



S.G. Sreejith

Transcending Jurisprudence

A Critique of the Architectonics of International Law

Academic Dissertation
to be presented,
with the permission of the Faculty of Law of the University of Lapland,
for public discussion
in LS 10, University of Lapland, Rovaniemi,
on November 5th, 2010, at 12 O'Clock.

University of Lapland
Faculty of Law

Copyright: S.G. Streejith

Distributor: Lapland University Press
P.O. Box 8123
FI-96101 Rovaniemi

tel. + 358 (0)40-821 4242 , fax + 358 16 362 932
publication@ulapland.fi
www.ulapland.fi/lup

Paperback
ISBN 978-952-484-388-1
ISSN 0788-7604

pdf
ISBN 978-952-484-427-7
ISSN 1796-6310
www.ulapland.fi/unipub/actanet

*To my maternal and paternal grandfathers,
Munshi Keshava Pillai and Chellappan Pillai, teachers par excellence*

*Samaani va aakoothiha samana: hrudayaani va: | Samaanamasthu vo mano yadha
va: susahasti*

**(As the harmony in the Universe, single be your purpose, united be your hearts,
and together be your mind)**

Rig Veda (Final Sukta, Verse 4)

**The inward eye that recognises the attraction of the ideal is a single eye shared by
all human minds. The soul of each human being recognises itself in the souls of all
other human beings.**

**Time has come for the single eye of the human species to see the universal idea of
human happiness**

Musings of Edmund Jennings in,
Philip Allott, *Invisible Power 2: A
Metaphysical Adventure Story*
(Bloomington: Xlibris, 2008), p.115.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

INTRODUCTION..... 1-17

CHAPTER I.....(18-50)

MISGUIDED SOCIALITY, LOST HUMANITY:	
INTERNATIONAL LAW AS PHENOMENOLOGY AND BEYOND	1
I. INTRODUCTION	2
II. SOCIALITY AS HUMAN REALITY	3
III. THE PHENOMENOLOGICAL PHILOSOPHY OF INTERNATIONAL LAW	7
IV. REALITY IS A TRANSCENDENTAL SINGULARITY	13
<i>A. Exploring the Transcendental Singularity</i>	15
<i>B. Situating the Transcendental Singularity: A Rationalist Perspective</i>	19
V. LAW AS A SUPER-INTELLIGENT GUIDANCE	22
<i>A. A New Concept of Law</i>	23
<i>B. “The Law”: A Sublime Discipline</i>	27
VI. CONCLUSION	31

CHAPTER II.....(51-154)

THE TRAGEDY OF THE PHILOSOPHY OF INTERNATIONAL LAW	
I. INTRODUCTION	1
II. THE CONCEPT OF COMMON INTEREST	10
<i>A. Common Interest as Philosophy</i>	10
<i>B. Common Interest as Doctrine</i>	18
1. <i>TWAIL: Means Did Not Justify the End</i>	21
2. <i>Global Governance: A Distorted Conception</i>	28
<i>a. Governance is Politics</i>	30
<i>b. Governance Ought Not To Have Been Thus: A Postmodern/Quantum Turn?</i>	37
<i>C. Reality Perceptions about Common Interest: Philosophy against Doctrine</i>	44
III. THE CONCEPT OF MARKET INTEREST	52
<i>A. Market as Ideology</i>	53
<i>B. Market Interest as Doctrine</i>	58
1. <i>Economic Analysis of International Law</i>	59
<i>a. Misguided Rationality: A Response to Economic Analysis of International Law</i>	68
<i>C. Reality Perceptions about Market Interest: The Dominion of Ideology</i>	76

IV. A JUXTAPOSITION OF COMMON INTEREST AND MARKET INTEREST	78
A. <i>Philosophy against Ideology</i>	78
1. <i>Altruism and Egoism:</i> <i>The Perennial Poles of Human Thought</i>	79
B. <i>Doctrine against Doctrine</i>	84
1. <i>Structural Doctrinal Moves</i>	85
2. <i>Discursive Doctrinal Moves</i>	89
V. CONCLUSION: THE TRAGEDY	96
CHAPTER III.....	(155-232)
PUBLIC INTERNATIONAL LAW AND THE WTO:	
A RECKONING OF LEGAL POSITIVISM AND NEOLIBERALISM	5
I. INTRODUCTION	6
II. INTERNATIONAL LAW AND THE COMMON SKEPTICISM ABOUT ITS LEGALITY	8
III. THE WTO IN INTERNATIONAL LAW: ASCENSION OF NORMATIVE VALUES	14
IV. THE WTO AND CLASSICAL POSITIVISM: BENTHAM, AUSTIN, AND HART	18
A. <i>Bentham and Utilitarianism</i>	20
B. <i>Austin and the Imperative Theory of Law</i>	24
C. <i>Hart and His Rule Theory</i>	33
D. <i>Summary</i>	47
V. THE WTO AND NEOLIBERALISM	48
A. <i>Neoliberalism: The Landscape</i>	48
B. <i>The WTO and Neoliberalism: Juxtapositions</i>	55
1. <i>International Organizations in the New World Order</i>	56
a. <i>International Organizations Situated</i>	56
b. <i>Why do International Organizations Matter?</i>	61
C. <i>The WTO: A Neoliberal Manifesto</i>	63
1. <i>Anarchy and Trade Regimes: From GATT to the WTO</i>	64
2. <i>The Neoliberal Strategies and Tools in the WTO</i>	71
VI. CONCLUSION: THE RECKONING	76
CHAPTER IV.....	(233-322)
WHITHER INTERNATIONAL LAW, THITHER SPACE LAW:	
A DISCIPLINE IN TRANSITION	331
I. INTRODUCTION	332
II. A CRITIQUE OF THE EPISTEMIC CULTURE IN SPACE LAW	336
A. <i>Advancing a New Discipline</i>	336
B. <i>Generality: The Hallmark</i>	344
C. <i>Jenks Versus McDougal: A Telling Debate Overlooked</i>	348
1. <i>Jenks and the Common Law of Mankind</i>	349
2. <i>McDougal and Policy-Oriented Jurisprudence</i>	350
3. <i>The Debate</i>	354

D. <i>Space Law in the IISL</i>	358
1. <i>Science and Law: A Failed Equation</i>	359
2. <i>Pink Clouds</i>	362
3. <i>“Other Regime” Analogies</i>	364
4. <i>Commercialization: From Rules to Strategies</i>	367
5. <i>Summary</i>	369
E. <i>Space Law in International Law Textbooks</i>	371
F. <i>Teaching and Students</i>	374
G. <i>A Closed Group</i>	376
III. UNIQUE JURISPRUDENCE: A DEFENSE OF SPACE LAW	377
A. <i>Disjunction: A Voice of Disciplinary Renewal</i>	380
1. <i>Law and Legal Profession in a New World Order</i>	381
2. <i>The Progressive Sensibility of Space Law</i>	383
B. <i>Receptiveness: An Inherent Quality</i>	386
C. <i>When in the Market, Be a Marketer</i>	389
D. <i>Progressive Thinking:</i>	
<i>Episteme and Pedagogy in Space Law</i>	392
E. <i>Methodological Summary and Conclusion</i>	395
IV. A COUNTER-DEFENSE	396
A. <i>The Renewalist Program of International Law</i>	397
1. <i>Lex Specialis and Lex Generalis: Beyond Doctrines</i>	399
B. <i>Comparable Trends: The Law of the Sea,</i>	
<i>Human Rights Law, and Environmental Law</i>	404
C. <i>Methodological Summary and Conclusion</i>	412
V. CONCLUSION	413

BIBLIOGRAPHY	(323-367)
	1-45

<i>Ashwattha</i>	368
------------------------	-----

Acknowledgements

This book was written in the small polar town, Rovaniemi. The town's University of Lapland and the University's Faculty of Law provided the space and resources for preparing this book. Financial support for writing this book came from the Faculty of Law, the Northern Institute for Environmental and Minority Law (NIEM), the Institute of Air and Space Law (IASL), the Rector of the University of Lapland, Ella and Georg Erhnrooth Foundation, Finnish Cultural Foundation (Lapland Regional Fund), Oikeustieteen tutkimussäätiö, and the Centre for International Mobility (CIMO). Numerous books and periodicals provided by the library of the University of Lapland through its shelves and databases helped building the arguments made in the book.

People who provided intellectual inputs, in one way or another, to this book include Philip Allott, Richard Foley, Kari Hakapää (the supervisor of this work), Veijo Heiskanen, Kamrul Hossain, C. Jayaraj, Juha Karhu, Markku Kiikeri, Jan Klabbers, Timo Koivurova, Outi Korhonen, and Hans Köchler. Adam Stepien checked the bibliography and Richard Foley the proofs. I thank you all.

I also thank all friends and colleagues in the University of Lapland for their motivation and support. In this endeavor, as in all other endeavours, my family remained my strength.

Rovaniemi
18 September 2010

S.G. Sreejith

INTRODUCTION

I

Because law is *believed* to be a science, legal reasoning is a scientific process. Legal materials are products of scientific skill. Observation, justification, ratiocination, interpretation, and quantification are a few examples of “legal skills”. A professional academic work in the field of law is recognized only if it reflects these skills; it qualifies as a scientific endeavor. A legal/judicial opinion is sound only if it has the niceties of juridico-scientific—Kelsinian or Posnerian—reasoning. Without the *elements* of science, any legal discourse is sheer rhetoric.

This intellectual state of affairs is not any surprise, for the prevailing belief is that science is what gives meaning to our existence; science is the only method of inquiring into our reality; science is the only religion whose teachings we believe unquestioningly. No matter one has travelled the mathematical path set by theoretical physics, because theoretical physics is a science, we believe that its findings are true. One reason why scientific findings are deemed to be the ultimate truth is that there is no non-science or meta-science to evaluate science. What is on hand is metaphysics or artful philosophy. However, given that they are deemed to be the most abominable [un]intellectual methods, we follow science for itself. Thus, science is absolute, but what renders it absolute is the absence—if not rejection—of non-sciences; science represents the Kantian “logical egoism”, according to which a sole intellectual position, irrespective of its truth-value, provides the criterion of truth.

That said, I do not mean to take the opposing side vis-à-vis science here; I take the salience attributed to science for granted. But I am sceptical: In what sense is law a science? Is it because law has the same methods as science has? If yes, then does law have the same role as science, the same subject-matter as science, the same philosophy as science? Science is a method humanity has invented to inquire into matter and its various states; law serves as guidance to good conduct for human beings in their social interaction. Science provides visions of the material existence of humanity; law provides visions of the inherent oneness of humanity. Science deals with gross matter; law deals with subtle matter (mind).

There is, however, a lingering scepticism regarding the epistemological duality—Cartesian as well as Kantian—in the subject of analysis in law and science—mind and matter, respectively. But such scepticism neither has proper articulations nor can it proffer convincing results.

Nevertheless, law has marked its own distinctiveness from science. According to legal theorists (of even the extremist scientific school, i.e., Scandinavian realism), the difference between science and law exists mainly in the existential states of the subject-matter of both. Moreover, law is not a science in a proper scientific sense but in a phenomenological sense. In this light, that is seen as the phenomenological base of human thought, science undeniably becomes the dominant intellectualism of the world. If so, it could be said that more than any methodological attributes of science, law possesses phenomenological attributes such as objectivity, intelligibility, and a discursive aesthetic. This view makes more sense if one conceptually tracks the growth of law throughout nineteenth and twentieth centuries, for what one observes is

a proclivity on the part of scholars to provide law such a structure—a “doctrinal complex”—ensuring that all the aforesaid phenomenological attributes of science are present in law. It is through this structure that law reflects the behavioral properties of science. The existence of such a structure then affirms that law is a science, legal reasoning is scientific reasoning, and the legal mindset is a scientific one.

The scientific mindset is objective, coherent, and powerful. But at the same time it is also impervious to human sentiments and values. Given that law is tasked to reconcile and constructively channel conflicting human sentiments and values in society, a scientific mindset cannot be constructive for society. Moreover, the social system in which law functions is one of relative *ideals*, determination of its true values is easier said than done. Yet, with its objective scientific mindset, law performs its social functions, for example, the objective determination of truth (or falsity) of subjective values, making value judgements by way of justification, and maintaining value-coherence by way of both assertion and justification.

Thus humanity is held together by law, which objectifies all subjective human values by way of legal/scientific acts. Like the broader universal visions of science, law also has broader perspectives—historical, normative, situational, and linguistic from which it views society. Owing to that scientific-social perspective, however, law only does no more than reflect the scientifically determined values and a materially determined reality.

From this we can deduce that existentially “science is social” and “social is scientific”. That is to say, science has social needs to fulfil; hence it is social. And society is a scientifically conceived and sustained structure; hence social is scientific. But ontologically this is not the case: “science is not social” and “social is not scientific”. Science is not social since science emerged out of human inquisitiveness— independent of any conceptions such as the society born out of science itself—to know their physical world, their reality, so to speak. And, social is not scientific because an inquiry such as science, which is qualitatively independent of any social structures it has conceived, cannot encompass society in it.

In this light, law—a constituent of the social—is existentially scientific but ontologically non-scientific. The ontologically non-scientific nature of law is buried by the rationalist schools of thought by imposing a phenomenological relationship between science and law.

In this book, I take this imperfect scientificism of law seriously and discuss the scientificism of law as reflected in international law. However, contrary to what we generally hear from the mainstream (and its neo-rationalist redeemers) in the field international law is not understood simply as a legal normativity providing peaceful coexistence of states in an otherwise self-interested world. Rather, international law is understood as a universal medium—a communitarian language—that has the underpinning of an exotic idea-complex capable of mobilizing humanity into a “social universe”. Yet, my intention is not to provide an ideological discourse asserting that the universalist enterprise of international law has failed to fulfil its promises; such a stance has the risk of supporting those claims that international law is an ideological/ideational promise to humanity. Not heeding the critical and revolutionary appeal such an approach has, I have chosen to conceptually invade the architectonics of international law using pre-scientific, pre-social knowledge on the human condition

and the methods of inquiry into human reality created by the pre-scientific traditions of antiquity and the Middle Ages. In this endeavor, I have mainly drawn on the Vedic philosophy of the Sanskrit tradition. However, I do not limit my efforts to simply critiquing the grand intellectual schemes—both science and law—that through many historical epochs have grown out of the aspirations of humanity, but provide a thumbnail view of alternative ways of thinking and living which have the intellectual potential to invoke a sense of oneness in humanity.

II

If scientifically revealed truths are not the ultimate truth and if scientific conceptions are superimpositions on the ultimate truth, then we need a non-scientific vantage point to view the world, view humanity, and view all human socio-scientific conceptions. This is the reason why I have chosen Vedic philosophy as a source of insights for assaying the design and structure of international law.

At first blush, Vedic philosophy does not seem to be a font of potentially society-forming ideas, let alone have the potential of being a methodological base for postmodern research, even where that inquiry focuses on a discipline desperately reduced (of late) to an unsophisticated economics and a non-jurisprudential pragmatism. The structural antiquity, metaphysical anchoring, transcendentalism, and enlightenment-centered thought of Vedic philosophy might appear uninspiring for both ideological/doctrinal reformists and global campaigner/activist groups alike. Moreover, Vedic philosophy is often geographically marked as reflecting a given region's epistemic beliefs and thus not qualifying for any disciplinary titles, save "Eastern exoticism".

However, in choosing Vedic philosophy I was encouraged by the very fact that it provides methods for a truth-oriented inquiry, unblemished by any ideological or impositionist ambitions. That is to say, the entire body of Vedic knowledge is the result of a self-inquiry—the question "Who am I?"—and does not entail anything beyond that question. Scholars of that tradition maintained unassuming modesty before the knowledge they gained from their inquiry: it was never used for creating an empire or with any motives of domination. To be sure, many socio-cultural concepts and models have emerged on the basis of Vedic philosophy, both in its pure and altered forms, but such models have barely influenced this work.

On balance, when I built an analytical framework on the basis of Vedic philosophy, the book found a pre-social and pre-scientific vantage point to examine science and scientific constructs, including law. That vantage point helped me ask the questions: Have we understood the world as it ought to be understood? If we did, why have we felt the shadow of an impending doom, the ultimate *darkness* (poeticized by Byron), ever since organizing the world? Why do our sanguine self-assurances leave trail of an abject cynicism? The Vedic perspective and the analytical framework I have drawn from Vedic epistemology provided answers to these questions.

The picture that appeared was not one of promise; each modernist idea, each intellectual method, each project guaranteeing a better world which I subjected to analysis proved to have the pall of egocentrism. And law appeared to be a concept fraught with manifold outlooks: if it is a naïve faith in doctrines one sees on one side,

then on the other side one encounters a normative agnosticism, and on a third an effort to establish law as an egoistic rationality. But, I could not have left the work in despair by concluding that law is a damned enterprise that nurtures an egocentric humanity. If I choose not to live in the sadistic pride of having laid waste a project on which rests the hopes (though naïve) of hundreds of millions of people, I have to tender alternative visions—ways of thinking and living—and instil confidence in the minds of people.

However, the task of providing an alternative way of looking at the world was not simple. One option (which is a stance generally taken by many critical scholars) was to make a phenomenal “apologetic return” to the dismantled structure and declare that my critique fits well into “law as it is”—as a meta-discourse or as a safety-valve and mechanism for combating against all the odds of time. Though such a stance might fetch applause from many quarters, I would stand guilty before my conscience—guilt for having been disloyal to that knowledge which helped me to realize the misguidance of humanity. The guilt would have been particularly agonizing given that the knowledge I would have betrayed pertains to the intellectual potential to bind humanity in the thread of love and oneness. Another option was to carry on the Vedic/transcendental project and articulate new visions. Such a step entails providing a non-scientific base for law and society as well as setting new goals for life itself. When it comes to a non-scientific base for law, my chosen approach entails a new logic, new reasoning, and new intellectual methods.

A Vedic project is, however, challenging, in that it requires every individual born in the world to realize his/her high intellectual potential. That is to say, human beings are not born free; they are born into the tragic prison of ignorance, ignorant of their own self, ignorant that the world exists only through them and that they are (each) the ultimate good and happiness in the world. Society and its scientific materialism only perpetuate this ignorance, instructing minds that the world comprises opposites (dualities)—economic richness and poorness, social bigs and smalls (“very important persons” and “less important masses”), imposers and bearers, and so on and so forth. The Vedic project aims to shatter all these material dualities by informing individuals of their oneness and showing them the path to reach that intellectual state where one attains a singular consciousness, the true human condition.

It may seem that asking humanity to intellectually transcend its basic egoistic nature is expecting too much. It is, however, the case that humanity grows intellectually every day to keep pace with the dynamics of society. This does not mean that we are engaged in a systematic study of social phenomena and structures, but only that every day we learn to live socially. This learning is an expansion of our social consciousness, a walk-along with the changes of the society, and a process of internalizing those changes or critically attempting to resist the changes which we deem as bad for the society. The transcendental program maintains this inquiry-oriented pattern of life. It only urges individuals to shift their focus from society to their inner selves and to ask more ontological questions on the basis of the knowledge of their transcendental reality.

In aiming to provide a description of humanity’s transcendental reality, and a reading of the society and organization of social knowledge on the strength of that description, this book has drawn heavily on Vedic philosophy. In many instances, original Sanskrit materials provided me the inputs to write; bearing in mind the multi-

regional, multi-linguistic audience the book targets, Vedic scholarship in English, of both Occidental and Oriental scholars, is cited as the authority. In certain special cases, Sanskrit verses are quoted (with English translation).

Employing Vedic knowledge to sketch a world order project does not signify my desire to create a new school or theory. Moreover, it is not to be taken as an indication of my commitment to any resistance movements or any faith-systems with which Vedic knowledge is often associated. In other words, this project is neither resistance to the West—it is not a voice of a subaltern or “the other”—nor an engagement with “law and religion”. It belongs neither to the “right” nor to the “left”. And it is not a view from “below” or from “above”.

III

This book comprises four chapters, each designed as an article, with its own thesis, analytical structure, and argumentative pattern. The chapters were not written in the order in which they are arranged here; chapter III was written first, followed by chapter IV, chapter II, and chapter I. This seemingly jumbled sequence owes much to the way I have designed my research.

The idea for this book was conceived at a time that saw increasing discussion of the “linkage” of the trade regime with other branches of international law. Most of these discussions were centered on the World Trade Organization (WTO) and its jurisdictional expansionism. It was interesting to observe how scholars of the respective branches of international law had contained the interventionism of the WTO—often by doctrinal adaptations, often by setting off a socio-political discourse, and often, but most paradoxically, by way of a resistance-oriented discourse and action. In all those scholarly endeavors, what was apparent was an eagerness—a professional concern, so to speak—to safeguard the structural integrity of their respective branches from being cannibalized by the trade regime. More than these conciliatory scholarly efforts, however, what aroused my curiosity was the incredible normative influence of the trade regime and the institutional power of the WTO, I asked, “What is so profound inside this grand ‘Cathedral’ (as it appears to Joel P. Trachtman when articulating the ‘economics’ of the sanctions of the WTO) that the normative language of international law yearns for a WTO dialectic”? To formally ask this question, while not sounding too naïve and poorly informed, I decided to create an analytical framework, of at least the minimum intellectual standard expected of a law review article, to examine the existential logic of the WTO. Below I tell the tale of that article, *Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism*.

First, I asked the clichéd, foundational, post-ontological (as Thomas Franck says) question: “Is international law real law?”—a question all international law primers and all teachers of graduate law classes ask (with their characteristic artificial scepticism), only to answer in the affirmative. Whereas they ask this question as part of an elementary instruction, I asked it to show the reader the hostility of legal positivism towards international law, especially the positivists’ dismissal of international law for want of certain attributes—sovereignty, command, obligations, and sanctions—which they deemed essential to real law. I also wanted to draw the reader’s attention to the

sanguinity among international lawyers in the wake of the WTO in their finding the “missing elements” of real law and rendering their discipline normatively more robust, a positive law.

Asking “If this is in fact the case?” seemed to be the most exciting and serious of all the tasks I had performed till then in that article. The subsequent section of the article became a “talking board” to record the views of three prominent positivists—Bentham, Austin, and Hart—as to whether they would have sanctioned international law had the WTO existed in their day. That endeavor revealed that their views on the status of international law would not have been any different. Having thus shown the satisfaction and sanguinity of international lawyers to be ill-founded, I proceeded to ascertain what force, if not positivism, has brought about the changes that international lawyers have witnessed. What has conferred power on the WTO and thereby endowed international law with a hard normativity?

I began to sense that no answers would be forthcoming from positivism in the way the theory is described in the Victorian tradition; nor could answers be had from positivism’s twentieth century English refinements or the revisions of the predecessors of modern day constitutionalism. Yet, by then, I had fallen in love with positivism such that I started to idealize many positivists (their biographies became my favourite reading). Call it my naiveté or a positivistically induced obsession for formalism, I simply reveled in the simplicity and comfort of talking about law as rules, as super-rules, and as the sacrosanct inscriptions of ultimate good and bad (the “principles”). That liking, however, was challenged by a mystery I sensed in the tabooed social frontiers of law. Hence, I returned to the three positivists, came back, and again returned, only to come back to the mystery. Finally, having been informed by the lives and work of the three positivists, I retold the positivist tale as a socially-oriented theory—one with a non-legal, social ontology—as against the power-oriented one. Yet I did not get an answer as to what the force is which propels the WTO.

I directed my quest across the Atlantic (not bodily). There, as everyone in Rome, I became a Roman, speaking the language of ideology, politics, and power. In that phase of infidelity to positivism I rigorously engaged with political and social theories. I became aware that the grand ideology of globalization—neoliberalism—has spread a unique, unconventional “market interest” (egoism) and market culture among global actors such that every market institution is highly revered and respected in the world. Further research revealed that the WTO is a market institution whose structure and strategies are dictated by the needs of the neoliberal agenda.

When international lawyers embraced the WTO and brought it into the structural framework of international law, it also benefited from the institutional strength of the WTO provided by neoliberalism. That is, the thickened normativity of international law is a reflection of the robustness of the socio-political order driven by neoliberalism. The power and normativity witnessed by international lawyers in international law is a “seeming reality”.

However, my love for positivism was not lost even then. Moreover the revelation that positivism is a socially-oriented theory with great potential for explaining social phenomena prompted me not to give up on positivism. To my surprise, a rereading of my social version of legal positivism in the light of neoliberalism revealed that positivism is a discourse of a given intellectual context and tradition just as

neoliberalism is in the intellectual context of the market tradition today. This does not mean that positivism is history; positivism exists even today in an ironical relationship with neoliberalism in that it is positivism that provides a sense of “legalism” and applies the rule of law to enforce and reinforce neoliberal ideals in the world.

This conclusion is revealing in a broader sense than it appears to be. It does not simply convey the existential logic of the WTO, the social orientation of positivism or the harmony between positivism and neoliberalism; it also shows that the renewed normativity in international law comes from a market culture and market practices. What is more, it tells that the legalism, or rule of law, about which humanity is so proud, is a rule of the market. Finally, positivism, my erstwhile passion, proved to be a theory that has no structural credibility, but only has an uncritical receptiveness to any social forces that come its way.

This state of affairs seemed serious to me, given that the concept of the market as it applies to the modern world (and is talked about throughout my research) is a mindset where one has to be optimal in his/her preferences in order to be better off than another—an egoistic mindset, the supposed true human nature.

However, international law as I have been taught it in law school hails from a communitarian tradition, which, although state centric, is humanistic, “Grotian” in a manner of speaking. I have understood it as a legal structure that stands for humanity and its common interest. It boasts the United Nations “to save succeeding generations from the scourge of war”, the 1967 Outer Space Treaty which recognizes the “common interest of mankind” in the peaceful exploration and use of outer space, the 1982 United Nations Convention on the Law of the Sea which declares “the seabed and ocean floor and subsoil thereof” as the Common Heritage of Mankind (CHM), and the 1948 Universal Declaration of Human Rights which recognizes the “inherent dignity and equal inalienable rights of all members of the human family”. But having seen the malleability and “softness” of legal positivism through which these communitarian ideals are to be realized and the sway of neoliberalism over positivism, I had sufficient reason to be sceptical about conventional international law and the realization of the altruistic ideals it stands for: What after all is international law other than a particular language-structure that has a subjective grammar, a grammar which helps its speakers construct subjective meanings in a seemingly legitimate fashion?

The two questions—first, “Is international law a communitarian project?” and second “Is it a subjective discourse?”—prompted me to undertake a study of the intellectual sensibilities of mainstream international law. Since market interest (egoism) appeared to be the current state of international law and trade regime to be the representation of that interest, any examination of a legal regime that is communitarian in outlook and that stands to secure the common interest of humanity seemed to necessitate a juxtaposition of market interest and common interest. Such a juxtaposition would be needed if I was to understand and appraise the “trade-and-the-other” linkages and the doctrinal adaptations through which other branches of international law have contained the trade regime and the market interest it promotes.

In that endeavor I chose the law of outer space (space law) to represent mainstream international law, for the reason that among all the branches of international law I found space law to best represent the communitarian aspirations of humanity. Moreover, space law is a discipline that has the communitarian character of

international law embedded in its theoretical and doctrinal structure; e.g., space law has the concept of “common interest of mankind” and recognized it as the governing doctrine of all space activities; space law codified the CHM principle (before the law of the sea claimed it); it restricted national claims of sovereignty in outer space; and it affirmed the peaceful use of outer space. Space law also has introduced for the first time procedural specialties that uphold the communitarian interests, e.g., voting by consensus which guarantees that the interests of all states and its peoples are fully represented.

I designed my inquiry in the form of yet another article—*Whither International Law, Thither Space Law: A Discipline in Transition*—which deals with the epistemological foundations and functional attributes of space law. I first provided a detailed assessment and critique of the professional and intellectual history and the prevailing epistemic culture of space law. This analysis helped me confirm an apparent tendency of space law to sever its ties to its parent discipline, international law. From that analysis, I derived two opposing hypotheses: 1) space law ought to remain separated from international law as a unique jurisprudence, and 2) although has its particular characteristics, space law is not a branch of law distinct from international law and there is an imbalance in the pattern of thinking in space law that prompts one to believe that it is separate from international law. I then framed a debate along the lines of epistemology (drawing on Foundationalism and Coherentism, in particular), wherein I defended the first and second hypotheses on behalf of space law and international law, respectively. While defending each side, arguments drew on the scholarship in space law and international law so as to avoid the risk of solipsism and prejudice.

In articulating the arguments for space law, it became obvious that the discipline has adapted itself so as to accommodate the growing commercialization of space activities into its regulatory sphere. Space law has taken up a new professional posture and reorganized its academic and professional vocabulary in order to meet the growing demands of the market. However, although this trend marked a substantial departure from the discipline’s conventional doctrinal base, it was a sign of its “progressive sensibility”. In the spirit of this sensibility, space law adjusted its theoretical bases to the market, installed the market culture in its structure and set *safeguarding the interests of the market* as its functional goal.

Arguing for international law, this stance of space law should have met with a theoretical opposition from international law. However, my research in this regard revealed that the right of space law to modify its perspective is part of a larger program to renew international law. International law was seen to be functioning like a discourse—that is, “a linear operation of texts, discursive practices and social practices” (Chapter IV, p.401)—that assigned space law and other special branches a right to reorganize. This function of international law served to maintain structural and “axiological harmony”. Given that discourse is influenced by the social practices of a given time, it is certain that the legal discourse is prejudiced by the character of the neoliberal market culture. It is such an influence on the nature and functioning of international law that has prompted space law to promote the interests of the market.

Upon completing these two articles, I achieved a better grasp of the linkage issue. I saw in an insightful manner the doctrinal adaptations made in order to overcome the

conflict of regimes and the theoretical explanations to legitimize the linkage between trade and other regimes. I understood that the source of all conflict was the coming together of the market interest (as seen in the trade regime) and the common interest (as seen in conventional international law and its special branches). Neither the eclipsing effect of the trade regime over other regimes nor the radical rewriting of international legal discourses remained a mystery for me. International law seemed to be the most wondrous intellectual enterprise with its survival mechanisms, receptivity to changes, doctrinal malleability, rhetorical power; I was left thoroughly impressed by the entire doctrinal complex of international law.

However, my interest in philosophy, particularly Oriental philosophy, triggered a curiosity about the two mindsets apparent in the conflict of regimes—common interest and market interest. I was led by an awareness that these mindsets are socially systematized forms of altruism and egoism, respectively. At a deep phenomenological level, any sociality associated with altruism and egoism would collapse and they would emerge as the two poles of human thought—egoism the natural state of consciousness and altruism the ultimate state of consciousness. This Vedic (of Vedanta in particular) and Husserlian phenomenology became a heuristic to organize a rigorous inquiry into the philosophical design of international law. That inquiry was to become the nucleus of this book.

I worked the next few months to design an analytical framework which could juxtapose common interest and market interest. Designing one such framework does not seem a difficult task; however, what I required was an analytical framework that could encompass the philosophical design of international law. In addition, I wanted to highlight that the pairing of common interest (altruism) and market interest (egoism) is deleterious at the deep philosophical level (that is, when perceived beyond any social framework); the splendour of the doctrinal complex did not dispel this scepticism. That proved to be hard task. Every day I sat amid a heap of multidisciplinary pieces gathered from over a dozen databases and numerous shelves, read the works, and prepared notes. Long evening walks into the woods provided space for self-dialogue, which systematized the scattered thoughts accumulated over the day. Nearly six months elapsed as I built a mental scaffold to begin with, I wrote in my diary:

First, study the design of common interest in a two-fold perspective: (a) common interest as philosophy, wherein the ethical and moral base on which the concept rests has to be examined, and (b) common interest as doctrines, wherein analyse the doctrinal and political mould provided for common interest in the ideas underpinning international law and politics. Then juxtapose the philosophical and doctrinal designs to ascertain the conceptual reality of common interest. Second, follow a similar approach for examining market interest. However, the market should be viewed first as ideology and then as doctrine. Third, set up a dialogue between the rationalities of common interest and market interest. The interaction should take place at two levels. On the first level, the reality of both concepts will interact. On the second level, common interest, as it appears in

doctrines, will interact with market interest, as this is reflected in doctrine.

Before I started doing any serious research to develop this frame (which was to last for another year and a half), I put the features of the enigmatic doctrinal complex of international law and its functional specialties in writing, with an allusion to the fact that it is this complex which has reconciled the disparate pairings of common interest and market interest.

As suggested by the sketch I made, I pondered the concept of common interest as it has featured in philosophy. However, nothing of a concept called common interest appeared before me, although I found comparable concepts such as “common good”, “public interest”, and “collective will” in certain traditions in politics, legal dogmatics, and theology, respectively. I also came across many knowledge communities that shared a kind of common philosophical interest. None of those loose representations of common interest could have helped me in ascertaining the true essence of the concept, but a concept of the common interest of humanity at large. The practice of discussing the common interest as the interest of the humanity was found only in Vedic philosophy, a philosophy that holds that the common interest of humanity lies in a self-oriented inquiry into human existence. Although the common inquiry engenders a common interest, humanity actualizes its common interest by arriving at an intellectual state in which one acquires a singular, non-dual consciousness, this being the outcome of such an inquiry. That state of intelligence is altruism.

Inquiry into the concept of common interest as it is manifested in the doctrines in law and politics met with the same problem I had with the inquiry into the concept as seen in philosophy: I felt the same vastness, looseness, and mistiness of the concept in legal and political discourses. The few common interest doctrines that are in international law are too narrow in ambit and represent only a particular regime rather than international law in general. Given that my intention was to inquire into a collective common interest that has undergone a compromise with market interest in the many instances of regime conflict, an inquiry into particular doctrines or particular regimes would not have helped. Hence, drawing on some of the critical, radical, and reformist scholarship in international law, as well as on the theory and methods of Vedic philosophy, I decided to expand the concept of doctrine to include those streams of thought in international law which aim at securing a common interest. This intellectual posture elevated the Third World Approaches to International Law (TWAIL) and “global governance”—movements supposedly standing for a certain common interest and extending over the entire doctrinal complex of international law—to the level of doctrine.

My analysis of TWAIL and global governance revealed that the common interest claimed to have been pursued by these streams of thought is egoism camouflaged as shared rationalities.

Thus, the concept of common interest as it is understood in philosophy turned out to have *altruism* at its core, whereas common interest as it is seen in doctrines was found to be engendering *egoism*. And when I juxtaposed common interest as the concept is reflected in philosophy and in doctrines, the philosophical version was seen as eclipsing the doctrinal one: a common interest is that which entails a mindset of

altruism. Through this juxtaposition I was also able to refine the concept of doctrine and conceptualize philosophy.

Examining market interest was not as tedious as investigating common interest. Even though the same pattern of analysis was followed, I deemed market interest to be an ideology instead of philosophy. This was because the juxtaposition between common interest as philosophy and as doctrine helped conceptualize philosophy as an intellectual discursivity for actualizing human reality. Given the dependence the market has on socially constructed reality as against human reality, market interest could not have found a place in philosophy. That analysis informed that markets promote egoism.

When it came to the question of analyzing market interest as doctrine, once again the juxtaposition that helped to refine the concept of doctrine helped me to choose Law and Economics (L&E), in particular economic analysis of international law, as a doctrine. Examining L&E as doctrine was a protracted affair, especially since I had to gather all models of economic behavior of states built by scholars of international law, organize them in a consistent fashion, and conduct a review of them to obtain a coherent perspective on the intellectual stance of L&E as it applies to international law. However, there was nothing by way of a conclusion of that review to say that L&E (and the market interest it represents) promotes egoism, since the fundamental claim of L&E is that egoism (i.e. maximizing one's preferences) is the true nature of human beings and all human entities. However, I was sceptical about this claim. At the same time I was aware of the intellectual strength of L&E. Hence, to proceed with my scepticism I once again employed Vedic philosophy and its theories about human nature. That step and the insights drawn from Vedic Philosophy facilitated my effort to provide a critique of L&E. That critique showed that the doctrinal form of market interest that L&E embodies reinforces egoism.

Once market interest had been studied as ideology and doctrine I juxtaposed market interest as reflected in both ideology and doctrine and sought the reality of market interest. However, unlike in the case of common interest there was no dichotomy between the ideological and doctrinal versions of market interest, for the latter was found to be reinforcing the former. Thus, I concluded that the reality of market interest as it is reflected in ideology and its doctrinal version only lays a theoretical and methodological foundation for the egoism being spread by the market.

That common interest represents altruism and market interest represents egoism was an interesting revelation. It was interesting, because it proved my initial doubt true, that is, that at a deep phenomenological level common interest and market interest are social representations of altruism and egoism. At that point I no longer needed any explanation for the regime conflicts.

However, these findings prompted another question; that is, if the common interest and market interest are representations of two opposite rationalities—altruism and egoism—can the doctrinal reconciliation of conflicting regimes (and subsequent validations) by the doctrinal complex of international law be justified?

To clear this scepticism I went on to create a juxtaposition for a third time. This time I built the juxtaposition on two levels: first between the reality of common interest and market interest, that is between philosophy and ideology and then between the doctrinal versions of common interest and market interest. At the first level, I

decided that instead of juxtaposing common interest and market interest, I would juxtapose altruism and egoism, their core rationalities. That analysis showed that altruism and egoism are the perennial poles of human thought and that the true meaning of life is in transcending egoism and realizing altruism. Any intellectual positions or thought-structures that bring together these rationalities have the effect of thwarting the true intellectual progress of humanity. At the second level, I examined how the doctrinal complex of international law has reconciled the clash between common interest and market interest. It was found that such reconciliation has been accomplished by way of hermeneutical invasions into law, and that a set of discourses has been set forth to legitimize such invasions. TWAIL, global governance, and L&E were found to be serving such a legitimizing function.

Nearly two years after I conceived this article, I concluded it by pointing out that it is sort of a scholarly obsession with science that has cast law into a doctrinal mould. As doctrines became the working modules of lawyers and scholars of law, a “doctrinal fetishism” came to exist such that philosophy—the true art of thinking and living—was restricted to a set of doctrine-centered, deontological reasoning called “jurisprudence” (informally, “legal philosophy and theory”). This scientifically conceived philosophy of law renders legal judgements devoid of the spirit and purpose of philosophy. It was with such an intellectual outlook that the doctrinal complex of international law grappled with regime conflicts and reconciled the disparate pairing of common interest and market interest.

Humanity in effect has a social system that has egoism as the conceptual surface to realize altruism. For international law, this intellectual state of affairs is nothing less than a tragedy, and thus I titled the article *The Tragedy of the Philosophy of International Law*.

By then, I had a critical reading of the philosophy of international law. Yet, I felt the need to write one more article in order to appropriately frame the research I did for the book. Therefore, I tried to recollect the advancement of my research thus far.

When I began the book, I had before me a regime conflict in international law as a *problematique* (the hallmark of a scientific academic work). As I advanced, the regime conflict expanded to include the structural deficiencies of international law. Structural deficiencies expanded to include structural errors. And structural errors extended to encompass social mistakes. In the same vein, the topics of the research qualitatively and quantitatively broadened from linkage issues to the existential reality of the WTO, from the WTO to the postmodern ontology of space law, from space law to the philosophy of international law; it came to embrace the discursivity of TWAIL, the spirituality of global governance, quantum physics as a transcendental revelation, Vedanta on the human condition, the structure of legal thought, and the misguidance of L&E. However, more than the expanding scope of the analytical framework or the increasing rigor of analysis with every new topic and every new article, there was an overall broadening of my social and individual consciousness.

I decided to appraise my research in the light of my broadened consciousness. I was able to ask bigger questions by then: What could be the reason why a social conception like international law stands misguided? Does the problem lie in the structure or in the function of international law? Although the poorly adapted scientificism of doctrine was found to be misleading, that cannot be the sole cause,

since I was able to find flawed thought-patterns beyond the doctrinal dialectic, in the philosophical configuration of the doctrinal complex of international law. Yet, regardless of such serious problems, the discipline is functional. International law lives in society (we hear about it every day), in law schools (we speak about it every day), and in international offices (*they* do it every day). No one but a few scattered sets of scholars has any concern for the intellectual health of international law. For the majority, international law is a robust regime and a dynamic social enterprise; whereas my pre-social analyses tell a different story. In that case, it is likely that there is a major phenomenological error related to international law. That idea prompted a fourth article *Misguided Sociality, Lost Humanity: International Law as Phenomenology, and Beyond*.

The first lesson of phenomenology is that consciousness is the foundation of all existence, be it law, the society, the world or the universe. This view implies that reality is what consciousness constructs. In that vein, any phenomenological error is an error in human consciousness.

If international law bears a phenomenological error, it is definite that society also bears that error, for it is from social consciousness that legal consciousness emerges. To find out if there is a phenomenological error in conceiving society (or, for that matter, in conceiving international law) I formulated a phenomenological discourse which illuminated the view that consciousness is only a material truth and that outside/within consciousness there is a super-consciousness—the ultimate truth—which is veiled by a “human ignorance”.

First, I developed the concept of the super-consciousness—transcendental reality—by drawing on Sankara’s *Advaita Vedanta*, commentaries on various *Upanishads*, and Vedic exegesis. That exercise helped me to comprehend transcendence, conceptualize the super-consciousness, and provide the means to realize the super-consciousness. Then I rationally situated the super-consciousness. However, putting the findings of that research in paper I went on to explore the characteristics parallel to the super-consciousness in the constructs of consciousness such as society and law. That analysis informed that society is an ersatz transcendence. This condition of society is self-evident given that consciousness, being clouded in a haze of ignorance, cannot fully recognize the super-consciousness, except for certain noetic flashes in the mind. That finding was followed by an account of the phenomenological philosophy of international law. In that account, too, I explored transcendental parallels, in concepts like sovereignty. I concluded that analysis with the finding that international law is only a functional aesthetic that exists in the minds of international lawyers and that international law is founded on social consciousness with the aim of sustaining the social reality.

Thus, I demonstrated that sociality is a “seeming reality” and that the true human state of consciousness is the super-consciousness. I also brought back to the article the text on the concept of the super-consciousness that I had temporarily withheld. It was then time to answer a polemical question: If true human reality is the transcendence and not the social reality perceived by consciousness, what might be the nature, purpose, and meaning of law/international law?

This is a question I ought to have answered in the conclusion of the book. However, the deconstructive spirit of the article (*Misguided Sociality, Lost Humanity*)

would have had the shadow of cynicism and distrust had I left it with a transcendental revelation and without showing the prospects of enlightenment. Hence I decided to envisage a transcendental foundation of law in the last part of that article.

In this regard, my first insight was that even though super-consciousness is a new reality, it is not antithetical to consciousness per se; rather, super-consciousness is a higher state of consciousness. In that case, law would require an intellectual refinement from a social concept to a concept that entails the higher level of reasoning distinctive of transcendental reality. Even if certain elements of society's law could be retained, the new concept of law would require a rejection of all prejudices, beliefs, and judgments of both the society and law. However, even amid such retentions and rejections, the purpose of law, that is, to show "right ways" to humanity, would remain unchanged.

My task was to see if law needed a canonical form to provide the right ways. That quest revealed that the super-consciousness is an intellectual state of perfection—a singularity—that itself is the ideal, the right way. However, to reach the ideal state of singularity it is necessary for humanity to acquire the knowledge of its self-becoming. That knowledge is law. Thus law is both an ideal state of mind as well the knowledge to realize that state. I called the latter "Ultimate law" and the former "Law". Finally, I went on to provide a thumbnail view of the discipline Law that embodies a logic and reasoning corresponding qualitatively to the super-consciousness. In providing such a foundation for the discipline, I drew on Vedic epistemology and focused on grammar, language-use, and relevant intellectual skills.

Thus, when transcending jurisprudence, law is a highly profound knowledge and set of intellectual techniques; and when jurisprudence is transcended, law becomes the ideal state of mind, the enlightenment.

IV

This book was written over a period of five years. It is rather unlikely that any work extending over such a long period of time is without any variations, especially when the author is in a formative phase of learning (i.e., a phase for learning the "art of learning" that has to be practised for the rest of one's life). This work has experienced the ebb and flow of time and reflects this, among other things, in its language, narration, and the overall writing and intellectual standards.

It is true that the book reflects my changing linguistic skills. However, there is also a conscious choice of language for each article/chapter depending on the theme and the message each chapter has set out to convey. Chapter I, which contextualizes the book, is also the sketch of a proposed transcendental project. Hence, it has a somewhat poised pitch and confident tone. Its sentences have a fragmentary brevity, for each sentence, more often than not, pithily brings in context and systematically arranges the ideas expressed elsewhere in this book (in its original context, an idea might have seemed only applicable to the situation in which it was discussed in the relevant chapter). However, that does not imply that the chapter is a summary of the book; the chapter provides a rereading of many socio-intellectual schemes, my interpretation of many transcendental positions, applications of transcendental logic to many social perspectives and, most of all, an outline of a transcendental project (the

chapter also seriously discusses certain intellectual positions in Vedic philosophy). Another reason for the sentential brevity is the theme of the discourse, transcendental philosophy. Transcendental discourses of Kant and Plato (and many modern-day scholars of their genre such as Philip Allott) have this brevity in their sentences and a rhythm induced by that brevity. However, apart from their influence, I might have been predisposed towards the Sanskrit tradition and its scholarship—in the form of *mantras*, which have a similar brevity and rhythm—that I have consulted in writing this chapter.

This style of the transcendental philosophers has been criticized as an attempt to obscure social reality. The main criticism is that there is a transcendental flamboyance which is created by verbal juggling (often by repeating or alternating words) and other “stylistic moves” such that the narrator, the referent, and the prose roll into a mellifluous sonata from which a pragmatic person gains nothing but a momentary aesthetics. In chapter I, I have resorted to many such “moves”, e.g. the expression “consciousness” and “super-consciousness” are more often than not seen to be striking a beat. Such a style of writing owes to the fact that the subject matter of transcendental philosophy is not transcendence in isolation; rather the transcendence appears as a superlative state of material reality. In other words, the relationship between material and transcendental reality is that of manifest and unmanifest reality, respectively. Hence, any reference to the unmanifest transcendence is preceded or followed by the manifest version of the transcendence. Regarding specific concepts, even the qualities of such concepts as reflected in manifest and unmanifest states accompany the discussion. The cumulative effect of a conceptualization of all these elements renders the narration to have a rhythm. Therefore, the criticism that this style is a stylistic mask misses the point.

The sentential brevity in transcendental discourses has also been subjected to criticism. Here the first point to be noted is that the earliest elements of transcendental knowledge were *sounds*, stored in the mind as memories. The thought-sentences of those memories had a unique aesthetic structuring. That is, knowledge about the manifest reality was designed as full-blown sentences, whereas knowledge about the unmanifest reality was designed as thoughts about the manifest reality collapsed, which comprise short sentences with words arranged in a phonetical order appealing to mind. Raffaele Torella concisely captures the purpose of such a linguistic structuring:

Language [in the Sanskrit tradition] is precisely the device by means of which succession (*krama*) is introduced into consciousness so that consciousness can dissolve it into pure reflective awareness.¹

Thoughts in the form of developed sentences were employed for the earlier stages of the inquiry into reality, and thoughts in the form of brief and rhyming sentences (*mantras*) were employed for articulating the transcendental reality. It is the latter type of language-structures that has to be the means of communication for humanity which has realized the cosmic consciousness, an intellectual oneness.

¹ Torella (2004), p.179.

On balance, deeming the discourses of transcendental philosophers to have an undesirable aesthetics is at the cost of a rejection, if not ignorance, of the discursivity of transcendental philosophy.

The language of chapter II is more assertive, since that chapter is an effort to demonstrate the misguided dialectic of doctrines in international law; the assertions made therein are supported by a host of sources. In the same chapter, in those instances where I have highlighted the role played by contemporary legal and political thought in undermining human potential, the narration conveys a certain pathos.

There is also substantial variation in the storylines of each chapter and in my way of carrying the arguments forward therein. Chapter I, despite being an assortment of Occidental and Oriental philosophy, social theory, international law, and Vedic cosmology, has a rather uncomplicated storyline. Chapter II has a much more complex structure because of its analytical ambition. The chapter is also conceptually dense, given that I had to first situate and then juxtapose many legal and political schools of thought. The style of Chapter III is “presentism”; i.e., it makes a modern institution return to the intellectual positions of three succeeding philosophers of the past and to re-appear in the present to tell that it is on a flawed foundation. The chapter then goes on to determine the existential logic of that institution in the present, which is but the past transformed. The plot is somewhat fantastical yet has the seriousness of a professional academic work. Chapter IV starts with an account of the professional and intellectual history of a discipline and later provides a plot for two opposing hypotheses to compete with each other. That plot has a certain artificiality about it in that I (the narrator) take on the responsibility to speak on behalf of each hypothesis. There is every chance of my being prejudiced in favour of one position. However, my prejudice (if there were any) would make no difference there; the reader gets to see the possible extent of the intellectual positions one can take in postmodernity, the milieu in which the article’s plot is set.

V

Readers can approach this book in many ways. First, for an ambitious reader, that is one who is sceptical about the present pattern in which contemporary legal and political thought are elaborated and one who is serious about transcending scientifically structured jurisprudence, I recommend a cover-to-cover reading in the order in which the chapters are arranged. The same is recommended for readers who believe that law is kept alive by human intentionality that works in a social cause-effect network or who believe that systematicity of mind can only be obtained from a formal legal or political mindset. The latter type of reader would have quite much to do in maintaining the opposite point of view and critically contributing to the discussion.

Second, other readers might read in the reverse order, that is, start with the scholarly and professional sensibilities of a common interest regime (Ch.IV) and how that regime has yielded to the normative influence of a market regime to make a regime-pair (Ch.III). Then, they could see why such a pairing is a philosophical tragedy for humanity (Ch.II), and finally, how humanity can intellectually transcend that tragedy.

Third, readers could follow my progression down the chapters when writing this work (described above).

Fourth, readers might read the design of the philosophy of international law that embodies the disparate pairing of common interest and market interest and learn that such a pairing is deleterious for humanity (Ch.II). They could then proceed to familiarize themselves with the epistemological and ontological aspects of a common interest regime and a market interest regime (Ch. III and Ch. IV or Ch. IV and Ch. III). Finally, they might read about the alternative ways to make human existence meaningful (Ch.I).

In spite of all the four ways to approach the book, for those readers interested only in a given chapter or certain chapters, each can be read on its own without consulting the others.

References

- Allott, Philip, "The Idea of International Society", *The Alec Roche Lectures 2006*, New College, Oxford, 15 November 2006 (on file with the author).
- Allott, Philip, *Eunomia: A New Order for a New World* (Cambridge: Cambridge University Press, 1990).
- Anderson, Bruce, "Discovery" in *Legal Decision-Making* (Dordrecht: Kluwer Academic Publishers, 1996).
- Bjarup, Jes, "Epistemology and Law According to Axel Hägerström", *Scandinavian Studies in Law*, vol.29, 1985, pp.11-48.
- Erneling, Christina E. & Johnson, Martel David, eds., *The Mind as a Scientific Object: Between Brain and Culture* (Oxford: Oxford University Press, 2005).
- Franck, Thomas M., *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).
- Halttunen, Rauno, "Justification as a Process of Discovery", *Ratio Juris*, vol.13, no.4, 2000, pp.379-91.
- Kant, Immanuel, *Lectures on Logic* (Cambridge: Cambridge University Press, 1992).
- Koskenniemi, Martti, "International Law as Therapy: Reading the Health of Nations", *European Journal of International Law*, vol.16, no.2, 2005, pp.329-41.
- Peczenik, Alexander, Lindahl, Lars, & van Roermund, Bert, eds., *Theory of Legal Science* (Dordrecht: D. Reidel Publishing Company, 1984).
- Posner, Eric A., *The Perils of Global Legalism* (Chicago: The University of Chicago Press, 2009).
- Taekema, Sanne, *The Concept of Ideals in Legal Theory* (The Hague: Kluwer Law International, 2003).
- Torella, Raffaele, "How is Verbal Signification Possible: Understanding Abhinavagupta's Reply", *Journal of Indian Philosophy*, vol.32, nos.2&3, 2004, pp.173-88.
- Trachtman, Joel P., "Building the WTO Cathedral", *Stanford Journal of International Law*, vol.43, no.1, 2007, pp.127-67.
- Wagensberg, George, "In Favour of Scientific Knowledge: The New Museums", in Svante Lindqvist, ed., *Museums of Modern Science* (Canton: Science History Publications, 2000), pp.129-38.

CHAPTER I

MISGUIDED SOCIALITY, LOST HUMANITY: INTERNATIONAL LAW AS PHENOMENOLOGY, AND BEYOND

Conventionally, sociality is deemed the true human condition; it is the reality cast before humanity by the collective social self-conscious of its members. International law is a legal consciousness, a vital constituent of sociality. In a challenge to this position, this article argues that the true human condition is not sociality but a transcendental super-consciousness, upon which a social consciousness is superimposed. The super-consciousness is an intellectual fullness of mind, a transcendental state into which all constructs created by consciousness collapse. This collapse also brings about the collapse of sociality and international law. Drawing on perennial philosophy of the East—Advaita Vedanta in particular—the article envisages a transcendental foundation of law that embodies the deeper logic and higher level of reasoning distinctive of the super-consciousness. What is international law in sociality becomes a profound intellectual discursivity in the transcendental scheme.

MISGUIDED SOCIALITY, LOST HUMANITY: INTERNATIONAL LAW AS PHENOMENOLOGY, AND BEYOND

TABLE OF CONTENTS

I. INTRODUCTION

II. SOCIALITY AS HUMAN REALITY

III. THE PHENOMENOLOGICAL PHILOSOPHY OF INTERNATIONAL LAW

IV. REALITY IS A TRANSCENDENTAL SINGULARITY

A. *Exploring the Transcendental Singularity*

B. *Situating the Transcendental Singularity: A Rationalist Perspective*

V. LAW AS A SUPER-INTELLIGENT GUIDANCE

A. *A New Concept of Law*

B. *“The Law”: A Sublime Discipline*

VI. CONCLUSION

*Visudham antahkaranam svarupe Nivesya sakshinyava bodhamatre | Sanaiha
sanair nischalatam upanayana Purnam svamevanu vilokayet tatah |*

(Focusing one’s purified mind—the witness—on absolute knowledge, and slowly bringing mind to calmness, one attains the reality).¹

Sankara, *Vivekachudamani*

[E]nlightenment for everyone? It sounds like too grandiose a Utopia, especially when we consider how inept human beings seem to be in the face of the harsh realities which confront the planet today. At best, one might hope for a broader secular base in general, for a greater percentage of fully enlightened persons and certainly for authentic leaders whose inspiration could light the way. Yet the human species has long shown a second surprising aptitude for improving itself. The process is called *cultural evolution*.²

James H. Austin, *Zen and the Meditation*

The meaning and the measure of human progress are difficult to establish. A fair general judgment might be that material progress has not been matched by spiritual progress.³

Philip Allott, *The Health of Nations*

As the moving hands of history is poised to write a new chapter in the story of humanity, we are being given a renewed—and perhaps a final—opportunity to transform into reality the fondest visions of the ages.⁴

C.G. Weeramantry, *The Lord’s Prayer*

¹ See SWAMI MADHAVANANDA, VIVEKACHUDAMANI OF SRI SANKARACHARYA 1926 168, 169 (1926) (hereinafter *Vivekachudamani*). My translation.

² JAMES H. AUSTIN, ZEN AND THE MEDITATION: TOWARD AN UNDERSTANDING OF MEDITATION AND CONSCIOUSNESS 710 (1998).

³ PHILIP ALLOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 314 (2002).

⁴ C.G. WEERAMANTRY, THE LORDS PRAYER: BRIDGE TO A BETTER WORLD 260 (1998).

I. INTRODUCTION

Humanity is proud of its intellectual abilities—its ability to think rationally, make judgments, organize life in the world, and above all, to understand its own ontology. Humanity evolved into its present state of salience through many intellectual projects such as religion, the Renaissance, the Enlightenment, science, the Industrial Revolution, liberalism, modernism, and postmodernism. It is through these intellectual projects that humanity became conscious of its human condition.

All theoretical abstractions of the human condition bear heavy traces of the intellectual projects that cradled such abstractions. It is from such theoretical abstractions that humanity found universalizing themes for coming together, for its social self-becoming.⁵ The most significant among all the themes which have helped humanity in that process is “peace”. The most significant means to secure peace is international law.⁶

Thus, international law sustains humanity; a collective social self-consciousness—a striving for peace and happiness—sustains international law; and the collective social self-consciousness is a product of human intellectual projects. That is to say, for humanity, a social consciousness is the human condition, human reality. Human reality is therefore sociality in which international law is a vital enterprise.

This article is an inquiry into human reality and the philosophy of international law as it pertains thereto.⁷ Accordingly it poses the question: Is reality that which is observable and perceivable as the prevailing sociality in international society (hereinafter “the society”⁸)? In Part II, the article tentatively answers the question in the affirmative, and in Part III it posits that since international law is an enterprise which constitutes the society and upholds sociality, the philosophy of international law is one conditioned by sociality. The article then goes on to ask: What if reality lies beyond the materially based sociality? What in that case would be the nature, purpose and meaning of international law? In Part IV, drawing on perennial philosophy, the article postulates that reality is a transcendental singularity and that sociality as it stands is a mistaken perception of a philosophical duality. In so doing the article shows that humanity is on a misguided intellectual course and that the concept of international law is flawed. The article also suggests that international law has to be reordered (even renamed) if it is to accommodate the deeper logic and higher level of

⁵ For the view that the self-becoming of humanity is a social process, see Philip Allott, *Reconstituting Humanity: New International Law*, 3 EUR. J. INT'L L. 219, 251 (1992).

⁶ See C.G. WEERAMANTRY, *UNIVERSALIZING INTERNATIONAL LAW* 408-2 (2004).

⁷ This article does not draw on any specific genre of source materials. Having said that, many of the ideas expressed in this article, even the words its sentences contain, might have been identified and celebrated in one or another epistemic form by one or another epistemic tradition. However, what makes the article novel research is its scepticism towards the intellectual progress claimed to have been achieved by humanity. That scepticism has prompted me to re-conceive humanity (in a pantheistic perspective) not as a social whole but as a cosmic whole. This endeavour is informed by numerous scriptures, books, articles, correspondence, and conversations with several learned and intellectually enlightened people; each authority has mutually influenced and conditioned the other, and no one in particular can take credit for having cultivated my views.

⁸ The concept of society in this article is mostly one of a politically structured international social order which I consider a universal collective consciousness. However micro societies or social clusters also feature occasionally in the discussion. To avoid confusion, I refer to international society as “the society” and other micro forms of social organization as “society”.

reasoning distinctive of reality. In Part V, the article provides theoretical guidance to this end.

II. SOCIALITY AS HUMAN REALITY

The society is the looking-glass through which humanity visualizes and conceives its reality.⁹ Therefore we often posit that humanity has an intellectual relationship with the society. Modern society is an essentialistically ordered self-sustaining entity with its own functional patterns and dynamics.¹⁰ Individuals, having been born into the society, pursue knowledge about the society's structural designs and functional dynamics through learning and lived experience. The more effectively they learn and the more deeply they live, the more socially enlightened they become. Social enlightenment equips them to live meaningfully in the society and to take part in its processes. It is from the society that individuals attain meaning and purpose of life.¹¹

Since gaining knowledge about the society and social organization is the goal of the members of the society, human beings are in relentless pursuit of understanding the society. They strive for social knowledge by delineating themselves into epistemic communities,¹² either in isolation or in perpetual interaction with other neighbouring communities. Each epistemic community has its own functional milieu, patterns of thought, and conceptual arsenal. Each such community also has a sense of superiority regarding its way of seeing the society. And it views those perceptions as the ideal way to understand the society.

Yet, epistemic communities mostly function in concert by positing a common social goal for humanity. When functioning in concert, each epistemic community gains an authoritative right to speak within its chosen, self-defined tradition. Once an epistemic community gains the authority to speak on a given area of human life, as well as on the various epistemic dimensions of the community's knowledge, such as its beliefs, its values, its claims and methods, there comes to exist empathetically united collectivities called "disciplines".¹³

Individuals become part of a society through the disciplines they have chosen for knowing that society. The disciplines teach them how lives were lived, are being lived, and shall be lived; how thoughts were thought, are being thought, and shall be thought; and how things were known, are being known, and shall be known. These three themes—human lives, human thought, and human world—and the pattern of inquiring about the three themes—how was, how is being, and how shall be—are pursued as

⁹ See generally PHILIP ALLOTT, *EUNOMIA: A NEW ORDER FOR A NEW WORLD* 1-119 (1990).

¹⁰ This generalization can be proven in its entirety by social systems theory and its variants and adaptations.

¹¹ See ALLOTT, *supra* note 9 at 39-41.

¹² The epistemic communities discussed herein are those holding views about social organization. The scientific community or groups pursuing a given area of material inquiry are not to be confused with epistemic communities.

¹³ McCulloch describes a discipline as:

[A] community of scholars who share a domain of intellectual inquiry or discourse. This commonly involves a shared heritage and tradition, a specialized language or other systems of shared symbols, a set of shared concepts, an infrastructure of books, articles and research reports, a system of communication among the membership, and a means of instruction and initiation.

Gary McCulloch, *Disciplines Contributing to Education? Educational Studies and the Disciplines*, 50 BRIT. J. EDUC. STUD. 100, 102 (2002).

micro-modules of “theory and practice” within the disciplines.¹⁴ The micro approach renders the resulting social awareness of individuals narrow in that it limits the awareness to a level defined by the materials and methods of one or the other discipline.

However, the epistemic communities acting through the disciplines are conscious that if the disciplines are left as islands, no social reality can be conceived. Hence they urge disciplines to interact by swapping methodologies, by drawing on one another’s findings, or by occasionally situating a set of beliefs of one discipline in another’s domain.

The robustness and credibility of these disciplines are evaluated against natural science. That evaluation is also the basis of determining the prominence of the disciplines: the more characteristics of science a discipline has the more salient that discipline is. The more effective a discipline is in this light the more authority it gains to provide knowledge in designing and regulating the society. This prominence and the directive role held by certain disciplines cannot be constant; they are subject to rising and falling cycles like anything in the social process.

In a society designed and directed by disciplines, there are a few disciplines which inherently have a pivotal role in the social process, for example “law” and its satellite discipline, “politics”.¹⁵ But there is ambiguity as to whether law and politics are [mere] disciplines in the strict sense of the term; they not only are theoretical embeddings of the society and its functioning, as other disciplines, but also are functionally directive and causative of the social course. This seeming ambiguity has rendered law and politics special in the society.¹⁶

The dyad of law and politics—when in a social discourse—has an internal determinant, that is “ideology”. Ideology is related to law in that it determines the attitude of law. Ideology is related to politics in that it determines the nature of politics. Thus law, politics, and ideology collectively pull humanity to the society and regulate human life within the society; this force may be called “social gravity”.¹⁷

Social gravity generates “social karma” which is a cause-effect relationship that comes to exist in the society between humanity and the society, humanity and various social entities, and social entities and the society. The social karma determines the rights and wrongs and the oughts and ought-nots of the society and thereby lays down social norms. Norms create social awareness. Social awareness coalesces with the natural human state of consciousness to form an essentially *meaningful* existence, the “social consciousness”.¹⁸ That means the society is an abstractum, a state of

¹⁴ The importance of reducing disciplines to micro-modules of “theory and practice” is highlighted in PIOTR SZTOMPKA, *SOCIETY IN ACTION: THE THEORY OF SOCIAL BECOMING* 101, 102 (1991).

¹⁵ By deeming politics a satellite of law, I only mean that if law is a discipline, politics has to be its satellite. Politics, in this context, is not equivalent to “political science”; rather, it is a discourse-oriented action of superimposing on a socio-legal discourse the prejudices and preferences shared by a group as if they are in the common interest of humanity at large.

¹⁶ References to law, either as a discipline or as a given force, in this article are to international law, which however, is conceived as a superior manifestation of “law”; this is an ontological postulate instrumental in securing the shared aspirations of humanity. In taking this stance, I have been inspired by Allott. See ALLOTT, *supra* note 9 at 1, 2.

¹⁷ This process explains the phenomenon Allott put forward as the “self-constituting of a society”, of which law is a part. See Philip Allott, *The Concept of International Law*, 10 *EUR. J. INT’L L.* 31, 32 (1999).

¹⁸ This view denotes that individuals are born into the society with a bare consciousness on which a social reality is superimposed.

consciousness. It is the social consciousness which renders individuals to have an intellectual relationship with the society. Philip Allott conveys this fact persuasively:

Society exists nowhere else than in the human mind. And the constitution of a given society exists in and of human consciousness, the consciousness of those conceived as its members and its non-members, past and present. Wherever and whenever a structure-system of human socializing is so conceived in consciousness, there and then a society is conceived.¹⁹

Since the society is a state of consciousness, it is very much personal and subjective. What is the society then would be contingent on what is the nature of consciousness. What is the nature of consciousness would in turn be contingent on what social awareness individuals have gained through the disciplines by which they have chosen to learn the society. In a sense, consciousness and the society are mutually conditioned; i.e., the society contributes to the creation of social consciousness and consciousness creates society. This mutuality, however, has the drawback of fuelling indeterminacy as to the foundation of both the society and consciousness. Moreover that indeterminacy foils the scope for any universal truth. Using as a foundation a philosophical/logical strong-point any discipline might propound would render the discipline a bad science, as has been the case with metaphysics.

In the absence of any foundation or universal truth, the society self-validates itself as a self-referential, self-existential phenomenon—a reality—by means of an internal coherence.²⁰ Internal coherence is an intellectual position which is a consolidated subjectivity. Securing that coherence is an intellectual act performed through discourses informed by disciplines.²¹ This method of obtaining coherence has intellectuality attributed to it for the very reason that it is a hermeneutical act.

The society thus becomes an intellectual entity which has immanent theoretical intelligibility and coherence. The society is the intelligence of the highest order for humanity. Its intelligibility and coherence is seen in social institutions such as law.²² Since it is these institutions which determine and shape the patterns of human thought, human beings also strive to acquire the same level of intelligibility and coherence in order to adhere to the dynamics of the society.

An intellectual construct such as the society remains in a state of salience only if it self-evaluates its intelligence and the effect of its intelligence on humanity at large.²³ The society has its own means of self-evaluation. Such means of societal self-evaluation are provided by the disciplines which possess the elements constituting the society and which engenders a social reality in the society. In self-evaluation, the

¹⁹ Allott, *supra* note 5 at 223.

²⁰ This is a Durkheimian position on societies. See TOM CAMPBELL, SEVEN THEORIES OF HUMAN SOCIETY 9-11 (1981).

²¹ According to Allott, theories perform this role. See Allott, *supra* note 17 at 224, 225.

²² Law as a social institution is no different than law as a functional directive in the advance of the society. On law as having an immanent intelligibility, which is what provides form as well as substance to law, see generally Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949-1016 (1988).

²³ See SZTOMPKA, *supra* note 14 at 102.

society reassesses the timeliness of its structures, the logic of its internal organization, the appositeness of its dominant discourse, the effects of interactions among various actors, and the voices of dissent. Findings of the self-evaluation are marked as research-findings by each of the disciplines through which the self-evaluation process is performed. Any societal renewals subsequent to self-evaluation are carried out as disciplinary renewals. Disciplinary renewals modify social consciousness given that it is disciplines which contribute to social consciousness.

In addition to the societal self-evaluation through the disciplines, society and social consciousness are often subject to evaluation by the mystic and metaphysical techniques of “religious epistemes”.²⁴ In evaluating the society, religious epistemes take larger cosmic perspectives; indulge in hyper-ontological discourses on mind-body, time-space, and cause-effect; highlight through a spiritual dialectic the cosmic forces urging change in human behavior; and put forward majestic schemes for transcending social consciousness. However, these religious epistemes are deprived of any disciplinary status because of their metaphysical anchoring and their being far removed from the characteristics of science. Thus religious epistemes not being in the class of disciplines, the findings and revelations of the epistemes, regardless of how socially constructive they are, often fail to fall within the scope of what is deemed socially constructive knowledge.²⁵

Yet, religion is deeply embedded in social consciousness,²⁶ as faith-systems, around which have accrued diverse viewpoints regarding organized living. These faith-systems aim to create societies on the basis of a view of the world informed by didactic scriptures.²⁷ However, the stronghold of law and politics over the society and the pull of social gravity frustrate the faith-systems from persuading human consciousness to move in a desired direction. Given this disadvantage, faith-systems take part in the consciousness-forming process of law and politics in a rather passive way by being a determinant—much like ideology—shaping the attitude of law and nature of politics.²⁸

In the middle of all these varied phenomena and active processes (narrated above), the society sets in as reality what may be called “sociality”.²⁹ Since sociality is reality, social consciousness is what endows reality with meaning and appearance. Social consciousness is also the phenomenological surface on which reality is

²⁴ As an episteme, religion resembles a discipline built on metaphysical and transcendental logic.

²⁵ See Cecelia Lynch, *A Neo-Weberian Approach to Religion in International Politics*, 1 INT’L THEORY 381, 387 (2009) (shows how religion is situated in the present socio-political setting and offers a “neo-Weberian” model to remove the dogmatic bias of religious epistemes).

²⁶ See Allott *supra* note 9 at 94-96.

²⁷ Narratives of these scriptures are often taken too literally and factually, beyond the didacticism in scriptures, with the result that the lyrical fantasies in the narratives influence the viewpoints of faith-systems.

²⁸ See David Kennedy, *Images of Religion in International Legal Theory*, in RELIGION AND INTERNATIONAL LAW (Mark W. Janis & Carolyn Evans, eds., 1999), pp.145-153 at 146. (writes how the constitutive ambitions of religion turned into religion becoming a passive determinant in the society’s self-constituting: “Religion begins as a social force, is transformed into a ‘philosophy’ and survives only as a set of ‘principles’ guiding the practice of institutions”. *Id.*).

²⁹ Consciousness also has its non-social realities, such as nature and its phenomena. Even though such realities can be experienced and perceived through a frame beyond the social consciousness, cognizers, need the linguistic structures of society to narrate the experiences and a social identification to attribute meaning to their experiences and perceptions. See BERTRAND RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 17, 18 (1948). I thank Markku Kiikeri for drawing my attention to non-social realities.

experienced. In this sociality and in its various forms of expression humanity discovers and re-discovers itself.³⁰

The role of law in constituting and sustaining the social reality is imperative. Its dual role—as a discipline embedding a theoretical foundation and as a force endangering social gravity and shaping social karma—is that of a variable determining the nature of social reality. Knowing more about the rationalities propelling that constitutive variable helps strengthen our understanding of sociality and the sociality-forming process. Hence, the next part attempts to understand law vis-à-vis the social consciousness which constitutes sociality.

III. THE PHENOMENOLOGICAL PHILOSOPHY OF INTERNATIONAL LAW³¹

International law is a functional system for the continuance of the society. It is an abstraction of *law* and it stands for uniting humanity as a collective whole. The noumenon—law—from which international law is abstracted is an ontological postulate deemed immanent in logical properties.³² In this sense, international law is an inclusive manifestation of law, a logical quintessence—the *nomos*.³³ International law has a form which is dogmatic (doctrines). International law has substance, which is subjectively accumulated in accordance with the social context in which it functions (theory).³⁴ The form and substance of international law come together to make what we may call “legal consciousness”.³⁵

In that international law has a form, it is recognized as lying in various sources. In that it has socially cultivated substance, international law is normatively received. In that it has both recognizable form and normative substance—both of which make a

³⁰ On the “forms of expression” of sociality, other than the politically couched rhetoric, through which humanity discovers and re-organizes itself, see Prabhakar Singh, *Colonised's Madness, Colonizer's Modernity and International Law: Mythological Materialism in the East-West Telos*, 3 J. E. ASIA & INT'L L. 67 (2010) (emphasizes, on a subaltern note, that a hostile semiotics has superimposed a sociality on what would have been a spontaneously evolved cultural reality).

³¹ Regardless of my efforts to cut loose from the late-modernist (to a certain extent post-modernist) tradition in international law (of which Allott's works in particular) and provide a narrative that maintains my own post-modernist views regarding international law, this section relies on the oeuvres of Allott. The fine distinctions I maintain between late-modernism and post-modernism in this context are informed by Nicholas Onuf, *The Constitution of International Society*, 5 EUR. J. INT'L L. 1, 4 (1994).

³² The belief that an ontological postulate has immanent logic is also a postulation. Different schools of legal thought have overcome this paradox by providing (more often than not) a self-referential source to law, e.g., God, a sovereign, and ultimate rule. The self-referentiality of the source implants its logic in law. However, the self-referentiality of these sources is viewed sceptically later in this article.

³³ I use the term “nomos” in the Greek mythological sense of nomos being the manifestation of law. It is not to be confused with “nomos” in the Schmittian sense of a spatially-oriented order and the concept of international law he conceives thereafter on that basis. Nomos in the latter sense is articulated in CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM* (2003).

³⁴ See Jonathan Mills, *The Substance of Law*, 27 INTERCOLLEGIATE REV. 47, 47(1991).

³⁵ Kennedy has provided a neatly cut definition of legal consciousness: Legal consciousness is a state of social consciousness wound together as a set of “legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideas and goals current in the profession at a given moment”. Duncan Kennedy, *Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 23 (1980) (with the aid of legal materials and legal practice, analyses the integration, disintegration, and re-composition of consciousness as a rather stable legal consciousness). Allott would describe legal consciousness as lawyers' perceptions about the social cause and effect and their perceptions about the perceptions of others having similar perceptions. Legal dogmatics is part of this perception. See ALLOTT, *supra* note 3 at 43, 44.

social identification possible—international law is deemed a social entity. Thus, international law being an amalgam of form and substance, is a given state of legal consciousness. To put it differently, legal consciousness being a particular form of social consciousness,³⁶ and international law being that legal consciousness, international law is a social entity.

Since legal consciousness is reliant on what the social consciousness is, legal consciousness is fundamentally an undefined aesthetics. Hence, legal consciousness is subject to subjective invasion by diverse social ideals; Allott calls this subjectivity of legal consciousness the “special relativistic reality” of the “strange inner world of the lawyer”.³⁷ Given the evanescent nature of legal consciousness, the history of international law is riddled with multiple types of legal consciousness;³⁸ each state of legal consciousness, amid the claims of having triumphed over the other, bears traces of the previous one; e.g., the universalist morality of “naturalism” found rational adaptations under “positivism”.³⁹ Positivism later adopted a functional and professional stance under realism, which was augmented by a rationalist approach that stripped international law of any normativity and restructured it on strategic behavior.⁴⁰

The main, perhaps forgotten,⁴¹ *telos* of international law is to unite humanity as one social unit. Humanity is united when what is deemed to be its common good is achieved.⁴² What is common good is ascertained by reckoning subjective individual interests and a certain ingrained set of values⁴³—a process known as politics (to perform this process international law provides its artillery and logistics). The received set of values is the dominant one among all the society’s prevailing sets of values. The dominant set of values becomes the conception of “justice”.⁴⁴ However, the values which compete with individual aspirations in the political process of determining common good are often ideologically cultured, as can be seen in the case with the present-day value-set, capitalism and its various forms. On balance, humanity is united in the name of justice which is ideologically determined and politically sought.⁴⁵

³⁶ See Kennedy, *supra* note 35 at 23.

³⁷ ALLOTT, *supra* note 3 at 45.

³⁸ See *id.* at 45-56.

³⁹ This uneven transition is finely presented in Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law*, 18 EUR. J. INT’L L. 379, 380-82 (2007).

⁴⁰ See Martti Koskenniemi, *Formalism, Fragmentation, Freedom: Kantian Themes in Today’s International Law*, 4 NO FOUNDATIONS 7, 8 (2007).

⁴¹ I mean to say that regardless of the claims of international law that it attends to the concerns of humanity, the “state” is the best-established referent in the epistemological precincts of international law.

⁴² See Philip Allott, *The True Function of Law in the International Community*, 5 IND. J. GLOBAL LEGAL STUD. 391, 399 (1998).

⁴³ See Philip Allott, *Five Steps to a New World Order*, 42 VAL. U. L. REV. 99, 101 (2007) (views the reckoning of individual subjectivity and dominant values as a universalizing of “all the particulars of human behavior”).

⁴⁴ Cf. Philip Allott, *The International Court and the Voice of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 26 (Vaughan Lowe & Malgosia Fitzmaurice, eds., 1996). Allott views “justice” as an intervening super-concept that aligns humanity within a social order by subtracting whatever is non-social:

The capacity of human beings to recognize order—the order of the physical universe, of society, of morality, of law, of human personality, of human consciousness—is the capacity to recognize the order of all order. And the order of the order of law is called *justice* ... The justice of a given society, the social justice embodied in its law, is a shadow, of the justice of all justice.

Id.

⁴⁵ Cf. Jouannet, *supra* note 39 at 388.

Thus, international law causes humanity to unite by means of politics, whereby international law is a mere scheme for, as well as instrument of, the sociality-forming process and politics the most significant catalyst of the sociality forming process.

The reckoning to determine the common good takes place in a conceptual field known as “sovereignty”. In meta-social discourses and ontological discourses on law, sovereignty is related to a “sovereign”.⁴⁶ The relationship between the sovereign and sovereignty is that sovereignty is “sovereign-hood”. Philosophically, the sovereign is a neuter; it is deemed a social fullness existing on wider scales of social continuity and change.⁴⁷ But, the fullness of the sovereign is a convenient assumption, one which bestows upon the sovereign logic and intelligibility. It is called a convenient assumption because the sovereign’s fullness is not abstracted from within the sovereign (i.e., the sovereign is not self-referential) but with reference to certain external social forces.⁴⁸ This external referentiality creates a conceptual duality—between the sovereign and what provides reference to the sovereign—which, in effect, argues against the fullness attributed to the sovereign. It is such doubts about the fullness of the sovereign which render the sovereign’s fullness a formulation of assumptive logic.

Yet, in international law, a sovereign is a logical certainty and an ultimate infinite social reality.⁴⁹ A sovereign is deified in the society through postulations to the effect that that sovereign organizes itself in the society through entities known as “states”. In fact, such postulations are intended to temper the general outlook that *states are sociality writ large* with the assumption that *there is a logical fullness, such as the sovereign, which is immanent in states*.⁵⁰ As a result, the sovereign is the “Social God” which is the supreme reason and cause of life in the society.⁵¹

A sovereign is thus what gives meaning to a state and its activities. The sovereign expresses itself as sovereignty that acts as a field of function for the state—the “sovereignty-field”. Functions of states such as politics and international law take place in the sovereignty-field. The operation of international law through politics in this sovereignty-field engenders social gravity, which in turn causes humanity to engage with social karma.⁵²

The cause and effect of social karma is experienced by everyone in the society. However, for lawyers, aside from being involved in the cause and effect of social karma like everyone in the society, knowledge about the theory and application of law—having studied law as a discipline, i.e., how to recognize the form and substance

⁴⁶ See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble, ed., 1995).

⁴⁷ This is position is what constitutes the rule-theory of Hart. See generally H.L.A. HART, *CONCEPT OF LAW* (1961).

⁴⁸ This position is apparent in the Benthamite search for a normative world beyond the sovereign; he holds that a powerful sovereign acquires its power from a “social situation”.

⁴⁹ At the more domestic level, a sovereign is a socio-legal superstructure reflecting the political power of a state. For a discussion in this vein, see Philip Allott, *The Court and Parliament: Who Whom?*, 38 *CAMBRIDGE L. J.* 79, 102-05 (1979).

⁵⁰ For a taxonomy of sovereignty in terms of these two positions, see AARON FICHTELBERG, *LAW AT THE VANISHING POINT: A PHILOSOPHICAL ANALYSIS OF INTERNATIONAL LAW* 57 (2008).

⁵¹ ROBERT JACKSON, *SOVEREIGNTY* 21 (2007).

⁵² The sovereignty-field, and the process occurring therein, is probably what Allott means by the “structure of causation which determines the successive conjectures of the particular field of forces which is the law”. See ALLOTT, *supra* note 3 at 43, 44. This view implies that law is one of the forces generating social gravity.

of law—provides the acuity to observe social karma.⁵³ This acuity is what gives rise to legal consciousness.

In sum, international law is a state of consciousness which is intellectually derived (by way of one’s disciplinary knowledge) from sociality (which is the social consciousness). Those possessing the legal consciousness, unlike the rest of the members of the society, sense the influence of social karma. Their experience of international law and sociality is therefore an “informed experience”.⁵⁴

By having informed experience, international lawyers, or for that matter everyone who knows the philosophy of the functions of law and functions of the philosophy of law, are active participants as well as passive observers of the sociality-forming process.

As active participants, international lawyers engage in a value-bargain and value-integration whereby all competing values form part of a dominant value; in other words, international lawyers engage in politics. This trading in values takes place in the sovereignty-field.⁵⁵ The fact that they are doing politics, however, remains unknown to international lawyers, for such is the pull of the “objectivity”⁵⁶ and the seeming intellectual “intelligibility” in the doctrines of international law with which international lawyers perform their social role.⁵⁷

As passive observers, international lawyers indulge in meta-theoretical (rather, meta-doctrinal) discourses so that the trading in values has legitimacy with regard to the collective social self-image. However, having the ability to observe their own performance and to provide meta-discourses on such performance does not help international lawyers shed their doctrinal bias and fetishism. Yet, their dual existence as participants sustaining sociality and as actors sustaining that sociality-sustaining process is deemed to be the most meaningful existence one can have in the society.

International lawyers’ participation in the sociality-forming process and their role as observers of their own participation has certain deep phenomenological ramifications. First, given that international law exists as a state of consciousness, especially as a consciousness ensuing from an informed experience, no one in the society other than international lawyers has this legal consciousness. That the rest of the society does not experience international law is not a social tragedy, however, since it possesses the social consciousness that is the basic state of consciousness for being adequately *social* in the society. Nonetheless, that segment of the society

⁵³ See ALLOTT, *supra* note 3 at 44.

⁵⁴ “Informed experience” is a concept in aesthetics, the subtleties of which I have accessed from accounts of the human “art viewing experience”. See generally Richard Lachapelle, Deborah Murray, & Sandy Neim, *Aesthetic Understanding as Informed Experience: The Role of Knowledge in Our Art Viewing Experiences*, 37 J. AESTHETIC EDUC. 78 (2003).

⁵⁵ Allott calls this field the “inter-public-realm” where all international interactions occur. See Philip Allott, *European Foreign Policy: After-life of an Illusion*, in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 216 (Martti Koskenniemi, ed., 1998).

⁵⁶ This much-acclaimed objectivity in doctrine is secured by reducing the form of a given concept or practice (the objectivity of which is in question) to a social form from all non-social forms that concept may have. This type of “phenomenological reduction” is introduced by Alfred Schutz. See Ion Copoeru, *A Schutzian Perspective on the Phenomenology of Law in the Context of Positivist Practices*, 31 HUMAN STUD. 269, 273, 274 (2008).

⁵⁷ Doctrinal fetishism and bias are not anything typical of international lawyers, but are sentiments which are instilled by legal education. See generally Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983).

remains naively subject to international law which is, for it, a mysterious, sacrosanct special consciousness that is superior to the social consciousness it has.⁵⁸ Its members feel compliant with law and idealize it. Then again, if individuals fail to find their sociality (either due to bad education or defective social orientations) and thereby to obtain a social consciousness, they find certain organic cognitive reflexes that prompt ideal actions. In any case, since the bulk of the society does not have legal consciousness, the situation gives international lawyers a role as experts in conducting the social process through law and politics.

Because of their special role in the society international lawyers acquire a sort of functional attitude which separates them from the rest of the society—the extrinsically ordered relationship between the inquirer and the object of inquiry. Thus, alienated from the object of inquiry, international lawyers assume the philosophical posture of the duality between the subject and the object. In other words, international lawyers separate their legal consciousness from their social consciousness, the former being only a micro state of the latter. Ignorance of this non-duality impinges on the functional attitudes of international lawyers in such a way that a sense of self (ego) separates them from the society and its problems. However, this deluded self-image⁵⁹—different from that of other individuals in the society—does not prompt a denial of responsibility, but rather a unique [deontological] sense of duty, its “uniqueness being a reflection of the esoteric and hermitic character of law”.⁶⁰

Thus ego has ingrained in the attitudes of international lawyers and with their attitudes being an expression of their legal consciousness, legal consciousness is an egoistic state of mind. That being the case, international law, which exists as the legal consciousness in international lawyers, is also an egoistic entity. However, given that what renders legal consciousness (and for that matter international law) egoistic is a phenomenological veil between legal consciousness and the social consciousness, cracking that veil would enable international lawyers to observe and sense the social consciousness from which their legal consciousness has emerged.⁶¹

This phenomenological philosophy of international law throws light on the existentially unreal nature of international law.⁶² That is to say, there is no international law but rather a functional aesthetic that exists in the minds of international lawyers. What the society generally celebrates as international law is a set of uninternalized objective canons of the society, which is only a reflection of subjectively reckoned individual subjectivities. However, from the perspective of international lawyers, international law is what sustains the society, and from the perspective of the society, international law is an enterprise that matters as it is situated in the society. Irrespective of the contrast in these perspectives, they are related to a

⁵⁸ See Allott, *supra* note 43 at 104 (identifies social consciousness without legal consciousness as a “non-legal social reality”).

⁵⁹ See Philip Allott, *The International Lawyer in Government Service: Ontology and Deontology*, 23 WIS. INT’L L. J. 13, 16 (2005).

⁶⁰ *Id.*

⁶¹ See *id.* at 23. Need of a broader understanding of sociality through disciplines (humanities and social sciences) is in the post-modern project of law. See e.g., MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENTS (2005).

⁶² See generally Philip Allott, *New International Law: The First Lecture of the Academic Year 20—*, in THEORY AND INTERNATIONAL LAW: AN INTRODUCTION 107 (Philip Allott et al., eds., 1991).

social reality which is the ultimate source of the society, international law, and humanity.

In addition to its existence in the society, law exists in a given society or societies, i.e., social forms other than “the society” such as a nation-state, as source of guidance for social conduct of the individuals. In such societies, law is the “law of the land” or “municipal law”. Even in a national society, law is no different than it is in the [international] society; i.e., law for the lawyers is a specific discursivity and for the people an ultimate standard of truth and righteousness. Such a similarity in perception regarding law exists for the society and other societies because law is a “relativistic discursivity” which acquires meaning in accordance with a chosen social frame of reference; the frame of reference may be the society or a society (this view implies that the difference between international law and municipal law is a perceptual illusion).⁶³

However, prior to any disciplinary conception of the society and most other forms of societies, humanity had intellectually conceived their existence. That intellectual conception took root from humanity’s inherent quest for knowledge about its existence and the universe. Inquisitive individuals of a pre-societal era sceptically viewed everything their consciousness conveyed to them:⁶⁴ “Who are we”? “Where did we come from”? “Why are we here”? What is the cause-effect system to which we are bound”? “Why does the body feel pain and pleasure, and correspondingly, the mind feel sorrow and happiness”? “Why beauty in life is ephemeral”?⁶⁵ “Why do we have the urge to possess everything”? “Why does consciousness end with death”? To these questions they found the answer that perceptions of consciousness might be illusory and that there might be a higher realm of experiences beyond consciousness. If consciousness and its perceptions are not real, what then is reality? The next section first provides a theoretical view of human reality conceived long before humanity found socio-political means to cohabit in the world. Afterwards the section demonstrates the validity of that view.

⁶³ Cf. ALLOTT, *supra* note 3 at 45. The frame of reference is mainly of relevance to those who meta-evaluate law from the perspective of a society (nation-state) or the society (international community of states). For such a meta-evaluation, see VEIJO HEISKANEN, INTERNATIONAL LEGAL TOPICS 11-199 (1992).

⁶⁴ This inherent quest for transcendental knowledge by way of sceptical questioning is situated within the phenomenological tradition in Hans K ochler, *Phenomenological Skepticism*, 15 MAN & WORLD 247, 249, 250 (1982) (articulates scepticism as a “system” and separates scepticism into a “formal ontology” (the inherent sense of a reality beyond consciousness) and “epistemological skepticism” (the systematic transcendental inquiry)).

⁶⁵ The most poignant musing on the evanescence of beauty in life is found in Shelly’s *Hymn to Intellectual Beauty* (1816).

“Spirit of Beauty, that dost consecrate
With thine own hues all thou dost shine upon
Of human thought or form, – where are thou gone?
Why dost thou pass away and leave our state,
This dim vast vale of tears, vacant and desolate?”

IV. REALITY IS A TRANSCENDENTAL SINGULARITY⁶⁶

Reality: “it is neither this, nor that”,⁶⁷ but it is all this and all that. It is a physical “emptiness”,⁶⁸ but an amazing “fullness”. The fullness is pure consciousness, an intelligence, but there is no mind to perceive it; it is the essence but without form to reveal it; it is bliss but without sense to experience it; it is luminous but there are no eyes to see it; it is sound but no ears to hear it; it is eternal but there is no time to measure it; and it is omnipresent but there is no space for it to manifest. It itself is empty of everything, but full of itself.⁶⁹ Thus, reality exists, as an acosmic absoluteness, a self-existing, self-ordered supreme state of intelligence, a “super-consciousness”, a noumenon—the ultimate infinite reality. It is imminently intelligible and fundamentally coherent.

