a lack of self-confidence. But even if we have no views as to the ultimate entitlements, we can be certain that the Chinese approach evinces a certain attitude: it is not ignoring international law.

With regards to Crimea, what does it mean when President Putin produces a lengthy legal brief, extremely well-written, going back through the history? One that is so well done that, if you only read it and nothing else, you might be rather convinced. It shows the point that Brian was making a few moments ago, that international law is taken very seriously.

Michael Byers

So, the international legal discourse continues even when, formally speaking, a country is choosing not to comply?

Jan Paulsson

Precisely.

Audience Member

I would like to suggest that the most obvious solution for small states is to join together in strong regional organizations. To give just one illustration: for centuries, Ireland, as a small state, was not taken particularly serious by Great Britain. Whereas now, Ireland has the weight of the EU behind it in the Brexit negotiations, with Irish interests being pivotal to finding a solution between the UK and the EU. So, I would like to ask: first, do you agree that forming strong regional unions is the way forward for small states? Second, do you think we will or should seek similar developments in Asia and other parts of the world?

Danielle Yeow Ping Lin

On one level, I certainly agree with you. We have to look at the toolboxes available, and one of them is like-minded or regional groupings. These are not necessarily mutually exclusive, because you will find countries with similar interests scattered across different regions with different political makeups. It just happens to be issue-specific. There is an old Chinese idiom: "A singular straw, breaks very easily. You bind them together, it becomes very strong." I certainly share that

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philosophy as does ASEAN and Singapore. ASEAN has gone through a process, a long history, and grown from a loose collective into a more rules-based organization. We have seen the evolution of ASEAN, particularly in the last five to ten years. You have a whole new area practice of law called ASEAN law which never used to exist before. So, ASEAN countries do recognize the value in coming together. Having said that, ASEAN is not a homogenous region. The EU has more shared history and a shared legal tradition. That is not the case in ASEAN. We had to find our own way to work together. We have done that particularly well in the economic field. We have agreed on legally binding ASEAN economic agreements. ASEAN as a group has negotiated a number of ASEAN+ agreements with New Zealand and Australia, for example. And currently, ASEAN is negotiating a mega-regional agreement called the Regional Comprehensive Economic Partnership (RCEP), where we come together to speak with a common voice in negotiations with ASEAN+ partners. We do not yet know whether it will develop into the kind of supranational organization that we see elsewhere. ASEAN will have to find its own way.

I can also link your question to one that was raised by the earlier speaker. ASEAN is working with China on a code of conduct for the South China Sea area. Like New Zealand, we do not have any substantive position or interest in the disputes themselves, but as part of ASEAN, we can come together and contribute to the maintenance of peace and security of this region.

Victoria Hallum

"Coalition Building 101" is the essential tool for any New Zealand diplomat. You asked about regional organizations. One challenge in our part of the world is that there is an awful lot of ocean and not a lot of countries. So, we are pretty agnostic about geography in our coalition building. We certainly see ourselves as part of the Asia-Pacific region and work on creating international legal regimes with that group but, equally, we have worked in other formations on a range of issues such as in the anti-nuclear context. We also have a lot of collaboration with SIDS. There is even a group that we work with at the UN called the "Mountains Group." It is a group of democracies who all happen to have a lot of mountains. So, really New Zealand will work with any other countries on the basis of shared interests and shared values—to pursue things New Zealanders care about.

Audience Member

Yesterday we heard a provocative series of remarks about challenges to international law and particularly rising populism around the world. In light of this populism, what will be the significance of international law as a counterweight in the power struggle? Are we going to see more soft law and different kinds of actors shaping international law? Or are we going to see, as Michael described, more of a role for national laws, with the struggles taking place in domestic systems rather than the international realm?

Brian Egan

My wife sometimes accuses me of being too Pollyannaish on everything. With that caveat, I think what people see as populism is certainly there. However, I actually think that it is good for international law and that, if you look back in history, you find a lot of skepticism toward international law, at least in the United States. And skepticism can lead to modifications and, in my mind, improvements to international law. It opens dialogue on some of the things that we have been talking about: the use of norms, the reversion to customary international law, and a shift to alternatives to some of the multilateral treaties we have grown to rely on in the last seven decades.

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Populism is definitely a challenge for international law, but it does not spell the end of international law.

Danielle Yeow Ping Lin

If I have given the impression that old treaties need to be reexamined, I should correct this, because the starting point of my comments was the rule of law and the predictability of the system. That means the sanctity of agreements should be respected. This does not mean that we should keep our eyes closed to new developments. Just because you do not like a situation does not mean that you can ignore it. You need dialogue, and sometimes a new or modified agreement that is fit for purpose.

I also draw some encouragement from how actors in the international system are using existing parameters to meet the needs of today. For example, we talked about the International Court of Justice, and we talked about other international dispute settlement bodies. This reminded me of the Timor-Leste and Australia conciliation, which was a very successful one and the first of its kind. The tribunal used a mechanism that is rarely used and was able to resolve a politically difficult issue. That brings to mind how tribunals are also reinventing and adapting their practices. You see an increased use of experts in the resolution of disputes. We saw this more than ten years ago in the International Tribunal for the Law of the Sea (ITLOS) land reclamation case. The panel very wisely asked the parties to jointly appoint a group of technical experts, because the issues the court had to deal with were very complex and required the assistance of third-party scientific experts to resolve.

Michael Byers

I have one last question for Jan. We have two representatives here from small states who demonstrate that small states can have exceptional foreign ministries. But that is not common across all small states. Some small states are relatively poor or have gone through transitions that have compromised their governmental effectiveness. Is the ability to run a highly effective foreign ministry with squads of experienced international lawyers a manifestation of power within the legal system, and are we missing part of the picture by not talking about those states that simply cannot do this?

Jan Paulsson

It is a fair comment. But I am struck by the fact that even in the smallest and poorest countries, there are legal experts who are extremely alert to international law and very interested in it. And you meet remarkably talented people, even in the most disadvantaged environments, who manage to keep abreast of international law developments. That is surely something that is encouraging for international lawyers. A century ago, would you be able to strike up meaningful conversations with anyone save the most *rarae aves* about international law? The world was dominated by imperial powers who knew only two realities: their own (right) law and foreign laws to be confronted. Today even lay people have ideas about international law. They have expectations and disappointments, and sure enough, they may not understand how international law operates and make excessive demands of it. But then again, some of the great specialists of international law have eccentric views as to how it operates. So that is not so strange. We might get older, but the world is in a permanent state of renovation. And the new communities that form consider themselves as the authors and subjects of rules that for better or worse transcend physical and conceptual borders. That means international law, perhaps generated in forms for which we do not even have names.

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Let me, however, be clear; this will always be a world of unlimited possibility, and I associate myself with Brian on being Pollyannaish in that respect.

Michael Byers

It is nice to end on a note of optimism from the most experienced of our panelists. I think we have been treated to a phenomenal display of professionalism and insight and I ask you to join me in thanking all of our panelists today.

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