Immaterial monism—singularity—is the existential nature of reality. Any duality or plurality is absent given that there is no alterity, no foreignness; the fullness of reality is absolute in itself. Since there is no alterity to defy this transcendent absoluteness, it is the ultimate singular truth. Moreover, that truth is intransitive, for there is no external causation for any change.⁷⁰

Not having external causation does not render reality ever-dormant. Being a super-intelligence it has highly imaginative properties which engenders causes—although the super-intelligence remains a non-cause—so that it is manifest beyond its absolute existence, and being reason in itself, rationalizes the causes it imagines. The imagination of reality, however, is not a product of chance, but the result of a self-ordered self-guidance passing through a succession of imaginations and non-imaginings lasting over infinity.⁷¹ The intellectual profundity of the process of imagination is such that reality itself becomes a super-intelligent matrix imagining matter. Matter thus becomes a newly manifested consciousness of the unmanifest super-consciousness—a micro consciousness of the macro consciousness.

⁶⁶ The discussion in this section draws on Vedic discourses and exegesis, as well as perennial philosophy in general (including Buddhist philosophy); it does not adhere to any one Veda in particular but traverses the whole of perennial philosophy. Sankara’s *Advaita Vedanta*, however, has an imperative influence. I have also drawn on various conflicting and competing schools of thought in the Vedic tradition to develop my argument, without embracing any particular epistemological opposition they have. However, I am motivated by the common theme of inquiry—human reality—that each school has, and take that as a good reason for a combined approach.

⁶⁷ Inquiry into human reality has to start with an apophasis like this deductive denial. *Isa Upanishad* helps commence that inquiry by describing reality: *tadejati tannajati taddure tadvantike | tadantarasya sarvasya tadu sarvasyasya bahyatah* || (“It moves, it moves not; It is far and it is near; It is within this Universe and It is outside of all this”) (translation as provided in NINIAN SMART, *THE WORLD’S RELIGIONS* 2ND EDITION 74 (1989)).

⁶⁸ Reality as “emptiness” (*sunyata*) is a Buddhist conception. See MASAO ABE, *ZEN AND WESTERN THOUGHT* 126-27 (1985) (“Emptiness as it is Fullness and Fullness as it is Emptiness”).

⁶⁹ This is an intellectual position in Tibetan thought by which the ultimate reality/truth is “emptiness”, as in Buddhism. However, emptiness has two forms, “self-emptiness” and “other-emptiness”. Self-emptiness is emptiness in term of its own essence, whereas other-emptiness is emptiness in terms of “something” external to it. The emptiness denoting the ultimate reality is other-emptiness. I have become aware of this delineation and how it is tempered by other schools within Tibetan philosophy in Douglas S. Duckworth, *Delimiting Emptiness and the Boundaries of the Ineffable*, 38 *J. INDIAN PHIL.* 97 (2010).

⁷⁰ Causation can, however, be internal to reality. That causation is an intellectual vibration, a flickering, which does not affect its absolute existence.

⁷¹ Imagination is creativity and non-imagination is the cessation of imagining; the former results in creation, whereas the latter is a kind of destruction.

Consciousness and the super-consciousness stand in a manner that they are in a micro-macro relationship. Consciousness and matter are related such that consciousness is the medium through which matter is perceived. Accordingly, matter is a state of consciousness. Both matter and consciousness are imaginations of the super-consciousness, but for consciousness matter is absolute or a manifestation of the absolute. Recognizing this illusory existence of matter, George Santayana writes: “For my part, I agree that we are imagination all compact, and that our minds clothe or exhibit something else, that alone is active and lasting”.⁷²

The power of imagination of the super-consciousness of reality is beyond the imagination of consciousness, which itself is a figment of the imagination of the super-consciousness. Hence, matter imagined by the super-consciousness appears to consciousness as if it is a spatial and temporal absolute—a spatiality lying in a vastness beyond the observational faculties of consciousness and temporality, barring many anti theses, as starting with the most determinately observable point of space.⁷³ The absoluteness of matter as it appears to consciousness leads to an intellectual state in which matter becomes the object of ontological pursuit for consciousness—an inherent passion for inquiry.

In the spirit of such an inquiry, the matter imagined by the super-consciousness appears to consciousness as the “first cause” of everything.⁷⁴ Consciousness feels this first cause to be inferable and verifiable from a sensually observable physical super-complex—the universe—which is set in a pattern of regularity and rhythm. For consciousness, this regularity is manifested as the physical laws of the universe. Consciousness experiences such a regularity and rhythm as being present in matter because of the inherent intelligibility and coherence of the super-consciousness. To consciousness, matter appears to structure itself and stay in motion maintaining the regularity and rhythm. This perception helps consciousness to study the nature of matter and the influence of matter and its movements on consciousness itself. Inquiring into matter, consciousness embraces the regularity and rhythm as the perfect order for any ordering it may have to perform.

Much like the gravitational pull on matter, at a functional level, in an active phase in the cosmic imagination, consciousness gets inextricably intertwined in a network of cause and effect. This network determines the processes of consciousness within the time-space framework which manifests before consciousness.⁷⁵

However, unlike the super-consciousness, which is beyond any spatial-temporality, consciousness and matter exist in space and time. But this space-time framework is only a perception of consciousness. Moreover, consciousness experiences space and time through various phases of perceptions constricted

⁷² GEORGE SANTAYANA, LETTERS OF GEORGE SANTAYANA, VOLUME 5, BOOK 5: 1933-1936. THE WORKS OF GEORGE SANTAYANA 300 (2003).

⁷³ This falsity about reality is the crux of the doctrine of *Maya*. For a refined exposition on the doctrine, see Harry Oldmeadow, *Shankara's Doctrine of Maya*, 2 ASIAN PHIL. 131 (1992).

⁷⁴ See and *Contra Shvetashvatara Upanishad* (1.2): *Kaala: Swabhavo niyathiryadrichchaa Bhutani Yoni: purusha ithi chinthyaa | Snyoga esham na tvaatmabhaavaa daatmaapyanisha: sukhadu:Khaheto* || (“Time, nature, necessity, accident, Elements, energy, intelligence—None of these can be the First Cause. They are effects, whose only purpose is To help the self rise above pleasure and pain.”). For the English translation, see MICHAEL NAGLER, UPANISHADS 159 (2007).

⁷⁵ The gravitational force, which impacts on matter and thereby maintains regularity and rhythm, impacts on consciousness as an interplay of cause-effect, the laws of karma.

temporally to periods negligible in comparison with cosmic time scales. After each phase, states of consciousness may recur; that recurrence, however, is determined by the cause-effect mechanism, the laws of *karma*. The recurrence ends when consciousness liberates itself from the entanglement of cause and effect. This liberation is possible only by consciousness becoming conscious of the super-consciousness which is the ultimate reality of all matter and consciousness.

The end of consciousness is also the end of matter and the material world consciousness has perceived. This end is inevitable for consciousness, whether it voluntarily chooses to liberate itself from the bounds of space-time or not. When consciousness ends, the biological human system hosting consciousness perishes and dissolves in matter.⁷⁶ However, this biological process is perceivable only to those states of consciousness which are within the frame of space-time. Consciousness which has ended its state of consciousness, if it escapes the pull of *karma* to take on a new state of consciousness, merges into the super-consciousness.⁷⁷

On balance, consciousness builds a reality around itself, a material reality of time and space, matter and energy, and cause and effect; all these splendid perceptions are but imaginations of the super-consciousness. Reality so construed is the result of the micro-intelligence of consciousness. As long as consciousness remains nescient of its figment-like existence in the imaginations of the super-consciousness, its intelligence remains incomplete in the incompleteness of matter and space-time. This incompleteness—ignorance of a singular reality—renders consciousness subjective regarding any determination of reality, or for that matter any determination of truth.

A. Exploring the Transcendental Singularity

The predicament of those who would study reality is that they have senses to experience but cannot experience reality; they have eyes but cannot see reality; they have ears but cannot hear reality; they exist in time but cannot measure reality; they are located in space but cannot locate reality; they are conscious of causality but ignorant of what triggers causes. Every inquiry into time and space returns the reply “It [reality] is not this, not this, not this”. The inquirers feel what beings in a super-being’s imagination would feel. They have a world, a world of everything, which is but a nothing. However, if a being in the imagination realizes that it is an imagined being, it can re-imagine the imagination which imagines it. In the same way, consciousness, which realizes that it is not a mere composite of atoms but a figment of the imagination of the super-consciousness, might shift the focus of its ontological inquiry to “itself”. The object of inquiry in that case is a nonmaterial, beyond-quintessence, diaphanous type of matter—consciousness.⁷⁸ In such an inquiry, methods of inquiring into matter such as observation, quantification, experimentation, and the many empirical means of verifications, are inconsequential. The attitudes typical of those inquiring into matter, as well as their ever-triumphing claims of

⁷⁶ A profound theoretical explanation regarding the end of consciousness and the dissolution of the matter hosting it into matter itself is found in the Buddhist *Tantra*. See VESNA A. WALLACE, *A INNER KALACAKRATANTRA: A BUDDHIST TANTRIC VIEW OF INDIVIDUAL* 57 (2001).

⁷⁷ *Id.* at 59.

⁷⁸ Diaphaneity is the nonmaterial texture of consciousness. See John Smythies, *Space, Time, and Consciousness*, 10 J. CONSCIOUSNESS STUD. 47, 47 (2003).

material objectivity and the inherent precision of their formulations, would prove flawed in the face of the diaphaneity of consciousness.

The foundational nature of inquiry then has to be an individual “self-inquiry” carried out by jettisoning the feeling of a material “I” (ego) dwelling in time-space and thereby feeling one with reality⁷⁹ or, in contrast, by cognitively engulfing everything materially manifested as if it all belongs to a non-material “I”.⁸⁰ The former method is a negation of what appears as material reality and the latter a process of “self-integration”, i.e., integration of one’s consciousness into the super-consciousness.⁸¹ The emptiness of the sense of “I”—the “pseudo individuality”⁸²—however, is understood by giving thorough instructions to the mind about the properties of the ontological wall separating the imagined from the imagination.⁸³ Cosmic perspectives are taken and rigorous cosmological approaches are pursued to develop a sense of acosmism, which is the first step in causing the sense of “I” to collapse. In these approaches the cosmos is studied as a pantheistic transcendence, which has to be strictly differentiated from the sociologically cultured cosmic approaches seen among certain critical realists and theoretical physicists. The transcendental view of the cosmos is theoretically assimilated to a biological perspective,⁸⁴ which grounds transcendental insights into the much accustomed [Husserlian] material ontology.

Until this stage, inquiry into reality is only a process of internalizing the concept of reality as it is philosophically accounted for by those who have first-hand experience of reality. All that is required by this process is for the seeker of reality to provide propedeutics for an intellectual ascension, to gain a fine-grained understanding of the structure and composition of mind and matter⁸⁵ and the relationship between mind and matter, and to theoretically situate reality. The whole process in fact amounts to a conceptual tidying up and organizing of consciousness for an intellectual transcending, for the “philosophizing”, so to speak, that has to follow.

The cosmic perspective, and the subsequent replication of the cosmological process as an organic phenomenon,⁸⁶ helps identify the human body as a micro

⁷⁹ Ramana Maharshi designed a method of sceptical questioning by asking “Who am I?” followed by rigorous cognitive self-tuning. See RAM DASS, *PATHS TO GOD: LIVING THE BHAGAVAD GITA* 108-09 (2004).

⁸⁰ *Id.* at 86 (“You expand and expand and expand who you see yourself to be, until it’s all included within you”. *Id.*).

⁸¹ See Hilary Anderson, *The Process of Self-Integration in Internal Yoga Psychology*, *YOGA J.*, November-December 34-36 (1976).

⁸² Homo Leone, *The Vedantic Absolute*, 21 *MIND: NEW SERIES* 62, 68 (1912).

⁸³ The state of mind that comes into existence after philosophically instructing the mind regarding the emptiness of “I” is known as *Viveka*. This view belongs to the “Samkhya School”, although it is recognized in *Advaita Vedanta*. See MAX MULLER, *THE SIX SYSTEMS OF INDIAN PHILOSOPHY* 310-13 (2008).

⁸⁴ This approach is part of Buddhist *Tantric* tradition, which views the cosmos as both animate and inanimate, i.e., as matter and consciousness, respectively. Cosmic properties are identical for both the animate and inanimate cosmos. The dynamics of the animate cosmos are more open to empirical verifications. Such an observation would reveal the development of the animate cosmos as starting with the five elements—earth, air, water, wind, and quintessence—and soon evolving into a biological process. For details on this process, see WALLACE, *supra* note 76 at 56-64. The whole process is an effort to see the inanimate cosmos as animate, especially as a human body. For an insightful reading of the *Tantra* as having a social perspective, see GAVIN FLOOD, *TANTRIC BODY: THE SECRET TRADITION OF HINDU RELIGION* (2006).

⁸⁵ The structure and composition of matter comprise the five elements of the animate cosmos mentioned above. See *supra* note 84. On the composition and functions of mind, see Manmatha Nath Banerji, *Hindu Psychological Basis and Experimental Methods*, 50 *AM. J. PSYCHOL.* 328 (1937).

⁸⁶ When the cosmos is replicated at the micro level as the human body, the *Tantric* concept of dual cosmos—animate and inanimate—is also replicated as gross body (*sthula shareera*) and subtle body (*sukshma*)

manifestation of matter and the human mind as a gateway to transcend material consciousness. This identification is followed by an empirical inquiry. However the empiricism involved is not the typical scientific process of externally directed experimentation and evidentiary verification; on the contrary, it denotes an interaction between the mind and the body.⁸⁷ The mind-body interaction is carried out first through a rigorous execution of certain physiological practices which sublimate the body (since body is identified as the micro manifestation of elemental cosmos), thereby facilitating the mind situated in it to transcend the strictures of both matter and consciousness.⁸⁸ This is followed by a psychological fine-tuning in line with certain ethical standards prescribed on the basis of the theoretical abstractions of reality. These standards include non-violence; truthfulness in speech and action; impartiality; an irresistible longing and quest for reality, yet humility before transcendental knowledge; and love and care for fellow beings.⁸⁹

The inquiry then advances to the third stage which involves steps such as intelligent dialogues with those who have sensed the super-consciousness, “hearing” their experience of the super-consciousness,⁹⁰ “reflections” on those experiences, a cognitive analysis of what is heard, and rigorous “meditation” on reality.⁹¹ At an advanced phase of this stage of inquiry, the duality of gross body and subtle body constructed by consciousness collapses.⁹² As the duality collapses, consciousness senses the absence of material consciousness. This is the true state of consciousness, the super-consciousness.⁹³

Consciousness which has reached the super-consciousness experiences singularity in perception.⁹⁴ Unlike consciousness, the super-consciousness has a truth—the truth of emptiness, the truth of fullness, and the truth of being the supreme intelligence. Once realized, the super-consciousness is intellectually secure such that

shareera). On these nuances, see SWAMI RAJARSHI MUNI, *YOGA: THE ULTIMATE SPIRITUAL PATH* 64-66 (2001).

⁸⁷ This mind-body interaction is the purpose of Yoga. The most comprehensive theoretical account of Yoga is that of PATANJALI, *THE YOGA SUTRAS OF PATANJALI* (James Haughton Woods, trans., 1923).

⁸⁸ Banerji, *supra* note 85 at 337-43.

⁸⁹ These behavioural qualities are derived from the four qualities of a seeker of reality—calmness, self-control, forbearance, and detachment—mentioned in Verses 69 & 82 of *Vivekachudamani*.

⁹⁰ *Vivekachudamani*, verse 70.

⁹¹ *Vivekachudamani*, verse 70. Meditation on reality as a way leading to the super-consciousness is emphasized in the *Pancadasi* of Vidyaranya/Bharatitirtha. See Andrew O. Fort, *Reflections on Reflection: Kutastha, Cidabhasa, and Vrittis in the Pancadasi*, 28 J. INDIAN PHIL. 497, 505 (2000).

⁹² *Vivekachudamani*, verses 71-74.

⁹³ *Vivekachudamani*, verse 126.

⁹⁴ Here, I describe the duality (of consciousness) and the singularity (of super-consciousness) as perceptions: Duality exists, because when perceiving an object, the subject sees him-/herself in the process.

Object (1) + *Subject* (1) = *Duality in perception* (2). That is, (1 + 1 = 2).

However, when the subject transcends the dual consciousness between him/her and the object, the subject becomes an observer (*Saksin*) of the perception process. Yet, he/she performs the process of perceiving the object—not as an “involved” participant of the process but as a “detached” participant who takes guidance from the super-consciousness.

Object (1) + *Subject* (0) = *Singularity in perception* (1). That is, (1 + 0 = 1).

The value of the subject is “zero” because the consciousness of the subject is transcended and the subject does not see him-/herself as part of the process.

there is no retreat to the level of consciousness;⁹⁵ it is intellectually complete in that it is not indeterminate before any teleological questions, and it is emotionally composed in that it “remains always unaffected internally”.⁹⁶ Being the unaffected purest state of mind the super-consciousness is free from desires, ego, and hatred, just as it is unaffected by pain and pleasure.⁹⁷ Sankara in *Upadesasahasri* has explained the characteristics of individuals who have the super-consciousness.⁹⁸ Andrew O. Fort captures this state pithily:

[Such an individual is] endowed with equanimity, self-control, compassion, concern for others, and is versed in scripture. He [sic] is also detached from visible and invisible enjoyments, beyond all works and means, and knowing and established in brahman. He [sic] has faultless conduct, being free from flaws like selfishness, lying, jealousy, trickery, evildoing, etc. and having the sole aim of helping others, wanting to employ his knowledge.⁹⁹

Being a fullness in itself, the super-consciousness does not need the values of essentialistically ordered social systems such as law and markets to realize its oneness with humanity; it has the sense of *Self* in everything and from that sense there arises a sense of duty towards humanity. Finally, being the ultimate logic and reason, it does not need the logic and reason of any externally ordered epistemic systems to validate its existence.

Once an individual’s consciousness develops irretrievably into the self-illuminating super-consciousness, it acquires the ability to observe the body and provide a meta-phenomenological perspective to mind about the experiences of the body¹⁰⁰—the advantageous position of having a “final intellectual court of appeal”.¹⁰¹ Since such observation is of the super-consciousness and is no longer that of consciousness, it maintains the singularity unique to the super-consciousness,¹⁰² which helps individuals

⁹⁵ See Walter Slaje, *Liberation from Intentionality and Involvement: On the Concept of Jivanmukti According to the Moksopaya*, 28 J. INDIAN PHIL. 171, 176 (2000).

⁹⁶ *Id.* at 177.

⁹⁷ REZA SHAH-KAZEMI, PATHS TO TRANSCENDENCE ACCORDING TO SANKARA, IBN ARABI, AND MEISTER ECKHART 59-60 (2006).

⁹⁸ Individuals bearing super-consciousness have similar phenomenological properties as the *Dasein* of Heidegger. See VENUS A. GEORGE, AUTHENTIC HUMAN DESTINY: THE PATHS OF SHANKARA AND HEIDEGGER 313 (1998); On *Dasein*, see MARTIN HEIDEGGER, BEING AND TIME 67-90 (1962).

⁹⁹ Andrew O. Fort, *Knowing Brahman While Embodied: Sankara on Jivanmukti*, 19 J. INDIAN PHIL. 369, 372 (1991).

¹⁰⁰ Such observation is made possible by a faculty of the super-consciousness called *Saksin* (witness). See BINA GUPTA, THE DISINTERESTED WITNESS: A FRAGMENT OF ADVAITA VEDANTA PHENOMENOLOGY 4-5 (1998). However, observation through the super-consciousness must not be confused with any observation through consciousness. The latter is typical of material inquiries. See TARA CHATTERJEA, KNOWLEDGE AND FREEDOM IN INDIAN PHILOSOPHY 18 (2002). See also Bina Gupta, *Sankara’s Notion of Saksin*, in ENCYCLOPAEDIA OF HINDUISM 1376-91 (Nagendra Kr. Singh, ed., 2000).

¹⁰¹ See Kalidas Bhattacharyya, *Vedanta as Philosophy of Spiritual Life*, in HINDU SPIRITUALITY: VEDAS THROUGH VEDANTA 231, 239 (Krishna Sivaraman, ed., 1989).

¹⁰² Andrew O. Fort, *The Concept of Saksin in Advaita Vedanta*, 12 J. INDIAN PHIL. 277, 278 (1984).

reject all materially ordered differences in the world and perceive the humanity as an entirety. This kind of awareness is a cosmic consciousness.¹⁰³

Singularity in perception and a cosmic consciousness generate a state of selflessness—altruism—when performing one’s duties.¹⁰⁴ These duties are not prescriptions of any democratic or other political forms of society, but a sense of responsibility that comes into being after sensing the microcosmic relation of human beings to the macrocosmic reality and the cosmically inherent oneness of humanity.¹⁰⁵

The duties emanating from one’s political and social consciousness, however, vary from society to society. When a society is conceived on a specific organization such as the “global governance”, there appears a conflict of duties. The notion of the “ideal” built into minds by a society perpetuates the conflict. However, the sense of duty generated by the non-dualistic cosmic consciousness eclipses the social ideals inlaid in minds and engenders toleration, sympathy, and mutual respect among individuals.

B. Situating the Transcendental Singularity: A Rationalist Perspective

Sociality, which has established itself as human reality, is a superimposition on the transcendental reality of humanity. Seen this way, sociality is a deluded consciousness of the being and the transcendental reality its true consciousness¹⁰⁶. However, what causes the transcendental reality to prevail over sociality is not simply the fact that the formulation of the latter preceded that of the former; the predominance has deep phenomenological logic ingrained in it. Understanding that phenomenological logic requires a rational restatement of the relationship between consciousness and the super-consciousness.¹⁰⁷

Seen in a rational way, there can be no super-consciousness without consciousness, for consciousness is the organic state of being. This position has two implications. First, the super-consciousness is an imagination/formulation of consciousness and, second, consciousness is the first and final cause of everything. It follows that the sociality contrived by humanity is its reality.

Believing in the ultimate nature of consciousness has, however, intellectual costs: it prompts existential questions; it engenders ontological mysteries and relative truths;¹⁰⁸ and it renders consciousness itself, or constructs of consciousness, as the

¹⁰³ STHANESHWAR TIMALSINA, CONSCIOUSNESS IN INDIAN PHILOSOPHY: THE ADVAITA DOCTRINE OF ‘AWARENESS ONLY’ 101 (2009).

¹⁰⁴ This view is related to the concept of Karma Yoga. See generally *Bhagavad Gita* Ch.3.

¹⁰⁵ However, the view that the duties individuals have to perform do not arise from the directives of any contemporary forms of the society does not preclude the scope for *the society* to become a platform for human existence. This optimism towards new forms of the society is converted into a blueprint later in this article.

¹⁰⁶ For a phenomenological explanation of how consciousness is deluded, see Tao Jiang, *Storehouse Consciousness and the Unconscious: A Comparative Study of Xuan Zang and Freud on the Subliminal Mind*, 72 J. AM. ACAD. RELIGION 119, 121-27 (2004).

¹⁰⁷ In Vedanta, rational reasoning (*Vichara*) is meant to rationally ascertain the distinction between the real and the unreal. See SWAMI ADISWARANANDA, *THE VEDANTA WAY TO PEACE AND HAPPINESS* 95 (2004) (“Vedanta exhorts an aspirant to scrutinize the meaning of Truth and make a critical estimate of what he or she has realized to be true”).

¹⁰⁸ This is a stance in *Pudgalavada* Buddhism, which prompted the school to stand for a unifying reality. See Anindita Niyogi Balslev, *An Appraisal of I-Consciousness in the Context of the Controversies Centering Around the No-self Doctrine of Buddhism*, 16 J. INDIAN PHIL. 167, 172 (1988).

meta-phenomenon or meta-intelligence of the experiences of consciousness. Into the bargain comes the scientific discovery of extra dimensions of matter—which otherwise remain beyond the observations of consciousness—that challenge the three-dimensional time-space deemed to be the only dimensional perception of consciousness.¹⁰⁹ If this scientific fact is ignored *arguendo* and the completeness of consciousness is examined only from the viewpoint of logic, then the negative aspect of consciousness is its “self-referential referentiality”, so to speak.

The view that consciousness is a self-referential referent need not always be regarded negatively, since the super-consciousness, which is deemed to be referencing consciousness and a self-referential referent in itself, is a referent of a self-referential referent, i.e., consciousness. This position, however, saves the super-consciousness from being a self-referential referent; it becomes an intellectual formulation of consciousness.

In the present inquiry into reality, the formulation that there is a super-consciousness becomes the “minimum working hypothesis”, which Aldous Huxley articulates: “That there is a Godhead, Ground, Brahman, Clear Light of the Void, which is the unmanifested principle of all manifestations”.¹¹⁰ Inquirers pursue this hypothesis empirically and intellectually in order to transcend the body and the perceptions of consciousness,¹¹¹ and thereby they experience the super-consciousness. Ian Whicher calls this transcending an “epistemic transformation”: “This epistemic transformation and reassessment of experience involves the recognition and inclusion of a formerly concealed, nonappreciated, and obscured mode of being”.¹¹²

Those inquirers who get the experience of singularity of the super-consciousness also acquire the ability to observe the collapse of the duality of consciousness (also the collapse of the intellectual coherence it had) and the same consciousness which has become dormant—but not “eliminated”¹¹³—due to the transcending. In a word, consciousness continues to exist, but is guided by the super-consciousness, which has induced a modified mind-stuff.

Hence, for the super-consciousness consciousness exists as an observable system; the self-referentiality of the latter is a delusion. But for consciousness the super-consciousness does not exist, or remains unobservable. Yet, before commencing any inquiry, both the super-consciousness and consciousness have a hypothetical existence as self-referential systems. Subsequent to the inquiry and the actualization of the super-consciousness, the inquirer becomes aware of the completeness of the super-consciousness and the incompleteness of consciousness. This awareness—that the super-consciousness exists as a fullness and consciousness as a transcended but observable state—is referred to theoretical terms as *Advaita* (non-dualism). It is not

¹⁰⁹ For an informative account on these extra dimensions, see Ashok Sen, *String Theory and Einstein's Dream*, in LEGACY OF ALBERT EINSTEIN: A COLLECTION OF ESSAYS IN CELEBRATION OF THE YEAR OF PHYSICS 25-46 (Spenta R. Wadia, ed., 2007).

¹¹⁰ Aldous Huxley, *The Minimum Working Hypothesis*, in VEDANTA FOR THE WESTERN WORLD 33, 34 (Christopher Isherwood, ed., 1945).

¹¹¹ For a pithy account of the structure of consciousness and what happens to that structure when consciousness is transcended, see MARVIN LEVINE, *THE POSITIVE PSYCHOLOGY OF BUDDHISM AND YOGA* (Mahwah: Lawrence Erlbaum Associates, 2000), pp.115-20, 135-38.

¹¹² IAN WHICHER, *THE INTEGRITY OF THE YOGA DARSANA: A RECONSIDERATION OF CLASSICAL YOGA* 282 (1998).

¹¹³ *Id.* at 136.

“monism” for, in *Advaita Vedanta*, consciousness does not disappear with the super-consciousness.¹¹⁴

The rationalist argument that the super-consciousness is an imagination of consciousness is thus misleading, if not untenable. Nonetheless, the rationalist can be assuaged by restating the relationship between the super-consciousness and consciousness: consciousness is an opportunity to know the super-consciousness. Had consciousness not existed, the super-consciousness would have been an absolute existence—an undisturbed calmness, the singularity. Because consciousness exists it has to know the super-consciousness. That means consciousness is a medium to know the super-consciousness.

This argument that consciousness is a medium to know the super-consciousness can be viewed from a slightly different perspective. That is, if one starts with a conviction that the unmanifest singular super-consciousness (x) in human beings wants to become manifest, it must assume a micro form—consciousness. In other words, the super-consciousness has subtracted “It” from “Itself”. But, since the super-consciousness is fullness and that fullness, if taken away from fullness, retains fullness, subtracting the super-consciousness from the super-consciousness does not create a micro state. Accordingly, $x-x = x$. This renders the super-consciousness only unmanifest.

For this reason the super-consciousness has struck a duality between It and the consciousness It has imagined by bidding consciousness under a veil of illusion. Under this illusion, consciousness senses duality of mind and matter, and the super-consciousness remains hidden from consciousness. In this state, consciousness becomes $x-1$. In reality, consciousness is only x , but under the veil of illusion consciousness appears to consciousness as super-consciousness subtracted ($x-1$).

In sum, the whole process is a result of our own (human) desire to know ourselves. We are x and we are $x-1$. However, we have forged a duality in order to know ourselves. That the duality around us is our own imagination is unknown to our senses.

Because consciousness is the opportunity to know the super-consciousness, consciousness must be a heuristic, such that living with it must have the elements and learning through it must have the embedding of the transcendental reality, which is the “perennial hypothesis”.¹¹⁵ This inevitability for a heuristic prompts the need for a revision of sociality and a reformulation of the idea of law; and as long as law is on shaky ground, tenability cannot be expected of international law.

Hereinafter it would be unfounded to refer to the form of law that has to guide humanity to its reality “international law” given the expression’s irrelevance.¹¹⁶ The expression has become irrelevant because the social consciousness which harbours

¹¹⁴ On the side of logic, the “singularity”—characteristic of the super-consciousness—may tightly fit into “monism”, since singularity refers to the state of transcendence before the non-duality occurred.

¹¹⁵ The expression “perennial hypothesis” is used by Yaran in a roughly similar context in Islamic cosmology, See CAFER S. YARAN, ISLAMIC THOUGHT ON THE EXISTENCE OF GOD: CONTRIBUTION AND CONTRAST WITH CONTEMPORARY WESTERN PHILOSOPHY OF RELIGION 144 (2003).

¹¹⁶ Cf. Philip Allott, *The Human Condition and the Role of Law*, 14 SYMPOSIUM TO CELEBRATE THE 10TH ANNIVERSARY OF THE MASTER OF LAWS IN HUMAN RIGHTS PROGRAMME, The University of Hong Kong, 13 March 2010 (on file with the author) (“By wherever name, [the] transcendental ideas act as universal ideas ... They will be identified, eventually and at last, in the ideal superstructure of international law. *Id.*)

notions such as state and sovereignty has proven misguided and the legal consciousness—of that social consciousness—which contributes to and sustains these notions collapses. Hereinafter, whenever the article has to bring up any form of guidance humanity receives in realizing its reality, the article will refer to that guidance (also the discipline that provides means to obtain that guidance) as “the Law” and when reference is to law as the legal consciousness of the society, the article uses the term “law”.

V. LAW AS A SUPER-INTELLIGENT GUIDANCE

It is likely that consciousness has the intellectual quality of the super-consciousness. In fact, the whole intellectual fabric of consciousness is bestowed up on it by the super-consciousness. Even though the “cognitive veil” constricts the perceptions of consciousness to a three-dimensional world of forms and phenomena, consciousness is neither *empty* of the super-consciousness nor it is *full* of the super-consciousness; consciousness is the super-consciousness present but unrealized. Since consciousness is the super-consciousness present, consciousness will have what Husserl terms “noetic perceptions”,¹¹⁷ i.e., perceptions of or resembling those of the super-consciousness.¹¹⁸ Yet, the attitudes consciousness has accumulated, which may be called the “Karmic bag” attached to consciousness, predisposes consciousness to observe the worldly phenomena in an ontic perspective.¹¹⁹

Thus, the social consciousness humanity has accumulated is a result of ontic states. The ontic perspectives have come to exist by way of deontic language modalities (consider, for example, that norms in the society transpire by way of deontic speech).¹²⁰ Yet, given the noetic flashes in the mind, consciousness cannot be totally ontic; nor can it be totally noetic. However, eventually the opaqueness of noetic perceptions yields to the ontic perceptions of consciousness, a process which Abdirahman A. Hussein calls, the “magic negation” of reality.¹²¹ Ultimately, what transpires is an ersatz model of transcendental reality as perceived and conceived into a sociality by consciousness and its “existential devices”.¹²²

That *sociality is transcendental reality writ small* is apparent from the many logical attributes of transcendental reality manifest in sociality/the society. That is to say, many logical features of the super-consciousness are present in consciousness. But, given the imperfections and limits of consciousness, the flashes of transcendental reality, which is an intellectual singularity, appear as duality for consciousness, i.e., “I” and the “society”. This duality of a singularity does not allow transcendental reality (“I am reality manifest”, “my consciousness is the super-consciousness in delusion”, “the

¹¹⁷ See Martin Jay, *The Life World and Lived Experience*, in A COMPANION TO PHENOMENOLOGY AND EXISTENTIALISM 91, 94 (Hubert L. Dreyfus & Mark A. Wrathall, eds., 2006).

¹¹⁸ BRIAN EDWARD BROWN, *THE BUDDHA NATURE: A STUDY OF THE TATHAGATAGARBHA AND ALAYAVIJNANA* 207, 211 (Delhi: Motilal Banarsidass, 1991).

¹¹⁹ By “ontic” I mean an intellectual conviction that consciousness can have physical dimensions although it cannot have physical states. For an enlightening discussion in this vein, see generally Barbara Montero, *The Epistemic/Ontic Divide*, 66 PHIL. & PHENOMENOLOGICAL RES. 404 (2003).

¹²⁰ See SEBASTIÁN URBINA, *LEGAL METHOD AND THE RULE OF LAW* 151 (2002) (drawing on Riccardo Guastini).

¹²¹ ABDIRAHMAN A. HUSSEIN, *EDWARD SAID: CRITICISM AND SOCIETY* 39 (2002) (presenting Said’s critique of Sartre).

¹²² *Id.* at 40.

super-consciousness is the ultimate reality”). Such a denial of a singular consciousness renders the dual consciousness of “I” and the “society” (sociality) the ultimate reality of humanity.¹²³ Accordingly, sociality has concepts logically parallel to those of transcendental reality, e.g., abstractions such as a self-referential sovereign (the social ultimate *in place of* absolute consciousness) and social karma (the web of cause-effect resulting from the interaction of law and politics in the sovereignty-field *in place of* the cause-effect created by the transcendental reality).¹²⁴

If sociality is no more than a superimposition on reality, law has a facilitating role in that superimposition. To reaffirm that role, law is a constituent of sociality in the society—it is causative of social karma and it is a theoretical account of the society (in the latter role, law is an elite discipline). Most of all, law is an experience of high order for lawyers and a directive for the masses. When reality/super-consciousness eclipses sociality—including law—fabricated at the level of consciousness, what ensues is not a state disparate from the perceptions of consciousness, but only a higher level of consciousness. For this reason, the concept and role of law only need intellectual refinement from their role in the consciousness to a role in the super-consciousness.¹²⁵ As simplistic as it may sound, however, such a refining would also have a polemical effect on the idea of the society and all forms of social organization.¹²⁶

The project¹²⁷ of refining the idea of law is not solipsistic, for it is situated on the fringes of many “higher law” projects, Agambenian jurisprudence etc. However, the project this article envisages does not intend to evoke any paradigms of higher law or “natural law” if they are taken in the strictest epistemological sense.¹²⁸ Yet, the project may share the analytical route common to many forms of non-positivistic, non-formalistic, and non-textualist approaches. Any other similarities apparent on the surface will collapse at the deeper level of logic and language applied in this project.

A. A New Concept of Law

When an individual transcends consciousness and realizes the super-consciousness, all images and concepts of consciousness become meta-subjects of the individual’s super-consciousness. This process where all constructs of consciousness *become* part of the super-consciousness may be called a *non-becoming* of

¹²³ The duality of consciousness has, in fact, two manifestations: physical and social. The physical manifestation of duality is mind and matter, i.e., “I” and the “universe”. This duality is the effect of the observation of the manifest universe, and quantification of that observation, (that science engages in). The social manifestation of duality engages in applying the same methods of observation and quantification in the disciplines—the social sciences—which help create the society. This results in the same kind of duality as science engenders—“I” and the society—appearing in the conception of the society.

¹²⁴ The *Nyaya Vaisesika* School of the Vedic epistemology deems cause and effect (Karma) as created by *Adrsta*—a version of the transcendental reality specific to *Nyaya Vaisesika*. See YUVRAJ KRISHAN, THE DOCTRINE OF KARMA 149-52 (1997).

¹²⁵ This intellectual action, I hope, meets Allott’s revolutionary expectations: “For those who suffer, in body or in spirit, from the imperfections of the human world as it is, the best way to make a better world is the way of law”. See Allott, *supra* note 42 at 413.

¹²⁶ For a reflection to the effect that a reconceiving of law—called for in modernity—would have ontological threats to the concept of law in how it is socially/normatively situated, see Neil Walker, *Out of Place and Out of Time: Law’s Fading Co-ordinates*, 14 EDINBURGH L. REV. 13 (2010).

¹²⁷ What is provided in this article is only a sketch of a larger study by the author on philosophy and logic.

¹²⁸ See e.g., Patrick McKinley Brennan, *The Place of ‘Higher Law’ in the Quotidian Practice of Law: Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys*, 7 GEO. J. L. & PUB. POL’Y 438 (2009).

consciousness.¹²⁹ Since this non-becoming also applies to all constructs of consciousness, sociality—and law as its constituent—becomes drawn into the process of non-becoming.

When law is in the process of non-becoming, what essentially happens to law? This question prompts one to ask further: “What purpose does law serve in the society”? How is law conceptualized at the level of consciousness? Answers to these questions would help ascertain what transpires in law when its “ground”¹³⁰ changes from the society to transcendence. A simplest yet most profound definition of law, which encompasses its meaning and purpose, is that law is a reasoning which provides “right ways ... through which consciousness can give a universal justified account of its unity from its own resources”.¹³¹ The “right ways” are logically drawn from sociality, since sociality/society is the mental repository of the entire *resources* of consciousness and the ultimate paradigm for testing the rights and wrongs of humanity. This being the case, what actually has to transpire in law during its non-becoming is a cleansing of the individual and collective legal consciousness.¹³²

Conceiving the ground of law as transcendence is nothing unknown to the history of philosophy. Immanuel Kant, Martin Heidegger and Emmanuel Levinas made attempts in this vein.¹³³ In their conceptions, transcendence is the enigmatic [“incomprehensible”] dimension of human mind. However, the incomprehensibility of this dimension is considered to be “an appearance of what is very comprehensible” to human mind.¹³⁴ That is to say, comprehension of the mind is a comprehending of the enigmatic transcendence. On balance, this philosophical position holds that the ground of law is an incomprehensible “ultimate” that is comprehensible as mental reflections.¹³⁵

This version of transcendence, while envisaging an ultimate, anchors “ideal behavior” or “standards of behavior” to the level of consciousness. Transcendence is thus no more than a fine-logic to validate the constructs of consciousness. As there is no intellectual transcending, the realm imagined as the ground of law is not the least bit transcendental. Social ideas such as sovereignty and justice are theoretical derivations of this purported transcendence, validating constructs of consciousness such as the society (social consciousness) and law (legal consciousness). This Occidental transcendentalism forges a super-sociality; instead of cleansing social and legal consciousness, it defends sociality.

Law can be on a profound transcendental foundation only if law’s/the society’s non-becoming is commensurate with the supreme intelligence (intellectual singularity)

¹²⁹ See Isa Upanishad (Verse 12): *Andham tama: pravishanti ye sambhuthimupasate Tato bhuya iva te tamo ya u sambhuthyam rata:* (“Into blind darkness they enter, people who worship non-becoming; And into still blinder darkness, people who delight in becoming”). Translation as provided in PATRICK OLIVELLE (trans.), *UPANISADS* 249 (1996).

¹³⁰ “Ground of law” refers to the psychological/philosophical plane where the “ideal” for determining the substance and authority of law lies, e.g., sociality or the transcendence. See generally Elif Cirakman, *Transcendence and the Human Condition: Reflections on Kant, Heidegger, and Levinas*, 84 *ANALECTA HUSSERLIANA* 315 (2005).

¹³¹ *Id.* at 319.

¹³² See and *Cf. Vivekachudamani*, verse 11.

¹³³ See generally Cirakman, *supra* note 130.

¹³⁴ *Id.* at 316.

¹³⁵ There are, however, subtle differences in the perspectives of Kant, Heidegger, and Levinas. For details, see generally *id.*

of the super-consciousness. In that case, law would be devoid of its canonical and inscriptional form, its linguistic discursivity, and the logical coherence of the individual subjectivities it defends. Law would then become part of the non-becoming of consciousness—an intellectual pursuit, the transcending.¹³⁶ Consequently, law would be a communication of the absolute super-consciousness that would steer the mind and body dwelling in the time-space of physical dualities.¹³⁷

Thus, conceptually the Law is a goal to be realized and a guidance by the super-consciousness informing conduct in the world. Only by pursuing the goal can one be in the advantageous position of receiving the “Absolute good” of humanity.¹³⁸ P. Narasimham makes this dual image of the Law clear: “Only after the transitional stage ... only when our consciousness has ‘sensed’ the Unity, can we aspire after the beyond good and evil. There can be no self-conscious [sic] delusion anywhere and every one is the best judge for oneself in this matter”.¹³⁹

Transcending is therefore a prerequisite to receiving guidance from the super-consciousness. The guidance does not come as an earthly vision or sound because the super-consciousness is a “new mind, new nerves, new perspectives and new *samskaras* (thought potencies)”, untouched by the values of time and space.¹⁴⁰ That is, the body gets the super-consciousness to observe the thoughts of a consciousness which is already falsified. “False consciousness” means that consciousness exists for individuals, consciously, but not self-consciously, as negated consciousness. Because consciousness is falsified, mind dwelling in the body will not heed consciousness but the super-consciousness.

When it comes to the question of the super-consciousness reckoning what is good and bad, there is no such reckoning, as the super-consciousness is a singularity. Since a singularity has no relative perceptions, good and bad in it are ideas of a falsified duality.¹⁴¹ The minds of individuals who have realized the super-consciousness do not see any schism between good and bad except in their meta-observations of the dual physical/social world. Such individuals resemble characters in a story who realize that the good and bad in their world are a meticulously ordered fantasy of a storywriter. If they transcend the story-world and dissolve in the mind of the storywriter, the final truth is the storywriter,¹⁴² who is an amorphous intelligence, and may be deemed to be the basic and ultimate “good”. And, if one prefers the term “bad” to refer to that intelligence, then it is the basic and ultimate bad. Regardless of what one calls it—good or bad—the super-consciousness is an ultimate, singular standard of existence.

However, at the level of consciousness there is duality, and hence there exists the good-bad schism. Generally, a consequentialist, deontological, or virtue-ethical *moral*

¹³⁶ For details on this transcending, see *supra* Section IV.A. Exploring the Transcendental Singularity.

¹³⁷ Prefixing “dualities” with “physical” has a logical connotation. That is, for individuals who have realized the super-consciousness and who receive guidance from it, dualities exist only as meta-phenomena, experienced by their mind. They are conscious that what mind experiences is a virtual reality—from which they are detached—of the world bound in time and space.

¹³⁸ P. Narasimham, *The Vedantic Good*, 24 MIND: NEW SERIES 37, 39 (1915).

¹³⁹ *Id.*

¹⁴⁰ SWAMI ADISWARANANDA, MEDITATION AND ITS PRACTICES: A DEFINITIVE GUIDE TO TECHNIQUES AND TRADITIONS OF MEDITATION IN YOGA AND VEDANTA 347-348 (2003).

¹⁴¹ For clarifying the schism between singularity and duality, see *supra* note 94.

¹⁴² This metaphor is adapted from a similar one by Swami Abhedananda. See SWAMI ABHEDANANDA, ATTITUDE OF VEDANTA TOWARDS RELIGION 176 (2007).

perspective determines good and bad when consciousness is social (which includes semi-social or sub-social consciousness, e.g. religious faith-systems and ideologies). However, all the abovementioned approaches are more or less explanatory in nature and create, and contribute to, a conceptual space for subjective explanations and judgments regarding good and bad.¹⁴³

Notwithstanding the many theoretical models for determining and explaining good and bad, humanity has been able to reflexively judge certain behavior as good and bad. Peter Philip Simpson exemplifies such behavior:

The selfless devotion that spouses show to each other and to their children, that soldiers in battle show to their country, that people of goodwill all over the world show to the poor, the deprived, the depressed, the lonely, and to the suffering generally, even at the personal cost to themselves, amply illustrate the human capacity to recognize the good of others and to act on it regardless of the good of self.¹⁴⁴

Why have we considered these types of behaviors good? Because such behavior is a result of the noetic flashes that blind the ontic mind enclosed in illusion. Ignoring or failing to perceive these flashes and acting against them amounts to bad behavior or wrong-doing.¹⁴⁵ This view implies that, barring a few noetic flashes, human mind is basically dual and egoistic. However, this understanding of human judgment regarding good and bad is in a certain sense forward looking in that it reinforces the intellectual position that the super-consciousness and consciousness are in a micro-macro relationship (which is unknown to consciousness) and that there is only a dimensional divide between them.

A transcending to the super-consciousness erases all traces of duality from mind. Yet mind retains that duality as a falsified notion. However, at the level of the society it is impossible for everyone to realize transcendence,¹⁴⁶ as it requires prolonged, protracted, and sustained intellectual efforts that must be pursued through education and lived experience.¹⁴⁷ Hence for the majority of humanity, the Law would exist as a goal to be realized in order to attain the intellectual maturity to discern good and bad (when seen as a goal, the Law may be called the “Ultimate Law”).

This view squarely resonates with the heuristic nature of consciousness that entails a methodological program in which the super-consciousness would be the hypothesis of life’s inquiry into reality. Therefore, it is essential for such a program to have a transcendental foundation. In addition, in view of the educative nature of this program, the path to the Ultimate Law should be mapped out.

¹⁴³ See PETER PHILLIPS SIMPSON, VICES, VIRTUES, AND CONSEQUENCES: ESSAYS IN MORAL AND POLITICAL PHILOSOPHY 56-59 (2001).

¹⁴⁴ *Id.* at 69.

¹⁴⁵ *Id.* at 72.

¹⁴⁶ See AUSTIN, *supra* note 2.

¹⁴⁷ Enlightenment through life and action is the essence of Karma Yoga, see SWAMI ADISWARANANDA, FOUR YOGAS: A GUIDE TO THE SPIRITUAL PATHS OF ACTION, DEVOTION, MEDITATION, AND KNOWLEDGE 11-78 (2006).

In this order of things, the Law has to assume the character of a discipline, a discipline which has a reality-oriented theory, logic, and reasoning. The rest of the article, drawing insights from Vedic and Sanskrit epistemology, sketches the foundation of such a discipline.

B. “The Law”: A Sublime Discipline

Individuals in pursuit of reality have to progress through certain stages before they are exposed to the theory of reality and other advanced and empirical methods of inquiry into reality.¹⁴⁸ It is these stages that constitute the Law—the first lesson and first discipline that humanity must learn. In learning this discipline, individuals develop the ability to transcend to the level of the Ultimate Law. The stages through which inquires of reality have to traverse—in other words, the Law—are acquiring: 1) a fine-grained grasp of grammar and language-use (*Vyakarana*), 2) skill in debating (*Nyaya*) and interpretation (*Mimamsa*), and 3) knowledge about the phenomenology of matter or the manifest reality (*Samkhya*). What differentiates these types of knowledge from the conventional, society-oriented legal knowledge (reasoning and logic) is their transcendental anchoring. Below I briefly explain how each of these skills and forms of knowledge¹⁴⁹ (I shy away from calling these skills “legal skills” and “legal knowledge”, for the conventional image of law which has encapsulated humanity in a few doctrines does not exist any longer) helps the inquirers to appreciate the transcendental reality, it motivates them and provides them with the fundamental knowledge for advancing intellectually towards the super-consciousness or the “Ultimate Law”.¹⁵⁰

Grammar and Language-Use: Deconstructing the grammar and style of language-use is imperative when humanity is in pursuit of its transcendental reality, since the fall (falsification) of sociality implies a fall of the socially structured “idealized speech community that is internally consistent in its linguistic practice”.¹⁵¹ In the society there exists a presupposed pattern of the cognizing of sentences. For example, take the sentence “the universe exists”. In the normal case, there is likely to be no “preverter cognition” when cognizing this sentence, since it is a social-scientific understanding that the universe exists. The absence of a preverter cognition enables the cognizor to cognize the meaning of the sentence.¹⁵² However, if the statement is “The universe

¹⁴⁸ See *supra* Section IV.A.

¹⁴⁹ What is provided here is only a thumbnail view. Each stage is a tradition—a convergence of many schools and sub-schools.

¹⁵⁰ Is the super-consciousness the “Ultimate Law”? I emphasize that the super-consciousness is the ultimate intellectual state or the reality of human beings. When individuals draw on the enlightenment of the super-consciousness to inform conduct in the world, the super-consciousness may be referred to as the Ultimate Law. However, the idea of the Ultimate Law is relevant only when the super-consciousness is related to bodily existence and conduct in the world. The concept of the Ultimate Law is irrelevant when conceptualizing the super-consciousness *per se*.

¹⁵¹ See NOAM CHOMSKY, KNOWLEDGE OF LANGUAGE: ITS NATURE, ORIGIN, AND USE 16 (1986). I understand that a homogenous “speech community”, bearing in mind the criticisms against it, is a conceptual tool more than a reality. That conceptual existence will, however, suffice for my purpose since I only mean that among the diverse speech communities there exists a conceptually generalizable language-structure for the society.

¹⁵² See and *Cf.* Sibajiban Bhattacharyya, *Epistemology of Testimony and Authority: Some Indian Themes and Theories*, in KNOWING FROM WORDS 69, 84-85 (Bimal Krishna Matilal & Arindam Chakrabarti, eds., 1994).

does not exist” or “the universe is an illusion”, a preventer cognition will obstruct the cognition and will lead to disbelief and subsequent rejection of the idea by the cognizer. This pattern of human cognition may have negative effects on human understanding when non-societal transcendental notions are relayed to the inquirer. To overcome the problem of cognitive denial, the description of transcendental reality should have persuasive syntax capable of defeating any likely preventer cognition. In other words, there has to be an element of “expectancy” in sentences.¹⁵³ This expectancy has to be purely linguistic, i.e., “an understanding derived of a sentence”,¹⁵⁴ free from a pre-existing psychological context.¹⁵⁵ In the Sanskrit grammatical tradition, expectancy is generally created by invoking a desire to know about the doer or the cause.¹⁵⁶ Therefore the statement “The universe is an illusion” will have expectancy if it is cast in a manner which has a hidden or passive reference regarding the doer and causation, e.g., “the universe is a materially manifest super-intelligent imagination”. This sentence would prompt further questions such as “What is that super-intelligence?”, “What prompts imagination?” “If the universe is an imaginary, what is it that we observe?”, and so on, thus prompting a chain of sceptical questioning in contrast to instant denial, as in the case of the statement “the universe is an illusion”.

This type of linguistic deconstructive-cum-structuralist approach is relevant not only for the transcendental project but also for studying and appraising existing scriptural and philosophic accounts of transcendental states. In short, the endeavour is to teach individuals to dispose of the phenomenological prejudices, inculcated in them by the society-oriented disciplines.

Skills in Debating and Interpretation: These skills empower the inquirers to engage in profound logical reasoning. Among the debating skills, the most prominent one is *refutation*, which is primarily meant to affirm the perennial hypothesis by countering possible materialist oppositions to the transcendental reality.¹⁵⁷ Affirmation is not *always* directly made; it is often made by positing seemingly logical situations—fundamentally absurdities—to the opponents and prompting them to accept such positions, rendering their oppositions absurd. This type of skill is best suited to arguing against the sophistries of denialists rather than against rational sceptics. However, triumphing over an opponent by the art of refutation is an extreme measure in debate,¹⁵⁸ it is a rare occurrence. Generally, adversarial positions are simply forged in

¹⁵³ This expectancy in the Sanskrit grammar tradition is known as *akanksa*. For an informative description of *akanksa*, see Purusottma Bilimoria, *Akanksa: 'Expectancy' in Sentential Comprehension: An Advaita Critique*, 9 J. INDIAN PHIL. 85 (1981). *Akanksa* is also present in art forms conveying transcendental messages. See HARSHA V. DEHEJIA, THE ADVAITA OF ART 89-90 (1996).

¹⁵⁴ *Id.* at 91.

¹⁵⁵ See *id.* at 90.

¹⁵⁶ *Id.* at 87.

¹⁵⁷ See Sung Yong Kang, *An Inquiry into the Definition of tarka in Nyaya Tradition and Its Connotations of Negative Speculation*, 38 J. INDIAN PHIL. 1, 3 (2010). Sanskrit epistemology calls this method *tarka*, which is defined in the *Nyayasutra* as a kind of deliberation “in which reasons are given for assumptions regarding an object whose true nature is not known in order to obtain knowledge of its true nature” (definition as provided in Kang. *Id.*)

¹⁵⁸ Texts like *Caraka Samhita*, however, deem victory-oriented debate (*Jalpa*) as constructive. See generally Hugh Nicholson, *The Shift from Agnostic to Non-Agnostic Debate in Early Nyaya*, 38 J. INDIAN PHIL. 75 (2010).

a debate to remove any mistiness surrounding the focal hypothesis. However, the truth of an argument or of a whole argument structure—be it in an adversarial or non-adversarial debate—is not to be tested against a given fact, empirical evidence, doctrinal coherence, or deontological ethics as in legal reasoning, but tested against the argument’s logical compatibility with (and ability to confirm) the perennial hypothesis.

Like the debating skills, transcendental inquiry entails proficiency in hermeneutics. Hermeneutics in the transcendental milieu transcends the standard function of hermeneutics—textual interpretation—to encompass interpreting cognitive perceptions, both sensual and transcendental. The former function, however, exists in transcendental philosophy as well,¹⁵⁹ bordering on the legal hermeneutics that ranges from the simple unpacking of legal propositions to the post-structuralist historicizing of legal discourses.¹⁶⁰ That is to say, the conventional hermeneutic tradition of textual interpretation, in the transcendental context, has “articulated increasingly refined rules and metarules for the interpretation of ritual acts and statements in their intrinsic interrelations and in relation to possible larger and broader motivations and attitudes towards the world”.¹⁶¹ However, when it comes to interpreting cognitive perceptions, the intention is to set consciousness free from any material objectivity the perception might have contacted. In this process interpretation is limited not only to the perceptions generated by consciousness but also to the process by which perceptions are generated.¹⁶²

The ultimate objective of the hermeneutics is to help an individual conceive transcendental singularity in terms of a singular worldly ethic, *Dharma*.¹⁶³ *Dharma* is the Ultimate Law—the guidance of the super-consciousness. *Dharma* is the behavioural nature of the super-consciousness.¹⁶⁴ It is the ideal state of mind and manner of conduct.

Knowledge about Material Reality: Knowledge about the material universe strengthens one’s ability to understand transcendental reality. The road to such

¹⁵⁹ The hermeneutic tradition that is conformist in nature within the Vedic epistemology is *Purva Mimamsa*. See NATALIA ISAYEVA, SHANKARA AND INDIAN PHILOSOPHY 200 (1993).

¹⁶⁰ On the conceptual range of legal hermeneutics, see Gerald L. Bruns, *Law and Language: A Hermeneutics of the Legal Text*, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 23 (Gregory Leyh, ed., 1992).

¹⁶¹ Francis X. Clooney, What’s a God? *The Quest for the Right Understanding of Devta in Brahmanical Ritual Theory (Mimamsa)*, 1 INT’L J. HINDU STUD. 337, 337 (1997). Texts in this context more often are mantras (hymns). For a view that mantras are speech acts that merit a hermeneutical reading, see LAURIE L. PATTON, BRINGING THE GODS TO MIND: MANTRA AND RITUAL IN EARLY INDIAN SACRIFICE 60 (2004).

¹⁶² See DAVID B. ZILBERMAN, ANALOGY IN INDIAN AND WESTERN PHILOSOPHICAL THOUGHT 73 (2006).

¹⁶³ K.R. PARAMAHAMSA, DHARMA 2 (2008).

¹⁶⁴ The singularity of *Dharma* may prompt scepticism given that Vedic commentaries often refer to *Adharma*—the corresponding opposite of *Dharma*—and that many societies have founded law and order systems on the basis of the schism between *Dharma* and *Adharma*. On such societies, see B. S. Chimni, *International Law Scholarship in Post-colonial India: Coping with Dualism*, 23 LEIDEN J. INT’L L. 23, 24-32 (2010) (articulates how *Dharma* was conceptually corrupted by the many socio-political discourses in pre- and post-colonial Indian society). However, I hold that *Adharma* is the basic nature of consciousness (save for the noetic flashes that consciousness receives from time to time) that has to be transcended so as to attain the *Dharmic* state of mind. This view, however, is in opposition to all theoretical efforts by which *Adharma* is used to caste *Dharma* as a spatial-temporal cultural relativity. For such an image of *Dharma*, see generally ARIEL GLUCKLICH, THE SENSE OF ADHARMA (1994).

material knowledge requires a profound understanding of the duality seen by consciousness.

According to materialist schools,¹⁶⁵ the universe is the matrix of all creation. The universe manifests itself as a salient physical system, perceivable only through the unmanifest soul in each individual. This perception of the universe (*prakriti*) is, however, different from the universe (*mulaprakriti*) itself.¹⁶⁶

The individual is a mind and body complex.¹⁶⁷ The mind is intelligence. The mind perceives the body—the universe—such that the body exists in the mind. All phenomena of the universe also occur in the mind. The soul is a silent observer of the perceptions of the mind—be they the macro phenomena of the universe or micro feelings such as pain and pleasure.¹⁶⁸

Individuals are urged to gain knowledge about their material reality in order to know the structure of consciousness. The materialist theories and their logical positions are evaluated by employing hermeneutical methods and contested by way of ratiocination. Such evaluation and contestation help individuals to situate material reality as an illustrative convenience to depict the transcendental reality, thereby providing a “technical formulation” of reality.¹⁶⁹

As a discipline that includes the material ontology of humanity, methods of reasoning and logic to evaluate that ontology, semiotic linguistics of a high intellectual order, and a heuristic to realize the ultimate reality of humanity, the Law would become a methodically organized knowledge which transcends all other disciplines. The Law would no longer be a state of consciousness existing in a social consciousness within individuals, but a rich epistemology to meta-evaluate the constructs and causes of consciousness and consciousness itself. The Law would no longer be a set of doctrines sustaining a social consciousness, but would be a method of inquiry that provides a pathology of the social conditions in which humanity exists. The Law would no longer be a constituent of sociality, but would be a first step and first lesson towards, and the first perception of, transcendental reality.

And, beyond its existence as a discipline, the Law would no longer be a determinant of good and bad, but would be the ultimate and sole standard of conduct in the world. The Law has to be the Ultimate Law. The Law is the super-consciousness.

¹⁶⁵The profoundest theories of duality are those of the *Samkhya* school.

¹⁶⁶ GERALD JAMES LARSON, *CLASSICAL SAMKHYA: AN INTERPRETATION OF ITS HISTORY AND MEANING* 170 (1969).

¹⁶⁷ See M. HIRIYANNA, *OUTLINES OF INDIAN PHILOSOPHY* 270-71 (1993). In *Samkhya* tradition soul is called *purusha* and the universe *prakriti*.

¹⁶⁸ LARSON, *supra* note 166 at 171.

¹⁶⁹ That material theories (*Samkhya*) are used to augment the transcendentalist position is evident from Sankara’s critique of *Samkhya*. For the particulars of Sankara’s critique, see *id.* at 209-33. One “technical formulation” of transcendental reality, tempering it against the material reality is the *Panchadasi* of Vidyaranya (also attributed to Bharatitirtha). See SWAMI KRISHNANDA, *THE PHILOSOPHY OF PANCHADASI* (1992).

VI. CONCLUSION

It has been the contention of this article that the unmanifest self in individuals is reality, it is the ultimate truth.¹⁷⁰ The unmanifest self is the singular super-consciousness in everyone. The super-consciousness is the true human condition.

Individuals remain deluded as long as they deem perceptions of consciousness to be reality. Such deluded existence forges “seeming reality”¹⁷¹—such as sociality—in the eyes of humanity. When individuals become aware of the macro-intelligent super-consciousness of which they are a micro-intelligence, the seeming reality is eclipsed by a *conceptual* knowledge of the super-consciousness. The conceptual knowledge of the super-consciousness serves as the perennial hypothesis of life. This knowledge of reality—and the hypothesis it provides—is the “interactive reality” in everyday life.¹⁷² Life becomes thus a heuristic process that helps *realize* the super-consciousness, the transcendental reality.

In rendering sociality only a seeming reality—although it takes away all vital constituents of sociality such as law from reality—law resurfaces as the ultimate guidance for humanity (the Ultimate Law) and as the knowledge that helps in the self-becoming of humanity (the Law).

The heuristic nature of life (and the super-consciousness it may lead to) has to be taken into account in organizing human life in the world. Deeming the egoistic duality—“I” and the “world”—as reality is the cause of social friction and its violent spillovers affecting the world. Life has to be lived in pursuit of the reality of life and, ultimately with the aim of entering that state of fullness where one sees everyone and the entire universe in oneself and oneself in everyone and the entire universe. The *Brhadaranyaka Upanishad* proclaims this very sublime purpose of life as a shift from “unreal to real, darkness to light, and death to immortality”.

This article has tried to describe that concept of human existence which would have emerged had the many medieval and modern intellectual projects not influenced human thinking and in organizing life in the world. However, in as much as they have influenced human thinking and we have developed the social concept of humanity, so much the better; as humanity is proud of its intellectual progress, so, too international lawyers are proud of international law. Yet, envisaging the human condition as the pre-scientific epistemic communities have—in terms of mind techniques and thought experiments, and looking inward—might provide a caveat to ponder whether humanity has erred on the side of its ontology. If that pondering prompts a few to set off on a

¹⁷⁰ In the *Chandogya Upanishad* the master tells the student: *Sa ya esonimaitadmyamidam sarvam tat satyam sa atma tat tvam asi svataketu iti* (Ch.6) (The Self is the essence of the entire universe, That is the truth, Thou art That) (My translation). Chapter 6 of the *Chandogya Upanishad* where this verse appears is in the form a dialogue between Saint Uddlaka and his son Svataketu.

¹⁷¹ Such an awareness of reality is known as *pratibhasika satya*. See MICHAEL JAMES, *HAPPINESS AND THE ART OF BEING* 286 (2007).

¹⁷² This awareness of reality is known as *vyavaharika satya*. *Id.* Tibetan philosopher Mipam has set apart interactive reality from the experience-of-ultimate-reality. He calls the former phenomenological reality, a particular perception in which [theoretical] awareness of reality removes any contexts-of-representation from the inquirer’s mind. On Mipam’s description of phenomenological reality, See *generally* Douglas S. Duckworth, *Two Models of the Two Truths: Ontological and Phenomenological Approaches*, 38 *J. INDIAN. PHIL.* (2010).

course that will lead them to work for a transcendentally/intellectually united humanity, this article will have fulfilled its purpose.

CHAPTER II

THE TRAGEDY OF THE PHILOSOPHY OF INTERNATIONAL LAW

Agnostic about the scientific foundations of international law, this article creates a conceptual framework for evaluating the discipline's design of thought. At the heart of the discourse is an awareness that pairings of regimes previously unknown have occurred in international law and that the "doctrinal complex" of international law has reconciled these pairings by way of an interpretative and rationalist reasoning. Sceptical about this act of reconciling, this article subjects the rationalities—common interest and market interest—found to be clashing in all the regime pairs to a thorough analysis. The objective is to find out if at a deep structural level this pairing of rationalities has coherence. The article also demonstrates that common interest and market interest, in their rawest form, are socially systematized forms of altruism and egoism—deemed to be the perennial poles of human thought—respectively.

First, the article studies the design of common interest in a two-fold perspective: (a) common interest as philosophy, wherein the ethical and moral base on which the concept rests is examined, and (b) common interest as doctrines, wherein the article analyses the doctrinal and political mould provided for common interest in the ideas underpinning international law and politics. The philosophical and doctrinal designs are then juxtaposed to illuminate the conceptual reality of common interest. The juxtaposition reveals that doctrines have distorted the true concept of common interest and that common interest is originally a philosophical concept that urges humanity to restructure human thought and intelligence at higher levels of consciousness. Such a restructuring would help humanity to discover their existential reality and on the strength of such consciousness constitute egalitarian societies—societies where human dignity realizes meaning through sentiments such as altruism.

Second, a similar approach is employed for examining market interest. However, the market is viewed first as ideology and then as doctrine. This analysis reveals that the reality in the case of market interest is that it is an ideological mindset promoting egoism.

Third, the article sets up a dialogue between the rationalities of common interest and market interest. The interaction takes place at two levels. On the first level, the reality of both concepts, i.e., common interest as a philosophy and market interest as an ideology interact, revealing that the pairing of common interest and market interest is theoretically unfounded and has a deleterious effect for humanity. On the second level, common interest, as apparent in doctrines, interacts with market interest as reflected in doctrine. Here, the pairing is seen to have a harmonious structure. Paradoxically, the pairing which is adverse in theory entails harmony in doctrines.

Thus, examining a simple regime conflict under a microscope, the article reveals how deleterious a pairing of rationalities is that otherwise appear to have been reconciled by doctrinal reasoning. The findings also suggest that the design of doctrinal thought in international law is flawed, so much so that it obscures humanity's true reality from it.

The article has engineered its discourse in such a way that international law has the ontology of humanity and the foundations of human thought in juxtaposition. It is

pioneering in a methodological sense in that it has an analytical framework drawn on Vedic and Sanskrit epistemology. To augment its arguments the article relies on Vedanta and quantum physics.

THE TRAGEDY OF THE PHILOSOPHY OF INTERNATIONAL LAW

TABLE OF CONTENTS

I. INTRODUCTION

II. THE CONCEPT OF COMMON INTEREST

A. *Common Interest as Philosophy*

B. *Common Interest as Doctrine*

1. *TWAIL: Means did not justify the end*

2. *Global Governance: A distorted conception*

a. *Governance is Politics*

b. *Governance Ought Not To Have Been Thus: A postmodern/quantum turn?*

C. *Reality Perceptions about Common Interest: Philosophy against doctrine*

III. THE CONCEPT OF MARKET INTEREST

A. *Market as Ideology*

B. *Market Interest as Doctrine*

1. *Economic Analysis of International Law*

a. *Misguided Rationality: A response to economic analysis of international law*

C. *Reality Perceptions about Market Interest: The dominion of ideology*

IV. A JUXTAPOSITION OF COMMON INTEREST AND MARKET INTEREST

A. *Philosophy against Ideology*

1. *Altruism and Egoism: The perennial poles of human thought*

B. *Doctrine against Doctrine*

1. *Structural Doctrinal Moves*

2. *Discursive Doctrinal Moves*

V. CONCLUSION: “THE TRAGEDY”

I. INTRODUCTION

International law is a doctrinal complex.¹ Doctrinal fetishism is its style of reasoning.² Inward and outward “spiralling” around a doctrinal center is its attitudinal

¹ “Doctrinal complex” may well be the Marxian “superstructure”. However, nothing seriously Marxian is intended as I employ the concept in this Article.

² “Doctrinal fetishism” captures in its meaning a sort of legal reasoning which has a fixated dedication towards legal formalism as opposed to any meta theories or transcendental visions regarding law. The reasoning that treaties have immanent powers in establishing norms in the international society and that any internal or textual modification of a treaty can strengthen the normativity in international law is one example of such fetishism. In a broader frame, doctrinal fetishism is a mental posture (one identified by Max Weber) that takes “law as given”. On the Weberian position (though in a different analytical context), see Daniel Bodansky, *International in Black and White*, 34 GA. J. INT’L & COMP. L. 1, 1 (2006). My attribution of the aforesaid meanings to doctrinal fetishism is inspired by Lemaitre’s articulation of “legal fetishism”. See Julieta Lemaitre, *Legal Fetishism at Home and Abroad*, 3 UNBOUND: HARV. J. LEGAL LEFT 6 (2007). Lemaitre relates the following meaning of “legal fetishism”: “[legal fetishism] is used to describe an excessive attachment to the letter of the law in contradiction with logic, convenience and justice” (p.7). Later on, she argues that legal fetishism is a mask to hide and reject reality: “what is rejected is the reality of emptiness, the reality of task, the lack of intrinsic morality and the value of human *qua* human” (p.17). These observations capture the anti-transcendental and anti-philosophical approaches of legal formalists who fetishize doctrines.

In international law, doctrinal fetishism is a consequence of “state-centrism”—a hope as well as despair that international lawyers have to live with, as Marks put it. When a state became the representation of an ontological truth, doctrine as a system of belief came to constitute and organize the affairs of the state. On the

pattern.³ Rule-based doctrinarism is its structural design.⁴ Biases,⁵ sympathies,⁶

state as an ontological reality, see Sébastien Jodoin, *International Law and Alterity: The State and the Other*, 21 LEIDEN J. INT'L L. 1 (2008) (suggests that the “ethics of statehood” should be replaced by “the ethics of alterity”). The view that doctrine is a result of state-centrism implies a symbiotic theoretical position according to which doctrine is state-centered belief and doctrines hypostatize a state as well as guard it from the *evil influences* of ethics and morals. See generally Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 LEIDEN J. INT'L L. 339 (2006). But, see ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS* (1986) (argues that a substantial dichotomy exists, in terms of substance as well as method, between the concept of state and the doctrines sustaining the concept).

³ Attitudinal pattern is an intellectual approach evident from the direction that arguments in international law generally take. In the spiral analogy employed here, doctrine is the center from which the arguments originate, which then spirals outward to an extent which the scholarly orientation of the cognizer permits. The more the arguments spiral outward, the more the cognizer distances him- or herself from the doctrines, yet the doctrinal essence (the umbilical connection to the center) of the arguments remains. To spiral outward, scholars take several standpoints and adopt various rhetorical tools. An extended pattern of argument is inward spiralling whereby the arguments make a phenomenal return towards the center upon reaching a certain limit. A piece of writing, e.g., a monograph or article, is not necessarily illustrative of the outward and inward spiralling of arguments; scholarly lives, even trends associated with an academic chair or institution, can exemplify such a pattern.

To illustrate, an outward spiralling can be inferred from Mälksoo’s instructive presentation on the styles of reasoning, arguments, and lives of five Estonian international law professors in the University of Dorpat/Iur’ev/Tartu. See Läuri Mälksoo, *The Science of International Law and the Concept of Politics: The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur’ev/Tartu 1855-1985*, 76 BRIT. Y.B. INT'L L. 383 (2005) (starting from the deeply ingrained positivist convictions of August von Bulmerincq and Carl Bergbohm, who believed in the strict separation of law and politics, the arguments spiral outward through Vladimir Hrabar’s recognition that “law has to be close to the facts” (*Id.* at 460) and arrive at Ants Piip’s assertion that *politics is an essential element of international law* and Abner Uustal’s conceiving international law within an ideological frame). Although the arguments appear to be only on a continuing outward spiral, one receding from the doctrinal center (positivism), a nuanced reading of the arguments of these professors provides, says Mälksoo, a “story of ruptures and discontinuities, beneath the great continuity” (*Id.* at 498).

On balance, international legal discourse and the attitude of its scholars and professionals, amid all the critical and new streams, have a spiralling pattern. Breaking the doctrinal/spiralling pattern renders any thought devoid of a pattern/design and nomadic; an alternative pattern becomes necessary. Scope for alternative modes of reasoning is apparent from C.G. WEERAMANTRY, *THE LORD’S PRAYER: BRIDGE TO A BETTER WORLD* (1998) (provides spiritual visions for a personal and global transformation). See also PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* (1990). But, see Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31 (1999) (optimistic that international law in its modern form can find a place within his own transcendental vision).

As regards the spiral pattern, I am not the first to employ it as a metaphor in the context of international law. Korhonen employed a spiral metaphor when articulating that scholarly rationality circles inward and outward, as if in a spiral, over three postmodern sensibilities which she metonymically calls “tragedy”, “fortress” and “cave”. See Outi Korhonen, *New International Law: Silence, Defense or Deliverance*, 7 EUR. J. INT'L L. 1 (1995).

Finally, perceiving spiralling as the attitudinal pattern of international law does not invade or contradict the “oscillating pattern” identified by Koskenniemi in *From Apology to Utopia*. His way of looking at things captures a pattern of arguments within the doctrinal world of international law—an inside story—and is a standpoint in the outward spiralling of arguments. See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENTS* (2005).

⁴ This position is hard fought and has been hard won by the scholars of international law from a jurisprudential, doctrinal configuration put together by Hart (rules) and Dworkin (principles and interpretation). For a succinct account in a densely populated area of scholarly research that leaves room to understand how and to what extent the doctrinal conception of law is shaped by the debate between Hart and Dworkin, see Michael Bayles, *Hart vs. Dworkin*, 10 L. & PHIL. 349 (1991).

⁵ Biases are conceptual and ideational inclinations towards what Hoffman calls “background conceptions” of the times of yore. Conceptually, biases are belief-systems on the basis of which international legal discourse operates and legal machinery functions; e.g., reliance on precedents is one mode by which past concepts become biases and afterwards become systematized as belief-systems. The present rule-based international

constitutive approaches, resistance to criticism, all such attitudes and actions have a doctrinal flavour and content in international law. International law is taught doctrinally.⁷ Its sources are doctrinal.⁸ It maintains its structural coherence by means of doctrines.⁹ International offices work under austere doctrinal formalism.¹⁰

legal system bares heavy traces of past concepts. On how biases have crept into international legal discourse from background conceptions, see Geoffrey Hoffman, *Critique, Culture, and Commitment: The Dangerous and Counterproductive Paths of International Legal Discourse*, 29 NOVA L. REV. 211 (2005).

⁶ Sympathy is a social presumption derived from a socio-cultural hierarchy existing in international society. International law uses an empathetic approach to safeguard and protect the creamy layer of the hierarchy or any other vulnerable group by means of its doctrine-centered, rule-based architecture. Doctrinal reasoning exemplifies that empathetic approach of international law. For support, see Note, *Sympathy as a Legal Structure*, 105 HARV. L. REV. 1961 (1992) (situating sympathy in legal and judicial reasoning); Lynne N. Henderson, *Legality and Empathy*, MICH. L. REV. 1574 (1987).

⁷ A typical discourse in a public international law classroom has a preset pattern in which students are taught from day one to be sceptical as to the legality of international law (for want of certain doctrinal attributes) every time they grapple with an international issue. The classroom discourse thus presents the conception of an enigmatic doctrinal complex consisting of a panoply of institutions, rules, normative semi-structures, methodically shelved principles, and [quasi-] judicial architectures. The pill for every international problem is concealed somewhere inside the complex—to be found beneath the structured prose of treaty clauses or to be derived from the reasoning of judges. Classrooms cast students into a doctrinal mould such that they remain insulated for rest of their lives from any other pattern of reasoning. See generally Gerry Simpson, *On the Magic Mountain: Teaching Public International Law*, 10 EUR. J. INT'L L. 70 (1999) (provides an appraisal of the types of instructions existing in international law—doctrinal, theoretic, and political—and proposes a new type of “teaching contexts”). This being the typical international law classroom, many law schools in the United States have started to use economic approaches to validate the structural designs of international institutions and explain the behavior of various international actors.

⁸ Virtually every “source discourse”, mostly cast as “source doctrine”, in international law draws on Article 38 (1) of the Statute of the International Court of Justice. For details on the sources of international law, see IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (1998). However, the normative complex of Article 38 (1), which comprises treaties, international custom, and general principles of law, if critically conceptualized, will turn out to be a figment that helps international lawyers dispel the scepticism that international law is a meta phenomenon. As Koskeniemi states in a similar vein, “It [sources] tells the lawyer where can he find the law in an objective fashion”. See Koskeniemi, *supra* note 3 at 303. On the many rhetorical moves within the source doctrine, see David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1 (1987) (“Source doctrine is a quite well worked out argumentative practice about the authority or “binding nature” of various legal instruments”. *Id.* at 20). A similar radical pattern can be seen in Koskeniemi, *id.* at 303-87 (every discourse/practice on source doctrine swings between the binaries of “consent” and “justice”).

A concept such as “equity”, which is deemed as casting the grace of “justice” and fairness on law, is also a positivistic source doctrine in international law. See Anastasios Gourgournis, *Delineating the Normativity of Equity in International Law*, 11 INT'L COMMUNITY L. REV. 327 (2009). But, see generally Thomas M Franck, *Equity in International Law*, in PERSPECTIVES ON INTERNATIONAL LAW 49-61 (Nandasiri Jasentuliyana, ed., 1995) (illustrates that equity acts as a solvent ensuring fairness in every doctrine of international law).

⁹ The response of the International Law Commission (ILC) to the issue of fragmentation of international law is noteworthy in this context. In its report on fragmentation submitted during the chairmanship of Martti Koskeniemi, the ILC dealt with a clash between the doctrines of *lex specialis* and *lex generalis*, certain questions regarding treaty applications, and doctrinal hierarchy in international law. See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION, A/CN.4/L.682 (13 April 2006). For scholarly responses, see Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 IND. J. GLOBAL LEGAL STUD. 483 (2009) (develops a hermeneutical model for defragmentation which has to address norm conflict by an act of “balancing” at the level of principles); Christian Leathley, Note: *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 N.Y.U. J. INT'L L. & POL. 259 (2007) (provides a design for a “judicial hierarchy” in a fragmented international legal system); Anja Lindroos, *Addressing Norm Conflict in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L L. 27 (2005); For a perspective on fragmentation, see Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007), (fragmentation has a

International settlement of disputes is a doctrinal reconciliation.¹¹ Growth of international law is measured in terms of the expansion of doctrines¹² and international law is said to be dynamic when social changes are contained by way of the creation of new doctrines or modification of existing ones.¹³ Doctrinal inadequacy causes international law to be “in crisis” and doctrinal adaptations overcome such crisis.¹⁴

The doctrinal complex is, however, a fragile architecture; any perturbation in the global environment shakes and disturbs the order of this complex of international law.¹⁵ Ideational pressures, high-impact global events, or social movements can cause perturbation.¹⁶ Symptomatic of a perturbed state are inter alia a loss of centrifugal force severing its components from international law, defaulting and schizophrenic principles, unspecified actors, and most prominently, “disparate rationalities”. The

utility-purpose for the powerful states in that it increases transaction costs for smaller countries); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

¹⁰ For details on such “executive international law”, see, e.g., Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962); Hans Corell, *The Role of the Legal Adviser of the Department of State*, 85 AM. J. INT'L L. 358 (1991); Michael K. Young, *The Role of the Attorney-Adviser in the U.S. Department of State: Institutional Arrangements and Structural Imperatives*, 16 L. & CONTEMP. PROBS. 133 (1998) (presents the outcome of an empirical study on the policy overlap in the routine doctrinal work of attorney-advisers); Sir Ian Sinclair, *The Practice of International Law: The Foreign and Common Wealth Office*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 117-34 (Bin Cheng, ed. 1982). But, see Koskenniemi, *supra* note 3 (proposes a reflective community of international lawyers which pools socio-political knowledge in its doctrinal routines).

¹¹ Koskenniemi goes a step further and demonstrates the predicament faced by the International Court of Justice (ICJ) (and the emptiness/subjectiveness of its sovereignty doctrine) when both parties to the dispute in the *Right of Passage Case (1960)* based their claims on the same doctrine. See Koskenniemi, *supra* note 3 at 208-09.

¹² It is a general conception that international law develops “through the restatement of existing rules or through the formulation of new rules”. See THE WORK OF THE INTERNATIONAL LAW COMMISSION (6th Edition, 2004). The view that the development of international law is tantamount to the expansion of doctrines is apparent from the writings of early international law scholars. See e.g., Editorial Comment: Pitman B. Potter, *The Future of International Law*, 37 AM. J. INT'L L. 632 (1943) (“changes in the procedure for international legislation are needed, in its formulation . . . , and in its enforcement” for strengthening international law). In addition, source doctrine also has played a major role in the development of international law. See Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 74-85 (2007).

¹³ In the aftermath of decolonization, with the emergence of the Asian and African states, international law met with the challenge of accommodating the claims and interests of the new states. The primary aim was to inscribe their rights in a legal instrument or, at the minimum, formalize their claims. For a summary of this trend, see Maurice Flory, *Adapting International Law to the Development of the Third World*, 26 J. AFR. L. 12 (1982). The post-decolonization period also witnessed the sprouting of new doctrines such as the principles of the common heritage of mankind, permanent sovereignty over natural resources, and sustainable development. This process as a whole was depicted as a sign of the dynamism of international law.

¹⁴ The regulatory challenges posed by globalization and the legal adaptation to them through buffering mechanisms such as new rules, institutions, and *rational* strategies exemplify the doctrinal response and adaptation to crisis.

¹⁵ This observation is derived from Teubner’s autopoietic theory of law (law is self-regulating). See generally, GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993). Evaluating the autopoietic theory, King writes: “In the language of autopoietic theory, a *perturbation* in the social environment which enters the meaning system of law creates a *structural coupling* at the point of perturbation between law and any other systems, both social and psychic, involved in generating the perturbation” (original emphasis). See Michael King, *The ‘Truth’ about Autopoiesis*, 20 L. & SOC’Y REV. 218, 225(1993). For a criticism of Teubner’s version of perturbation, see Review Article: Anthony Beck, *Is Law an Autopoietic System?*, 14 OXFORD J. LEGAL STUD. 401, 411-12, 417 (1994).

¹⁶ Such an influential social movement is depicted in BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENTS, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

concept of disparate rationalities serves as an analytical springboard for this article. I will return to the import and niceties of disparate rationalities shortly. For the moment, suffice it to say that disparate rationalities manifest in international law as pairing of regimes hitherto unknown or considered improbable.¹⁷ Among the *simplest* pairs are environment and trade, the regimes of oceans and outer space and trade, human security and trade, and so on.¹⁸ To continue, to counter any perturbation the doctrinal complex has an auto-response system¹⁹ which works by way of a set of interconnected doctrinal moves that reinstate the order of the complex through scholarly interpretative manoeuvres reinterpreting old doctrines or through new methods to practice those doctrines and thereby provide new meanings and contextuality.²⁰

This Article proceeds on the basis of a conviction that disparate rationalities (together with other symptoms) have come to exist in international law, implying that the doctrinal complex of international law is in a crisis. However, the auto-response system of the complex has mediated and harmonized the disparate rationalities by establishing new institutional frameworks and by implanting new discourses.²¹ This is notwithstanding that the existential logic of the institutions in which disparate rationalities are harmonized has been a puzzle for many scholars and the activities of such institutions mistrustful for various global actors. Yet, the system/complex has adapted to disparate rationalities by a process of validation. Validation has been accomplished through three modes: first, by situating the disparate rationality as a significant element of a larger social transformation; second, by linking the institution within which the disparate rationalities are mediated to the doctrinal complex of international law; and third, attributing to them the character of a hegemonic scheme whereby they are objects of criticism.²² In the third case, ironically, the fact that disparate rationalities are phenomena worthy of criticism and of resistance is what provides validation. On balance, the doctrinal complex, by grappling with the disparate rationalities, has demonstrated a self-constitutive process by which it can persevere against societal transformations and turbulences.

Having validated the disparate rationalities, the effectiveness of the doctrinal complex in the post-adaptation/post-perturbation phase is being tested in terms of the utility and functionality of the complex in the changed circumstances. Disparate rationalities are set on course for a “norm status”. Once become norms, their norm

¹⁷ See Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT'L L. J. 61, 82 (2005) (asserts that disparate rationalities are side effects of fragmentation; “fragmentation pits particular rationalities against each other”).

¹⁸ *Id.* However, this Article considers the above examples as only discursive frameworks within which rationalities exist. Every such framework is composed of certain sets of doctrines, precepts, beliefs, methods, ideas, and ethics, a collective systematic understanding and cognitive reflection of which represent “rationality”. For a related view, see Alexandra Khrebtukova, *A Call to Freedom: Towards, a Philosophy of International Law in an Era of Fragmentation*, 4 J. INT'L L. & INT'L REL. 51 (2008) (argues that regimes are social reality writ large: “the regime does not hold views about a bounded issue, it hold views about the world”. *Id.* at 62.).

¹⁹ For support, see generally TEUBNER, *supra* note 15.

²⁰ An example of this type of salvaging is the rational approach to customary international law. See *infra* Section III.B.1.

²¹ See Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT'L REL. 395, 413 (2009).

²² These doctrinal acts of validating the disparate pairing of rationalities are illustrated later in this Article. See *Infra* Section IV.B.

status would liberate disparate rationalities from any further need for validations. Being on a course to normativity, disparate rationalities are continually subject to evaluation which, however, is by means of the much habituated interpretative—as well as the very much in fashion “rationalist”—reasoning focused on the many doctrines of the complex. What might be the result if disparate rationalities were subjected to a theoretical analysis? By theoretical analysis what I mean is not to scrutinize the normative base of disparate rationalities, but to inquire into the “philosophical composition”²³ of a disparate rationality by delving into each of its component rationalities. If the two rationalities that form a disparate pair are juxtaposed on the basis of their theoretical composition, would it generate a different dialogue and have a different socio-political, even ontological, meaning than what doctrinal/rationalist interpretation provides? Would such an analysis then inspire the creation of alternative methods and models to analyse the utility and effectiveness of contemporary thought in international law, may be a totally new way to perceive the functions and purpose of international law?

As said, the disparate pairing of rationalities has manifested itself in the conceptual landscape of international law as regime-pairings; for example regimes focusing on securing or promoting the *common interest* of peoples/humanity such as the environment regime or the regime for outer space or regime for oceans, have paired with the trade regime promoting *market interests*.²⁴ Common interest and market interest are thus the mindsets seen in these regimes; these mindsets represent rationalities. In each of these regime-pairings one could witness these two rationalities clashing. Hence, what makes a pairing disparate is the coupling of incompatible rationalities, common interest and market interest.

International law scholarship is resplendent with analyses mediating between the dichotomous poles of any two regimes forming a pair and the chaos such a pairing has created. However, no exclusive analysis of the polarities between the mindsets powering the conflicting regimes has hitherto been undertaken. To fill that gap being one purpose of this Article, it departs from analysing the conflict specific to any two regimes and adopts a broader perspective on disparity. Indeed, the main objective of the Article is to examine the dialectic and dialogical impact of the two underlying rationalities—common interest and market interest—and not that of two regimes or any one or a few type/types of doctrines related to common interest and market interest within given regimes. If a single doctrine or set of doctrines were taken for examination, only the contextual dynamics of that/those doctrine/s could be examined, which would be too constricted for an evaluation of the doctrinal complex of international law.

Hence, both rationalities—common interest and market interest—are studied as separate but interrelated collectivities comprising principles, precepts, beliefs,

²³ On the meaning of “philosophical composition”, see *supra* note 18.

²⁴ See Koskenniemi, *supra* note 17. Trade (market interest) is present in every pairing. In fact, the pairing of other rationalities with trade is what renders the pairings disparate. The logic of this invasion by the trade related rationality into every other rationality is articulated later in this Article. See *infra* Section III.A.

The concept of “market interest” discussed throughout this Article pertains to the liberal free market with its emphases on “individualism”; at times, however, I take a broader view of the market in order that certain basic features common to all forms of the market are taken into account. I use the expressions “market interest”, “market rationality” and “market mindset” interchangeably.

methods, and ethics. The essentiality of each collectivity is explored with the aid of various philosophical tools in order to ascertain its epistemological meaning, which I refer to it as its “reality perception”. Once we establish the perceptions of reality rooted in common interest and market interest, we can test if they correspond to each other. If they are disparate, then reconciliation of conflicting regimes by the doctrinal complex is only a “surface healing”. In that case, one has valid grounds to be sceptical about the entire survival mechanism (adaptability) of the doctrinal complex, and the more so about the functional and existential logic of the complex itself.

The selection of the pairing of common interest and market interest for analysis has a higher analytical utility and ambition than I have hitherto provided. Above, I have asserted that common interest and market interest are not two principles of international law, but are simply two underlying mindsets of substantial social and moral import. In other words, every disparate pairing of regimes manifested in international law has in it the mindsets of common interest and market interest conflicting against each other.²⁵ However, a philosophical journey into common interest and market interest reveals that these mindsets are in fact socially systematized forms of two micro rationalities—*altruism and egoism* respectively. Altruism and egoism have been regarded as the perennial poles of human thought ever since humanity began to systematically conceive any forms of thought—philosophical, political, social, legal, or economic. With such an awareness, when I place the thought-structure of international law within the clash between common interest and market interest, I gain an analytical framework in which the dialectic of international law can be viewed in the context of the structure and dialectic of human thought.

In the spirit of its analytical ambition, this Article defines doctrines in a comprehensive manner (and later on verifies that definition as ideal) in order that the present design of thought in international law falls into the category of doctrine. Accordingly, the idea of doctrine employed in this Article has a triple meaning, each an extension of the other. The first is a *narrow* meaning: It is narrow when it is attributed specificity, that is to say, the concept is isolated from its multi-contextual dictionary meaning (religious doctrine etc.) and limited to doctrines in the context of law, or “legal doctrine”. In this approach, doctrine is simply “a rule or principle of law”²⁶ including treaties, customary law, etc. Second, doctrines are seen in a *broad* sense to include the positive legal framework espoused by the mainstream in international law which, in addition to rules and principles, includes diplomatic correspondence, government policies, organizational strategies, functional and methodological standards, etc.²⁷ Any reference to doctrine vis-à-vis the doctrinal complex of international law has this meaning. Third, doctrine in its *broadest* sense means a discourse prompted by a subconscious psychological loyalty to certain sentiments embedded in the agents’ mind and a collective observance of the ideals

²⁵ Those clashes that do not represent these two elements may be called “structural clashes”. Structural clash does not represent the clash between any “interrelated collectivity” of rationalities. To illustrate, a clash between two provisions of a treaty as to the question of which one prevails over the other is a structural clash.

²⁶ See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Edition. An insightful representation of a rule-family can be found in Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 956, 960-68 (1995) (considers that the basis of delineation of rules into a family is the *legal act* of interpretation).

²⁷ Cf. Sunstein, *supra* note 26.

resulting from such discourse.²⁸ Under this definition doctrine is a mindset perpetuating personal/group interest, as opposed to any common interest of humanity, and thus represents egoism. This idea is related to the second meaning of doctrine in such a way that when the doctrinal complex functions, it presumably generates egoism. It is this third meaning of doctrine that I have employed in the many analyses in this Article. However, convolutions, if any, have to wither, and as will be apparent, these definitions are only a basis for the discourse and means of delineating a concept of doctrine.²⁹ As the discourse proceeds through many analytical routes, a clear and articulate concept of doctrine takes form and its nature comes to light. In its simplest sense, doctrine in this Article refers to the current pattern of thought in international law,³⁰ and not necessarily, as generally understood, rules and principles, etc.

This analytical setting of this Article posits certain schools and streams of thought, revolting against the complex, which have lodged claims of being anti-doctrinal and reformative in stance, as engendering the same [egoistic] effects as the doctrinal complex.³¹ In the broader analytical framework of this Article, their claims

²⁸ This idea of doctrine is inspired by Unger's conception of doctrine. While constraining his conception of legal doctrine to fit within his views regarding formalism, Unger defines legal doctrine as related to "[a] form of conceptual practice that combines two characteristics: the willingness to work from the institutionally defined materials of a given collective tradition and the claim to speak authoritatively within this tradition ...". See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). My claim that doctrines have an expansive (also multiple) meaning finds endorsement in A. Peczenik, *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law*, in A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE VOL.4 8 (E. Pattoaro, ed. 2005).

²⁹ See *infra* Section II.C. (The Concept of Doctrine).

³⁰ The definition of international law provided by Kennedy—that the discipline is a sum total of the “sensibilities”, “viewpoints” and “mission”—is doubtlessly tantamount to deeming the current pattern of thought in international law to be doctrine. For Kennedy, international law is what is discernible from its thought structure:

Their [international law professionals] disciplinary consciousness or lexicon is composed of typical problems, a stock of understood solutions, a vocabulary for evaluating new ideas, a sense about their own history and a way of looking at the world. They launch projects of criticism and reform within and against this professional vocabulary.

David Kennedy, *My Talk at the ASIL: What is New Thinking in International Law?*, 94 AM. J. INT'L L. 104, 104 (2000).

³¹ A new stream of anti-doctrinal reasoning has been initiated by the Critical Legal Studies (CLS), which examines law culturally, linguistically, and rationally. For rigorous CLS analyses of international law, see DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); Koskenniemi, *supra* note 3. For an overview of CLS, see Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L. J. 81 (1991).

There have emerged many critical groups, declaring their allegiance to CLS and claiming to have anti-doctrinal approaches and methods, e.g., feminist theories (examine the extent to which international law has been skewed by the historical narratives of men); Third World approaches to International Law (TWAIL) (hold that contemporary international legal structure marginalizes the Third World countries and peoples. TWAIL's assumptions are borrowed from subaltern studies); International Legal Process (a method to monitor and study the process and application of international law, which is more “reformist” and less “deconstructive” in nature); and “Law and ...” (an interdisciplinary approach whereby ideas and concepts are drawn on neighbouring disciplines, e.g., economics and international relations, to examine the utility of law). Although the tenets and methods of most of the new streams overlap, all of them fairly resist the dogmatic composition of international law. On feminist theories applied to the analysis of international law, see, e.g., Hilary Charlesworth, Christine Chinkin, & Shelly Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379 (1999) (from a humanitarian law standpoint). On TWAIL, see e.g., RAJAGOPAL, *supra* note 16; On International Legal Process, see Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999) *et seq.*; “On law and ...”, see Annie Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998) (provide a methodological perspective on a combined IL/IR scholarship). *et seq.* For a thumbnail

are shown to be misguided, establishing that many critical, new streams of thought in international law only serve the doctrinal complex instead of providing alternative structures.

In part II, the Article studies the design of the idea of common interest in a two-fold perspective: (a) common interest as philosophy, wherein the ethical and moral base on which the concept rests is examined, and (b) common interest as doctrines, wherein the Article analyses the doctrinal and political mould provided for common interest in the ideas underpinning international law and politics. The broad definition of doctrine positions discourses such as Third World Approaches to International Law (TWAAIL) and global governance within the province of doctrines and thus within the analytical range of this Article. The philosophical and doctrinal designs are then juxtaposed to illuminate the conceptual reality of common interest. The juxtaposition reveals that doctrines have distorted the true concept of common interest and common interest is originally a philosophical concept that urges humanity to restructure human thought and intelligence at higher levels of consciousness. Such a restructuring would help humanity to sense their existential reality and founded on such consciousness constitute egalitarian societies—societies where human dignity realizes meaning through sentiments such as altruism.

In part III, a similar approach is employed for examining market interest. However, the market is viewed first as ideology and then as doctrines. In this part of the Article, the “Economic Analysis of International Law” is positioned as a doctrinal discourse and shown to be as an incomplete approach which misleads humanity from its reality. This analysis informs that the reality in the case of market interest is that it is an ideological mindset that promotes egoism.

In part IV, the Article sets up a dialogue between the rationalities of common interest and market interest. The interaction takes place at two levels (See Table 1). On the first level, between what has come out as the reality of both concepts, i.e., common interest as a philosophy and market interest as an ideology interact, revealing that the pairing of common interest and market interest is theoretically unfounded and has a deleterious effect for humanity. On the second level, common interest, as apparent in doctrines, interacts with market interest as in doctrine. Here, the pairing is seen to have a harmonious structure. Paradoxically, the pairing which is adverse in theory entails harmony in doctrines.

Thus, having a simple regime-conflict on a microscopic magnification, the Article reveals how deleterious is a pairing of rationalities that otherwise appear to have been reconciled by doctrinal reasoning. The findings also suggest that the design of doctrinal thought in international law is flawed, so much so that it obscures its true reality from humanity. In the conclusion the Article explains the relevance, scope, and purpose of the analysis for the future of humanity.

view of the many new streams of thought, see Anne Peters, *There is Nothing more Practical than a Good Theory: An Overview of Contemporary Approaches to International Law*, 44 GERMAN Y.B. INT'L L. 25 (2002).

For a review of the architectonics and rhetoric of CLS, see J. Paul Oetken, *Form and Substance in Critical Legal Studies*, 100 YALE L. J. 2209 (1991) (presents the criticism that the contradictions CLS claims to be present in liberal theory and structures are manifested in CLS as well).

Common Interest (altruism)	Market Interest (egoism)
Philosophy	Ideology
Doctrine	Doctrine

TABLE 1

The Article deviates from the bounds of conventional inquiry—it tests “is” against “ought”, employs the analytical methods of Vedic metaphysics, relies on quantum physics, invades meanings deeply ingrained in concepts, and engineers its discourse in such a way that international law has the ontology of humanity and the foundations of human thought in juxtaposition.

II. THE CONCEPT OF COMMON INTEREST

The term “common interest” does not have a definite denotation. It in general refers to concepts which serve the interests of all peoples; the same spirit of the term is also relayed through other terms with minor nuances such as “common good”,³² “general will”,³³ “general interest” or “public interest”,³⁴ “collective will,”³⁵ and so on and so forth. Scholars select the germane term on the basis of their scholastic motives and orientations. Two facets of the idea of common interest are generally apparent, first that of a philosophical idea, and second of doctrines, the latter being more obvious and is amply available in contemporary legal, social, and political literature, whereas the former lies buried mostly in ethical and transcendental wisdom. This part of the Article examines the structure of the idea of common interest, first as philosophy and then as a legal and political doctrine.

A. Common Interest as Philosophy

If modernity is recognized as a tradition, or as a minimum *post-tradition*, then the distance between modernity and what we originally understand as tradition is not far.³⁶

³² See e.g., B.J. Diggs, *The Common Good as Reason for Political Action*, 83 ETHICS 283 (1973) (common good is achieved when interests of all persons are fairly and equitably served. *Id.* at 291.).

³³ Analyses of the term “general will” often associate the term with Rousseau. For instance, see John A. Clark, *The Definition of the General Will*, 53 ETHICS 79 (1943) (asserts that “[g]eneral will is a common interest and purpose actually present in each individual and developed to the degree that each, in consideration to his relationship to the rest, sees clearly wherein his own advantage lies”. *Id.* at 86.). Another study drawing on Rousseau’s conception of general will is Gopal Sreenivasan, *What is the General Will?*, 109 PHIL. REV. 545 (2000).

³⁴ The term “general interest” or “public interest” (used synonymously) is generally seen in procedural law, where the term is used in an implied mode, without specifying its theoretical essence, in order to assert certain doctrinal aspects of the legal/judicial process.

³⁵ See Brij Lal Sharma, *Authority and Obedience in Vedanta*, 46 INT’L J. ETHICS 350 (1936) (“The collective will is the will of a group of people”). *Id.* at 361. Sharma holds that the collective will could be in conformity with or in conflict with the universal will—God’s will—and that collective will is a variable which determines individual will vis-à-vis the universal will. *Id.*

³⁶ The oeuvre of German philosopher Dieter Henrich, who follows in the footsteps of German idealism, which commanded a “return to subjectivity” in philosophy, is an example of the perspective “modernity as post-

It is the belief that the ideas governing modernity are designed by a “critical-hermeneutic attitude towards tradition”.³⁷ That being the idea of ideas governing the world, the contemporary legal and political thought might be a critical derivative of tradition.³⁸ Vesting faith in the constitutive power of tradition, in the context of common interest, takes one to the foundational belief of every socio-religious tradition that humanity has one common goal, tersely transmitted as “realization of one’s reality”, removing the aesthetic tinge of which makes the belief a persisting self-evaluative social question “Who am I?”³⁹

Most religious tradition considers the quest for reality (who am I?) as the singular goal for humankind, and in that way its only interest should lie in bringing about their reality. At this point, I must caution the reader that, speaking of religious tradition, I refer to a sort of ethical epistemology having roots in metaphysics, didacticism, and transcendental logic.⁴⁰ The idea of religion employed in this Article is far from that of any organized faith-system.⁴¹ In other words, I talk about religion with the same spirit and attitude as when one talks about any other branch of knowledge, for example, civics, mathematics, or psychiatry. To continue, among the many religious teachings, Hindu philosophy deviates slightly from its counterparts⁴² in directly addressing the question “who am I?” and providing a method of inquiry to explore it. Hence, I mostly use Hindu philosophy to highlight the philosophical meaning of common interest. Another reason for drawing predominantly on Hindu philosophy is its metaphysical and subjective anchoring, which complements the Article’s scepticism towards the undue faith in reason and material empiricism apparent in the philosophy underlying contemporary international law. My reason for excluding non-Hindu wisdom is not to be presumptuous by relying authoritatively on those religions about which I am meagrely-informed, although it is highly probable that a non-Hindu analytical route and religious precepts would also yield the same conclusions as I have for this study.

tradition”. For an instructive account, *See generally* DIETER FREUNDLIEB, DIETER HENRICH AND CONTEMPORARY PHILOSOPHY: THE RETURN TO SUBJECTIVITY (2003). My hazy view of the relationship between tradition and modernity was clarified by the review article Gabriel A. Almond, Marvin Chodorow & Roy Harvey Pearce, *What has Happened to the Idea of Progress?*, 13 CONTEMP. SOC. 132, 132 (1984).

³⁷ Almond, Chodorow & Pearce, *supra* note 36 (“critical-hermeneutic attitude” is one among the three attitudes towards tradition).

³⁸ Tradition in this context comprises ideas of the pre-Enlightenment period, mostly metaphysical and transcendental, which are often criticized for their value-load by the Enlightenment thinkers.

³⁹ “Self” as a theme has transcended the borders of social psychology and philosophy and recently become a line of research in international law, a discipline which had been considered as a positive science since the late nineteenth century.

⁴⁰ See J.N. Mohanty, *The Structure of the Religious World*, 37 SOPHIA 103, 113-15 (1998) (clarifies that religion is religiosity: an ontological inquiry into human reality—“a profanity”—by stimulating the aesthetic faculties of mind).

⁴¹ Such a focus, however, does not disregard the reformatory scope of organized faith. See e.g., Book Review: William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1746-1749 (2003) (holds that an interaction between religious faith and law is at the heart of being a good Christian and good legal theorist).

⁴² Islam, for instance, prescribes that devout faith in God is the path to happiness and well-being. Instead of treading an ontological route, individuals have to seek God by leading a pious and virtuous life. For an insightful account on Islam, see S.A. NOGOSIAN, ISLAM: ITS HISTORY, TEACHING, AND PRACTICES (2004) (“Humans are called only to believe and to submit”. *Id.* at 96).

The *Advaita Vedanta* (non-dualism) (hereinafter “*Advaita*”) philosophy⁴³ of Hinduism posits that a certain “veil of illusion”⁴⁴ has placed the human reality beyond the limited cognitive power human beings have and that individuals should strive to bring about that veiled reality⁴⁵. In a similar vein, Buddhist thought considers discovering the truths about life as the “most cherished” goal for humankind;⁴⁶ this is the state which Buddhist scriptures refer to as *Nirvana*. The goal varies with minor subtleties from religion to religion on the basis of their epistemological foundation and the faith-system each has prescribed, although every religion focuses on an ultimate infinite reality. In addition to providing goals, religious traditions have laid down the processes for reaching the goals. One assumption that could be made at this point is that it is such processes geared towards a common goal which generate common interest among individuals. In other words, a common interest emerges when a group of individuals pursues a common goal. Uniquely, Hinduism requires relinquishing all worldly interests if the ultimate goal is to be reached. This view renders any interest, and for that matter common interest, a misnomer. What then is the common interest in the Hindu context? In the following, I demonstrate that it specifies solidarity, which incurs fraternity and a sense of oneness, factors which lead to social harmony. This demonstration reveals that a set of egoistic individuals pursuing a common goal exemplifies only an assortment of personal interests and not a common interest. What follows is a succinct account of the method to bring about the true reality of humankind which involves the ascension of reason to higher levels, a state at which a common interest is generated.

⁴³ Advaita Vedanta is a pantheistic philosophy, propounded by Adi Sankara, asserting that the universe and all beings are manifestations of “Brahman”, who/which is the ultimate infinite reality. In Its human manifestation, Brahman is normally unidentifiable because of a veiling property called “Maya”, which creates a dualism between the human (scripturally known as “atman”) and the Brahman immanent in every human being. See CYBELLE SHATTUCK, *HINDUISM* (London: Routledge, 1999), pp.56, 58. See also OLIVER LEAMAN, KEY CONCEPTS IN EASTERN PHILOSOPHY 4-8 (1999).

⁴⁴ Brahman has a veiling property (maya), which hides the Brahman inherent in every being. Maya is also depicted as ignorance, ignorance of the nonduality between Brahman and the Self. See LEAMAN, *supra* note 43 at 7; S, Radhakrishnan, *The Vedanta Philosophy and the Doctrine of Maya*, 24 INT’L J. ETHICS 431 (1914).

⁴⁵ The human mind, according to Hindu psychology, is a “mind-stuff” comprising faculty (*manas*), intelligence (*budhi*), ego (*ahamkara*), and a mental store-house (*chitta*). Every object is perceived by the mind, which stands between the Brahman/Atman/Self and the object under perception, transmitting the form and meaning of the object to the Self. This human mental structure is what I refer to above as the “limited cognitive power” of human beings. See SWAMI AKHILANANDA, *HINDU PSYCHOLOGY* 29 (2001). However, individuals can surpass the limited power of their cognition by detaching the mind structure from the object and the Self. Once detached, the mind structure does not transmit images of any of the worldly passions to the Self. Detachment of the mind, however, does not mean an end to the material world; rather it is a state which helps the Self to judge the material world and its processes by way of an inner higher faculty. When this state comes into existence, individuals are said to have realized their reality. Detachment of the mind structure from the worldly objects can be accomplished through various “Yogas”. See James H. Leuba, *The Yoga System of Mental Concentration and Religious Mysticism*, 16 J. PHIL., PSYCHOL., & SCI. METHODS 197, 198, 199 (1919).

⁴⁶ BRADLEY K. HAWKINS, *BUDDHISM* (1999), p.64 (“From the Buddha’s point of view, the most important way to employ one’s incarnation as a human being, itself a very rare event, was to strive for Enlightenment”, *Id.* at 65).

Hinduism lays down three methods to realize the ultimate goal:⁴⁷ a) knowledge, b) selfless service, and c) devotion. Relevant methods are prescribed for the seekers on the basis of their “temperaments and mental capacities”.⁴⁸ What masks the reality from individuals is ignorance of the reality, thereby rendering mind a phenomenon of limited cognitive power, a state similar to what Kant lamented as being the peculiar fate of human reason.⁴⁹ Hindu psychology considers the limit of cognition as due to the element of ego present in every “mental operation”.⁵⁰ Kant, however, disappointed by the limits of reason, retreated “as if frightened by its [reality’s] stupendousness”.⁵¹ At this point Hinduism transcends the Kantian notion that “*intuition is confined to sense perceptions*”⁵² and the bounds of time and space, and teaches how reason can escape confinement. However, reason that escapes the sense-time-space framework, unlike in the Kantian scheme, is not simply a cognitive process, but a multi-channelled process involving learning, action, meditation,⁵³ and devotion,⁵⁴ which can be pursued either in combination or separately. Irrespective of the process the seekers opt for, it triggers the ascension of human reason to transcendental planes at which the mind can perceive reality.

The ascension of reason is possible only when the mind is detached from the material world, for in a state where mind is attached to the material world, it sees the world through the ego, whereupon everything to be perceived in terms of plurality and duality of sorts.⁵⁵ The detachment of mind from the material world should be the first step in the heightening of reason,⁵⁶ as aptly echoed by Purushottama Bilimoria “If one could cultivate the [...] emotion of detachment ... then one would achieve a state of

⁴⁷ According to Hindu scriptures, there are four methods, or yogas, to reach the ultimate goal: 1) Karma-Yoga (path of service), Jnana-Yoga (path of knowledge), Raja-Yoga (path of mind control), and Bhakti-Yoga (path of devotion). See AKHILANANDA, *supra* note 45 at 174, 75 (drawing on Vivekananda). Of the four, Raja yoga has application in the other three Yogas, a reason why I have not specifically mentioned it as part of the Yoga types.

⁴⁸ *Id.* at 175.

⁴⁹ IMMANUEL KANT, *CRITIQUE OF PURE REASON* 99 (Paul Guyer & Allen W. Wood, trans. & eds. 1998).

Human reason has the peculiar fate in one species of its cognitions that it is burdened with questions which it cannot dismiss, since they are given to it as problems by the nature of reason itself, but which it cannot also answer, since they transcend every capacity of human reason.

Id.

⁵⁰ See Manmatha Nath Banerji, *Hindu Psychology: Physiological Basis and Experimental Methods*, 50 AM. J. PSYCHOL. 328, 331 (1937) *See also supra* note 44.

⁵¹ SWAMI KRISHNANANDA, *THE PHILOSOPHY OF LIFE* 27 (1992).

⁵² *Id.*

⁵³ On the fine points of meditation as an intellectual technique that helps one achieve the higher consciousness, *see generally* Wolfgang Fasching, *Consciousness, Self-Consciousness, and Meditation*, 7 PHENOMENOLOGY & COGNITIVE SCI. 463 (2008) (“Meditation is the endeavour to withdraw from one’s being occupied with the objects of consciousness in order to become aware of consciousness itself”).

⁵⁴ *See generally* D. Mackenzie Brown, *The Philosophy of Bal Gangadhar Tilak: Karma vs. Jnana in the Gita Rahasya*, 17 J. ASIAN STUD. 197 (1958). Tilak, having been sceptical about knowledge-based means of enlightenment, expounded a philosophy of activism in which action was considered as a common duty, irrespective of caste or occupation. All the while he believed that knowledge and devotion also have “[a] place under certain times and condition”. *Id.* at 200.

⁵⁵ See AKHILANANDA, *supra* note 45 at 177 (discussing how to evade seeing duality and plurality in everything by gaining knowledge about reality (Jnana-yoga)).

⁵⁶ *See supra* note 45.

reasonable intelligence”.⁵⁷ Selfless service is one quality that can disengage the ego from the senses through which material world is perceived.⁵⁸ In the same manner, intense love and irresistible longing for a personal deity or spiritual form can liberate perceptions from the shadow of the ego. In such a detached state, reason becomes illuminated and acquires the power to “[t]ranscend even the limitation of the nervous system”.⁵⁹

Social rationalists assert that the state that occurs when mind is detached from the material world causes inactivity, whereas certain modern disciplines, set on rationalist pedestals and claiming to ensure/secure human welfare through that disciplines’ processes, would suppose the sort of enlightenment discussed above as perpetuating inefficiency.⁶⁰ The arguments rationalists put forward in support of their faith have, indeed, profound bearing on modern societies. However, an extended interpretation of *Advaita* can prove the rationalists’ beliefs to be the result of a simplistic reading of *Advaita*, if not a refusal to understand it.

According to *Advaita*, the state arrived at by detaching the mind from the body is only an intermediary stage in the progress of mind towards a higher level of consciousness where reality lies.⁶¹ This intermediary state resembles a deep “dreamless sleep” and is a “desire-less state of consciousness”⁶² in which one has neither a sense of self nor a material identity, that is, the perception of things around oneself”.⁶³ From this state, mind proceeds to the highest state of consciousness, a state of supreme intelligence at which one can perceive one’s reality. This state is called *Turiya*; the sense of *Self* comes into existence in this stage, but any identification with the body (duality) collapses.⁶⁴ An extended interpretation of *Advaita* tells that entering *Turiya* “does not mean that the body is “‘ontologically’ dead”, but one’s way of looking at the body changes.⁶⁵ In this state, mind does not identify itself with the body but only with the ultimate reality it has realized.⁶⁶

Turiya helps an individual “observe”⁶⁷ the three-dimensionally bound state of mind-body and provides visions of a fourth dimension.⁶⁸ This fourth dimension is

⁵⁷ As quoted in Kathryn Ann Johnson, *The Social Construction of Emotions in the Bhagavad Gita: Locating Ethics in a Redacted Text*, 35 J. RELIGIOUS ETHICS 655, 669 (2007).

⁵⁸ Selfless service to humanity is Karma-Yoga. On Karma-Yoga, see SWAMI SIVANANDA, PRACTICE OF KARMA YOGA (2001).

⁵⁹ See AKHILANANDA, *supra* note 45 at 18 (referring to Raja-yoga).

⁶⁰ The contentions of such disciplines are well summarized, and juxtaposed with altruism in Serge-Christophe Kolm, *Altruism and Inefficiency*, 94 ETHICS 18 (1983).

⁶¹ For the hierarchy of consciousness, see WILLIAM M. INDICH, CONSCIOUSNESS IN ADVAITA VEDANTA 67-116 (1980).

⁶² Daniel Raveh, *Ayam, aham asmiti: Self-consciousness and Identity in the Eighth Chapter of the Chandogya Upanisad vs. Sankara’s Bhasya*, 36 J. INDIAN PHIL. 319, 323 (2008). Vedic texts describe this state as *susupti*. For a comprehensive treatment of *susupti*, see ARVIND SHARMA, SLEEP AS A STATE OF CONSCIOUSNESS IN ADVAITA VEDANTA (2004).

⁶³ Raveh, *supra* note 62 at 325.

⁶⁴ *Id.* at 330.

⁶⁵ *Id.* at 329.

⁶⁶ *Id.*

⁶⁷ The power of observation discussed here is not sensually driven. It is a faculty of super-consciousness, an intellectual-field, known as *Saksin* (“witness-consciousness”). According to Gupta “the concept of *saksin* in Advaita is the single most important postulate of the principle of revelation operative in experience”. See BINA GUPTA, THE DISINTERESTED WITNESS: A FRAGMENT OF ADVAITA VEDANTA PHENOMENOLOGY 4 (1998).

⁶⁸ Naming this dimension a “fourth dimension” may not be proper, as dimensions are discussed in scientific circles as the three dimensions of space (left-right, up-down, and forward-backward) and one dimension of

outside the framework of the time-space in which we live. This dimension beyond our time-space is the central theme of the currently explored M-Theory of theoretical physics (discussed as the “eleventh dimension”), according to which our physical universe is one among the many membrane universes, each with its own time-space, floating in an infinite amaterial space.⁶⁹ Augmenting the insights of M-Theory with the accounted experiences associated with *Turiya* brings out the hidden cosmic truth that all universes (implying a “multiverse”), including our three-dimensional one, are only states of consciousness hidden within the brain states and a cognitive experience.⁷⁰ This view implies that the physical universe is an *unreal* state of consciousness seen through the senses, aptly captured by Sankara in the aphorism: *Brahma satyam jagan mithya* (“only the Real is real, universe is a mirage”). *Turiya* is the true state of consciousness.

Although *Advaita* supposedly ends at the *Turiya* stage, the extended reading construes *Turiya* as the beginning of a good life, provided one chooses not to detach the self from the nervous system and from the material world itself (*Samdahi*).⁷¹ Daniel Raveh puts this idea succinctly:

[A] person in *turiya* is free either to attend the ‘phenomenal world’ or to withdraw from it; either to participate, take part and hence identify at least to a certain extent with the so-called ‘externality’, or to opt out, to withdraw his senses from their objects as a tortoise withdraws.⁷²

Living in the world, the enlightened *Self* beholds the world through its higher consciousness and the reality it has sensed.⁷³ Such individuals with illuminated reason will have an outlook structured internally upon an awareness of human reality, which enables them to better identify themselves with their comrades, habitat, and the

time. However, for the sake of clarity, I do not follow these distinctions. This classification is notwithstanding the seven new micro-dimensions of space added by the String Theory and M-Theory of theoretical physics.

The fourth dimension is not to be confused with the “fourth state of consciousness” in the hierarchy of consciousness, as *Turiya* is often described, although the difference between the fourth dimension and the fourth state is only that they are separate analytical categories. On the states of consciousness, see MICHAEL NAGLER, *UPANISHADS 199-205* (2007) (the four states of consciousness are waking state, dreaming sleep, dreamless sleep, and *Turiya*).

⁶⁹ See MICHIO KAKU, *PARALLEL WORLDS: A JOURNEY THROUGH CREATION, HIGHER DIMENSIONS, AND THE FUTURE OF THE COSMOS* 207-216 (2005).

⁷⁰ See ANIL K. RAJVANSHI, *NATURE OF HUMAN THOUGHT: ESSAYS ON MIND, MATTER, SPIRITUALITY AND TECHNOLOGY* 25-27 (2004). For support, see Laurence J. Lafleur, *Time as a Fourth Dimension*, 37 *J. PHIL.* 169, 171 (1940) (substantiating that universal time is outside the three dimensions, though space need not be); John Smythies, *Space, Time and Consciousness*, 10 *J. CONSCIOUSNESS STUD.* 47 (2003) (“[C]onsciousness may have its own space-time system and its own system of ontologically independent and spatio-temporally organized events”. *Id.* at 55.). The relationship between a Higher Consciousness and time-space are thoroughly and systematically presented in *The Self-Aware Universe: How Consciousness Creates the Material World* by theoretical physicist Amit Goswami. See ALEXANDRA BRUCE, *THE DEFINITIVE UNAUTHORIZED GUIDE TO WHAT THE BLEEP DO WE KNOW!?* 101- 13 (2005).

⁷¹ See Raveh, *supra* note 62 at 332; But *Cf.* AKHILANANDA, *supra* note 45 at 19, 20.

⁷² Raveh, *supra* note 62 at 332.

⁷³ For details on what would be the thoughts and deeds of an enlightened one who has chosen to be an embodiment of reality, see Andrew O. Fort, *Knowing Brahman While Embodied: Sankara on Jivanmukti*, 19 *J. INDIAN PHIL.* 369 (1991).

universe itself.⁷⁴ They are active and efficient, quite contrary to what the social rationalists maintain. However, what prompts efficiency is not the desire to be better off than others, but a sense of being a representative microcosm of human reality in the world, from which emerges a sense of duty and care to fellow beings and the world.⁷⁵

Swami Akhilananda relates that social harmony is in close proximity to an individual with illuminated reason:

When a man is master of his own mental forces, he will be able to understand and influence the minds of others. He is well established in poise and creates an atmosphere of peace. When anyone enters the presence of such a person, he consciously or unconsciously absorbs the peaceful atmosphere and derives poise and benefit from the contact. A man of superconscious realization can be compared to a luminous substance which radiates light. It not only illuminates itself but also objects within its radius. Similarly, a man with a unified mind emanates wisdom and strength to others.⁷⁶

S. Radhakrishnan echoes the same perception that “the touch of reason makes the whole world kin”,⁷⁷ “reason makes [individuals] act on a feeling of the unity of the whole human race”.⁷⁸ Individuals with illuminated reason are assets for the world; through them the feelings of camaraderie, solidarity, love, and compassion acquire meaning.⁷⁹ Such individuals are vital constituents of a society. Their illuminated reason is what causes societies and humanity to self-constitute;⁸⁰ the collectivity of their reason is the rudiment of democratic societies.

⁷⁴ This identification is captured in P.B. Rana Singh, *Nature and Cosmic Integrity: A Search in Hindu Geographical Thought*, 26 GEOJOURNAL 139 (1992). See also SRI AUROBINDO, *ESSAYS ON THE GITA* 338-40 (1995).

⁷⁵ Situating this sense of “Self” in the phenomenological category of “altruism”, Pedro Oliveira writes:

It is indeed a life-altering experience in which one becomes a real *witness* of the unbreakable and uncreated Ground which sustains all existence and all life. The energy of such “witnessing” is of such an order that it reduces to ashes every form of self-concern, of self-preoccupation, and leads the one to whom such experience has come to a life of selfless service that has no end.

See Pedro Oliveira, *Altruism’s Inextinguishable Fire: Annie Besant’s Testimony*, 129 THE THEOSOPHIST 24, 29 (2007).

⁷⁶ AKHILANANDA, *supra* note 45 at 20.

⁷⁷ S. Radhakrishnan, *The Ethics of the Vedanta*, 24 INT’L J. ETHICS 168, 170 (1914).

⁷⁸ *Id.*

⁷⁹ In the context of Indian nationalism, cultural leaders of India had similar visions for nation-building. Van Bijlert observes:

The divine can be and has to be realized by every member of the nation. This can be done by developing all human potential that is available. Everyone has to do this for him or herself, but not for one’s own sake, but for the sake of others. Self-realization in a spiritual sense and realization of the fullest potential of the nation thus converge. But self-realization actually equals selflessness in the ultimate sense, because one realizes oneself by helping others to fully realize themselves.

See Victor A. Van Bijlert, *The Ethics of Modernity in Indian Politics: Past and Present*, 9 J. HUMAN VALUES, 53, 57 (2003).

⁸⁰ On the self-constitution of humanity and society, see generally Philip Allott, *Reconstituting Humanity: New International Law*, 3 EUR. J. INT’L L. 219 (1992). However, according to Allott, the human reality and the resulting consciousness from which humanity and society self-constitute is the material reality of human beings, not their transcendental reality. Allott seems to be Kantian in his observations on the limits of reason.

Having articulated a design for the enlightenment of reason and the reformation of the self, I might have pushed the concept of a common interest into a philosophical wilderness, which may prompt some readers to ask: “Does our common interest lie in a spiritual pursuit?”⁸¹ “Can’t common interest be cast in a non-spiritual mould”? Had the description been a non-spiritual one, it would have rendered common interest a value-barren and unintelligent concept, one engendered in a group of naïve individuals egoistically pursuing a common goal. The interest of an individual in such a group will either be the result of a raw desire for an object (or the benefits thereof) simultaneously sought by many other individuals and a visceral reaction to the call of the ego to possess the object and maximize one’s benefits.⁸² The ego erects alleys through which desire traverses to the goal, thereby isolating the mind from meeting with other minds. “Such modes of action, while gregarious in external appearance and result [...] are not in any true sense social”.⁸³ Any common interest seen among such groups is synthetic.

However, as said earlier, annihilation of the ego elevates reason to hitherto inexperienced planes, a state at which one’s mind, completely disengaged from senses and free from any selfish motives, perceives reality. In this ego-free state, mind comprehends the psychological desires and social needs of others with whom one is bound by certain social norms.⁸⁴ In such an enlightened state, mind enters into a new bond with other members in the group.⁸⁵ As more individuals heighten their reason by relinquishing personal interests, social solidarity will emerge.

Thus the state of solidarity and social harmony ensues from renouncing personal interests;⁸⁶ a common interest is what induces solidarity. A common interest is simultaneously the vital constituent of solidarity, and it is a common interest, a product of enlightened reason, that sustains social harmony. All things considered, what unifies individual and society is a spiritual pursuit⁸⁷—a heuristic method—that entails the annihilation of ego and enlightenment of reason.⁸⁸

Finally, a mind, if its reason denies any reality beyond the world it can otherwise perceive and it persists with the freedom of reason, what Kant censures as the “unbelief of reason”⁸⁹ (or non-spirituality), tends to deny any sense of duty,⁹⁰ be it duty to fellow beings or to the society. Unbelief of reason/non-spirituality is “a precarious state of human mind”⁹¹ from which personal interest grows. Unilluminated

⁸¹ Spirituality is an intellectual pursuit to break the bounds of time and space and to inform the mind of a higher intellectual potential than what it believes it has.

⁸² For support, see J. Mark Baldwin, *The Basis of Social Solidarity*, 15 AM. J. SOC. 817, 821 (1910) (asserts that gregarious groups are many times driven by mechanical instincts).

⁸³ *Id.* at 822.

⁸⁴ See *id.* at 824.

⁸⁵ *Id.* at 826.

⁸⁶ Cf. J.T. Punnett, *Ethical Alternatives*, 10 MIND 85, 89 (1885). While recognizing the hostility between common interest of the society and individual interest, J.T. Punnett spoke out in favour of “a formal reconciliation between them by recourse to the noumenal and permanent individual, who, having his roots out of Time, is one with other individuals and with the essence of Being itself”.

⁸⁷ For support, see generally, *Id.* (holds that human progress is an ethical pursuit).

⁸⁸ See Baldwin, *supra* note 82 at 826 (a sense of the self “[u]nifies the individual and the society, and establishes solidarity on the higher plane of common intelligence and joint volition”). *Id.*

⁸⁹ IMMANUEL KANT, RELIGION AND RATIONAL THEOLOGY 17 (Paul Guyer & Allen W. Wood, trans. & eds. 1996).

⁹⁰ *Id.*

⁹¹ *Id.*

reason, when coupled with personal interest (ego) on the pretext of designing investigative methodologies that provide precision and objectivity to guide reason, builds value-systems to pursue selfish motives.

To conclude, humanity shall gain a finer understanding of its ontology. It is in its common interest. It requires a restructuring of one's perceptive capabilities from the material limits of time-space to a state of cosmic intelligence. That state of super-intelligence is the cognitive "ought" of humanity—an enlightened and fertile state of mind from which the sentiment of altruism sprouts and flourishes. This understanding implies that a common interest is that which has the elements of altruism, and everything non-altruistic has to be deemed to be not in the common interest of humanity.

It is also the case that, the common interest as manifested in the many doctrines of international law has to have elements of altruism in it to be genuine. With this qualification in mind, the next section examines whether the doctrines supposedly upholding a common interest in international law promotes altruism.

B. Common Interest as Doctrine

A classification of the doctrines relating to common interest is a lacklustre approach, for common interest is so broad a concept that any interpretation of it might know no bounds. In addition, the concept has a pluralistic profile in scholarly accounts. Both these factors frustrate a taxonomical base for the concept. However, given such a methodological difficulty, this Article sorts the doctrines of common interest with reference to the philosophical characteristics of common interest whereby common interest is identified as a spiritual pursuit leading to altruism: common interest is an intellectual state that exists in the absence of personal interest, a concept that provides a heuristic method for the reformation of the self and society, and a constitutive agent of an egalitarian society.⁹² That being the case, any non-altruistic aspects of common interest assume a doctrinal character. In other words, wherever there is a value/knowledge system within which there are vestiges of personal interests or patterns of collectively pursuing personal interests aiming a common goal, one finds common interest in the form of a doctrine.⁹³ This view is consistent with the definition

⁹² See *supra* Section II A.

⁹³ This whole approach is neither a rhetorical convenience nor an escape route, but one which has epistemological kinship with medieval Indian linguistic metaphysics. This tradition maintains that possession of an intellectual faculty called *Pratibha* (a sort of "enlightened imagination") helps the rhetors transform existing reality by way of cognitive, aesthetic, and linguistic invasion into meanings. For a discussion on *Pratibha* and its transformative potential, see David Shulman, *Illumination, Imagination, and Creativity: Rajasekhara, Kuntaka, and Jagannatha on Pratibha*, 36 J. INDIAN PHIL. 481 (2008).

Sanskrit tradition says that there can be tangible effects on what is implied as reality when ideas lying abstract in mind are relayed to the material world by the inventive power of speech and language. That is to say, when mind, speech, and language, with all their innate creative power, perform a linear operation, there can be a tangible effect on reality. However, speech and language in the Vedic context pertain to Hymns (*Mantra*) and not discursive practices such as legal reasoning. See Jan Houben, *The Sanskrit Tradition*, in *THE EMERGENCE OF SEMANTICS IN FOUR LINGUISTIC TRADITIONS* 49, 59, 63 (Wout van Bekkum, ed. 1997) (on the semantic tradition of the Vedas).

Philip Allott conceives this method as the "recreating" of reality. However, he expresses this Vedic idea, differently but in an equivalent spirit, with a tinge of philosophical materialism to the effect that human beings look at the material world and perceive their reality in their minds as images, which when stimulated by

of doctrine provided earlier, i.e., doctrine is a schematized discourse prompted by a group holding certain shared sentiments as well as a mindset which fuels particular interests as against any common interest of humanity at large.

Second, to sort the doctrines of common interest, I now bring in the concept of politics, for politics is understood as related to a group-oriented action which is contradistinctive to altruism of any sort. Any traces of politics can turn “something” into non-altruism, which implies that everything political is non-altruistic. The following postulate throws light on how the element of politics can turn a discourse into doctrine.

In international law, doctrine is the foundation of legal practice, for diplomacy and international settlement of disputes, which are the essential aspects of the practice of international law, advance through doctrines. Correspondingly, in international politics, the two vital aspects of interstate relations—policymaking and foreign relations—are doctrine-centered; in addition, doctrine is a legitimizing agent of political strategies and decisions. Doctrine is the common gauge of fairness for international law and politics.⁹⁴ In fact, all international law is politics,⁹⁵ or, conversely, politics is all dressed up as international law, which implies that doctrines of international law have the values of law and politics⁹⁶ (value presupposes a collectivity of reasoning, design, rationale, and functioning). The many doctrines of international law representing common interest are also an amalgamation of law and

imagination and reason become ideas. Then they can recreate their reality by transmitting ideas through language. See Allott, *supra* note 80 at 222.

When this method is applied to the present context, doctrine is “what is deemed to be the present reality”. The philosophical abstractions of common interest then become “constitutive ideas” to be “effectuated”. When constitutive ideas invade the meaning/images of doctrines through the channel of language, they provide doctrines with a new meaning and material effect.

However, this method is not an all-purpose method; i.e., it cannot be applied for invading any concepts in accordance with the cognitor’s subjective, intellectual ambitions. Its application is contingent upon certain contexts and intellectual positions. As said earlier, this method pertains to *Mantras*/hymns: *Mantras*, in their simplistic sense, are linguistic mini-structures bearing the cosmic truth: they have high transformative potential, meant to lead humanity to its reality (On *Mantras*, see generally LAURIE L. PATTON, BRINGING GODS TO MIND: MANTRA AND RITUAL IN EARLY INDIAN RITUAL SACRIFICE (2005). Given that *Mantras* are this method’s subject of application, one prerequisite for the application of the method is that the context must be a “quest for human reality”. Moreover, the idea of invading and transforming a concept must include in it an awareness of human reality as well as an ontological credibility.

Since the preconditions for applying this method fit in with the analytical context and aims of this Article, the method is employed here.

⁹⁴ This implies that a “fairness box” is attached to doctrines, which turns a doctrine into a representation of a “social situation”. The fairness element attached to a doctrine is emphasized by Tiller and Cross while articulating the psychological comfort of judges with doctrines: “[d]octrines are mentally economical, allowing for quicker resolution of cases because judges need not think the logical underpinnings of fairness and equity for the given factual situation”. See Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine*, 100 N. W. U. L. REV. 517, 530 (2006).

⁹⁵ For the case that international law is politics, see generally KOSKENNIEMI, *supra* note 3. In Koskenniemi’s scheme, the belief that international law is politics (apologetic) is persistently opposed by a belief that international law is moralistic (Utopian) in character. See Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4 (1990). But, see Martti Koskenniemi, *The Politics of International Law: 20 Years Later*, 20 EUR. J. INT’L L. 7 (2009) (asserts that the political nature of international law is obscured by a “managerialism” that has come to dominate the practice of the discipline).

⁹⁶ By restating that, in my scheme, doctrine refers to legal formalism in international law, I affirm that doctrine has elements of both law and politics in it. However, I leave the reader to assess—using Koskenniemi’s grand scheme—the plight of legal minds caught between law and politics inside the doctrinal world. See KOSKENNIEMI, *supra* note 3.

politics. Thus, having posited that international law has the elements of politics, any analysis that views common interest as a doctrinal matter would involuntarily absorb every perspective of common interest that has a political pall over it. This logic justifies the inclusion of much politically-oriented thought in international law, purporting to be anti-doctrinal, into the domain of doctrine. This methodological stance is further justified later in this part.⁹⁷

On the strength of these grounds, two branches of thought in international law, known to promote a certain common interest, diverse in terms of geo-ideological origin and structure, are analyzed to see if what they pursue is altruistically driven common interest:⁹⁸ first, Third Worldism represented by the discussions on the Third World Approaches to International Law (TWAAIL), which line up with the Critical Legal Studies (CLS), largely a socially-oriented school of thought; second, the global governance paradigm—a Northern project—which provides a forum for a social interaction and thereby aims at securing the common interests of peoples across the globe. The analysis confirms that defining TWAAIL and global governance as doctrinal discourses is realistic.

Some readers might ask why I have forsaken any doctrines specific to international law, e.g., the principle of state responsibility or sovereignty, or any particular set of rules to examine the doctrinal construct of common interest. Why did I choose TWAAIL and global governance, movements which generally fall outside the conventional meaning of “doctrine” and have fairly resisted the rule-model of international law? I earlier provided a general explanation for ignoring specific doctrines as part of the general analytical scheme of the Article. As regards the doctrines related to common interest, in addition to the reasons provided above, there is an extra ground for choosing TWAAIL and global governance as doctrines: the present focus on common interest as a convergence of human rationalities, a process driven by the cosmic consciousness of humankind. However, under formalist and state-centric international law the idea of common interest was deemed to be only the common interest of states,⁹⁹ the securing of which was nothing more than a diplomatic target. The idea of the common interest of the world’s peoples was indefinite,¹⁰⁰ and any allusion to peoples or human beings as one collectivity was cast as “affairs of state”, which lay far afield of any idea of collective rationality. Conversely, international law in our day, through its anti-formalist approach, as seen in many of its new streams, has advanced to become a peer among the social sciences and has assumed a sensitivity towards the cultures, values, and interests of individuals and groups. For this reason, the common interest promoted by such a socially oriented international law through its various new streams represents a convergence of

⁹⁷ See *infra* Section II. B.2.

⁹⁸ Unger’s idea of doctrine can loosen the grip of weirdness, if any, that might be on my idea of the doctrines of common interest. See Unger, *supra* note 28 at 565. Unger’s conception of doctrine casts its shadow on socially oriented movements or causes that generally escape the conventional positivist idea of doctrines.

⁹⁹ To ascertain the extent of conceptual heaviness the idea of ‘state’ exerted on international law, see generally Roland R. Foulke, *Definition and Nature of International Law*, 19 COLUM. L. REV. 429 (1919).

¹⁰⁰ See Timo Koivurova, *The International Court of Justice and Peoples*, 9 INT’L COMMUNITY L. REV. 157 (2007) (upon reviewing the extent to which individual rights have featured in the decisions of the ICJ concludes that collective rights of peoples have never been a normative force in the development of international law). For support, see Ian Brownlie, *The Place of Individual in International Law*, 50 VA. L. REV. 435 (1964).

rationalities. Since TWAIL and global governance are such new streams in international law, the rationalities pursuing a common goal within these streams constitute the common interest of peoples.

1. TWAIL: Means did not justify the end

In international law, Third Worldism, after a brief spell of doctrine-centered New International Economic Order (NIEO),¹⁰¹ has now undertaken the task of “Tailing.”¹⁰² International lawyers, with a psychological affinity to that “political reality”¹⁰³ which the French economist Alfred Sauvy called the “Third World”,¹⁰⁴ who are postmodernists, anti-essentialists, and deconstructionists (collectively called post-structuralist), make up the majority of TWAIL scholars. They believe that social structures were substantially altered by the colonial scholars using the thought and practice of international law, first as a medium to create social and normative hierarchies and then as a base to sustain such hierarchies.¹⁰⁵ Hence to knock down the hierarchies, Third World scholars seek to discredit international law, by deconstructing it,¹⁰⁶ revealing its inner contradictions,¹⁰⁷ using methods such as historiographical analysis¹⁰⁸ and critiquing the rule-oriented mainstream international law. Both methods are objective: that is to say, when historical narratives are *interactively*

¹⁰¹ Chimni and Anghie would consider this movement as part of TWAIL I, a phase when Third World scholars (some of them in the spirit of historical revisionism) challenged the Euro-centrism of international law and sought to reform it by recasting core doctrines. See Anthony Anghie & Bhupinder Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77 (2002).

¹⁰² By the expression “Tailing”, Gathii verbalized the acronym TWAIL to represent the process of interpenetration between the ideals of liberal conservatism and Third Worldism and the revision of “accepted praxis, orthodoxies, and hierarchies” in international law in a “conceptual space” created as a result of the interpenetration. See James Thuo Gathii, *Rejoinder: Tailing International Law*, 98 MICH. L. REV. 2066, 2068 (2000).

¹⁰³ Makau Mutua, *What is TWAIL?*, PROC. AM. SOC’Y INT’L L., 31, 35 (2000). A meaning attribution to “Third World” in a non-political vein is in Martin W. Lewis, *Is there a Third World?*, CURRENT HIST. 355 (November 1999). Lewis recommends for replacing “Third World” with “Poor Parts of the World” since the expression Third World lacks descriptiveness and that it is “loaded with oriental preconceptions”. See *id.* at 358. However, Rajagopal asserts that the expression “Third World” is amply descriptive, as “it reveals the hierarchical ordering of the international community at both the statal and non-statal levels” in addition to critically situating such hierarchies within the larger framework of colonialism and imperialism. See Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, THIRD WORLD LEGAL STUD. 1, 3 (1998-99).

¹⁰⁴ See Robert Malley, *The Third Worldist Moment*, CURRENT HIST. 359, 360 (November 1999).

¹⁰⁵ In a reverse manner, Mutua states that the objective of TWAIL is “[t]o understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions”. See Mutua, *supra* note 103 at 31.

¹⁰⁶ *Id.*

¹⁰⁷ Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 CANADIAN J. L. & JURIS. 475, 477 (2007).

¹⁰⁸ For one such historiographical account, see ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005) (narrates how European/Western states, over the years, passed on the baton of sovereignty by keeping it off from the Third World states). See also Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT’L L. J. 529 (2000); DAVID J. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (2001). On the relevance of historiography in international law, see George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT’L L. 539 (2005) (considers Koskenniemi’s *The Gentle Civilizer of Nations* (see *infra* note 216) as a work employing historiographical analysis by attempting “to rewrite the past”, see *id.* at 548, 557).

replayed from a Third World perspective, there arises a collective conscience and a feeling of oneness in the minds of the peoples of the Third World, which prepares them for a collective resistance against all forms of marginalization.¹⁰⁹ Moreover, when one adopts a critical stance towards international law, it provides a potential conceptual space—one akin to what Gathii visualized when liberal conservatism and Third Worldism finally interpenetrate¹¹⁰—where ideals for building an egalitarian world can be conceptualized. In sum, what bring together scholars and peoples of the Third World under one common interest are: first, the realization generated by the historiographical accounts that their identities were determined by common historical acts and second, the optimism, sprouted from being critical and deconstructive, that there lies an opportunity to recreate their social world.

TWAIL scholars writing historiographies, like any historiographers, have a particular analytical and observational standpoint regarding the colonial time-space framework. From this standpoint they subject colonial discourse and dialectic, and conceptual architectures to a methodical analysis.¹¹¹ In this process, given TWAIL's nascent state and comparative paucity of methods and the urge to resist the tools and concepts of the Anglo-American and continental traditions,¹¹² a tendency to lean on the rhetorical tools of postcolonial streams such as subaltern studies groups is apparent.¹¹³ However, more than “critical rigor”, it could be that, postcoloniality drew the TWAIL scholars, who were on a deconstructive path, to such streams. Equipped with these tools, TWAIL engages in unraveling the Euro-centricism in international law by way of several micro-methods: a consciousness-analysis of self and others, which provides identity symbols within which Third World groups may form collectivities; documenting the record of domination¹¹⁴—an error-manual for further social engineering; and counter rhetoric that generates a revolutionary and fighting spirit among the Third World actors.¹¹⁵ The collective effect of these methods on international law is “deconstruction”.¹¹⁶

¹⁰⁹ I use the expression “interactive replay” to represent the narrative strategy in the Historiographical scheme of TWAIL, taking into account the constructionist method—of engaging in interaction with the social world and the self—adopted by the TWAIL scholars. The collective conscience emerging from such narratives are hence non-essentialist in nature.

¹¹⁰ See Gathii, *supra* note 102.

¹¹¹ See generally ANGHIE *supra* note 108. Despite the growing interest in TWAIL, most of the literature coming under the banner TWAIL is devoted either for expressing TWAIL's oppositional stance or in articulating agendas; only a few works have embarked on historiographical analyses of the history of international law.

¹¹² But, see Sunter, *supra* note 107 at 480 (points out that there is a strong urge to resort to the analytical tools of the Anglo-American thought).

¹¹³ The fact that Subaltern Studies have an impact on TWAIL scholars is best represented in B.S. Chimni, *Alternative Visions of Just World Order: Six Tales from India*, 46 HARV. INT'L L. J. 389, 395-96 (2005) (states that perspectives, such as that of the subalterns, have a critical property in it such that they can facilitate in conceptualizing the form and substance of a just world).

¹¹⁴ Such documentation is in Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L. J. 1 (1999).

¹¹⁵ The insight I have gained on these methods is shaped by a general reading of Gyan Prakash, *Subaltern Studies as Postcolonial*, 99 AM. HIST. REV. 1475 (1994).

¹¹⁶ However, modern subalternism would say that deconstruction does not have any calls for reversing hierarchies, instead it equilibrates knowledge sources:

[T]he recognition that the third world historian is condemned to knowing “Europe” as the original home of the modern, whereas the “European” historian does not share a comparable predicament with regard to the pasts of the majority of humankind” [sic], serves as the condition for a deconstructive rethinking of history.

Since methods such as historiography and foundational critique are believed to generate some sort of common interest among Third World groups, below I focus on those methods and their application by TWAIL scholars. Afterwards, I examine if the common interest generated under such methods is, in effect, a common interest.

TWAIL and Historiographical Method. Historiography is an art of sorts. It requires ingenuity and imagination¹¹⁷ and, like any art, it sketches images in the human mind, which motivate human action.¹¹⁸ In other words, the methods and processes of historiography are agents inducing an internalizing function in the historiographer as well as in the minds of the one who reads the historiography. How does this internalization happen? To answer this question a close look at the professional tasks and sensibilities of historiographers is necessary.

Historiographers generally analyze historical accounts which are representations of the speech and practice of earlier times.¹¹⁹ Yet, there is a group of historiographers who suspect that there is a historical reality. They hold that past only provides analyzable evidence exposed to numerous inferences resulting in contradictions.¹²⁰ However, new historicists, among them the anti-essentialists and the realists, stand firm against any tendency to drive the past into remoteness. They assert that rejection of the past creates a “horizontal otherness”¹²¹ and a world of the dead.¹²² Therefore, against reducing the relevance of accounts of the past to merely generating contradictions, they create a countermove in the form of engaging in a dialogue with the past and integrating past voices into theirs.¹²³ John E. Toews analogizes this process as “historiographical exorcism”.¹²⁴ Toews elaborates Historiographical exorcism in view of a semi-fictional formulation:¹²⁵

First, it [historiographical exorcism] summons or conjures up the world of the departed spirits so that they may speak to the inhabitants of the present with their own voices. Its aim is to make the past, or a specific

See *Id.* at 1486.

¹¹⁷ See Carl Becker, *What is Historiography?*, 44 AM. HIST. REV. 20, 22 (1938).

¹¹⁸ The idea of images motivating human action dates back to Aristotle. See C.E. McMahon, *Images as Motives and Motivators: A Historical Perspective*, 86 AM. J. PSYCHOL. (1973) (articulates the ebb and flow of the theory of motivation). Vedic literature also expounds that mind has a storehouse where images of the past are stored; these images trigger a process which culminates in action.

¹¹⁹ However, this is too simplistic a way of putting across the relationship between history and historiography. Caught between the Realist (historiography interprets historical narratives to make inferences from descriptions of past events) and Constructionist (historiography is a representation of the present) views the relationship has been somewhat blurred. Yet, the role of the past/history, despite the subjection to critical scrutiny, has been of relevance in shaping a scientific historiography. For an enlightening discussion in this vein, see TUCKER AVIEZER, *OUR KNOWLEDGE OF THE PAST: A PHILOSOPHY OF HISTORIOGRAPHY* 254-262 (2004).

¹²⁰ See *id.* at 256.

¹²¹ It is called “horizontal otherness”, for this otherness, which is a “temporal otherness”, is diametrical to the “hierarchical otherness” created on the basis of essentialist attributes, e.g., culture, race, and gender. See John E. Toews, *Historiography as Exorcism: Conjuring Up ‘Foreign’ Worlds and Historicizing Subjects in the Context of the Multiculturalism Debate*, 27 THEORY & SOC’Y 535, 546 (1998).

¹²² See generally *Id.*

¹²³ *Id.* at 550.

¹²⁴ *Id.*

¹²⁵ Toews draws this observation on Toni Morrison’s historical fiction *Beloved*.

past, visible and audible in ways that allow us to imagine it as if we were there. Second, it engages in experimental attempts to appropriate or integrate the voices of the dead into a more inclusive understanding of the conditions of the personal and collective identity, subjective agency and social action in the present, and in so doing, to lay the haunting spirits to rest, to bury them with full recognition of their legitimate place in the public story that defines us.¹²⁶

In conjuring the past, historiographers study the way historians have amassed traces of past lives, societies, and cultures and the dialectic they employed in organizing historical texts—an analytical standpoint. However, in contrast to the historians, who examine the past by pushing themselves into a different time-space framework, historiographers contextualize the historical records by remaining in their current situation. It is their situationality¹²⁷—that is the spatial-temporal structure to which one’s mind has set up a connection¹²⁸—which conditions the modes and types of analysis of the historical texts. Roughly speaking, historiographers are objective, i.e., they critically and analytically approach the past, but prejudicially, for they are driven by the cultural and academic sensibilities already embedded in them. Owing to this prejudice their sole focus is on assimilating history into their thought-structure, thereby relevantizing the past.¹²⁹ The past then becomes the authentic history of their ideas¹³⁰ and historiography an account of their identity-shaping. This kind of assimilation undermines the scope for any further relative assessment of their identities vis-à-vis their past, as the assimilation renders that past error-free. The past then dissolves in their identity.

When the historiographers are TWAIL scholars, the situation is even complex in that in addition to the horizontal otherness, whereby past becomes “other”, the otherness forged on account of ethnic, cultural, racial, sexual, and national grounds in the past comes to light.¹³¹ The latter is more or less a vertical otherness, since it comes in the form of hierarchies. The historiographers in that case have to assimilate not only the past but also the fact of subjugation and oppression and the sentiments and outlook

¹²⁶ *Id.* at 535, 36.

¹²⁷ Korhonen, while correlating the epistemological constraints and praxis of law, the method which she calls “situationality-analysis”, defines situationality as “[a]ll the biological, anthropological, social, cultural, historical, traditional, political, economical etc., conditions that influence an actor-subject and, thus, yield its ever-changing limits and potentials”. See Outi Korhonen, *International Lawyer: Towards Conceptualization of the Changing World and Practice*, in *THE INTERNATIONALIZATION OF THE PRACTICE OF LAW* 373, 376 (Jens Drolshammer and Michael Pfeifer, eds. 2001).

¹²⁸ See Korhonen, *supra* note 3.

¹²⁹ *Cf.* PHILIP ALLOTT, *HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 337-39 (2002) (“history-writing” is subjective, without a defined purpose and method).

¹³⁰ This view is curative in an unconstructive way if Allott’s thesis that “Humanity has no history, only histories” (*id.* at 339) is taken seriously. That is to say, when the Historiographers assimilate one of the many interpretations of history into their thought-structure they are in fact situating that particular interpretation as the only and true history.

Craven points out that the tendency to assimilate the past, both uncritically and critically, is very much seen among the historians of international law. See Matt Craven, *Introduction: International Law and Its Histories*, in *TIME, HISTORY, AND INTERNATIONAL LAW* 1, 6, 7 (Mathew Craven et. al. eds., 2007).

¹³¹ Toews, *supra* note 121 at 546.

of the subjugated into their identity; any failure to assimilate the past, to paraphrase Toews' cautioning, implies a rejection of the conflicts and divisions of the past.¹³²

Historiographers assimilate the past to the present by way of memory.¹³³ Past is stored in the memory as images, as are hopes for the future.¹³⁴ Once reason envelopes the images of the past and hopes for the future, an individual identity takes its form. In the case of Third World historiographers the assimilated past stored as images of subjugation, marginalization, and exploitation, when it interacts with their anti-imperialistic deconstructive sensibilities of the present and hopes for the future, Third World historiographers conceive their "selves"¹³⁵ as embodying oppositional resistance¹³⁶ and revolutionary reformism.¹³⁷ These conceived selves are collectivized by language into ideas and approaches;¹³⁸ steering TWAIL as a movement to oppose, collectively resist, and reform the international legal system, which is perpetuating an unjust global order.¹³⁹

In such a spirit of inquiry, opposition, and resistance, TWAIL perceives a neo-imperialism being perpetuated in the contemporary world order in the guise of domineering ideologies which are portrayed as if they were natural outcomes of a global process. These ideologies are ingrained into the society as an order through international institutions designed on imperial lines and legitimized by the rules of international law.¹⁴⁰ Furthermore, hegemonic forces with the aim of frustrating the resistance of poor states have fragmented international law into various anomalous units.¹⁴¹ Prompted by such perceptions, TWAIL designs its agenda to safeguard the interests and rights of the peoples of the Third World from the domineering groups. The socialist ingenuity of some TWAIL scholars has identified the domineering groups as representatives of the capitalist class¹⁴² and socio-economic marginalization perpetrated by them as a class-oriented action. They often identify themselves as anti-hegemonic as well. In that order of things, TWAIL's revolutionary reformism turns

¹³² *Id.*

¹³³ On the correlation between the past, memory, and the present, *see generally* BARBARA A. MISZTAL, THEORIES OF SOCIAL REMEMBERING (2003), pp.99-125. *et seq.*

¹³⁴ This Aristotelian observation is presented in McMahon, *supra* note 118 at 466.

¹³⁵ See Allott, *supra* note 80 at 222 (explaining how humans self-constitute).

¹³⁶ See Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L. J. 353, 397 (1998) (Third World scholars "[s]hare a sense of anger ... [t]hat frequently wells into outrage").

¹³⁷ I resorted to the expression "revolutionary reformism" since it adequately captures a sentiment emerged from colonial discontents, the structural transformation being advocated by TWAIL scholars, and TWAIL's resistance to transnational organizations. For a brief description of the character of revolutions, see R. Stahler-Sholk, *Revolution*, in INT'L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. (Neil J. Smelser & Paul B. Baltes, eds. 2001), pp.13299-13302.

¹³⁸ Allott transmits this view in the following words: "Using socially the self-conceived capacities of individual consciousness (imagination and reason and memory and language), society constructs great structures of ideas which may be called *theories*". (original parenthesis and emphasis). Allott *supra* note 80 at 224.

¹³⁹ Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L. J. 171, 176, 177 (2005).

¹⁴⁰ *See generally* B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELBOURNE J. INT'L L. (2007).

¹⁴¹ *See generally*, Benvenisti & Downs, *supra* note 9.

¹⁴² *See* B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004)

out to be a reconstruction of class hierarchies¹⁴³ and TWAIL's stand for securing the collective common interests of a marginalized class.

Although successful in rallying the Third World scholars under a single banner, the oppositional and revolutionary stance has not rendered TWAIL a "monolithic collegium".¹⁴⁴ There are obviously structural and attitudinal reasons for the heterogeneity within TWAIL, but according to TWAIL scholars, more than anything else it is the "divide and rule" line of attack of the "transnational elites", first against the Third World nomenclature and then against Third World coalitions, both of which threatens the unity of TWAIL.¹⁴⁵ TWAIL suspects that such imperial strategies operate through an elite intelligentsia and for this reason Third World international lawyers need to, as B.S. Chimni says, "refuse to unquestioningly reproduce scholarship that is suspect from the standpoint of the interests of the Third World peoples"¹⁴⁶ and develop as alternatives to "mainstream Northern scholarship" *inter alia* public-oriented projects in the form of visual arts and like pursuits.¹⁴⁷ TWAIL thereby recognizes vestiges of imperialism and class domination in a portion of international law scholarship which are to be dealt with through a "hermeneutics of suspicion".¹⁴⁸

What does TWAIL aim to achieve in its overall scholarly course of action? Evidently, to provide a foundational critique of international law that draws on empirical understandings¹⁴⁹ and thereby transform international law into a law of emancipation.¹⁵⁰ Having these objectives in focus and therefore persisting in a mode of action that transcends the historical and doctrinal foundations of international law, TWAIL has already laid an epistemological base which has to steer and legitimize any future course of action.¹⁵¹ However, as seen above, TWAIL epistemology, despite the constructionist claims, has been shaped by a process commencing with a phenomenological prejudice in favor of the Third World—determined by the current situationality of the scholars—prior to any constructionist analysis and assimilating histories to the present.¹⁵² The assimilation of the history of domination into TWAIL's present identity injects hatred and a cultural vendetta against the West into the scholastic sensibilities of TWAIL followers. Chances are that novices in TWAIL subconsciously absorb this hatred such that in their analyses of international law they apply an oppositional dialectic,¹⁵³ which perpetuates a class struggle,¹⁵⁴ resulting in an

¹⁴³ See B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT'L L. 1, 29 (2004) (quoting Harold J. Laski).

¹⁴⁴ See Okafor, *supra* note 139 at 176.

¹⁴⁵ B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMMUNITY L. REV. 3, 6 (2006).

¹⁴⁶ *Id.* at 15.

¹⁴⁷ *Id.* at 22.

¹⁴⁸ On hermeneutics of suspicion as a stance of TWAIL, see Sunter, *supra* note 107 at 497-501.

¹⁴⁹ "Empirical understanding" means what Chimni states, the "lived experience of the ordinary peoples", and is synonymous to what Sunter calls "marginalized world-views". See Chimni, *supra* note 140 at 00; Sunter, *supra* note 107 at 478.

¹⁵⁰ Chimni, *supra* note 140 at 00

¹⁵¹ Parmar sees this epistemology as the conceptual guide for pursuing human rights. See Pooja Parmar, *TWAIL: An Epistemological Inquiry*, 10 INT'L COMMUNITY L. REV. 363 (2008).

¹⁵² See *supra* Sub-section: TWAIL and Historiographical Method.

¹⁵³ For an illustrative account of how an oppositional dialectic comes to exist, see Raj Bhala, *Marxist Origins of the 'Anti-Third World' Claim*, 24 FORDHAM INT'L L. J. 132 (2000) (holds that a foundational belief in the Marxian critiques on capitalism is the cause of the claim that the multilateral trading system is hostile to the interests of the third world). However, citing this illustration does not imply my support for the multilateral

epistemological partition of international law scholarship. As a result, the identity symbols being sent by TWAIL epistemology to various Third World actors have the character of self-centeredness and self-absorption. In a word, the epistemological foundation, upon which coalesced the common interest of the Third World actors, has the vestiges of personal interests.

Accordingly, what has been deemed as common interest in TWAIL is a group interest—a collective pursuit of personal interests, a sort of “empathy-induced altruism”¹⁵⁵—as against any melioristic visions. This approach, squarely hits the idea of doctrines expressed above, i.e., the subconscious loyalty of a group to certain deeply entrenched sentiments and collective observance of the ideals emerging from such loyalty.¹⁵⁶ This intellectual position renders TWAIL doctrinal in nature. Being doctrinal in nature, the lack of altruism and presence of personal interest (attributes of doctrine) corrupts the concept of common interest in TWAIL, causing its search through international law for a global order whereby Third World “bonds with the rest of the humanity”¹⁵⁷ to be self-defeating.

At this juncture, the scenario demands a self-reflective question: Can one pass judgment on TWAIL for being non-altruistic? After all, TWAIL’s end-goal of social restructuring has an ameliorating effect and Third Worldism, to which TWAIL adds a voice, is a revolution against the injustice of discrimination and cultural marginalization. On one hand, understanding its epistemology from a goal-oriented perspective in all probability renders TWAIL criticism-proof, for TWAIL does not incite an unreflective upsurge but only champions a rational revolution from below,¹⁵⁸ a revolution for the amelioration of the plight of peoples living under the gloom of famine, poverty, hunger, homelessness, and economic underdevelopment. On the other hand, if we understand the world as experiencing substantial value loss—values of love, kindness, tolerance, unselfishness, and oneness—we envisage a revolution in our minds.¹⁵⁹ The revolution in the mind is the realization of the monism of self and human reality. It is such a realization that drives human reason to higher planes, a cognitive frame in which altruism eclipses ego. In that order of things, any populist-

trading system. And, it should not either be seen as self-contradictory to the critiques of capitalism I provide later in this Article (see *infra* Section III). My purpose is to emphasize how morbid obsession with ideologies can destroy altruism.

¹⁵⁴ See generally and contra B.S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 EUR. J. INT’L. L. (2010) (argues for a class-based approach towards international law in order to better assess the structural and intellectual divides in the world).

¹⁵⁵ The concept of “empathy-induced altruism” is discussed and experimentally verified as threatening the common good in C. Daniel Batson et al., *Two Threats to the Common Good: Self-Interested Egoism and Empathy-Induced Altruism*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 3 (1999).

¹⁵⁶ See *supra* note 28 and the accompanying text thereof.

¹⁵⁷ David P. Fidler, *Revolt Against or from within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT’L L. 29, 32 (2003).

¹⁵⁸ See Chimni, *supra* note 154 at 78, 79 (recommends that all social struggles, such as TWAIL, espouse non-violence as the preferred strategy).

¹⁵⁹ The raw idea of mind revolting against injustice metaphorically appears in *Bhagavad Gita* as Krishna (the universal consciousness) reincarnating in the world (mind) to save humankind from maladies: “[t]o destroy evil [and] to set standards of sacred duty, I appear in age after age” (as Krishna’s counsel to Arjuna). See THE BHAGAVAD GITA: KRISHNA’S COUNSEL IN TIME OF WAR 52 (Barbara Stoler Miller, trans. 1986). In the modern day context, revolution in the mind is what Allott conceived as the first step towards an international society. See ALLOTT, *supra* note 3 at 257.

style revolutions diffusing hatred and resentment are impediments to achieving a just world.¹⁶⁰ TWAIL loses merit on this point.

The critical articulation above is neither a cavalier rejection of the tears and sorrows of countless human beings in the Third World nor does it characterize an inclination towards the promotion of universalistic ideals. What prompts this discourse is my optimism regarding the constitutive potential of cosmic consciousness in building a better world, my agnosticism about philosophical formalism, and love for humanity.¹⁶¹

Having found the common interest sought by TWAIL to be of an egoistic quality, I now turn to global governance to assay its phenomenological character.

2. Global Governance: A distorted conception

Social theory and thought at first flickered inside international law in the wake of numerous triumphs and failures in the world—politics triumphed over ideology, self over society, rhetoric over narrative and, unprecedentedly, time over the past.¹⁶² During that turbulent time, “normative entropy”¹⁶³ beset the structure of the field, regardless of the relentless urge by the scholars of international law to resist any design beyond the rule format and dogmatic reasoning.¹⁶⁴ However, to survive that turbulence they had to compromise their conformism and yield to social theoretic thought. Towards the end of the millennium, scholars streamlined their beliefs into an idea that an inexorable fatalism had struck all branches of knowledge and that they and their discipline, like every other scholars and their disciplines were in the midst of a transition. They spoke as if a sweeping tragedy had affected the world that shattered the element of coherence in all types of knowledge, turning knowledge into an adimensional, borderless space.¹⁶⁵ Many scholars have had an Enlightenment upbringing and they detested any type of vastness and infiniteness, phenomena which

¹⁶⁰ However, lately, TWAIL scholars lean towards spiritually radiated visions regarding human unity. See B.S. Chimni, *Retrieving “Other” Visions of the Future: Sri Aurobindo and the Ideal of Human Unity*, in *DECOLONIZING INTERNATIONAL RELATIONS 197-217* (Branwen Gruffydd Jones, ed. 2006) (“[t]he stress on inner transformation helps those participating in the struggle for a just world order keep away egoistic concerns and ensure the presence of ethical behavior in transformative politics”. *Id.* at 211.)

¹⁶¹ In addition, I intended an auto-critique of TWAIL for a reassessment of its agenda. It is, however, frightening and disappointing to see that TWAIL has set up a conceptual categorization, one Mutua names as a “minimalist assimilationist” class, which is a sort of “condemned cell” to abandon all those whom TWAIL deems as betrayers. Such classing can be harmful that any introspective students of international law face the risk of being branded betrayers by TWAIL crusaders. See Mutua, *supra* note 103.

¹⁶² Probably the triumph of time over the past takes with it all other cases of triumphs and failures. For a pithy account, see Christine Desan, *Out of the Past: Time and Movement in Making the Present*, *1UNBOUND: HARV. J. LEGAL LEFT* 39 (2005).

¹⁶³ “Normative entropy” refers to a normative fissure in the doctrinal understanding of international law and the resulting confusion in the governance pattern of the discipline. Falk has used the expression referring to certain inevitable spillovers of a philosophical shift from modernism to postmodernism. See Richard A. Falk, *In pursuit of the Postmodern*, in *SPIRITUALITY AND SOCIETY: POSTMODERN VISIONS* 81, 89 (David Gray Griffin, ed. 1988). However, in spite of the considerable parallelism in our meaning attributions, I request the reader to provide normative entropy the meaning I have attributed it.

¹⁶⁴ I do not typecast scholars of international law here. The level of conformism varies from member to member within the community of international law scholars. Irrespective of one’s allegiance to the mainstream, socially oriented thinking is a matter of style that might have been followed by many.

¹⁶⁵ At least the malady part of the transition is apparent from the discussion on fragmentation of international law and its various facets.

they condemn as “imprecision” or “metaphysical traps”. Because of this aversion, little did they attribute to the transition a philosophical or meta-connotation; rather they described the transition as an outcome of certain “political realities”.¹⁶⁶ Hence, for the scholars of international law, any mode of governance for the changing world is nothing but a political process. It is against the backdrop of this mindset that I seek the element of common interest in the new mode of governance.¹⁶⁷

In the midst of global changes, there has been an amalgamation of political ideology and market forces.¹⁶⁸ These new alignments have generated friction in the working of existing social systems, which in turn have engendered a feeling of *discontent* among people with the overall global process.¹⁶⁹ The discontent is not only ubiquitous in the social system but also pervades individuals’ inner world. Treading the path of reform, an “invisible governance”¹⁷⁰ has heightened the interaction between people and “systems”¹⁷¹ all over the world under a banner of “collective regulation of social affairs”.¹⁷² Accordingly, it is a common discontent that is what may be the primary conjectural cause of marshalling peoples and interlinking their concerns into an epistemology of reform named “global governance”.¹⁷³

Given that the common discontent relates to contemporary social systems, global governance is tasked to contrive alternative systems.¹⁷⁴ The “top-down” pattern of governance has hitherto not been able to reach every type and level of social system.¹⁷⁵

¹⁶⁶ See R.S. Pathak, & Ramaa Prasad Dhokalia, *Editorial Note*, in INTERNATIONAL LAW IN TRANSITION: ESSAYS IN MEMORY OF NAGENDRA SINGH (R.S. Pathak, & Ramaa Prasad Dhokalia, eds. 1992).

¹⁶⁷ This storyline is continued later in this section. See *supra* notes 212-232 and the accompanying text thereof.

¹⁶⁸ The understanding I have on the symbiosis of politics and market is informed initially by the lectures of Profs. B.S. Chimni and Manmohan Agarwal, and later on shaped by, e.g., Jagdish Bhagwati, *The Capital Myth: The Difference between Trade in Widgets and Dollars*, 77 FOREIGN AFF. 7 (1999). For a recent summary of various views on state-market relationship and the dynamics of it, see Simon Lee & Stephen McBride, *Introduction*, in NEO-LIBERALISM, STATE POWER AND GLOBAL GOVERNANCE IN THE TWENTY-FIRST CENTURY I (Simon Lee & Stephen McBride, eds. 2007).

¹⁶⁹ Statements of this sort, though have become cliché, cannot be jettisoned as long as a coherence is found in describing the global process. On the lack of coherence, see generally Klaus Dingwerth & Philipp Pattberg, *Global Governance as a Perspective on World Politics*, 12 GLOBAL GOVERNANCE 185 (2006).

¹⁷⁰ A prior use of the term “invisible governance” by John Mathiason as a lament on the penumbra cast over international secretariats should not weaken my intent with the term that a “beyond formalism” type of governance has come to exist. JOHN MATHIASON, *INVISIBLE GOVERNANCE: INTERNATIONAL SECRETARIATS IN GLOBAL POLITICS* (2007).

¹⁷¹ “System” denotes a social system such as institutions, cultural clusters (e.g., diasporas), family, trade union, etc.

¹⁷² See Dingwerth & Pattberg, *supra* note 169 at 188. Drawing on Renate Mayntz the authors inform that governance refers “to all coexisting forms of collective regulation of social affairs, including the self-regulation of civil society, the coregulation of public and private actors, and authoritative regulation through government”. *Id.*

¹⁷³ By way of an introduction to global governance, see K. Benedict, *Global Governance*, in INT’L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 6232 (Neil J. Smelser & Paul B. Baltes, eds. 2001) (“Global governance is the combination of international and patterned human interactions that regulate action worldwide for the common good”. *Id.* at 6232).

¹⁷⁴ Of late, there emerged many alternative [legal] perspectives—“re-imaginings”—(mostly academic and intellectual in nature) on how to govern the world. For a review of these perspectives in view of global governance, see David Kennedy, *The Mystery of Global Governance*, 34 OHIO N. U. L. REV. 827, 835-847 (2008) (the many efforts to re-imagine the world should complement an understanding of the dynamics of time and space: “There is too much work we still need to do simply to understand how it works, how the forces and factors we have overlooked might be brought into the analysis”. *Id.* at 858).

¹⁷⁵ A top-down pattern for global governance does not mean absence of any bottom-up approach. Several regional, cultural, linguistic, and ethnic groups have been following bottom-up approaches. Here I differentiate

Yet, it has addressed the upper-layer issue of the decentralized nature of the international system that today scholars all over the world contemplate as a new means and methods of governing the world. Their starting point is an “assumption” that a compound network of culture, politics, law, and society exists at an abstract level.¹⁷⁶ Homogenizing and concretizing the elements in this network would mean global governance in a realistic sense.¹⁷⁷ In other words, finding a common interest of the peoples, and if it is not found, then coordinating their assorted interests into a linearity,¹⁷⁸ is the basic function of global governance.¹⁷⁹

To sum up, the world is navigating through a turbulence, an act which Rosenau conceives as passing “from one moment in time to the next”, by means of certain “reflective and reflexive”¹⁸⁰ moves.¹⁸¹ These actions in their totality may be called “politics”. In what ensues, I demonstrate that governance in the name of common interest of the peoples of the world is nothing but politics. Later I assert that by casting global governance as politics the true directives of this transformative era have been distorted. The involvement of politics and the non-altruistic intent of global governance evince that there is no true common interest in its design.

a. Governance is Politics

If it is the definitional burden that turns global governance hostile to any taxonomy, for politics it is the “proteanism” of the concept.¹⁸² Yet, politics may be tersely described¹⁸³ as a discourse that has various patterns of manifestation.¹⁸⁴ Because politics is a discourse, it is a product of human reason and it functions on the basis of a prejudiced rationality.¹⁸⁵ This character of politics may render any political

between the top-down and bottom-up approaches in the manner that top-down is the original pattern of governance (mostly multilateral concerns) and bottom-up approaches are bargains of the relevant actors to secure a good deal in global governance. When enquired about their respective priority-focus for global governance, many prominent scholars, though stood diverse with regard to their priority-areas, have consent as to the “trickle down” nature of governance. See generally, *Global Social Policy Forum*, 1 GLOBAL SOC. POL’Y 1 (2001).

¹⁷⁶ See Dingwerth & Pattberg, *supra* note 169 at 192.

¹⁷⁷ *Id.* at 195.

¹⁷⁸ See James N. Rosenau, *Governance, Order, and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 13 (James N. Rosenau & Ernst-Otto Czempiel, eds. 1992), pp.1-29 at 13 (citing the example of the possible co-existence between the Islamic and the Western orders)

¹⁷⁹ This statement is an objective formulation of the view of K. Benedict that global governance is related to “an increasing consciousness of the interconnectedness of human activity on planet”. Benedict, *supra* note 173 at 6233.

¹⁸⁰ These terms have broader connotation that all the governance related “moves and shakes” in the present world are condensed into them.

¹⁸¹ See generally, Rosenau, *supra* note 178 at 5-7.

¹⁸² See William Keech, *Politics, Economics, and Politics Again*, 53 J. POL. 597, 597 (1991).

¹⁸³ I timidly endeavor to express the concept of politics on the basis of the description of Stigler’s research by Keech. My intention is modest; I only seek a rhetorical escape route towards finding the level of politics in global governance. See *Id.* For the original research by Stigler, see George J. Stigler, *The Theory of Economic Regulation*, 2 RAND J. ECO. 3 (1971).

¹⁸⁴ The statement is derived from Keech’s quotes from Stigler: “[p]olitics is an imponderable, a constantly and unpredictably shifting mixture of forces of the most diverse nature, comprehending acts of great moral virtue [] and of the most vulgar venality []”. See, Keech, *supra* note 182 at 598.

¹⁸⁵ See *id.* (political systems “[a]re rationally devised and rationally employed, which is to say that they are appropriate instruments for the fulfillment of desires of members of the society”) (quoting Stigler).

action egoistic. Given that reason can be prejudiced—and in that way egoistic—politics often witnesses a conflict between ego-driven personal interests and the interests of the community at large (common interests).¹⁸⁶ Hence, a good political action is a proper balancing of reason and the prejudice that tends to eclipse the reason.¹⁸⁷ In other words, “politics is [...] the process by which private preferences are balanced against ‘permanent and aggregate interests of the community’”.¹⁸⁸ It is this process of balancing common and personal interest that maintains virtually all modern “international configurations”.¹⁸⁹

First, how have we had politics playing its balancing role and how does it perform a similar function in global governance?¹⁹⁰ That is chronicled briefly below,¹⁹¹ to the effect that politics carried out the role of balancing common interest and individual interest initially by way of “power moves” and then, in global governance, through the interaction of ideas.

Socio-political forms of the past only perpetuated self-centeredness. That is to say, structures such as the state, government, family, and organized religion specified groups of concurring individuals maximizing their respective benefits.¹⁹² They divided the power [unequally] among themselves and erected normative edifices within which they equilibrated their respective interests¹⁹³. Any idea of the common interest of humanity was alien to them. However, when the massive socio-political

¹⁸⁶ This conflict is apparent in many branches of knowledge. See e.g., Keech, *supra* note 182 (in the context of economics, the author claims that perhaps economics is a discipline which is successful in demonstrating “that there *can be* a systematic connection between individual selfishness and collective well-being”. *Id.* at 599); See generally, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1975) (articulates that legal materials oscillate between the binaries of individualism and altruism, the pattern which manifests as conflict between rules and standards).

¹⁸⁷ Cf. Clarke E. Cochran, *Political Science and ‘The Public Interest’*, 36 J. POL. 327, 328 (1974). In a pathology of contemporary political science, Cochran postulates that the political process is a synthesis of varied personal and group interests and their transformation “into outputs, policies, or outcomes which, temporarily at least, satisfy the interests of the political actors”.

¹⁸⁸ Keech, *supra* note 182 at 608 (drawing on James Madison). For Madison’s original statement, see James Madison, *The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection*, FEDERALIST 10, November 22 1787.

¹⁸⁹ The expression “international configurations” refers to the many types of reorganizations, general and sectoral, being done in the name of governance.

¹⁹⁰ The objective of this question is to trace the changing sequence of political control.

¹⁹¹ Staying away from a methodical presentation with the aid of various ideology shifts and schools of thought as to how politics performed its balancing role, I densely pack those developments into a few assertions.

¹⁹² This observation is derived from the realist position which views world as comprising of “conflict-ridden” states, “concerned preeminently with their security and pursuing power as the means to assure their survival”. A. Stein, *Realism/Neorealism*, in INT’L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 12812, 12812-15 (Neil J. Smelser & Paul B. Baltes, eds. 2001). However, the self-centeredness of families and religion has to be on a different foundation. The idea that families are/were self-centric is an inference drawn on the understanding that families are receptive to economic and political changes. For a research analyzing the extent to which family values accept and resist economic and political trends, see generally Gerald W. Creed, ‘Family Values’ and Domestic Economies, 29 ANN. REV. ANTHROPOLOGY 329 (2000) (“family is largely the dependent variable in relation to capitalism and the state, but cultural commitments can influence family ‘adaptations’ in nuanced ways”). *Id.* at 332.

¹⁹³ The theory of hegemonic stability and the concept and dynamics of regimes are condensed into this statement. On hegemony, the role of power in international relations, regime dynamics, the waning of hegemony, and state of international relations after the hegemony, see generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

transformation traumatized the power orientation among the groups,¹⁹⁴ the curtains separating them were lifted, exposing state, government, etc., to the stark reality of the decay of formalism. Phenomenally the world entered a phase in which power became the weakest catalyst in balancing conflicting group-interests. From this point a dialectic of “alternatives” developed.

The search for models of governance alternative to the power-oriented one was intensely subjective in that what was sought was an optimal mode of governance that could sustain the emergent interdependency (following the evaporation of power) among the states. Hence, networks were chosen as the apposite mode of governance. These “thickets of organizational networks” linking state and civil society actors have become the “sites of governance”¹⁹⁵ within which governance proceeds by way of trans-sectoral deliberations and actions involving a multitude of actors.¹⁹⁶ This mode of governance has a sort of flexibility and informality which have grown out of the weakening of traditional political structures and the decay of formalism. In addition, an instrumental rationality that engages individuals with active strategies for maximizing their utility,¹⁹⁷ by adumbrating the “formal rationality” related to the day to day activities in various normative superstructures, emerged as the functional logic of the new mode of governance.¹⁹⁸ From a legal perspective, the scenario entailed a “deconstruction of procedural and substantive rights, the dissolution of the normative legality that is historically embedded in formal justice, and the deformation of constitutional protections and safe-guards”.¹⁹⁹

In this overall process of the withering of time-space bound institutional mechanisms and the emergence of a floating and flexible system of governance, the idea of democracy and its conceptual associates—justice, fairness and equality—had to be situated in the new order. What the new era required was a new arrangement in lieu of traditional political structures to carry out the democratic process, for it was through democratic ideals that politics with its “power moves” has been equilibrating the common interest of the community and individual interests. However, democracy, if it is the raw Aristotelian idea of “rule and to be ruled”²⁰⁰ and setting a balance between the right to rule (asserting one’s individual standpoint or personal interest) and getting ruled (streamlining one’s choices with the society’s general interest or the common interest), always requires structural forms such as a government. When schematizing global governance, it became hard for raw democratic ideals to detach

¹⁹⁴ Conceptual and political niceties on how interdependence replaced power orientation are articulated in ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977).

¹⁹⁵ Peter Bogason & Juliet A. Musso, *The Democratic Prospects of Network Governance*, 36 AM. REV. PUB. ADMIN. 3, 3 (2006).

¹⁹⁶ See generally, *Id.*

¹⁹⁷ Wolf Heydebrand, *Process Rationality as Legal Governance: A Comparative Perspective*, 18 INT’L SOC. 325, 330 (2003).

¹⁹⁸ See generally *Id.* The overpowering rationality in Heydebrand’s analysis (drawn on Weber) is “process rationality” and not “instrumental rationality”. However, he informs that the mutual boundaries between the concepts are often vague. *Id.* at 332.

¹⁹⁹ *Id.* at 334.

²⁰⁰ See ARISTOTLE, *THE POLITICS* 144 (Stephen Everson, ed. 1988).

themselves from the structural embedment of nation states²⁰¹ and get re-embedded in the new interactive form of governance²⁰². The biggest challenge was the reluctance on the part of democratic states to extend internationally the values they practiced in a state setting.²⁰³ A fear that any forfeiture of sovereignty to international machineries could obstruct states' maximization of benefits as well as an awareness that power—the balancing agent—does not any longer have its potency to resist the likely surge of conflicting interests (thereby striking a balance) when democracy is an international affair exacerbated the governance crisis. However, the solution was found by envisaging a conceptual space in which the networked interactions would take place. That space was to become the democratic foundation of the new form of governance.

In the interactive democratic process, sovereignty has been redesigned to mean an optimal allocation of relevant functions among the various actors.²⁰⁴ The ever contested conceptual associates of democracy such as justice, fairness, and legitimacy are asserted by way of a postmodern dialectic and rational practices that stand in accord with social realities.²⁰⁵ These new arrangements have prompted states to unleash their democratic values, which were tied up to the constitutional mindset of state actors. Having thus found avenues for practicing international democracy, the concern remaining was how it has to be practiced. Meanwhile, the neoliberal ideology fueled global capital mobility, setting a common goal of wealth-seeking for the states to pursue. However, the competitiveness involved in the pursuit left each state self-centered and egoistic. The international democracy had to accommodate the common interest of capital accumulation and the states' selfish interest of becoming better off than others. At this juncture a balance was struck between the common interests of the states and their desire to maximize benefits by way of political moves. In this balancing act the states are supported by a variety of actors²⁰⁶ such as non-governmental organizations, transnational corporations, and civil society,²⁰⁷ who negotiate between the conflicting common interests and individual interests.

²⁰¹ See generally Philip G. Cerny, *Globalization and the Erosion of Democracy*, 36 EUR. J. POL. RES. 1 (1999) (discusses the conceptual complexities globalization poses for democracy by delineating democracy from the embedment of nation states).

²⁰² See Daniele Archibugi, *Cosmopolitan Democracy and Its Critics: A Review*, 10 EUR. J. INT'L REL. 437, 445-53 (2004) (surveys the extent to which a cosmopolitan democracy, which is basically interactive in nature, has materialized).

²⁰³ *Id.* at 441.

²⁰⁴ See generally John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782 (2003).

²⁰⁵ This statement might sound more a generalization, however, it has been informed by scholarly works e.g. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006) (theorizing legitimacy in the governance era, propose "a global public standard for the normative legitimacy of global governance institutions").

²⁰⁶ It is to this balancing act that Halabi refers when he avows that "global governance is an attempt to administer globalization and resolve disputes between states so that developing as well as developed countries can pursue wealth under a constructed structure of their own choice". See Yakub Halabi, *The Expansion of Global Governance into the Third World: Altruism, Realism, or Constructivism*, 6 INT'L STUD. REV. 21, 24 (2004).

²⁰⁷ For an appraisal of the role of transnational actors in global governance, see Thomas Risse, *Transnational Actors and World Politics*, in Walter Carlsnaes, in HANDBOOK OF INTERNATIONAL RELATIONS 255 (Thomas Risse, & Beth Simmons, eds. 2002).

In this international democratic process every global actor interacts in some fashion with others and conditions the others' interests, choices, and identities.²⁰⁸ Interactions, despite their economic leitmotif, are founded on one or a set of varying ideas, depending on the sector where and the theme on which the interactions take place. These interactions proceed on a discursive basis and their intensification opens new discursive courses.²⁰⁹

When global actors interact, rules and standards of the international system guide their behavior by providing transparency to the situation.²¹⁰ In addition, the emancipation of the legal mind from constitutional and formalist rationality and its subsequent espousal of an instrumental rationality²¹¹ have rendered the legal mind willing for any give and take deals in order to maximize the benefits of the respective global actor who invokes law. In the main, the balance between the common interest of wealth maximization and the selfishness that crops up during this pursuit is effected through effective and subjective interaction of ideas. These subjective interactive moves constitute politics in global governance.

Scholars of international law, in indecision for a time, presently have their constitutional mindset adjusted to the changing political rationalities. The fact that global processes entail interaction and exchange was recognized by them following a meek resistance.²¹² However, certain affirmations of a deconstructionist school regarding the functional futility of formalism daunted scholars' minds.²¹³ Before the ensuing despair took its toll, the deconstructionists returned with a scheme to salvage formalism²¹⁴ and the returnees were identified as dutiful defendants of international law²¹⁵. Their formalism differed considerably from that of the dogmatists in that it was an ensemble of certain sensibilities, types of consciousness, and rationalities culminating in social virtues such as justice, fairness, and egalitarianism.²¹⁶ According to Martti Koskenniemi, this discursivity is a "culture of formalism" as opposed to the formalism associated with structure, "rigidity and objectivity"²¹⁷ and any other

²⁰⁸ On how interactions shape identity, see generally Alexander Wendt, *Anarchy is what States Make of It*, 46 INT'L ORG. 391 (1992).

²⁰⁹ *Id.* at 35, 36.

²¹⁰ See *Id.*

²¹¹ See *supra* notes 197-199 and the accompanying text thereof.

²¹² Alston criticizes the disinclination shown by international lawyers to accept the reality that a multi-modal governance has materialized. See Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997). For an inside-out view and acceptance of the shifting paradigms of international law in the wake of global governance, see Everton Vieira Vargas, *Global Challenges and the Shaping of International Law*, 1 BRAZILIAN Y.B. INT'L L. 166 (2006).

²¹³ It is with the surge of critical legal theory that many theoretical and practical limitations of international law came to light. von Bernstorff opines that Koskenniemi's *From Apology to Utopia* has prompted a doctrinal agnosticism among the scholars of international law. See generally Jochen von Bernstorff, *Sisyphus was an International Lawyer: On Martti Koskenniemi's 'From Apology to Utopia' and the Place of Law in International Politics*, 7 GERMAN L. J. 1015 (2006).

²¹⁴ See *id.* at 1027. But, see Korhonen, *supra* note 3 at 19 (stating that the anti-formalist stance and the subsequent return is part of the war strategy, "knowing the enemy"). This return to formalism is an example of the argumentative pattern of international law on a reverse spiraling towards the doctrinal center. See *supra* note 3 and the assertion footnoted thereof.

²¹⁵ See Korhonen, *supra* note 3 at 19, 20.

²¹⁶ See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW* 500 (2002).

²¹⁷ *Id.*

contested types of formalism.²¹⁸ The culture of formalism has a democratic stipulation “that those who are in positions of strength must be accountable and those who are weak must be heard and protected”.²¹⁹ In the plain language of politics, accountability and the right to be heard and protected are each in themselves balancing acts: *accountability* entails an act of balancing between the particular interests of the ruled and the collective interests of the community,²²⁰ while the people’s *right to be heard and protected* entails a weighing of the particular choices of the individuals against the interests of the community.²²¹ These are discursive acts. However, unlike in the case of legal formalism, the discursiveness inside the culture of formalism proceeds neither from the interpretative rationality of authority figures nor from any established normative practices²²² but rather manifests when professionals of international law engage in meaningful interactions.²²³ The balancing of common and personal interests

²¹⁸ For the other facets of legal formalism, see D. Kennedy, Legal Formalism, in INT’L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 8634 (Neil J. Smelser & Paul B. Baltes. eds. 2001).

²¹⁹ KOSKENNIEMI, *supra* note 216 at 502.

²²⁰ Accountability, according to Grant and Keohane,

[I]mplics that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met. [It] presupposes a relationship between power-wielders and those holding them accountable...The concept of accountability implies that the actors being held accountable have obligations to act in ways that are consistent with accepted standards of behavior and that they will be sanctioned for failures to do so.

See Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29, 30 (2005).

When there is abuse of power, accountability mechanisms impose constraints on such abuse. As a democratic practice, accountability involves a rational choice between what is just and unjust when performance of the power-wielders is tested against some accepted standards regarding legitimacy. *Id.* at 30. The standards regarding legitimacy in a democratic setting are the common expectations of the peoples who confer power on the elected. When exercise of power transcends the standards regarding legitimacy, it marks a conceptual eclipse of the common interest of the peoples by the selfish interest of the power-wielders. (Compare the statement by Thomas Hartley: “the great end of meeting [in a legislature] is to consult for the common good and thus to transcend local or partial view[s]” (internal quotes omitted)), see J. M. Bessette, *Accountability: Political*, in INT’L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 38, 39, 40 (Neil J. Smelser & Paul B. Baltes, eds. 2001).

Sanctions attached to the accountability mechanisms ensure that a balance is struck between common interests of the peoples and selfish interests of the power-wielders.

²²¹ In a formalist setting, the idea of a right to be heard and protected relates to equity. Such a right, however, in a global setting ensures that individual interests are fairly signified against what has been accepted as the common interest. In other words, every individual has a right to take part in the global process by integrating their individual insights into the common interest of the community. Often the common interest of the community is reflected in and safeguarded by one or another international institution. Participation in the global process is by means of “meaningful interactions” and these interactions balance the individual interests and common interest. For support, see A.-J. Arnaud, *Equity*, in INT’L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 4729, 4732-33 (Neil J. Smelser & Paul B. Baltes, eds. 2001) (“[E]quity has become a referent in the framework of globalization, re-emerging in many new areas of legal work”).

²²² Deeming the discursiveness inside legal formalism as a combination of interpretative rationality and normative practices is a crude formulation, beyond which lie much profounder applications of logic and intellect. See e.g., Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949 (1988) (articulating that the “immanent intelligibility” of law is the fundamental philosophy of legal formalism).

²²³ KOSKENNIEMI, *supra* note 216 at 502.

through interactions among professionals represents politics in the culture of formalism.²²⁴

Yet, the culture of formalism does not resist deconstructionism.²²⁵ It recognizes that there is “deformalization” in international law.²²⁶ Deformalization, however, takes away the conceptual terrain on which interactions take place,²²⁷ leaving international law devoid of a discursive surface. That being the case, an alternative surface is needed for the interactions to occur.²²⁸ At this point in time, the culture of formalism integrates postmodernity’s demand for a social interdependence into the functioning of international law by means of a shift towards an instrumental conception of law comprising expertise, active strategies, and conflict management.²²⁹ Through this instrumental conception of law, actors engage in particularistic interactions and seek the universality that might emerge out of such interactions.²³⁰ In this way, interactions balance the particularistic interests with universalistic interests²³¹. The transitory effectiveness of instrumentalism—in contrast to the rigidity and protractedness of legal formalism—and a proof against biases,²³² all become facets of the culture of formalism.

Thus, the epistemological drift of international law in our era was perceived and conceptualized by the scholars of the discipline with an artful dexterity by being doctrinally “atheistic”—traditional fixations no longer contributed to the mechanics of international law—whilst they found ontological substitutes for the discipline that are capable of causing the same impact as doctrines. In other words, when they attributed a political nature (balancing act) to global governance, scholars transposed, *mutatis*

²²⁴ Compare this assertion with Koskenniemi’s statement: “[T]hey [professionals] are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power”. *Id.*

²²⁵ What the culture of formalism resists (to include in it) is “universalist ideologies”. However, the culture of formalism has in it a scope for the universal but it secures universalism by being “empty” of any catalyst that has the risk of triggering biases of sorts. “It [culture of formalism] tries to induce every particularity to bring about the universality hidden it”. *Id.* at 504.

²²⁶ See Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 THEORETICAL ENQUIRES L. 9, 13 (2007). Koskenniemi defines deformalization as “[T]he process whereby the law retreats solely to the provision of procedures or broadly formulated directives to experts and decision-makers for the purpose of administering international problems by means of functionally effective solutions and balancing interest” (internal quotes omitted). *Id.* at 13.

²²⁷ The doctrinal complex is the conceptual surface on which the discursivity in international law exists.

²²⁸ *Cf. id.* at 14.

²²⁹ See Robert van Krieken, *Legal Informalism, Power, and Liberal Governance*, 10 SOC. & LEGAL STUD. 5, 18 (2001) (setting an agenda for future research prospects of legal informalism).

According to Horwitz, a flexible instrumental conception of law is the best tool for effectuating transformation and reform. In an historical account of American legal formalism he articulates that formalism was preceded by an instrumentalism which was, however, exploited by the wealthy class to secure their respective interests. See generally Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975).

²³⁰ See KOSKENNIEMI, *supra* note 216 at 504.

²³¹ Koskenniemi has also attributed a “balancing” character to instrumentalism. See Koskenniemi, *supra* note 226 at 13 (instrumentalism is indirectly defined as those concepts and practices to which deformalization retreats—“provision of procedures or broadly formulated directives ... for the purpose of administering international problems by means of functionally effective solutions and ‘balancing interest’”). See *id.* at 13.

²³² Horwitz asserts that legal formalism in its traditional structural form bears the “legal distribution of wealth against the weakest group in the society”, hence formalism has an inherent bias towards certain classes. See Horwitz, *supra* note 229 at 252.

mutandis, the dogmatic ethics and professionalism of the thought and practice of international law into the modern world in the guise of a “new international law”.

Is the kind of transformation related above what global governance necessitates?²³³ Can't it be that the true prescriptions of modernity urged an internal transformation, offering an opportunity to recreate the relationship between the self and the society²³⁴—a spiritual project? If so, is there a “drama of governance”²³⁵ being enacted before us? These questions are dealt with and answered in the next section.

b. Governance Ought Not To Have Been Thus: A postmodern/quantum turn?

We are the land Where every man
stands his ground,
as short of ideas as of faith,
ever ablaze to inject
inaneities, to capsize conversations.²³⁶

If governance ought not to be the way it is, we have perceptually erred on the side of social prescriptions. That erring, however, predates governance, dating back to a time when the idea of society was being systematically conceived. The conception of global governance is merely the last in a sequence of similar errors.

Perceptual error occurred for the first time when “objective knowledge” was attained by an alienation of the superior mind (soul) from the body; the objectivity gained from that knowledge was applied in systematizing the social world.²³⁷ It was the Enlightenment project that performed this alienation, and post-enlightenment visionaries followed suit by denying teleology.²³⁸ Both the alienation of soul from the body and the denial of teleology turned the world into an imperfect composite of miserable but rational humans.²³⁹ The Enlightenment thinkers, charged with the utilitarian task of improving social life by securing maximum happiness for humans, emphasized reason as the medium to control the forces of nature and thereby establish order in an otherwise imperfect world.²⁴⁰ Meanwhile, reason crystallized into an analytical epistemology, “science”,²⁴¹ which directed the social process.²⁴² The

²³³ Heiskanen displays radical sensibilities in this regard, however, with analytical objectives lying far beyond that of this Article: “The real call for global philosophy resonates from somewhere else: it is the forceful echo of our collective reading of the global reality”. See Veijo Heiskanen, *Architexture: An Outline of an Alternative Philosophy of Global Governance*, 17 FINNISH Y.B. INT'L L. 233, 252 (2006).

²³⁴ See Philip Allott, *The Opening of Human Mind*, 1 EUR. J. LEGAL STUD. (2007) (having passed through many gloomy and murky phases, humanity sees “the first signs of a new human springtime”).

²³⁵ See Kennedy, *supra* note 218 at 8637 (“Formal law is part of the drama of governance, the trivial or murderous drama of breaking eggs to make omelettes”).

²³⁶ Robert Nazarene, *We Are The Land Where Every Man*, 38 AFR. AM. REV. 156 (2004).

²³⁷ Ramashray Roy, *Beyond Ego's Domain: Emotion, Rationality, and Prajnana*, 11 PSYCHOL. & DEVELOPING SOC'Y, 1, 2 (1999).

²³⁸ By “denial of teleology” I signify Martin Heidegger's “death of transcendentalism for the West” more than Friedrich Nietzsche's “death of God”. For a juxtaposition of the views of Heidegger and Nietzsche, see J. Glenn Gray, *Heidegger 'Evaluates' Nietzsche*, 14 J. HIST. IDEAS 304 (1953).

²³⁹ Roy, *supra* note 237 at 9.

²⁴⁰ *Id.* at 9, 11.

²⁴¹ *Id.* at 9.

²⁴² Articulating the evolution of social organization through the life and ideas of Auguste Comte, DeGrange, emphasizes the influence science had over the enlightenment thinkers: “No thinker of the period could hesitate

objectivity science has provided offers avenues for the exercise of power “and to augment a positive balance of felicity, both individual and collective”.²⁴³

The “formulaic approach” of science to social problems²⁴⁴ and the resulting epistemological specificity prompted sociologist Auguste Comte to create a new science—“social physics”—that has to provide “mankind a guide for directing social action”.²⁴⁵ However, social physics was run on the lines of classical physics, which considers reality as mere matter.²⁴⁶ In a similar vein, social science espoused the Cartesian dualism of the separation and “irreducibility” of the mind and body, with social processes assuming a materialistic outlook.²⁴⁷ Ever since, the mind-body correlation significantly has remained overlooked.

When it comes to the human process in the world, it is continual, recurring over generations—an exodus from the past, a struggle in the present, and an advance towards the future.²⁴⁸ In this process, humanity confronts its reality many times,²⁴⁹ offering itself a chance to reconceive its true identity.²⁵⁰ Reality affords this opportunity by reducing the conflict between the rationalities of materialism and nondualism²⁵¹. Paradoxically, when reality is closer, society and existing social structures experience social entropy in the form of normative disorders, indeterminacy in thought, conflicting micro-rationalities, and fragmentation of existing knowledge.

It is true that, lately, an unusual intellectual current has traversed the thought pattern of insightful intellectuals and disturbed its “systematicity”.²⁵² Imagination and

as to the choice of route to lead to a new level of knowledge in social phenomena, whereby a guide for political action might be had. The road led by way of the spirit and method of science”. See McQuilkin DeGrange, *Comte's Sociology*, 4 AM. SOC. REV. 17, 18 (1939).

²⁴³ See Roy, *supra* note 237 at 9, 10.

²⁴⁴ According to DeGrange,

In the growth of science, [there is] something more than the quasi mystical application of a global methodology to a series of indifferent subject matters. In it he [Auguste Comte] saw the slow and successive recognition and the gradual isolation of homogenous classes of phenomena; he saw the emergence in each case of a characteristic method adapted to the specific nature of each isolated class of data,—a method which could never have been provided *a priori* but could have resulted from assiduous occupation with the isolate itself.

The cognitive weariness and tedium that might have emerged out of the above process of science is what I refer as “formulaic approach” of science. See DeGrange, *supra* note 242 at 18, 19.

²⁴⁵ See *id* at 19.

²⁴⁶ Alexander Wendt, *Social Theory as Cartesian Science: An Auto-critique from a Quantum Perspective*, in CONSTRUCTIVISM AND INTERNATIONAL RELATIONS: ALEXANDER WENDT AND HIS CRITICS (Stafano Guzzini & Anna Leander, eds. 2006), pp.181-219 at 183. Wendt's contribution is particularly instructive that the sources cited therein have been a broadening learning experience for me.

²⁴⁷ *Id.* at 182, 183.

²⁴⁸ Muniz Sodr , *For a Feeling of Humanism: The Political Emergence of the Emotions*, 52 *DIOGENES* 71, 71 (2005).

²⁴⁹ Cf. Allott, *supra* note 80 at 220 (“Humanity has come face-to-face with itself”).

²⁵⁰ Cf. Allott, *supra* note 128 at 94.

²⁵¹ See Sodr , *supra* note 248 at 72. Sodr  refers to the micro level at which the rationality conflict between materialism and nondualism materializes, e.g., the conflict between “History and Destiny, reason and passion, *logos* and *pathos*”.

Nondualism in the broader context is the theory that self/soul is a manifestation of reality and that there is no duality between the soul/self and reality. At an analytical level nondualism can be reduced to mean “the power of consciousness”. For details on the theory of nondualism as it is originally conceived, see J.J. Navone, *Sankara and the Vedic Tradition*, 17 *PHIL. & PHENOMENOLOGICAL RES.* 248 (1956).

²⁵² “Systematicity” refers to a “system” which holds its various units together in a relationship and ensures that all its units function in unison. See footnote 14 in ‘Jeremy Waldron, *‘Transcendental Nonsense’ and System in the Law*, 100 *COLUM. L. REV.* 16, 19 (2000) *Et seq.*

language came under stress in an unprecedented manner whereby an infectious sense of crisis in narration threatened human intelligence.²⁵³ At a structural linguistic level, the meanings that structure texts and discourse waned into an archeology of images²⁵⁴ and the linguistic cords that lashed society together loosened; social structures collapsed as a result and the meanings associated with these structures evaporated.²⁵⁵ The subsequent social events and conceptual decay showed that what the objectivity of human inquiry established as reality was untrue. This denial that the post-enlightenment social order is the true human reality is an apophasis— *Neti, Neti* (reality is not this).²⁵⁶

If reality is not this, what is it? To answer this question I refer to the “postmodern turn” the world has taken. In the ostensible decay of the social world, a group of futuristic philosophers have observed a postmodern turn which calls for the creation of new visions, ideas, theories, and processes for reconstituting and sustaining humanity and “human habitat”.²⁵⁷ In postmodernity, existing social structures are doomed to a gradual collapse; hence alternative means for sustaining sociality are necessary. A “textualist approach” has materialized as a response, which has prompted a shift from understanding the world empirically/materially to perceiving it rhetorically.²⁵⁸ Richard Harvey Brown conceives the shift as thus:

Humans enact truth not by legislating it scientifically, but by performing it rhetorically. Our knowledge of truth is not based on some extralinguistic rationality, because rationality itself is demystified and reconstituted as a historical construction and deployment by human rhetors. Logic and reason are down from their absolute, preexistent heights into the creative, contextual web of history and action.²⁵⁹

²⁵³ See Barbara Creed, *From Here to Modernity: Feminism and Postmodernism*, in *A POSTMODERN READER* 403 (Joseph Natoli & Linda Hutcheon, eds. 1993). Against this crisis, a few discourses of the time reacted, however, upon exerting stiff resistance, they collapsed before the intellectual tempest. See Neville Wakefield, *POSTMODERNISM: THE TWILIGHT OF THE REAL* 3 (1990).

²⁵⁴ See generally Jean-François Lyotard, *The Postmodern Condition*, in *THE POSTMODERN TURN: NEW PERSPECTIVES ON SOCIAL THEORY* (Steven Seidman, ed. 1994), pp. 27-38. For Lyotard, postmodernism characterizes the “obsolescence of the meta narratives” and the immediately subsequent state of linguistic decay, *id* at 27).

²⁵⁵ For an understanding that texts and language structure society see Richard Harvey Brown, *Rhetoric, Textuality, and the Postmodern Turn in Sociological Theory*, in *THE POSTMODERN TURN: NEW PERSPECTIVES ON SOCIAL THEORY* 229 (Steven Seidman, ed. 1994).

²⁵⁶ Apophasis of arriving at the reality is well established in *Bṛhadaranyaka Upanishad* which by a deductive method—“Neti, Neti” (not this, not this)—verifies that the spatial-temporal material world is a false reality. This inquiry continues by ruling out, through various “methods of living” (see *supra* note 47 and the text thereof), one falsity after another until one arrives at the *Brahman*, the ultimate reality. For insights, see D.C. Mathur, *The Concept of Self in the Upanishads: An Alternative Interpretation*, 32 *PHIL. & PHENOMENOLOGICAL RES.* 390 (1972). For a description on how this apophasis manifests in practice, see RAM DASS, *PATHS TO GOD: LIVING THE BHAGAVAD GITA* 84-86 (2004) (in meditation, the seekers of truth instruct the mind that the material perceptions such as sound, colour, smell, and light are not signs of reality).

²⁵⁷ Allott speaks of a three dimensional human habitat: the natural world, the social world, and the inner world. In the natural world and social world, the “self” is identified within the time-space framework, whereas true human self can be explored only in the inner world. See Allott, *supra* note 80 at 220, 221.

²⁵⁸ Jean-Jacques Lecercle, *Postmodernism and Language*, in *POSTMODERNISM AND SOCIETY* 76, 76 (Roy Boyne and Ali Rattansi, eds. 1990) (drawing on Lyotard); See generally Brown, *supra* note 255.

²⁵⁹ Brown, *supra* note 255 at 131.

At the level of active socialization, thought and language facilitate a discursiveness through which individuals and groups could interweave their inner illumination into a sociality which when comes to exist would mark a union of mind and body. Philosophers of science aver that such a sociality is in the offing;²⁶⁰ the physical world has shed its materialism and spatial-temporality and moved away from the classical physics of dualism to a “macroscopic quantum mechanical phenomenon” of holism and wave-particle interconnectedness.²⁶¹ This quantum phenomenon is the physical representation of reality²⁶² which originally transpires in the mind.²⁶³

Before the postmodern turn, the world was in a state of anarchy where global actors were self-seeking in thought and action.²⁶⁴ In that era, human thinking and sociality did not have any being-specific values beyond its organic structure and pattern. Humans lived a life of theatrical realism by enacting their life as directed by their imperfect reason as if it were their reality.²⁶⁵ War, insurgences, conquests, etc. were vigorously performed under the guidance of their somatic rationality. However, reality has an “unveiling” property in that it often reveals itself to humanity in the form of a “top-down guidance” which originates from a “superintelligent” matrix.²⁶⁶ This revelation occurs in both material and nonmaterial forms.²⁶⁷ At a material level reality manifests as quantum wave functions²⁶⁸ and at the nonmaterial level in our

²⁶⁰ See generally DANAH ZOHAR & IAN MARSHALL, *THE QUANTUM SOCIETY: MIND, PHYSICS AND A NEW SOCIAL VISION* (1993).

²⁶¹ Wendt, *supra* note 246 at 183. For an appraisal of the various views regarding mind-body correlation in a quantum perspective, see Harald Atmanspacher, *Quantum Theory and Consciousness: An Overview with Selected Examples*, 8 DISCRETE DYNAMICS IN NATURE & SOC'Y 51 (2004).

Quantum mechanics and postmodernism are juxtaposed neither for analogizing nor for any metaphoric purpose; rather it is a scholarly conviction that the postmodern world we live in is a quantum world. See Wendt, *supra* note 246 at 196, 197. However, that does not render the scope of quantum physics as an analogy for understanding social dynamics. On the optimality and viability of science (especially quantum physics) as a metaphor for social phenomena, see Dimitris Akrioulis, *The 'Quantum Politics' Metaphor in International Relations: Towards a Hermeneutic of Political Metaphoricity*, PAPER PRESENTED AT THE 57TH POLITICAL STUDIES ASSOCIATION ANNUAL CONFERENCE, University of Bath, UK, 11-13 April 2007 (on file with the author). See also William Bennett Munro, *Physics and Politics: An Old Analogy Revised*, 22 AM. POL. SCI. REV. 1 (1928) (Munro is cynical about any analogy between science and the social if it is to prompt a subjective metaphysical analysis, however, he has optimism if the objectivity in science could guide the political process); Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97 (2007) (asserts that given the variation in social participation and the differences in the levels of social occurrences, a “tipping point” triggering social change is difficult to ascertain, turning the concept of critical mass into an “imperfect analogy” vis-à-vis the social world).

In this connection, I invite the readers to compare Sokal’s controversial ridicule (in the form of a spoof) of the attitudes and approaches of the “postmodernist epistemology”. See Alan D. Sokal, *Transgressing Boundaries: Towards a Transformative Hermeneutics of Quantum Gravity*, 46/47 SOC. TEXT 217 (1996). On the linguistic typology of the article in Sokal’s own words, see Alan D. Sokal, *A Physicist Experiments with Cultural Studies*, LINGUA FRANCA, May/June, 1996.

²⁶² ZOHAR & MARSHALL, *supra* note 260 at 189.

²⁶³ See Subhash Sharma, *Routes to Reality: Scientific and Rishi Approaches*, 7 J. HUMAN VALUES 75, 77, 78 (2001).

²⁶⁴ This has been the contention of political realists. See generally ANDREAS HASENCLEVER, PETER MEYER & VOLKER RITTBERGER, *THEORIES OF INTERNATIONAL REGIMES* 83-135 (1997).

²⁶⁵ See ALLOTT, *supra* note 3 at 125, 126.

²⁶⁶ See Tariq Mustafa, *Development of Objective Criteria to Evaluate the Authenticity of Revelation*, 43 ZYGON 737, 741 (2008).

²⁶⁷ See Lothar Schäfer, *Nonempirical Reality: Transcending the Physical and Spiritual in the Order of the One*, 43 ZYGON 329, 330 (2008).

²⁶⁸ *Id.* at 336.

consciousness as brain waves.²⁶⁹ Quantum Chemist Lothar Schäfer, drawing on Hans-Peter Dürr, asserts that reality is immanent and absolute in itself that it initially reveals itself to consciousness.²⁷⁰ It is consciousness that has to constitute matter.²⁷¹ In the state of matter an empirical inequity can divulge reality by way of quantum mechanics and in a nonmaterial state the same can be discovered in transcendental meditative states.²⁷²

Once a quantum path is preferred for discovering reality, a reasonable faith in the mysteriousness of quantum physics is called for. It is good to pay attention to Zohar and Marshall's signal: "Things are very different in quantum reality", for in the quantum realm indeterminacy and unpredictability permeate.²⁷³ The quantum world, according to Niels Bohr, comprises electrically charged particles which make unpredictable moves from one energy state to another,²⁷⁴ a phenomenon which Bruce Rosenblum cynically wits as "damn quantum jumps".²⁷⁵ Zohar and Marshall elaborate the mechanics of these quantum jumps:

Each possible journey and each eventual destination [of the electrons] is associated with a probability, but nothing is ever determined. Indeterminacy [...] characterizes the quantum realm. The electrons *may* go to the next lowest state, it *may* go to the next highest state, it *may* leap over several intermediate states or even double back on itself.²⁷⁶
(original italics)

However, physicist Erwin Schrödinger's interference in Bohr's quantum dynamics added to the understanding regarding the quantum world that it not only comprises of plain particles but such particles have waves around their nucleus.²⁷⁷ In that state, when particles collide, their waves interpenetrate each other, retaining the basic character of the particle but assimilating the wave character of one another.²⁷⁸ "The two [...] relate internally; they get inside each other and evolve together. The new system to which their overlapping gives rise now has its own particle and wave aspect, and its own corporate identity".²⁷⁹ When placed in a larger network such interactions would generate a collectivity of charged electrons sharing and assimilating their immanent properties.

²⁶⁹ See generally *id.*

²⁷⁰ *Id.* at 342.

²⁷¹ *Id.* This view is seemingly contradictory to the Vedic cosmology in the sense that according to Vedic cosmology it is from *Brahman* that the matter originates and that all physical objects are in a micro-macro relation with the *Brahman*. See BRUCE BURGER, *ESOTERIC ANATOMY: THE BODY AS CONSCIOUSNESS* (1998), pp.124, 125. However, the contradiction is not alarming if it is understood that consciousness is a micro-Brahman state enclosed in matter. If consciousness attains the awareness regarding its Brahman-hood, materiality of consciousness collapses and it gains command over matter.

²⁷² See Sharma, *supra* note 263 at 78.

²⁷³ ZOHAR & MARSHALL, *supra* note 260 at 25.

²⁷⁴ *Id.*

²⁷⁵ BRUCE ROSENBLUM, *QUANTUM ENIGMA: PHYSICS ENCOUNTERS CONSCIOUSNESS* 69 (2006).

²⁷⁶ ZOHAR & MARSHALL, *supra* note 260 at 26.

²⁷⁷ See generally ROSENBLUM, *supra* note 275 at 69-80.

²⁷⁸ ZOHAR & MARSHALL, *supra* note 260 at 31.

²⁷⁹ *Id.*

Having thus postulated a quantum dynamics, Schrödinger further prepared a “thought experiment”²⁸⁰ and discovered that electrons not only make numerous jumps from one state to another but also may exist in more than one state or in all states at the same time, rendering the real situation a set of probabilities.²⁸¹ Schrödinger demonstrates this probability with the example of a cat in an opaque box with a “fiendish device that decides, randomly, whether to feed the cat with healthy food or to give it poison”.²⁸² Whether the cat will live or die depends on what the device feeds the cat. For an observer, the reality regarding the cat is a probability.²⁸³ This indeterminacy/probability regarding the reality collapses once the box is opened—probabilities collapse and reality emerges.²⁸⁴

While, quantum dynamics, in conjunction with the advances of theoretical physics, has a more profound and expanding knowledge base, the thumbnail sketch provided above will suffice for the purpose of this Article. Having thus reduced quantum mechanics to its core ideas, I now turn to draw conclusion regarding the bearing it has for the postmodern social world. I do this by separating quantum dynamics from what Schrödinger’s thought experiment revealed. First, I consider the thought experiment.

The ubiquity of microphysical particles in various states that Schrödinger has discovered engenders an indeterminacy of sorts, for ubiquity, when it offers multiple realities, hides the true reality from any observers. This appearance of numerous realities before the observers and their being prompted to choose the true reality is the social condition I described earlier as humanity’s coming in proximity to their reality.²⁸⁵ The apparent social decay and intellectual asymmetries are results of the indeterminacy fueled by the invasion of multiple realities. On balance, as an *artful observation* collapses the probabilities into the true reality in quantum physical world, the social world needs similar intellectual methods to dismantle the misguided idea of reality it has constituted on the basis of classical Newtonian physics, the truism regarding which Zohar and Marshall succinctly capture as follows: the “impenetrable [particles] become the individual [egoistic] ‘units’ of society, whose necessarily external relations are mediated by power and influence, suspicion, and mistrust”.²⁸⁶ To have an intellectual method to explode the notions regarding reality, both social scientists and their peers in frontier disciplines such as law need to recognize the logical potential of metaphysics in eliminating probabilities and identify the true reality.

Now I turn to quantum dynamics. The rise of quantum consciousness in the scientific world underlined matter as a composite of energized particles which have both a particle-like and wave-like character.²⁸⁷ The collision of particles and their assimilation of wave character while retaining their particle character bring about new

²⁸⁰ See *Id.*

²⁸¹ *Id.* at 27-29.

²⁸² *Id.* at 28.

²⁸³ *Id.* This probability regarding reality is also explained by Sankara with the help of “Snake or Rope Matrix”. On that matrix, see Sharma, *supra* note 263 at 78, 79.

²⁸⁴ ZOHAR & MARSHALL, *supra* note 260 at 28.

²⁸⁵ See *supra* notes 249-250 and the accompanying text thereof. According to Schäfer, multiple realities are probabilities and true reality is actuality. See Schäfer, *supra* note 267 at 342.

²⁸⁶ ZOHAR & MARSHALL, *supra* note 260 at 31.

²⁸⁷ *Id.* at 25.

physical states of matter,²⁸⁸ which is a sign of an “emergent reality”.²⁸⁹ That being the dynamics in the physical world, at the social level the same dynamics provides for assimilative interaction among the peoples, which “leads to new elements of consciousness from which the learning process starts out anew”.²⁹⁰ In sum, comparable to that of the physical world, the interaction in the social world prompts a search for a higher level of consciousness and a gradation of consciousness to that level, the dialectic which Allott incorporates into the idea of philosophy as “the self-perfecting of human beings”.²⁹¹ Such is the nature of transformation our age demanded.²⁹²

Living with the Error. Regardless of what was ordained and what was churned out, a generation of social thinkers and professionals engaged in building on a post-enlightenment error, an error glorified in the name of scientism, objectivity, rationalism, empiricism, and positivism.²⁹³ They first censured philosophy²⁹⁴ and its principal variant—metaphysics—as lacking immanent objectivity (and hence intelligibility),²⁹⁵ disregarding the fact that metaphysics is the only language that can decode the complex dialectical composition of nonmaterial reality.²⁹⁶ They deemed as reality what their sensual inquiry revealed to them and on account of that reality set epistemological standards resembling that of science to sustain the social complex.²⁹⁷ Then there came the postmodern era, perturbing the social complex, which invited the idea of existing reality and the various functions of its manifestations to undergo an acid test regarding their appositeness. Learned individuals sensed the import of the age, however, fashioning its prescriptions into an intellectual frame bordering the Newtonian-Marxian dialectic materialism to which their way of thinking was attuned. This was particularly true of global governance. The reformism that emerged in its wake was intensely rational—aiming at dismantling only the forms and frames of law

²⁸⁸ Schäfer, *supra* note 267 at 343.

²⁸⁹ ZOHAR & MARSHALL, *supra* note 260 at 31.

²⁹⁰ Schäfer, *supra* note 267 at 343.

²⁹¹ See *Review Essay Symposium: Philip Allott's Eunomia and The Health of Nations, Thinking Another World: This Cannot Be How the World Was Meant to Be*, 16 EUR. J. INT'L L. 255, 256 (2005) (hereinafter “This Cannot Be How the World Was Meant to Be”).

²⁹² See Philip Allott, *Kant or Won't: Theory and Moral Responsibility*, 23 REV. INT'L STUD. 339 (1997) (appeals thinkers to remove their phenomenological bias of materialism and attune their minds for taking up higher moral and social responsibilities).

²⁹³ The quest for the “scientific” by the scholars of law is well articulated in Jeremy M. Miller, *The Science of Law: The Maturing of Jurisprudence into Fundamental Principles in Fairness*, 13 W. ST. U. L. REV. 367 (1986) (upon reviewing the “scientific element” as claimed to be present in various streams of legal thought, the author emphasizes the supremacy of principles and concludes that fairness is the super-principle that renders law a science).

²⁹⁴ The antipathy of legal objectivists towards philosophy is pointed out by Unger: “Philosophy they abased into an inexhaustible compendium of excuses for the truncation of legal analysis”. Unger, *supra* note 28 at 675.

²⁹⁵ The obsession of international lawyers with objectivity and their discomfort with philosophical subjectivity are succinctly captured in Emmanuel Voyiakis, *International Law and the Objectivity of Value*, 22 LEIDEN J. INT'L L. 51, 56 (2009) (offering a theoretical formula for international lawyers to eliminate unfounded criticism against their quest for salience).

²⁹⁶ For support, see F.C.S. Schiller, *The Place of Metaphysics*, 17 J. PHIL., PSYCHOL. & SCI. METHODS 455 (1920).

²⁹⁷ See generally, Miller, *supra* note 293.

and society²⁹⁸—such that reformists proffered ersatz alternatives having the potential to reproduce the materialistic spirit (including the political character) of international law.²⁹⁹ In that spirit, humanity is urged to rally in the name of wealth and global democracy and international law arranges for a conceptual surface where any interests that might weigh down the materialistic pursuit can be balanced against the common interest of humanity.³⁰⁰

Given that there is a shadow of politics in global governance, the common interest it promises to secure turns into an illusion, and its failure to comprehend the spiritual directives of postmodernity foils any scope for realizing human reality.

The analyses in this part of the Article indicate that the majestic ambitions of TWAIL and global governance to secure a common interest are being undermined by the wrong designs of thought and dialectic they have. The discourses of both TWAIL and global governance were also found to promote a dialectic of egoism.

C. Reality Perceptions about Common Interest: Philosophy *against* Doctrine

When analyzed at logically articulate levels, the concept of common interest as various doctrines tends to give forth certain unconstructive attitudes of the aphotic realm of the human mind. Such negativity is inherent in doctrine in that it apparently alters many otherwise well-intentioned, reformist, and altruistic schemes to transgress the rational confines of consciousness, leading them astray. But is that the only reason why doctrines are negative catalysts which misguide human progress? Before I answer this question, I clarify why the Article has not yet detailed the configuration of a doctrine, although I defined “doctrine” earlier. Hitherto, the Article had a rhetorical convenience, a methodological privilege of discoursing on the doctrinal character of common interest without having provided any coherent structure for doctrine. The reason why I did not work with a parametric inclusive idea of doctrine is that I wanted to procure a finer understanding of the elements of doctrine and the epistemological conditions in which they function. Any notions regarding doctrines also had to be distilled. Accordingly, the fallacies regarding doctrines have been accented, by way of critiquing the objective doctrinal mindset of social thinkers, whilst explaining the drastic physical and social transformations in our day.³⁰¹ By inferring “what ought to have been the concept of reality” and testing the objectivity which exemplifies doctrines against that inference, the misguided dialectic of doctrines was

²⁹⁸ “Forms and frames” should not be equated with the CLS jargon “form and substance”; the latter refers to a poststructuralist rhetoric and the subject matter of that rhetoric. When I criticize the method of governance for its sole focus on forms and frames, I stand against the neglect of the human reality that lies beneath those material forms and frames.

²⁹⁹ See generally and Cf Peter Goodrich, *The Critic’s Love of the Law: Intimate Observations on an Insular Jurisdiction*, 10 L. & CRITIQUE 343(1999) (sketching inter alia the counterproductive route of critical legal studies).

³⁰⁰ The image of international law as an arena of conflicting interests, however, on a different analytical perspective, is in CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2005). Inspired by the commodity exchange theory of Evgeny Pashukanis, Miéville postulates that in international disputes/relations the combatants are located in two putative *doctrinally*-neutral points from where they control the legal discourse.

³⁰¹ See *supra* Section II.B.2.b. It is true that I have not explicitly examined doctrine in the previous section (II.B.2.b.); instead I have examined “objectivity”, which is the quintessential quality of doctrine.

comprehended.³⁰² This argumentation would not have been possible and the analytical experience related to it would not have been instructive had I worked with a set idea of doctrine. At this time, having procured a finer understanding of the elements of doctrine, formulating the conceptual structure of doctrine is a realistic undertaking.

Now I turn to the question, “Why are doctrines negative catalysts which misguide human progress”? The finding regarding doctrine was that it bears self-interest (egoism), a feature that is commonly employed to engineer socio-political structures. This view evidently contrasts with the results of an analysis in which common interest was philosophically comprehended; i.e., common interest is a spiritual pursuit and engenders an altruistic state of mind.³⁰³ If common interest as it is dissimilarly manifested in doctrines and philosophy is juxtaposed, would it theoretically corroborate the fallacies associated with doctrine? In what follows I venture forward in that vein by weighing the deep structural properties of philosophy against that of doctrine and then relate the findings I would have with the concept of common interest. Whichever—philosophy or doctrine—turns out to have a logical potential to secure the common interests of humanity, that will stand as the reality regarding common interest. In that process, I will also answer the question *why doctrines mislead humanity from its reality*.

Henceforth, this Article cannot have the rhetorical convenience of inductive reasoning on doctrines used thus far. Therefore, I first theoretically situate doctrine.

The Concept of Doctrine. Doctrine in general is a normative structure that bears the structuralist properties of “antisubjectivism” and “antihumanism”.³⁰⁴ Doctrines crystallize when the linguistic quality of structuralist epistemology configures individual aspirations regarding the social world of a *given context and time* into a “holistic”³⁰⁵ structure and attributes to that structure a certain normative value. In addition to doctrines being normative structures and prescriptions, the structuralist content in doctrines turns them into objective tools for assessing social changes and evaluating social performance.³⁰⁶ Whilst being such tools of social utility, the validity of doctrines, however, remains determinable by an “immanent intelligibility”—a logical result of the internal coherence in the holistic nature of doctrines—as against reference to any “extraneous elements”³⁰⁷ (a doctrine’s validity is also often contested on normative grounds³⁰⁸). Immanent intelligibility is essentially objective in that it contributes to preventing the doctrines from being swayed by any subjective

³⁰² See *Id.*

³⁰³ For details, see *supra* Section II.A.

³⁰⁴ On the character of structures, see Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 132 (1984) (referring to the character of structuralist analyses).

³⁰⁵ Holism is what Piaget identifies as one of the essential properties of a structure. See JEAN PIAGET, *STRUCTURALISM* 5, 6-10 (1968).

³⁰⁶ This construal is made from a general reading of Joseph D. Sneed, *Structuralism and Scientific Realism*, 19 ERKENNTNIS 345 (1983).

³⁰⁷ This character of doctrine is drawn on Piaget’s reference to a “structure” and Weinrib’s “formalism”: structure is the foundational basis of doctrines and formalism its collective functional framework. See PIAGET, *supra* note 305 at 5. See generally Weinrib *supra* note 222. For details on “immanent intelligibility”, see DENNIS PATTERSON, *LAW AND TRUTH* 22 (1996).

³⁰⁸ Such contestation occurs when what is contested as doctrine is a rule or principle.

considerations. In that way doctrines typify scientism, far from any humanistic and moral approximations.³⁰⁹

Doctrinal reasoning has a logic ingrained in the epistemological pair of holism and coherence.³¹⁰ Minds engaged in doctrinal reasoning have a quest for truth, which they always aim to achieve in an intellectual frame of coherence; the later task is what Aulis Aarnio terms as “interpretation and systematization”.³¹¹ Minds derive an aesthetic beauty from such analytical actions.³¹² Perception and a feeling of beauty, however, vary among the minds engaged in doctrinal analyses. Yet, among all of them a state of *deep* coherence is the subject and cause of beauty.³¹³ To illustrate, if it is the “majestic harmony” of doctrines that ignites an aesthetic sensation in scholars, it is a “working beauty”, stemming from a rational identification and structured application of relevant doctrines, which illuminates the mind of a judge.³¹⁴ In both cases, an elite professional language and aesthetic discursivity distinguish doctrines from what is spoken and done in routine human dealings.³¹⁵ That elite discursivity is the crude quality of law, however, cast in a state of artificial salience by H.L.A. Hart as the unique linguistic nature of rules.³¹⁶ This alienness of the majority of ordinary people from any doctrine endows even the most simplistic application of doctrines with credibility, prompting naïve approval of the legal process by the masses.³¹⁷ All told, doctrines are impervious to the changing aspirations of the masses³¹⁸ and accordingly to the ethics and values fundamental to a dignified human living. Given their remoteness from humanism and ethical sterility doctrines are ill-suited to represent altruism.

However, legal professionals functioning in a doctrinal framework cast their glance outwards at the society when doctrines experience a normative turbulence, an

³⁰⁹ See Peczenik, *supra* note 28 at 128.

³¹⁰ See Andrei Marmor, *Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory*, 10 L. & PHIL. 383, 384 (1991). See also Peczenik, *supra* note 28 at 137, 138.

³¹¹ AULIS AARNIO, *THE RATIONAL AS REASONABLE: A TREATISE ON LEGAL JUSTIFICATION* 12 (1987).

³¹² The sense of beauty incited by an analytical coherence is related to Schlag's categorization, “grid aesthetics” of law. See Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1055-56 (2002).

³¹³ See K.N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 227-50 (1942).

³¹⁴ See generally and *Cf. id.*; see *id.* 228, 230. What prompted my choosing of the elements of beauty from Llewellyn's illuminating articulation, and specifically attributing those elements to scholarly and judicial minds, is a logical reading of Llewellyn in the light of my analytical objectives.

³¹⁵ See A. Beck, *Rule of Law and Legal Rules*, 82 MIND, NEW SERIES 104, 105 (1973). *Cf.* Richard Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314 (2002) (holds that doctrine-centered legal scholarship, than theoretically-oriented legal research, is of higher utility to legal professionals).

³¹⁶ This Hartian conception is as cited in HAMISH ROSS, *LEGAL THEORY TODAY: LAW AS A SOCIAL INSTITUTION* 58 (2001).

³¹⁷ See and *Cf.* David A. Strauss, *On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia's The Rule of Law as a Law of Rules*, 75 U. CHI. L. REV. 997, 1013 (2008) (argues there are certain ways by which “rules can help diffuse the sense of resentment that discretion might engender”. Such a utility for rules is in addition to the fact that they “can protect judges from popular disapproval”). *Id.* One scholarly suggestion to remedy this naïve approval of doctrines by the general public and ensure the possibility of a “public deliberation” is that judges not only provide speaking orders but also judiciously disclose the dialectical reasoning they applied in pronouncing that order. See generally Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987(2008). The fact that there are “weighty moral and political values” behind the expectation of “judicial sincerity” from judges provides scope for a foundational critique of doctrines and the psychological comfort associated with it. See *id.* at 1025. See also Tiller & Cross, *supra* note 94.

³¹⁸ As a remedy, Eberie and Grossfeld suggest that doctrines/law may be made value-rich by culturally illuminating it with the aid of socially-oriented forms of knowledge such as poetry. See generally, Edward J. Eberie & Bernhard Grossfeld, *Law and Poetry*, 11 ROGER WILLIAMS U. L. REV. 352 (2006).

internal churning, or a functional inertia. In a structural casualty as this, they fine-tune their beliefs and thought patterns to “social realities”.³¹⁹ Fine-tuning is still only a matter of structural and procedural adaptation of the dialectic and functioning of doctrines, respectively.³²⁰ Their *core* rationality,³²¹ which is that of ontological dualism and their objective predilections, defies any scope for a foundational revolution, and they perform deconstruction “in such a way as to leave their own normative and political commitments intact”.³²²

These subjective adjustments imply that determinacy of doctrines is a matter of rational judgment and indeterminacy a consequence of the loss of an intellectual dexterity. Even in extreme cases of doctrinal casualties, a dexterous legal mind can endure any social turbulence and sustain a doctrinal thought-frame.

What has been said thus far concerns doctrines as conventionally understood—as an ensemble of rationalities governing the contents and application of rules, principles and formal procedures. That structural idea of doctrines has a beauty and salience when conceived in an intellectual coherence; the absence of the same renders doctrines indeterminate. Departing from this structural form, there is a discursive form to doctrines. In that form doctrine is an ideological and ideational design or a discursive practice consequential to a subliminal loyalty towards and devout faith in one or another enterprise, the end result of which might be a non-altruistic mindset.³²³ In this view, any misguided discourse leading to non-altruism is also doctrine. Doctrines which fall under this broad comprehension and thereby qualify for inclusion in the second category might be innately humane and ethically constructive, in addition to being reformative, transformative, and foundational critiques.³²⁴ However, irrespective of the revolutionary zeal, critical course, and dialectical practice, followers of the discursive type of doctrines, like the followers of the structural type, err on the side of rationality by allowing their revolutionary spirit to be shaped by the materialistic consciousness embedded in their minds. Given that the “embedded rationality”³²⁵ remains unchanged and it catalyzes action, any urge for a revolution yields to

³¹⁹ See Peczenik, *supra* note 28 at 133.

³²⁰ *Id.* at 134.

³²¹ Core rationality is what I later on refer to as “embedded rationality”. See *infra* note 325.

³²² Pierre Schlag, *A Brief Survey of Deconstruction*, 27 *CARDOZO L. REV.* 741, 743 (2005). Schlag further illustrates the overhauling approach of the deconstructionist scholars as it is apparent from their texts: “To be sure, the nature of the citations changed—from U.S. Reports to Philosophical investigations—but the rhetoric (not to mention blue book symbols) remained much the same” (internal quotations omitted) (original parenthesis). *Id.*

³²³ The “distillation” of doctrines conducted thus far has conditioned this view regarding doctrines. See *supra* Section II.B. A

³²⁴ See and *Cf.* Timo Makkonen, *Between Anti-Essentialism and Anti-Everything: Is there Anything? On Critique, Cross-Disciplinarity and Culture*, in *NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI* 251, 253 (Jarna Petman & Jan Klabbers eds. 2003) (examines what is so critical in the claims of various sub-streams of CLS such as Feminism and Critical Race Theory).

³²⁵ The term “embedded rationality”, at the risk of not having conducted a rigorous analysis, may be defined as the logical and intellectual pattern of thinking developed over the years that gets embedded in one’s personality. Despite the many nuances of the term seen in scholarly literature, I prefer to have my way of looking at it. For instance, Megill has used it as a rationality inherent in the world. See ALLAN MEGILL, *KARL MARX: THE BURDEN OF REASON* 3 (2002). What I refer to as embedded rationality in the present context is the thought-frame, “materialistic dualism”.

“adaptive” and therapeutic techniques.³²⁶ Thus by being doctrine-like in terms of embedded rationality, discursive doctrines reinstall anti-humanism and all other vices of doctrines onto their conceptual surface.

Earlier in this section of the Article, for want of a theory of doctrine the discourse had to be suspended. With the delineation above, the idea of doctrine is theoretically situated. The delineation also sheds light on the reasons why doctrines misguide the advancement of humanity towards its ultimate goal. If that theoretical perspective—one heedless to humanism and human wants—is an accurate perception concerning doctrines, does common interest be secured by pursuing it? The analysis thus far reveals that scientific objectivism and the materialistic prudence of doctrines, even if they sustain socio-legal systems and processes, have certain side effects. These side effects feature normatively in the style and methods of the discursive type of doctrines and shape the behavioral attitudes of its adherents. The effects of such perverse incentives are writ large in the case of poststructuralist projects such as TWAIL and global governance, whose projects turned out to be counterproductive and self-defeating. To illustrate, that TWAIL borrows methods and analytical tools from rebelling groups such as subaltern studies, which confront the hierarchies deemed to be inlaid in social relations from positions of domination and perspectives of a class and cultural consciousness, is what causes TWAIL to have a cultural antagonism towards, to employ subaltern jargon, “the Other”.³²⁷ In the case of global governance, revolutionist sensibilities were apparent; however, the idea of a revolution repeated the proverbial process of uprooting the structures and dogmas underpinning those structures.³²⁸ The revolutionaries were not conscious of the physical and social significance of the era; they did not envisage a concept and design of a revolution appropriate to the times.³²⁹ Consequently, as with all revolutions, it became a revolution to achieve better material conditions, from which matter emerged as the victor over mind. Despite the promise to change the social and political world, when it

³²⁶ “Therapy” to legal minds is an impression popularized by Koskenniemi in the context of Allott’s call for a “revolution in mind”. Having been conscious of the insightfulness of Koskenniemi’s use of the term, however, I read revolution in mind as a foundational spiritual revolution and doctrinal reform as has a therapeutic effect on legal minds. See Martti Koskenniemi, *International Law as Therapy: Reading the Health of Nations*, 16 EUR. J. INT’L L. 329 (2005).

³²⁷ The spillover of the “subaltern devotion” of TWAIL is what this statement captures. For support, see *supra* notes 111-114 and the accompanying text thereof. I have also cast in this statement, the ideological tinges and epistemological position of subaltern thought. For a glimpse of the aforesaid aspects of subaltern studies, See D. Simeon, *Subaltern Studies: Cultural Context*, in INT’L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 15241 (Neil J. Smelser & Paul B. Baltes, eds. 2001).

³²⁸ Allott explains the logic of such a judgment by the modern revolutionaries:

The way in which we understand the past affects the future because it affects the way in which we understand the potentialities of the future, and hence the way in which we understand our moral responsibility in relation to the future.

See Philip Allott, *Globalization from Above: Actualizing the Idea through Law*, 26 REV. INT’L STUD. 61, 62 (2000).

³²⁹ See Unger, *supra* note 28 at 670-73. In addition, a resistance to alternative visions for governance frustrates any reform. Falk senses such a resistance to global governance: “[T]he global democracy alternative [which is the alternative Falk envisages] continues to be disregarded and even dismissed, by mainstream media and commentators as an irrelevant utopia that clouds the mind without possessing any prospect of realization”. See Richard Falk, *Towards Global Democracy: A Plea for Moral Globalization*, 26 AUSTRALIAN Y.B. INT’L L. 1, 3 (2007). However, Falk’s visions, though borders a transformation in the individual viewpoints about governance, do not fully correspond to a spiritual revolution.

comes down to it, improvised [democratic] systems and [political] processes of the doctrinal complex are all that global governance has brought with it.³³⁰

Misguidance of rationality occurred in the case of TWAIL and global governance by way of two different (almost contrasting) discursive modes, but did converge at one point; i.e., it was the practice of inappropriate methods which structured the rationality of TWAIL as ego, whereas, in the case of global governance, an ill-conceived rationality gave rise to counterproductive methods, and structured an egoistic dialectic. Given this self-defeating advance, the pursuit of common interest by way of the types of discursive thought and practice seen in TWAIL and global governance, leads its adherents astray, towards a dialectic of doctrines, and repel the rationality of its adherents from moving towards any possible common interest of humankind at large.

Even with such negativities, doctrinal discursivity, at its best, could reduce conflicting individual *values* to a least common denominator, aiming at a common interest of the community. Myers S. McDougal names this discursivity a “global public order” under which an intellectual “calculus” in an interactive manner melds human expectations into a value-system.³³¹ McDougal’s theory has everything required for securing common interest of the community, e.g., the individual at the heart of law and society,³³² faith in human faculties, ethical sentiments, shared aims, and aspirations for social solidarity.³³³ However, McDougal has deemed individuals to have an enlightened rationality whereby they innately remain tolerant to conflicting values and are altruistic.³³⁴ Sadly, his “individual” who has to interactively engender value harmony, in the absence of an enlightened intelligence,³³⁵ is a narcissistic being bound by the materialism of time and space.³³⁶

To conclude, doctrinal inquiries in pursuit of reality have been misleading³³⁷ or such inquiries provide a “drastically impoverished view of reality and of the avenues

³³⁰ The view that global governance has a misguided dialectic would become logical and persuasive when perceived through Allott’s conceptualization, the “dyad of the actual and the ideal”. In this dyad—a morally bound mind-frame—“ideal” is the reference for assessing the “actual”. See Allott, *supra* note 328 at 69-70.

³³¹ There is a plethora of research on McDougal’s value-oriented jurisprudence, which includes many spectrum views and continuums. Given that any attempt of notating those researches is not viable, see (for a succinct account) Myers S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS LEGAL PHILOSOPHY DOCTRINE AND THEORY* 103 (R. St. J. MacDonald & Douglas M. Johnston, eds. 1983).

I labeled the intellectual techniques of McDougal a “calculus” in order to highlight a complex process of value maximization and an element of unaesthetic materialism that I sense in that whole process. However, Wiessner and Willard caution that in terms of utility, McDougal’s intellectual technique is in no way a “Benthamian calculus” designed for hedonism. See Siegfried Wiessner & Andrew R. Willard, *Policy Oriented Jurisprudence*, 44 *GERMAN Y.B. INT’L L.* 96, 106 (2001).

³³² W. Michael Reisman, *Theory about Law: Jurisprudence for a Free Society*, 108 *YALE L. J.* 935, 938, 939 (1999).

³³³ These observations are drawn on the Lecture Video: W. Michael Reisman, “The View from the New Haven School of International Law”, available at http://untreaty.un.org/cod/avl/ls/Reisman_IL.html

³³⁴ Nevertheless, according to Reisman, McDougal’s idea of “individual” is not that of a person who is “deliriously libidinalized with greed”. Reisman, *supra* note 332 at 937. Yet, McDougal has not in theory guaranteed that individuals are inherently altruistic.

³³⁵ “Enlightened intelligence” or illuminated reason is the altruistic (intellectual) state of mind that comes to exist when ego is detached from the senses. See *supra* Section II.A.

³³⁶ Casting McDougal’s value-oriented jurisprudence, without providing a meticulous and rigorous analysis of it, as doctrines, I am aware, is presumptuous. However, considering the conceptual density and space limitations of this Article, I pledge to have an extensive analysis in this regard in my later researches.

³³⁷ See *supra* notes 304-336 and the accompanying text thereof.

by which it might be apprehended”.³³⁸ Various types of putative common interest which an inquirer encounters when engaged in doctrinal inquiry are in fact personal/group interests in disguise. Casting such personal interest in the role of common interest and building belief-systems on the strength of that interest engender only illusive realities. Irrespective of what ever qualifies as doctrinal, those are not—and adherence to them cannot secure—common interests.

The Beauty of Philosophy. Having materialism to burn up in the transcendental glow of reality, doctrines—the structural output of materialism—are cast into the shade by the splendour of philosophy. Philosophy is the practice of thought through which one imagines reality.³³⁹ More specifically, it is a discursivity through which one tries to discover that reality.³⁴⁰ At a linguistic level, it is an exotic dialect of transcendentalism.³⁴¹

If philosophy is all this, its art, thought, and practice constitute the route to reality, provided reality is the ultimate goal of every inquiry. It is supposedly incontrovertible that every knowledge-system—doctrinal or philosophical; every mode of inquiry—pragmatism or idealism; every art of living—communitarian or ascetic; and every cognitive method—empiricism or meditation focuses on a goal. That goal is ultimate. It is the reality, the highest good; humankind, irrespective of caste, creed, gender, race, religion, and intellectual orientation, has to be engaged in a collective pursuit of reality. This collective pursuit is the real common interest of humanity.³⁴²

Before we confirm that the thought and practice of philosophy lead us collectively to our reality, let us recall that a collectivity of personal interest is not common interest, nor an unenlightened humanity collectively marching towards an ultimate goal common interest.³⁴³ In the case of the latter, given the unenlightened state of the mind the process is highly prone to be misinformed by objective signs and symbols typical of materialistic thought. However, when the ultimate goal is sought by renouncing personal interest through various intellectual techniques or way of living, common interest comes to exist among humanity.³⁴⁴

Relinquishment of personal interest leads to a heuristic mindset, a non-selfish attitude.³⁴⁵ In that non-selfish state individuals find “utter unification of mind with nature, or of mind with God, or of mind with mind, or of mind with Spirit, or of soul

³³⁸ Harry Oldmeadow, *The Comparative Study of Eastern and Western Metaphysics: A Perennialist Perspective*, 46 SOPHIA 252, 258 (2007) (while providing an epistemological bargain for metaphysical methods of Eastern philosophy, criticizes the marginalization of metaphysics by reason-oriented inquiries).

³³⁹ See generally Pravas Jivan Chaudhury, *Vedanta as Transcendental Phenomenology*, 20 PHIL. & PHENOMENOLOGICAL RES. 252 (1959).

³⁴⁰ *Id.* This observation is similar to Heidegger’s idea of philosophy: “Philosophy is the correspondence to the Being of being”. See MARTIN HEIDEGGER, *WHAT IS PHILOSOPHY?* 75 (Jean T Wilde & William Kluback trans. 1956).

³⁴¹ See generally Oldmeadow, *supra* note 338.

³⁴² See *supra* Section II.A.

³⁴³ Apprising Allott’s vision of individuals captaining the world, Scobbie is apprehensive of an absolute takeover by subjective aspirations. See Ian Scobbie, *Slouching towards the Holy City: Some Weeds for Philip Allott*, 16 EUR. J. INT’L L. 299, 311, 312 (2005).

³⁴⁴ See *supra* Section II.A.

³⁴⁵ See Marzenna Jakubczak, *Towards Knowing Ourselves: Classical Yoga Perspective*, 10 J. HUMAN VALUES 111, 115 (2004).

with soul”.³⁴⁶ This amalgamation of mind and matter creates an altruistic state of mind free from ego.³⁴⁷ Wolfson situates this enlightened rationality in the epistemological framework of metaphysical philosophy:

[Philosophers] do indeed seek the totality of experiences or the totality of the universe or the totality of life and not [unlike sensual inquiries] its fragmentation and not its atomization and not its particularization.... [T]he [philosophers], through the use of the generalization, unite[] the subjective with the objective the sense of being with “wellbeing”, the sense of the I with the Thou, the sense of the self with the other.³⁴⁸

The art and thought of philosophy allow the mind to “observe and systematize the maximal characters of the Universe”.³⁴⁹ This ability to think in terms of the “whole” unites time-space and transcendence into a “oneness”, philosophical individuals thus have experience of the physical world as well as a perception of the transcendental reality of human beings; they have “cosmic humanism”³⁵⁰ and cosmic consciousness.³⁵¹ When this state of mind is shared by many individuals, an immaculate perennial common interest (common will) of humanity emerges.

Engagement with philosophy helps minds exceed the margins of time-space and push human rationality to the transcendental planes where our reality lies. In this common pursuit of humanity minds supremely reign the world, rendering, to borrow the title of Beryl Satter’s insightful work, “each mind a kingdom”.³⁵² In that world, to live as humans endows high values such as human dignity, altruism, compassion, and love with meaning.

A Summation of the Discourse Thus Far. A desire to articulate the idea that the concept of international law ought not to have been that of a doctrinal structure is what prompted this research. For this reason, the Article has illustrated the misguided dialectic of doctrines. In this regard, the Article has found that opposing rationalities, what I have chosen to call disparate rationalities, have manifested in the world, and coexist in certain international regimes. Such a coexistence of conflicting rationalities has been provided with normative and rational meanings, and thus validity, by the doctrinal vocabulary and by the interpretative and rationalist reasoning of international law. Being sceptical about this act of legitimizing and validating disparate rationalities,

³⁴⁶ Martin Wolfson, *What is Philosophy*, 55 J. PHIL. 322, 335 (1958) (drawing on Spinoza while exploring the metaphysical side of philosophy).

³⁴⁷ For example, Koons articulates that an amalgamation of mind and matter evokes a moral consciousness concurrent to the prevailing legal consciousness regarding the protection of earth and its species. See Judith E. Koons, *Earth Jurisprudence: The Moral Value of Nature*, 25 PACE ENVTL. L. REV. 263 (2008).

³⁴⁸ Wolfson, *supra* note 346 at 336.

³⁴⁹ Edward O. Sisson, *What is Philosophy? A Proposed Definition*, 57 PHIL. REV. 167, 169 (1948).

³⁵⁰ See Frank C. Doan, *An Outline of Cosmic Humanism*, 6 J. PHIL., PSYCHOL. & SCI. METHODS 57 (1919) (tracing the “phylogeny” of human consciousness, Doan conveys that human thought evolved out of a “mystic passion” as well as certain reflexive physical experience: there is a “marrow of divinity within the dry bones of scholasticism”. *Id.* at 62).

³⁵¹ For a strong argument that there exists a cosmic mind in humanity and thereby a cosmic consciousness, see Wm. Pepperell Montague, *The Human Soul and the Cosmic Mind*, 54 MIND. NEW SERIES 50 (1945).

³⁵² BERYL SATTER, *EACH MIND A KINGDOM: AMERICAN WOMEN, SEXUAL PURITY, AND THE NEW THOUGHT MOVEMENT, 1875-1920* (1999).

this Article has chosen a pair of disparate rationalities—common interest and market interest—that are apparent as regime-conflicts in international law for thorough analysis. The objective is to find out if at a deep theoretical level this disparate pairing of rationalities has coherence. Common interest was chosen first. The Article examined the philosophical composition of the idea of common interest, which revealed that common interest of humanity comes to exist when humanity pursues its ultimate reality by annihilating ego. Next, the Article tried to examine the idea of common interest as it is reflected in the various doctrines of international law. Doctrine was defined *inter alia* as every discourse which has traces of selfishness/egoism in it.

Discursive modes of two discourses in international law, i.e., TWAIL and global governance, purported to have engendered common interests, were examined as doctrines of international law. It revealed that both discourses, despite their humane purpose, have vestiges of self-interest, and hence are counterproductive. A subconscious adherence to certain ingrained cultural sentiments is what has put TWAIL in a counterproductive route. Where global governance is concerned, a pattern of thinking, set on an assurance that mind is organic and corporal, has flouted the fact that we are at the portals of a new cosmic cycle, and thus arrogantly denied any nonmaterialistic visions.

The findings regarding TWAIL and global governance helped develop the idea of doctrines. Doctrines are conceptualized as a structure and discursivity. These forms, taken either in isolation or combination, the rationalities of both engender egoism.

In the many analyses of common interest from the perspectives of philosophy and doctrine, doctrinal forms of common interests were found to have distanced human reality from humanity. Common interest exists only as it is in its philosophical form.

Having found the reality regarding common interest, the Article now has to turn to the second rationality that of market interest.

III. THE CONCEPT OF MARKET INTEREST

The market is a lifestyle and way of thinking more than simply a multifarious economic whole distributing human material needs and wants.³⁵³ Such a mindset and lifestyle is powered and sustained by one or another base ideology and its various forms; in the case of the market, it is capitalism and the many pre- and post-modern manifestations of it which sustain and continue its activities.³⁵⁴ The charm of capitalism (and the free markets it runs) is that it has a cultural and psychological embedding in the global consciousness, which ties and equates the market/capitalist way of living to elegance and dignity.³⁵⁵ In other words, in a modern state setting, a

³⁵³ Sociologist Neil Fligstein has propounded this idea through his many insightful contributions. See e.g. Neil Fligstein, *Market as Politics: A Political Cultural Approach to Market Institutions*, 61 AM. SOC. REV. 656 (1996) (offers a socio-economic perspective on markets by explaining internal market dynamics). For various sets of views on the social aspects of the market, see Neil Fligstein & Luke Dauter, *The Sociology of Markets*, 33 ANN. REV. SOC. 6.1 (2007); John Lie, *Sociology of Markets*, 23 ANN. REV. SOC. 341 (1997).

³⁵⁴ See generally Book Review: Teresa Walker, *Globalism: The New Market Ideology by Manfred Steger*, 2 LOGOS, 148 (2003). Ideologies such as colonialism, imperialism, and neoliberalism will qualify as the manifestations of capitalism.

³⁵⁵ See I.T. Berend, *Capitalism*, in INT'L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 1454, 1457 (Neil J. Smelser & Paul B. Baltes, eds. 2001).

dignified and elegant life is deemed to be one which has the qualities of a market such as competitiveness, self-interest, and wealth.³⁵⁶

Introducing the market thus, this Article persists on the narrative route it has charted and with the analytical structure it has built. Hence, in order to have the reality perceptions regarding market interest the idea of the market would be analyzed first as a capitalist/neo-capitalist/neoliberal ideology³⁵⁷ and then market interest as doctrine before they are juxtaposed.

A. The Market as Ideology

The market in any reckoning is not simply an ideology; it has more shades, sentiments and sensitivities, and repercussions than scholarly minds and media would have us believe.³⁵⁸ Yet, discourses on the market always span or, if not, at least culminate in, capitalist and related ideologies. In such discourses, if the discourses is a supporter of the market, ideology for the most is a “social representation” of reality and if the discourses is a critic, ideology is seen as a mask of certain social realities.³⁵⁹ Since I do not intend to seek a definition of ideology, neither do I, at this point, take a stance on any of these positions nor attempt to reconcile them. Yet, this Article has to view market through an ideological lens, for such a spectacle might be the reality regarding market interest. However, instead of delineating ideology at this point, I leave the concept of ideology to gel as I go forward with my examination of the design “market as a capitalist ideology”.³⁶⁰ My primary goal is to learn the nature and impact of ideology-based thinking on the human mind.

Capitalism classifies individuals living in a society and their actions into two economically-responsive unlike poles—the buyer/buying and the seller/selling—which always attract each other.³⁶¹ Prompted by such an “economic rationality”, they deal with each other in a dignified customary way under “minimum regulatory supervision”³⁶² imposed by the state.³⁶³ However, the relationship between the

³⁵⁶ *Id.*

³⁵⁷ I use the terms “capitalism”, “neo-capitalism”, and “neoliberalism” as incremental forms, as if in a progression, of the same ideology.

³⁵⁸ My choice to view the market as an ideology is no more than a learner’s desire to learn the logical underpinning and nature of a phenomenon which steers the world.

³⁵⁹ Both these positions are articulated, juxtaposed, and reconciled in Eve Chiapello, *Reconciling the Two Principal Meanings of the Notion of Ideology: The Example of the Concept of the ‘Spirit of Capitalism’*, 6 EUR. J. SOC. THEORY 155 (2003). See also Susan Marks, *Big Brother is Bleeping US: With the Message that Ideology Doesn’t Matter*, 12 EUR. J. INT’L L. 109 (2001) (international legal discourse should not hopelessly be limited by the strictures of ideology but should have a critical and radical approach to ideology).

³⁶⁰ Regardless of my refusal to take sides, my analysis might have fallen into any of the above said positions regarding ideology, for it is hardly possible to discuss capitalism without heeding to the social role of ideology.

³⁶¹ See generally, Allott *supra* note 3 at 340-375 (describes that humans conceive their reality through economy, and all social organizations facilitate in sustaining the economy and reinforce the economic values as the underpinning of human sociality).

³⁶² I use the phrase “minimum regularity supervision” in order to lay emphasis on the fact that capitalists have faith in the rule of law, although state/government—the imposer of regulations—has minimum role in the functioning of the market.

³⁶³ This whole statement is a Weberian position on law and economics. See Sally Ewing, *Justice and the Spirit of Capitalism: Max Weber’s Sociology of Law*, 21 L. & SOC’Y REV. 487, 490, 499 (1987) (referring to Max Weber, Ewing states that actors in a capitalist market society dutifully honors their agreements).

individuals belonging to each group is maintained by an “impersonal” and faceless behavior, rendering the interaction between the individuals to operate on the basis of certain concrete “units of value”—money³⁶⁴—free from any normativity or ethics.³⁶⁵ Max Weber described this market as follows:

The “free” market, that is, the market which is not bound by ethical norms, with its exploitation of constellations of interests and monopoly positions and its dickering, is an abomination to every system of fraternal ethics. In sharp contrast to all other groups which always presuppose some measure of personal fraternization or even blood kinship, the market is fundamentally alien to any type of fraternal relationship³⁶⁶.

However, from these anti-ethical idiosyncrasies of individuals there emerge a unique ethics of the markets³⁶⁷. The individuals adhering to such ethics and living deeply within this system have a “subliminal devotion”³⁶⁸ towards and faith in the order of things such that they think and act as if inhabitants of a non-anthropogenic planet.³⁶⁹ They pride in themselves and their own standards of decision making, resource allocation, risk sharing, and equity,³⁷⁰ a rationality which may be characterized as “market spirituality”.³⁷¹

The market-oriented individuals have to maximize their welfare, or they risk forgoing a better and dignified life. However, it has been a capitalist assumption that the welfare of the individuals enhances *in turn* the general welfare of the society.³⁷² Hence the ahumanistic capitalist individuals of the market seek to maximize the means of wealth by way of pro-market thoughts and deeds. In this process they act such that a

³⁶⁴ On the logic behind the idea that money is a unit of value, see generally the review S.P. Altmann, *Simmel's Philosophy of Money*, 9 AM. J. SOC. 46 (2003). Specifically on the role of money in individual and social relationships, see *id.* at 50.

³⁶⁵ See Weber on the philosophy of the market in MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 636 (Guether Roth & Claus Wittich, eds. 1978).

³⁶⁶ *Id.* at 637.

³⁶⁷ *Id.* at 636. See generally Edward J. Romar, *Noble Markets: The Noble/Slave Ethic in Hayek's Free Market Capitalism*, 85 J. BUS. ETHICS 57 (2009). See also “This Cannot Be How the World Was Meant to Be”, *supra* note 291 at 259 (Allott criticizes that all the “horrors” of human societies are “within the good life of democracy capitalism”).

³⁶⁸ This subliminal loyalty of market individuals borders, if not squarely hits, the idea of doctrine defined and elaborated earlier in this article: doctrine is “a subconscious psychological loyalty to certain sentiments embedded in the agent’s mind and a collective observance of the ideals”. See *supra* note 28 and the accompanying text thereof. Also, see *supra* Section II.C. (The Concept of Doctrine).

³⁶⁹ See John Renesch, *Humanizing Capitalism: Vision of Hope; Challenge for Transcendence*, 14 J. HUMAN VALUES, 1, 5 (2008) (capitalism “is reducing every living person in its path to a thing. This is dehumanizing”).

³⁷⁰ For a snapshot of the so called “market faith”, see Bernard E. Harcourt, *Neoliberal Penalty: The Birth of Natural Order, The Illusion of Free Markets*, 12-17 JOHN M. OLIN LAW & ECONOMICS WORKING PAPER No.433, available at <https://www.law.uchicago.edu/files/LE433.pdf>

³⁷¹ McMurtry’s idea—“market is an absolutist religion” of which an “invisible hand” is the “omnipresent” Divinity—brightens up the concept of market spirituality. See John McMurtry, *The Contradictions of Free Market Doctrine: Is There a Solution*, 16 J. BUS. ETHICS 645, 657 (1997) (concerned that freedom in the market is subjectively determined).

³⁷² Berend, *supra* note 355 at 1456. This view constitutes one of the most contested, criticized, and deconstructed notion in economics, the “invisible hand”, conceptualized by Adam Smith.

prospective buyer finds them sellable commodities,³⁷³ exemplifying the mindset which Marx described as “commodity fetishism”.³⁷⁴ The minds of the creative individuals among them are so fine-tuned to the demands of the market that they create pieces of art/thought which appeal to moneyed buyers in the market.³⁷⁵ This subjectivity that is forced on individuals often restricts their level of creative ambitions, bringing the immanent *high* intellectual potential of the individuals down to the level of relatively modest market standards. Their complaisance to market demands, however, turns them into practical and sociable individuals; at the same time they remain unreflective and naïve with regard to the putative natural order of things.³⁷⁶ Spencer J. Pack construes the Adam Smith’s views on the negative effects that this naiveté of the capitalists has: “The modern capitalist ... has the potential, and perhaps the natural inclination, to be one of the scariest, nastiest characters ever to walk the face of the earth”.³⁷⁷

Having such a narrow and minimal mindset, market individuals fall prey to the fleeting effervescence of instrumentalism. They become “planners”, “projectors”, modelers, and specialists and build an objectivity for the functioning of the market and society,³⁷⁸ these positions serve their subjective aspirations.³⁷⁹ In this process, they allure novices craving wealth and a glamorous lifestyle to the grip of the market, erase any ethical vision the novices may cherish,³⁸⁰ and engage them in an “instrumental pursuit” to enrich the market society and spreading the market ethics.³⁸¹

When capitalism came of age in modernity,³⁸² it acquired a new pace and momentum.³⁸³ Researches recognized this neo-capitalism as multi-layered—economic, institutional, and ideological—and designed to create conceptual spaces for mediating diversities in the world and thus develop capitalism as the life-support system of

³⁷³ McMurtry, *supra* note 370 at 646.

³⁷⁴ See Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 968-69 (1985). Articulating the position of Marx, Kennedy writes: there is a tendency among “people under capitalism to treat other people as things, and even to understand themselves as thing-like”. However, commodity fetishism is “one of the mind-fucks of capitalism”. *Id.* at 969.

³⁷⁵ *Id.*

³⁷⁶ For an account on the false perception of reality regarding modern societies, including market societies, see Philip Allott, *Five Steps to a New World Order*, 42 VAL. U. L. REV. 99, 112-16 (2007).

³⁷⁷ SPENCER J. PACK, CAPITALISM AS A MORAL SYSTEM: ADAM SMITH’S CRITIQUE OF THE FREE MARKET ECONOMY 147 (1991). Pack further states that the capitalist demons—insulated against any human values and swathed in “material greed”—were responsible for the bloodshed and cruelty the world has witnessed in the twentieth century. *Id.* For a background to the raw idea of capitalism envisaged by Smith, see G.R. Bassiry & Marc Jones, *Adam Smith and the Ethics of Contemporary Capitalism*, 12 J. BUS. ETHICS 621 (1993).

³⁷⁸ As a background to ascertain the role of specialists in maintaining the market and society, see generally David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5 (2007) (“we remain subjects of an invisible hand—not that of the market, but of expertise”. *Id.* at 28).

³⁷⁹ See PACK, *supra* note 377 at 148-51.

³⁸⁰ This erasing is a forced action performed on the novices either by way of challenging the ethics they hold dear or by depriving access to the functional architectures and routine activities of the modern capitalist society.

³⁸¹ In this pursuit, “thinking” is the process of finding active solutions for the problems which a market confronts. See Wendell T. Bush, *The Background of Instrumentalism*, 20 J. PHIL. 701, 702 (1923). This pattern of thinking is what shapes novices into future planners and specialists in the market.

³⁸² See Wayne Hope, *Conflicting Temporalities: State, Nation, Economy, and Democracy under Global Capitalism*, 18 TIME & SOC’Y 62, 65 (2009). For support, see Michael Blim, *Capitalisms in Late Modernity*, 29 ANN. REV. ANTHROPOLOGY 25, 27 (2000).

³⁸³ See generally *id.* (the speed of modern capitalism has created temporal discrepancies in the process of globalization).

humanity.³⁸⁴ The new capitalist dialectic came to be known as “neoliberalism”,³⁸⁵ a fairly sophisticated ideology by which the old capitalist idea of wealth maximization by capital accumulation was institutionalized; however, the state continued its “active passivism” in regulating the markets.³⁸⁶

The most important output of this new capitalism is that it singularized the image of law; in neoliberalism law has taken the form of rules and standards, through which it guarantees that capitalist ethics are esteemed in the market;³⁸⁷ e.g., the many neoliberal rule-architectures curtail trade-impeding measures—defection, unfair competition, erecting blockades to capital flow, and other protectionist measures—while ensuring that prices are regulated, challengers are controlled, and the market is stable. The other features and forms that rule application assumes are also to uphold the market ethics. That is to say, law, in the form of rules and standards, regardless of the area in which it is practiced, be it human rights or international conflict, has an economic rationality and purpose driving it.³⁸⁸ Any other forms of law, for instance, “law as ethics” and “law as morality” are deemed to be inferior thought.³⁸⁹ In the form of rules and standards, law guarantees a fairness allowing wealth maximization to be pursued unconstrained in the capitalist process and leads the market/society to a win-lose situation.³⁹⁰ Law in a capitalist setting thus contributes to creating winners and losers.

If the above-narrated aspects of capitalism provided meaning to modern human life and thought, then it would be appropriate to construe that we are all tangible “physical particles”³⁹¹ set to perform objectively in a time-space framework.³⁹² Within that framework there is a social system that has been accumulating capital/wealth and

³⁸⁴ See Blim, *supra* note 381 at 27-31. I have been informed of the hypothetical spaces for negotiating diversity by EMMANUEL MELISSARIS, *THE UBIQUITOUS LAW: LEGAL THEORY AND THE SPACE FOR LEGAL PLURALISM* (2009).

³⁸⁵ Harvey, revealing the synonymy between neoliberalism and capitalism, defines neoliberalism as “a theory of political economic practices proposing that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, unencumbered markets, and free trade”. David Harvey, *Neoliberalism as Creative Destruction*, 620 *ANNALS AM. ACAD. POL. & SOC. SCI.* 21, 21 (2007).

³⁸⁶ Martin H. Wolfson, *Neoliberalism and the Social Structure of Accumulation*, 35 *REV. RADICAL POL. ECON.* 255, 260 (2003). See also Harvey, *supra* note 387 at 28 (neoliberalism is a “theoretical template for the reorganization of international capitalism”).

³⁸⁷ See ZENON BANKOWSKI, *LIVING LAWFULLY: LOVE IN LAW AND LAW IN LOVE* 79-97 (2001) (explains how capitalism has come to be deified within the contested domain of legal theory).

³⁸⁸ See Chimni, *supra* note 142 at 9-14.

³⁸⁹ The ascendancy of rules over other forms of law marked the post-ontological victory of legal formalism and objectivity.

³⁹⁰ This view borders the philosophy of rule as it is formulated in the concept of sport. According to that philosophy rules have the singular utility to guarantee fairness in games such that those who ought to have won win and those who ought to have lost lose. This idea is spurred by a broad reading of GRAHAM MCFEE, *SPORT, RULES, AND VALUES: PHILOSOPHICAL INVESTIGATIONS INTO THE NATURE OF SPORT* (2004).

³⁹¹ The metaphor “physical particles” (as opposed to “charged particles” in quantum mechanics)—to refer to market individuals—is employed in order to highlight the insensitivity of such individuals towards human sentiments.

³⁹² Noel Castree, *The Spatio-temporality of Capitalism*, 18 *TIME & SOC’Y* 26, 35 (2009) (drawing on Harvey). For the idea that capitalist individuals are akin to physical particles, see Scott Lash, *Capitalism and Metaphysics*, 24 *THEORY, CULTURE, & SOC’Y* 1, 1-3 (2007).

a politico-legal system facilitating such accumulation.³⁹³ Laid within this social system are incredible types of networks, through which individuals interact and thereby constitute identities on the basis of the *choices* offered by capitalism.³⁹⁴ This systemic triad—time-space bound individuals, the social system in which they live, and interactions among them—when functions in concert spreads the market mindset and lifestyle across the world.

This being the idea of capitalism, what does it mean to think ideologically? If we receive the type of life we live as real, and if we perceive the textual descriptions and “social symbols”³⁹⁵ regarding life in our day as the true theory of our society and life, it may be said that we think ideologically. Then again, if we are agnostic about what we have been made to believe as our social reality and if that agnosticism serves a heuristic function, thus prompting an inquiry into the true human reality, we think philosophically; i.e. we perform the art of envisaging reality.³⁹⁶ This delineation of ideology integrates the two prevailing views regarding ideology into one image, referred to earlier in this section of the Article: 1) ideology is a social depiction of reality, and 2) ideology is a mask of reality.³⁹⁷ It becomes a social representation of reality when it embeds in the minds of individuals a feeling that their lives have to be lived according to the market mechanics of buying and selling, competition, and wealth maximization.³⁹⁸ For market individuals what capitalism tells them thus becomes their reality. However, Silvia T. Maurer Lane described this quality of ideology with a touch of irony, meaning that when ideology represents something as a social reality, it is masking reality.

Ideology has the objective, at least in capitalist societies, of maintaining individualism and introducing as natural concepts the thought that society is built out of necessary and universal relations of authority and inferiority, of domination and submission, and through the establishment, a ‘natural’, of the competition of people against each other.³⁹⁹

Ideology thus has the potential to cast what ought to be deemed vices as virtues and thus misguide normativity and human thought, inducing it to take any preferred

³⁹³ *Id.* at 40. Drawing on Enlightenment discourse, Koskeniemi criticizes the development of the “law of the nations” for having been a cushion for holding the markets. See Martti Koskeniemi, *The Advantage of Treaties: International Law in the Enlightenment*, 13 EDINBURGH L. REV. 27 (2009).

³⁹⁴ See Vincent Miller, *New Media, Net Working and Phatic Culture*, 14 CONVERGENCE 387, 388 (2008) (reiterates that constituting sociality is a facet of modernity, while highlighting that the sociality which is being constituted has only a form, not substance).

³⁹⁵ I understand “social symbols” as empirically observable aspects of social life. But, for a description emphasizing the niceties of the term/concept and its role in constituting social reality, see GEORGES GURVITCH, *SOCIOLOGY OF LAW* 34-36 (1947).

³⁹⁶ See *supra* Section II.C (*The Beauty of Philosophy*).

³⁹⁷ See *supra* note 357 and the accompanying text thereof.

³⁹⁸ For a discussion in support of this assertion, see Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 372-75 (1984) (“ideology disguises one’s motivations from oneself and thereby permits action that one might otherwise eschew as against one’s own true interests or beliefs about the world”).

³⁹⁹ Silvia T. Maurer Lane, *Ideology and Consciousness*, 9 THEORY & PSYCHOL. 367, 372 (1999).

course.⁴⁰⁰ To conclude this brief delineation of ideology, ideology positions human against human, urges us to vie with each other,⁴⁰¹ and anesthetizes our “self” that the self for ever lies dormant in, to borrow Lord Byron’s simile for a material human, “a sad jar of atoms”.⁴⁰²

B. Market Interest as Doctrine

From the time when human thinking conceived it epistemologically, the “market rationality” has had an *eclipsing effect*⁴⁰³ over every design of thought that had a “schematic interaction”⁴⁰⁴ with it. The outcome of such interaction is an inclusive invasion by the market rationality and a subsequent fine-tuning of the dialectic of any confronting thought structure, whatever it might be. The interaction law had with market rationality impacted law so much so that law grew up to be instrumental in ingraining market ethics in the world.⁴⁰⁵ Market-oriented thinking has built up around law two approaches to make judgments about it: the first is a view of law as a regulatory and normative project sustaining human institutions and society, and the second, there is a discursivity to predict, assess, and modify the performance of law in its role in regulating human/societal interactions.⁴⁰⁶ This rationality of law—epistemologically and functionally celebrated as “law and economics” or “economic analysis of law” (hereinafter “L&E”)—represents the contemporary design of legal thought, particularly in capitalist neoliberal societies.

In as much as L&E seems to steer the structural progress of law (international law in the context of this Article) and complements the market-oriented social order in our day, the collective rationality of this stream of legal thought is the prime candidate to have its doctrinal character assayed and confirmed. However, the rather hasty choice of the theme and organization of the discourse may seem simplistic for some readers if I do not submit plausible reasons and explanations for making such choice. That explanation is below.

First, at this stage of the Article there is nothing like the kind of haziness regarding the concept of doctrine that this Article had when it commenced its discourse on common interest as doctrine.⁴⁰⁷ The vagueness at that stage prompted me to make a couple of assumptions⁴⁰⁸ about doctrines and I let those assumptions turn

⁴⁰⁰ *Id.* (“Ideology in hiding those [vices], fragments our social representations and, consequently, our consciousness”).

⁴⁰¹ This oppositional mentality is not unique to capitalism but it is an innate property of ideology; lining up humans against humans on other grounds as well, be it class, gender, race, or geography.

⁴⁰² GEORGE GORDON BYRON, *THE WORKS OF LORD BYRON: LETTERS AND JOURNALS* 457 (2005).

⁴⁰³ This sway market thinking has on contemporary socio-economic systems and thought is concisely provided in Henry A. Giroux, *Neoliberalism and the Demise of Democracy: Resurrecting Hope in Dark Times*, *DISSIDENT VOICE*, 7 August 2004.

⁴⁰⁴ My idea of “schematic interaction” is that of a conceptual dialogue between two rationalities, which has a probability to generate an orderly thought pattern that may have substantial social-structural significance.

⁴⁰⁵ At the time of law’s encounter with market, law was more or less spotless, cleansed from the grime of natural law by the intellectuals sprouted in the fire of scientific enlightenment. The prospects and utility they found in the rule-form of law offered by the market prompted them to theorize law so as to render it an instrumentality of market. See Kennedy, *supra* note 374 at 939-958.

⁴⁰⁶ See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 24-26 (2007).

⁴⁰⁷ See introductory account to Section II.B.

⁴⁰⁸ See *id.*

into verified conceptions as the discourse proceeded through a few schools of thought which I deemed as doctrinal in effect, if not in character.⁴⁰⁹ The insight gained from that analysis, when examined in light of the prevailing scholarly views on doctrines, helped conceptualize doctrine.⁴¹⁰ The idea of doctrine arrived at is that of a rationality motivated by egoism.⁴¹¹ Given that as L&E makes it possible for the capitalist market ideology to enshrine human society into its order of wealth maximization, the probability of L&E being egoistic, and thereby doctrinal in character, is high. If this is in fact the case will be seen in the course of the analysis.

Second, insightful readers might take issue with my reliance on the idea of common interest for distilling any notions regarding doctrine and question the logic of the delineation of doctrine I have provided. They might ask: “is *common interest* so imperative in conceptualizing doctrine that the qualities of doctrine have to be extracted from it”? “How can one make generalizations about doctrine on the basis of analyses centered on common interest”? “Why should the findings of such analyses hold relevance for examining the doctrinal nature of market interest”? To respond to these questions, I provide the following deductive logic: My concern throughout this Article has been over the disparity in the idea of doctrine and human reality. Human reality and common interest are correlated in such a way that a common quest (philosophy) by humanity for its reality is the true common interest of humanity.⁴¹² That being the case, any elements which misguide human progress in its pursuit of reality have to be alienated; doctrines were found to have a dialectic and rationality which mislead the human quest for reality and hence had to be alienated. What was thus alienated is what forms the basic constituents of doctrines. The concept of doctrine thus extracted embodies the true character and meaning of doctrine, which can be used for any analyses.

Having thus clarified the genuineness of the idea of doctrine arrived at in this Article, I now turn to contemplate the doctrinal character of L&E.

1. Economic Analysis of International Law

Prior to any analysis, I submit a short note on the type of analysis I intend to carry out in this section. Hindsight tells us that L&E had a propensity to grow into “methods of applications”⁴¹³ in the many branches of law more so than into a stream of thought laying down standards of social life.⁴¹⁴ Given the inability to review each such application of L&E, I primarily rely on the methods of application in international law. I also make use of the generalizable elements and foundational

⁴⁰⁹ See *supra* Section II.B.

⁴¹⁰ See *supra* Section II.C. (The Concept of Doctrine)

⁴¹¹ See *id.*

⁴¹² See *supra* Section II.A.

⁴¹³ For various illustrations on the application of Law and Economics (L&E), see generally A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2nd Edition, 1989). For support, see Bingyuan Hsiung, *The Commonality Between Economics and Law*, 18 EUR. J. L. & ECON. 33 (2004) (argues that it is a methodological gap in law that prompted economics to bond with law).

⁴¹⁴ L&E laying down standards of social life is a phenomenon different from L&E guiding the normative course of law. When L&E starts to guide the normative course of law, the process would lay down not only norms of social life but also many methods of application in law. In other words, social norms are laid when L&E conducts the normative progress of law.

claims of L&E. In the first part of this section, I track the trajectory of economic analyses of international law. “Tracking” is done by way of a concise review and evaluation of the relevant literature (mostly in chronological order) because economic analysis in international law is only in the process becoming an epistemology of which no homogenous form is apparent yet.⁴¹⁵ In addition, its followers contribute to its growth by formulating various individual models explaining international cooperation and behavior.⁴¹⁶ They generally introduce each model through a law review article; the ideas expressed therein are synthesized and refined afterward to produce advanced models conclusively, [more often than not] drawing a design or explaining a given aspect of international law.⁴¹⁷ The models are constitutively of such import for the anticipated L&E architecture of international law that nothing less than a review can facilitate the conceptual tracking.⁴¹⁸ In the second part, I critically respond to the economics analysis of international law and show that such analyses are in the process of creating a style of thought which can uphold the market mindset. This style is being created by providing new explanations, meaning, and contextuality to the concepts of traditional international law, which is notwithstanding L&E’s claims of being unorthodox in approach. In sum, I show that L&E, in particular, economic analysis of international law, promotes egoism; it is doctrinal in effect.

However, inviting and enduring criticism is a functional property of L&E. The magnificence and explanatory salience of L&E is such that criticisms are no more than the many meteors hitting a materially dense, gigantic planet. As is the case of meteors, criticisms hardly impinge on L&E; often they are tragically blasted to ashes. Bearing in mind this condition, I have structured my response such that L&E is analyzed as falling outside the “ontological ought” I have conceptualized earlier. That is, rather than conducting a conceptual raid on L&E, I focus on locating it within the series of mistakes committed by humanity in abstracting the world. In that way, I attempt to push L&E off its rails. This is the only pertinent course, for I sense the futility in internally invading the pragmatism, i.e., the elaborately expounded human behavioral aspects, of L&E, which adamantly and aggressively asserts that its beliefs are the “is” as well as “ought” of human thought.⁴¹⁹

⁴¹⁵ However, for a review of various economic analyses which are being employed in international law research, see Alan O. Sykes, *The Economics of Public International Law*, JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 126 (2D SERIES), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=564383

⁴¹⁶ This observation does not preclude the fact that L&E has common assumptions and objectives.

⁴¹⁷ See e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *LIMITS OF INTERNATIONAL LAW* (2005); JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009).

⁴¹⁸ I do not claim to have covered all the existing models. However, it is my sincere belief that the models chosen for review are such that the rationale and purpose of an economic architecture in international law are sufficiently clear for the readers.

⁴¹⁹ Literature is resplendent with analyses questioning the human behavioral patterns set by L&E, see, e.g., Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005 (2000) (illustrates that cost-benefit analysis often falls short of addressing the challenges of “morality element” in “choosing”); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977) (articulates that rational choice theory is unheeding to sentiments such as sympathy and commitment); Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431 (1996) (provide a survey of literature on theories that skeptically view inter alia the commensurability between human and market values).

L&E came to exist in international law following certain normative and methodological misgivings regarding the commensurability between economics and international law: economics has methods foreign to the state-centric, political, normative rationality of international law.⁴²⁰ In the beginning, mainstream international law—an altered prototype of enlightenment cosmopolitanism—resisted the libertarian individualism of L&E with its modern-day communitarian constitutionalism.⁴²¹ Hence, L&E developed only at the periphery of international law, and only in the wake of an interdisciplinary surge typical of globalization at that time.⁴²² Yet, in certain high capitalist societies such as the United States, L&E has turned out to be a dominant paradigm of thought in international law.⁴²³ Such receptivity is primarily because of the synonymy between the methods and processes of L&E and the way capitalist life has to be lived.⁴²⁴

Until the influx of L&E, international law had the elements of economics primarily in terms of the many studies on interstate monetary and fiscal policies and trade relations.⁴²⁵ Later on trade and economic concerns were put in order and broadened on a normative basis under the rubric “international economic law”.⁴²⁶ However, nearly all such approaches were taken and studies conducted within the margins of the conformist styles of doctrinal inquiry characteristic to the mainstream international law. The latter-day shift of focus to the global political economy and the institutions sustaining it, although it added a new vitality to international economic law, has not eliminated the conventionality in reasoning; the shift simply does not bring economics to the heart of international law.⁴²⁷ Towards the end of the last

⁴²⁰ See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 1-12 (1999) (within the epistemological frame of L&E, the authors examine the extent of the compatibility of L&E with international law). By way of an introduction to the methodologies of economics, see D.M. Hausman, *Economics, Philosophy of*, in INT’L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 4159 (Neil J. Smelser & Paul B. Baltes, eds. 2001).

⁴²¹ For a glimpse of the theoretical underpinning of mainstream/European tradition in international law (on top of a critique of “universality”), see Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, 6 EUR. J. INT’L L. 113 (2005).

⁴²² Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT’L L. & POL. 567, 579 (2000).

⁴²³ Why L&E rushed in the United States but feared to tread in Europe? See Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Transition: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT’L L. 602 (2006) (the class-conscious, communitarian, and product-of-revolution societies of Europe are opaque to libertarian individualism which L&E holds as its dogma). For a more detailed exposition, see Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in the Europe and the United States*, 59 ALA. L. REV. 1555 (2008) (analyzing L&E as the most impactful among the many legal innovations typical to the American academia).

In this regard, Waller provides a theoretical explanation for the acceptance and non-acceptance of L&E in various areas. Using the metaphor of viral infection, he illustrates that L&E virus is highly immune in those areas which are either occupied by a robust ideology or where institutional organization is highly decentralized. See Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367 (2009).

⁴²⁴ See generally Garoupa & Ulen, *supra* note 423.

⁴²⁵ For an account of the fiscal and monetary cooperation that existed in the post war period and how they fit into the frame of international law, see generally Richard N. Gardner, *The Bretton Woods-GATT System After Sixty Five Years: A Balance Sheet of Success and Failure*, 47 COLUM. J. TRANSNAT’L L. 31 (2008); Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT’L L. 769 (2006).

⁴²⁶ See generally Vagts, *supra* note 425.

⁴²⁷ For a persuasive account in support of this assertion, see David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 671 (1995) (casts John Jackson as the representative-designer of modern political economy and characterizes his work as a “cosmopolitan idealism” radiating a “pragmatic” reformism).

millennium, a broad-based consciousness came to exist, which inter alia prompted bodies of knowledge to intersect, generating sub-knowledge-mixes and discourses.⁴²⁸ Yielding to this reformist pull, international economic law, on top of its much habituated norm-laying practice in the political economy, set a methodological program in which it absorbed the fundamentals of economics to assess the utility and efficiency of the many rules sustaining the global trading system.⁴²⁹ This action marked the launch of L&E in international law.

Although sparked in the analyses on political economy, L&E soon after focused on situating its beliefs and judgments within the dialectic of international law: How could rational choice theory be assimilated into international law? The cause of such concern was the complexity associated with ascertaining rational choice in a group context;⁴³⁰ any ascertaining of rational choice required a given behavior by a “unitary actor”, and the international system simply was not conceived of as a unitary actor but as a collectivity of many actors.⁴³¹ The solution that finally came up was to theoretically deconstruct the state and re-imagine it as a composite of diverse actors engaged in interactions and mediating diversities⁴³². This mediation is a “political process”⁴³³, one in which the preferences of each individual are balanced with the aggregate interest of the community.⁴³⁴ This reasoning, among other ones, collapsed as mere assumption and failed to offer a cogent account on what rational choice means in a collective setting. Rational choice was thus assimilated to international law on shaky grounds, yet with promises for the future.⁴³⁵ Alexander Thompson provides the following:

As rational choice makes inroads into the study of IL [international law], treating the state as a unitary actor will lead to productive theorizing but should eventually be replaced by a more nuanced vision of precisely who creates and is influenced by international legal institutions and how these actors interact.⁴³⁶

Today, scholars as Kenneth W. Abbott believe that rational choice in the international context has matured: when classical liberalism was sculpted into a method to study how grassroots clusters have been influencing international “preferences and policies”,⁴³⁷ the many units, e.g., non-state actors, constituting the “international

⁴²⁸ See Joel R. Paul, *The New Movements in International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 607, 609 (1995).

⁴²⁹ *Id.* at 613 (casting the new methodological program as “value-neutral”).

⁴³⁰ See generally Paul B. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 745 (1995).

⁴³¹ See Alexander Thompson, *Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. S285, S291, S292 (2002).

⁴³² See *id.* at S291-S294.

⁴³³ *Id.* at S292 (drawing on Abbott and Snidal). See Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legislation in the Fight against Corruption*, 31 J. LEGAL STUD. S141, S154, S155 (2002).

⁴³⁴ See *supra* Section II.B.2.a.

⁴³⁵ See generally, Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEGAL STUD. S307 (2002).

⁴³⁶ Thompson, *supra* note 431 at S294.

⁴³⁷ Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 12 (2008) *Et seq.*

whole” became obvious. Despite Abbott’s creditable optimism—“Liberalism opens the ‘black box’ of the state, exposing to analysis its internal social and governmental structures and politics”⁴³⁸—rational choice, in order to be applied in international law, does not have unitary actors/individuals as economics has. It would be reassuring for these scholars that they can find support from philosophical groups which “detach” rational choice from individuals’ psychology and structure it on the attitudes and actions of social groups.⁴³⁹ However, the bad news is that not only are the claims of these groups contested within philosophy,⁴⁴⁰ but they deem what they criticize to be an auxiliary tool for their normative approach to rational choice.⁴⁴¹

From the foregoing it is apparent that for international law the type of an ideal “crystal ball” for gazing at the performance of actors, as economics owns, remains yet to be possessed. Yet, for the sake of tractability the assumption of a unitary actor “combines an element of methodological convenience with some beliefs that [these altogether are] empirically accurate portrayal of state behavior”.⁴⁴² On the whole, the scenario is déjà vu of, what Thomas Franck would call “the ontological days of international law”,⁴⁴³ when scholars were anxious to establish that a state has a will and personality of its own.⁴⁴⁴

The first application of L&E in international law was to observe the dynamics of international cooperation, for instance, the many factors prompting actors to cooperate and honor the terms of the cooperation and the means by which the parties in cooperation settle their conflicts.⁴⁴⁵ Such an analysis is based on the presumption that as in the case of market contracts there are “transaction costs”⁴⁴⁶ in international

⁴³⁸ *Id.*

⁴³⁹ This group of philosophers criticizes the focus on human psychology for reckoning rational choice and considers rational choice as a normative theory which must be judged in a social context. See generally Debra Satz & John Frejohn, *Rational Choice and Social Theory*, 91 J. PHIL. 71 (1994).

⁴⁴⁰ See Daniel M. Hausman, *Rational Choice and Social Theory: A Comment*, 92 J. PHIL. 96 (1994) (“rational choice explanations [are] psychological explanations”. *Id.* at 96).

⁴⁴¹ Concluding their critique of the psychological approach to rational choice Satz and Frejohn write: “At the same time, we recognize that, for many purposes, an internalist, agent-centered perspective on action is crucial. It makes a great deal of difference for normative concerns”. Satz & Frejohn, *supra* note 439 at 87.

⁴⁴² Thompson, *supra* note 431 at s291.

⁴⁴³ This expression is instructive if one heeds to Franck’s description of international law being in a post-ontological era ever since world moved beyond the Cold War: “Like any maturing system, international law entered its post-ontological era”. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995).

⁴⁴⁴ See e.g., Hans Aufricht, *Personality in International Law*, 37 AM. POL. SCI. REV. 217 (1943).

⁴⁴⁵ See e.g., Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT’L L. 384 (1996) (conveys that an economic approach to international cooperation can fetch pareto-optimal outcomes and productively use international law at the same time by not leaving out many issues that international law has to address).

⁴⁴⁶ For a seminal work on transaction costs in the context of law, see Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). Although Coase has not used the expression “transaction cost”, he qualifies the concept:

In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out on a world in which the pricing system worked without cost.

Id. at 15; But see, Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1161 (1989) (argues that the credibility of “market-based” approach is marred by a “black hole” that exists in the theory and practice

dealings and that such costs may impact the practice of international law.⁴⁴⁷ William J. Aceves elucidates that endogenous governance structures, such as state practice, and exogenous structures, such as internally organized formal procedures and institutions, help overcome the transaction costs in international dealings.⁴⁴⁸

However, as analyses combined the issues of compliance with cooperation, endogenous and exogenous governance structures came under attack; customary international law (hereinafter “CIL”⁴⁴⁹), one route state practice take, was besieged with the criticism of being logically undersupplied⁴⁵⁰: “behaviorally epiphenomenal and doctrinally incoherent”.⁴⁵¹ Jack L. Goldsmith and Eric A. Posner in an insightful contribution exploring the deep layers of the main constituent of CIL—the *opinio juris* of states⁴⁵²—claim that any patterned international behavior, which the traditional scholars of international law deem to be CIL, is a coincidence, if not prompted by coercion or other preferential acts.⁴⁵³ Applying certain game theoretic models,⁴⁵⁴ they contend that there are many strategic and rational moves which have directed state action that such behavioral regularities have emerged.⁴⁵⁵ Furthermore, there is nothing in these regularities which can be likened to an *opinio juris*—“a sense of legal obligation”—on a given issue;⁴⁵⁶ these behaviors are simply the result of a “managerial and informal ingenuity”⁴⁵⁷ prompted by a rationalist sensibility.

of transaction costs). For a conceptual tracking of the development of transaction cost, see MICHAEL DIETRICH, TRANSACTION COST ECONOMICS AND BEYOND: TOWARDS A NEW ECONOMICS OF THE FIRM 15-30 (1994).

⁴⁴⁷ William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U. PA. J. INT’L ECON. L. 995, 1016, 1017 (1996). In addition, Eric A. Posner argues that international law suffers from bad agency costs and problem of collective interests, which constraints structural reform as well as “global welfarism”. See Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487 (2006).

⁴⁴⁸ See generally *id.*

⁴⁴⁹ I have borrowed this acronym, which has by now become a jargon in the economic analysis of international law, from Goldsmith and Posner. See *infra* note 450.

⁴⁵⁰ See e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639 (2000).

⁴⁵¹ George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541, 541 (2005).

⁴⁵² The earliest formulation of *opinio juris* is of the ICJ in *North Sea Continental Shelf* (Federal Republic of Germany v. Netherlands):

“Not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The state concerned must therefore feel that they are conforming to what amounts to a legal obligation”.

North Sea Continental Shelf Judgment, I.C.J. REPORTS 1969, para 77, p.44.

⁴⁵³ Goldsmith & Posner, “A Theory of Customary International Law”, *supra* note 450.

⁴⁵⁴ See *id.* at 1121-28. The games are *coincidence, coordination, cooperation, and coercion*.

⁴⁵⁵ *Id.* at 1131.

⁴⁵⁶ *Id.* at 1132.

⁴⁵⁷ See Koskeniemi, “The Politics of International Law: 20 Years Later”, *supra* note 95 at 15, 16. I will deal with the relevance of managerial ingenuity and informalism that comes with it and their import on the economic analysis of international law shortly. “Managerialism” in this context refers less to what Chayes and Chayes conceived as the rational coordination games which prompt compliance but more to a coherent consolidation of the many strategic moves that international offices make and to a postmodern trend which prefers standards to traditional form of lawmaking. On managerialism, see Abraham Chayes & Antonia

This so called “rationalist”⁴⁵⁸ approach to CIL was first questioned,⁴⁵⁹ but subsequently fine-tuned in order that the thought and praxis of international law would not fall into disarray.⁴⁶⁰ George Norman and Joel Trachtman advance a refined model of CIL and contest the rationalist claim that *since patterned behavior is distinct from opinio juris “customary international law does not exist”*.⁴⁶¹ First, they envisage an iterative multilateral prisoner’s dilemma game with many self-interested states and assert that the repeating nature of the game modifies payoffs and thus prompts multilateral cooperation contingent, however, on certain “circumstances”.⁴⁶² CIL seems to exist. Second, they reinstate *opinio juris*, albeit an altered version of it, one not resting on a “sense of legal obligation”, but as “a perception or assertion that a legal rule would be beneficial”.⁴⁶³ CIL affects state behavior.⁴⁶⁴

In a similar vein Andrew T. Guzman develops a reputational theory of CIL⁴⁶⁵ according to which states comply with CIL because of a concern for their reputation.⁴⁶⁶ Guzman claims that in this process of compliance *opinio juris* exists. However, while tendering such a claim, much like his rationalist peers, Guzman also redefines *opinio juris* such that it is commensurate with his reputational theory. His concept of *opinio juris* is a psychological element that comes to exist among the community of states when one of the states violates a given rule. Guzman carves out what seems to be a definition that upholds not only the rationalist understanding of

Handler Chayes, *On Compliance*, 47 INT’L ORG. 175 (1993). The understanding I have of managerialism is formed more by Kennedy, *supra* note 378; Koskenniemi, *id.*

⁴⁵⁸ Norman & Trachtman, *supra* note 451 at 541.

⁴⁵⁹ See Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist’s Defence*, 15 EUR. J. INT’L L. 1031 (2004) (although CIL has come way far from being a pure normative enterprise and is corrupted by power politics, it still has its stronghold—the psychological element of *opinio juris*—at least in certain areas of interstate relations); Anne van Aaken, *To Do Away with International Law? Some Limits to the ‘Limits of International Law’*, 17 EUR. J. INT’L L. 289, 294-97 (2006) (“[I]t might well be the case that modern CIL does rely more on the interest of states in the validity of a rule, thereby creating law with a potentially behavioural effect”. *id.* at 297). See also Jun-shik Hwang, *A Sense and Sensibility of Legal Obligation: Customary International Law and Game Theory*, 20 TEMP. INT’L & COMP. L. J. 111 (2005) (argues that the game theory employed by the rationalists when rejecting CIL has ignored certain aspects of state practice).

⁴⁶⁰ See e.g., Norman & Trachtman, *supra* note 451; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Edward T. Swaine, *Rational Custom*, 52 DUKE L. J. 559 (2002) (CIL can effectively be assessed without divorcing its traditionalist content from rational choice approach). Even prior to any rationalist approach, there were scholarly efforts to reconcile and bring to salience the contending traditional (descriptive) and modern (normative) approaches to CIL. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001) (a Dworkinian-Rawlsian “‘reflective interpretative equilibrium’ can be used to explain the fluid nature of customary international law”. *Id.* at 790). On a non-rationalist fine-tuning of CIL, but one discarding *opinio juris*, see Hiroshi Taki, *Opinio Juris and the Formation of Customary International Law: A Theoretical Analysis*, 51 GERMAN Y.B. INT’L L. 447 (2008) (“[I]n order determine that customary international law has been established, one does not need to prove the presence of *opinio juris*, but only the presence of consciousness of ‘any norm whatever’”. *Id.* at 466).

⁴⁶¹ Norman & Trachtman, *supra* note 451 at 542, 545.

⁴⁶² See *id.* at 553-62.

⁴⁶³ *Id.* at 570 (comparing *opinio juris* with a contract-model of offer and acceptance).

⁴⁶⁴ For a refined exposition, see Trachtman, *supra* note 419 at 72-118.

⁴⁶⁵ Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115 (2005). For an account of the limitations of the reputational model of compliance, see Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L. J. 231 (2009), (argues that reputational models may not be effective when the agent facing any loss-of-reputation is the sitting government as opposed to the perpetual entity, the state).

⁴⁶⁶ This idea is compellingly articulated in Guzman, *supra* note 460.

CIL but also the traditionalist notions of CIL.⁴⁶⁷ “Opinio juris refers to the beliefs of states that interact with a potential violator. To the extent that these states believe there exists a legal obligation, the potential violator faces a rule of CIL.”⁴⁶⁸

Although the earliest rationalist model by Goldsmith and Posner tended to jeopardize the traditional understanding of CIL, subsequent models tried to leave some aspects of the systemic logic of traditional international law intact, which, however, does not preclude the rationalist sensibilities and assumption they have. Regarding *opinio juris*, it exists for the new rationalists (CIL also matters). Where for Norman and Trachtman, *opinio juris* is an act of compliance, which is an offer to the community of states—“why not do you accept our act of compliance with this rule in order that it becomes a norm?”—for Guzman, it is a feeling of disapproval by the community of states when a given state violates a rule which has a sense of obligation.

Like CIL, treaties or international agreements—yet another means of state practice which is supposed to reduce transaction costs—were also re-evaluated on a functional basis. In the case of treaties, instead of inquiring if there is normative force behind states’ compliance with treaties, L&E used the scale of rational choice to find out states’ motives for entering into treaties.⁴⁶⁹ In fact, the reality is that, *agnostic* about normativity, scholars of the rational choice stream did not find it relevant to delve into the question *whether there is any normative kinetics behind states’ actions vis-à-vis treaties*.⁴⁷⁰ Dismissing any normative force in states’ compliance with treaties Goldsmith and Posner hold that compliance with treaties is either a matter of coercion or coincidence (both driven by the rational self-interest of the states), which nevertheless does not rule out the “cooperative element” in treaties.⁴⁷¹

A substantial portion of the work done by law and economics scholars on treaties regards their “form and substance”.⁴⁷² This approach, according to the scholars, is adopted in order to understand the proper mechanics of international cooperation⁴⁷³ and to modify that cooperation accordingly. In an analysis in that vein, Kal Raustiala presents a rational model of an agreements-architecture, one in which factors such as the form and substance of international agreements systemically interact and engage in a trade-off.⁴⁷⁴ He asserts that apropos of the central question regarding treaties *why do*

⁴⁶⁷ Guzman, *supra* note 467 at 147 (referring to the Statute of the ICJ and the (Third) Restatement of the Foreign Relations Law of the United States).

⁴⁶⁸ *Id.* at 146.

⁴⁶⁹ See GOLDSMITH & POSNER, *supra* note 417 at 83-106. For a critique on the scales used in the rational choice theory to ascertain the motives of states to enter into treaties, see Alex C. Geisinger & Michael Stein, *Rational Choice, Reputation and Human Rights Treaties*, 106 MICH. L. REV. (1129 2008) (contending that with regard to human rights treaties, in addition to the rational choice explanations, there is a reputational factor that prompts states to enter into treaties).

⁴⁷⁰ See Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT’L L. 113, 141-43(2003).

⁴⁷¹ *Id.* at 119-21.

⁴⁷² See e.g., Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581 (2005); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579 (2005).

⁴⁷³ See e.g., Raustiala, *supra* note 472 at 586.

⁴⁷⁴ See generally *id.* Raustiala has a sophisticated and “radical” delineation of the “form and substance” of international agreements, what he calls a “tripartite conceptual framework” of legality, substance, and structure” (*Id.* at 583). *Legality* pertains to form, and involves a classification of agreements into contracts and pledges. *Substance* relates to the substance part of “form and substance” and refers to the substantive commitments an agreement demands i.e., whether the commitment required by the agreement is deep or

states choose particular forms of cooperation—a pact or any informal agreement—the interaction and trade-off between the form and substance of international agreements provides convincing answers.⁴⁷⁵ Raustiala illustrates the tradeoffs as taking place between e.g., the domestic policies, domestic preferences, national legislative procedures, and foreign policies of states.⁴⁷⁶ However, the model indicates, though not overtly, that any effectiveness it has derives from the fact that states focus on the payoffs which accrue from international cooperation. In other words, it holds tightly to the rationalist assumption that states are self-interested players.

Guzman extends this model, having been supported by the reputational model he built earlier.⁴⁷⁷ He ponders a hypothesized “puzzle”: why do states fail to “design their agreements in such a way as to maximize the credibility of their commitments”?⁴⁷⁸ To answer this question, the model likens international agreements to private contracts: “[W]hen states enter into international agreements they will, like domestic parties entering into a contract, seek to maximize the joint benefits to the parties”.⁴⁷⁹ In a private contract, if one party defaults, the other one is compensated through the machinery for the settlement of disputes agreed on by the parties.⁴⁸⁰ The compensation, often in the form of a sanction against the defaulter, returns the transaction to a zero sum situation. In the case of international law, which is devoid of a centralized enforcement authority, enforcement measures are such that sanctioning the defecting state, instead of leading to a zero sum situation, imposes costs even on the complying state.⁴⁸¹ In a situation such as this, states are better off without resolving any violation of the agreement,⁴⁸² and hence they may choose not to have any dispute settlement mechanism in their agreement. Guzman further provides a scenario in which there is high probability that the presence of a dispute settlement mechanism encourages compliance from the states. In that case, the gains of having a dispute settlement mechanism surpass the gains of not having a dispute settlement mechanism.⁴⁸³ It is on the basis of these types of choices that states *rationally* decide whether to have a dispute settlement mechanism or not.⁴⁸⁴

It is beyond doubt that the models discussed above and many other applications of economic analysis of international law illustrate the manner in which international

shallow (*Id.* at 584, 585). *Structure* also pertains to form and “refers [] to the *mechanisms* for monitoring and enforcing performance” (*Id.* at 585).

⁴⁷⁵ This interaction and trade-off is the central theme of Raustiala’s work. He explains the interaction through the functionalist, realist, and liberalist paradigms of international relations. *See generally id.*

⁴⁷⁶ *Id.* at 595-99.

⁴⁷⁷ See Guzman, *supra* note 462.

⁴⁷⁸ Guzman, *supra* note 472 at 582.

⁴⁷⁹ *Id.* at 586.

⁴⁸⁰ *Id.* at 587. On the types of remedies available to the affected party in a private contract and the choice regarding such remedies, see POLINSKI, *supra* note 413 at 27-38.

⁴⁸¹ *Id.* at 595.

⁴⁸² *Id.* at 601 (“This is so because when there is a violation, a net cost is imposed on the parties (meaning one suffers a loss that is not offset by the other’s gain”).

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

When negotiating an agreement, therefore, the parties must take into account both the increase in compliance that is generated by the dispute resolution clause and the resulting joint loss that occurs when there is a breach. These offsetting effects will lead them to include dispute resolution provisions in some agreements but not in others.

Id.

law has to be designed in order that transaction costs are minimized, efficiency is secured, and cooperation is achieved. However, many of the exogenous structures, e.g., international institutions, designed to reduce the transaction costs, struck back following the fragmentation which hit international law.⁴⁸⁵ First, the burgeoning international institutions for reconciling differences and settling disputes have increased the transaction costs for smaller states.⁴⁸⁶ Second, the availability of numerous venues provides avenues for forum-jumps to the bigger states whenever their preferences are at risk.⁴⁸⁷ In addition, shifting the venue often helps the violator of a rule to obscure any reputational issues that were at stake.⁴⁸⁸ However, even with these weighty concerns, no L&E model explaining the fragmentation of international law has as yet evolved.

Having tracked the advance of L&E in international law, from the time when economics made its debut in the studies on world political economy to the most recent rationalist models, I ponder what impression that tracking has left on us. What has economic analysis of international law added to our understanding of international law? Below, I provide a systematic treatment of these and many concomitant questions.

a. Misguided Rationality: A response to economic analysis of international law

What brought economic analyses to law was a desire among the legal scholars to get rid of any “value-judgments” from law and to instill a scientific rationality in legal reasoning.⁴⁸⁹ The economics with which law came into contact was essentially neoclassical,⁴⁹⁰ whereby law came to bear all the assumptions of neoclassical economics, e.g., rational choice, utility maximization etc. The progress of L&E afterwards was not unproblematic. That, however does not concern this Article; it is described elsewhere.⁴⁹¹ Our focus is on international law. Since L&E entered international law through International Relations (IR) it has substantially been impacted by the intellectual and ideational spirit of political realism and neoliberalism which permeated IR.⁴⁹² IR and its theories, disposed in a certain way to neoclassical economics, taught international law to behold the world in terms of “is”, not “ought”. These theories do not, however, deny the existence of any “moral ought”; such virtues have meaning when valued and sought through the world as it is.⁴⁹³ According to the dominant realist school of IR, the present world is anarchical, ideationally torn, and power-driven.⁴⁹⁴ Robert G. Giplin contemplates the foundational logic of this world:

⁴⁸⁵ See Benvenisti & Downs, *supra* note 9.

⁴⁸⁶ *Id.* at 599.

⁴⁸⁷ *Id.* at 628.

⁴⁸⁸ *Id.*

⁴⁸⁹ See NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 10-13 (1997).

⁴⁹⁰ See Ejan Mackaay, *History of Law and Economics*, in *ENCYCLOPEDIA L. & ECON., VOL. I. THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS* 75 (Boudewijn & Gerrit De Geest, eds. 2000).

⁴⁹¹ See *id.*

⁴⁹² For an account substantiating this observation, see ARTHUR A. STEIN, *WHY NATIONS COOPERATE: CIRCUMSTANCES AND CHOICE IN INTERNATIONAL RELATIONS* 3-13 (1990). On the process of infiltration by IR and its theories into international law, see KOSKENNIEMI, *supra* note 216 at 465-480.

⁴⁹³ See Robert G. Giplin, *The Richness of the Tradition of Political Realism*, 38 *INT'L ORG.* 287, 290 (1984).

⁴⁹⁴ *Id.* at 289-91.

[H]uman beings confront one another ultimately as members of groups, and not as isolated individuals. *Homo sapiens* is a tribal species, and loyalty to the tribe for most of us ranks above all loyalties other than that of the family. In the modern world, we have given the name “nation state” to these competing tribes and the name “nationalism” to this form of loyalty.⁴⁹⁵

The many national groups in the world are in perpetual conflict with each other,⁴⁹⁶ each trying to be better off than the other. This realist position of the *world as one comprising primarily states* made its way straight into the economic analysis of international law and set the primary assumption that states are, above all other qualities, self-interested in nature.⁴⁹⁷ In this setting, individuals are social particles in constellations of states. They have to identify themselves as first belonging to a state and then to a region, then a province, a village/city, and a family. This identification is never made with their mind or ontology, for the state is deemed the primary guardian of individuals. That is to say, the world around individuals is socially turbulent and they are perilously exposed to that turbulence so long as they do not make “provision for [their] security in the power struggle among social groups”.⁴⁹⁸ States with which individuals can identify protect them from falling into any turbulence.

Undoubtedly, this scenario tells enough to establish that international law nurtures a group-centric, or “state-centric”, mindset. It provides evidence for the claims of the supporters of the applicability of rational choice in international law, which attempted to restructure rational choice in a way applicable to a collectivity or sub-collectivities, e.g., non-state actors and similar groups. Any concern regarding the absence of unitary actors in order to assess the rational choice can be dismissed. It thus seems true that when international law is economically analyzed, the choices to be studied are the rational choices made by “self-interested states”.

However, rationalists such as Goldsmith and Posner restore the rational choice back to individuals by assuming that “state interest is merely descriptive of leaders’ perceived preferences and is morally neutral”.⁴⁹⁹ This view places representative individuals at the helm of decision-making and their preferences make up the preferences and self-interest of states.⁵⁰⁰ A more nuanced and compelling account of individuals steering the process of international law is provided by David Kennedy⁵⁰¹ and Martti Koskenniemi.⁵⁰² Their perspectives, however, are evaluative and pathological, respectively. That is to say, an inevitable evil has come to exist in

⁴⁹⁵ *Id.* at 290.

⁴⁹⁶ *Id.*

⁴⁹⁷ See GOLDSMITH & POSNER, *supra* note 417 at 4-7. I do not, however, assert that economic analysis of international law is based on a purely realist foundation. For instance, Goldsmith and Posner have set their assumptions on a nuanced idea of realism.

⁴⁹⁸ See Giplin, *supra* note 493 at 291.

⁴⁹⁹ GOLDSMITH & POSNER, *supra* note 417 at 7.

⁵⁰⁰ *Id.* at 6.

⁵⁰¹ See generally Kennedy, *supra* note 378.

⁵⁰² See Koskenniemi, “The Politics of International Law: 20 Years Later”, *supra* note 95. See also, Koskenniemi, *supra* note 21 (criticizes expert-rule by likening experts to moral policemen—the Kantian “miserable comforters”—who impose a given subjectivity—power—on the world in the name of governance).

international law in the form of expert-rule, following the structural disintegration of the discipline into various branches.⁵⁰³ This disintegration—fashionably known as “fragmentation”—and the related theoretical imbroglios have infused a new sense of responsibility in the experts within each branch to offer theoretical clarifications providing meanings to the design and function of their respective branch.⁵⁰⁴ These experts develop an attitude of professionalism towards their work whereby their choices, having been influenced by their preferences, often becomes subjective judgments.⁵⁰⁵

Whoever the agents are, leaders or managers, rational choice in international law is the rational choice of officials empowered with decision-making. And, the elements of behavior generally assessed in L&E such as self-interest, preferences, and motivation are to be assessed in international law as they are reflected in officials. However, I do not ponder if decisions by officials rise up to a “methodological individualism” essential to any assessment of individual behavior.⁵⁰⁶ That is, I do not worry if international law as conducted by a few officials has any normative value in order to render their behavior a valid topic for making judgments about international law.⁵⁰⁷ My interest is in the foundational assumptions about individuals made by L&E and in seeing if those assumptions in any way support the grand claims and models which economic analysis of international law has advanced about the world.

L&E is the latest “enterprise” in the larger scheme of what is supposedly a “scientific inquiry” in law.⁵⁰⁸ It is deemed as unleashing the force of pragmatism against the unpragmatic super-structure of law.⁵⁰⁹ The roots of pragmatism as reflected in L&E have semi-meta origins. It first vested faith in the human faculty of observation, and then forcefully rejected many dualisms, e.g. mind and body, subject and object.⁵¹⁰ Afterwards, it set a “contemplative relation between an observing subject and an objective reality, whether natural or social, as an active, creative relation between striving human beings and the problems that beset them and that they seek to overcome”.⁵¹¹ This creditable advance towards human ontology is, however, frustrated by a denial of any ultimate reality for humans; in its place reality is found in a continuity of socially contextualized human instincts.⁵¹²

⁵⁰³ See Martti Koskenniemi, *International Law: Constitutionalism, Managerialism and the Ethos of Legal Education*, 1 EUR. J. LEGAL STUD. (2007).

⁵⁰⁴ *Id.*

⁵⁰⁵ See Koskenniemi, “The Politics of International Law: 20 Years Later”, *supra* note 95 at 12-14; David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 647 (2007).

⁵⁰⁶ On the theory, assumptions, and utility of methodological individualism, see E. Picavet, *Methodological Individualism in Sociology*, INT’L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 9751 (Neil J. Smelser & Paul B. Baltes, eds. 2001).

⁵⁰⁷ The relevance and normative value of methodological individualism in international law is highlighted in Jeffrey L. Dunoff & Joel Trachtman, *The Law and Economics of Humanitarian Law: Violations in International Conflict*, 93 AM. J. INT’L L. 394, 397 (1999).

⁵⁰⁸ RICHARD POSNER, *OVERCOMING LAW* 15 (1995).

⁵⁰⁹ *Id.* at 15-21. See also Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard Posner*, 36 AM. BUS. L. J. 193, 206-217 (1998) (presents L&E and postmodernism as two arms of a reformism characteristic to the era and envisages a postmodern model of L&E).

⁵¹⁰ POSNER, *supra* note 508 at 389.

⁵¹¹ *Id.* at 389, 390.

⁵¹² *Id.* at 390, 391.

At this point, L&E turns ideological in a way that conceals the ultimate reality by the veil of an organic reality; in abstracting the cosmic intelligence of humans, L&E bases its entire belief-set on materially driven biological instincts.⁵¹³ When centered in a given social surrounding these instinctual propensities trigger a chain of calculative reasoning. This calculative reasoning—rational choice—is the central theme and pride of L&E.⁵¹⁴ That means the triad—organic human instincts, the situationality of individuals, and material choices—is causative of human action. The analyses presented earlier in this Article have established that this triad is an erroneous design of human thought and action, one typical of unintelligent humans sceptical or ignorant about their Self. An unfounded faith in one’s power of observation, ignorant of a higher intellectual potential; a false pride in one’s ability to make choices; and a naïve perception of the world render the economic person a “rational fool”, to use Amartya Sen’s characterization.⁵¹⁵ This naïve state of mind is what Shelly relates human thought to in *Hymn to Intellectual Beauty*: “The awful shadow of some unseen Power Floats through unseen among us ...”.

It is primarily the denial of ultimate reality/truth beyond what is observable which has misguided thought in L&E.⁵¹⁶ To explain, initially L&E was on constructive lines when it denied the subject-object dualism; however, when it came to connecting the subject and object, the observing subject was linked to a social reality (the object) instead of an ultimate infinite reality. Although the social reality was prudently presented as an outcome of certain socially processed beliefs rooted in routine human problems, it did not prevent the mistake from happening. What ought to have been the real connection between the subject and object is a recognition that sensually observable reality is false and a desire to perceive the absolute reality that lies beyond the apparent social reality.⁵¹⁷ With such a connection, if the subject *intellectually* strives for the object (the ultimate reality), false reality collapses and the mind perceives the true ultimate reality.⁵¹⁸ Material minds, those that deduce reality from the social order and by way of a sensual inquiry, naively “live in the [false] hope that satisfaction of their various desires will eventually bring fulfillment”.⁵¹⁹

The subject-object connection set by L&E and the discipline’s subsequent depiction of social life as reality are contestable from another angle as well. This contestation focuses on the “subjective consciousness” that L&E approximates as the casual factor of human action. This approximation of L&E is imperfect because the subjective consciousness as L&E perceives it to be rooted in human instincts and

⁵¹³ See *supra* section III.A.

⁵¹⁴ Cf. POSNER, *supra* note 508 at 390.

⁵¹⁵ However, Sen is critical about the conventional approach of economics in predicting behavior that fails to consider sentiments such as sympathy and commitment in behavior analyses. See Sen, *supra* note 419.

⁵¹⁶ For a support to this view, see Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974) (criticizing the parochial methodologies and unfounded assumptions of L&E, concludes that humanity is “[W]restling with a universe filled with too many things about which we understand too little and then evaluate them against standards we don’t even have”. *Id.* at 482).

⁵¹⁷ See Joseph Milne, *Advaita Vedanta and Typologies of Multiplicity and Unity: An Interpretation of Nondual Knowledge*, 1 INT’L J. HINDU STUD. 165, 166-68 (1997) (presents the subjectivities seen in non-dualistic approaches in the inquiry into reality).

⁵¹⁸ *Id.* at 167. The intellectual process referred to here is elaborated in Section II.A. According to Sankara, the intellectual striving for reality involved in the inquiry is what reduces the duality between subject and object. *Id.* at 167.

⁵¹⁹ *Id.*

social life is not the absolute state of consciousness. Friedrich Schleiermacher conceives the subjectivity in human consciences as has an expansionary intellectual character.⁵²⁰ According to him, at first, the mind finds identification with the social surroundings.⁵²¹ This identification enables individuals to read ontological meanings on the basis of the social state of affairs around them. As the mind in this state is unrefined and narrow, it is at risk of developing emotions such as egoism and spite, subject to the nature of the signals transmitted by the social world.⁵²² This identification, however, expands, writes Edmund H. Hollands, “[I]nto conceptual thought, so this same social experience arouses on the subjective side widening feelings of sympathy in which the merely organic and personal or selfish feelings are transcended”.⁵²³ This transcending and the subsequent graduation of the mind to even higher levels is an intellectual process, a pursuit of ultimate reality, discussed in many places in this Article, which broadens the mind to relate to the world, its physical environment,⁵²⁴ inhabitants, and the universe at large.⁵²⁵ At this stage, when mind feels that is it one with the entire creation, consciousness is said to be *absolute*.⁵²⁶ L&E, however, makes the mistake of setting the subjective consciousness of individuals as it is at its initial stage and employs that consciousness to objectively make *observations*.⁵²⁷

Since L&E’s assumptions about individuals are on a mistaken course, it is likely that the shadow of that mistake has fallen on international law. The obvious, but inevitably strange, position in which individuals are seen to be piloting the course of international law, which somehow uncomfortably fits into the way things are, adds gravity to the assumptions concerning individuals and human thought. This intellectual position is in one sense advantageous to the pure rationalists as Goldsmith and Posner in that their theory, especially those rejecting any normative basis for states’ behavior, triumphs over all the formulations of their peers, who search for normative explanations in states’ behavior. Yet, despite the many formulations entrusting individuals with decision-making, the decisions coming from a leader or any other leader-like individual must be seen as products of a collective expert reasoning taking

⁵²⁰ See generally Edmund H. Hollands, *Schleiermacher’s Development of Subjective Consciousness*, 15 PHIL. REV. 293 (1906).

⁵²¹ *Id.* at 296. However, in discussing the stages in the development of consciousness, I have not followed the strict classifications of Schleiermacher.

⁵²² See *id.* at 296, 297 (“this dependence is so close that its development is practically identical with that of language”. *Id.*).

⁵²³ *Id.*

⁵²⁴ See generally Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L. J. 205 (1974) (states that as from any legal prescriptions, one has to find an aesthetic identification with the environment and assume a duty to protect it by receiving direction from cultural “symbols”). See also Philip Allott, *Mare Nostrum: A New Law of the Sea*, 86 AM. J. INT’L. J. 764, 773 (1992) (articulating sea as a profound idea existing in human consciousness, an idea and a reality to which humanity has a relationship beyond mere cultural and legal relations).

⁵²⁵ Hollands, *supra* note 520 at 299.

⁵²⁶ See Chris King, *Quantum Cosmology and the Hard Problem of the Conscious Brain*, in THE EMERGING PHYSICS OF CONSCIOUSNESS 407, 447 (Jack A. Tuszynski, ed. 2006) (holds that subjective consciousness corresponds to physical universe in its entirety).

⁵²⁷ This viewpoint of L&E that subjective consciousness is socially conditioned is also a Marxian position “consciousness as praxis”. However, same as L&E, Marx also dismisses any reality beyond the social reality. For an illuminating discussion on the Marx’s viewpoints on consciousness, see PHILIP HODGKISS, THE MAKING OF THE MODERN MIND 51-55 (2001).

place in a given official setting.⁵²⁸ That official setting may be politically or ideologically charged.

Into the bargain come the educational and cultural orientations and personality of each official: elite/middle class, socialist/liberal/ethical radicals, pragmatists, conformists, positivists, to name a few orientations and outlooks. Notwithstanding the intellectual grooming or cultural cut of the individual, the official setting in which modern state/government system works requires its officers to forfeit any person-specific values, attitudes, and aptitudes. As a substitute, the system has a value template prescribing a unique set of ethics and morals, which the officials have to internalize.⁵²⁹ This demoralizing is an ideological program, which demands from the officials a type of performance bordering on theatrical naturalism.⁵³⁰ Accordingly, each individual is an actor as well as a Self;⁵³¹ being one's Self is deemed to be unprofessional and incompetent.⁵³² In such a milieu, international offices groom their officials to be sympathetic to the political ambitions of the government and sensitive to the political surroundings in which the government functions.⁵³³

Having thus revealed the official culture in international law and its incongruity with actual human nature, we are in a comfortable position to evaluate L&E's assumptions about international law. Most important of all the assumptions is that

⁵²⁸ See Stephen M. Schwebel, *Remarks on the Role of the Legal Advisor of the US State Department*, 2 EUR. J. INT'L L. 131 (1991); A.E. Gotlieb, *Legal Advisers and Foreign Affairs: A Comment*, 16 U. TORONTO L. J. 158 (1956) ([I]t is not his [the legal advisor] lawyerly qualities in isolation from others which will be count but that blend of competence and experience which makes for excellence". *Id.* at 165); See generally *Role of the Legal Adviser of the Department of State: A Report on the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association*, 85 AM. J. INT'L L. 358, 363 (1991) (hereinafter "Report on the Role of the Legal Adviser").

⁵²⁹ See and *Cf.* "The Report on the Role of the Legal Adviser", *supra* note 528 at 363:

[I]f the Legal Adviser believes that a situation involves an important issue of conscience or professional or personal ethics, the Legal Adviser may be unwilling to participate further in the matter and, in extreme cases, the content and interpretation of the applicable rules are in controversy.

Id.

⁵³⁰ See & *Cf.* Alexander Boldizar & Outi Korhonen, *Ethics, Morals, and International Law*, 10 EUR. J. INT'L L. 279, 287, 310-11 (1999) (suggest that individuals should live a socio-professional life, but not one in which "life-ethics" are sacrificed at the altar of "social ethics"). Sensing the tragedy involved in this sacrifice of "life-ethics", Boldizar and Korhonen write:

[A] person's ethical ability cannot be left to idle or shut down for any period of time, except perhaps to the extent that the 'self' can fall into abeyance within the social; it seems not only dangerous to cover up such significant ability under a compartmentalization of a person's identities or roles into a work-sphere and a personal-sphere, but it also seems authentic and unethical.

Id. at 287.

⁵³¹ See RABINDRANATH TAGORE, *THE ENGLISH WRITINGS OF RABINDRANATH TAGORE: VOLUME 4 ESSAYS* 628 (2007) (on the costs of unenlightened, misguided professionalism).

⁵³² *Cf.* Martti Koskenniemi, *Letter to the Editor of the Symposium*, 93 AM. J. INT'L LAW 351, 356, 357 (1999) (says that speaking culturally or intellectually oriented language in a professional setting is "a professional and social mistake").

⁵³³ "The Report on the Role of the Legal Adviser", *supra* note 528 at 363. See also "This Cannot Be How the World Was Meant to Be", *supra* note 291 at 277. Nothing in contrast to this view turned up in a recent study which has collected the opinion of legal advisors on the bearing international law has in their routines. See Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45, 62-75 (2009). For a note of disapproval of the state of affairs in international offices, see Philip Allott, *The International Lawyer in Government Service: Ontology and Deontology*, 23 WIS. INT'L L. J. 13, 17-18 (2006).

states are self-interested; i.e., states conceive their preferences, determine their interests on the basis of those preferences, and rationally maximize their interests.⁵³⁴ These assumptions are common to rationalists as well as to the moderates, who would fall in Cass Sunstein’s conceptualization “trimmers”,⁵³⁵ in the L&E group, or they could be fitted into a rationally identifiable category, the “revisionists”⁵³⁶ (although the moderates/revisionists mostly attempt to reinstall the traditional and normative base uprooted by the rationalists). The vital question is, *Are states “by nature” self-interested?*⁵³⁷ Answering this question urges a glance at how this assumption has come to exist in international law. Without elaboration it is obvious, since pointed out earlier,⁵³⁸ that L&E accessed international law by way of political realism and neoclassical economics, both of which presented the realist-political and the capitalist-economic scenario as the true social reality of the world. It is on the basis of this reality that the officials of a state, whose minds are already adjusted to the political traditions their government upholds, construct preferences which determine the nature and content of the interest for their states. To illustrate, officials of a capitalist/realist state would construe preferences of their states as to triumph over other states in the perpetual conflict states are in.⁵³⁹ They see this as the only means to ensure the welfare of their citizens and protect the state territorially and economically. This desire to be better off determines the preferences and thereby the interests of that state. For any assessment of the rational course by which such a state would choose to pursue its interest, L&E would be an excellent model. This is because of the theoretical compatibility between a politically realist state and the realist foundation and assumptions of L&E. This scenario adequately reveals that self-interest is not individually or socially aspired but politically constructed.⁵⁴⁰

However, this finding only partially answers the question whether states are by nature self interested. What if a state is not one which upholds political realism or for that matter is a non-capitalist society (although non-capitalist societies hardly exist today)? How could the many L&E models designed on the assumption that states are self-interested explain the behavior of states which do not actively pursue a policy of becoming better off than other states? Indeed, there are states bearing the legacies of glorious traditions and civilizations imparting the gospels of toleration and one world.⁵⁴¹ Besides, the unenthusiastic welcome meted out to L&E in many European states strengthens one’s suspicion towards the credibility of L&E.⁵⁴² What sense does

⁵³⁴ GOLDSMITH & POSNER, *supra* note 417 at 6, 7.

⁵³⁵ See Cass Sunstein, *Trimming*, 122 HARV. L. REV. 1049 (2009) (“Trimmers” are a type of motivated pacifists who would prefer to have their cause pursued while leaving structures unharmed).

⁵³⁶ See Richard B. Bilder, *On Being an International Lawyer*, 3 LOYOLA U. CHI. INT’L L. REV. 135, 136 (2006).

⁵³⁷ I pose this question in the manner it is asked by Wendt. See ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 239 (1999).

⁵³⁸ See *supra* notes 492-495 and the accompanying text thereof.

⁵³⁹ For a supporting discussion on the dominance of realism in interstate relations, see WENDT, *supra* note 537 at 238-245.

⁵⁴⁰ See *id.* at 240.

⁵⁴¹ For example, according to S. Radhakrishnan, democracy—and thereby foreign policy—in India has roots in the traditional Hindu Philosophy such that prejudiced and parochial nationalism shall not damage the unity of mankind; the entire world has to be viewed as one family. See Monika Kirloskar-Steinbach, *Toleration in Modern Liberal Discourse with Special Reference to Radhakrishnan’s Tolerant Hinduism*, 30 J. INDIAN PHIL. 389 (2002) (interprets that the concept of toleration remains unchanged amid many divergent discourses).

⁵⁴² See Dau-Schmidt & Brun, *supra* note 423.

it make to contrive a theory without regard for the diversities that describe the world and its systems? According to van Aaken, it might be that rationalists among the L&E enthusiasts in international law are attempting to “unbind hegemonic states from international duties”.⁵⁴³ If that is the case, why are moderates in the L&E group trying to restore the normativity uprooted by the rationalists and thereby uphold the traditional structures and concepts of international law? However, a review of the polemics of the moderates and the models of state behavior they have designed sufficiently reveals that although traditional structures and concepts are secured from the criticism of rationalists, the rationalists’ assumptions—such as the self-interest of states—are left unharmed.⁵⁴⁴ In contrast, the dialectics of the argumentative structures have been substantially transformed; yet the mainstream in international law would rejoice to see concepts, e.g., CIL, soft law, and treaties, to gain new explanations regarding their bindingness. On balance, L&E has simply replaced the foundational assumption of states’ behavior from “consent of states” to self-interest.⁵⁴⁵ In effect, if the assumption regarding the self-interest of the states is removed, most of the L&E models cannot explain state behavior, to an extent, they cannot even continue to exist.

Truly, L&E has been presumptuous by proffering hidebound views of social reality as if ideas, ethics, civilizations, and cultures have sunken into a cosmic ocean, leaving economics textbooks and economists afloat. As if she had envisaged a scenario as this, Martha C. Nussbaum writes:

If Law and Economics is ignorant of the theories of human action that have been painstakingly elaborated over the course of twenty-four hundred years, it is not terribly likely that it will see all the complexities of the ways in which people are moved by ethical considerations. And in fact it does not.⁵⁴⁶

Such has been the mistake of L&E that it never heeded critics;⁵⁴⁷ instead it trivialized their criticism by insisting on the false pride of having provided the “simplest”,⁵⁴⁸ social-theoretical explanations of a complex physical world and thus remained ever aware of their failings and imperfections.

If the market mindset and the market spirituality L&E propagates are deemed reality, there is meaning in being economically a capitalist, politically a realist, behaviorally a rationalist, and attitudinally an egoist; all these roles if performed in unison render one a modern-day intellectual. But if reality is intellectually beyond the

⁵⁴³ van Aaken, *supra* note 459 at 307, 308.

⁵⁴⁴ See *supra* Section III.B.1.

⁵⁴⁵ Koskenniemi is sceptical about this newly assumed [deceptively] advantageous posture:

“[I] am puzzled about the taking away of ‘law’ from international law analyses of this type, replacing it by a vocabulary of empirical political science, techniques and strategies to reach the interests or objectives assumed to stand ‘behind’ law and to have a reality or importance far greater than it.

See Martti Koskenniemi, *Formalism, Fragmentation, Freedom: Kantian Themes in Today’s International Law*, 4 *NO FOUNDATIONS* 7, 8 (2007).

⁵⁴⁶ Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics*, 64 *U. CHI. L. REV.* 1197, 1211 (1997).

⁵⁴⁷ See generally *id.* (criticizes that the conceptual architecture of L&E is built on a rejection and neglect of many aspects of human behavior).

⁵⁴⁸ This simplification and the resulting incompleteness is the central theme in Bodansky, *supra* note 2.

rhythm-less patterns of material instincts and the false rhythm we have set for the world, is the invisible innateness behind the rhythm of the physical laws of the universe, is the center from which all physical and mental energy emerge, or is the macrocosm that dwells as microcosmic consciousness in billions of humans,⁵⁴⁹ L&E has been illogically audacious in simplifying and compressing thought and action into a nutshell and writing prescriptions for the world.

An examination of L&E reveals that it is structurally as well as discursively doctrinal. L&E is structurally doctrinal because it has built a theoretical superstructure on the basis of a myopic view of the human states of consciousness. L&E is discursively doctrinal for the subliminal fidelity of its followers to certain unfounded ethics.⁵⁵⁰ Logically, both these positions correspond to a non-altruistic attitude. If so, L&E is egoistic. Yet, it may appear difficult to penetrate L&E with criticism of its being a non-altruistic enterprise, for L&E has been ever cautious in its basic references to concepts that potentially threaten its own ethics. For example, altruism is defined as one among the many ends of human desire “economically” pursued by humans or states or other collectivities,⁵⁵¹ which implies a claim that there is an altruistic tinge to L&E.⁵⁵² However, at a functional/analytical level, altruism has only an economic connotation, i.e., “making of any transfer that is not compensated”,⁵⁵³ which dispels the linguistic smoke screens of L&E. Even otherwise, having philosophically confirmed that altruism is a long drawn out intellectual twilight, the unilateral attribution of meaning by L&E is no more than a self-justificatory apology.

C. Reality Perceptions about Market Interest: The dominion of ideology

Earlier in this Article it was found that there was substantial dichotomy between common interest as philosophy and common interest as doctrine. Analyses, illustrations, and deductions revealed that conceiving common interest as doctrine is a theoretical mistake. No such dichotomy, however, seems to exist in the case of market interest. Instead, the two manifestations of market—ideology and doctrine—seem to be mutually reinforcing and interacting. Having this hypothesis at hand, this section confirms it by looking at the nature and extent of the interaction between the ideological and doctrinal form of market, and thus obtains perceptions of reality regarding market interest.

The analytical framework adopted in this Article for examining market interest included: on one side a socio-economic force ambitioning to bring the whole world

⁵⁴⁹ I attribute this construal to the ideas propounded by Carl Sagan, Stephen Hawking, and Vedic Cosmology.

⁵⁵⁰ As support to these conclusions, see Section II.C. (The Concept of Doctrine).

⁵⁵¹ Nussbaum, *supra* note 546 at 1211.

⁵⁵² Posner has erected semantic railings around the perimeter of L&E that criticism of it being non-altruistic does not enter the sphere of L&E:

Its [L&E] project is not to reduce human behavior to some biological propensity, some faculty of reason, let alone to prove that deep within us, pulling the strings, is a nasty little “economic man”... The individual imagined by economics is not committed to any narrow, selfish goal such as pecuniary wealth maximization. Nothing in economics prescribes an individual’s goals. But whatever his goal or goals, some or for that matter all of which may be altruistic, he is assumed to pursue them in forward-looking fashion by comparing the opportunities open to him at the moment when he must choose.

POSNER, *supra* note 508 at 15, 16.

⁵⁵³ William Landes & Richard A. Posner, *Altruism in Law and Economics*, 68 AM. ECON. REV. 417, 417 (1978).

into its rhythm (ideological) and on the other side a legal discourse making claims of having uncovered the secrets of human nature and devised a calculus to assess and predict human behavior (doctrinal). That framework also revealed that market in its ideological form is a discourse which depicts capitalism as a kind of faith-system requiring a commitment to competitive values and dedication to wealth maximization. However, capitalist ideology (as a matter of fact, any ideology) is found to be socially motivated and potentially distorting the reality. This observation presupposes the existence of a pre-conceived reality, in other words, whether something is ideology depends on the availability of a conception of reality so that ideology can be delineated from reality.⁵⁵⁴ In the absence of such a reality what is socially prescribed and what is sensually observable would become the reality. It is a denial of any reality beyond the materially observable social facts that helped capitalism to succeed in and dominate the modern world.⁵⁵⁵ But, this Article has provided a preconception of reality, which described reality as a state of supreme intelligence—the fourth dimension—realizable only through a transcendence-oriented thought-process.⁵⁵⁶ In a market frame of mind, this reality is masked by “superimposing” an ideology-centered thought (capitalism) on human intelligence.⁵⁵⁷

However, in socially structured formal societies it is hard for any ideology to directly influence the members of the societies because of the fears about ideology’s “falsity” and the power orientation of ideology spread by the social theorists.⁵⁵⁸ Hence promoters of a given ideology generally choose to inject the essence of that ideology to the social system mainly through preset institutions such as law, economy, and polity which are rationally opaque for lay-minds.⁵⁵⁹ They intervene into these institutions by masquerading as reformists and introduce new *models*, methods, and styles of reasoning, and set illusionary socio-economic goals.⁵⁶⁰ This was exactly what the proponents of capitalist ideology did. First, they emphasized the maturation of capitalism into an economically robust and dynamic ideology which invites every being and collectivity to be cost-effectively active if human dignity is to be achieved. Then, dogmatic legal reasoning and the decentralized political system were declared inhospitable to the goals pursued by the world. Deep-cultures and faith-systems were

⁵⁵⁴ See Mark Warren, *Nietzsche’s Concept of Ideology*, 13 THEORY & SOC’Y 541, 543 (1984).

⁵⁵⁵ Such denial is characteristic to streams of thoughts ranging from enlightenment philosophy to postmodernism.

⁵⁵⁶ See *supra* section II.A.

⁵⁵⁷ Superimposition on human intelligence is what Sankara in *Advaita* philosophy calls the “veiling” (*Maya*) over reality. See *supra* note 43 and 44. For a detailed account on superimposition, see T.M.P. MAHADEVAN, *SUPERIMPOSITION IN ADVAITA VEDANTA* (1985).

⁵⁵⁸ “Falsity” is the main feature of ideology in the writings of Marx and Althusser. On the point that social theorists were sceptical about the social-utility of ideology, see generally Messay Kebede, *Science and Ideology via Development*, 26 J. VALUE INQUIRY 483 (1992) (provides details on the scepticism of social theorists about ideology, their efforts to eliminate ideology from the scheme of social development, and predicts the consequences of such a move).

⁵⁵⁹ Once ideology is recognized as has a power orientation, any fusing of it with law provides “the arbitrary and cultural features of social life with the aura of the natural and inevitable”. See *From the Special Issue Editors*, 22 L. & SOC’Y REV. 629, 633 (1988).

⁵⁶⁰ The scepticism that economic models are “apologies of laissez faire capitalism” finds articulation in Allan Gibbard & Hal R. Varian, *Economic Models*, 75 J. PHIL. 664, 665 (1978) (present the utility and function of economic models in assessing human behavior).

rhetorically adumbrated. Opposing ideologies, by default, were lost.⁵⁶¹ Finally, a new situation-friendly way of looking at human behavior and assessing the laws regulating that behavior was designed in the form of methods as L&E.

Seen from such a perspective, the relationship between L&E and capitalist ideology rests on the functional correlation and conceptual interaction between law and ideology.⁵⁶² However, traditional, politically sterile dogmatic legal reasoning may not favor an ideological intervention into law. But, L&E with its realist genes and economic ambitions is compatible with the power-laden, politically couched capitalist ideology.⁵⁶³ In its discourse and through its methods, L&E has validated the capitalist mindset of market, thus legalizing that mindset.

Generally speaking, L&E rises up to the egoistic nature of ideology and empathizes with the market mindset. Unlike in the case of common interest, the image of market as ideology does not conflict with its image as doctrine. Rather the doctrinal form of market interest reinforces the ideological form, facilitating the market capitalist ideology in dominating the world. Quite obviously, the reality perception of market interest is that of an ideological structure.

IV. A JUXTAPOSITION OF COMMON INTEREST AND MARKET INTEREST

In this part of the Article, my objective is to examine if the pairing of common interest and market interest is logical. This is done at two levels of analysis: first, the perceptions of reality of common interest and market interest—philosophy and ideology, respectively—are juxtaposed and second, common interest as doctrine is juxtaposed with market interest as doctrine.

A. Philosophy against Ideology

Theoretical Physicist Stephen W. Hawking ends his *A Brief History of Time* with the hope of a united humanity contemplating the meaning of its existence and, as a consequence, triumphing over human reason which now lies far off:

[I]f we do discover a complete theory [of the universe], it should in time be understandable in broad principle by everyone, not just a few scientists. Then we shall all, philosophers, scientists, and just ordinary people, be able to take part in the discussion of the question why is it that we and the universe exist. If we find the answer to that, it would be the ultimate triumph of human reason—for then we would know the mind of God.⁵⁶⁴

⁵⁶¹ For a background discussion on the development and advance of capitalism, see generally ROBERT A. DEGEN, *THE TRIUMPH OF CAPITALISM* (2008).

⁵⁶² On the various possible levels of relation between ideology and law, see Andrew Halpin, *Ideology and Law*, 11 J. POL. IDEOLOGIES 153 (2006).

⁵⁶³ This is a contention of CLS. There are, however, criticisms against the negative image of ideology and many perspectives on ideology as a constructive force. See e.g. id.; J.M. Balkin, *Ideology as Cultural Software*, 16 CARDOZO L. REV. 1221 (1995) (argues that ideology can be a representation of “everyday thought”, and need not be characterized by any inherent “falsity”, “deception”, or “empowerment”).

⁵⁶⁴ STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME* 191 (1998).

However, such enthusiasm for higher knowledge and humility before the magnificence of cosmos is nowhere to be seen among the social theorists and many self-styled pragmatists. They purport to have *a posteriori* understood and comprehensively accounted for human ontology, their very object of investigation. They trust that human reason is at its pinnacle of glory and that the rapid flow of wealth across the world made possible by the use of human intelligence evinces the triumph of reason. These social theorists have read the world in their material states of consciousness and constructed meanings for it, and on the basis of those meanings they have built structures to govern humanity. These meanings and the structures bearing it have determined the common goal, common interest, and common causes of humanity.

We have seen the gravity of this mistake reflected in discourses like TWAIL and global governance. However, if one could see beyond the shadow cast over human thought by manmade structures, common interest is a common inquiry into human reality, which renders humanity altruistic. Altruism is accordingly the highest state of consciousness one's reason can attain. *This is the crux of common interest as a philosophy.* Altruism being the goal, the starting point in humanity's inquiry of reality is egoism, which is the organic, natural state of mind. A mind subdued by the sensual satisfaction of having empirically understood the world would not tend to advance towards higher states of consciousness, constructing realities using its organic intelligence. In this way an egoistic mind denies any further states of intelligence other than its rational intelligence or any reality other than the social reality. *This finding is an insight into the heart of the market mindset.*

That means the perception of the reality of common interest as philosophy and that of market interest as ideology are macro-dimensional perceptions. In micro-dimensions, common interest and market interest are representations of altruism and egoism, respectively. Philosophy and ideology then become simple structures of thought bearing the qualities of altruism and egoism (this Article has made use of these structures of thought to discover the reality underlying the social concepts of common interest and market interest). Therefore in order to test the logical scope of the pairing of common interest and market interest, what should be examined here is the theoretical compatibility between altruism and egoism, for they constitute the true spirit of common interest and market interest.

1. Altruism and Egoism: The perennial poles of human thought

Human thought is essentially egoistic and clouded in ignorance.⁵⁶⁵ However, it incrementally advances from the cloudy egoistic state toward the intelligible perfection of altruism. In every single thought, the mind continuously experiences the tendency to break away from the ego, however, the pull of the ego is such that the mind is drawn towards the material state every time it advances towards altruism.⁵⁶⁶ Unless mind is conscious of its ability and methods to advance towards altruism, it remains in a

⁵⁶⁵ This ignorance is *Maya*, the superimposition of materialism. See *supra* note 43 and 44 and the materials cited therein; See also Mahadevan, *supra* note 557; For a focused treatment on the nature and role of *Maya*, see Harry Oldmeadow, *Shankara's Doctrine of Maya*, 2 ASIAN PHIL. 131 (1992).

⁵⁶⁶ See, e.g., ROBERT L. PAYTON & MICHAEL P. MOODY, UNDERSTANDING PHILANTHROPY: ITS MEANING AND MISSION 84 (2008).

perpetual push-pull between egoism and altruism. In view of this phenomenological fact, egoism and altruism signify the perennial poles of human thought.

Despite the fact that every philosophical tradition—Oriental or Occidental—considers altruism and egoism as the two poles of thought,⁵⁶⁷ the general Occidental conception of altruism (with exceptions) is very much materialistic, so much so that it tends to theoretically reduce the distance between altruism and egoism. These attempts at reconciling the poles should be viewed seriously, for such attempts usually lead to theoretical exercises such as justifying the pairing of rationalities within which altruism and egoism coexist. The spurious image of altruism has to be dispelled in order to appraise the real polarization between it and egoism.

In most of the medieval and contemporary Occidental discourses on altruism, the concept has certain rational qualifiers, e.g., a behavior is altruism provided that there is real action beyond mere thought, there is conscious self-sacrifice, and there is no expectation of reward.⁵⁶⁸ Any behavior lacking in these requirements is non-altruistic or egoistic. There are also discourses, as seen in economics, where altruism is presented as one of the many preferences of an otherwise egoistic individual.⁵⁶⁹ These approaches are criticized for their lack of clarity and credibility.⁵⁷⁰ Taking into account these limitations, a few scholars have proposed a cognitive model—the Cognitive-Perceptual Approach—which regards cognitive activity like empathy as the causal factor shaping altruism.⁵⁷¹ Kristen Renwick Monroe has put forward an advanced version of this model which, in addition to the focus on cognitive factors for determining altruism, helps individuals to have a sense of self and identity. However, self and identity are basically determined by essentialist factors, e.g. culture and upbringing.⁵⁷² Thus, cognitive-perceptual models are at the risk of espousing a sort of empathy-induced altruism, as seen in the case of TWAIL, which promotes group interests and threatens common good.⁵⁷³

These and many other Occidental conceptions of altruism are so extensive in scope and have manifold inferences that a review of them is neither feasible nor germane for the present context. Moreover, critical reviews of the general conceptions of altruism are available elsewhere.⁵⁷⁴ Hence I rely on a hindsight impression that they are all the result of a phenomenological materialism which fails to understand altruism as a sentiment springing from a fullness of mind. This fullness is a result of being in the highest state of intelligence.⁵⁷⁵ Individuals in this state do not feel the need for any

⁵⁶⁷ See K.R. Monroe, *Altruism and Self-interest*, in INT'L ENCYCLOPAEDIA SOC. & BEHAVIOURAL SCI. 415, 416 (Neil J. Smelser & Paul B. Baltes, eds. 2001).

⁵⁶⁸ *Id.*

⁵⁶⁹ For an overview of the economists' view of altruism, See Kristen Renwick Monroe, *A Fat Lady in a Corset: Altruism and Social Theory*, 38 AM. J. POL. SCI. 861, 864-70 (1994) (emphasizes that it is the basic assumptions about human self-interest that frustrates the efforts of many social sciences in offering a credible theory of altruism). On the assumptions of economics regarding altruism, see Herbert A. Simon, *Altruism and Economics*, 83 AM. ECON. REV. 156, 158-61 (1993).

⁵⁷⁰ See generally Monroe, *supra* note 569.

⁵⁷¹ See *id.* at 884-86.

⁵⁷² *Id.* at 887.

⁵⁷³ See *supra* note 155 and the source cited therein.

⁵⁷⁴ See KRISTEN RENWICK MONROE, HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY 121-94 (1996).

⁵⁷⁵ Isabelle Ratie, *Remarks on Compassion and Altruism in the Pratyabhijna Philosophy*, 37 J. INDIAN PHIL. 349, 355 (2009). In Buddhist philosophy, fullness is known as "emptiness", meaning empty of sensual desires. See

gratification, for, being those experiencing fullness, they have neither desires to fulfill nor merits to gain.⁵⁷⁶ Isabelle Ratie concisely captures the concept of fullness: individuals in the highest state of consciousness “do[] not have any will; but [their] will is exclusively turned towards the others—it cannot be selfish, given the completeness or the fullness that the liberated subject[s] [have] acquired by recovering a full awareness of [themselves]”.⁵⁷⁷ Furthermore, as the highest intelligence is the ultimate reality of humanity, which is synonymous with pure consciousness, there is also no risk of the highest intelligence having any essentialist or materialist quality. This purity renders altruism a state of mind free from the influence of any materialistic empathy, one that views the whole world as one.

Altruism is thus *qualitatively* far from the natural human state of egoism. All intermediary behaviors drawn out and elaborated by social sciences are the many versions of egoism, and are on no account altruism. Monroe affirms the incompleteness of intermediary behaviors:

[N]one of the socio-cultural correlates of altruism unfailingly and systematically explains altruism or behavior by altruists. It suggests, further, that remaining within the paradigmatic confines of self-interest produces only partial explanations of altruism. Such rational analyses offer some limited insight concerning quasi-altruistic acts by rational actors but fail to explain altruism itself.⁵⁷⁸

Further, the view that altruism and egoism are the perennial poles of human thought, to have a certain level of conceptual purity, requires a significant tempering of the idea that *egoism is the natural state of human thought*. Although this idea is not contested, and is a suitable depiction of the real situation, the natural human state (of ego) is often seen to be a necessary perspective for explaining the dynamics of our time-space and modern social life. This confers a special theoretical utility on ego,⁵⁷⁹ which has the possibility of reinforcing the egoistic side of the polarity. This intellectual posture of observing society through the natural state of consciousness is apparent in all the three doctrinal schools of thought—TWAIL, global governance, and L&E—examined earlier, in addition to being present in many thought-structures. This problem exists primarily because when ego becomes the basic variable for analyzing human behavior, it acquires a “causal status”.⁵⁸⁰ When the causal status of ego is

Ruben L.F. Habito, *Compassion out of Wisdom*, in ALTRUISM AND ALTRUISTIC LOVE: SCIENCE, PHILOSOPHY, AND RELIGION IN DIALOGUE 362, 373 (Stephen Garrard Post, ed. 2002) (“The compassionate life is an outflow of the vision of reality, “the way things are”, open to a person in the pivotal experience of awakening”. *Id.*)

⁵⁷⁶ Ratie, *supra* note 575 at 357, 362.

⁵⁷⁷ *Id.* at 355.

⁵⁷⁸ MONROE, *supra* note 574 at 233.

⁵⁷⁹ But, the origin of the idea that the egoistic side of the polarity gets a methodological purpose is in the Vedic philosophy itself. See Martha Doherty, *A Contemporary Debate among Advaita Vedantins on the Nature of Avidya*, 33 J. INDIAN PHIL. 205 (2005); S.K. Arun Murthi, *The Maulavidya Controversy Among Advaita Vedantins: Was Sankara Himself Responsible?*, 37 J. INDIAN PHIL. 149 (2009) (argues that the idea that ignorance assumes an ontological status owes to the imperfections in the taxonomy adopted by Sankara).

⁵⁸⁰ See Doherty, *supra* note 579 at 213, 214. While attributing this idea to Doherty’s articulation, I take it outside the strict Vedantic context within which Doherty works and structure it in a modern context without polluting her views. The view that the discussion within the Vedanta on the ontological character of ego has a modernist character is articulated in the later parts of Doherty’s article. See *id.* at 227-229.

combined with an absence of a clear conception of reality, the explanations implying causality to ego slowly set in as perceptions of reality.

In order to not to misrepresent the polarities, what is necessary is to dismiss any approach which has ego as the lens through which to look at the world. Then again, mere awareness of a state of fullness (altruism) or a desire to reach that state is not enough; this awareness and desire should be on top of a consciousness that ego—understood as the natural human state—has no ontological credibility.⁵⁸¹ This assertion does not deny that egoism is the point of departure of human thought. Any shift to altruism certainly starts from the natural egoistic state, not, however by means of the methods set by any ego-centric variable, but through the apophasis/negation of natural behavioral “nudges”.⁵⁸² In sum, the distance between altruism and egoism is obvious. However, a more logical way to view the polarities would be to take the position that more than any distance what separates altruism and egoism is their being different states of consciousness, one maturing to the other, with no intermediary psychological spaces.⁵⁸³

The departure from egoism towards altruism is what gives hope to human life. In other words, an awareness that the natural state of ego is a condition of ignorance and a desire for the highest intelligence are factors which help overcome the purposelessness of human life, the purposelessness satirized by Benjamin Franklin King in *The Pessimist*: “Nothing to see but sights, Nothing to quench but thirst, Nothing to have but what we’ve got”.⁵⁸⁴ What provides meaning and purpose to life then is the pursuit of supreme intelligence. This optimism might sound rather absurd from the perspective of materialism, for it creates an “impersonal cosmic perspective” on life,⁵⁸⁵ a perspective that miniaturizes earth as a “pale blue dot”, to borrow Carl Sagan’s widely admired expression,⁵⁸⁶ and life on earth to a surreal state of consciousness. John Kekes, however, equates the meaning of life with an intellectual state of coherence, one self-directed but driven by the natural order of things rather than getting lost in the metaphysical wilderness of transcendental reality.⁵⁸⁷ Yet, Kekes is aware that finding

⁵⁸¹ I have been influenced to take this view by Doherty’s review of the work of Swami Satchidanandendra. See *id.* at 215-19.

⁵⁸² See *id.* at 233. “Nudge” on individual behavior finds best articulation and illustration in RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

⁵⁸³ Readers need not think that the absence of any psychological space between altruism and egoism defeats the theory of “states of consciousness” or the idea of the reason gradating to higher levels. In the first three states of human consciousness, i.e., waking, dreaming sleep, and dreamless sleep, the “autonomic nervous system” is at work (see *supra* note 68 at 200), and hence they only qualify to the egoistic state. However, in *Turiya*, the fourth stage, which generates altruism, senses lose their sway and an awareness of “Self” overpowers the sensually motivated “self”. There are also many stages in the progress towards the supreme intelligence such as *Sattvapatti* (when there are noetic flashes), *Asamsakti* (when one gets detachment from senses), and *Padarthabhavana* (when one realizes the all-pervasiveness of the Brahman, the reality). See SWAMI KRISHNANDA, *THE PHILOSOPHY OF PANCADASI* 14 (1992). However, these stages hardly match with the fullness of the highest intelligence—*Turiya*—which engenders altruism. Only *Turiya* is identifiable with altruism. See SWAMI KRISHNANDA, *THE PHILOSOPHY OF PANCADASI* 14 (1992).

⁵⁸⁴ *The Pessimist*, BEN KING’S VERSE 126 (1894).

⁵⁸⁵ John Kekes, *The Informed Will and the Meaning of Life*, 47 *PHIL. & PHENOMENOLOGICAL RES.* 75, 79 (1986).

⁵⁸⁶ CARL SAGAN, *PALE BLUE DOT: A VISION OF THE HUMAN FUTURE IN SPACE* (1994).

⁵⁸⁷ Kekes, *supra* note 585 at 89, 90.

meanings in such cognitive activities would be no more than a palliative for the meaninglessness of human life.⁵⁸⁸

The true meaning of life is to be found in the pursuit of knowledge and in attaining absolute intellectual bliss.⁵⁸⁹ Absolute intellectual bliss is an identification with human reality: an identification of cosmic intelligence, identification of fullness, and identification of human *qua* human. This one whole intelligence in many forms of identifications imbues thoughts with beauty and deeds with meaning. E.M. Adams sums up the sublime purpose of life: “Our lives have their meaning through our participation in [the] struggle for the realization of what ought to be ... our mission is to be enlightened, rational, creative pulses to the divine heartbeats of the universe”.⁵⁹⁰

Thus, life absolutely being an advance from unreal to real, denouncing any meta-visions and conceptualizing the world on the basis of observed characteristics of the physical world and human behavior constrains any further intellectual development for humanity⁵⁹¹: “[W]e mutilate ourselves and deny our humanity when we conceptually repackage ourselves so that we fit into the world”.⁵⁹² Therefore any effort to stagnate the world has the effect of thwarting the advance of humanity towards our reality. Moreover, absence of knowledge regarding the ephemerality and limits of the organic state of consciousness can be detrimental to humanity; it not only prevents reason from achieving its goal, but closes the doors to many unknown cosmic truths that science has been investigating.

To sum up, maintaining the *duality* and distinction between altruism and egoism is imperative if humanity is to realize its goal. Any intellectual position or socio-political system tampering with this duality, be it one in which egoism and altruism mutually reinforce one another, coexist, balance, draw near, or remain in perpetual conflict, is unconstructive as well as harmful.

In this regard, there is, however, no consolation for those who seek social stability and inquire into the purposes of life through international law, for the duality is tampered with in international law;⁵⁹³ many disparate pairings of rationalities bearing

⁵⁸⁸ *Id.* at 90 (“within these [cognitive] frameworks, human lives can be and many are meaningful, even though outside of the human world everything is grey”. *Id.*).

⁵⁸⁹ E.M. Adams, *The Meaning of Life*, 51 INT’L J. PHIL. RELIGION 71, 80, 81 (2002) (“The universe [] is coming to self-knowledge through humanity in human culture and it is achieving a new level of being through the knowledge based action of human beings”. *Id.*).

⁵⁹⁰ *Id.* at 81.

⁵⁹¹ Such denouncing is equivalent to ignoring the inner world of humans and building the world solely on the basis of their physical world. Allott theorizes this position:

In the physical world made by [materialist] consciousness, the human being has found means of transforming that world by treating it as a world ordered in the dimensions of consciousness, time and space, and as a world which respects the ordering projecting onto it by the self-ordering of consciousness.

See ALLOTT, *supra* note 3 at 404.

⁵⁹² Adams, *supra* note 589 at 74.

⁵⁹³ About this argument, a scepticism is possible, especially for those readers familiar with the duality of apology and utopia formulated by Koskenniemi (see KOSKENNIEMI, *supra* note 3). For them, any reference to the duality between egoism and altruism might also be *déjà vu* of apology and utopia. Even if a doubt of my having committed a tautology creeps in; it is natural. All these concerns may exist because the utopian position of individual interest and apologist position of community interest are after all legal/political manifestations of egoism and altruism. However, altruism and egoism in a liberal political context are simply rudiments of the political philosophy of individualism and collectivism, respectively. In simple terms, Koskenniemi’s reference is to patterns of thought within a liberal political setup. That is not the background in which I analyze altruism

altruism and egoism, e.g., environment and trade, human security and trade, law of the sea and trade, law of outer space and trade, have occurred in international law and theoretically support many modern-day institutions and frameworks. These pairings defeat the very ontological purpose of humanity. Nevertheless, international law has shrouded any disparity in these pairings and validated them, as if they are natural systemic phenomena, by way of its doctrinal as well as rational discourses and dialectic. The details of that intellectual action make up the subject matter of the next section.

B. The Doctrine *against* Doctrine

In international law, the disparate pairing of rationalities became manifested as “regime-level linkages”⁵⁹⁴ whereby many special branches of international law (hereinafter “regimes”, since that expression is a fad and fashion in the postmodern world⁵⁹⁵) began to interact with other special branches of international law. Scholars of international law were concerned about linkages/clashes even before any regime conflicts were apparent.⁵⁹⁶ However, such clashes were mainly normative doctrinal ones,⁵⁹⁷ where the challenge was, more often than not, the impossibility of performing obligations due to the conflict of two norms.⁵⁹⁸ It was only with a recent phenomenon—the loss of the centrifugal force of the doctrinal complex of international law and the collapse of its “center”—that [“self-contained”]-regimes started to burgeon and threatened the coherence of the doctrinal complex. Each of these regimes seemed to be a mini-system in its own right, e.g., legal regimes for the environment, outer space, oceans, technology, human security, and the fight against terrorism etc. Scholars first had anxieties about this development that a jurisdictional anarchy in dispute

and egoism. In this Article, altruism and egoism represent the beginning and end, organic and transcendental, and illusion and reality [respectively] of human life and thought.

However, in the epilogue to the 2005 edition of *From Apology to Utopia*, Koskenniemi, as the culmination of the role of law, [“if ever happens”, as he would say] envisages a scenario in which altruism replaces egoism:

[A]s society becomes more integrated the (artificial) egoism of the individual actors cedes more room to their (natural) altruism so that the need of law diminishes until at some imaginary point ethics and natural love allow the (now fully integrated) community to govern itself without formalism. (original parenthesis)

Id. at 599. In this reference, altruism and egoism come out of its political context and correspond to the concept of the poles of human thought.

⁵⁹⁴ On the delineation of linkages into regime-level linkage and other specific and micro types of linkages, e.g., issue-area-linkage, see David W. Leebron, *Linkages*, 96 AM. J. INT’L L. 5 (2002).

⁵⁹⁵ Today, it is unlikely that specialist scholars in international law would deny regime status to their respective branch of specialization. International law today has an image of more than a venerated canon with a general application; rather it has the image of an actively functional catalyst, divided into many branches and sub-branches, efficiently reaching many areas of human activity, in an expanding and intermingling world. Every special branch has such a conceptual artillery of “principles, norms, rules, and decision-making procedures” (matching with that of a regime) to it that it can prompt actor’s expectations to meet around the issue it seeks to regulate (regimes are defined and elaborated in Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185 (1982)).

⁵⁹⁶ See, e.g., Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L. 401 (1953).

⁵⁹⁷ According to Simma, the normative clashes have the potential to generate sub-systems within international law; these sub-systems can in effect be regimes. See Bruno Simma, *Self-contained Regimes*, 16 NETHERLANDS Y.B. INT’L L. 111 (1985) (assures that the existence of self-contained regimes does not significantly threaten general international law).

⁵⁹⁸ On a typological specification of doctrinal normative clashes, see generally Erich Vranes, *The Definition of ‘Norm Conflict’ in International Law and Legal Theory* 16 EUR. J. INT’L L. 395 (2006).

settlement might arise if regime-specific special courts proliferate.⁵⁹⁹ This anxiety soon gave way to an assurance that there are no autonomous regimes, but only special regimes; and, these special regimes do not pose any threat to the structural safety of the doctrinal complex.⁶⁰⁰

Today regime clashes and their consequences are barely a theoretical worry in international law.⁶⁰¹ Over the past few years, the discipline has had many doctrinal shifts and moves, rendering the conflicting regimes to coexist and mutually interact with each other. In what follows, I analyze how international law has settled the regime-clashes through its doctrinal complex, thereby putting together the disparate rationalities—common interest and market interest—to interact and thus bridged the extremes of altruism and egoism. This analysis is done bearing in mind that doctrine has two forms, i.e., doctrine as structure and doctrine as discursivity. The structural moves mediating common interest and market interest are described first and then the discursive moves. Regarding discursive doctrinal moves, for intelligibility and focus, I choose the three types of doctrinal discourses with which the readers are already familiar—global governance, TWAIL, and L&E—and demonstrate how each of these discourses worked in order to validate the disparate pairing of rationalities. These three discourses do not, however, exhaust the types of discursive doctrinal moves which validate disparate rationalities.

1. Structural Doctrinal Moves

Trade came into the spot light in the 1980s, when the global economy was under the severe threat of protectionism in the form of non-tariff barriers to trade.⁶⁰² Many of the non-tariff barriers were related to “issue-areas” lying far beyond that of trade.⁶⁰³ Indeed, this remoteness of the issue-areas from the trade regime was the major challenge in combating protectionism. The issue-areas featuring in the use of non-tariff barriers, the phenomenon which John H. Jackson calls “special sector interests”, “are myriad, and many are [of] the types [...] for which human ingenuity can perpetually develop new devices”.⁶⁰⁴ Non-tariff barriers were found in environmental standards, labor standards, human rights and the like.

Two major rounds of talk in the General Agreement on Tariffs and Trade (GATT) had been unsuccessful in grappling with non-tariff barriers to trade. Afterwards the

⁵⁹⁹ See generally Koskenniemi & Leino, *supra* note 9.

⁶⁰⁰ See *Report of the Study Group of the International Law Commission*, *supra* note 9. See also Anja Lindroos & Michael Mehling, *Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO*, 16 EUR. J. INT’L L. 857, 858 (2006); Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 17 (2007).

⁶⁰¹ See, e.g., Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L L. 265 (2009). Simma assures international lawyers that “We may not always be aware of how thin the ice is on which we are moving, but what we keep in mind in very pragmatic ways is that we must handle the law” (on fragmentation and self-contained regimes) *id.* at 297.

⁶⁰² See JAGDISH BHAGWATI, PROTECTIONISM 43-60 (1989).

⁶⁰³ “Issue-areas”, the term used by Leebron, has a functional connotation, although the term sufficiently captures those regimes which *prima facie* clash with trade. On the meaning and application of the term in the context of “trade and ...” linkages, see Leebron, *supra* note 594 at 6-10.

⁶⁰⁴ John H. Jackson, *Afterword: The Linkage Problem—Comments on Five Texts*, 96 AM. J. INT’L L. 118, 121 (2002).

issue came on to the agenda of the Uruguay Round of GATT negotiations,⁶⁰⁵ where it was resolved successfully. Inspired by the overall success of the Uruguay Round it was felt that non-tariff barriers would be best addressed through an international institution, one mandated to manage intervening issue-areas and which could contain the non-trade rationalities of those issue-areas.⁶⁰⁶ As if in response to this feeling, the World Trade Organization (WTO) was founded, which has an institutional framework to accommodate inter alia non-trade concerns and thereby mediate the conceptual conflict between the various issue-areas and trade.⁶⁰⁷

The trade community hypostatized (and lionized) the WTO as the institutional manifestation of the trade regime.⁶⁰⁸ Linkage issues, nonetheless, were raging, tending to threaten even the working of the Organization. The primary matter of concern was the WTO intervening in issues irreconcilable with its logic and design, which might cause severe imbalances in the world and could be deleterious for the future of humanity. At the root of these concerns were perceptions that a market interest was moving towards the center of inter-state, inter-human relations and that the trade regime, propelled by opportune ideologies, was cannibalizing other regimes. The WTO, however, mollified these concerns through a doctrinal, interpretative move in which it assured all stakeholders that it was not a legal phantom existing beyond the rule of law,⁶⁰⁹ but an organization functionally interlinked to international law in a systemic, interactive way.⁶¹⁰ This was endorsed in scholarly writings.⁶¹¹ In addition to

⁶⁰⁵ Non-tariff barriers were discussed in the Kennedy Round and Tokyo Round of the General Agreement on Tariffs and Trade (GATT), though they were less successful. See L. Alan Winters, *The Road to Uruguay*, 100 *ECON. J.* 1288, 1292-99 (1990); *Id.* For an account of the background of the Uruguay Round, its advancement, and the challenges confronted by the Round in the milieu of the then economic and political situation, see “Gilbert R. Winham, *An Interpretative History of Uruguay Round*, in *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC, AND POLITICAL ANALYSIS* 3-25 (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer, eds. 2005).

⁶⁰⁶ See generally Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 *CORNELL INT’L L. J.* 607 (1994).

⁶⁰⁷ For example, the World Trade Organization’s (WTO) commitment to balance common interest and market interest is embodied in the preamble of the WTO Agreement in the form of a declaration to preserve the environment [in the common interest of humanity]:

[Trade should be conducted], while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns of different levels of economic development.

See *The Marrakesh Agreement Establishing the World Trade Organization* (hereinafter “The WTO Agreement”), THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999) (hereinafter “Legal Texts”). On the organizational side, in pursuance of its commitment to balance trade and environment, the WTO has established The Committee on Trade and Environment. See http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm.

For an evaluation of the WTO as a platform and tool for linkages, see Jose E. Alvarez, *The WTO as a Linkage Machine*, 96 *AM. J. INT’L L.* 146 (2002).

⁶⁰⁸ MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 93-115 (2006).

⁶⁰⁹ See Article 3.2. “Understanding on Rules and Procedures Governing the Settlement of Disputes”, *Legal Texts*, *supra* note 607 at 355. See also Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Towards a More Collective Approach*, 94 *AM. J. INT’L L.* 335, 341-42 (2000).

⁶¹⁰ See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 *AM. J. INT’L L.* 535 (2001).

⁶¹¹ *Id.* For support, see generally Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 *EUR. J. INT’L L.* 969 (2007) (“the WTO is an engine, a motor energizing the international legal order”. *Id.* at 984).

that WTO's institutional charisma was seen as reinforcing the normativity and bindingness of international law,⁶¹² liberating it from an age-old accusation of being an insignificant player outside the family of law.⁶¹³

This action is a sign of how the auto-response system of the doctrinal complex of international law responds to a crisis. To illustrate, when the crisis of protectionism became a menace to international trade, an international institution seemed to offer the optimal remedy. However, protectionism was a crisis not only in the sense that it hampered free trade, but issues at variance with the culture of the trading system were taken up in that process, which left the multilateral trading system with no alternative but to assimilate the new issue-areas into the regulatory sphere of trade. The very formation of the WTO and its subsequent integration into the doctrinal complex of international law were part of the functioning of the auto-response system of the doctrinal complex.⁶¹⁴ A good bet on this point would be that formal-minded, ingenious international lawyers would have seen in this institutionalization of disparate rationalities a tinge of progress of international law.⁶¹⁵

The impact of cannibalism of the trade regime was such that many special branches of international law had witnessed trade concerns entering their regulatory realm. This overpowering advance of trade had weighty ideological reasons⁶¹⁶—the ideological advance has even weighty philosophical explanations⁶¹⁷—beyond that a crisis had simply erupted (I will forgo a detailed treatment in this context). In any event, special branches of international law were in turmoil triggered by the new issues they had to regulate. Prominent cases were that of the legal regimes of the oceans and outer space, for these regimes, which to a significant extent regulate human activities in order to realize the interests of humanity at large,⁶¹⁸ were required to brazen out the trade-driven market interests.

⁶¹² See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 24-26 (2005).

⁶¹³ See, e.g., Raj Bhala & Lucienne Attard, *Austin's Ghost and DSU Reform*, 37 INT'L LAW. 651 (2003).

⁶¹⁴ Until the official integration by way of a declaration in the preamble of The WTO Agreement, its predecessor GATT did not strictly adhere to the conventions of interpretative reasoning of the doctrinal complex. See P.J. Kuyper, *The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-contained Regimes?*, 25 NETHERLANDS Y.B. INT'L L. 227 (1994) (points out that despite a tendency to function as if it is a self-contained regime, GATT failed at many points. Kuyper, however, concludes, "whether GATT is or about to become a self-contained system of international law, cannot yet be answered affirmatively". *Id.* at 257.).

⁶¹⁵ Nothing less than this view is what turns out from Klabbers' musings on Thomas Franck—"Franck was right in designating the law of international organizations as constitutional, as being 'capable of growth'". Jan Klabbers, *The Paradox of International Institutional Law*, 5 INT'L ORG. L. REV. 151, 162 (2008). Trachtman views inter-regime linkages, particularly "trade and ...", on a slightly different note: "They [regimes] can also be artificially linked in order to provide bargaining power or enforcement power". See TRACHTMAN, *supra* note 417 at 196.

⁶¹⁶ The epithet, "market fundamentalism", as popularized by Stiglitz, speaks a lot about the ideological reasons behind the dominance of trade. See generally JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002). These reasons are, to a certain extent, the subject matter of an earlier discussion in this Article (see *supra* Section III.A).

⁶¹⁷ The analyses I have in section II.2 is a modest attempt to augment those philosophical explanations.

⁶¹⁸ See the preamble of the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 1967, UNITED NATIONS TREATIES AND PRINCIPLES ON OUTER SPACE 3-8 (2002) ("Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes"). Also, see the preamble of the "United Nations Conventions on the Law of the Sea", 1982 (UNCLOS), 21 I.L.M. 1261. "[W]ill contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world ...").

As regimes safeguarding and securing the common interest of humanity, the main challenge facing the law of the sea and outer space was the refractoriness of their doctrines of common interest which were deeply entrenched within the legal discourses maintaining the coherence of the respective regimes.⁶¹⁹ At a functional level, the challenge for the law of outer space was to regulate commercial space activities,⁶²⁰ whereas for the law of the sea the trial was its political opposition to its *supposed* undue inclination towards maintaining community interest.⁶²¹ As the first step, jurisdictional frontiers of both regimes were left open for an invasion by market interests.⁶²² Then, these legal regimes faced up to the crisis, and continued to adjust to it, through extended interpretations of their doctrines and extended bodies of legislation, subsuming thereby market concerns into their sphere of regulations.⁶²³

However, when it was the turn of the trade regime to reconcile itself with the claims of common interest regimes, such as the regime for the protection of the environment, the interpretative acts within the trade regime were seen to reduce the utility of the substance of “environmental arrangements”.⁶²⁴ Environmental concerns and the legal framework devoted to their solution were integrated into the trade regime, but as mere tools “helping interpret an exception from the principles of free

In addition, both the regimes uphold the principle of the “Common Heritage of Mankind” (CHM), which vests on humanity a duty to protect as well as a moral right of inheritance of the natural resources of the universe. For an instructive discussion, see KEMAL BASLAR, *THE CONCEPT OF COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW* 7-28 (1998) (contents that the constituents of the rights associated with the CHM are derived from ethics and morals).

⁶¹⁹ For example, the principle of the CHM was deemed to be the bedrock of the legal regimes of oceans and outer space. Scholars of these disciplines cherish the CHM and take pride in the principle. They believe that any tampering of the CHM would damage the foundations of these regimes. On a sentiment that the CHM constitutes the foundation of these regimes, see Aldo Armando Cocca, *The Common Heritage of Mankind: Doctrine and Principle of Space Law—An Overview*, 29 *PROC. COLLOQ. L. OUTER SPACE* 17 (1986). See also Nicolas Mateesco Matte, *The Common Heritage of Mankind and the Outer Space: Toward a New International Order for Survival*, 12 *ANNALS AIR & SPACE L.* (313 1987) (argues that space law is progressive only when it is developed through the CHM). However, disagreements exist regarding the normative strength of the doctrine. See, e.g., Christopher C. Joyner, *Legal Implications of the Concept of Common Heritage of Mankind*, 35 *INT’L & COMP. L. Q.* 190 (1986) (asserts that the CHM is neither a principle *erga omnes*, nor a *jus cogens*, but a “philosophical notion with the potential to emerge and crystallize as a legal norm”. *Id.* at 199.).

⁶²⁰ For a succinct account of the challenges being confronted by the law of outer space, see Johanne Irene Gabrynowicz, *Space Law: Its Cold War Origins and Challenges in the Era of Globalization*, 37 *SUFFOLK U. L. REV.* 1041 (2004).

⁶²¹ During the UNCLOS negotiations a group of industrially advanced countries held that the regime for the mining of the deep sea-bed, by excessively focusing on the common interest of all states in the exploration and mining of the deep sea-bed, ignores the economic/market and political realities of the time. On this state position, see MARKUS G. SCHMIDT, *COMMON HERITAGE OR COMMON BURDEN?* (1989).

⁶²² A noteworthy example in this regard is the institutional tie between the International Seabed Authority and the WTO. See *INT’L ORG. AND L. SEA DOCUMENTARY Y.B.* 22, para 38 (2000).

⁶²³ See Franz G. von der Dunk, *Public Space Law and Private Enterprise: The Fitness of International Space Law Instruments for Private Space Activities*, 1999 *PROC. PROJECT 2001—WORKSHOP ON LEGAL ISSUES OF PRIVATISING SPACE ACTIVITIES* 12 (2001). For the proposals on how to adapt to the crisis, see, Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 *STAN. ENVTL. L. J.* 109 (2009) (proposes to alter the CHM and make the doctrine amenable to market interests by way of redefining and commercializing property rights in common heritages); John S. Lewis & Christopher F. Lewis, *A Proposed International Legal Regime for the Era of Private Commercial Utilization of Space*, 37 *GEO. WASH. INT’L L. REV.* 745 (2005).

⁶²⁴ See Anja Lindroos & Michael Mehling, *From Autonomy to Integration? International Law, Free Trade and the Environment*, 77 *NORDIC J. INT’L L.* 253, 260-67, 271, 272 (2008).

trade”.⁶²⁵ Accordingly, the trade regime maintained its pre-eminence in mediating conflicting rationalities.

Finally, if the interpretatively mediated conflict between common interest and market interest is viewed as one performed in a liberal political setting by the contemporary doctrinal discourse,⁶²⁶ the interpretative act takes on a postmodern aura of being a hermeneutical action,⁶²⁷ and in that way gains a theoretical credibility.⁶²⁸

2. Discursive Doctrinal Moves

Thus the discontents about the linkage between disparate rationalities were put off and the doctrinal rearrangements legalized by way of several structural doctrinal moves. There was, however, no discourse to validate those rearrangements. This was the time when international law would use its doctrines in their discursive form, trimming this with the discourse of global governance and its auxiliary discourses, “sustainable development”.

In the scholarly circles of international law, global governance is considered as a force that tidied up a conceptual litter spewed out by the crises that hit the world when the Cold War ended. For scholars in the field, global governance is also a ubiquitous guiding *tour de force*—an enlightenment which contributes meaning to the contemporary “open-ended” public process⁶²⁹—and a “cosmocracy”⁶³⁰ and “cosmopolity”. However, as argued earlier, these perceptions are misguided, the result of a deeply embedded materialist reformism in modern individuals and, simultaneously, of a self-imposed spiritual poverty, both of which showed the way to a politically designed as well as a recycled program of governance.⁶³¹ Notwithstanding this specious perception of it, global governance flourishes in a liberal political and neoliberal economic environment; breathing the air of these environments and thereby catering to the needs of the market.⁶³² Moreover, governance is projected as representing a virtue and a “prerequisite to human development”, and a medium securing the common interest of humanity.⁶³³

⁶²⁵ *Id.* at 271.

⁶²⁶ Given that the setting in which the mediation between common interest and market interest is done is a liberal political one—one between “truth” and “power”—likening the polarity between the common interest and market interest to that between truth and power is logical. On the liberal doctrinal discourse and its [faulty] dynamics, see David Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985). This view also implies that bringing the poles of common interest and market interest to a liberal setting is at the expense of distorting the reality regarding the polarity (which is that of the organic and transcendental states of human life) and reducing the polarities to that of positions as they are seen in political philosophy. For support, see *supra* note 593.

⁶²⁷ This likening is not simplistic either. In the interpretative actions within the law of outer space and the law of the sea one can find inter alia, what Kennedy associates with hermeneutics, a devotion for the “mechanism of the ‘legal system’, describing the behavior of norms and actors”. *Id.* at 256, 257.

⁶²⁸ But, see *id.* (“By retaining and suppressing behavioral and interpretative conflict, theory adopts the confident tone of an anti-intellectual practicality”. *Id.* at 257.).

⁶²⁹ See Kennedy, *supra* note 30 at 106.

⁶³⁰ “Cosmocracy” refers to the interdependent and intersecting governance structure. See JOHN KEANE, GLOBAL CIVIL SOCIETY? 97 (2003).

⁶³¹ See *supra* Section II.B.2.b.

⁶³² See Lee & McBride *supra* note 168 at 6.

⁶³³ *Id.* at 10, 11.

On the face of it, global governance is a normal theoretical configuration, but on a second look, it becomes obvious that, in the name of governance, a mediation is taking place between common interest and market interest. That is to say, by means of the dialectic of governance, common interest of humanity is situated within neoliberal market interest. If the neoliberal economic milieu is replaced with a liberal political milieu, even then, governance situates common interest of humanity within liberal political individualism.

Enough has been said about the theoretical design of global governance.⁶³⁴ I now turn to showing how the concept of sustainable development, which is an auxiliary discourse of global governance, aids in the mediation between common interest and market interest.

In international law, sustainable development emerged as a policy response to the global problems that threaten to lead humanity and its habitat to self-destruction—a crisis.⁶³⁵ Sustainable development was solemnized through the Report of the World Commission on Environment and Development (WCED).⁶³⁶ In keeping with this report, the objective of the concept of sustainable development, above anything, is to maintain the poise of economic growth and the protection of the common interest of humanity in its habitat.⁶³⁷ Subsequently, the doctrinal complex of international law integrated sustainable development into its epistemological and functional framework⁶³⁸ in such a way that international law remains a site for balancing economic development with the protection of environment.⁶³⁹ However, when bringing in economic development, in order that any market interest remains out of sight, the economic concerns were diluted in their entirety into a discourse—the “right to development”—representing a mixed bag of economic, political, social, and human

⁶³⁴ See *supra* Section II.B.2.a.

⁶³⁵ Nico Schrijver, *Introducing the Book*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE xi. (Nico Schrijver, ed. 2004).

⁶³⁶ See *Our Common Future: Report of the World Commission on Environmental and Development*, available at <http://worldinbalance.net/pdf/1987-brundtland.pdf>

⁶³⁷ See generally, *id.* See also Oluf Langhelle, *Sustainable Development: Exploring the Ethics of Our Common Future*, *International*, 20 POL. SCI. REV. 129, 130, 135 (1999) (contents that the economic dimension in the concept of sustainable development is because of the “over-emphasis and misinterpretation of the growth issue”. *Id.* at 130.).

⁶³⁸ See generally Marie-Claire Cordoneir Segger, *Sustainable Development in International Law*, in SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW 85, 116-182 (Hans Christian Bugge & Christina Voigt, eds., 2008) (argues that sustainable development can pass the “normative test” set by the doctrinal framework of international law). But, see Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19-38 (Alan Boyle & David Freestone, eds., 1999) (sustainable development in itself is not a norm, but “it can properly claim a normative status as an element of the process of judicial reasoning”. *Id.* at 31.).

⁶³⁹ This balancing is evident from the many decisions of the ICJ, e.g., the *Case Concerning the Gabčíkovo-Nagymaros Dam*, see ICJ REPORTS 1997, p.78, para 140. See also *Case Concerning Pulp Mills on the River Uruguay*, 13 July 2006 (order for provisional measures) available at <http://www.icj-cij.org/docket/files/135/11235.pdf> (“[T]he present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development”. *Id.* at p.19, para 80.). How this balancing is done in practice within the GATT/WTO is presented in Massimiliano Montini, *The Interplay between the Right to Development and the Protection of the Environment: Patterns and Instruments to Achieve Sustainable Development in Practice*, 10 AFR. Y.B. INT’L L. 181, 210-22 (2002); B.S. Chimni, *WTO and Environment: Shrimp-Turtle and EC-Hormones Cases*, *ECON. & POL. WKLY.* 1752 (13 May 2000) (highlighting the interpretative acts of the Dispute Settlement Body (DSB) of the WTO, argues that the WTO has the potential to be a platform for balancing trade and environment).

rights.⁶⁴⁰ In the flamboyant rhetoric of the right to development,⁶⁴¹ and accompanied by the hopes and cries for securing social, political, economic, and human rights, market interest has gently entered the sustainable development discourse in the form of an innocuous right to economic development. Carlos J. Castro summarizes the process syllogistically:

[P]overty need to be reduced ... [P]overty was and still is a cause of environmental degradation. Therefore, environmental degradation will be reduced when poverty is reduced. To reduce poverty, the countries in the periphery need to have economic growth. To achieve economic growth, there need to be freer markets ... In other words, sustainable development sounds suspiciously like plain old [economic] development.⁶⁴²

Today market motives drive sustainable development.⁶⁴³ Furthermore, the sustainable development discourse guarantees that any act of mediation between the common concerns of humanity regarding the protection of the environment and market-driven economic development is theoretically valid. In other words, any mediation between common interest and market interest can have effect within the doctrinal complex of international law without having the fairness of the act challenged. Thus, being buttressed by a “postmodernist discourse”,⁶⁴⁴ the doctrinal complex advances with institutional⁶⁴⁵ and strategic reform⁶⁴⁶ to reinforce the union of common interest and market interest.

⁶⁴⁰ This view has more strength when viewed in the light of the United State’s position in the right to development negotiations. When the right to development was discussed in international negotiating forums, the United States has found the concept as contrary to its national and international economic policies and aspirations. See Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 143-47 (2004) (“It may be presumed to be a sincerely held belief of the decision-makers in the U.S. government that the best path to development is through free enterprises domestically and free trade internationally”. *Id.* at 145.).

⁶⁴¹ Donnelly argues that the right to development is deceptive in legal terms and illusory in moral terms; it is nothing but a “charming delusion”. See Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT’L L. J. 473 (1985).

⁶⁴² Carlos J. Castro, *Sustainable Development: Mainstream and Critical Perspectives*, 17 ORG. & ENV’T 195, 197 (2004) (articulates that faith in achieving sustainability through economic free trade is a mainstream view on sustainable development. However, this view has been resisted and is being reconstructed by a “poststructuralist critique” and “environmental Marxism”).

⁶⁴³ Not only that, Beckerman instructively argues that the presence of market motives and the effort to balance it with a loosely defined ethical guidance to protect the environment have rendered sustainable development dysfunctional and logically unsustainable. This is for the reason that the concept of *development*, which is construed as “welfare maximization” in sustainable development discourses, is incompatible with the ethically conceived meaning of *sustainability*. See generally Wilfred Beckerman, *Sustainable Development: Is It a Useful Concept?*, 3 ENVTL. VALUES 191 (1994).

⁶⁴⁴ On the view that sustainable development is a postmodern discourse and that it supports the reconciliation of environmental interests with trade interests, see TUOMAS KUOKKANEN, *INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME* 315-338 (2002).

⁶⁴⁵ See generally Joyeeta Gupta, *Global Sustainable Development Governance: Institutional Challenges from a Theoretical Perspective*, 2 INT’L ENVTL. AGREEMENTS: POL., L. & ECON. 361 (2002) (evaluates the various institutional models that could bring together the goal of sustainable development and the spirit of global governance).

Despite the ubiquity of global governance, the governance structures it brought with it did not receive worldwide acceptance; in certain contexts the governance paradigm itself faced resistance and contestation. The resistance primarily came from TWAIL, which recognizes that it is its responsibility to continue and uphold the spirit of the resistance started after decolonization even when a new paradigm like global governance presides over the world.⁶⁴⁷

From its historiographical records, TWAIL realized that global society is the product of a social action, as is market. Later on, when social relations became an economic function, market took over the social functions and governance of social institutions.⁶⁴⁸ In the process, the colonial world gained control over the market, and in the many power ploys that ensued, colonies lost their social identity and control.⁶⁴⁹ TWAIL therefore considers it as its major assignment to study the institutions of the market society and to attempt to reorder the patterns of control.⁶⁵⁰ This recognition from TWAIL that its identity and welfare lie in getting control of the market institutions from the West has driven TWAIL scholars to focus on the distribution of power in and activities of these institutions.⁶⁵¹

It is paradoxical that the reformist TWAIL scholars do not oppose market interest, free trade, or free-trade institutions *per se*, but are only concerned “whether free-trade automatically translates into the welfare for the subaltern classes”.⁶⁵² However, this empathy of TWAIL with free trade has not lessened the oppositional resistance to which TWAIL has oriented itself.⁶⁵³ This is apparent from two functional stances taken

⁶⁴⁶ The introduction of Environmental Impact Assessment (EIA), which evaluates commercial projects, in order to help set a balance between economic efficiency and environmental efficiency is a major strategy within the sustainable development paradigm. See KUOKKANEN, *supra* note 644 at 287, 288.

⁶⁴⁷ Fidler, *supra* note 157 at 29, 30. But, see Ruth Buchanan, *Writing Resistance into International Law*, 10 INT’L COMMUNITY L. REV. 445 (2008) (asks to what extent TWAIL can carryout its resistance within the conceptually clogged liberal framework of international law).

⁶⁴⁸ Michael Fakhri, *Law as the Interplay of Ideas, Institutions, and Interests: Using Polyani (and Foucault) to ask TWAIL Questions*, 10 INT’L COMMUNITY L. REV. 455, 459, 460 (2008).

⁶⁴⁹ *Id.* at 460.

⁶⁵⁰ See *id.* at 464, 465.

⁶⁵¹ Inquiries into the existing mode of governance have been done in, e.g., Anthony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 893, 894, 906-09 (2000). Considering that the concept of “good governance” was contrived by the Western world only to get control on global governance, Anghie writes with a doubt regarding the neutrality of the practice of good governance:

Good governance, in short, provides the moral and intellectual foundation for the development of a set of doctrines, policies and principles, formulated and implemented by various international actors to manage, specifically, the Third World state and Third World peoples. Attempts by Western states to promote good governance in the non-European world are simply one example of a much broader set of initiatives relating to the promotion of democracy, free market and rule of law. These initiatives have a basic structure in common: in all cases, the basic task is that of reproducing in the non-western world a set of principles and institutions which are seen as having been perfected in the Western world and the non-Western world must adopt if it is to make progress and achieve stability.

Id.

⁶⁵² See B.S. Chimni, *The World Trade Organization, Democracy, and Development: A View from the South*, 40 J. WORLD TRADE 5, 10 (2006).

⁶⁵³ To remind that the oppositional resistance has been the fundamental functionality of TWAIL, I quote Mutua:

Any TWAIL scholarship or political operation must be fundamentally oppositional to an important question in international law. Such disagreement must be related to an issue that is of significance to, or affects in an important way, the Third World ... At a minimum, the

by TWAIL on the question of the linkage between disparate rationalities. First, it sceptically views any association between social rationalities and market interest;⁶⁵⁴ e.g., TWAIL is sceptical about the linkage between trade and the “social”.⁶⁵⁵ Second, TWAIL seeks to reverse the discourse of the right to development—which we now understand as a discourse that brings market interest in the name of economic development into a common interest regime like the protection of environment—in favor of the Third World by adopting a “left developmentalism that step[s] outside the framework of a global capitalist order”.⁶⁵⁶

However, the oppositional stances taken by TWAIL against disparate linkages have been seriously impacted by the manner in which TWAIL has situated the concept of resistance into its manifesto. That is, TWAIL exerts resistance through collectively and culturally informed social movements which intervene in the power-oriented international legal order and thereby transform the system.⁶⁵⁷ To be sure, the theoretical formulation of resistance chosen by TWAIL is a logically profound Marxian conception,⁶⁵⁸ but, in putting that resistance into action, TWAIL has chosen the doctrinal complex as the theater to mobilize the relevant social movements.⁶⁵⁹ Thus international law became the medium through which TWAIL exerts resistance.

TWAIL’s position on resistance resembles the “Foucaultian dilemma”.⁶⁶⁰ Foucault believed that resistance often takes the form of a “tactical reversal” of the power patterns in a society.⁶⁶¹ In that mode, resistance is an interplay of forces, one a dominant and the other a corrective force.⁶⁶² However, Foucault was also conscious that the interplay between the dominant and corrective forces entails the risk of creating mutuality between the forces in addition to the interplay validating the structure within which it occurs.⁶⁶³ Kevin Thompson paraphrases Foucault’s sentiment on the latter

author or political actor exposes, attacks, or unpacks a particular phenomenon that is inimical to the Third World.

Mutua, *supra* note 103 at 36. Also, see *supra* Section II.B.1.

⁶⁵⁴ Chimni, *supra* note 652 at 35 (suggests that “international trade is not used as a tool for pursuing non-trade values”, while arguing for a redemocratization of the neoliberal political economy).

⁶⁵⁵ On the linkage between “trade” and “the social”, see Sungjoon Cho, *Linkage of Free Trade and Social Regulation*, 5 CHI. J. INT’L L. 625 (2005).

⁶⁵⁶ Chimni, *supra* note 652 at 28 (internal quotes omitted).

⁶⁵⁷ RAJAGOPAL, *supra* note 16 at 23. See generally Sonja Buckel & Andreas Fischer-Lescano, *Gramsci Reconsidered: Hegemony in Global Law*, 22 LEIDEN J. INT’L L. 437 (2009) (explaining the Gramscian conception of [capitalist] hegemony, the authors provide illustrative tips for designing a counter-hegemonic socio-legal model).

⁶⁵⁸ TWAIL has delineated the concept of resistance by standing on the shoulders of giants, see, e.g., *id.* at 11-23.

⁶⁵⁹ *Id.* at 23. However, according to Chimni, TWAIL had the options to choose either a structuralist internal reform of international institutions or prompt a foundational revolution. See Chimni, *supra* note 142 at 29.

⁶⁶⁰ Reviewing Rajagopal’s *International Law from Below*, Hurwitz uses the expression “Foucaultian dilemma” to refer to the functional situation (which I discuss here) of TWAIL. Deena R. Hurwitz, *The Politics of the People, Human Rights, and What is Hidden from View*, 37 GEO. WASH. INT’L L. REV. 293, 300 (2005).

⁶⁶¹ Kevin Thompson, *Forms of Resistance: Foucault on Tactical Reversal and Self-formation*, 36 CONTINENTAL PHIL. REV. 113, 116 (2003). For an account on how law features in the interplay of power and resistance, see Book Review: Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 STAN. L. REV. 449 (1996).

⁶⁶² *Id.* at 118.

⁶⁶³ See *Id.* at 120. Drawing on Foucault, Thompson explains the impact of this interplay: “The tactical and the strategic thus condition one another, the strategic acts as the fundamental structure enabling the forces to exercise themselves in consistent and relatively stable patterns; the tactical is the support insuring and providing the limiting concreteness for the aims of the strategic”. *Id.* at 118.

point: “[H]ow is resistance possible and what could it be if the arena within which it must be created is itself defined by the very antinomy that it is seeking to contest?”⁶⁶⁴

Placing this dilemma in the present context generates suspicion towards TWAIL’s resistance: first, the interaction between the dominant forces and the social movement taking place within the doctrinal complex of international law validates the form and structure of the complex. Second, the resistance exerted by TWAIL against free-market capitalism becomes an interaction between free markets and the reversal TWAIL seeks. The latter position results in a repeat of the Foucaultian tragedy whereby the market sociality of the free market and the left-leaning developmentalism of TWAIL turn into a “scheme of coordination”.⁶⁶⁵ Given this mediative nature of its resistance, TWAIL has in fact assimilated the opposition it has raised against the disparate pairing of rationalities into the market institutions it has chosen to oppose, thereby falling prey to what Rajagopal feared, that is, that resistance not properly defined is in the danger of being a “cooptive/coopeted enterprise”.⁶⁶⁶ In general, the form and dialectic of resistance serves as a discourse validating the mediation of common interest and market interest.

So far we have seen two discursive doctrinal moves: First, the explanatory power of global governance assuaging the concerns of a discipline overwhelmed by regime clashes, and second, structural flaws of the concept of resistance, as it is embedded in TWAIL, assimilating into the doctrinal complex of international law what TWAIL has been disputing. Both cases, in effect, validate the pairing of common interest and market interest, and in so doing tend to confer normativity on this disparate pairing. Yet, a third type of discursive doctrinal move can be seen on the methodological front, that employed by L&E in the form of the economic analysis of international law. The remainder of this section briefly describes that move.

Because its attitude is market-based, L&E views international society as a market-place where states and non-state actors trade against each other in statist assets.⁶⁶⁷ Regime conflicts in this arrangement potentially increase transaction costs;⁶⁶⁸ e.g., in a typical trade and environment conflict, on the one hand, trade liberalization can impose environmental costs on states and, on the other, environmental protection can impose costs on trade by restricting its scope.⁶⁶⁹ These transaction costs are overcome by the structural and functional use of the doctrines of international law. That is, L&E adequately designs strategies by relying on the doctrines of international law so that states can, without having to make any trade-off, remain within the scope of both trade and the environment. One prominent example of such an application of doctrine is the many flexible, market-based mechanisms under the Kyoto Protocol to the United Nations Framework Convention on Climate Change. These market-based mechanisms are predicated on a certain “assigned amount” of greenhouse gas emissions to the state parties to the Protocol. The three mechanisms are: 1) “emissions trading”, under which

⁶⁶⁴ *Id.* at 114.

⁶⁶⁵ *Id.* at 118.

⁶⁶⁶ RAJAGOPAL, *supra* note 16 at 10.

⁶⁶⁷ Dunoff & Trachtman, *supra* note 420 at 12-14.

⁶⁶⁸ However, the fact that regime conflicts would increase transaction costs was not widely perceived at a time when regimes were theoretically conceived. Regimes were then seen as frameworks that reduce transaction costs in international relations. *Cf.* KEOHANE, *supra* note 193, pp.85-109.

⁶⁶⁹ See P.K. RAO, INTERNATIONAL ENVIRONMENTAL LAW AND ECONOMICS 273, 274 (2002).

a state that has emitted less greenhouse gas than the assigned amount assumes an entitlement to sell its balance to another state which has exceeded its quota,⁶⁷⁰ 2) Joint Implementation, which requires certain states to “transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy”⁶⁷¹, and 3) the Clean Development Mechanism, a kind of credit compensation system which entitles a state to compensatory credits of greenhouse gas emission for assisting certain other states “in achieving compliance with their quantified emission limitation and reduction commitments”.⁶⁷² These measures cumulatively help states fulfill their environmental obligations without having any impediment to their industrial development and trade policies.⁶⁷³ In effect, the market-based mechanism of the Kyoto Protocol, by means of a composite cost-benefit analysis of L&E effectively and in a seemingly “pragmatic manner”,⁶⁷⁴ mediates between common interests and market interests.

The analysis of the dynamics of the doctrinal complex in this section reveals the style of working of international law when regimes—varied in terms of normative magnitude and functional goals—clash and a normative constellation of conflicting rationalities obscures the path of international law: how *realistically* international law settles in with a crisis in general, how *creatively* it makes structural adjustments by the use of its interpretative reasoning, and with what *grandeur* it validates such adjustments by initiating new discourses and methods. By making a disparate paring of rationalities coexist, and writing down such coexistence in the language of pragmatism and expediency, international law has been able to “actualize” itself in the role of sustaining international societies.⁶⁷⁵ On a casual note, and if prepared to ignore the effects a meta-evaluation of the philosophy of international law may have on our understanding of the discipline, it could be said that international law preserved its systemic intelligibility and cognitive systematicity, as it were, and created stable conditions in which the discipline can function with social credibility.

⁶⁷⁰ Art. 17. of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 10, 1997 37 I.L.M. 22.

⁶⁷¹ Art. 6(1).

⁶⁷² Art.12.

⁶⁷³ DIRE TLADI, SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW: AN ANALYSIS OF KEY ENVIRO-ECONOMIC INSTRUMENTS 132 (2007).

⁶⁷⁴ I have preferred to call the approach pragmatic in view of the Pareto efficient condition the economic configuration in the Kyoto Protocol has created.

⁶⁷⁵ According to Allott “actualizing” is a process of law becoming “non-law” and non-law becoming law. See ALLOTT, *supra* note 3 at 320. Whether the actualizing as it has taken place in the international society is law or non-law depends on the concept of human reality as it is reflected in international law.

V. CONCLUSION: “THE TRAGEDY”

It is an “intellectual conviction” that international law is a science.⁶⁷⁶ Such a conviction has come to exist when the professional experience of international lawyers and their *perspectives* about society have merged into a state of coherence.⁶⁷⁷ They experience this state of coherence through doctrines, i.e., when they perform interpretative and rationalist reasoning centered on doctrines they derive an intellectual beauty and performative satisfaction.⁶⁷⁸ To be specific, international lawyers find their scientificism: in the objectivity lying in doctrines, in the pursuit of certain particularistic ideals, by imagining the world as a market, and in the metrically defined formulations of an economic approach.

The conviction that international law is a science is a kind of self-enlightenment, perpetual in existence but varying in form; a history of law would speak of the varied bases of international law’s scientificism—positivism,⁶⁷⁹ realism, policy-oriented jurisprudence,⁶⁸⁰ L&E, rationalism, and so forth.⁶⁸¹ However, is it not the case that all the constituents of the scientificism of international law, e.g., objectivity in inquiry, empirical verifiability within time-space, *systemic* coherence and intelligibility, anti-idealism, anti-humanism are specialties of inquiry into the time-space structure of physical matter (constituents which inter alia provide the ability to contrive matter for the comfort and betterment of human life)? If it is this type of inquiry which characterizes science, can the aforesaid specialties be useful in addressing the amaterial human consciousness which shines as a transcendence (consciousness is the basic constituent of any individual or collective thinking)? Can they be used for organizing humanity into one collectivity?⁶⁸² In fact, ignoring the necessity of an intellectually profound approach, international law and its many counterparts in the social sciences have committed the fallacy of attempting to organize humanity using those tools and approaches which are designed for studying and shaping physical

⁶⁷⁶ For a first note of expression that international law is a science, see L. Oppenheim, *The Science of International Law: Its Tasks and Methods*, 2 AM. J. INT’L L. 131 (1908). For support, see Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997) (analyzes the claim that *law is a science* in historical, evolutionary, and attitudinal contexts: analogizing law and phrenology, Schlag argues that the claim of law of being a science is a “self-referentiality” and “reification”. Such a claim, by drawing support from social culture, develops into a professional belief).

⁶⁷⁷ In making this formulation and exploring the content of the term “intellectual conviction”, I was considerably informed by Crandall, although I have made a nuanced absorption of neither the concept nor the illustration he has provided. See David P. Crandall, *Knowing Moral Human Knowledge to be True: An Essay on Intellectual Conviction*, 10 J. ROYAL ANTHROPOLOGICAL INST. 307 (2004).

⁶⁷⁸ See *supra* Section II.C. (Concept of Doctrine).

⁶⁷⁹ For an assessment of the view that positivism at its time has evoked the sense of being a scientific theory, see Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT’L L. 269, 279-84 (2001).

⁶⁸⁰ Myres S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L. J. 1345 (1947) (emphasizes the need to get rid of the highly speculative unscientific approaches and the aimless route legal reasoning has taken, and recommends a policy-oriented course).

⁶⁸¹ This variation in the foundations of knowledge is what T.S. Kuhn conceives: “transition from one research tradition to another in scientific communities” (Hollinger’s paraphrase), in a scientific revolution, See David A. Hollinger, *T.S. Kuhn’s Theory of Science and Its Implication for History*, 78 AM. HIST. REV. 370, 373 (1973).

⁶⁸² See ALLOTT, *supra* note 3 at 76, 77 (“At one time, it seemed that it might be possible to extend the method of science to the study of society. But the special character of social study ... has reasserted itself to make the method of natural science only a distant analogical inspiration to social study”. *Id.* at 76.).

matter.⁶⁸³ In other words, the same process was applied for assessing and addressing human consciousness as for exploring matter.⁶⁸⁴ By this approach, the Cartesian dualism of mind and matter—the philosophy that delineates and distinguishes science from other modes of inquiry and which social scientists pride themselves on as the scientific quality endemic to their inquiries—became self-defeating in the processes of international law.

The source of the problem, however, lies in the manner in which the human being is conceived in the humanities—as mere physical matter, and in a dyadic state, far from being “monad-like”.⁶⁸⁵ This dyadism is in effect an ontological dualism of mind and matter whereby the supremacy of matter is self-consciously asserted.⁶⁸⁶ This stance has provided a functional milieu which facilitated the entry of science and its materialist approaches into disciplines where human consciousness is the focus of analysis and human behavioral attributes a theme. Thus distorting their ontological targets, epistemological base, and true phenomenological experiences, these disciplines and their functional approaches stand as ersatz sciences. As a result, science as it is understood and applied in the humanities, social sciences, and law is “bad science”.

The doctrinal complex of international law is ordered by the theoretical inscriptions of such bad science. Therefore, the design, functions, attitudes, actions, and sensibilities of international law necessarily bear traces of that bad science (these features are exactly what I have presented as typical of the world of international law through the first few brush strokes in this Article) This flawed foundation has caused international law to fail to value the sublime purpose humanity has. Instead, the discipline has pressed forward, highlighting a materialist cosmopolitanism as its outlook, which in turn plotted a formalist frame for fulfilling the aspirations of humanity.⁶⁸⁷ In this posture international law is an attitudinal linearity swinging between two poles—a “rhetoric field” (politics) and a “domain of desire” (communitarian optimism).⁶⁸⁸

When crises like regime conflicts have struck the discipline, the same [un]scientific sensibility has propelled the defense mechanisms: its materialist scientificism has not only driven it to make external systemic adaptations but also

⁶⁸³ These disciplines, to support their approach, would adhere to the logic that humanity is trapped in time-space theatre and connected by “contiguous structures” of matter; hence scientific tools are best suited to organize humanity into a social collectivity. See BERTRAND RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 244(1948). However, it has been the argument throughout this Article that it is the sense of being bound by time, space, and causality that has been the obstacle in making humanity aware of their super-consciences.

⁶⁸⁴ *Contra*, Heikki Patomäki, *After Critical Realism? The Relevance of Contemporary Science*, 8 J. CRITICAL REALISM (2009) (forthcoming) (on file with the author) (drawing on critical realism argues that in ontological inquiries science and philosophy can be synergistic, however, if that has to happen the self-sufficiency of philosophy and the “intransitivity” of science need a rereading).

⁶⁸⁵ Korhonen has discussed this view in the context of international law through a situationality-analysis, see Korhonen *supra* note 3 at 4-7.

⁶⁸⁶ I have been informed of the view that dyadism when differentiated from ontological dualism results in a “denigration” of the “other”, as happened in the case of modern disciplines whereby mind was denigrated before matter, by KEEKOK LEE, THE NATURAL AND THE ARTIFACT: THE IMPLICATIONS OF DEEP SCIENCE AND DEEP TECHNOLOGY FOR ENVIRONMENTAL PHILOSOPHY 108 (1999).

⁶⁸⁷ See Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck’s Messianic World*, 3 N.Y.U. J. INT’L L. & POL. 471, 475-86 (2003). See also, Martti Koskenniemi, *What is International Law For?*, in INTERNATIONAL LAW 57 (Malcolm D. Evans, ed., 2003).

⁶⁸⁸ David Kennedy, *The Discipline of International Law and Policy*, 12 LEIDEN J. INT’L L. 9, 84 (1999).

internalized those adaptations by articulating seemingly reformist discourses. Sadly, the sublime philosophical meanings of the occurrences that triggered the crisis remained in a “structural nescience”.⁶⁸⁹ As a result, the doctrinally scientific outlook of international law perceived regime clashes only as systemic clashes between two regimes and situationally adjusted its structural logic and theoretically re-scripted its international legal discourse. The disparity between the rationalities—common interest and market interest—pervading the regimes which have been paired was certainly known, not however, in terms of its philosophical disparity—between altruism and egoism—but only as a politically motivated force. This force was viewed as upsetting the socio-economic balance of international society and carrying away any social control that lay with the developing world. Notwithstanding this social picture, the damaging effect the disparate pairings of rationalities have on human thought and humanity, which is in perpetual pursuit of its reality, continue to be beneath an ignorant bliss celebrated as scientificism.

A few questions seem pertinent here: Had a quest for reality been the shared attitude of humanity (common interest) instead of a broad-based materialism, would a kind of environmentalism other than one which is in a continuous bargain with market interests have emerged? Would then the exploration of outer space and the oceans and the benefits accruing there from have not been a matter of wielding economic power for market giants, who reinforce egotistic ideologies? Most likely yes. In the trade and environment conflict, it is probable that a perception of a mind-matter (spirit-nature) non-dualism would have emerged, which had in it the ability to provide visions beyond a material reality cast over human mind.⁶⁹⁰ In this state of consciousness, environmentalism would be a sense of ontological oneness with nature, whereas development—as opposed to a profit-and-loss reckoning—an intellectual and scientific progress towards an advanced social order. Regarding the commercial exploration and use of outer space, the enthusiasm of humanity about the universe would have converged with a recognition that by exploring the universe humanity in fact gets a meta-theoretic vista of its material existence. This understanding would have infused a sense of gnostic humanism in individuals that each individual is a representative microcosm of a macrocosmic reality immanent in their consciousness. This insight alone would have made possible the advancement of science and technology and the equitable sharing and distribution of the resources of space, without being swayed by any market interest.

However, the misguidedly embraced scientificism of international law with its aversion to metaphysics could not on any account have valued an inquiry into a transcendental human reality. As a result, in international law common interest of humanity became a collective pursuit of group interests—some in the name of universal values, some in the name of ideologies, and some as individual aspirations

⁶⁸⁹ “Structural nescience” is an unawareness of the alterity, which is ingrained in a system that suffers from a “structural bias”. On structural bias, see generally KOSKENNIEMI, *supra* note 3 at 600-15.

⁶⁹⁰ See Tetsuya Sakakibara, *The Relationship between Nature and Spirit in Husserl's Phenomenology Revisited*, 31 CONTINENTAL PHIL. REV. 255 (1998) (presenting the Husserlian typology of nature and spirit and its utility in the advancement of humanity).

consensually accumulated around a formal legal-structure, e.g., the state⁶⁹¹—which had to be pursued through a global-level bargain (interaction). Any allusion to the idea that common interest lies in an ontological inquiry into human reality would have sounded absurd amid the invasive rhetoric of value-pluralism, legal universalism, and cosmopolitan particularism, all masquerading as approaches or ideals to secure the common interest of humanity.⁶⁹²

Since humanist transcendentalism is unknown to international law, when it has had to grapple with a conflict of common interest and market interest, it has chosen market as the discursive site and market ethics as the guiding principle to secure the common interest of humanity. The ethical and philosophical consequence of this approach is such that egoism becomes the conceptual field on which humanity has to cultivate altruism. This disturbs the advance of human mind from its “state of nature”, as Husserl identifies egoism, to the super-consciousness of altruism.⁶⁹³ The inferior understanding of human reality, which has misguided human thought, renders the philosophy of international law a tragedy.

The Article started with the problem of regime conflict, something systemically internal to international law. Studying regime conflict or seeking a solution to it, however, was not the objective of this project. If so, why have I chosen an analytical frame that has regime conflict as its base? Why has it grown into a philosophical discourse—a foundational critique of international law? What have I planned to achieve through this project? Whither this project? Answering these questions will be my final undertaking.

1. Any discourse on transcendentalism faces the risk of being branded “nonsense”, perhaps not for its theme, but for bringing with it all the evils a discourse may have: textual obscurantism, stylistic elitism, misty contexts, massive linguistic slides, and so on. Transcendentalism as a discourse theme also has been seen to face charges that it tends to evoke a theistic estheticism and that pragmatism—the sense of being scientifically modern—oozes out of such discourses. Although aware of this risk, my objective was to shed light on transcendental human reality, which is buried under a prosaic aesthetic of materialism. Hence, to plausibly articulate that reality I required a current problem, one faced by the predominant system which reflects the aspirations of humanity, so that the transcendental reality would find juxtaposition with what is understood as current reality. This is the reason why I have chosen to analyze international law which claims to have been standing for securing the interests of humanity at large, the problem of regime conflict that international law has been facing, and the dynamism with which the discipline has responded to that problem. I was certain that precisely because of its particular scientificism international law has

⁶⁹¹ See Jean d’Aspremont, *The Foundations of the International Legal Order*, 18 FINNISH Y.B. INT’L L. 261 (2007) (envisages a legal order geared by a value-free concept of common interest. The common interest has to be identified and realized through the human aspirations embedded in the rule of law).

⁶⁹² As I read Boyle’s structuralist review of international law scholarship, I become more persuaded to think that if a doctrinal “reification”—as he calls for the scholarly trend safeguarding and deifying the thought-structure—is mode of functioning for the scholars of international law, my lament that international law did not have a sympathetic eye for transcendental philosophy certainly has a shade of an ironical absurdity. See James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 HARV. INT’L L. J. 327 (1985).

⁶⁹³ On the Husserlian view, see generally Sakakibara, *supra* note 690.

viewed the problem insularly, completely ignoring a meta-scientific perspective. Such a meta-scientific approach would not have been plausible unless the study had the benefit of a reliable philosophical framework of analysis which can host a debate between tradition and the modern. It is in order to have such a framework that I decided to delve into the rationalities constituting each of the regimes in conflict. As I explored the details of these rationalities, the conceptual mass surrounding them melted to reveal that the rationalities I was studying were collectivities of thought formed over the two perennial poles of human thought.

2. Virtually every discourse in international law in which some kind of universality is a referent has been criticized for promoting subjective values such as personal, political, religious, moral, and cultural values. I also stand at a high risk of getting blamed on a similar ground, particularly given that the grounds for my appeal for universality are spiritual and that my views are informed by a religious tradition. Even though, I have clarified that I approach religion as a knowledge system as opposed to a faith system, it may not appease the sceptics. They would say: “your subjective view is no ground for us to dismiss what we have objectively understood”. Heeding this sentiment, I let the sceptics, if they so wish, to retain their understanding that religion is nothing but a faith-system. It does not follow from this assent, however, that I am promoting certain values associated with a given religious faith. I submit that irrespective of my religious route my appeal for universality is based on the potential of human intelligence to go beyond the perceptions it has observationally obtained and order a mind-system transcending the limits of time, space, and causality. This state of intelligence—I have talked about it throughout this Article using various expressions, e.g., “super-intelligence”, “super-consciousness”, “cosmic consciousness”, and “fullness of mind”—comes to exist when human mind cleanses itself of all material values.⁶⁹⁴ Accordingly, it is beyond the sway of any socially cultivated values. It is the intellectual summit of humanity that provides a theoretical view of our reality, which is absolute, infinite, immanent, ubiquitous, ineffable, and adimensional.

3. We live in a world essentialistically alienated into various imagined collectivities disproportionate to each other, e.g. states, societies, and geographies. Members of these collectivities often choose to adjust the imbalances their collectivity has vis-à-vis

⁶⁹⁴ A worldview which is not that of any universalist humanism but of a “cosmic ethico-political and religious” has been in vogue among social theorists (critical realists). Conveying a sentiment resembling the latter Patomäki writes:

Now we can and perhaps should define our identity as humans and earthlings ... in the context of a wider cosmic setting. The vision of cosmic evolution enforces the idea of humans as matter and energy and as biological organisms that are dependent not only on each other but also on the physical processes of the solar system and our planet in it, as well on the thin and unique biosphere of earth.

See Heikki Patomäki, *Dialectics of Civilization: A Cosmic Perspective*, PAPER PRESENTED AT THE CONFERENCE HONORING HAYWARD R. ALKER, Providence RI, USA, 6-7 June 2008, p.15 (on file with the author). See also, F.S.C. Northrop, *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 YALE L.J. 1430 (1950).

However, the concept of “cosmic consciousness” discussed by these theorists has a purely materialist ontological approach such that they have a sense of human identity which is derived from viewing cosmos as an expansive time-space configuration. Their understanding of humanity is based on a Darwinian evolutionary approach.

another collectivity or collectivities organized on a similar basis. Such readjustments are done through resistance and revolution. I have found TWAIL as a historically well-informed movement which is intent on readjusting an essentialistically ordered socio-political world. Further analysis of TWAIL's processes prompted me to take a position that the movement is on an unconstructive path. My intention there was not to dismiss the ambitions of TWAIL, but to submit that a mere reversal of positions within the present socio-political organization cannot dispose of the divisions we live in. TWAIL has to redefine its purposes from resistance and reordering hierarchies to spreading the concept of an intellectually united humanity, an aspiration nurtured by the many traditions and civilizations from which TWAIL draws inspiration.⁶⁹⁵

4. Despite my stance against employing the methods of science in international law, some readers might ponder why I have drawn substantially on quantum physics in this Article. My primary objective in that context was to emphasize the significance of the time in which we live and assert that quantum physics is a physical revelation of reality which has uncovered hitherto unperceived dimensions of matter. This analysis was followed by a theoretical confirmation that since reality is physically manifest it can be perceived as brainwaves in human consciousness as well. Non-material reality has to be perceived by invoking the philosophical acumen of human intellect.

5. This Article has provided a juxtaposition of the philosophy of international law and the foundations of human thought. It has laid bare the fact that international law, in the name of mobilizing and organizing, confines humanity to be governed by the imperatives of ego. In one sense, the analytical framework of the Article is ambitious in that it brought together the many grand schemes of modernity for evaluation. Then again, the Article's ambitions are modest if asked about any scheme where the findings would be employed and developed. Because of its conceptual focus and space constraints, this Article could not tender an alternative scheme. Yet, it is set to grow into a larger project, a life-goal, a pursuit of truth. That project would envisage a world where everyone has found the fineness of his or her mind, a sense of being special. That world would neither need hierarchically erected structures nor representatives to echo people's voices. Each one—political leaders, scientists, lawyers, teachers, farmers—would be motivated and guided by the cosmic consciousness—the human reality—and order a world of intelligence, love, peace, and harmony, the kind of heaven Rabindranath Tagore has envisioned and prayed for.⁶⁹⁶

Where the mind is without fear and the head is held high
Where knowledge is free
Where the world has not been broken up into fragments
By narrow domestic walls

⁶⁹⁵ Cf. Onuma Yasuaki, *When was the Law of International Society Born?: An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIST. INT'L. L. 1, 61 (2000) (opines that the first generation Afro-Asian scholars were trapped in the dialectic of Eurocentricism such that, instead of offering a "transcivilizational" perspective, their approaches became a claim "we too had [Eurocentric] international law". *Id.*).

⁶⁹⁶ Tagore wrote this poem in *Gitanjali* as his visions for India. However, its significance and relevance for the world would be uncontested.

Where words come out from the depths of truth
Where tireless striving stretches its arms towards perfection
Where the clear stream of reason has not lost its way
Into the dreary desert sand of dead habit
Where the mind is led forward by thee
Into ever-widening thought and action
Into that heaven of freedom, my Father let my country awake.

CHAPTER III

PUBLIC INTERNATIONAL LAW AND THE WTO: A RECKONING OF LEGAL POSITIVISM AND NEOLIBERALISM

From the very inception of their discipline, international lawyers have been on the defensive, grappling in their own minds and public forums with the nagging question “Is international law real law?”. Legal positivism, which dominated legal thought in the nineteenth century and coexisted with other major schools of thought in the twentieth, dismissed international law out of hand as lacking certain attributes – sovereignty, command, obligations, and sanctions – which the positivists considered essential to real law. It was the institutional apparatus of the World Trade Organization (WTO) that provided international lawyers with these “missing elements.” With the establishment of the organization, their discipline became normatively more robust and has thenceforth been put forward as positivist law. This article first examines the extent to which this is in fact the case, looking at the WTO in the light of the tenets of three prominent positivists – Bentham, Austin, and Hart – and inquiring whether they would have sanctioned international law had the WTO existed in their day. The analysis reveals that their views on the status of international law would not have been any different. Having thus shown the satisfaction of international lawyers to be ill-founded, the article proceeds to ascertain what force, if not positivism, has brought about the changes that international lawyers have witnessed. What has conferred power on the WTO and thereby fetched international law a hard normativity? The article argues that the force is neoliberalism. Neoliberalism functions through various actors by horizontally allocating power to them, international organizations exemplified one such actor. The significance of international organizations in the neoliberal scheme is presented with the aid of various theories of international relations. The article then shows that the WTO is a neoliberal organization, whose structure and strategies are dictated by the needs of the neoliberal agenda. In the conclusion, positivism and neoliberalism are critically juxtaposed and shown to stand in harmony with one another. The thickened normativity of international law is fetched by the social order driven by neoliberalism/positivism.

Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism

S.G. SREEJITH*

TABLE OF CONTENTS

I.	INTRODUCTION	6
II.	INTERNATIONAL LAW AND THE COMMON SKEPTICISM ABOUT ITS LEGALITY	8
III.	THE WTO IN INTERNATIONAL LAW: THE ASCENSION OF NORMATIVE VALUES	14
IV.	THE WTO AND CLASSICAL POSITIVISM: BENTHAM, AUSTIN, AND HART	18
	<i>A. Bentham and Utilitarianism</i>	20
	<i>B. Austin and the Imperative Theory of Law</i>	24
	<i>C. Hart and His Rule Theory</i>	32
	<i>D. Summary</i>	45
V.	THE WTO AND NEOLIBERALISM	46
	<i>A. Neoliberalism: The Landscape</i>	46
	<i>B. The WTO and Neoliberalism: Juxtapositions</i>	53
	1. <i>International Organizations in the New World Order</i>	54
	<i>a. International Organizations Situated</i>	54
	<i>b. Why do International Organizations Matter?</i>	59

* M.Phil, Jawaharlal Nehru University, New Delhi; LL.D. Candidate, University of Lapland. Research Scientist, Arctic Center, Finland. I thank Richard Foley, Kari Hakapää, Jan Klabbers, and Timo Koivurova who perceptively commented on an earlier version of this article. I also thankfully acknowledge a grant from Oikeustieteen Tutkimussäätiö, Finland which helped me to finalize this article.

	C.	<i>The WTO: A Neoliberal Manifesto</i>	61
		1. <i>Anarchy and Trade Regimes: From GATT to the WTO</i>	62
		2. <i>The Neoliberal Strategies and Tools in the WTO</i>	69
VI.		CONCLUSION: THE RECKONING.....	74
	A.	<i>Why Does the WTO Matter?</i>	75
	B.	<i>The Normative Case for International Law and the Return of Positivism</i>	77

I. INTRODUCTION

In the modern history of the world, the formation of the WTO has surpassed even the creation of the United Nations, in evoking a high level of enthusiasm and curiosity among global actors. In academia, notwithstanding the plethora of intra- and interdisciplinary discourses on the WTO,¹ there is persistent and growing interest in the existential logic underlying its institutional structure. With the WTO were born many new perceptions, on the one hand, and numerous stakeholders—and their diverse interests—on the other. But despite severe and often bitter conflicts of interests, the WTO has been the most fertile ground for concept formation, accompanied by an array of linkages with other topics (trade and . . .). Most prominent among the terrains that witnessed normative transformations in the WTO boom has been public international law (hereinafter “international law”). With the WTO as its nucleus, international law has been credited with a “thickened” normativity,² the spin-offs of which—sovereignty, command, obligations and sanctions—put it within the provenance of positivist law. This is not to assert that other spheres of law were any less influenced or not influenced at all. Rather, I would contend that the WTO (an auxiliary institution of the neoliberal scheme) is itself a consequence of the impact sustained by the world order as a result of the neoliberal wave and not the source of global transformations. If this is the case, why did international law alone

1. See generally, JOHN H. JACKSON, *THE JURISPRUDENCE OF THE GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* (2000); BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* (1995); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (1995). For other perspectives, see P.K. RAO, *WORLD TRADE ORGANIZATION AND THE ENVIRONMENT* (2000); CONSTANTINE MICHALOPOULOS, *DEVELOPING COUNTRIES IN THE WTO* (2001).

2. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH L. REV. 1, 24 (2004). Pauwelyn uses the expression “thickened normativity” to refer to the judicialness the WTO has added to international law by way of its Dispute Settlement Body (DSB). International law was often criticized as having a fragile normativity for want of a strong judicial body with compulsory jurisdiction and the power to render binding decisions.

became susceptible to the ramifications of the WTO? I argue that the transformation which occurred in the normative world of international law cannot be attributed to the unique institutional features of the WTO; rather, credit is due to the changes in the social order occasioned by the neoliberal ideology. Indeed, the establishment of the WTO and its rule-based architecture was an important project in the larger scheme of things.

The article proceeds in five parts. In part one, I review the scholarly skepticism as to how far international law is law in the “hard” sense and show that this skepticism has always permeated the discipline. In part two, I go on to examine what has prompted contemporary scholarship to credit the WTO with helping international law grow out of the “thin” normativity often attributed to it. The analysis suggests that certain features of legal positivism customarily associated with law in its strict sense, which were alleged to be lacking in international law, are found in the institutional apparatus of the WTO. To test this hypothesis, in part three, I examine that apparatus in light of the tenets of three prominent positivists—Bentham, Austin, and Hart—and enquire whether they would have sanctioned international law had the WTO existed in their day. The conclusion drawn is that, even with the WTO, their views on international law would not have been different than what they were. This finding rectifies the myths that regard the WTO as a positivist enterprise. Part four of the article undertakes to demonstrate that neoliberalism is the driving force of not only the WTO but also the normative and structural global changes all around. To this end, the analysis conceptualizes neoliberalism and then demonstrates how the WTO serves the implementation of the neoliberal agenda. As a corollary, in part five, positivism and neoliberalism are critically juxtaposed and shown to stand in harmony with one another. The conclusion highlights the extent to which the findings can restructure the outlook of international lawyers towards the WTO.

Before proceeding, however, a short note on the style and methodology used in the article is in order. Given the nature of the topic at hand, the article speaks an interdisciplinary language. Parts one and two highlight the scholarly standpoints within international law. Part three is a theoretical endeavor to dispel the myths surrounding the WTO. For this purpose, conventional wisdom is re-explored through an extensive treatment of the relevant legal philosophy. A summation of the arguments at the end of part three provides the rationale for the undertaking and links it with the broader discourse. In part four, in conceptualizing neoliberalism, the

central line of reasoning is built on certain basic notions of economics, although only in moderate detail. A substantial portion of part four is “homework” on the position of international organizations within the fields of international relations and sociology, understanding then facilitates the examination of the true legal nature of the WTO. My sole task is to provide a credible explanation for the authority of international organizations in general and the WTO in particular. In that process, neoliberalism emerges as a protagonist, albeit in its simple and general form, as conceptualized in part four. In other words, neoliberalism is not dealt with in the strict international relations sense, which is too constrained vis-à-vis the concept at large. However, care is taken to ensure that this approach does not adulterate the fundamental thesis of neoliberalism even as it appears in the international relations literature.

Throughout the article, I use the expressions “institution” and “organization” synonymously, except where these are expressly differentiated. At certain points the article has had to view the developmental process of the trading system from different perspectives; this is a natural consequence of the interdisciplinary nature of the topic. Each part and many sections are summarized to aid the reader in following the discourse.

II. INTERNATIONAL LAW AND THE COMMON SKEPTICISM ABOUT ITS LEGALITY

The authors of virtually every treatise and textbook on international law start their exposition with the skeptical and quite often rhetorical question “Is international law real law?” They then proceed, in assorted ways and through various approaches, to demonstrate that international law is indeed law. Most scholars, at the outset, bring in its relationship with municipal law, then quickly distance themselves from the issue by stating that international law, being a legal system in its own right, cannot be compared with municipal law and that this relativism is the cause of all the misconceptions concerning international law. Having made such a caveat, scholars then fall back on finding systems and institutions similar to that of municipal law in international law. Some rely on logical deductions and philosophical assertions. In general, these exercises end up with a formulation to the effect that international law is law, albeit imperfect, but an indestructible reality; in other words, that it has some practical complexity although not an intrinsic impossibility, but However, this skeptical approach is not universal. A majority of the nineteenth century classical scholars rejected international law out of hand, albeit with rationalizations that showed true adherence to their cults. Hugo Grotius, the father of international law, had the conviction that sovereign states are bound by the law of nations. Although he

attributed this bindingness to the “consent” factor among states, he saw its roots in the law of nature, which is based on and deduced from the nature of man as a social being.³ Hobbes and Pufendorf had already answered the question as to the legality, let alone bindingness, of international law in the negative.⁴ When legal positivism established its strong hold in the jurisprudential realm, the metaphysical speculations of natural law went into oblivion. One of the doyens of this anti-natural law movement, Jeremy Bentham, refused to accept the prospect that, in his time, any form of law regulating the actions of states would exist.⁵ He believed that anyone could divert what was then considered international law to satisfy his or her political caprices by arguing that it conferred rights bequeathed from natural law.⁶ Bentham’s antipathy towards international law only pertained to its natural law form; he in no way was antagonistic towards it as such and in fact later devised a plan for universal and perpetual peace in his *Principles of International Law*.⁷ In determining the province of jurisprudence, the positivist John Austin ousted international law from the very start. According to Austin, to be within the province of jurisprudence, the prospective legal system must emanate from a determinate superior and that superior shall not be in the habit of obedience to any other determinate superior.⁸ With this bearing, international law—merely the declaration of a certain type of conduct that is in sync with the sentiments of an undefined mass—was repugnant to him.⁹ However, the Austinian theory of sovereignty and concept of the superior sovereign’s command had a profound impact on later

3. H. Lauterpacht, *The Grotian Tradition in International Law*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 10, 16-18 (Richard Falk et al. eds., 1985).

4. 1 OPPENHEIM’S INTERNATIONAL LAW 8-9 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

5. Jeremy Bentham, *Essay 1: Objects of International Law*, in PRINCIPLES OF INTERNATIONAL LAW available at <http://www.la.utexas.edu/research/poltheory/bentham/pil/pil.e01.html>.

6. Hart dubbed this situation “criterionlessness.” H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 82 (1982).

7. Jeremy Bentham, *Essay 4: A Plan for an Universal and Perpetual Peace*, in PRINCIPLES OF INTERNATIONAL LAW available at <http://www.la.utexas.edu/research/poltheory/bentham/pil/pil.e04.html>. See generally M.W. Janis, Comment, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AM. J. INT’L L. 405 (1984); H.B. Jacobini, Note, *Some Observations Concerning Jeremy Bentham’s Concepts of International Law*, 42 AM. J. INT’L L. 415 (1948).

8. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 166-67 (Wilfrid Rumble ed., 1995).

9. See generally *id.* Austin refused to accept international law as being a positive morality.

scholarship, so much so that the theory became the primary cause of skepticism regarding the legality of international law. The post-Austinian scholars fixed Austin's precepts of sovereignty and sanction as the systematic way to present international law in its totality, and soon lost themselves in that wilderness.¹⁰ It is no surprise that later commentators focused their attention on defending these criteria by searching for a supreme legislature to command, a judiciary to punish violators, and an executive body to enforce the decisions of the legislature and the judiciary and to impose sanctions upon violators.

A considerable proportion of modern scholars have defended the Austinian checklist by pointing to the institutional features of the United Nations, although most treatments end up with the idea of there being only a possibility of international law becoming a complete system.¹¹ Indeed, reference to the United Nations, is the most unsophisticated of the defenses, for it is a refined way of going back to the old notions of self-help, retorsion and reprisals that hankered for legitimization. A somewhat different position is taken by Louis Henkin, who defended the legality of international law by highlighting the presence of a compliance culture in international law analogous to that in domestic legal systems.¹² This compliance culture, according to Henkin, stems from certain internal motivations and external inducements such as sanctions and remedies.¹³ The threat of retaliation, collective actions, remedies in the form of damages or repairs—such as inter-state claims through institutional means—and recourse to “machineries” acts as an inducement to compliance.¹⁴ Although constructed on a conceptual plane, Henkin's postulation is nothing more than a metaphysical description of the United Nations system itself, for his factors of inducement are illustrated with examples that closely resemble the United Nations machinery.

Another set of scholars, among them Vattel, Triepel, and Anzilotti, attributed the bindingness of international law to the fact that it is a result of agreements between sovereign states. The politico-juridical fiction of the sovereignty of states and the inference that every agreement is a fusion of the wills of such states, and thereby a “higher will,” served as

10. Harris, in his notes to Brierly's *The Law of Nations*, addresses this situation as an “Austinian handicap.” Although this has placed international lawyers on the defensive, they would not dispute that the test has more utility than many others by which international law could be said to be “law.” D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 6 (6th ed. 2004).

11. See, e.g., OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 4, at 8-13.

12. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 48-57 (1995).

13. *Id.* at 49.

14. *Id.* at 50-60.

the logical point of departure for this thesis.¹⁵ Within the school, scholars like Anzilotti, in contradistinction to his counterparts, sought the fundamental logic regarding the validity of agreements in a “basic norm” and not in a “united will.” For Anzilotti, *pacta sunt servanda* constituted this basic norm.¹⁶ But the juridical construction of *pacta sunt servanda* could only put the debate into a state of vacillation, as Tunkin later illustrated:

If agreement is the sole means of creating norms of international law, say bourgeois jurists, the binding force of its norms rests upon the international legal principle or norm *pacta sunt servanda*. But on what is the legal force of this principle based? If one says that it is based on agreement, a new question arises: on what is the legal force of that agreement based? The juridical construction did not answer the question and went on *ad infinitum*.¹⁷

This vacillation gave way to the Kelsenian theory of the hierarchy of norms.¹⁸ Kelsen envisaged law as a hierarchical structure, succinctly paraphrased by W.B. Stern: “[t]he constitution stands above the statute, the statute above the ordinance, and any norm-setting organ is a higher organ than one which does not set norms but merely applies them.”¹⁹ According to Kelsen, it is not the legal order of the states but international law that occupies the highest stage atop the norm pyramid in the hierarchy of law,²⁰ thus making it the hypothetical basic norm of the legal order.

Kelsen, as a general rule opposed the consent theory whereby international law is a creation of only the consent of states. Then, through a regressive process, he arrived at the norm *pacta sunt servanda*.²¹ However, *pacta sunt servanda* is a norm created by custom.²² Thus, primarily international law is customary law.²³ Kelsen’s main aim in

15. G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 208-09 (William E. Butler trans., 1974).

16. *Id.* at 209.

17. *Id.* at 218.

18. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 123-61 (Anders Wedberg trans., 1946).

19. W.B. Stern, *Kelsen’s Theory of International Law*, 30 AM. POL. SCI. REV. 736, (1936). For the original exposition, see KELSEN, *supra* note 18.

20. See generally HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW (The Lawbook Exchange, Ltd 2003) (1952). For a quick and focused treatment, see Stern, *supra* note 19, at 736-37. For another insightful approach, see Henry Janzen, *Kelsen’s Theory of Law*, 31 AM. POL. SCI. REV. 205 (1937).

21. KELSEN, *supra* note 18, at 369-70.

22. *Id.*

23. *Id.*

this exercise was to refute the notion of state sovereignty as the basic factor that confers bindingness on international law.

For Kelsen, international law is law like any other law, and the norms of international law share similar characteristics with municipal law. Hence, the norms of international law can be analyzed by the same method of analysis as used for the analysis of norms generally.²⁴ This analysis led Kelsen to be defensive with regard to the Austinian checklist. When defining a legal obligation by the sanction it entails, Kelsen argued that international law in fact had sanctions available to it in the form of wars and reprisals.²⁵ However, this assertion cannot be taken as definitive of his theory, for he later said that such sanctions are sanctions of a primitive decentralized legal order lacking any forms of centralized machinery.²⁶ The essence of Kelsen's arguments *inter alia*²⁷ aims at a centralized system for international law in which primary importance is attributed to an institution with compulsory jurisdiction for settling international disputes. This brings Kelsen, who himself was a staunch advocate of the United Nations system, very close to those who defended the Austinian test through the United Nations institutional structure.

As the Austinian test permeated international law scholarship and scholars succumbed to its umbral influence, H.L.A. Hart took a bold initiative to rupture the mold. What made Hart a radical philosopher of law was his innovative account of the concept of law, which he formulated in its entirety on the bricks of Austinian theory while patching up the Achilles' heel of that theory. Hart's concept of law represents a complete departure from the Austinian version by asserting that the concept of coercive sanctions and sovereignty are not essential apparatuses of law.²⁸ His conviction is that every mature legal system is a union of two kinds of rules: primary and secondary rules.²⁹ Primary rules are those under which human beings are required to do or abstain from doing certain actions whether they wish to or not. Secondary rules are those that authorize human beings to introduce, modify, or control the primary rules by doing or saying certain things.³⁰

Hart did not dismiss international law from the world of law as such. He in fact refuted some of the routine criticisms against the discipline,

24. Stern, *supra* note 19, at 737.

25. See KELSEN, *supra* note 18, at 330. For a comprehensive treatment, see KELSEN, *supra* note 20, at 20-89.

26. KELSEN, *supra* note 18, at 339-41.

27. For the other facets of Kelsinian theory that have been overlooked by international law scholarship, see Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EUR. J. INT'L L. 287 (1998).

28. H.L.A. HART, CONCEPT OF LAW 215-21 (1961).

29. See *id.* at 77-96.

30. *Id.* at 78-79.

which he believed were on shaky ground. However, his main objection to international law's legality was that instead of being a union of primary and secondary rules, international law was simply a set of primary rules.³¹ Since international law is made up only of primary rules, it suffers from three deficiencies—inefficiency, uncertainty, and a static character. It is *inefficient* because there is no organized way to settle disputes or enforce sanctions; it is *uncertain* because there is no established procedure for determining whether or not a particular rule belongs to the set; and it is *static* because there is no way to deliberately introduce new rules into the set. Hart believed that only secondary rules of adjudication, change, and recognition could overcome these defects. Thus, it was the absence of secondary rules that made international law unacceptable as law to Hart, as he was quite convinced that the routine shortcomings associated with it could be surmounted.

From this brief evaluation, it appears that none of the post-nineteenth century scholars were free from the influence of the skepticism as to the “hardness” of international law, whereas the pre-nineteenth century scholarship, mainly continued a superstitious adherence to natural law and hence remained free of the skeptical penumbra. Early positivists, like Bentham, were so preoccupied with their annihilation of natural law notions that their entire focus was on building a new architecture in keeping with their own faith and convictions. With Austin's imperative theory of law, the skepticism “Is international law a real law?” became a nagging question, upsetting international lawyers and placing them on the defensive. Since Austin, scholars have in one way or another desperately sought systems and a mechanism to satisfy the Austinian test, Hart being an exception.³² Post World War II scholars, while they have found consolation in the institutional features of the United Nations, have failed to produce a compelling case for international law.

However, with the establishment of the WTO, international lawyers found the missing elements of real law in the organization's institutional apparatus. The next part of the article articulates the response of international law scholars to the institutional features of the WTO.

31. *Id.* at 209.

32. Even before Hart many other commentators expressed their dissatisfaction with the Austinian test in strong rhetoric but none could frame a theory as credible as Hart's. See, e.g., Payson S. Wild, *What is the Trouble with International Law?*, 32 AM. POL. SCI. REV. 478 (1938).

III. THE WTO IN INTERNATIONAL LAW: THE ASCENSION OF NORMATIVE VALUES

It has been opined that the establishment of the WTO was a “watershed innovation” for international law.³³ While enthusiasts considered the WTO to be the rise of constitutionalism in international law in general (constitutionalism is not a positive phenomenon for all), and the quasi-judicialization of international trade law in particular, critics found a new authoritarianism and judicial activism in the basic process of international law.³⁴ Accolades, as well as accusations, tacitly acknowledge that the WTO has substantially changed the normative terrain of international law. As one commentator noted in the context of the WTO and its organizational allies: “The usual lament that international laws lack enforcement mechanisms does not apply to these institutions. They do not merely bark, they also bite.”³⁵

Scholarly perceptions on the might of the WTO vary. It is difficult to give a strict taxonomical base for the views, because the perceptions overlap and most rely on others. But, it is possible to deduce one common factor from these views: despite minor differences in their approaches, they all converge at the dispute settlement mechanism of the WTO.³⁶ Considering this fact, this paper will bring together these views and make some generalizations, although not within any watertight compartments.

First, there is a group of scholars who optimistically view the regulatory shift in international trade from the General Agreement on Tariffs and Trade (GATT) to the WTO. Let us call them relativists.

33. This expression was first used by Jackson in conceptualizing the WTO. See John H. Jackson, *The World Trade Organisation: Watershed Innovation or Cautious Small Step Forward?*, 18 *WORLD ECON.*, Autumn 1995, at 11 (1995).

34. JACKSON, *supra* note 1, at 6. On the criticism regarding authoritarianism, see Anupam Chander, *Globalization and Distrust*, 114 *YALE L.J.* 1193, 1195 (2005). Chander’s criticisms are directed towards all post-cold war institutions. On the pros and cons of constitutionalism, see Jan Klabbbers, *Constitutionalism Lite*, 1 *INT’L ORG. L. REV.* 31 (2004).

35. B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 *EUR. J. INT’L L.* 1, 7 (2004).

36. What is unique in dispute settlement in the WTO is the automatic accession to the common Dispute Settlement Body. Pursuant to Article 23 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), all members are obliged to submit their disputes to the WTO and abide by the rules and procedures laid down by the Understanding. According to Article 21 “Prompt compliance with the recommendations or rulings of the DSB is essential . . .” and the DSB monitors the matter until compliance has occurred. Where a recommendation or ruling is not implemented within a reasonable time, the WTO prescribes compensation for the aggrieved party or suspension of concessions for the violator. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 *I.L.M.* 1125 (1994) [hereinafter DSU].

They evaluate the WTO and derive its positive features by comparing it with GATT.³⁷ Their main argument is that GATT, despite being an international agreement and even having its own jurisprudence, was never an effective mechanism for international law.³⁸ This was because of GATT's inability to secure compliance, mainly owing to a weak dispute settlement system that lacked a "beyond doubt" legitimacy to issue a command or enforce it.³⁹ This argument of the relativists seems credible, for none of the commentators of international law, to this author's knowledge, have relied on the GATT system for advancing their argument regarding the bindingness of international law. Unlike in GATT, in the WTO the relativists quite obviously find a quasi-automatic, legalized, and rule-based dispute settlement body with enforcement powers—the Dispute Settlement Body (DSB). The DSB not only decides on breaches of WTO rules but makes suggestions on how to bring measures into conformity with those rules; it also monitors and induces compliance.⁴⁰ This comparative advantage over GATT in securing compliance makes the WTO an important apparatus for international law.

A second group of scholars sees the might of the WTO in its rule-based system and rule-oriented approach. Jackson is the most prominent among the "rule activists," although he cannot be strictly assigned to this school alone. His convictions are predicated on the role of ensuring predictability that the WTO has to fulfill in the multilateral trading system.⁴¹ He argues that the existence of rules enables the members to have an awareness of the expectations that the trading system has of them and that this in turn will lead parties to focus on the rules of the system.⁴² Correspondingly, in dispute settlement, as the settlement progresses, the rule-oriented approach reveals to the participants the

37. See, e.g., JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 81-100 (1998).

38. Thomas Cottier, *Preparing for Structural Reform within the WTO*, 10 J. INT'L ECON. L. 497, 498 (2007) (suggesting structural and functional reform).

39. See generally JACKSON, *supra* note 1.

40. For more information on the advantages of the WTO's dispute settlement mechanism over that of other international organizations, including GATT, see Joost Pauwelyn, Comment, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 338-39 (2000). For details on the international law effects of the GATT dispute settlement panel report, see JACKSON, *supra* note 1, at 124-29.

41. *Id.* at 121.

42. *Id.* at 120-22.

likely outcome of the case, prompting compliance with the rules.⁴³ Thus, the rule-based and rule-oriented system enhances compliance in a decentralized international legal system.

A third group of scholars—the largest—comprises those who rely on the sanctioning arm of the WTO. They believe in the range of the sanctioning power of the dispute settlement mechanism and that it is this range that has been material in hardening the normativity of international law.⁴⁴ They generally find three key features in the WTO that are absent in the dispute settlement systems of most other international treaties: (1) (the presence of) panels with compulsory jurisdiction to examine complaints about violations of the WTO Agreements; (2) (the provision for an) appellate review of the decisions of the panels with compulsory jurisdiction; and (3) the ability to issue binding decisions.⁴⁵ Should these mechanisms fail, there will be authorized retaliatory sanctions, which will induce the violator to comply with the obligation that it has violated.⁴⁶ The sanctions available under the WTO's dispute settlement system are compensation and suspension of concessions.⁴⁷ "If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance . . . such Member shall . . . enter into negotiations with [the member] having invoked the dispute settlement procedures."⁴⁸ If no satisfactory compensation has been reached, the complaining member may seek authorization to suspend the application to the member concerned of concessions or other obligations under the covered agreements from the DSB.⁴⁹ The vitality of these sanctions rests on the fact that all the decisions—establishing of panels, referring the matter for appellate review and suspending of concessions—are taken by *negative consensus*,⁵⁰ making sanctions virtually automatic and unavoidable. This guarantees greater compliance with the rules.

The sanction group repeatedly prefixes the expression "binding" when speaking of the decisions of the DSB; to rationalize this, they repeatedly rely on the relative advantage that the WTO dispute settlement system has over that of the GATT.

43. John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 J. INT'L ECON. L. 329 (1998), reprinted in JACKSON, *supra* note 1, at 168-92, 179-80.

44. See, e.g., Brendan P. McGivern, *Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives*, 36 INT'L LAW. 141 (2002).

45. *Id.* at 142.

46. *Id.* at 144.

47. DSU art. 22(1).

48. DSU art. 22(2).

49. DSU art. 22. For an appraisal of the WTO sanctions, see Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001).

50. See *infra* Part IV.C.2.

A fourth group of scholars hold the view that the WTO's power derives from certain non-legal factors. Robert Howse articulates the argument of this group: "[t]he WTO has no power independent of the rules agreed to by consensus of the member states;" its power lies in the fact that it is based on "domestic political procedures that have the legitimacy prescribed by domestic constitutional arrangements."⁵¹ Jackson attributed the bindingness of the decisions of the WTO to the "credibility of the judgment that is rendered and the potential of that judgment to raise diplomatic hurdles for a nation that tries to ignore it."⁵² Even with the most tactful diplomacy, powerful trading entities cannot break away from the dispute settlement system.⁵³

As mentioned earlier, regardless of the variations in approaches, the scholarly views regarding the bindingness of WTO rules and decisions converge at the institutional features of the dispute settlement mechanism. While the first group—the relativists—is content with the regulatory shift in the legal controls from GATT to the WTO, the second finds the emphasis on "rules" to be effective in securing compliance. The third group focuses on showing that the WTO has teeth to bite, while the fourth, remaining within the enthusiast camp, seeks justifications for the bindingness of the decisions in the non-legal realm. The cumulative effect of these views is to say that WTO rules are binding. Yet binding in what sense? Jackson says they are binding "in the traditional international law sense" but adds, although "not always in a 'statute like' sense."⁵⁴ Jackson's conviction and the pessimism attached to it, as well as the views considered above, reveal that what the scholars have found in the WTO is exactly what post-Austinian scholars were desperately searching for in international law. With the might of the WTO established by stressing its sentencing power, the enthusiasts demonstrated that the WTO is a new manifestation of legal positivism centered on states: its commands are the commands of a sovereign because it is generally obeyed and, if disobeyed, it punishes the disobedience.

51. Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trade Regime*, 96 AM. J. INT'L L. 94, 106 (2002).

52. John H. Jackson, *Appraising the Launch and Functioning of WTO*, 39 GERMAN Y.B. INT'L L. 20, 33 (1996).

53. *Id.*

54. John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 63 (1997) (emphasis omitted).

III. THE WTO AND CLASSICAL POSITIVISM: BENTHAM, AUSTIN, AND HART

The formation of the WTO was a consolation for the Austinian international lawyers, as many of them saw their as well as their predecessors' unfulfilled expectations being realized in the organization. They might have then slept peacefully having liberated international law from the criticisms of Austinian positivism. But were they successful in their endeavor? Were they "shadow boxing" all those years with their own misunderstandings as the adversaries? Was Austin not properly understood as a philosopher of his time? Was he the victim of an over-simplistic interpretation? If he were given the benefit of the doubt, would it open the doors to conceptual fallacies meaning that the international lawyers of a century had a "hangover?" These questions should probably be answered in the affirmative.

This assertion might make at least some readers skeptical about this approach. Will this paper re-explore Austinian wisdom and provide him with a defense? Why are Bentham and Hart included in this analysis? How is "revisiting" the positivist trio going to help in this paper's central assertion that the WTO is a neoliberal project?

The discussion presented in part one reveals that there was skepticism as to the legality of international law, which mainly owed to a reliance on the Austinian test of a sovereign and its sanctions as the sole test to determine "real law." The impact created by Austin's theory was so profound that it became not only the acid test of real law but also the hallmark of legal positivism. Although positivism was later painted in different shades by Kelsen and Hart, Austin continued to be its icon and his test remained the only applicable test for law. Since the early nineteenth century and throughout a good part of the twentieth, international law was subject to the Austinian test and hence remained outside the realm of real law. With the establishment of the WTO, as it began to display Austinian elements, the law that housed the organization—international law—was admitted into the realm of positivism. Contemporary international lawyers treat the WTO as a positivist bank, refuting any argument disparaging the legality of international law by pointing to the organization.

It is true that scholars found international law in a new and relatively better environment after the WTO and called it "positivism in international law." However, this relatively better environment is neither a result of the WTO, nor Austinian positivism as it is generally understood. To support my contention, I will demonstrate that even with the WTO the positivists would not have accepted international law into their domain. To this end, I refer to the teachings of Bentham, Austin and Hart. The criteria for choosing and confining the analysis to this trio are the

following: first, they represent three varying schools of thought within legal positivism; second, each built his theory on his predecessor's teachings, albeit without blind adherence; and third, a chronological tracking of positivism helps to determine the common tenet that all of them were following. This process also dispels the scholarly misconceptions of Austin and reveals that he was only acting in accordance with the central positivist tenet, but in its then current form, and that he was a man of his time and his positivism was a positivism of the age.

If it is neither Austinian positivism, nor the WTO, that has brought international law into a relatively better environment, what then has been the force behind the change? I assert in the subsequent sections that it is neoliberalism, and contend that the WTO is a passive neoliberal structure—an important project in the larger scheme of things—and that it is the corollaries of the neoliberal wave which scholars have mistaken for Austinian positivism. Prior to substantiating these claims, I summarize the views of the three positivists, showing that positivism never changed its core but only its form.

Before I proceed with the three scholars, let me explain in brief the positive theory of law. Legal positivism is a school of thought that arose under the long-term influence of the scientific discoveries that started in the seventeenth century and the eighteenth century philosophy of enlightenment rationalism.⁵⁵ Its primary objective was “the exclusion of every trace of [metaphysics from investigations of natural phenomena. . .]”⁵⁶ Positivists held that everything must be first observed experimentally and then understood in terms of facts independent of any subjective evaluation of the factual matter. In sum, the positive theory opposed any attempt to link observable and empirically deducible facts with moral values and judgments.⁵⁷ This sentiment gave birth to the fundamental tenets of positivism: 1) the *separability thesis* that there is no necessary connection between law and morality; and 2) the *source thesis*, or *social thesis*, that legal validity is determined ultimately by reference to certain basic social facts.⁵⁸ All later positivists based their postulations on these two tenets.⁵⁹

55. MARK TEBBIT, *PHILOSOPHY OF LAW: AN INTRODUCTION* 17 (2000).

56. *Id.* at 16-17.

57. *Id.* at 17.

58. *Id.*

59. For an introduction to legal positivism, see LORD LLOYD & M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* (5th ed. 1985). For its different versions, see HART, *supra* note 28; JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF*

A. Bentham and Utilitarianism

In this sub-section, I first briefly introduce Bentham's utilitarianism and what makes him a positivist and then make an evaluation of Bentham's views and conclude that he would have had the same position had the WTO existed in his day.

Until the late eighteenth century, positivism was in an embryonic state and focused on the annihilation of natural law notions. At that time, it was mainly discussed and debated as a political philosophy: its full elaboration came only with Jeremy Bentham and his utilitarianism.⁶⁰ Bentham's utilitarianism⁶¹—based on the principle “general happiness is the *right* and proper *end* of human action” (utility)—did not offer a strong logical foundation for positivism but nevertheless created a favorable climate for the move towards it. Bentham's entry into the limelight coincided with the escalating anti-natural law movement, and he played the role of perpetuating “utility,” which was looked upon as the then rational and scientific standard; as noted by a commentator: “[t]owards the end of eighteenth century, it is not only the thinkers, it is all the English who are speaking the language of utility.”⁶²

Bentham's antipathy for natural law made him repudiate concepts like natural rights and state of nature, which he considered a mere fiction, a phantom, and a formidable entity used by a great multitude of people to support their false claims.⁶³ He believed that the law of nature provided no force by any means and hence advocated the strict separation of law

MORALS AND LEGISLATION (Batoche Books 2000) (1781); AUSTIN, *supra* note 8. For support, see JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); W. J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994). For a critical appraisal, see *POSITIVISM TODAY* (Stephen Guest ed., 1996). On the separation of law and morals, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958).

60. DENNIS LLOYD, *THE IDEA OF LAW* 100 (1981). Utilitarianism is a theory proposed by David Hume in the eighteenth century. It is a political philosophy advancing the idea that explanation of moral principles is to be sought in the utility they tend to promote. Bentham was so influenced by Hume that he adhered completely to the concept of utility. Based on the aphorism “the greatest happiness of the greatest number,” Bentham formulated his theory of utility as every action should be judged right or wrong on the basis of the extent to which that action promotes or damages the happiness of the community. He recognized the fundamental role of pain and pleasure in human conduct and believed that human behavior was motivated by a desire to obtain pleasure and avoid pain. Since pleasure is equated with good, human beings must seek pleasure, and that must be the ultimate end of human life. To measure the net-value of pain and pleasures in a given action, Bentham devised an “emotional machine” called felicific calculus. BENTHAM, *supra* note 59, at 31-32.

61. For an overview of Bentham's utilitarianism, see GEOFFREY SCARRE, *UTILITARIANISM* 72-81 (1996).

62. Wesley C. Mitchell, *Bentham's Felicific Calculus*, 33 *POL. SCI. Q.* 161, 163 (1918) (quoting ELIE HALEVY, *1 LA FORMATION DU RADICALISME PHILOSOPHIQUE* 231 (1901)).

63. See generally BENTHAM, *supra* note 59.

from morals.⁶⁴ He then outlined a general theory of legal duty and obligation.⁶⁵ At this juncture, he found the principle of utility to be the best way to greater reforms.⁶⁶

In advocating utility, Bentham developed such a penchant for it that in all his subsequent works he made it a point to advocate this principle as the basis of every action and concept.⁶⁷ One sees the principle of utility throughout Bentham's works—be it constitutional reforms, the criminal code, or international law. The sway this principle had over Bentham is reflected in this excerpt from *The Principles of Morals and Legislation*:

*Intense, long, certain, speedy, fruitful, pure—Such marks in pleasures and in pains endure. Such pleasures seek if private be thy end: If it be public, wide let them extend. Such pains avoid, whichever be thy view: If pains must come, let them extend to few.*⁶⁸

Bentham believed that the means should be determined by the end, and the end he envisioned was utility. However, Bentham was aware that men do not all spontaneously desire utility—"the greatest happiness of the greatest number"—because of the self-interested nature of human beings,⁶⁹ this interest must be created in the minds of individuals for the principle of utility to work. The interest must be created by contriving devices, in the form of coercive sanctions, by which selfish individuals must serve the pleasure of others to get pleasure for themselves.⁷⁰ Bentham brought together individual interests and interests of the community through the imposition of sanctions by the legislator and society.⁷¹ Here, Bentham argued that law is the command expressing the will of a sovereign.⁷²

64. See HART, *supra* note 6, at 82-94.

65. See *Id.* at 127-143.

66. ROSS HARRISON, BENTHAM: THE ARGUMENTS OF THE PHILOSOPHIES 169 (1999).

67. *Id.*

68. BENTHAM, *supra* note 59, at 29. (This verse is quoted from the 1948 edition of *Introduction to the Principles of Morals and Legislation* and is absent in the 2000 edition published by Batoche Books).

69. The self-interested nature of individuals is explained by Ayer as the reason why, for a particular action, individuals find that the greatest happiness of the community stemming from that action is also that which is causative to their own greatest happiness. See PHILIP SCHOFIELD, JEREMY BENTHAM, THE PRINCIPLE OF UTILITY, AND LEGAL POSITIVISM 7 (2003), available at http://www.ucl.ac.uk/laws/academics/profiles/docs/schofield_inaug_060203.pdf.

70. Mitchell, *supra* note 62, at 177-78.

71. SCHOFIELD, *supra* note 50, at 7 (drawing on Ayer's defense against the critics of Bentham).

72. This line of reasoning is continued in HART, *supra* note 6, at 105-26.

In postulating the powers of a sovereign, Bentham was influenced by the Hobbesian view that the command of a sovereign constituted law because it was given to subjects already under a prior obligation stemming from their contract with each other to obey the sovereign.⁷³ Later, the influence of Hume's version of the social contract caused Bentham to flout the Hobbesian version of sovereignty. Bentham persisted in the conviction that the obligation to obey a sovereign is attributable to the sovereign if there is a reason for doing so, which "in part is natural and in part man-made artefact."⁷⁴ At the same time, he held that the legislative powers of a sovereign are not bestowed by law because law manifests only from the will of the sovereign.⁷⁵ However, the power of a sovereign that is not bestowed by law is a result of a "social situation," the account of which needs no "normative terms;" this social situation constitutes "the disposition of the people."⁷⁶ At this juncture, Benthamite theory touches the social thesis of legal positivism whereby the validity of law is determined ultimately by reference to certain basic social facts.

The question of import is to what extent Bentham would have found the WTO agreeable. Quite obviously, the utilitarian in him would have tested the utility that an institution like the WTO produces. Whatever his stance as a utilitarian might have been is less relevant in this context, however, for the concerns of this paper relates to the sovereignty and sanction aspect of the WTO. Hence, the focus is limited to two points: 1) would Bentham have accepted the sovereign power that is said to be present in the WTO?; and 2) would he have found the logic of sanctions in the WTO consistent with his theory of sanctions?

First, to debate the sovereign status of the WTO, one should understand that Bentham separated the powers of a sovereign from the powers of its subordinates. The subordinates' powers are conferred by law, which is a command of the sovereign, whereas the sovereign gains its law-conferring power from the social situation, which is a non-legal situation. The WTO is the result of an agreement between states and has powers from the rules agreed to by the states. Therefore, it cannot meet the Benthamite requirement that a sovereign's power must come from a non-legal force.⁷⁷ Yet, it

73. *Id.* at 221. *See also* THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., 1991).

74. HART, *supra* note 6, at 221.

75. *Id.* at 224.

76. *Id.* at 221.

77. The basic statute that establishes the WTO is the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) negotiated by the contracting parties in the Uruguay Round of the General Agreement on Tariffs and Trade (1986-1993). Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf [hereinafter WTO Agreement]. The WTO Agreement has an appendix consisting twenty-nine individual legal texts that deal with various substantive rights, twenty-eight additional

could be argued that the social situation that preceded the creation of the WTO and gave rise to certain “forces”—the emergence of a network society that had fetched the interdependence among states and necessitated some kind of institutional coordination—made the WTO a sovereign power. Regrettably, this situation only makes the forces that created the WTO the sovereign. It is the command of this sovereign that created the WTO. Nonetheless, the WTO fits reasonably well into the Benthamite scheme as a subordinate to the sovereign, which exercises the powers conferred by the latter.

Second, the complementarity of the WTO’s sanctions with Bentham’s sanction theory requires examination. For Bentham, sanctions mean punishments, “a suffering which befalls a man . . . if it be supposed to befall him through any imprudence of his . . . if inflicted by the law.”⁷⁸ In other words, a sanction is an evil inflicted on an offender by the law, which has the authority to do so. Bentham’s theory of punishment was basically a progressive one that aimed to prevent crimes and ensure public safety, not a “backward-looking” practice that aimed at “retribution based on desert.”⁷⁹ Now the relevant query is whether this theory is complementary to the trade sanctions under WTO. Nowhere in the WTO agreements does the word “sanctions” appear. However, supporters of the sanction part of the WTO rely on Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which embodies the provision for compensation and suspension of concessions.⁸⁰ General WTO scholarship considers these two measures as the consequence of disobeying the rules and decisions of the WTO. Lamentably, this is a misconception. What Article 22 imposes is not a punishment for noncompliance but the means to secure compliance:⁸¹

ministerial declarations, decisions, and understandings that provide further obligations and commitments, as well as 26000 pages of computer printouts detailing each member’s tariff concessions and service commitments. For details, see JACKSON, *supra* note 1; Anne O. Krueger, *Introduction to WTO AS AN INTERNATIONAL ORGANIZATION* 1 (Anne O. Krueger ed., 1998); HOEKMAN & KOSTECKI, *supra* note 1.

78. BENTHAM, *supra* note 59, at 28.

79. See generally Hugo Bedau, *Bentham’s Theory of Punishment: Origin and Content*, 7 J. BENTHAM STUD. (2004).

80. See generally YENKONG NGANGJOH HODU, *WTO DISPUTE SETTLEMENT SYSTEM AND THE ISSUE OF COMPLIANCE: PERSPECTIVES IN THE REMEDIES AGAINST NON-COMPLIANCE* (2006).

81. Charnovitz, *supra* note 49, at 804.

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.⁸²

Thus, the so-called sanction measures in the WTO have the “externally directed” purpose of encouraging compliance.⁸³ This is not what Bentham intended by his punitive theory, which aimed at deterrence and reformation.

If the WTO had been a case in Bentham’s time, he likely would not have taken a different stance; there is nothing extraordinary in the WTO that would have appealed to a reformist like Bentham. He never was antagonistic towards international law as such but did object to its natural law form. The presence of the WTO would not have changed Bentham’s perceptions on international law in any way, for what he required was a supreme sovereign that is bestowed with power by a social situation and a system of punishment based on deterrence and reformation. The WTO proved to have neither of these features.

B. Austin and the Imperative Theory of Law

Austin’s analytical jurisprudence sought a definition of law in connection with a sovereign, where sovereignty is employed to define law in its proper sense.⁸⁴ To Austin every law implies a command of a sovereign, which is habitually obeyed by the bulk of society and which is not in habitual obedience to anyone. If the sovereign’s will is not complied with, it inflicts punishments.⁸⁵ In sum, Austin’s theory of law comprises a supreme sovereign, habitual obedience, commands, and punishments—the purported requirements of *real* law.

In jurisprudence whatever Austin said was prejudicially branded as sterile verbalism, caricaturizations, metaphysical formulations, “ill-informed dialectic,” and irrational. However, one cannot ignore the irony here, as the conferrers of these accusatory labels had built their theories on Austin’s tomb.⁸⁶ The critics were aware that the best way to be successful was to be Austinian, yet they desired to be known as those who revived jurisprudence from Austinian sophistries. This hypocrisy owes much to the straightforwardness and minimalism involved in Austin’s command

82. DSU art. 22.

83. Charnovitz, *supra* note 49, at 803.

84. *See* AUSTIN, *supra* note 8.

85. *See generally id.*

86. Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 VA. L. REV. 1, 6-14 (2005) (articulating the jurisprudential mood in the academia after Austin).

theory because it takes a scholar directly to the central concerns of jurisprudence. This does not mean that Austin's theory is flawless, but a mistaken perception of any theory will beget a mistaken result, particularly when it is applied to make judgments on concepts and institutions of modern relevance such as the WTO. Austin's theory is no exception.

The first set of arguments in this section provide more justifications for this assertion and show that Austin's views on jurisprudence are the work of a staunch positivist, inspired by Bentham breathing the air of positivism that permeated his own age. As Austin went on determining the province of jurisprudence and thereby rejecting candidates one after another, scholars observed the process with a fine sense of naiveté and made judgments on the basis of Austinian terms; they failed to see the positivist orientation of Austin, whose undertaking obviously coupled with other reasons. Once this is shown, the "true Austin" emerges to judge the WTO and excludes the organization from the province of jurisprudence.

Austin had the vision to construct a science of jurisprudence free from the cobwebs of moral considerations. While igniting his passion to frame a science of jurisprudence, life in the neighborhood of Bentham, James, and John Stuart Mill put Austin in the prevailing philosophical radicalism—utilitarianism.⁸⁷ Austin joined Bentham in the revolt against the nebulous conception of natural law and sought to expel it altogether from the parlance of political philosophy. The main focus of their scheme was to demarcate law from morals, law being the will of a supreme sovereign. As it was the will of a sovereign they called this law positive law.⁸⁸ At this juncture, the much criticized Austinian version of sovereignty was born.

The initial impression of the Austinian theory of sovereignty is that it is power-oriented. However, there is no such power orientation at the core of Austinian sovereignty. Back in the late nineteenth century, John Dewey had expressed skepticism with regard to the power-orientation in Austin's theory.⁸⁹ For example, Dewey termed the Austinian conception of sovereignty as understood by the scholarship "Austinian myth."⁹⁰ It was mythical for two reasons: first, sovereignty was confused with the

87. For a biographical sketch of Austin, see JOSEPH HAMBURGER & LOTTE HAMBURGER, *TROUBLED LIVES: JOHN AND SARAH AUSTIN* (1985).

88. See HART, *supra* note 6, at 223-26.

89. See generally John Dewey, *Austin's Theory of Sovereignty*, 9 POL. SCI. Q. 31 (1894).

90. *Id.* at 31.

“organs of its exercise;”⁹¹ and second, a sovereign was understood as a determinate and common superior receiving habitual obedience and not in habitual obedience to a determinate superior.⁹²

Dewey subjected the second reason to a detailed analysis. Austin’s sovereign, although receiving habitual obedience, was not in the habit of obedience to any determinate superior. Later, Austin conceded that sovereigns habitually deferred to the sentiments of the masses. Why then, asked Dewey, did those masses become sovereign? Dewey provisionally dismissed his skepticism by saying that since the masses were an *indeterminate* body, they could not become the sovereign.⁹³ However, this whole exercise confirmed that Austin’s theory of sovereignty had a social dimension and; if the question of determinateness was absent, a mass social movement would have become the sovereign because politically determinate sovereigns defer to the sentiments of the masses.⁹⁴ If so, as it was subject to the sentiments of the masses, no political organ could become a sovereign. What then did Austin intend by “sovereign?” Here it should be conceded that all that Austin required was a source from which a command could emanate so that it constituted “law in the strict sense,” and he fulfilled this requirement by postulating a sovereign.⁹⁵ In this task he might have been inspired by Bentham during their joint-venture days on the separation of law and morals. Bentham’s conception of a sovereign acquiring powers from a social situation appeared to be the rationale behind Austin’s social dimension.⁹⁶ Lest the symmetrical construction appear a bit artificial, one should consider that the social thesis—law as originating from a social construction—has been the core of legal positivism and Austin and Bentham its staunch adherents. In sum, the Austinian sovereign could be construed as a social force—a determinate superior—from which emanates the commands and organizational forms through which the sovereign exercises its power. This sovereign force receives habitual obedience through the organizations and systems that it has created; the moment another social force takes its place, it loses its habitual obedience, and the new force and the institutions and systems it creates become the sovereign.

For the forces to qualify as a sovereign, however, they must be *determinate*. According to Dewey, this was the core test of Austinian sovereignty,

91. *Id.* at 34.

92. *Id.* at 36.

93. Susan Minot Woody, *The Theory of Sovereignty: Dewey Versus Austin*, 78 ETHICS 313, 314 (1968). *See also* Dewey *supra* note 89.

94. *See* Dewey, *supra* note 89, at 37.

95. Woody, *supra* note 93, at 317.

96. *See generally* Neil Duxbury, *Why English Jurisprudence is Analytical*, in CURRENT LEGAL PROBLEMS 2004 1 (Jane Holder et.al. eds., 2005).

although, he maintained that what constitutes determinate must not be subject to any kind of numerical evaluations, e.g., sovereignty as vested in a government.⁹⁷ Dewey's contention was that what is determinate

is a matter lying quite outside the range of Austin's theory; [determinate sovereigns] exist precisely because large social forces, working through extensive periods of time, have fixed [them] as organs of expression. It is these forces, gradually crystallizing, which have determined governments and given them all specific (determinate) character which they now possess.⁹⁸

D. Gerber offered a methodological defense for Austin's definitions. Commenting on Dewey, as well as the reply to Dewey by Susan Woody,⁹⁹ Gerber maintained that Austin's definitions cannot be viewed as mirroring ordinary language.¹⁰⁰ Austin was working on "general jurisprudence" so as to provide a vocabulary for describing a legal system.¹⁰¹ In the context of a sovereign "[Austin] was systematizing, and, for that, ordinary language just will not do; with the introduction of each of his definitions is a further indication of a constructive inclination."¹⁰²

The issue of determinateness and the ensuing "unverifiableness" of the sovereign is a result of another mythical interpretation, for nowhere does Austin stress the notion of determinateness as requiring sovereignty to inhere in a specific number of persons. It is a mistake to consider Austin's definitional statements as "empirical generalizations" or as entailing normative units. They are only definitions, yet they lay down uses.¹⁰³

The cumulative effect of these arguments is to bring more coherence to Austinian wisdom, as they dispel the myth and justify the social dimension of his concept of a sovereign. Austin was a positivist sprouted and grown in the shade of Benthamite philosophy, although he was not to remain in that shade forever.

97. Dewey, *supra* note 89, at 37-38.

98. *Id.* at 41.

99. Woody, *supra* note 93.

100. D. Gerber, *A Note on Woody on Dewey on Austin*, 79 ETHICS 303, 306 (1969). Gerber's central contention is reflected in the following passage: "Austin's terms are introduced by the use of the ordinary terms with which we are all already familiar. They are picked and chosen from the rather inchoate, or at the very least 'open,' texture of ordinary language, selected in hopes of developing a clearer language for the domain of jurisprudence. They are not quite stipulative, since the uses which they lay down are not arbitrary or capricious; but they do *lay down* uses. The truth of what they assert is independent of any facts about the nonlinguistic world. They are, obviously, true by the definition." *Id.* at 304-05.

101. *Id.* at 305.

102. *Id.* at 304.

103. *Id.* at 305.

Once he had established a link with Bentham, Austin proceeded to “depoliticise” Benthamite jurisprudence.¹⁰⁴ Austin’s pre-professorship days in Germany had a substantial impact on him,¹⁰⁵ “his exposure to German jurisprudence reinforced his drive for the systematization and classification of law.”¹⁰⁶ The subsequent lectures he delivered on jurisprudence that later became *Province of Jurisprudence Determined* (1832) came with a large dose of his German influence and essentially appeared as a taxonomy for law.¹⁰⁷ It is true that Austin could not attract a large audience to his lectures and critics normally ascribe this to the weaknesses in Austin’s theory. However, it was not the failure of Austin but rather a failure on the part of scholars to reconcile Austin’s farsightedness with the epistemic culture present in the Victorian universities in the first half of the nineteenth century.¹⁰⁸

As knowledge “hardened” towards the late nineteenth century, university culture also underwent changes. In jurisprudence, among other disciplines, it became essential to present clear and precise definitions for “leading terms” and explanations for “fundamental conceptions.” The solution to meeting this need was obvious—Austinian jurisprudence.¹⁰⁹

On January 1, 1995, the date on which the WTO was established, international lawyers, in particular international trade lawyers, “apparently told Austin’s ghost to haunt other areas of the international realm.”¹¹⁰ At least for the WTO, though not for all of international law, Austin had gone to rest in peace, and there would no longer be any need to be defensive with regard to the Austinian test. In one sense, this should be a source of solace for contemporary international lawyers, for unlike their predecessors they have a case to put forward in their “debates” on the legality of international law with municipal lawyers. The situation attracts attention in as much as a dramatic utterly unprecedented event has in international law. This point begs further justifications. Hence, revisiting Austinian perceptions on international law becomes inevitable.

In the context of international law, Austin opined that:

The so called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called. But one supreme government may doubtless command another to forebear from a kind of conduct which the law of nations condemns. And, though it is fashioned on law which

104. See generally Duxbury, *supra* note 96, at 43.

105. John Stuart Mill, *Autobiography* (1873), available at <http://www.utilitarianism.com/millauto/five.html>.

106. See Wilfred E. Rumble, *Introduction to JOHN AUSTIN*, *supra* note 8, at ix.

107. See Duxbury, *supra* note 96, at 44.

108. *Id.* at 45-47.

109. *Id.* at 46.

110. Raj Bhala & Lucienne Attard, *Austin’s Ghost and DSU Reform*, 37 INT’L LAW. 651, 653 (2003).

is improperly so called, this *command* is law in the proper significations of the term. Speaking precisely, the command is a rule of positive morality set by a *determinate* author.¹¹¹

Here, Austin ascribed the element of command to international law but did not dispute the determinateness of the sovereign. He specifically excluded international law from the category of law proper because “[t]he government commanding does not command in its character of political superior. If the government receiving the command were in a state of subjection to the other, the command though fashioned on the law of nations, would amount to a positive law.”¹¹²

The absence of sanctions is another major lacuna in international law that Austin pointed out. Since no evil is attached to its command, international law cannot be a law in the proper signification of the term.¹¹³ In sum, the two elements of his theory that Austin could not find in international law were a sovereign in the nature of a political superior and sanctions attached to the sovereign’s command.

In his Whewell lectures, Sir Henry Sumner Maine accused Austin of showing an eagerness to diminish the imperative force of international law.¹¹⁴ If this accusation is accepted, it is because something branded a naturalist credo of the time like international law could only fall outside the realm of law in Austin’s scientific rearrangement. However, there is a point in Austin’s theory that is favorable to international law; namely, considering the social dimension in his theory, if the social forces become the sovereign then Austin should concede that behind every international law formation there is a sovereign power that functions through political superiors. Given the fact that international law formation in Austin’s day was on a strikingly low level, he cannot be indicted for a serious misrepresentation of the facts.

In the WTO, what would have evoked the curiosity of Austin is the so-called sanctioning power of the DSB—compensation and suspensions of concession—and to some extent the sovereignty claimed to be present in the organization.

111. AUSTIN, *supra* note 8, at 124 (emphasis added).

112. *Id.* at 124-25.

113. *Id.*

114. See HENRY SUMNER MAINE, THE WHEWELL LECTURES: INTERNATIONAL LAW A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE (1887), available at <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/maine/intlaw.htm>, in particular Lectures I and II.

Austin conceptualized a command as follows:

A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and purpose of the party commanding to inflict an evil or pain in case the desire is disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request.¹¹⁵

Austin thus required two components in a command—power, i.e., physical capacity or authority,¹¹⁶ and the ability to cause injury to the non-complying party.

The following two clauses of the DSU may meet Austin’s requirements:

1. *Prompt compliance* with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members (Art. 21(1))¹¹⁷
2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time . . . such member shall . . . enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable *compensation*. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures *may request authorization* from the DSB *to suspend the application to the Member concerned of concessions or other obligations* under the covered agreements (Art.22.2).¹¹⁸

The first clause (Art.21.2) has imperative language but the second, which speaks of compensation, sounds like a bit of a cliché.¹¹⁹ Certainly, Austin was least concerned about the imperativeness in the language of the command; he only required the ability to inflict harm. Where a member fails to compensate another member it has aggrieved, the DSU authorizes the aggrieved party to retaliate by suspending concessions or obligations. Although the offending member is required to seek authorization for taking such an action, the negative consensus involved in decision-making results in that request being automatically granted. Would this be more in keeping with Austin’s “harm?” Powers akin to this are also vested in the United Nations Security Council (UNSC), where sanctions are still a collective action; under the DSB it is a bilateral state-to-state affair. Now, what if the member to suspend a concession is an economically weak country and the one against whom the sanction is sought is an economically

115. AUSTIN, *supra* note 8, at 21.

116. *See generally* Colin Tapper, *Austin on Sanctions*, 24 CAMBRIDGE L.J. 271 (1965).

117. DSU 21(1).

118. *Id.* art. 22(2) (emphasis added).

119. *See* Bhala & Attard, *supra* note 110, at 663.

powerful one? Such a measure might have some side effects on the weaker state.¹²⁰ What is more, according to one commentator, even the remedy of compensation under the WTO lacks the “traditional sense of compensation for damages.”¹²¹ Another author lamented: “[T]here is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.”¹²² Clearly, measures available in the WTO are incongruous with Austin’s theory of command and punishment.¹²³

The second factor that ousted international law from the province of jurisprudence is the absence of a sovereign in the form of a political superior. Would Austin have found such a political superior in the WTO?

A sovereign for Austin was a person or body that is politically superior, i.e., that possessed *supreme* power; “this power is infinite in number and kind,” partly activated and partly lying “dormant” in the sovereign.¹²⁴ The sovereign delegates these powers to political subordinates or immediate partakers in those very powers.¹²⁵ These powers are called *subordinate* powers.¹²⁶ In Austin’s scheme of things (it should be conjectured) international law has neither of these attributes. What then would be the case with the WTO? Regrettably, Austin made any determination complex by not making explicit the nature of the supreme powers that a sovereign should have, although he did provide examples of various legal systems to illustrate a sovereign. He also did not clarify how sovereigns happen to acquire these powers; he essentially dismissed the question by saying

120. For more information, see Pauwelyn, *supra* note 40, at 345.

121. *Id.* at 339. However, considering the drawbacks present in the compensation system, the Consultative Board’s Report on the Future of the WTO (Sutherland Report) has highlighted the importance of monetary compensation to replace the compensatory market access measures currently granted to the winning aggrieved disputant. Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, (2004) available at www.wto.org/English/thewto_e/10anniv_e/future_wto_e.pdf. For an evaluation of the Sutherland Report, see Mitsuo Matsushita, *The Sutherland Report and its Discussion of Dispute Settlement Reforms*, 8 J. INT’L ECON. L. 623 (2005).

122. Judith Hippler Bello, Editorial Comment, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT’L L. 416, 417 (1996).

123. A further effort to raise the quality standard of the WTO’s enforcement mechanism to meet Austin’s requirements is articulated in Bhala & Attard, *supra* note 110, at 661-67. *But see* Raj Bhala, *WTO Dispute Settlement and Austin’s Positivism: A Primer on the Intersection*, 9 INT’L TRADE L. REG., 14-25 (2003).

124. AUSTIN, *supra* note 8, at 199.

125. *Id.*

126. *Id.*

that those powers are partly dormant and partly activated.¹²⁷ At this juncture, a focus on the social dimension of Austinian sovereignty, as discussed earlier, appears to be a more reasonable course. If Austinian sovereignty is to be construed as a social force that exercises its sovereign powers through various agencies such as government and other organizations, the WTO will fit into the category of a subordinate to the sovereign. Not surprisingly, this is tantamount to the Benthamite position that a subordinate's powers are conferred by the sovereign.¹²⁸ This situation will only make the political and social forces that created the WTO a political superior and the organization its subordinate.

Ultimately, like Bentham, Austin would also have maintained an unfavorable view of the WTO in regard to its inclusion in the realm of positive law. None of the institutional features or the so called "hard" mechanisms of the WTO could fulfill Austin's requirements. Any reproach that Austin imposed unfeasible requirements would not hold water, for Austin was only acting as a positivist of his time, however radical.

C. Hart and his Rule Theory

In this section, the same method of analysis, as applied earlier for Bentham and Austin, is followed by portraying Hart's version of rule-based positive theory and then viewing the WTO through the prism of rule theory.

Hart was the first scholar to undertake the study of legal positivism in a philosophical perspective.¹²⁹ His concept of law was firmly rooted in the two basic tenets of positivism—the separability thesis and the social thesis.¹³⁰ In regard to the separability thesis, Hart did not adhere to the Austinian view that it is the coercive nature of law that differentiates it from morals; according to Hart, attributing coercive nature was a mischaracterization of the purpose and function of law.¹³¹ He rejected the contentions that law is a coercive order and that law is a moral command. Hart's adherence to the separability thesis came in the form of his "rule theory," according to which every mature legal system is a combination of two sets of rules—primary and secondary—with primary

127. *See id.*

128. *See supra* at 24.

129. Frederick Schauer, Book Review, *(Re)Taking Hart*, 119 HARV. L. REV. 852, 856 (2006). Although Hart's predecessors, e.g., Bentham and Austin, philosophized law, their postulations were based more on political theories and other wide-ranging thinking. *See AUSTIN, supra* note 8, at 858-59.

130. *See generally* Hart, *supra* note 59.

131. *See generally* HART, *supra* note 28, at 18-25.

rules laying down ways of conduct and secondary rules validating the primary rules.¹³²

Although a passing reference was made to primary and secondary rules while describing Hart's position on the skepticism of the legality of international law, it only served that context and a more detailed treatment of Hart's rule theory is in order to set up an analysis of the existential logic of an institution like the WTO.

Primary rules are rather mundane in human society, for they are verbal prescriptions that aim to guide the behavior of actors. A society with only rules of this type is likely to face three problems: 1) *uncertainty* as to the determination of valid rules; 2) a *static* character resulting in decay, as there is no means to eliminate old rules and introduce new ones; and 3) *inefficiency* in settling disputes and imposing sanctions in an organized way.¹³³ These problems can be remedied through secondary rules. For each defect, there are different types of secondary rules: the problem of uncertainty can be remedied by means of the *rule of recognition*, which determines the criteria that govern the validity of the rules of the system; the problem of static character is resolved by *rules of change*, which regulate the process of change by conferring the power to enact legislation in accordance with specified procedures; and the problem of inefficiency can be solved by way of *rules of adjudication*, which confer competence on officials to decide on alleged wrongs and to impose sanctions.¹³⁴ All three secondary rules are required to convert a society having primary rules alone into a complete legal system. In other words, no society that lacks one or all of these features can constitute a legal system, and the *laws* of any so-called legal system that lacks these features are not laws.

Hart's rule theory is by no means a crude formulation that easily flexes for any application. The two-tier system of primary and secondary rules that Hart demanded in a legal system involves certain intricacies in its application to the WTO. The cause of this difficulty is largely that the rules in the WTO resemble a complete legal system in having both primary and secondary rules existing in tandem. At first sight, this may seem to be an encouraging picture of the WTO, but it is a misconception. In the next section, this paper will first attempt to dispel the misconception by exposing the true nature of the WTO rules and will argue that the system of primary rules in the WTO is a covering closer in character to secondary

132. *See id.*

133. *Id.* at 89-91.

134. *Id.* at 91-96.

rules. Then the paper will reveal that there is nothing in the WTO that Hart did not include in international law.

International law, according to Hart, lacks an international legislature, courts with compulsory jurisdiction, centrally organized sanctions and, above all, a unifying rule of recognition specifying the “sources” of law and a general criterion for the identification of its rules.¹³⁵ The absence of these features means that international law resembles a simple form of social structure consisting only of primary rules.¹³⁶ In other words, international law suffers from the deficiencies of uncertainty, static character, and inefficiency. If the WTO should bring with it rules of recognition, change, and adjudication, it could remedy the deficiencies and thus fit into Hartian rule theory.

However, before moving in this line, a certain question must be resolved. Should the WTO be considered as a possible remedy that solves the problem of the absence of secondary rules in international law? In that case, it must be presupposed that the WTO constitutes a system of secondary rules only. In the alternative, if the WTO is a separate legal system comprising primary and secondary rules, the WTO must be a self-contained regime distinct from international law and, consequently, not an instance of thickened normativity in international law. The question regarding the self-contained nature of the WTO has been of recent concern,¹³⁷ although the organization’s kinship with international law has been positively asserted much earlier.¹³⁸

Recent studies conducted in connection with the International Law Commission’s Special Study Group on the Fragmentation of International Law revealed that the WTO does not have the status of a self-contained regime independent of international law.¹³⁹ Although this is reassuring, one point regarding the nature of WTO agreements begs clarification: Do all WTO agreements confer power, and are thus secondary rules in character? If not, are there any rules that impose duties making them in effect primary rules? If this doubt is not clarified, Hart’s rule theory

135. *Id.* at 209.

136. *Id.*

137. This question has mainly come to light in the wake of the alleged fragmentation of international law. In response to the allegation, the International Law Commission established a Special Group on the Fragmentation of International Law in 2002, chaired by Martti Koskenniemi. See Gen. Assembly [GAOR], Int’l Law Comm’n, *Report of the Study Group on Fragmentation of International Law*, U.N. Doc.A/CN.4/L.628 (Aug. 1, 2002). See also Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT’L L. 27 (2005).

138. See generally Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535 (2001).

139. For a discourse on why the WTO is not a self-contained regime, see Anja Lindroos & Michael Mehling, *Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO*, 16 EUR. J. INT’L L. 857 (2005).

could be used as a ground to invoke the self-contained regime nature of the WTO all over again, for the presence of primary rules in tandem with secondary rules presupposes the existence of a complete legal system. To answer this, the types of agreements in the WTO must be considered.

The whole WTO architecture is based on one agreement—the Agreement Establishing the World Trade Organization (WTO Agreement). This agreement has various annexes and sub-annexes, e.g., various agreements on trade in goods, agreements on trade in services (GATS) intellectual property (TRIPs), and dispute settlement (DSU).¹⁴⁰ These agreements spell out a variety of substantive rights and obligations of members. The decisive question is: If these agreements impose rights and obligations on members, are they not primary rules? The importance of this question is heightened by the presence of definitive judicial power (that generally follows these kinds of rights and obligations) in the DSB, and it is substantiated by the fact that under GATT, which lacked a dispute settlement body of judicial character, the prescriptions of its legal text were seen only as “standards” prescribing tariff quotas for the contracting parties. The situation urges further clarification.

Although there was a “system transposition” from GATT to the WTO, a new context and an altogether different mood awaited the WTO: it was a transformation of the legal framework towards multilateral trade liberalization. At the outset of this process, the WTO had to confront a set of practices in the form of domestic policies, which, although not discriminatory in any specific sense, nevertheless undermined trade liberalization measures.¹⁴¹ Subsidies, dumping, and technical “barriers” were just some of these practices. This situation generated normative ambiguity, which was addressed by a set of new rules on subsidies, anti-dumping, intellectual property, technical barriers, and the like.¹⁴² However, the new rules were in many respects different from those in GATT. To quote Robert Howse: “[T]hese rules cannot easily be seen as general ‘standards’ They often have the character of detailed legal

140. For full text of the agreements, see World Trade Organization, Legal Texts—The WTO Agreements, http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Oct. 16, 2007).

141. Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 355, 357-59 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

142. *Id.*

code, embodying trade-offs between regulatory autonomy and trade liberalization explicitly negotiated *ex ante*.¹⁴³

To innocent eyes, this external character of WTO rules resembles a set of codes imposing obligations and duties, followed by punishments. This view is rather naïve, and erroneous as well, as becomes apparent upon a retake of the transformation process from GATT to the WTO. The transformation was not merely a change in the vocabulary of trade; it was a cultural and structural change that *inter alia* changed trading patterns as well as the “socio-economic framework” for trade.¹⁴⁴ Trade transformed to become more “homogenous” among states.¹⁴⁵ At the objective level, traders turned more inter-reliant.¹⁴⁶ Under such conditions any kind of trade-impeding domestic policies or protectionist measures—a “race to the bottom”—could wreck the give-and-take arrangements between the interdependent states.

To avoid such a situation, predictability in trade behavior became a crucial need of the time. Here lies the logic of the rule-oriented approach of the WTO, which established principles of tremendous scope upon which states, non-state entities, and other global actors could rely.¹⁴⁷ The operational strategy of this rule-oriented system is positive harmonization—the creation of uniform global regulatory standards. Agreements like TRIPs, the Agreement on Technical Barriers to Trade (TBT), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), to name a few, reflect this regulatory philosophy.¹⁴⁸ These agreements address the member countries and require them to adopt certain minimum standards in their domestic regulations. Although the agreements speak the language of duties and obligations, their philosophical base lies in “positive harmonization.”¹⁴⁹ Even in Hart’s scheme of rules, the secondary rules, although power-conferring in nature, are in the form of addresses to officials. The nature of the scheme is determined not by the terminology, but by its connection with the primary rules in ascertaining, introducing, eliminating, and determining violations of it.¹⁵⁰ This view emphasizes

143. *Id.* at 358.

144. JANE FORD, A SOCIAL THEORY OF THE WTO: TRADING CULTURES 42 (2003). Ford has provided a systematic presentation of the social and economic dimension of the transformation process from GATT to the WTO. *Id.* at 41-64.

145. *Id.* at 56.

146. *Id.*

147. See JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 88-89 (2006).

148. Each of these agreements is analyzed in the light of positive harmonization philosophy in Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law*, 38 J. WORLD TRADE 1 (2004).

149. *Id.* at 34.

150. HART, *supra* note 28, at 91-92.

that the nature of WTO rules is akin to that of secondary rules and is far beyond the scope of primary rules.

Another question is whether the *punishment* attached to the WTO rules brings them close to primary rules. This issue is related to the nature of dispute settlement in the WTO. The DSU declares that its role is a central element in ensuring predictability and security to the multilateral trading system.¹⁵¹ In emphasizing the role of the DSU, the panel in *US-Section 301 Trade Act* ruled: “Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators.”¹⁵² In this task, the DSB facilitates the WTO in carrying out its objectives by grappling with the infringement of the harmonization obligations contained in the covered agreements. Moreover, there is no aspect of a trial in DSB proceedings and its rulings are not sentences; instead, it facilitates compliance with the standards that have been infringed. The DSU leaves no ambiguity in this regard: “[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute” and the preferred solution is one mutually acceptable to the parties.¹⁵³ Obviously, in the case of a failure to obtain a mutually acceptable solution, the WTO authorizes retaliatory measures. These measures are occasionally referred to as those “inducing compliance”¹⁵⁴ and are thus reformatory in nature. However, WTO practice on retaliation reveals that this point of view is incorrect.¹⁵⁵ Although retaliation under the WTO dispute settlement system is far from the restoration of the “balance of concessions” policy of GATT, it is essentially like a measure for the “maintenance” of equilibrium in the multilateral trading system and in all probability is incompatible with the notion of a punishment.

The WTO now must face the test of providing the missing elements of secondary rules for international law—the rules of adjudication, change, and recognition.

Can one find the characteristics of rules of adjudication in the DSB? The answer requires a specification of the relevant characteristics of

151. DSU art. 3(2).

152. Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm.

153. DSU art. 3(7).

154. See Arbitral Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/ARB (Aug. 28, 2000).

155. McGivern, *supra* note 44, at 145-53.

rules of adjudication. The most simplistic form of such rules should empower individuals to make “authoritative determinations” as to whether a primary rule has been broken or not.¹⁵⁶ In addition, the rules should identify the individuals who are to adjudicate and the procedures for such adjudication.¹⁵⁷ In short, rules of adjudication define a group of important legal concepts such as judge or court, jurisdiction and judgment.¹⁵⁸ These criteria, in effect, require the WTO to tender evidence as to its judicial character. Generally, the judicial nature of the WTO is undisputed; the only contentious issue is its judicial activism.¹⁵⁹ The WTO’s reliance on the rules of interpretation laid down in the Vienna Convention on the Law of Treaties, 1969, and its occasional resort to the principles of public international law are good examples of its judicial character.¹⁶⁰ Even the Appellate Body of the DSB has emphasized the “precedential value” of its decisions.¹⁶¹ The judicial nature of the WTO is also reflected in its jurisprudence and in how it fills gaps and clarifies ambiguities.¹⁶²

If a rule of adjudication entails no more than a minimalist requirement, as stated above, then the dispute settlement mechanism of the WTO meets the criterion. This acceptance would, however, question Hart’s wisdom in rejecting international law, which was not devoid of an adjudicative organ. Indeed, Hart in all probability was aware of the adjudicatory role of the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ). Hart’s rejection of international law has more credible grounds than merely the absence of a rule of adjudication; besides requiring a set of rules for empowering individuals to make authoritative decisions, Hart sought the reason for such an authoritative decision-making power being vested in a court or individual. Such a power, according to Hart, comes from a rule of recognition.¹⁶³ In other words, the WTO’s candidacy for the Hartian world of law depends

156. HART, *supra* note 28, at 94.

157. *Id.*

158. *Id.*

159. In this connection, see Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT’L & COMP. L.Q. 861 (2004).

160. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 250 (2004).

161. *Id.* at 254. For a detailed study of the application of precedents in WTO decision-making, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. U. J. TRANSNAT’L L. & POL’Y 1 (1999); Raj Bhala, *The Power of the Past: Towards de Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT’L L. REV. 873 (2001).

162. Steinberg, *supra* note 160, at 52-53.

163. HART, *supra* note 28, at 95.

on the existence of a rule of recognition that validates the dispute settlement system under it.

Before attending to this issue, the second requirement of rule theory must be examined and the extent to which the WTO is receptive to change must be determined. In other words, are there any rules of change in the WTO? The identification of such rules, according to Hart, lies in the form of a rule that “empowers an individual or body of persons to introduce new primary rules . . . and eliminate old rules.”¹⁶⁴ In plain terms, Hart required a legislative act.

The first provision of interest is Article III of the WTO Agreement, which is generally presented as the one that upholds the traditional theory of *separation of powers*, albeit within an organization.¹⁶⁵ Article III.2 appears to be the clause on legislative power:

The WTO shall provide the *forum for negotiations* among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a *forum for further negotiations* among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.¹⁶⁶

This power exists in addition to the lawmaking power vested in the autonomous judicial body of the WTO.¹⁶⁷ Such a coexistence of legislative and judicial functions throws the aura of a constitutional system around the WTO. Yet, there is room for skepticism: Can the so-called lawmaking power of the WTO as manifested in Article III.2 be equated with a legislative process? Does not the “forum for negotiation,” as characterized by Armin von Bogdandy, sound more like the international exercise of public functions than a legislative act?¹⁶⁸ First, a survey of the Agreements reveals that no rule exists that speaks clearly of the legislative competency of the WTO. Second, it has been argued that WTO rules are mere standards of good behavior in macro-economic policy and international trade that states want to follow as a “seal of good house-keeping.”¹⁶⁹

164. *Id.* at 93.

165. Armin von Bogdandy, *Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. U.N. L. 609, 617 (2001).

166. WTO Agreement, art. III.2 (emphasis added).

167. *Id.* art. III.3.

168. Bogdandy, *supra* note 165, at 618.

169. Nicholas Bayne, *International Economic Organizations: More Policy Making Less Autonomy*, in AUTONOMOUS POLICY MAKING BY INTERNATIONAL ORGANIZATIONS 195, 199 (Bob Reinalda & Bertjan Verbeek eds., 1998). However, Bayne opines that no government wants to defy the WTO.

Such views do not attribute any substantial legal value to WTO rules; they reflect global trends. Third, it has been alleged that WTO rulemaking undermines democratic values, as the lawmaking system in the organization does not allow the state to intervene in the body of law and transform it.¹⁷⁰ Von Bogdandy is even more critical: “The WTO undermines the positivity of law in this sense. Once a treaty is set up, the political grasp on its rules is severely restricted—not normatively but in all practical terms.”¹⁷¹ This deficiency renders the so-called legislative act in Article III.2 “anti-legislative” in a constitutional sense. Weak resistance to the third view appears in the form of the amending power of the WTO rules vested in the members.¹⁷² However, this only makes the powers in Article III.2 a legislative power in the traditional international law sense such as, where Article 108 of the U.N. Charter invests amending power in the U.N. members.¹⁷³

Proponents of the WTO’s lawmaking power might have considered it futile to hunt for a legislature hiding behind its clauses, much as was the case with elevating the WTO’s procedures to constitutional legislative actions. Hence, they focused their efforts on highlighting the judicial lawmaking in the WTO.

The WTO’s judicial lawmaking is evident from the frenetic activity of the Panels and the Appellate Body,¹⁷⁴ and it finds endorsement in scholarly writings.¹⁷⁵ However, what would enthuse Hart is the dynamism of the DSB, i.e., the transformative role it plays by providing rules of change to the system. One example of the transformative role of the DSB is the standard of review, although the practice is not *transformative* in a municipal law sense.¹⁷⁶ However, in an international context, the standard of review represents dynamism and is, to some extent, transformative in nature. This is because in an international forum like the WTO, lawmaking is more of a diplomatic process—a manifestation of the policies and interests of various sovereign states. Moreover, a review,

170. Bogdandy, *supra* note 165, at 620

171. *Id.*

172. WTO Agreement, art. X.

173. Bogdandy, *supra* note 165, at 623.

174. For a statistical account of the work of the DSB, see WTO Dispute Settlement Statistics, http://www.wto.org/English/tratop_e/dispu_e/stats_e.htm. To make a comparison with GATT dispute settlement, see Robert Hudec, Daniel Kennedy, & Mark Sgarbossa, *A Statistical Profile of GATT Dispute Settlement Cases 1948-1989*, 2 MINN. J. GLOBAL TRADE 4 (1993).

175. See, e.g., Steinberg, *supra* note 160.

176. Generally, standard of review is a procedure meant to analyze the level of deference given to the decision reviewed. The reviewing authority normally focuses on whether 1) there is a discretionary ruling, 2) there is abuse of discretion, and 3) there is an error in the decision. See generally Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11 (1994).

rather than being an appraisal of the panel reports, takes the form of a relative assessment of the state policies and the judicial application of such policies.¹⁷⁷ The difference vis-à-vis the standard of review of a municipal court is that while an appellate municipal court assesses the discretion, abuse of discretion, or errors involved in the judgment of a subordinate court and thereby shows deference to the will of one single entity—the national legislature—in an international body like WTO, the standard of review by the Appellate Body not only defers to the sentiments of sovereign states but, in effect, puts to the test the “judiciability”¹⁷⁸ of state interests. Lack of judiciability is an indication of the inadequacy of the organization’s rules, which are designed to ensure security and predictability in a multilateral trading system. To put it simply, if a rule leads to arbitrariness or discretionary use by the Panels, it means that, despite the rule, state interests are divergent on the area of the multilateral trading system addressed by the rule, and that the rule requires transformation. This view is supported by the fact that the very objective of the standard of review in WTO law is to facilitate the organization in accomplishing the ultimate objective of ensuring security and predictability in a multilateral trading system.¹⁷⁹ At this point, the standard of review acts as an agent of change. All these assertions are notwithstanding the accusations regarding intrusion into national sovereignty by an international court, which is manifested to a high degree in the WTO’s case.¹⁸⁰

Apart from the standard of review, there is no strong case for likening the WTO’s rules to Hart’s rules of change. The robust activity of the Panels and Appellate Body, although it constitutes a weak case, can at best be equated with the work of the ICJ and other international adjudicative bodies that have been dynamic in their respective roles.

177. For details on the standard of review in the WTO, see Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT’L ECON. L. 491, 494-498 (2004). For a conceptual approach, see Stefan Zleptnig, *The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority*, 6 EUR. INTEGRATION ONLINE PAPERS (2002), <http://eiop.or.at/eiop/pdf/2002-017.pdf>. See also Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193 (1996).

178. The expression “judiciability” denotes wider judicial criteria and is not limited to “courtworthiness.” It includes the validity, content, objectivity, relevance/contextual significance of a law for being invoked in a dispute, as well as other features that make a law a rule to be relied on for dispute settlement.

179. Ehlermann & Lockhart, *supra* note 177.

180. See, e.g., Chander, *supra* note 34.

Even assuming that the WTO gains credit here, Hart would have pitied those making this claim, just as he pitied those scholars who asserted the existence of a legislative act in international law by pointing to its institutional apparatus.¹⁸¹ The source of Hart's sympathy was his conviction that the mere existence of rules without a rule of recognition was illogical.¹⁸² In other words, both rules of adjudication and rules of change must be validated by a rule of recognition.

In his *Concept of Law*, Hart presented the rule of recognition in a dual role. It made its first appearance as a remedy to overcome the uncertainty permeating the regime of primary rules; this uncertainty stemmed from the lack of established procedure for determining whether a particular rule belongs to the set of primary rules. A rule of recognition in the form of a rule stating that all valid laws are inscribed in an existing text solves the problem of uncertainty.¹⁸³ In this context, the rule of recognition is of the same genre as rules of adjudication and change.

The rule of recognition makes a reappearance when Hart criticizes the notion of a legally unlimited sovereign.¹⁸⁴ There he uses it as a concept to validate a legal system. However, Hart is heedful in not letting the concept of the rule of recognition fall into the Kelsinian "Grundnorm" or become a mere meta-legal abstraction.¹⁸⁵ He criticizes the general conception that the legal validity of rules of recognition cannot be demonstrated, and asserts that although the rule of recognition is not expressly stated anywhere, it can be identified from the practice of courts and other legal authorities. According to Hart, statements made about a particular statute in the day-to-day life of a legal system by judges, lawyers, or ordinary citizens carry with them certain presuppositions.¹⁸⁶ These presuppositions are of two types: one is that the statements made about the validity of a given rule are "internal statements of law," which express the point of view of those who make the statement; the other is that the person making the statement not only accepts the validity of the law but also accepts the fact that there is a rule of recognition actually

181. HART, *supra* note 28, at 227.

182. *Id.* at 93. ("There will be a very close connexion between the rules of change and the rules of recognition: for where the former exist the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules . . .").

183. Although this form of rule of recognition fits only into a simple form of legal system, it brings with it many elements distinctive of law. In the case of a developed legal system, instead of being identified exclusively by reference to a text, rules of recognition are marked by some general characteristic possessed by the primary rules. Generally, rules of recognition may take the form of a legislative enactment, customary practice, general declarations of specified persons, or past judicial decisions. For details, see HART, *supra* note 28, at 92-93, 97.

184. *Id.* at 97-120.

185. *Id.* at 108.

186. *Id.* at 109.

accepted and employed in the general operation of the system, this being the rule's *external* aspect.¹⁸⁷

This account of the rule of recognition in terms of an internal and external aspect complicates the concept. On the whole, the rule of recognition in its second manifestation sounds like an abstraction that is arrived at inductively from observations, but is not itself observable.¹⁸⁸ Yet, the dual role is not confusing, except for the use of the same terminology for qualitatively different concepts—one a type of secondary rule to determine the valid rules in a system and the other a concept validating the legal system. Hart suitably engineered a connection between the two concepts: “[I]n the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.”¹⁸⁹

A rule of recognition having the quality to validate a legal system is referred to as an “ultimate rule.” The rules of adjudication, rules of change, and rules of recognition need to be validated by the existence of an ultimate rule of recognition.

This picture of Hartian rule theory is doubtless a bit disappointing to scholars who cherish the institutional features of the WTO as the *hard* part of international law. The assorted evidence for the hard nature of WTO in tangible form, e.g., judicial characteristics, legislative features and well-inscribed procedures, still falls short of Hart's requirements, which demand validations for that evidence at higher abstract levels. However, a final effort is made here to see whether the WTO could meet this requirement.

To make a complete legal system requires secondary rules of recognition, change, and adjudication validated by an ultimate rule. The above assessment of the WTO's institutional machinery revealed only the existence of adjudicatory, legislative, and procedural rules. The common approach for ascertaining the existence of an ultimate rule is the chain of legal reasoning of validating one rule by pointing to another rule, as endorsed by Hart. However, having worked thus far on an assumption that the WTO is a system of secondary rules, there is no further validating rule substantiating the criteria for those rules. What is present are only facts—social and political. For Bentham and Austin this situation would

187. For the discussion, see *id.* at 105-07.

188. Here, too, Hart has objections to saying that the validity of a rule of recognition cannot be demonstrated. See *id.*

189. *Id.* at 93.

have been acceptable. However, Hart would not have looked upon this situation favorably, for it takes the question of the validity of law back to metaphysics and the Grundnorm.

Accordingly, while making his assertions regarding international law, Hart felt that there was something comic in the search for a rule of recognition,¹⁹⁰ inasmuch as no such rule exists for international law. Yet, he considered the question of multilateral treaties only to dismiss it by saying that treaties do not have universal acceptance and compliance with them is coincidental, as in a primitive society. Notwithstanding this conviction, Hart was optimistic:

It is sometimes argued that [multilateral treaties] may bind states that are not parties. If this were generally recognized, such treaties would in fact be legislative enactments. And international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states.¹⁹¹

One question remains, however: Why did Hart not try to seek the rule of recognition in international law through the practice of the ICJ, the PCIJ, and other quasi-adjudicative bodies, or through the statements made by international lawyers, diplomats, and other officials? In other words, why did Hart not apply the internal and external aspect, which are vital for the identification of a rule of recognition? What made him prejudicial in his approach towards international law?

These are things which are best known only to Hart. However, if prejudice is his stance, then the WTO has nothing special to offer him. The WTO has the obvious selling point of the automatic jurisdiction of its DSB, but this has so far served only as a technique to bring disputes to the table. This automaticity cannot command automatic compliance.¹⁹² Regrettably, there is no feature to be found in the WTO that Hart overlooked in international law that might have prompted him to analyze that legal order in terms of an internal and external aspect. Yet, the increasing number of accessions to the WTO, the enhanced compliance with the rulings of Panels and Appellate Body, the growing harmonization of trade standards and other post-cold war developments make a rather good case for international law. However, the WTO as an institution cannot claim any credit for these developments.

190. *Id.* at 230.

191. *Id.* at 231.

192. McGivern, *supra* note 44, at 157.

D. Summary

The arguments made thus far in this part have sought to demonstrate that the institutional characteristics of the WTO, if taken in isolation, have nothing in them that would melt the positivists' age-old coldness towards international law.¹⁹³ However, this is in no way meant to suggest to the reader that the WTO is ineffective. It does not imply that there has not been structural or normative transformation. The three positivists and their likely rejection of the WTO only reveal that the normative power which contemporary scholars have witnessed in the WTO and subsequently designated as Austinian positivism is only a mirage. Moreover, what contemporary scholars have seen is positivism only in its fundamental form.

Bentham, Austin, and Hart were all staunch adherents to the fundamental positive tenet that the validity of law depends on certain basic social facts.¹⁹⁴ Bentham and Austin adhered to this view by postulating a sovereign, whereas Hart proposed a rule of recognition. Yet, positivism took on diverse forms in the works of these scholars as a reflection of their times. Bentham, who breathed the air of utilitarianism, was prepared to go to any extent of theorizing to achieve utility, even to devise a sanction theory of law where a sovereign imposes punishment. However, when it came to the powers of this sovereign, Bentham attributed it to a social situation and thereby remained faithful to the fundamental positive theory. Austin's antipathy towards natural law and Benthamite influence prompted him to postulate a sovereign that formed the source of law; its commands were law. However, Austin's sovereign, as generally perceived, is not a power-oriented concept but a social force that receives habitual obedience through the organizations and systems that it creates. Thus, Austin, too, arrived at the fundamental positive theory. Hart, unlike his predecessors, took a different approach towards fundamental positivism. His rule theory was a result of the alienation of law from morals and a dissatisfaction with the conception of a legally unlimited sovereign. Accordingly, he replaced a sovereign with a rule of recognition which validated the legal system. However, Hart nowhere explicitly equated the rule of recognition with a social force. In its place, he relied on a "presupposition"

193. The metaphor of coldness in the positivist approach towards international law finds mention in Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269, 271 (2001). Hall borrows the analogy from LON L. FULLER, *THE MORALITY OF LAW* 232 (rev. ed. 1969).

194. For more on the basic nature of positivism, see RAZ, *supra* note 59.

thesis, whereby the existence of a rule of recognition is based on a presupposition—“there is a valid rule”—regarding the statements made by the *persons* in a legal system about a rule. This presupposition (internal and external aspect) constituted the validity of law. Hart avoided any reference to social forces in this regard; yet if he were asked what made a *rule* so special that it could validate a legal system by means of a presupposition, he would have had to confess that the rule is in one way or another conditioned by social forces. Otherwise, rule theory would remain devoid of a foundation.

Thus, positivism was practiced by these scholars by remaining truly faithful to its fundamental form. Utilitarianism, command theory, and rule theory are various formulations of this fundamental form, each appropriate to its time. Among these, Austin’s account, for the reasons discussed earlier, developed into the essential representation of positivism with command theory as its hallmark. It continued to exert its sway, notwithstanding the changes in positivism, in essentially every branch of law. If what contemporary scholars have discovered in the WTO is Austinian positivism, the analysis of Austin’s theory ought to have shown an inclination on his part towards the WTO, but it did not. This failure means that what scholars have discovered is not Austin’s positivism as it is commonly understood.

On balance, the transformations and the subsequent global changes—normative and structural—can be attributed to positivism, but only in its fundamental form, i.e., the social thesis. The impetus for transformations and the validity of the resultant norms are determined by certain social forces. That social force was neoliberalism in the present context.

V. THE WTO AND NEOLIBERALISM

A. Neoliberalism: The Landscape

There is no representative definition of the term neoliberalism, although there are many unofficial ones. Most are predicated on activism, however, the term is generally used in a pejorative sense and to oppose the market liberalism that has emerged as a result of globalization. Activists prefix “neo” because the old liberal idea of free markets is performed through the compression of the world and the strengthening of the consciousness of the peoples all over the world.¹⁹⁵ But the term finds more rational application in the “globalization debates” within academia, where neoliberalism is considered the ideology of the process of

195. Cf. ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 8-31 (1992).

globalization.¹⁹⁶ Such a view generally provides an economic logic which justifies the emergence of a single global market and upholds the principle of global competition.¹⁹⁷ This, in effect, evokes an impression that the world will act in accordance with economics textbooks. Does this mean that market forces are going to make every other choice irrelevant? Yes, but only to a certain extent. This view will be dealt with in the following paragraphs. For the time being, for tractability's sake, this paper will proceed with the definition that neoliberalism is a "global policy regime that comprises free trade and the free flow of resources via market mechanisms."¹⁹⁸

In order to conceptualize neoliberalism, one must first define its purpose. Is mere attainment of market expansion all that has been meant by neoliberalism? To answer this question, one must start with the assumption that neoliberalism aims at the expansion of markets only. An "expanded market" or, say, a "global market" does not mean solely a meeting place of supply and demand as in the conventional sense. Rather, it is a social organization.¹⁹⁹ In such a market, there are two major participants—

196. Held, McGrew, Goldblatt, and Perraton have classified the academic debate on globalization into three broad schools of thought: the *hyperglobalist thesis*, the *sceptical thesis*, and the *transformationalist thesis*. Hyperglobalizers are those who believe that contemporary globalization defines a new era in which peoples everywhere are increasingly subject to the disciplines of the global market place; sceptics argue that globalization is a myth which conceals the reality of an international economy increasingly segmented into three major regional blocks in which national governments remain very powerful; and transformationalists view contemporary patterns of globalization as historically unprecedented, whereby states and societies across the globe are experiencing a process of profound change as they try to build a more interconnected but highly certain world. It is within the Hyperglobalist School that the neoliberalism finds its place. In this camp, an orthodox liberal account of globalization can be found alongside Marxist accounts. The other two theses—the sceptics and transformationalists—rather than basing their view on any ideology identify themselves with the position of a myth and a new architecture of the world order, respectively. For a detailed discussion, see DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999).

197. In this context, globalization is defined as "a politically contested process in which different state-market models of interaction come into conflict locally, nationally, and transnationally." Seán Ó Riain, *States and Markets in an Era of Globalization*, 26 *ANN. REV. SOC.* 187, 188 (2000).

198. GEORGE DEMARTINO, *GLOBAL ECONOMY, GLOBAL JUSTICE: THEORETICAL OBJECTIONS AND POLICY ALTERNATIVES TO NEOLIBERALISM* 125 (2000).

199. See generally NEIL FLIGSTEIN, *THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST-CENTURY CAPITALIST SOCIETIES* (2001). The basis of such markets is the existence of certain institutions. Institutions refer to shared rules, which can be laws or collective understandings, held in place by custom, explicit agreements, or tacit agreements. These institutions—which can be called property rights, governance structures, conceptions of control, and rules of exchange—enable actors in markets to

incumbent and challenger firms—which know one another and take one another’s behavior into account in their actions.²⁰⁰ The stability²⁰¹ of this market depends on the production of a conception of control. Conceptions of control

refer to understandings that structure perceptions of how a market works and that allow actors to interpret their world and act to control situations. A conception of control is simultaneously a worldview that allows actors to interpret the actions of others and a reflection of how the market is structured.²⁰²

The formation of such a market culture is driven both by exogenous factors, such as resource dependence, and endogenous factors, such as with whom one wants to build interdependencies.²⁰³ The stability of the market will be upset when new entrants break through it with new conceptions of control.²⁰⁴ The existing players on the market look upon the state to intervene to protect a local market that is threatened.²⁰⁵ However, any state that has been acting according to a determined strategy²⁰⁶ regarding markets and society finds itself in an alien element and rushes to learn the lessons of the new environment.²⁰⁷

The state has two options with regard to the new entrants: to strengthen the old conception of control or to accept a new one. If the state opts to

organize themselves, to compete and cooperate, and to exchange. For a detailed account, see Neil Fligstein, *Markets as Politics: A Political-Cultural Approach to Market Institutions*, 61 AM. SOC. REV. 656, 658 (1996).

200. NEIL FLIGSTEIN, MARKETS, POLITICS, AND GLOBALIZATION 36 (1997). “Incumbents” are the principal players of the market, who determine the rules of the game. “Challengers” are the outsiders. They must accept the rules of the game or risk a “war.”

201. Stability here refers to a situation where the identities and the status hierarchy of the incumbent and challenger firms are well known. Fligstein, *supra* note 199, at 663.

202. *Id.* at 658.

203. For an empirical study on the structuring of and the criteria for organizational networks in a globalized society, see Ranjay Gulati & Martin Gargiulo, *Where do Interorganizational Networks Come From?*, 104 AM. J. SOC. 1439 (1999).

204. Entry into the market can be made in various ways, e.g., through imports, acquisition of an old established firm, or a “management shake-up.” P.A. GEROSKI, MARKET DYNAMICS AND ENTRY 10 (1991).

205. FLIGSTEIN, *supra* note 199, at 73.

206. On the basis of their relationship with markets, Ó Riain has classified states into four categories: liberal states, social rights states, developmental states, and socialist states. *Liberal states* are those where the state promotes the markets in every sphere of society and ultimately even in the state itself. This is done by securing favorable conditions for the reproduction of the markets. In *social rights states*, the state limits the range of feasible market strategies by strengthening society and setting social limits on market action. Here there is an alliance between the state and society, which sets limits on the ways in which markets can be organized. In *developmental states*, the state never undertakes any tasks by itself but shapes the capabilities of society and markets to undertake the tasks. *Socialist states* endeavor to subsume society and the market within the state. Ó Riain, *supra* note 197, at 193-200.

207. A detailed empirical study on the predicament of states in the wake of these global changes appears in HELD ET AL., *supra* note 196.

strengthen the old conception of control, it needs to take steps to block entry to the local market, either by raising prices (tariffs) above costs or by increasing the efficiency of operations. Raising prices above the costs will result in immediate entry to the market by other agents, whereas increasing efficiency will certainly be a bonus, as efficiency and the resulting dividends will materialize without all the ruckus of actual entry.²⁰⁸ But with a horde of potential entrants surrounding the market neither raising prices nor improved efficiency seems to be easily realizable. In this predicament, the state is left with only one option, to adopt the new conception of control.²⁰⁹ This requires changing the local market to fit the diverse set of global actors that have invaded it with new conceptions of control and integrating the markets into one whole. There are a variety of ways to integrate the national markets into the global whole. As it is increasingly difficult for states to function detached from the market or isolated from transnational capital,²¹⁰ they carry out integration mainly through free trade and free capital mobility.²¹¹ This is facilitated by establishing rules for economic actors in the market in areas like property rights, governance structures, and rules of exchange.²¹² For newly expanding markets, however, creating stable conceptions of control is difficult because property rights, governance structures, and rules of exchange are vaguely specified.²¹³ Moreover, the various inconsistencies in the world of competitive business such as continuing discrepancies in the comparative prices, wages, profits, and interest rates of different countries, sectors, trades and industries, impose practical limitations upon capital mobility.²¹⁴ Cultural disparities, divergence in legal systems, and a lack of communication facilities compound the problem. To heighten the mobility of capital, a state must also increase the porosity of its international borders. Achieving these capacities requires states to interact with firms, political

208. GEROSKI, *supra* note 204, at 10.

209. Here, too, firms follow the same strategies and criteria that they followed in adapting to earlier conceptions of control. To understand how they do so, see Gulati & Gargiulo, *supra* note 203.

210. John Roemer, *Market Socialism: A Blueprint*, 38 DISSENT 562 (1991).

211. For different perspectives on this aspect, see Jagdish Bhagwati, *The Capital Myth: The Difference between Trade in Widgets and Dollars*, 77 FOREIGN AFF. 7 (1999); Jeff Faux, *Without Consent: Global Capital Mobility and Democracy*, 51 DISSENT 43 (2004).

212. Fligstein, *supra* note 199, at 660.

213. *Id.* at 661.

214. Lawrence Seltzer, *The Mobility of Capital*, 46 Q.J. ECON. 496 (1932).

parties, international institutions, and newly invented conceptions of regulation.²¹⁵

The neoliberal requirements for states include political correction, cultural adaptation, optimization of resources, spatial allocation of economic activity (urbanization), decentralization, and harmonization of laws and legal systems. These are met by allocating tasks to sub-state enterprises such as international organizations, companies, non-governmental organizations (NGOs) and other pertinent actors. The sole task of the state in this project is the coordination of the various actors involved in the globalization process, who work together to ensure free mobility of capital and goods. The state retains its essential role but takes on the function of a critical enterprise in promoting economic competition and mobility; its role as a “civil association” diminishes.²¹⁶

Earlier, neoliberalism was mentioned as working to create a global whole; that is, one unity into which the relevant parts are integrated. However, this requires a de-integration of national units—ripping them apart and integrating them into the global whole. This process could be perceived as a “shift from a two-dimensional Euclidian space with its centers and peripheries and sharp boundaries, to a multidimensional global space with unbounded, often discontinuous and interpenetrating sub-spaces.”²¹⁷ “The functional integration of this space depends less upon horizontal relations of spatial integration emphasized by concentric [] zone[s] and more upon hierarchically structured linkages to global system processes, such as capital accumulation and the [] international division of labor.”²¹⁸ This character of “integration” that connects any point to any other point, the structuring of diversities by ramifying into states, societies, and many other social bodies and spaces are what make neoliberalism a matrix of all global changes.

The changes that neoliberalism has brought about in the global order are noticeable in all aspects of human interaction. Neoliberalism has ionized every facet of social life in its ethical domain, regardless of the facet’s internal values or exterior texture. It has secularized the world but wrought a newly organized order with liberal values and attitudes. The reason for this transformation is the fundamental logic of globalization. It is probably among the simplest of all the ideologies that the world has ever seen but the one with the most consequential outcome. It has perhaps nothing more

215. Fligstein, *supra* note 199, at 661.

216. Philip G. Cerny, *Globalization and the Changing Logic of Collective Action*, 49 INT’L ORG. 595, 597 (1995).

217. M. Kearney, *The Local and the Global: The Anthropology of Globalization and Transnationalism*, 24 ANN. REV. ANTHROPOLOGY 547, 549 (1995).

218. *Id.* at 552 (quoting M. GOTTDIENER, *THE SOCIAL PRODUCTION OF URBAN SPACE* 76 (1985) (internal quotations omitted)).

substantial to call its own than the free market ideology had during the liberal revolution of the nineteenth century, with the exception of the international exchange of foreign capital.²¹⁹ States in the twentieth century liberal revolution have only one motivation and target: the creation of conditions that facilitate the accumulation of foreign capital so that they can compete in an “extended market.” In endeavoring to attract foreign capital, states tamper with their legal systems, ideologies, monetary exchange rates, environment, and cultural values—everything which hampers the free flow of capital—in “a neoliberal race to the bottom.”²²⁰ What ensue are ideological de-construction, perestroika, and the standardization of legal systems. Every branch of knowledge, descriptive as well as abstract, has rewritten its assumptions, concepts, values, and practices so that the neoliberal agenda can effectively be implanted in their respective fields.

Among all the changes, the most perceptible change was the appearance and exponential increase of new actors in the global amphitheater—multinational corporations, NGOs, and other agents of change—a forum built on the principles of universalism, individualism, rational voluntaristic authority, progress, and world citizenship.²²¹ These institutions are imbued with neoliberal culture, concerns, content, norms, and shape. Although they cannot claim to have totally taken over the baton from the states, they lobby and criticize states, mobilize around and elaborate global cultural principles, and convince states to act on those principles.²²² Amid this proliferation of neoliberal institutions, the existing non-neoliberal institutions began to face functional crises resulting in institutional gaps

219. Deepak Nayyar, *Towards Global Governance*, in GOVERNING GLOBALIZATION 3, 8 (Deepak Nayyar ed., 2002).

220. How this tampering has resulted in a nascent global state is well articulated in Chimni, *supra* note 35, at 7-10.

221. John Boli & George M. Thomas, *World Culture in the World Polity: A Century of International Non-Governmental Organization*, 62 AM. SOC. REV. 171, 187 (1997).

222. *Id.* For a discussion of multinational corporations in the contemporary international political economy in various perspectives, see Richard E. Caves, *The Multinational Enterprise as an Economic Organization*, Walter B. Wriston, *Agents of Change are Rarely Welcome*, Stephen D. Krasner, *Multinational Corporations*, Sayre P. Schatz, *Assertive Pragmatism and the Multinational Enterprise*, and Richard S. Newfarmer, *Multinationals and Marketplace Magic the 1980's*, in JEFFRY A. FRIEDEN & DAVID LAKE INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH 146-207 (2d ed. 1991). For a review of the literature on the role of nongovernmental organizations in international politics, see William F. Fisher, *Doing Good? The Politics and Antipolitics of NGO Practices*, 26 ANN. REV. ANTHROPOLOGY 439 (1997).

and were reconstituted with a rich dose of the neoliberal mandate.²²³ They now function with a dual agenda: 1) to guarantee that the neoliberal mandate is effectively enforced by laying down uniform standards to enforce economic sanctions, to attach conditionalities, and to ensure that member states do not pursue excessive protectionism and hence a “race to the bottom;” and 2) to shape the future neoliberal manifesto by creating linkages across issues and to serve as agents who create as well as diffuse ideas, norms, and expectations.²²⁴

The “trickle down economics” of neoliberalism is a maturing process, with more fields of applications, more facets of culture, more growth expectation and probably more neoliberalism,²²⁵ which builds a progression in itself. Progression may be described as a series of occurrences involving the same or varied intensity for each occurrence, appearing every time in new and different spheres *ad infinitum*. It is akin to a progression as a mathematical abstraction with a series of numbers and the same relation between each number, although the terms vary. The operation of neoliberalism may be demonstrated through the following arithmetic progression of squares.

$$1 \diamond 4 \diamond 9 \diamond 16 \diamond 25 \diamond 36 \diamond 49 \diamond 64 \diamond 89 \dots$$

Every space between the numbers (\diamond) is an occurrence. The basic unit of the intensity of these occurrences is x , which remains the same or varies throughout the progression and depends on the intensity of the occurrence; it could be $x1$, $x7$, $x8$, etc. The numbers or the squares are the various spheres of activities, which vary in value, quality, quantity, properties, and performance. Yet, the basic operation of the progression is squaring. In the context of the world order, neoliberalism stands as the basic operation. It produces a set of waves that occur with either the same or different intensity engulfing one sphere after another that once stood independent, with its own values and identities. This recurs then

223. This reconstitution, says Chimni in the context of United Nations, “is a cumulative result of (a) assigning a greater role to the corporate actors within the UN; (b) redefining the principle of non-use of force by the Western power-bloc against the third world states and; (c) adopting the neo-liberal state as a model for its member states, manifested in particular in its peace-building efforts in post-conflict societies.” See Chimni, *supra* note 35, at 14. For support, see U.N. Secretary General, *Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, available at <http://www.centerforunreform.org/node/206>. See also Richard Falk, *The United Nations System: Prospects for Renewal*, Jong-II You, *The Bretton Woods Institutions: Evolution, Reform and Change*, and S.P. Shukla, *From GATT to the WTO and Beyond*, in GOVERNING GLOBALIZATION (Deepak Nayyar ed., 2002).

224. Devesh Kapur, *Processes of Change in International Organizations*, in GOVERNING GLOBALIZATION 335 (Deepak Nayyar ed., 2002).

225. Cf. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

with the same or different intensity and consistency in other spheres. Even though the progression grows, its *basic* neoliberal character remains invariable.

B. The WTO and Neoliberalism: Juxtapositions

The conceptualization of neoliberalism shows that the concept primarily necessitates a horizontal allocation of power and functions among various global actors and that international organizations (IO) constitute significant actors. The neoliberal functions of IOs in general include sustaining long-term cooperation among self-interested states, harmonizing global standards, perpetuating decentralization, and promoting global networking for cross-national interaction.²²⁶ They carry out these functions in ways compatible with [neo]liberalism and the global order.²²⁷ A simple analysis in neoliberal terms reveals that IOs function under a principal-agent relationship in which IOs derive authority from the state. A complex neoliberal approach says that the authority of IOs derive from social relations.²²⁸ However, both views of IOs have their own reasoning and stand in a symbiotic relation.²²⁹ The wisdom of both views is required to illustrate the correlation between the WTO and neoliberalism.

In the section to follow, the role and authority of IOs in the neoliberal state of affairs will be described in general. Drawing on that understanding, the WTO will be examined in the same terms. The process reveals that neoliberalism is the source of the WTO's normative power.

226. For an analysis of horizontal power allocations in the context of sovereignty, see John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782 (2003).

227. Michael Barnett & Martha Finnemore, *The Power of Liberal International Organizations*, in POWER IN GLOBAL GOVERNANCE 161, 162 (Michael Barnett & Raymond Duvall eds., 2005).

228. *Id.* For a more detailed treatment on the complex neoliberal approach, see Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 707-15 (1999).

229. A seminal approach to the concept of IOs is that taken by Jan Klabbers. He conceptualizes IOs firstly as endowed with a managerial task, whereby they perform specialized tasks delegated by states and secondly in terms of an *agora* where IOs are public realms in which international issues can be discussed. He then threads the two concepts together despite their inherent and functional drawbacks. See Jan Klabbers, *Two Concepts of International Organization*, 2 INT'L ORG. L. REV. 277 (2005).

1. International Organizations in the New World Order

a. International Organizations Situated

At the core of the general idea of IOs lies a synthesis of aspirations for an orderly world community and the positive creative influence such aspirations might derive from the policy and action of states.²³⁰ In this scheme, states view IOs as instruments through which they might further the cause of an orderly world while retaining their national policies and interests, what Pitman B. Potter called “a very complex and delicate computation of costs and benefits.”²³¹ The simple impression is that international cooperation can be carried out more effectively through IOs, because IOs can accommodate differences of policy where everyone shows a high tolerance for disagreements. Inter-nation collaboration is the subatomic property of IOs.²³² However, neoliberalism requires IOs to be much more functional and demands their increased participation as sub-state actors in helping the state fulfill its neoliberal roles.²³³ Theoretically, within neoliberalism, the sub-atomic property of inter-nation collaboration remains unharmed, as without mutuality transnational networks for the free mobility of capital and goods cannot be built. This shifts the pendulum towards the simple neoliberal (to some extent realist) view that the power of IOs is a cumulative product of state power. This is certainly a true assertion, although not a complete one. Barnett and Finnemore endorsed it, albeit under a different concern: “Certainly there are occasions when [] states do drive IO behavior, but there are also times when other forces are at work that eclipse or significantly dampen the effect of states on IOs.”²³⁴

230. Charles E. Rothwell, *International Organization and World Politics*, 3 INT’L ORG. 605, 607 (1949).

231. Pitman B. Potter, *The Logic of International Relations and Organization*, 44 AM. POL. SCI. REV. 661, 664 (1950).

232. This “sub-atomic” property has been present throughout the various conceptualizations of IOs—functionalist integration theory, neo-functionalist regional integration theory, and interdependence theory. On functionalism, see DAVID MITRANY, *A WORKING PEACE SYSTEM* (1966); on neo-functionalism, see ERNST B. HASS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950-1957* (1958); on interdependence theory, see ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977). All three theories assert that international institutions can help states cooperate.

233. See *supra*, Part IV.A.

234. Barnett & Finnemore, *supra* note 228, at 714-15. This assertion is preceded by a suspicion that an IO’s power is derived from state power. The skepticism is substantiated with the cases of the World Bank, NATO, The European Bank for Reconstruction and Development, and the OSCE, which perform the job of “norm diffusion” for powerful states. The authors are concerned that the realist [and neoliberal] theories that sustain these practices provide no “ontological independence” for IOs.

They then continued with a progressive plan: “Which causal mechanisms produce which effects under which conditions is a set of relationships that can be understood only by intensive empirical study of how these organizations actually do their business.”²³⁵

The complex neoliberal approach, which maintains that the authority of IOs is generated from certain social relations, helps in understanding this relationship. This approach is called complex because it cannot be shown with a definitional ease, but rather requires a step-by-step presentation. By positioning IOs in the neoliberal scheme and by providing a concise clarification, the authority of IOs to a great extent can be attributed to their social position.

While conceptualizing neoliberalism, it was established that neoliberalism requires accumulation of capital by states and, accordingly, the removal of all barriers to the free mobility of capital and goods. In order to accomplish these objectives, states need interactions with various global actors. These interactions in their entirety typify “social relations.” In other words, social relations mean the sum of exchanges through which global actors manage their commonized affairs across the world.²³⁶ The management of common affairs—fashionably known as “global governance”—is not an easy task, given the diversity of national self interests. In addition, a lack of authoritative governmental institutions at the international level creates pervasive uncertainty. This structural anarchy results in the formation of regimes, which 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.”²³⁷

235. *Id.*

236. *Cf.* CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS 109 (2001). Generally it is presumed that in the intensifying interactions between various global actors, states are likely to adopt protective barriers and re-create the conditions for enduring conflict, which prompt a need for governance and rule-making at the global level. For a treatment on the various facets of global governance, see Michael Barnett & Raymond Duvall, *Power in Global Governance*, in POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2005).

237. This definition of “regime” provided by Stephen D. Krasner is the most widely accepted. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983), originally published in Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185 (1982). For more on the regime literature, see for example ORAN YOUNG, GOVERNANCE IN WORLD AFFAIRS 189-93 (1999); Stephan Haggard & Beth Simmons, *Theories of International Regimes*, 41 INT’L ORG. 491 (1987). For a review of studies on and approaches to regimes, see ANDRAES HASENCLEVER ET AL., THEORIES OF INTERNATIONAL REGIMES (1997). For a

Regimes are managed by classifying them on the basis of various “issues,” e.g., international crime, security and conflict, environmental degradation, and migration. Regimes are “tool-kits” for the management of common affairs; norms, rules, and decision-making procedures are the tools.²³⁸ The formation of a regime is *inter alia* a process of institutionalization,²³⁹ and IOs are concrete institutions with formal structures and sets of rules. IOs can serve the needs of a regime in implementing and administering the provisions of the governance systems.²⁴⁰ They help to create substantive agreements “by providing a framework of rules, norms, principles, and procedures for negotiation.”²⁴¹

Before going into detail, a caveat regarding the approach is in order. In the explanation to follow, the *formation* of regimes is viewed as a social action, the result of a particular social situation.²⁴² It follows that the formation of a regime is not a part of a state’s general “governance” scheme, which is a strategy of sorts. Governance of common interests begins only with the institutionalization of issues. Regimes, however, provide a framework for this; regimes are *maintained* by human actions.

To describe effectively the position of IOs, an explanation is necessary starting with *governance* or, more specifically, one step back, with the formation of regimes. What necessitates the formation of regimes? In outlining the argument, the situation preceding the formation of new regimes is characterized as anarchical and uncertain. Despite the variations in formulations among the three streams of thought on regimes—the

detailed treatment on how regimes are formed and what the creation of international regimes requires, see Robert Keohane, *The Demand for International Regimes*, 36 INT’L ORG. 325 (1982). For a case study, see THOMAS GEHRING, DYNAMIC INTERNATIONAL REGIMES: INSTITUTIONS FOR INTERNATIONAL ENVIRONMENTAL REGIMES (1994).

238. ARCHER, *supra* note 236, at 109.

239. James Bohman, *International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions*, 75 INT’L AFF. 499, 500 (1999). When regime formation is discussed as a process of institutionalization, “international organization” as a concept is strictly differentiated from “international institution.” International relations are considered orderly and institutions are one form of that orderliness. “Institutions” can be defined more systematically as “the collective forms of basic structures of social organization as established by law or human tradition.” An “international organization” in this context represents a form of institution that comprises “a formal system of rules and objectives and a rationalized administrative instrument, which has a formal technical and material organization: constitutions, local chapters, physical equipment, machines, emblems, letterhead stationery, a staff, an administrative hierarchy and so forth.” See M. DUVERGER, *THE STUDY OF POLITICS* 68 (1972); P. SELZNICK, *LEADERSHIP IN ADMINISTRATION* 8 (1957). Both definitions are as quoted in ARCHER, *supra* note 236, at 2.

240. ORAN YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY* 164 (1994).

241. Keohane, *supra* note 237, at 337.

242. See Oran Young, *Regime Dynamics: The Rise and Fall of Regimes*, 36 INT’L ORG. 277, 279 (1982). As a footnote to this view, Young emphasizes its similarity to the philosophical tenets of legal positivism.

realists,²⁴³ the neoliberals,²⁴⁴ and the cognitivists,²⁴⁵—there is some level of unanimity as to the prevalence of anarchy and uncertainty before the formation of a regime.²⁴⁶ Anarchy is generally defined as a system where both central authority and collective security are absent—a system of self-help and power politics.²⁴⁷

The paper will assert that anarchy is a social construction, akin to the Benthamite social situation. In other words, anarchy is not a moribund concept; it is, as Alexander Wendt premised, “what states make of it.”²⁴⁸ States do not resort to self-help and power politics in all circumstances

243. The realist view on regimes is a power-oriented one. It works on the basis of a presumption that “states care not only for relative, but for absolute gain as well.” HASENCLEVER ET AL., *supra* note 237, at 3. Hence realists are skeptical about the effectiveness of institutions; they nevertheless realize the significance of regimes. Realists believe that the presence of a hegemon that has the resources and power to support the regime can ensure its continuity. *See id.* at 83-135 (providing general account of the realist position on regimes). *See* Charles P. Kindleberger, *Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides*, 25 INT'L STUD. Q. 242 (1981) (providing general account of hegemonic stability). For a general account of the realist position on regimes, *see* HASENCLEVER ET AL., *supra* note 237, at 83-135. On hegemonic stability *see* Kindleberger, *supra*.

244. Neoliberalist theories on regimes are interest-oriented ones. They posit that states are atomistic actors that seek to maximize their absolute gains and are indifferent to relative gains. “Cheating . . . is the greatest impediment to cooperation among rationally egotistic [nations].” Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 487 (1988) (providing an understanding of neoliberalist view on institutionalism in relation to realism). However, neoliberals believe that regimes can help states overcome this barrier to joint action by facilitating cooperation, providing information, lowering transaction costs, promoting linkages, and so on. For details, *see* HASENCLEVER ET AL., *supra* note 237, at 23-82.

245. The Cognitivist concept of regimes is knowledge based. There are two approaches to cognitivism—weak cognitivism and strong cognitivism. Weak cognitivists believe that ideas help to reduce uncertainty in international affairs. “[C]onsensual knowledge and epistemic communities facilitate policy innovation, diffusion, selection, and persistence.” Eric Brahm, *International Regimes, Beyond Intractability* (2005), http://www.beyondintractability.org/essay/international_regimes/?nid=6584. The advantage of this view is that regimes are seen as the result of dynamic ideas. Strong cognitivists consider the international system as a social structure. They emphasize the sense of obligation that exists and reasons for the varied pull of compliance. Thus regimes can act as a “source of self-understandings of the world.” *Id.* For a detailed account, *see* HASENCLEVER ET AL., *supra* note 237, at 136-210.

246. This version, however, is a refinement of a more crude formulation whereby anarchy is a perpetual phenomenon that is generally overcome by cooperation among states; anarchy then remains suppressed or hidden. For a discussion, *see* Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypothesis and Strategies*, 38 WORLD POL. 1 (1985).

247. Alexander Wendt, *Anarchy is what States Make of it: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 392 (1992).

248. *Id.* at 395 (emphasis omitted).

but are driven to do so by endogenous factors. They act on the basis of the meanings that the objects constitute for them.²⁴⁹ Such meanings are defined in accordance with the social situation; to quote Wendt, “[a]ctors do not have a ‘portfolio’ of interests that they carry around independent of social context.”²⁵⁰ Accordingly, anarchy exists because the social conditions, which include interests and interest-based interactions, necessitate it.

According to neoliberals, anarchy could be conquered by institutionalized patterns of cooperation.²⁵¹ Such a situation can be provided by regimes, which are principles, norms, rules, and decision-making procedures around which actors’ expectations converge. Through regimes, actors seek to reduce conflicts of interest and risk by coordinating their behavior.²⁵² However, the emergence of regimes is not a deliberate action; they are natural formations. Krasner conceptualized regime formation as “[the] intervening . . . [action] between basic causal factors . . . and outcomes and behavior.”²⁵³ Although this action might be the result of egoistic self-interest on the part of some states or a concentration of power in a single actor or group of actors—both of which impede the rest of the actors and jeopardize common interests—the end result is a convergence of the expectations of many individual actors.

Such a convergence could occur for two reasons: 1) a desire to regain an equilibrium of common interests and 2) a fear that if the tables are turned, there is a likelihood of reciprocation.²⁵⁴ The core of this contention is that regime formation is a societal response to anarchy and uncertainty, that is, a social force.²⁵⁵ These forces lead to conventionalized behavior, which generates a certain set of values. The values then form the basis of international normativity.²⁵⁶ Accordingly, a regime is a normative structure upon which states can construct shared understandings. The norms, however, are validated by the social conventions that create them. Yet, mere convergence of expectations around a set of valid norms is pointless. Given the decentralized nature of international relations, such a normative system remains ineffective; it requires institutional forms and organizational structures with decision-making power and procedures.

249. *Id.* at 396-97.

250. *Id.* at 398.

251. *See, e.g.,* Keohane, *supra* note 237, at 325.

252. *See generally* Krasner, *supra* note 237.

253. *Id.* at 1.

254. This is a reversed version of the argument put forward in Robert Jervis, *Security Regimes*, 36 INT’L ORG. 357 (1982).

255. *See generally* Young, *supra* note 242.

256. *See* Jaye Ellis, *International Regimes and the Legitimacy of Rules: A Discourse-Ethical Approach*, 27 ALTERNATIVES: GLOBAL. LOC., POL. 273, 274-77 (2002).

b. Why do International Organizations Matter?

Under a neoliberal governance scheme, a system of shared values, norms, and enforcement mechanisms diffuses a common culture throughout the globe. The scheme, however, is manifested through IOs with programmed strategies related to voting, membership, and dispute settlement as well as administrative bodies such as secretariats. However, such structural features are common to all IOs that have existed to date. Why are modern IOs special? Why do they matter in the new world order? What makes them the centerpiece of contemporary scholarly discourse?

We now understand that IOs in a neoliberal scheme are in a pivotal position and perform multifarious tasks, but an increase in their number or activities does not evince authority. The authority of modern IOs is undisputed, although little is known about its source. Regime theorists generally rely on the Prisoner's Dilemma (PD) to account for it. They normally argue that the "system" (which includes regimes as well as IOs) increases the incentive to cooperate by "lengthening the shadow of the future, limiting the number of players, increasing the transparency of state action, and altering the payoff structure."²⁵⁷ However, this view can be subjected to the criticism that states that are in iterative cooperation are not like prisoners, who stay separated from each other. This criticism will have little vigor, as will be pointed out below. Moreover, the PD only offers an explanation as to how the cooperation works; it implies that regimes have some kind of inherent quality that makes cooperation inevitable but fails to explain what that inevitability is. Otherwise, the PD can be an effective theory to explain the authority of IOs. The lacuna, however, can be filled in by drawing from the sociological discourse on globalization.

A good starting point for this discussion is the nation-state because the dominance of nation-states is parallel to the development of international relations.²⁵⁸ In the world system, nation-states guarded their territories, nurtured their cultures, and secured recognition of their autonomy from other states through international relations,²⁵⁹ what Anthony Giddens calls "reflexively ordered relations."²⁶⁰ The system overall was a "simple model[]

257. See Haggard & Simmons, *supra* note, 237 at 513 (providing basis for this summary of the regime theorists' view on the authority of regimes as a whole).

258. MALCOLM WATERS, *GLOBALIZATION* 47 (1995); drawing heavily on ROBERTSON, *supra* note 195; GIDDENS, *infra* note 257.

259. See ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 73 (1990).

260. *Id.*

of world polity.”²⁶¹ At the same time, nation-states were citadels of national interests and in a state of anarchy were sanctuaries of security and peace. The world in that state of affairs was a collection of states dwelling in anarchy. The nation-state system with its centralized governmental control over the citizens posed the biggest impediment to achieving the neoliberal goals. The neoliberal action plan targeted the system accordingly and attempted to remove all the “national barricades” that it had erected. This process involved lifting all kinds of social relations out of their national/local context and restructuring them at the global level.²⁶² This decontextualization posed a formidable threat to the fundamental design of nation-states,²⁶³ but the argument does not mean that the nation-state is dead; rather, it has gained resilience and now performs actions once managed unilaterally in cooperation with other global actors and in an enhanced network of relationships. These relationships between the local and the global are facilitated by the annihilation of space by time, Giddens’ “time-space distanciation process,”²⁶⁴ as a result of which social relationships materialize across great expanses of time and space. States now deal with each other through non-state actors, who may even remain invisible to each other, much like the prisoners in the PD. The developing progression of neoliberalism requires states, as well as other actors, to keep themselves informed about the multiplying nature of activities and “system developments,” including changes in the character and rules of the market. To this end, the participants build fiduciary relationships while remaining cautious about risks. To maintain these relationships, a knowledge of the risks involved as well as other actors’ strategy is necessary, and this is where IOs play a significant role.

In this scheme, IOs, as framed by Jan Klabbers, serve as an *agora*²⁶⁵ — a sort of epistemic forum, although Klabbers called the idea “less progressive, less optimistic, [and] less modernist.”²⁶⁶ Klabbers’ position

261. ROBERTSON, *supra* note 195, at 61 (internal quotations omitted).

262. WATERS, *supra* note 258, at 49 (drawing on GIDDENS, *supra* note 259).

263. See TONY SCHIRATO & JENN WEB, UNDERSTANDING GLOBALIZATION 104 (2003) (summarizing the effect of globalization on nation-states). However, scholars such as Giddens and Robertson believe that the fundamental logic of globalization lies in the very concept of the nation-state. Waters deduces this logic in the following words: “nation-states are bounded social systems; they will compete for resources and markets and they will not necessarily be materially self-sufficient; they will therefore engage in economic, military, political (diplomatic) and cultural exchanges across the boundaries that are both co-operative and conflictual; differential outcomes and therefore cross-national mimesis will ensue; states will seek to systematize international relations in order to secure the conditions of their own existence.” (parenthesis as in the original). WATERS, *supra* note 258, at 45.

264. GIDDENS, *supra* note 259, at 17-21.

265. Klabbers, *supra* note 229, at 282.

266. *Id.* at 283.

was akin to the cognitivist view on regimes that regimes, including IOs, have constitutive effects on actors' identities by providing knowledge about the ideas that are gaining importance in a given social order.²⁶⁷ In this perspective, IOs provide "system awareness," offer expertise on specific issues, help states to build a reputation, and so on. Nevertheless, in a broader scheme, IOs are not mere epistemic communities; to borrow from Klabbers again, they operate on a "management-oriented concept" that facilitates increased cooperation. Keohane has an analogous logic to offer whereby nation-states in anarchy use international regimes including IOs to accomplish those objectives which may not be possible through unilateral action.²⁶⁸ In this view, IOs provide outlets for settling disputes and universalizing norms and cultural values by building rules, monitoring compliance with those rules, and so forth. Cumulatively, IOs are focal points where actors' expectations converge—the material manifestations of regimes. Defection, mistrust, and other egotistic actions of states remove any scope for convergence and threaten common interests. The structural features of modern IOs, tailored to meet neoliberal requirements, facilitate convergence: the *agora* produces rules laying down norms; the epistemic community disseminates the situational requirements of rules as well as information regarding the dividends for compliance and the consequences of deviation; and the dispute settlement system facilitates and monitors compliance. Noncompliance is least preferred (though not unknown), for IOs will divulge the deviation, which then affects the reputation of the one who deviates from the rule. In addition, IOs provide amenities for retaliation against the transgressor. In sum, any cooperative venture outside the IOs is impossible, for every actor who stays outside the IO framework remains ignorant of the rules of the game and ends up a loser.

C. WTO: The Neoliberal Manifesto

In this section, it is first shown that the WTO meets the criteria for a neoliberal IO as characterized above. This is done in two stages: 1) by unknotting the old tale of "GATT to WTO" in a regime-theoretical perspective to show that the current multilateral trade regime emerged from an anarchical situation, which created the GATT, and that the

267. See generally HASENCLEVER ET AL., *supra* note 237.

268. See ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN WORLD POLITICAL ECONOMY* 62 (1984).

regime subsequently underwent a “change” and necessitated an institution like the WTO with a large dose of neoliberalism; and 2) by demonstrating that the WTO’s institutional apparatuses and strategies are designed in such a way as to enable it to fulfill the role meant for an IO in the neoliberal agenda.

1. Anarchy and the Trade Regime: From GATT to the WTO

In the aftermath of World War I, the United States set a pro-tariff policy in motion by enacting the Smoot-Hawley Tariff Act.²⁶⁹ One of the immediate reasons for this policy, according to President Herbert Hoover, was to counter the substantial hike in the tariff duties on agricultural products in the world market.²⁷⁰ Immediate retaliation against this policy came from Canada—the major trading partner of the United States—in the form of measures such as increasing the preferences given to British products, levying countervailing duties on certain products and making minor adjustments and reductions in the general tariff rates.²⁷¹ In this crisis, countries like Britain and France sought other pastures, whereas Germany resorted to autarchy. Soon all nations raised their tariffs and hid behind the walls of protectionism. In this “tariff war,” the self-help trade measures adopted by the states led to a precipitous decline in international trade and according to some economic historians, contributed to the economic depression of the 1930s.²⁷² Quantitative analyses show that in the wake of the Smoot-Hawley Act “the volume of US imports plummeted 41.2% between the second quarter of 1930 and its local trough in the third quarter of 1932,”²⁷³ whereas world trade in general declined 14%.²⁷⁴ The impact of Smoot-Hawley—falling prices, unemployment, and bank failures—demonstrated that excessive protectionism is harmful. Many economic historians defensively argue that the United States tariff policy in the wake of the Great Depression was a response to *changes* in the economic conditions and undercurrents of national

269. Mario J. Crucini, *Sources of Variation in Real Tariff Rates: The United States 1900-1940*, 84 AM. ECON. REV. 732, 732 (1994). See also Colleen M. Callahan, Judith P. McDonald, & Anthony P. O’Brien, *Who Voted for Smoot-Hawley?*, 54 J. ECON. HIST. 683, 683 (1994).

270. Judith A. McDonald, Anthony P. O’Brien, & Colleen M. Callahan, *Trade Wars: Canada’s Reaction to the Smoot-Hawley Tariff*, 57 J. ECON. HIST. 802, 806 (1997).

271. See *id.* at 809.

272. See, e.g., *id.* at 802.

273. Douglas A. Irwin, *The Smoot-Hawley Tariff: A Quantitative Assessment*, 80 REV. ECON. & STAT. 326 (1998). However, in this review, the author shows that of the 40% decline in imports, only 8-10% can be directly attributed to the rise in tariffs.

274. Jakob B. Madsen, *Trade Barriers and the Collapse of World Trade During the Great Depression*, 67 S. ECON. J. 848, 848 (2001).

politics and an eventual choice.²⁷⁵ Other countries, in order to secure their economies, were left with no choice but to resort to the firewall of protectionism. No matter what the rationale and policy behind the tariff hikes and the subsequent retaliatory actions were, the economic scenario represented anarchy in trade and political relations.

Following these developments, states, particularly the United States, desperately wanted to overcome the problem of excessive protectionism in which all were left worse off.²⁷⁶ However, the pitfalls of an instantaneous unilateral tariff reduction were clearly apparent. Considering the exigencies of the situation, the United States began to campaign for bilateral agreements with trading partners as the most feasible method at hand. In 1933, Cordell Hull, then secretary of state drafted a bill authorizing the president to negotiate such agreements.²⁷⁷ The bill became the Reciprocal Trade Agreements Acts (RTAA), which was a turning point towards liberalization of the world economy.²⁷⁸

The policy of trade liberalization under bilateral agreements was a great success.²⁷⁹ At the same time, reciprocal tariff liberalization had a political side-effect: if tariffs were reduced instantly, “the export sector support for a reduction in foreign tariffs would serve as a political counterweight against complaints from the domestic import-competing

275. See, e.g., David Epstein & Sharyn O'Halloran, *The Partisan Paradox and the U.S. Tariff: 1877-1934*, 50 INT'L ORG. 301, 319 (1996).

276. See generally Percy W. Bidwell, *Tariff Reform: The Case for Bargaining*, 23 AM. ECON. REV. 137 (1933) (capturing the policy mood at the time). See also CHARLES KINDLEBERGER, *THE WORLD IN DEPRESSION: 1929-1939* (HISTORY OF THE WORLD ECONOMY IN THE TWENTIETH CENTURY) 291-308 (1973).

277. Michael J. Hiscox, *The Magic Bullet? RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG. 668, 671 (1999) (obtaining information from CORDELL HULL, MEMOIRS OF CORDELL HULL 365 (1948)).

278. General economic history literature gives two reasons, wittily called the “magic bullets” by Hiscox, for the RTAA and the trade liberalization in the mid-1930s. One was that the practice of logrolling prevalent among the members of Congress was alarming for any trade liberalizing measure and hence tariff setting was delegated to the executive branch to ensure more effective policies. The other was the Democratic Party's pro-liberalization policy, whereby it based the measures on reciprocal concessions that would strengthen the support from the export interests. However, Hiscox rejects complete reliance on these two reasons and argues that the trade liberalization policy and RTAA were to a large extent influenced by the societal preferences and the policy positions taken by the parties. For a more detailed account see Hiscox, *supra* note 277, at 673.

279. Between 1934 and 1939 twenty trade agreements were signed under the RTAA covering some 30% of U.S. exports and 45% of imports. See L. Alan Winters, *The Road to Uruguay*, 100 ECON. J. 1288, 1290 (1990).

sectors.”²⁸⁰ However, the principle of non-discrimination—which served to speed the liberalization program—was seen as the remedy. In effect, through a policy of non-discrimination, “bilateral reciprocal tariff reductions could be multilateralized.”²⁸¹

There was a general skepticism regarding multilateralism, particularly its Most Favoured Nation (MFN) treatment, for “no country would be inclined to make concessions to reduce a particular US tariff if there [were] a danger that in the US’s next negotiation another country would be allowed access at a lower rate.”²⁸² Hence, states considered it necessary to carry out a series of bilateral deals at the same time. The combination of bilateral reciprocity and MFN was not easy to cope with but states were nevertheless optimistic about the prospects of a multilateral trading system.²⁸³ Their optimism mainly centered on a set of principles such as non-discrimination and reciprocity, which could ensure them a fair deal in trade relations. A sort of “indivisibility,” characterized by John Gerard Ruggie as a “social construction,”²⁸⁴ had taken shape out of the common interests and expectations of states. Soon the states resolved to formalize their interests and expectations regarding these principles and international efforts came into play. The goal was an International Trade Organization (ITO) that would specify the rules under which multilateral negotiations would go on, as well as the way in which the rules would be enforced.²⁸⁵ In due course, an interim agreement was reached—GATT.²⁸⁶ The ambitious scheme of the ITO failed because of a refusal by the U.S. Congress to ratify the ITO Charter, and the interim GATT, drawn up on the principles envisioned for the ITO, was converted into a normative institution enabling members to pursue multilateral trade negotiations.²⁸⁷

GATT marked the genesis of a multilateral trade regime. However, it was a regime concerned with only one area of trade—tariffs.²⁸⁸ Several trade issues, such as prices and earnings derived from the export of primary commodities, the effect of private business practices on trade, and non-tariff barriers (although their impact was minor), remained

280. Kyle Bagwell & Robert W. Staiger, *GATT-Think* 29 (Nat’l Bureau of Econ. Research, Working Paper No. 8005, 2000).

281. *Id.*

282. Winters, *supra* note 279, at 1290.

283. *See id.* at 1290-91.

284. John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT’L ORG. 561, 571 (1992).

285. For details, see HOEKMAN & KOSTECKI, *supra* note 1, at 12-15.

286. Kofi Annan, *Laying the Foundations of a Fair and Free World Trade System*, in *THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE* 19, 20 (Gary P. Sampson, ed., 2001).

287. *Id.*

288. Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulations of Trade Barriers: Regime Dynamics and Functions*, 35 INT’L ORG. 561, 562 (1981).

outside the scope of GATT. Yet, states' expectations converged in GATT, which successfully regulated trade barriers through its own set of rules and decision-making procedures.

The principle of economic nationalism that permeated the era posed governance dilemmas for the new regime. The situation highlighted the need for a hegemon that would be able to maintain open markets for surplus goods and sustain the flow of capital while managing the institutions and instilling values and norms into the regime. The United States, which had control over raw materials and capital and a competitive advantage in value-added goods, took on this function.²⁸⁹ However, its tenure was short-lived; the power-oriented United States hegemony could not successfully maintain the robustness of the regime. According to John Ikenberry, the principal reason for the failure of the United States hegemony in the multilateral trade regime was the economic and political disequilibrium created by the war.²⁹⁰ In effect, the objectives of hegemony could not be balanced with the power at the disposal of the United States.²⁹¹ The collapse of the unipolar global structure and the emergence of bipolarism as a part of the Cold War loosened the United States' grip over power structures. In addition, the emergence of regional arrangements with legalized preferential trading arrangements attenuated norms like nondiscrimination. In the wake of these changes, the norms and rules of GATT underwent substantial erosion, moving the regime towards being a cluster of sterile norms and rules.²⁹² Yet, it was not until 1970s that the trade regime came under severe pressure.²⁹³ In the wake of the economic recession, protectionist measures became widespread, mostly in the form of non-tariff barriers.²⁹⁴ GATT made an attempt to

289. See generally G. John Ikenberry, *Rethinking the Origins of American Hegemony*, 104 POL. SCI. Q. 375 (1989).

290. *Id.* at 385.

291. *Id.*

292. Finlayson and Zacher have identified seven broad categories of norms of the multilateral trade regime under GATT: nondiscrimination, liberalization, reciprocity, the right to take safeguard action, economic development, norms relating to multilateralism, and the role of states with major interests in trade relations. They analyze in detail why these norms failed to be effective under the multilateral trade regime. See Finlayson & Zacher, *supra* note 288, at 566-98.

293. Howse, *supra* note 51, at 101.

294. Drawing on Bhagwati, Howse lists the factors that led to the economic recession in the 1970s. These included the collapse of the gold standard, mounting intellectual and practical challenges to the postwar economic model, which in turn led to various macro-economic interventions for adjustment purposes, as well as new practices such as voluntary export restraints. See *id.* See also JAGDISH BHAGWATI, *PROTECTIONISM* (1988).

address the challenges of the new protectionism through the Multilateral Trade Negotiations (MTN) in what was an economically unstable and politically disturbed world,²⁹⁵ but its institutional inadequacies became apparent in short order, e.g., the obsolescence of rules and outmoded negotiating strategies.²⁹⁶ At the normative level, GATT was strangled between its conventional economic nationalism and the call for interdependency that permeated the mid-1970s.²⁹⁷ These concerns became the core of the Uruguay Round negotiations.

The Uruguay Round proceeded with an ambitious agenda of dealing with non-tariff barriers to trade and other liberalization policies.²⁹⁸ In the negotiations, many of the GATT rules were retained, and some new ones were instituted in order to address new substantive areas, e.g., intellectual property, investments and services. One significant trend noted in the Round was the use of mutual adjustments in connection with protectionist non-tariff barriers that were constrained by domestic political and economic pressures.²⁹⁹ Compromises were also reached in the liberalization of agriculture and textiles. The results nevertheless indicated the continuation of multilateral trading arrangements.

The core architectural principles of GATT, e.g., Most Favoured Nation Treatment (MFN) and reciprocity, were transposed into the WTO, although subject to minor alterations, mostly at the operational level. For example, the scope of derogation from MFN in the form of exemptions was broadened in the Uruguay Round.³⁰⁰ Reciprocity also took on new forms to deal with non-tariff measures.³⁰¹ In the area of dispute settlement, apart from remarkable structural changes, the system of power- and diplomacy-

295. According to Jackson, the political world was watching the U.S. military activity in Vietnam, which had economic repercussions such as hike in oil prices, high unemployment and rampant inflation. Most of the political systems were operating on narrow parliamentary majorities and had to respond to the complaints about the harm caused by imports. JACKSON, *supra* note 1 at 36. *See also id.* at 34-38 (describing how GATT conducted the MTN in the midst of these issues).

296. *Id.* at 39-42.

297. *See* Robert Keohane, *International Organization and the Crisis of Interdependence*, 29 INT'L ORG. 357 (1975) (sketching interdependence).

298. For details, see Winters, *supra* note 279, at 1296-1303. *See also* Bernard Hoekman, *New Issues in the Uruguay Round and Beyond*, 103 ECON. J. 1528 (1993).

299. KEOHANE, *supra* note 268, at 194.

300. Although GATT demanded unconditional MFN, it provided exceptions relating to balance of payment difficulties, the establishment of customs unions and free trade areas, dumping, and the accession of new members. Under the WTO, exceptions relate to balance of payment difficulties, newly acceded members, general and security exceptions, anti-dumping, customs unions and free trade areas, the settlement of disputes, nullification and impairment, and the establishment of infant industries. For details, see RORDEN WILKINSON, *MULTILATERALISM AND THE WORLD TRADE ORGANIZATION: THE ARCHITECTURE AND EXTENSION OF INTERNATIONAL TRADE REGULATION* 80-99 (2000).

301. *See* HOEKMAN & KOSTECKI, *supra* note 1, at 76.

based dispute settlement gave way to a rule-based approach.³⁰² Other changes in this regard included the added legitimacy of the dispute settlement system, enhanced judiciability, and international law obligations under the rules.³⁰³ On balance, the shift from GATT to WTO can be characterized as a “system transplantation.”

At this point a summation of these events from a regime-theoretical perspective seems relevant. However, a rigorous analysis of the “regime status” of the multilateral trading system is beyond the scope of this article.

The multilateral trade regime took shape from the vantage point of the post-world-war political economy. Although the regime aimed at an open trading structure and had liberal sentiments, it lacked strategies for the effectuation of its goals. The United States, which had both liberal sentiments and the ability to invest in and support the costs of a regime, became the hegemonic power within the regime,³⁰⁴ which at the risk of exaggeration, could be described as *Pax Americana*.³⁰⁵ However, after a short period of ascendancy, the United States hegemony began to crack under pressure, leaving the principles, norms, rules, and decision-making procedures of the regime in a state of ambiguity.³⁰⁶ The ambiguous nature of the regime impacted actual practice with a high level of inconsistency, thereby weakening it.³⁰⁷ Yet, the regime did not collapse altogether; it endured with the aid of proliferating cooperation—the natural alternative to hegemony. Cooperation thus came to sustain the regime, but the modules of the regime—norms, principles, rules, and procedures—that had been shaped in accordance with hegemonic needs required a retooling in keeping with the needs of cooperation. This

302. JACKSON, *supra* note 1, at 118-32.

303. *See generally id.* at 162-67.

304. There is abundant literature on the theory of hegemonic stability. *See, e.g.*, KEOHANE, *supra* note 268, at 182-216; HASENCLEVER ET AL, *supra* note 237 (reviewing the theory); *but see* Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 579 INT'L ORG. 579 (1985) (criticizing the theory).

305. Snidal, *supra* note 304, at 613.

306. *See* KEOHANE, *supra* note 268 at 135-81 (providing a progressive picture of the rise and fall of American hegemony).

307. According to Krasner, “[i]f the principles, norms, rules, and decision-making procedures of the regime become less coherent, or if actual practice is increasingly inconsistent with principles, norms, rules, and procedures, then [it means] a regime has weakened.” Krasner, *supra* note 237, at 189 (emphasis omitted).

transformation of the rules, procedures, norms and principles of the regime constituted a comprehensive change.³⁰⁸

In this development, the trade regimes—old and new—represented the variable intervening between certain basic causal factors, e.g., economic self-interest, power shifts and the resulting common expectations, and certain outcomes and behavior. If Stephen Krasner's assertion that regimes are sometimes dependent variables is taken seriously,³⁰⁹ then it follows that basic causal factors influence the nature of the regimes. This is exactly what happened in the case of the multilateral trade regime. Both the hegemonic and the cooperative regimes were predisposed by the basic factors discussed above.

However, the theory that influenced the development of the second phase of the multilateral trade regime was interest-based, which favored (the scheme of) cooperation. It coincided with the advent of a liberal market ideology—neoliberalism.³¹⁰ The interest-based theory nevertheless recognized the economic self-interests of states in the trade regime—a feature it shared with the power-based approach—and cooperation was only seen as a mode for coordinating common expectations among states.³¹¹ The threat of protectionism hung over the world economy as a consequence of the liberal market ideology. States, in pursuit of capital, were already racing to the bottom by erecting various barriers—political, cultural, and environmental. In terms of strategy, they resembled the prisoners in the PD, secluded from one another and speculating on one another's action, with each wanting to be better off than his counterparts.³¹² For this reason, states looked upon the trade regime for mutual gains. What they saw, however, was a trade regime handicapped by a lack of institutional coordination. The pressing need of the time was a new IO to formalize the norms, rules and principles and to enforce these by way of sanctions. The WTO was established in response to this situation.

As the material manifestation of the multilateral trade regime, the WTO is primarily expected to ensure predictability in trade deals,

308. Krasner has classified regime change into change within a regime and change of a regime. If there is a change in the rules and procedures of the regime, it constitutes a change within the regime, whereas any change in the norms and principles constitutes a change of the regime. *Id.*

309. *Id.* at 195.

310. In order to avoid confusion between the neoliberal view under IR literature, which deals with regimes in cooperative terms, and neoliberalism as the liberal market ideology—the central theme of this article—the former is presented as an “interest-based theory.”

311. *Cf.* KEOHANE, *supra* note 268, at 51-55 (repeatedly emphasizing the existence of cooperation does not presuppose harmony). *See also* HASENCLEVER ET AL., *supra* note 237, at 28-33.

312. *See* HASENCLEVER ET AL., *supra* note 311, at 31 n.7 (illustrating the Prisoner's Dilemma game in the interest-based context).

precluding any scope for unpredictable moves on the part of states.³¹³ Its auxiliary functions in a broader perspective include harmonizing global trade standards, diffusing norms and values, shaping the future neoliberal manifesto by establishing cross-sectoral linkages³¹⁴ and enforcing the neoliberal agenda.

2. *The Neoliberal Strategies and Tools in the WTO*

Under neoliberalism, tasks are equitably delegated by the state (which remains the epicenter) among various actors. Such delegation of tasks is made on the basis of certain performance criteria and on mutually constitutive terms with neoliberal requirements. In this scheme, the state yields a lion's share of its authority to IOs, with the rationale that IOs constitute the tools for the governance of common state interests. However, given the nature of their existence as "juridical persons," IOs face many restrictions and cannot perform every neoliberal role assigned to them. This handicap has been adequately remedied in global governance by framing apposite tools and functional working arrangements, although many are left to be designed. Several of the innovative institutional strategies in the WTO—lauded and censured—are a reflection of the governance strategy. This part of the article will analyze three novel institutional features of the WTO: the provision for amicus curiae briefs, negative consensus, and trade policy review. The discussion will not focus on the scholarly perspectives on these strategies, which are well articulated elsewhere,³¹⁵ rather it aims to highlight how they complement neoliberalism.

313. This view is buttressed by the bicycle theory, according to which a multilateral trade regime resembles a bicycle, which must gradually and incrementally go forward. Despite the pressures, economic contingencies, and political circumstances, the bicycle regime must progress towards even freer trade. On this journey, IOs like the WTO, by ensuring predictability regarding the route, facilitate the smooth progress of the bicycle—the multilateral trading system. For a basic account of the significance of the theory, see James Bacchus, *The Bicycle Club: Affirming the American Interests in the Future of the WTO*, 37 J. WORLD TRADE 429, 430 (2003).

314. For perspectives on linkages, see Symposium, *The Boundaries of WTO*, 96 AM. J. INT'L L. 1 (1996). For a recent discussion in this vein, see Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79 (2006).

315. See, e.g., Steve Charnovitz, *Opening the WTO to Nongovernmental Interest*, 24 FORDHAM INT'L L. J. 173 (2000); C.L. Kim, *The Amicus Brief Issue at the WTO*, 4 CHINESE J. INT'L L. 85 (2005).

The concept of amicus curiae briefs: Amicus curiae³¹⁶ (hereinafter amicus), for international law, exemplifies private actor participation in international lawmaking. While the concept is not alien to international law,³¹⁷ it does not have any glorious tradition of practice.³¹⁸ However, there has been an exponential increase in the number of amicus briefs before the international courts in the era of globalization.³¹⁹ The concept came into the limelight when the WTO Appellate Body's (AB) overruled a Panel report rejecting an application for an amicus brief in the Shrimp Turtle Case.³²⁰ Since then, however, the available jurisprudence of the DSB provides a convoluted picture of amicus participation in dispute settlement with the AB (which is confronted with the interpretation) most of the time hiding behind extreme formalism.³²¹ The abrupt rejection by the AB of all applications for filing an amicus in the *Measures Affecting Asbestos and Asbestos-Containing Products* (Asbestos case) is touted as an instance of the victory of state sovereignty over the WTO.³²² Yet, behind the molds of formalism and the glorification of state sovereignty lurks the organization's *status quo* as a site for the governance of globalization.³²³ If the provision for amicus participation is interpreted less in strict legal terms and more in light of the existential logic of the WTO, the organization's receptiveness to the universalization of liberal democratic

316. The term literally means "friend of the court" who calls the attention of the court to some point of law or judgment or on any matter relating to the case. OXFORD ENGLISH DICTIONARY, 2nd ed. 1989. The provision for amicus curiae briefs is generally set out in the writ of certiorari.

317. There are quite many instances where nongovernmental organizations participate in the negotiations at various international bodies, such as the ILO and UN. However, such participation has not been widespread in international settlement of disputes.

318. It was understood that international courts had the power to permit amicus participation under the general principles of law. Yet, in most of the cases the statute establishing the court specifically conferred this power upon it. See Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 238-39 (2002). In this regard, also see Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994).

319. Amicus participation is not limited to the WTO, but has also been seen in the International Criminal Tribunals for Rwanda and Yugoslavia, the Inter-American Court of Human Rights, and others.

320. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 99-110, WT/DS58/AB/R (Oct. 12, 1998).

321. See, e.g., Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 50-57, WT/DS135/AB/R (Mar. 12, 2001).

322. See, e.g., Hollis, *supra* note 318.

323. Jens L. Mortensen, *The Institutional Requirements of the WTO in an Era of Globalization: Imperfection in the Global Economic Polity*, 6 EUR. L.J. 176, 77 (2000). However, given the institutional imperfection of the WTO, Mortensen does not fully agree with the view that the WTO has become a governance site.

values is clear.³²⁴ Given that such values are the cornerstone of governance, the participation of civil society in the WTO's governance task is essential. This indispensability has a simple logic: when the transplantation of social activities from the local to the global level took place, it also required a transformation, characterized by Thomas Franck as "a cosmic but unmysterious change," of the democratic rights of civil society from the national level to the universal level.³²⁵ This democratic right by design conferred upon civil society a right to be consulted and to take part in the global governance process.³²⁶ However, these democratic rights and the associated public participation are much larger in scope than those seen in the IO-NGO relations of the recent past.

The scope of amicus participation in the overall neoliberal program for the WTO cannot be overstated. Its significance cannot even be restricted to that of a mere procedure of judicial efficiency. There is likelihood of falling prey to the latter approach if the DSB's role is measured only in terms of the settlement of disputes. However if one considers the overall functions of the DSB, i.e., securing a positive solution that is mutually acceptable to the parties and thereby maintaining the equilibrium of the multilateral trade regime, it becomes apparent that the DSB needs to reconcile conflicting values, rules, cultures, social activities, ideologies, tastes, and so on. In other words, the DSB plays an indirect role in homogenizing a broad-based consciousness. In this perspective, every dispute before the DSB is a sign of a threat of disequilibrium in a given area that needs to be rectified. Information regarding the state of affairs in the area under threat is a prerequisite for the effective reinstatement of a balance, as well as an indication of the values and norms that need repair. A lawyer's brief is likely to overlook

324. The provision that is of primary importance in this regard is Article 13 of the DSU. However, jurisprudence shows that Articles 11 (objective assessment criterion) and 17(9) (procedural autonomy) are used as aids in interpreting Article 13. For support, see Appellate Body Report, *United States Imposition of Countervailing Duties on certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, ¶¶ 36-42 (May 10, 2000).

325. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 85 (1995).

326. An argument in a similar vein is made in Petros Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in *EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUSE-DIETER EHLERMANN* 317 (Armin von Bogdandy, Petros C. Mavroidis & Yves Meny eds., Kluwer, 2002), available at <http://www.worldtradelaw.net/articles/mavroidisamicus.pdf>.

the interests of the relevant actors in the given area, consideration of which is decisive for restoring a balance and for preventing future imbalances. Provisions like amicus participation, aside from providing the decision makers with a true picture of the situation, enable the relevant actors, such as civil society, to offer resistance to any sweeping changes—a good neoliberal bargain.

Negative consensus: Negative consensus is a well-known negotiating strategy, but its judicial application, brought out by the WTO, is an innovation. In this strategy, a proposal—introduced in a negative manner, e.g., “Panel Report X will not be adopted”—is deemed to have been accepted when there is *no* objection from any WTO member present at the meeting of the DSB.³²⁷ It is obvious that the winning member will oppose the non-adoption of a Panel report in its favor, thereby making the adoption practically automatic. In short, a decision is said to have been taken when a consensus fails. The established reason for such a procedure in the WTO decision-making process is to overcome the problem common under GATT of non-adoption, or blocking, of Panel reports, which required adoption by consensus at various stages.³²⁸ Non-adoption served the GATT Contracting Parties as a delaying strategy.³²⁹ Negative consensus has overcome this problem.

When negative consensus was introduced, a time limit was set for every legal process that required a negative consensus vote.³³⁰ In effect, no such DSB proceedings can be delayed on account of a lack of consensus. If this is the case, then what does negative consensus aim at? First, it aims at minimizing aggressive unilateralism.³³¹ Second, and significantly, it acts as a safety valve by ensuring the unhindered progress of the multilateral trade regime, which is moving steadily forward towards freer trade with the advance of neoliberalism. Economists have cautioned the world about the possible danger of retarding the trade regime,³³² the logic of which is aptly captured by James Bacchus in terms of the bicycle theory:

[W]hatever the pressures, whatever the economic happenstances, and whatever the political circumstances, we must always keep the bicycle we call the “world trading system” going forward by making ever more progress toward ever freer trade. . . . [I]f we do not [move steadily forward], the world will be overwhelmed by all the many reactionary forces that would have the nations of

327. DSU art. 16(4).

328. JACKSON, *supra* note 1, at 384-85.

329. *Id.* at 123.

330. *Id.* at 384-85.

331. ISIKELI MATAITOGA, THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT MECHANISM: A DEVELOPING COUNTRY PERSPECTIVE 2 (2005), <http://documents.ag.gov.fj/wto/DisputeResolution-mataitoga.pdf>.

332. See generally BHAGWATI, *supra* note 294.

the world retreat from trade. . . . [T]he world will turn away from growing economic integration, turn away from the mutual propensity of growing economic interdependence, and turn inward toward all the self-deceiving illusions and all the self-defeating delusions of an isolating and enervating economic autarchy.³³³

Given the role of the DSB in maintaining the balance of the trade regime and in facilitating the progress of the multilateral trading system, its institutional limbs must also work towards removing all procedural barriers which are likely to encourage inertia. A consensus rule like the one that stalled the adoption of many Panel Reports in GATT is next to impossible in the WTO. The present automatic nature of the procedure foils any blocking or halting of DSB proceedings and ensures the organization's unconstrained functioning.

Trade policy review: The Trade Policy Review Mechanism (TPRM) is the surveillance wing of the WTO, which monitors and periodically reviews the trade policies of the member countries.³³⁴ The TPRM enhances the transparency of members' trade policies and thereby facilitates the smooth functioning of the multilateral trading system.³³⁵ Central to the strategic objectives of the TPRM is the harmonization of the trade policies of various countries, which, if left in discord, would likely encourage protectionism and impede free trade. A system of transparency in national trade policies helps the member countries to better understand and evaluate each other's position and coordinate their activities accordingly.³³⁶ The resulting openness foils any protectionist measures. However, a review by the TPRM is not an investigation culminating in a judicial process and followed by sanctions for nonconformity.³³⁷ This orientation enshrined in the WTO Agreement itself declares: "[Trade policy review] is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement

333. Bacchus, *supra* note 313, at 430.

334. See Annex III of the Agreement Establishing the World Trade Organization. Generally, two reports on the trade policies of the member country under review are prepared; one by the WTO secretariat and the other by the government of the member country under review. The former is an independent one, whereas the latter is a governmental policy statement. Trade Policy Review Mechanism, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, Legal Instruments- Results of the Uruguay Round [hereinafter TPRM], http://www.wto.org/english/docs_e/legal_e/29-tprm.pdf.

335. TPRM ¶ A.

336. Petros Mavroidis, *Surveillance Schemes: The GATT's New Trade Policy Review Mechanism*, 13 MICH. J. INT'L L. 374, 375 (1992).

337. See Roderick Abbott, *GATT and the Trade Policy Review Mechanism: Further Reflections on Earlier Reflections*, 27 J. WORLD TRADE 117, 117-18 (1993).

procedures, or to impose new policy commitments on Members.”³³⁸ The TPRM ensures smooth progress towards freer trade.

If this is the legal status of the TPRM, then its philosophical base is in neoliberalism. A compelling argument supporting this assertion is found in the IR literature, in the cognitivist approach to regimes. Cognitivism, despite the duality in the school,³³⁹ emphasizes the importance of ideas and knowledge in the shaping and functioning of regimes. In such a knowledge-based perspective, an assessment of the situation and the identification of interests in a given area enables states to make effective policy decisions. The TPRM provides states with knowledge about the general trading climate, acting as an epistemic community having a common awareness of the trading situation. The fact that the TPRM is housed in an IO with strong normative roots forestalls the prospect of loose, interest-based epistemic communities influencing state policies and thus provides a high degree of institutionalization in the sharing of ideas and knowledge. The resulting transparency helps states to understand the trading situation and fashion their trade policies in accordance with neoliberal requirements, while at the same time balancing their interests and continuing role in the multilateral trade regime.

The three features observed above do not exhaust the list of governance tools in WTO. The neoliberal agenda is advanced through the joint action of any number of such tools. The dose of neoliberalism incorporated in each tool nevertheless varies depending on its function.

Even collectively the three tools discussed—amicus participation, negative consensus and trade policy review—account for only a minor share in the whole work of the organization. In the general governance scheme of the WTO, amicus participation provides expertise on work in specific areas, to a large extent functioning as the *agora*; the same holds for trade policy reviews, which provide system awareness; negative consensus, which removes procedural blocks in the DSB, for its part, applies more on the management side of the WTO.

The arguments presented in the two sections above substantiate the WTO’s status as a neoliberal IO.

VI. CONCLUSION: THE RECKONING

Although it has dispelled the myths surrounding WTO and identified its real source of authority, the article has not yet taken up the question why, after all, the WTO matters in the modern world. An unsophisticated

338. TPRM ¶ A (i).

339. The dual views are categorized as weak cognitivism and strong cognitivism. See *supra* note 245. For present purposes, I consider both views together.

answer, in the form of a syllogism, will serve as a starting point: IOs matter in the modern world; the WTO is an IO; therefore the WTO matters. Too naïve a deduction, to be sure, yet herein lie elements of a simple truth. The major and minor premises of the syllogism (IOs matter; the WTO is an IO) have been proven above. The task remaining is to elucidate the conclusion (the WTO matters), which is undertaken below. Once this is done, the paper relates the findings to the thickened normativity in international law and to the legacy of legal positivism.

A. Why Does the WTO Matter?

The post-world-war economy was fashioned on the basis of a compromise. On one side was the economic nationalism of the 1930s and on the other free trade and certain liberal monetary policies. Domestic interventionism and multilateralism coexisted. In other words, what one saw was a combination of Keynesian economics—“national self-sufficiency” and “economic isolation”³⁴⁰—and Fordist ideas of capital accumulation regimes and modes of regulation.³⁴¹ The condition is better known as “embedded liberalism,” to use John Gerard Ruggie’s term.³⁴² What made the compromise possible was the formation of a multilateral trade regime and the ensuing institutionalization of embedded liberalism—an unprecedented and odd configuration. In the overall scheme, the Fordist policy of capital flight was given primacy. The monetary side-effects of the flight of capital e.g., balance of payments deficits, were handled by the Bretton Woods Institutions (mainly the IMF). However, regimes of capital accumulation, although providing economic growth, are highly susceptible to crises.³⁴³ This drawback was remedied to a certain extent by the Keynesian strategy of state intervention and other modes of regulation, which included laws, institutions, power, and hegemony.

340. The main objective behind Keynes’ call for economic isolationism and national self-sufficiency was the elimination of the threat of capital flight. For details, see James R. Crotty, *On Keynes and Capital Flight*, 21 J. ECON. LITERATURE 59, 61 (1983).

341. Regimes of capital accumulation, although providing economic growth, are highly vulnerable to crises; hence they are stabilized and maintained by modes of regulations, which include laws, institutions, power, and hegemony. For an understanding of the theory and various perspectives, see REGULATION THEORY: THE STATE OF ART (Robert Boyer & Yves Salliard eds., 2002).

342. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. (SPECIAL ISSUE) 379, 393 (1982).

343. Boyer & Salliard, *supra* note 341, at 30.

Nevertheless, the trade regime was maintained by the United States hegemony. In this framework GATT had a minor role, i.e., the elimination of tariff barriers to facilitate the smooth flight of capital by encouraging states to enter into reciprocal and mutually beneficial arrangements. There was nothing in its framework of rules or functions that could generate strong compliance by the states.³⁴⁴ GATT first worked as a tool of the hegemon's interests and later as a negotiation forum. What success it has to its credit owes mainly to the economic and security interests the hegemon and other states had at that time.

With the collapse of United States hegemony and the change of regime towards a cooperation-based model, the role of IOs also underwent a transformation (Post-Fordists consider this a transformation towards a new regime of capital accumulation). The new regime of multilateral trade driven by the neoliberal ideology also required the accumulation of capital, regulated and stabilized by new modes of regulation. However, under the new regime, capital accumulation worked on the basis of a global demand rather than demand within a nation. To meet this requirement, all social relations were removed from their national context and restructured at the global level. In this state of affairs, the old mode of regulation comprising the Keynesian strategy of state intervention became a counterfeit coin. What was required instead was a new and innovative mode of regulation to control and stabilize the international flight of capital. In political terms, the scenario represented the failure of nation-states to work effectively in the available mode of regulation. Under the new mode of regulation, Keynesianism, quite obviously, was discarded, as was hegemonic control. The strategy of institutionalization was retained, however, to serve the cooperation model regime. The state, although remaining the centerpiece, retreated from the limelight, and now functioned through non-state actors, that is, in a fiduciary position.

However, the post-Fordists have cautioned about the crisis hanging over every regime of capital accumulation;³⁴⁵ if such a crisis occurred, it would be disastrous for the current multilateral trade regime, even with the new modes of regulation. The fall of the old trade regime was due to the collapse of the hegemon, which constituted the primary mode of regulation of that regime. In order to avoid such a situation, the present cooperative model regime must, at whatever cost, maintain cooperation. In other words, the fiduciary relationship between the states must be maintained. This requires more effective modes of regulation.

344. Cf. Douglas A. Irwin, *GATT in Historical Perspective*, 85 AM. ECON. REV. 323 (1995) (discussing how GATT, though imperfect, still helped to encourage trade after during the interwar period).

345. See generally Boyer & Salliard, *supra* note 341.

The WTO, as the institutional manifestation of the regime, is assigned the primary function of maintaining the fiduciary relationship among states by providing system awareness, helping states build a reputation in their dealings (*agora*) and, thereby, ensuring predictability for the regime. Second, the WTO performs the traditional roles—to some extent performed by GATT as well—such as removing, by universalizing norms and cultures, all trade barriers that threaten cooperation, settling disputes, and ensuring compliance. The WTO's specially designed structural features augment the performance of its role: mechanisms like the TPRM, which reveals the existing barriers to trade and conveys to the members the likelihood of danger, and the DSB, which tackles deviation from the rules and secures a positive solution that is mutually acceptable to the parties and thereby maintains the equilibrium of the multilateral trade regime. Non-compliance is least preferred, given the danger of hampering cooperation. In sum, the expectations of states converge in the WTO, which is the material manifestation of the trade regime.

Atomistic states, which act behind the scenes through their agents and hence resemble prisoners, will always try to minimize their losses—the only and best option to maximize their gains. The WTO reveals each member's trading position and hence minimizes the danger of egoistic actions from other members—thanks to the *agora*. This is, however, notwithstanding its role in removing trade barriers through positive harmonization.

In the present international trade regime, where trade relations are enmeshed in the labyrinth of the prisoners' dilemma, reciprocity finds no resistance and the WTO as the embodiment of the regime, appears to have the teeth to bite. However, the WTO's institutional features are not immaterial but become salient only when the social situation in which the institution functions becomes favorable.

*B. The Normative Case for International Law and the
Return of Positivism*

In the present context, normativity is a result of certain patterned behavior among states³⁴⁶ whereby states, having fallen into anarchy, responded positively to the common interest of ongoing cooperation. This behavior

346. For support, see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG . 887 (1998) (discussing the norm "life cycle").

generated certain values, which in turn formed the basis of a set of norms. When a set of valid norms came into existence, it naturally gave rise to a new regime. Yet, that regime was far from complete because its component norms remained sterile in the absence of rules urging compliance and institutional mechanisms to coordinate the governance of common interests. Therefore, states by agreement gave shape to a rule-based architecture, in the form of the WTO, based on a uniform set of principles and a mechanism for settling disputes. At the same time that the *robustness* of the regime fetched a high degree of compliance with the rules from the states, international law, which governs the relationship between states, gained a strong case for its thickened normativity.

However, on the whole, rules, norms, and regimes all seem to have some element of artificiality attached to them. Rules can certainly be identified with norms, and norms can arguably constitute a regime, but what makes a regime a basis of valid normativity? If regimes are forged by humans, then any claims regarding their normative content are suspect at best, for the existence of norms requires social practices resulting from a particular social situation. However, throughout this part of the article, I have asserted the view that although regimes are maintained by human strategies, the formation of those regimes is purely a social action. In other words, regimes are formed when states react to a prevailing anarchy. The reaction (social forces) leads to a new patterned behavior, which generates norms. States construct their common expectations on the basis of these norms. Accordingly, a regime is a normative base validated by social conventions. This validation of norms by social conventions has been the fundamental assertion of legal positivists. In sum, social forces stand in prime perspective; they constitute Austin's sovereign as well as Hart's ultimate rule; their authority derives from a social situation, e.g., anarchy, and leads to patterned behavior and generates norms. However, given the fact that the driving ideology behind these forces is neoliberalism, it must stand as the protagonist in any reckoning.

This article set out to achieve three goals: 1) to locate the WTO within the contemporary social order, 2) to liberate international lawyers from their obsession with positivism as generally understood and from their futile hunt for alternatives to a sovereign, its commands and sanctions in the WTO, and 3) to reveal the synchrony between legal positivism and neoliberalism.

With regard to the first of these ambitions, the work rectified the myth concerning WTO as a positivist enterprise. It demonstrated that the forces of neoliberalism are the real source of power for the WTO and thereby situated the organization within the contemporary social order driven by neoliberalism. It also showed that the thickened normativity

of international law is a product of the social order and not the apparatuses of the WTO.

Where the second aim is concerned, the research revealed that Austin's theories and assertions on the legality—or lack thereof—of international law were products of his era, whereby international lawyers' adversaries in the battle for legality were their own misunderstandings about Austin's work. Indeed, positivism in its fundamental form has favored international law throughout the former's existence. International lawyers are hereinafter liberated from the search for a sovereign sitting on a throne or commands and sanctions in any institutional structures. In addition, by showing that neoliberalism is positivism in another manifestation, the article brings legal positivism to the ongoing world-order discourse centered on neoliberalism.

Third, the article aspired to synchronize legal positivism and neoliberalism; this ambition did not, however, avow that the two were conflicting schools of thought but rather that they are different forms of the same wisdom. Positivism's dynamism also becomes obvious. In pointing out the parallels between neoliberalism and positivism, the article enabled international lawyers and social scientists to develop a common viewpoint regarding the WTO and pool their ideas jointly for enhancing the social utility of the organization.

CHAPTER IV

WHITHER INTERNATIONAL LAW, THITHER SPACE LAW: A DISCIPLINE IN TRANSITION

In recent times, space law has seemingly sought to sever its ties to international law, generally considered its parent discipline. The article first enquires whether this is in fact the case by providing a critique of the professional and intellectual history and the prevailing epistemic culture of space law. Upon confirming the apparent tendency of space law, the article derives two opposing hypotheses: 1) space law ought to remain separated from international law as a unique jurisprudence, and 2) although has its own characteristics, space law is not a branch of law distinct from international law and there is an imbalance in the pattern of thinking in space law that prompts one to believe that it is separate from international law. A debate is then framed along epistemological lines, wherein the author defends the first and second hypothesis on behalf of space law and international law, respectively. According to space law, severance is a sign of progressive thinking and accords with postmodernism, the governing paradigm of the time. Then again, the tendency of a discipline to sever ties to its parent, followed by a sense of autonomy, is common to the special branches of international law, and accords with the script that international law has for a new world order. Articulating the postmodern ontology of space law, the article provides a new dimension to the issues of “fragmentation” of international law and the “question of self-contained regimes” and significantly modifies the contemporary understanding of international law vis-à-vis its special branches.

Copyright 2008 *California Western International Law Journal*. Reprinted with the permission of the California Western International Law Journal

**WHITHER INTERNATIONAL LAW, THITHER SPACE LAW: A
DISCIPLINE IN TRANSITION**

S.G. SREEJITH*

CONTENTS

I. INTRODUCTION	332
II. A CRITIQUE OF THE EPISTEMIC CULTURE IN SPACE LAW.....	336
A. <i>Advancing a New Discipline</i>	336
B. <i>Generality: The Hallmark</i>	344
C. <i>Jenks Versus McDougal: A Telling Debate Overlooked</i>	348
1. <i>Jenks and the Common Law of Mankind</i>	349
2. <i>McDougal and Policy-Oriented Jurisprudence</i>	350
3. <i>The Debate</i>	354
D. <i>Space Law in the IISL</i>	358
1. <i>Science and Law: A Failed Equation</i>	359
2. <i>Pink Clouds</i>	362
3. <i>“Other Regime” Analogies</i>	364
4. <i>Commercialization: From Rules to Strategies</i>	367
5. <i>Summary</i>	369
E. <i>Space Law in International Law Textbooks</i>	371
F. <i>Teaching and Students</i>	374
G. <i>A Closed Group</i>	376
III. UNIQUE JURISPRUDENCE: A DEFENSE OF SPACE LAW	377
A. <i>Disjunction: A Voice of Disciplinary Renewal</i>	380
1. <i>Law and the Legal Profession in a New World Order</i> ...	381

* M.Phil., LL.D. (Candidate), Research Scientist, Arctic Centre, Finland. Status Member of the Finnish Graduate School Law in a Changing World, 2007-2010. Timo Koivurova has commented on many successive drafts, as has Richard Foley, who also ensured that the style is reader-friendly. Kari Hakapää and C. Jayaraj were the first readers of the finished draft. I thank all of them for their input.

2. <i>The “Progressive Sensibility” of Space Law</i>	383
B. <i>Receptiveness: An Inherent Quality</i>	386
C. <i>When in the Market, Be a Marketer</i>	389
D. <i>Progressive Thinking: Episteme and Pedagogy in Space Law</i>	392
E. <i>Methodological Summary and Conclusion</i>	395
IV. A COUNTER-DEFENSE	396
A. <i>The Renewalist Program of International Law</i>	397
1. <i>Lex Specialis and Lex Generalis: Beyond Doctrines</i>	399
B. <i>Comparable Trends: The Law of the Sea, Human Rights Law, and Environmental Law</i>	403
C. <i>Methodological Summary and Conclusion</i>	412
V. CONCLUSION	413

I. INTRODUCTION

A law review essay articulating the relationship between the topics chosen for writing in the *Harvard Law Review* by law teachers and students is worthy of attention.¹ Apart from the extensive research done by the author of the essay and the interesting findings in it, what held my interest was a certain description of space law. Although space law as such is not included by the author as a topic, the discipline did come to her attention, since a book review on space law had appeared in the *Review*. The topic came to the essay in this manner:

The pages of the *Review* revealed other historical quirks, too In 1964, for example, Judge Posner . . . wrote a review of a book entitled *Law and Public Order in Space*, a subject that seems quaint now. I had not created a subject for “space law,” [for tabulating the scholarly interest] of course, and I was in no mood to create one After some reflection, I catalogued space as the “final frontier” of international and comparative law—but not before having a good laugh.²

1. Sara K. Stadler, *The Bulls and Bears of Law Teaching*, 63 WASH. & LEE L. REV. 25 (2006).

2. *Id.* at 42.

While perhaps being a bit short of scorn, the passage betokens the triviality to the discipline space law.³ The present article in no way aims to confront the author of the essay for this assessment; instead, it uses the triviality attributed to the discipline as a point to consider what it is in space law that provokes laughter and the feeling that is a quirk. Is it that space law is a less populated branch of law? Given the fact that the number of scholars pursuing space law exceeds that of those who pursue legal informatics or legal linguistics, such skepticism is unfounded. The scientific nature of the activities regulated by space law and therefore an orientation that could be described as “less of law and more of hard science” could also be a reason for the triviality attributed. Yet, this skepticism collapses before the reality of the coexistence and symbiosis of science and law in areas ranging from forensic methods to patent specifications. However, suspicions regarding the discipline’s status come to the fore again if one considers the relatively fewer number of space law publications in the general law reviews and journals of international law⁴ as well as the dearth of public legal debates on international law.⁵

3. Space law is mentioned again in a couple of footnotes; e.g., note 69 of the essay states:

Law and Public Order in Space would have been incomplete without at least a word on the topic of the problem of men from Mars, and the authors of the book did not disappoint, devoting a whole chapter to the subject. What might such men be like? The authors did not know, but they did discuss the problem of Chinese adaptation to the realities of Western power in the late nineteenth century. What?

Id. at n.69 (internal quotations and citations omitted).

4. Although no authoritative survey has been conducted in this area, a rough search of Westlaw and Lexis reveals that the total number of articles (notes, comments, and book reviews excluded) written on space law is relatively small. There are many international law journals not yet to publish an article on space law. The journals that used to sporadically publish research on space law are no longer doing so. Even law journals dedicated to space law come with an “air and space” section, which in most cases devotes seventy-five percent of its pages to Air/Aviation Law. See, e.g., *Annals of Air and Space Law*, *Air and Space Law*, *German Journal of Air and Space Law*. The only journal exclusively meant for space law—*Journal of Space Law* (presently published by the National Remote Sensing and Space Law Center of the University of Mississippi)—although inactive for a short period from 1995 to 2003, now serves in the discipline.

5. Although space law has been discussed in the annual meetings of the American Society of International Law as well as in the Hague Academy courses, it has not attracted much attention from new-generation scholars.

Nevertheless, space law has every bit as much academic vitality as its counterparts—or, probably, a tad more—if measured in terms of annual conferences,⁶ summer courses organized annually,⁷ international and regional epistemic forums,⁸ and an annual international moot court competition.⁹ In addition, there are a few universities that host institutes offering special space law teaching.¹⁰ Apparently, there is some inconsistency: on one hand there is the relative absence of the discipline from the legal mainstream, on the other its activeness within its own ambit. The triviality of space law seems to lie far deeper than the above-mentioned speculations suggest. In fact, the situation warrants a detailed and methodical enquiry into the epistemic culture of the discipline.

The article first provides a critique of the intellectual and professional history and the prevailing epistemic culture of space law with the aid of scholarly sensibilities, a literature review, and an account of ideological and technological influences. It reveals that, while active in its own ambit, space law has been sliding away from international law—which is considered its parent discipline—and has enclosed itself within a new set of values and norms. However, the

6. The Annual Colloquia on the Law of Outer Space organized under the auspices of the International Institute of Space Law (IISL) since 1958 are a sort of town-meeting of the space law community. More recently, the European Center for Space Law (ECSL) has started its own annual colloquia. In addition, the space law wing of the United Nations Office of Outer Space Affairs (UNOOSA) also organizes periodic thematic workshops.

7. The most noteworthy program of study in this regard is the ECSL Summer Course on Space Law and Policy, held regularly since 1992.

8. The IISL and the ECSL serve as the best examples.

9. The Judge Manfred Lachs Moot Court Competition is organized annually by the IISL alongside its annual colloquia. The competition is preceded by regional rounds for Asia-Oceania, Europe and North America and national funding rounds in certain Asian countries. For details, see www.spacemoot.org (last visited on Jan. 21, 2008).

10. For example, the National Remote Sensing and Space Law Center of the University of Mississippi (United States), the Institute of Air and Space Law at McGill University (Canada), the Institute of Air and Space Law at Cologne University (Germany), the Institute of Air and Space Law at the University of Lapland (Finland), and the International Institute of Air and Space Law at Leiden University (Netherlands). A comprehensive list of universities teaching space law is available at www.unoosa.org/docs/spacelaw/eddir/eddir.doc (last visited on Jan. 21, 2008).

article does not confine itself to a critique but rather seeks to provide a broader analytical framework for understanding the normative characteristics of the field. To this end, the research derives two opposing hypotheses: 1) space law ought to be where it is and as it is and should remain separated from international law as a unique jurisprudence; and 2) although it has its own characteristics, space law is not a branch of law distinct from international law and there is an imbalance in the pattern of thinking in space law that prompts one to believe that it is separate from international law. The article introduces selected concepts and theories of epistemology to frame a debate in which the two hypotheses compete for justification. Within this setting, it examines the true nature and foundation of space law.

The article serves another purpose in that it addresses the postmodern concerns in international law centered on “fragmentation” and the “question of self-contained regimes,” topics hotly debated and discussed among various international law groups. A surprising amount of literature has evaluated the pros and cons of the fragmentation of international law and verified self-contained regimes as mere figments of the scholarly imagination. However, nearly all such studies have taken a viewpoint that focuses on the structural integrity of international law; hardly any studies have examined closely the internal agitation experienced by a special branch/fragment of international law amid the vicissitudes of postmodernity. The article fills that gap in the literature by examining the disciplinary mechanics of space law, in particular its reflexive response to postmodernity. The format adopted in the article is to balance the assumptions and beliefs of space law against those of its parent structure, international law, yielding a neutral depiction of the situation.

As a caveat, the article has some level of artificiality, in terms of methodology, pooled into it. This is seen in its discourse pattern—a critique and a debate on the critique. Even within the debate the sole argumentator changes positions and defends each side. However, the method has the advantage of taking the assertions to the extreme, predicting the worst that can happen in postmodernity and presenting the effectiveness of law’s defensive mechanism in crisis.

II. A CRITIQUE OF THE EPISTEMIC CULTURE IN SPACE LAW

A. *Advancing a New Discipline*

The opening of the high frontier to human exploration occurred at a time when the nations of the world lived in an atomistic culture supported by certain self-centered ideologies.¹¹ It was obvious that the benefits of the new frontier would be polarized among the superpowers at the time—the only ones who could penetrate outer space. This accretion of power in space by two contending systems led the rest to part with atomism and line up behind the superpowers, creating polarized clusters in a choice driven partly by the lesser countries' global status and partly by ideological sympathies. The superpowers felt a certain responsibility towards the countries of the world,¹² yet, motivated by security and economic concerns, “claimed for themselves the right in their discretion to exclude others [from certain rights and] . . . impose conditions.”¹³ On the other side, states without any space capabilities claimed a right to be allocated space resources and to the coordination of exclusive uses, if established, by an international organization.¹⁴ In general, both the haves and have-nots felt the need to have some kinds of prescriptions governing space-related activities and to safeguard their respective interests in space. All eyes optimistically turned towards the lawyers.

11. The ideologies that supported self-centerism are not limited to realism and economic and political nationalism; the Soviet practice of communism was not anti-egoistic either.

12. Myres S. McDougal and Leon Lipson capture the probable logic behind this stance.

As the lessons of space prowess are driven home to the peoples of the earth, the Big Two may find that they must pay not less but more attention to the reactions and drives of the less powerful nations; that they must redouble their coupled assurances of the possession of strength and the resolution not to use it except under extreme provocation; that they must pursue their quest of international support in the formal and informal fora of world public opinion.

Myres S. McDougal & Leon Lipson, *Perspectives for a Law of Outer Space*, 52 AM. J. INT'L L. 407, 410 (1958).

13. *Id.* at 416.

14. *See id.*

Lawyers were somewhat confused at the unfamiliar orientation of the activities involved—more or less a feeling of inferiority. In addition, “[s]ome disposition to claim priority for the physicists [was] . . . eviden[t] in certain utterances.”¹⁵ Yet, the lawyers made studious note of their anxieties¹⁶ and mutually discussed the future course of action,¹⁷ all the while excusing themselves from making any final prescriptions.¹⁸ With the unraveling of scientific puzzles, which to certain extent disadvantaged legal work, action became inevitable on the part of the lawyers. Soviet President Khrushchev’s facetious assurance to the world that the U.S.S.R. had no intention of claiming the Moon as the sixteenth Soviet socialist republic¹⁹ prompted a reaction from at least American lawyers.²⁰

The first official U.S. legal statement pertained to three possible issue areas—sovereignty claims, the definition of outer space, and the right of self-defense against an armed attack from space.²¹ It called for a case-by-case approach to legal controls rather than a binding

15. Pitman B. Potter, *International Law of Outer Space*, 52 AM. J. INT’L L. 304, 305 (1958).

16. See, for example, McDougal & Lipson, *supra* note 12; Potter, *supra* note 15; John C. Hogan, *Legal Terminology for the Upper Regions of the Atmosphere and for the Space Beyond the Atmosphere*, 51 AM. J. INT’L L. 362 (1957); and Wilfred Jenks, *International Law and Activities in Space*, 15 INT’L & COMP. L. Q. 99 (1956).

17. See, e.g., Jean Rivoire, *How to Introduce the Law into Space*, 2 PROC. COLLOQ. L. OUTER SPACE 129 (1959).

18. Jenks explains the situation: “International lawyers have not been slow to explore the challenge which the new scientific and technological developments present for the law, but their collective thinking on the subject is necessarily in a tentative stage of development.” C. Wilfred Jenks, *The International Control of Outer Space*, 3 PROC. COLLOQ. L. OUTER SPACE 3, 3 (1960). Ironically, the physicists were disturbed by the developments in policy and noticed an erosion of the philosophical base of physics; they preferred to remain secluded in their sphere. For a survey of the physicists’ views on policy, see Donald A. Strickland, *Physicists’ View of Space Politics*, 29 PUB. OPINION Q. 223, 227, 231-32 (1965).

19. Arnold L. Horelick, *Outer Space and Earth Bound Politics*, 13 WORLD POL. 323, 323 (1961).

20. The mood among American lawyers in the “Sputnik crisis” is well captured in Barton Beebe, *Law’s Empire and the Final Frontier: Legalizing the Future in the Early Corpus Juris Spatialis*, 108 YALE L.J. 1737 (1999).

21. O.J. Lissitzyn, *The American Position in Outer Space and Antarctica*, 53 AM. J. INT’L L. 126, 126-27 (1959).

code.²² However, academia disapproved of these statements, for they were not consonant with the prevailing political situation.²³ In any case, both approaches had the aim of safeguarding realist interests in space.²⁴ On the other side, Soviet lawyers advocated a policy of peaceful coexistence, which was criticized by the United States as being part of an “ideological battle” to spread “proletarian internationalism.”²⁵ The concept of peaceful coexistence found its way from policy desks all the way to classrooms as indoctrination through two companion volumes on Soviet space law published in 1962—*The Cosmos and International Law* and *The Way to Space Law*.²⁶ Although couched in the vocabulary of internationalism, the nationalist interests of the Soviets in the peaceful coexistence doctrine cannot be ignored, for it sought to put humankind in pursuit of a communist world order.²⁷ In addition to their respective national

22. *Id.* at 128.

23. Both views are captured in Lissitzyn, *supra* note 21, at 130.

24. For example, one among the claims made by the legal adviser of the Department of State, Loftus E. Becker, was complete and exclusive sovereignty over air space, which extends to 10,000 miles from the surface of the Earth. Drawing on the Antarctica analogy, he asserted that U.S. rights over outer space need no specific claim on the country's part, as its activities in outer space have created a right upon which it would be justified in asserting territorial claims. Opposing this view, Professor Lissitzyn argued that this claim is absurd since the United States has not recognized 10,000 miles as the upper limit of sovereignty, a condition for determining exclusive and complete sovereignty over the area. However, his real concern was the following: “If the Soviet Union should also make a claim of sovereignty on the basis of similar activities, where should the boundary between the two sovereignties be drawn?” For details, see Lissitzyn, *supra* note 21, at 129.

25. A critical view of the Soviet approach to space law appears in Robert D. Crane, *Soviet Attitude Toward International Space Law*, 56 AM. J. INT'L L. 685 (1962). For an issue-based approach, see Samuel Kucherov, *Legal Problems of Outer Space: USA and Soviet Viewpoints*, 2 PROC. COLLOQ. L. OUTER SPACE 64 (1959).

26. Robert D. Crane, *The Beginnings of Marxist Space Jurisprudence?*, 57 AM. J. INT'L L. 615, 618, 619 (1963).

27. With the concept of peaceful coexistence, the U.S.S.R. intended a communist form of “superstructure” and thereby a new reality that avoided any kind of opposition to its political and economic strategies and put humankind under a communist world order. This strategy was criticized for a distortion of the doctrine of historical materialism. See Crane, *Soviet Attitude*, *supra* note 25, at 715, 716. Nationalist intentions are also evident in many issue areas, for example, delimitation of outer space, where certain ideological inadequacies were pointed out by the

interests, the superpowers differed in their opinion on many issue areas, which certainly hampers the development of a body of law. Certain scholars felt that an emphasis on internationalization could eliminate the tribulations of superpower rivalry (strategic as well as ideological) and build a “comprehensive and complex outer space system” benefiting all peoples.²⁸ Their focus was a kind of institutionalism, preferably under the United Nations,²⁹ since “coordination” then was synonymous with institutions, which in turn was synonymous with the United Nations. Although the United Nations did undertake coordination activities by way of some ad hoc arrangements, its complex formalism and lack of proper institutions and procedures failed to secure the expected coordination.³⁰ There was also a lack of a real sense of duties to be performed. Hence, epistemic forums were looked to as the ideal platform at that time. Coincidentally, Andrew G. Haley, a Washington lawyer, was elected president of the International Astronautical Federation (IAF), which during his tenure established the International Institute of Space Law (IISL).³¹ From the very start, the IISL focused its activities on studying various legal issues rather than securing intergovernmental cooperation; from its very inception, it tended to be an agora. A few initial colloquia of the IISL witnessed efforts to pump law into the vacuum. Yet, on the whole, there was rather little talk of internationalism; the social dimension of space activities was also absent, and there was even a quixotic touch to many contributions. A hard-science syndrome was evident throughout the forum, in which legal problems wrapped in scientific niceties were seen as a matter of prestige for the authors. Scientists were deities. However, the fact

Soviet Union.

28. Klaus Knorr, *On the International Implications of Outer Space*, 12 *WORLD POL.* 564, 567 (1960).

29. *Id.* Nongovernmental academic and professional bodies like the IAF were also considered. See, e.g., Michel S. Smirnoff, *The Role of IAF in the Elaboration of the Norms of Future Space Law*, 2 *PROC. COLLOQ. L. OUTER SPACE* 147 (1959).

30. *But see* James Simsarian, *Outer Space Co-operation in the United Nations*, 57 *AM. J. INT'L L.* 854 (1963).

31. For details, see ANDREW G. HALEY, *SPACE LAW AND GOVERNMENT* 364-70 (1963). Glimpses of the preparatory work that led to the IISL are articulated in Eugene Pepin, *Proposals for the Future Work of the Permanent Legal Committee of the International Astronautical Federation*, 2 *PROC. COLLOQ. L. OUTER SPACE* 123, 124 (1959).

that historically the Institute was a sister undertaking of the IAF—a technical body—in all likelihood spawned a nascent legal-scientific community within the IISL. The concern that science was outstripping law, aggravated by the boastings of the scientific scholarship,³² was felt seriously by the legal community, which expressed its regret that, for example, “[i]f satellites always burned up as they reentered the atmosphere and before they reached the earth, we would not have the legal problem of responsibility for damage.”³³ Since satellites did not always burn up during reentry, they made a call to pool legal and scientific resources.³⁴ However, the IISL could never equilibrate effectively between the two streams and that was to become the Institute’s biggest handicap (this is dealt with in due course below).

The general impression during the era was that it was the lack of political will that thwarted international cooperation in space activities. Certain quarters sensed an emerging “technological determinism” and thought that it might secure cooperation; however, it in no way could have substituted for political will.³⁵ The policymakers aimed at establishing a global satellite consortium. To this end, the International Telecommunications Satellite Organization (INTELSAT) was established as an attempt at functional integration,³⁶ for it was the conviction at that time that functional organizations could surmount the forces of politics.³⁷ INTELSAT’s organizational structure was built up and strategies were programmed for an interface between technological dynamism and political choices,³⁸ which

32. The danger lurking in such an attitude is articulated in David Madsen, *The Scholar, the Scientist, and Society: Unifying the Intellectual Community*, 38 J. HIGHER EDUC. 96 (1967).

33. Eilene Galloway, *The Community of Law and Science*, 1 PROC. COLLOQ. L. OUTER SPACE 59, 60 (1958).

34. *See id.* at 61.

35. Walter A. McDougall, *Technocracy and Statecraft in the Space Age—Toward the History of a Saltation*, 87 AM. HIST. R. 1010, 1021 (1982).

36. *Id.* Jonathan F. Galloway, *Worldwide Corporations and International Integration: The Case of INTELSAT*, 24 INT’L ORG. 503, 515-17 (1970). For the functional integration theory, see DAVID MITRANY, *A WORKING PEACE SYSTEM* (1966).

37. McDougall, *supra* note 35.

38. For details, see Steven A. Levy, *INTELSAT: Technology, Politics and the Transformation of a Regime*, 29 INT’L ORG. 655, 658 (1975). For more on the

secured some degree of cohesion in global communications. Yet, the organization did not bring expected internationalization at the political level.³⁹ What the venture did do was inculcate a corporate culture into the space sector and create a new set of space professionals—the managers.

Amid these developments, the United Nations, which hitherto had exhibited some kind of procedural inactivity, started to respond positively to the failing cooperation in space activities. In August 1962, Manfred Lachs, then a Polish diplomat, assumed the office of Chair of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS). He was not one of those diplomats torn between excessive enthusiasm and complex pragmatism. He was a pragmatist who, to quote Thomas Franck, “panned for nuggets of utility in the raging torrents of ideology.”⁴⁰ He initiated the work of the committee with an artistic elegance; with an appeal to the legal community to shed its abject feeling of inferiority, he evoked the humanness of scientists and underlined the need for a professional fraternity among the two:

[S]cientists were no longer confined to the ivory towers of their laboratories, and the effects of their work on human and international relations were becoming felt with increasing rapidity. International law should likewise not be regarded as an intellectual poor relation of science, but should be used decisively to deal with the practical effects of the discovery of a new dimension.⁴¹

Lachs’ vision was sublime, based as it was on the understanding that the world is confronted with two conflicting ends—science and society:

technical and economic aspects of INTELSAT, see Marcellus S. Snow, *INTELSAT: An International Example*, 30 J. COMM. 147 (1980).

39. Scholars such as Levy and Jonathan F. Galloway claim that INTELSAT has achieved this goal as well. However, their arguments are not convincing in this regard, although they have demonstrated an element of cohesion in global communications.

40. Thomas M. Franck, *The Private Lachs: Life as Art*, 87 AM. J. INT’L L. 419, 419 (1993).

41. U.N. GAOR, 1st Sess., 1st mtg. at 3, U.N. Doc. A/AC.105/C.2/SR.1 (Aug. 21, 1962).

On the one hand, there was the fear lest men should become a prisoner of his own scientific and technical inventions; on the other hand, there was confidence in the progressive development of man's mastery over nature and his use of it to serve his noblest aspirations.⁴²

Science cannot single-handedly guide humankind to achieve its goals, for it cannot effect the transition from facts to norms. Therefore, science must be subjected to philosophical scrutiny, which can comprehend societal values and effect the transition from facts to norms smoothly.⁴³ Lawyers engaged in philosophical criticism in hermitic isolation will be too thinly supplied with facts and likely to misapprehend the values. Hence, both scientists and lawyers should carry on an effective dialogue in order to synthesize facts and norms. Such a synthesis can dismantle the destructive powers of the world and draw benefit from science and technology for constructive human purposes. This vision was realized by creating a legal and a technical subcommittee that was to arrange for a dialogue between scientists and lawyers—"an imaginative and innovative effort at international legislation within the United Nations,"⁴⁴ which Lachs referred to as a "phenomenon."⁴⁵

Simultaneously with this measure, UNCOPUOS adopted a new dialectic method of consensual decision making—a procedure previously unknown in the United Nations.⁴⁶ It is a multilevel negotiating structure whereby the big powers negotiate first in their capital cities. Once their common interest takes space, a "corridor negotiation" easily brings others under the umbrella—a process

42. *Id.* at 3-4.

43. JAMES S. FULTON, *SCIENCE AND MAN'S HOPE* (1954) (emphasizing the value-barrenness of science in the absence of a philosophical outlook).

44. Nandasiri Jasentuliyana, *A Survey of Space Law as Developed by the United Nations*, in *PERSPECTIVES ON INTERNATIONAL LAW* 350 (Nandasiri Jasentuliyana ed., 1995).

45. Manfred Lachs, *Foreword*, in *MANUAL OF SPACE LAW VOL. 1*, xii (Nandasiri Jasentuliyana & Roy S.K. Lee eds., 1979).

46. Although UNCOPUOS set out the consensus procedure in 1959, it was not put into practice until 1962. For details, see Eilene Galloway, *Consensus as a Basis for International Space Cooperation*, 20 *PROC. COLLOQ. L. OUTER SPACE* 105 (1978) (discussing how the use of the consensus method proved successful in shaping legal agreements on international space cooperation).

generally dubbed “higher-level consensus.”⁴⁷ By the time the issue under consideration reaches the negotiation room, consensus has been secured.⁴⁸ In UNCOPUOS, it might have been the hope that a consensus between the superpowers could bring about unanimity among other countries.⁴⁹

Yet, none of the new legislative formulas proved to be the magic potion to fetch cooperation in one gulp. In the committee’s work, what the technical subcommittee essentially recommended for carrying out space activities was congenial working conditions, authorization, resources and, above all, international cooperation.⁵⁰ However, in the legal subcommittee, ideology and political concerns cumbered efforts at cooperation, which to a large extent maintained the inertia in lawmaking. Not even first-level consensus could be secured, as neither of the superpowers relaxed its position. The subcommittee felt that, given the unyielding stance of the superpowers, consensus could materialize only if the subcommittee relaxed its requirements. Since internationalization of all outer space activities appeared idealistic as a yardstick, the subcommittee reduced the standards of cooperation and reset the goal as being to secure the maximum possible cooperation.⁵¹

47. Amitai Etzioni, *The Dialectics of Supranational Unification*, 56 AM. POL. SCI. REV. 927 (1962).

48. Considering the informal nature of these negotiations, preliminary negotiations between states were neither reported nor archived. See BIN CHENG, *STUDIES IN INTERNATIONAL SPACE LAW* 165 (1997).

49. See *id.* at 148 (the superpower ascendancy to which Cheng refers relates to the UN General Assembly).

50. See Lincoln P. Bloomfield, *Outer Space and International Cooperation*, 19 INT’L ORG. 603, 612 (1965) (some of the recommendations for which the Committee gave authorization included:

- 1) further steps to facilitate exchange of information; 2) support for international programs such as the International Year of the Quiet Sun and the World Magnetic Survey; 3) increased national participation . . . ; 4) United Nations Educational, Scientific and Cultural Organization (UNESCO) fellowships to assist scientific and technical training; and 5) the establishment of sounding rocket facilities under UN sponsorship . . .).

Id. at 612.

51. See *id.* at 608-09.

B. Generality: The Hallmark

The new approach crept into the subcommittee's strategy in such a manner that whatever regulations were to be prescribed thenceforth should be of a general nature. The approach gave ample room for nations to maneuver whenever their national pride and prestige was at risk in the consensus procedure, for generality only creates commitments of a general nature: specific obligations are difficult to identify. The "space" consequently created by generality was sufficiently broad that opposing state positions—realism and communism—came to cohabit it under the same headings.⁵² Principles creating general obligations now started to take shape. The initial optimism was that these general obligations could be narrowed down to more specific ones—according the principles the status of "criteri[a] of the legality"⁵³ or "ground rules for the future exploration and use of outer space . . ."⁵⁴ In addition, the principles, although broad, were seen as generating certain shared expectations among the states and giving them certain clues to setting optimal policy goals.⁵⁵ The subsequent Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty)⁵⁶ melded the principles together did not deviate from the general nature of those principles, for UNCOPUOS apprehended that any variation from what

52. The first resolution spelling out a set of principles governing the activities of states in outer space, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, was secured under the new strategy of consensual decision making. The two superpowers, which had stood antagonistic to one other until then united under the broad legal framework provided by the resolution. *See* Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, U.N. GAOR, 18th Sess., 128th plen. mtg., U.N. Doc. A/RES/1962 (1963).

53. GENNADY ZHUKOV & YURI KOLOSOV, *INTERNATIONAL SPACE LAW* 40 (1984).

54. CHENG, *supra* note 48, at 153.

55. *But see* Harry H. Almond, *General Principles of Law—Their Role in the Development of the Law of Outer Space*, 57 U. COLO. L. REV. 871 (1986).

56. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

had been secured thus far might break the thin thread binding the states together in cooperation.

The Outer Space Treaty was warmly received by the international community of states. It laid down principles such as freedom of exploration, international responsibility of states for national activities in outer space, the duty to assist astronauts in peril, exclusive peaceful use of celestial bodies, and not stationing nuclear weapons and weapons of mass destruction in outer space.⁵⁷ Yet, little did the states that took part in the negotiations know that the Outer Space Treaty was an opportune diplomatic code negotiated to ensure cooperation between the superpowers. Most of the principles of which states felt proud and which scholars glorified⁵⁸ have virtually no normative content or import. For example, in order to make sense of “peaceful use” of outer space, scholars desperately run between “non-aggressive” and “non-military.”⁵⁹ Freedom of exploration means hardly anything for the majority of states, for whom space is a remote reality, partial demilitarization of outer space is puzzling,⁶⁰ and the meaning of “international responsibility” for states is far from the real normative sense of the term.⁶¹ Nevertheless, in the superpowers’

57. See generally *id.*

58. The Outer Space Treaty has been glorified by scholars as, for example, “the foundation of the international legal order in outer space” (Jasentuliyana, *supra* note 44, at 359), “a concrete base” (I.H. Ph. Diederiks-Verschoor, *Some Observations Regarding the Treaty on Space Law*, 10 PROC. COLLOQ. L. OUTER SPACE 164, 164 (1967)), “the charter” (Eilene Galloway, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 5 ANNALS AIR AND SPACE L. 481, 481 (1980)), and “the Magna Carta for space activities” (Eilene Galloway, *Expanding Space Law into the 21st Century*, 35 PROC. COLLOQ. L. OUTER SPACE 49, 52 (1992)).

59. See, e.g., J.E.S. FAWCETT, *INTERNATIONAL LAW AND THE USES OF OUTER SPACE* 29-34 (1968); Linda Johanna Friman, *War and Peace in Outer Space: A Review of the Legality of the Weaponization of Outer Space in the Light of the Prohibition on Non-Peaceful Purposes*, 16 FINNISH Y.B. INT’L L. 285, 285 (2005) (the oscillation between non-aggressive and non-military has been presented within the framework of apologist and utopian positions in the international legal arguments as articulated by Martti Koskenniemi).

60. For instance, Damodar Wadegaonkar feels that the demilitarization clause of the Outer Space Treaty is imperfectly drafted and somewhat illogical. DAMODAR WADEGAONKAR, *THE ORBIT OF SPACE LAW* 13 (1984).

61. See S.G. Sreejith, *International Space Law: A Saga of Mankind’s Lost Aspirations—Introductory Episode*, 2 AALCO Q. BULL. 1, 6-8 (2006).

perspective, the hollowness of the same principles becomes phenomenally transformed into evocative standards of mutual conduct. For instance, freedom means “survival of the fittest”; ambiguity in the meaning of peaceful use makes it subjectively and expediently determined. Partial demilitarization is favorable for both superpowers, as they themselves are the armers and disarmers, i.e., to paraphrase Fawcett, the right hand has to devise military capabilities and the left defend against them.⁶² Finally, control by international law and the Charter of the United Nations validates the inherent right of self-defense by the superpowers, which presupposes the possibility of an armed attack in outer space as well.⁶³

In essence, the Outer Space Treaty is a risk-free contractual instrument of bilateral scope meant for the superpowers. A trick of international diplomacy, however, furnished it with the image of an inchoate instrument requiring development, which was vigorously pursued by the scholars in the field. They indoctrinated the novices on the elementariness and generality of the Treaty; no one had even an iota of suspicion regarding the Treaty’s two-fold image. Virtually every scholarly work on the Treaty ends with an emphasis on its generality,⁶⁴ an optimism for progress,⁶⁵ and a call for revision.⁶⁶

62. FAWCETT, *supra* note 59, at 29.

63. *But see* CARL Q. CHRISTOL, *THE MODERN INTERNATIONAL LAW OF OUTER SPACE* 35-37 (1982).

64. Jasentuliyana, *supra* note 44, at 359-61 (maintaining that the Outer Space Treaty has “broad parameters” which can serve as the foundation on which more detailed rules can be built).

65. Joanne I. Gabrynowicz voices such an optimism regarding space law in general. “[I]nternational space law has completed its first phase. Important general principles—some of them, historic—were articulated and agreed upon by a majority of nations. The next generation of space law involves agreeing on specific norms [Many] questions, . . . are yet to be answered.” Joanne I. Gabrynowicz, *Space Law: Its Cold War Origins and Challenges in the Era of Globalization*, 37 SUFFOLK U. L. REV. 1041, 1047 (2004). *See also* Ivan A. Vlasic, *The Space Treaty: A Preliminary Evaluation*, 55 CAL. L. REV. 507, 519 (1967) (expressing doubt that by the Space Treaty, the “quasi-legislative role of the [UN] General Assembly . . . may have been undermined, and the authority of its future law-oriented space resolutions diminished It would be most unfortunate for the cause of public order in outer space if the future shows that states have by their recent action on the Space Treaty permanently impaired the decision-making usefulness of the United Nations General Assembly.”).

66. *See, e.g.*, Ty S. Twibell, *Circumnavigating International Space Law*, 4

Only a small minority make an appeal against any tampering with the Treaty.

With the Outer Space Treaty, UNCOPUOS nevertheless accomplished the first step towards its mission of securing international cooperation in outer space. The Committee paid no heed to the repercussions in the form of generality that its course of action had wrought throughout the discipline. The space law that developed afterward in UNCOPUOS also focused on international cooperation,⁶⁷ regardless of the normative compromises it might have to make in securing cooperation. Further efforts to craft specific obligations, in the “cooperation compromise,” created more general and inconsequential obligations even for specific activities. For example, the Rescue Agreement⁶⁸ imposes an unconditional obligation to return astronauts and space objects to the launching state but lacks any specific provision for the settlement of claims.⁶⁹ The Liability Convention⁷⁰ lays down absolute and fault liability for the damage caused by space objects yet leaves the compensation concerns to be determined by the myriad principles of equity and justice.⁷¹ The

ILSA J. INT'L & COMP. L. 259 (1997). Twibell explores various ways to “vaccinate” the Outer Space Treaty, which in his view is infected with a virus. *Id.* at 274-95. His focus indicates that the virus is the “no-sovereignty” laid down by the Treaty. *Id.* at 271-72. *See also* Kendra Webb, *To Infinity and Beyond: The Adequacy of Current Space Law to Cover Torts Committed in Outer Space*, 16 TULANE J. INT'L & COMP. L. 295, 313 (2007) (the call for revision, however, applies to the entire space law).

67. For a review of the development of space law in the United Nations, *see generally* Vladimir Kopal, *United Nations and the Progressive Development of International Space Law*, 7 FINNISH Y. B. INT'L L. 1 (1996) (discussing how space law became an essential part of international law during the last half of the twentieth century).

68. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, *opened for signature* Apr. 22, 1968, 672 U.N.T.S. 119.

69. CHENG, *supra* note 48, at 282-83.

70. Convention on International Liability for Damage Caused by Space Objects, *opened for signature* Mar. 29, 1972, 961 U.N.T.S. 187.

71. *See generally* BRUCE A. HURWITZ, STATE LIABILITY FOR OUTER SPACE ACTIVITIES (1992) (discussing the danger posed by abandoned space objects and the lack of liability assumed by the launching countries for that danger such objects pose if and when they fall to earth).

Registration Convention⁷² is no more than a log-book system.⁷³ And, the Moon Agreement⁷⁴ witnessed the heights of legal speculation, as a result of which states fought a war of shadows and came out with nothing.⁷⁵

Nevertheless, the Outer Space Treaty and its progeny were in effect realistic, at least giving them a role in securing superpower cooperation. The tool of generality which was used for securing cooperation, although it did not create any specific binding obligations, brought all space activities—and the associated virulent forms of nationalism and clash of ideologies—under the umbrella of international law.⁷⁶ In the meantime, international law had become a forum for a remarkable scholarly discourse, by Myers McDougal, which was to have a crucial bearing on space law as well, although it passed unobserved by the space law community. That discourse is presented and its impact examined by way of a putative debate with Wilfred Jenks in the next section.

C. Jenks Versus McDougal: A Telling Debate Overlooked

Jenks and McDougal had their own respective visions of the future world order. Interestingly, human conquest of outer space occurred when both the scholars were in the process of devising schemes for the deployment of their respective ideas, and they found outer space to be an ideologically and normatively amorphous domain where they could try out their schemes. What else could prompt a UN official and a champion of a new stream of legal thought to muse over human interests in an inorganic domain? Whatever their motives,

72. Convention on Registration of Objects Launched into Outer Space, *opened for signature* Jan. 14, 1975, 1023 U.N.T.S. 15.

73. For details of the Convention, including its drafting history, see Nicolas M. Matte, *The Convention on the Registration of Objects Launched into Outer Space*, 1 ANNALS OF AIR AND SPACE L. 231 (1976).

74. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, *opened for signature* Dec. 18, 1979, 1363 U.N.T.S. 3.

75. The major dispute between the states in the negotiations regarded the exploitation and sharing of the natural resources of the Moon. *See generally* Carl Q. Christol, *The Moon Treaty Enters into Force*, 79 AM. J. INT'L L. 163 (1985).

76. *But see* Manfred Lachs, *The International Law of Outer Space*, in RECUEIL DES COURS III 41, 41-46 (1964).

they did frame schemes for outer space with grave concern, interestingly, differing significantly.

1. Jenks and the Common Law of Mankind

Disappointed by the negative balance of power which characterized the world at the time, Jenks sought a “common law of mankind” which could reinstate the balance and to which all nations of the world could subscribe.⁷⁷ In a subsequent work, he expressed the conviction that the law of nations could be shaped into such a common law,⁷⁸ although an imbalance existed in the form of the law of nations. As an initial step, Jenks appeals to lawyers to build a “universality of perspectives,” embracing all the legal systems of the world, and to discover the “will of the world community,”⁷⁹ which would furnish the basis for a new set of norms. The fact that such norms emerge from the will of the community would be the basis of obligation in international law. Basically, to quote Richard S. Miller, “Jenks’s approach is that of the experienced international lawyer working within the framework of legal positivism to increase respect for rules of international law and thereby to encourage states which are members of the international community to submit their conduct to the application of those rules.”⁸⁰

Jenks extended his general scheme of law to the law of outer space. In his address to the IISL in 1968, upon reviewing the development of space law, he pointed out a narrowness in the substantive approach of the discipline. “Space law, like air law, is not a substantive branch of the law It consists of an angle of preoccupation with a wide range of diverse problems rather than a well-defined area demarcated by the substance of the problems which it embraces.”⁸¹

77. The seminal work in this connection is C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958).

78. See generally C. WILFRED JENKS, *LAW, FREEDOM, AND WELFARE* (1964).

79. Richard S. Miller, *Legal Scholarship, Realism, and the Search for Minimum World Order*, 17 *WORLD POL.* 478, 478-80 (1965).

80. *Id.* at 479.

81. C. Wilfred Jenks, *Seven Stages in the Development of Space Law*, 11 *PROC. COLLOQ. L. OUTER SPACE* 246, 262-63 (1968).

Jenks felt that such an approach was a requisite of the developmental stage of space law however, for the then ongoing phase, he emphasized the need to view the problems of space law through a wider spectrum. In other words, to paraphrase Jenks, space law had to be integrated into the development of the common law of mankind and to be situated wholly within the context of the relationship between humankind and its environment created by contemporary scientific and technological advancements.⁸² He believed that the Outer Space Treaty and other UN Declarations on space would develop into the “common law of mankind” in the form of a World Science Treaty, which would provide “the framework for a concerted long-term effort to preserve and enlarge human freedom and human dignity in a world in which unprecedented resources of knowledge and skill create an unprecedented challenge and an unprecedented opportunity.”⁸³ However, Jenks’ positivist scheme met resistance from McDougal’s policy-oriented jurisprudence, which was embedded in the social context and viewed law as the outcome of an authoritative decision-making process.

2. *McDougal and Policy-Oriented Jurisprudence*

As a teacher, Myres McDougal advocated a policy-oriented legal curriculum that enabled his students to break out from the sterile world of abstract and contextless legal doctrines and sought to engage them in building a new world order.⁸⁴ As a scholar, he dreamt of an individual-centered world order.⁸⁵ Such was McDougal’s flair that whatever he posited as a scholar he sought to import to his charges as a teacher.

82. *Id.* at 263.

83. *Id.*

84. Luther L. McDougal III, *Professor Myres S. McDougal’s Contribution to Legal Education*, 66 MISS. L.J. 27, 30 (1996). See also the tribute by Dame Rosalyn Higgins in Rosalyn Higgins, *McDougal as Teacher, Mentor, and Friend*, 108 YALE L.J. 957 (1999).

85. W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 937 (1999). Reisman emphasizes that, although centered on human beings, McDougal’s theory is not one of excessive libertarianism. Rather, its aim is to enhance the wider participation of individuals in societal decision-making. *Id.*

McDougal's theory (in addition to its conventional designation "policy-oriented jurisprudence," the theory is known as "value-oriented jurisprudence," which is more appropriate) aims at a world order based on human dignity where the individual is the nucleus.⁸⁶ However, in modern societies, aspirations for justice, peace, and security for individuals, who are under a sovereign nation state subject to the norms of international law, cannot be realized.⁸⁷ Moreover, the general failure of international law to attain universal effectiveness, which has enabled totalitarian regimes to grow, exacerbates the situation.⁸⁸ Human dignity becomes an illusion. "McDougal [and his associate Harold] Lasswell attempt to bypass the internal and external sovereignty [the real culprit] of nation-states by defining a 'world social process' in which individuals participate directly."⁸⁹ In other words, they deny any participation by a national society on behalf of its members. Such denial is incident to the attempt to build a world public order, whereby individuals and groups strive to maximize values within the limits of their capability, "individually in their own behalf and in concert with others with whom they share symbols of common identity and ways of life of varying degrees of elaboration."⁹⁰ In this scheme, in order to prevent the burgeoning of any totalitarian regimes, any attempts at a universal culture of shared beliefs, meanings, values, purposes, and principles are cast off.⁹¹

Human dignity—the core of the order—is said to have been achieved when values are widely shared (maximization of values) and private choice is underlined as the "predominant modality of power."⁹² This phenomenon entails a social process. But how is the

86. Gray L. Dorsey, *The McDougal-Lasswell Proposal to Build a World Public Order*, 82 AM. J. INT'L L. 41, 42 (1988).

87. *Id.*

88. *Id.* Universalism, say McDougal and Lasswell, "has had the effect of undercutting the authority of every doctrine put forward in the name of the whole body of nations." Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 2-5 (1959). As examples of totalitarian regimes, they cite Nazi and Communist regimes. *Id.*

89. Dorsey, *supra* note 86, at 42.

90. *Id.* (quoting Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 7 (1959)).

91. *See id.* at 43.

92. McDougal & Lasswell, *supra* note 88, at 11.

social process achieved? In other words, how are values maximized? At this point, McDougal and Lasswell call upon the scholars of international law to “disclose to as many as possible of the effective leaders, and constituencies of leaders, throughout the globe the compatibility between their aspirations and the policies that expedite peaceful co-operation on behalf of a public order of human dignity.”⁹³

It is also up to scholars to give shape to the specific forms of institutions and processes for facilitating the maximization of values, law being one such process.⁹⁴ Rather than engage in abstract and dogmatic debates, scholars should “shift [their focus] to the appraisal of contemporary structures according to their positive or negative impact upon present and prospective value-shaping and sharing.”⁹⁵ Only then can the world order based on human dignity become a reality.

Given this scholarly scheme, what might have prompted McDougal to write *Law and Public Order in Space*—an 1100 page treatise on space law? Did the understanding conform to his world order? Or, was it a random scholarly act producing a bulky reader? According to a former student, the law of outer space seemed like an “eccentric interest of Mac’s.”⁹⁶ On the scholarly side, his treatise is branded as no more than a mere “handbook of analogies,” one “marred by excessive conceptualism, failure to differentiate legal from other problems, and preoccupation with the extraneous.”⁹⁷ However, McDougal had the conviction that outer space was yet another realm where value sharing takes place, and most effectively.⁹⁸ However, in

93. *Id.* at 29.

94. According to McDougal and Lasswell, “legal process” is the making of authoritative decisions and law is the “conjunction of common expectations concerning authority with a high degree of corroboration.” See McDougal & Lasswell, *supra* note 88, at 9.

95. McDougal & Lasswell, *supra* note 88, at 29. For an application of this method, see generally Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 4 GERMAN Y.B. INT’L L. 96 (2001) (discussing policy-oriented jurisprudence as a concept developed to provide legal professionals and others with a framework to understand and shape the law).

96. José A. Cabranes, *quoted in* YALE BULLETIN AND CALENDAR, May 1998.

97. Richard Posner, *Law and Public Order in Space*, 77 HARV. L. REV. 1370, 1373 (1964) (reviewing MYRES S. MCDUGAL ET AL., LAW AND PUBLIC ORDER IN SPACE (1963)).

98. See generally MYRES S. MCDUGAL ET AL., LAW AND PUBLIC ORDER IN

that sector, the community process—including value sharing—is imperceptible; various intellectual techniques are required to reveal it and thus to shape apposite policy goals.⁹⁹ In this scheme, McDougal postulates the same goal as he had for the earth arena—realization of a society based on human dignity.¹⁰⁰

In order to build an effective public order in space—a “space commonwealth,” as McDougal and his colleagues called it—scholars should aim for optimum designs for the space age,¹⁰¹ even if world politics (of the 1960s) constrains those efforts. As the first step, they should form a pattern of value distribution by inviting interested people from diverse regions to join in discovering and proposing policy principles and specific policies concerning space.¹⁰² The second step would be to clarify value shaping and value sharing by establishing a legal order and relevant institutions. At this stage, it should be ensured that the “facilities of the legal order . . . do in fact harmonize with the requirement[s] of human dignity.”¹⁰³ An effective legal order exists only when its institutions have authority and control. McDougal, however, dissociates authority and control from power, in whose stead he sees individual-centrism: i.e. authority exists when it is “embedded in the expectations of the effective participants in the world community.”¹⁰⁴ Nevertheless, it cannot “be taken for granted that human expectations” are stagnant; expectations always change as society changes.¹⁰⁵ A treaty or charter, if considered as the representation of authority, will, given its inertness, trail behind the dynamism of society.¹⁰⁶ In contrast authority embedded in the participants’ expectations provides the desired balance between the

SPACE (1963).

99. *Id.*

100. *Id.* at 1025.

101. *See id.* at 1027. While making their prescription, McDougal and his associates insert the caveat that their recommendations are highly tentative, generalized, and approximate in terms of several aspects of the overall problem.

102. *See id.* at 142.

103. *Id.* at 145.

104. *Id.* at 146.

105. *Id.*

106. *See id.*

community process and social context by enabling a less complex transformation along with individual expectations.¹⁰⁷

3. *The Debate*

1) Jenks calls upon scholars to identify the common will of individuals and thereby facilitate the formation of a robust international legal framework. Space lawyers should endeavor to discover shared perspectives parallel to the identified common will for space and then integrate those into the broad international legal framework and make a larger whole. In effect, he takes a holistic approach towards space law, asserting that space law is not a self-sufficient discipline distinct from international law. However, Jenks' robust legal framework, what he calls the "common law of mankind," exists in the form of comprehensive treaties and principles, both general and particular.¹⁰⁸ This approach is contentious for McDougal (although he does not oppose there being scope for formal agreements and rules), who asserts that only particular subjects in space law need to be addressed by formal agreements. "The remainder of what a future historian will . . . be entitled to call 'The Law of Outer Space[]' . . . is conceived as the community's expectation about the ways in which authority will and should be prescribed and applied . . ."¹⁰⁹

2) Jenks wants to seek common will through universality; his conception of universality emphasizes the need to develop rules of universal applicability through a comparative study and synthesis of various legal systems.¹¹⁰ McDougal, on the other hand, calls for an intellectual movement which can perform value maximization, i.e., one much akin to Jenks' comparative study.¹¹¹ However, in an earlier work with Lasswell, McDougal cautioned against the dangers of

107. *See id.* at 1036.

108. Jenks' faith in the formal sources of law is highlighted in C. WILFRED JENKS, *SPACE LAW* (1966).

109. McDougal & Lipson, *supra* note 12, at 420.

110. Miller, *supra* note 79, at 481 (attempting to repudiate Jenks' "model of universality" using McDougal and Feliciano on the grounds of "normative ambiguity"). *But see* C. Wilfred Jenks, *The Need for an International Legislative Drafting Bureau*, 39 AM. J. INT'L L. 163 (1945); C. Wilfred Jenks, *Craftsmanship in International Law*, 50 AM. J. INT'L L. 32 (1956).

111. McDougal & Lasswell, *supra* note 88, at 28.

universality.¹¹² His opposition primarily regarded putting the whole world in pursuit of a single doctrine or ideology. His fear might have been a communist base for all space activities. Jenks' idea of comparative study and then maximizing universality is not objectionable vis-à-vis McDougal's scheme. But, what is objectionable for McDougal is Jenks' faith in legal doctrines and principles as a factor in decision making for the institutions that are to maximize shared values. This objection stems from McDougal's realization that those who will be making authoritative decisions for space will be the officials of the nation states making claims.¹¹³ When such officials believe that particular claims bear heavily on the prominent values of their own state, they will manipulate legal doctrines and principles for the realization of preferred values,¹¹⁴ that is, in the name of freedom of use and exploration, outer space possibly will be subject to power politics.

3) For Jenks, the will of the world community is the force urging compliance with rules and submission to international adjudication. However, McDougal eschews this traditional positivist approach of law as rules and rules as binding. First, he reduces rules to "receptacles of useful information,"¹¹⁵ and secondly recasts law from its *rules* mold to a "delicate balance of authority and control" whereby authority "is a set of conditioned subjectivities shared by relevant members of a group" and control "refers to resources that can be employed to secure a desired pattern of behavior in others."¹¹⁶ What secures compliance is the degree of authority (uniformity) and height of control (expectations).¹¹⁷

112. *Id.* at 4-5.

113. McDougal & Lipson, *supra* note 12, at 418. For the discussion leading to this finding, see *id.* at 413-17.

114. The doctrines of international law vulnerable to such manipulation, according to McDougal, include sovereignty, domestic jurisdiction, non-intervention, independence, and equality. See McDougal & Lasswell, *supra* note 88, at 4.

115. Tom J. Farer, *International Law and Political Behavior: Toward a Conceptual Liaison*, 25 *WORLD POL.* 430, 434 (1973).

116. *Id.* at 435. Farer quotes the definitions from W. MICHAEL REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* (1971).

117. *Id.* (drawing on McDougal & Lasswell).

Did space law scholars respond to McDougal's critique of Jenks' theory? What impact have McDougal's and Jenks' works had among space lawyers? What should space lawyers have learned from the debate?

McDougal's policy-oriented jurisprudence appeared at a time when the legislative exercise for space was torn between two conflicting academic traditions in law—the American and the Victorian traditions of law. Whereas Victorian positivists like Jenks stood for a legal order based on doctrines, rules, and equity and comprising treaties, international custom, and general principles of law, American scholars held an instrumentalist view that law is an apparatus to balance societal interests and that any further action should be directed in terms of this conception of law. It was this conflict that was thwarting any attempt to govern human activities in space, whereas the general impression was that ideological differences between the superpowers were the sole cause of the deadlock. However, space law scholars vigorously pursued the positivist strategy by regulating state conduct through treaties and rules; most of the time they ignored the societal dimension of space activities.

Filling the legal vacuum by way of a comprehensive or particular treaty¹¹⁸ and taming the superpowers were the only goals before scholars in the discipline, and these goals resulted in disposable diplomatic instruments. McDougal, in contrast, linked law with the “unfolding pattern of effective and authoritative decisions concerning the distribution of values in [a] social system[.]” and thereby provided a social spectrum for evaluating legal relationships.¹¹⁹ This approach would have created a normatively stronger public order for space, maintaining the common interest of all peoples. The absence of such an approach posed challenges when the societal impact of space

118. See, e.g., Cyril E.S. Horsford, *The Need for a Moon Treaty and Clarification of the Legal Status of Space Vehicles*, 9 PROC. COLLOQ. L. OUTER SPACE 48 (1966) and Giovanni Meloni, *International Liability for Space Activity*, 10 PROC. COLLOQ. L. OUTER SPACE 185 (1967). Meloni, after analyzing numerous and complex aspects of international liability for space activities, discusses the character of a future convention on liability. *Id.* at 194.

119. Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60, 63 (1972). Young nevertheless adopted a critical stance on McDougal's scheme. For a response by McDougal, see Myres S. McDougal, *International Law and Social Science: A Mild Plea in Avoidance*, 66 AM. J. INT'L L. 77 (1972).

exploration, in its later stages, became apparent and the need to safeguard rights to the benefits from space. In reacting to the challenge, scholars inundated the forums, initially with commentaries and interpretations,¹²⁰ and later on painstakingly stretched the scope of the treaties to virtually every space application,¹²¹ albeit with no concrete outcome. This was particularly evident in the case of the Common Heritage of Mankind (CHM) principle, where, as the conceptions of “community property, . . . community benefit, . . . and benefit[s] of the posterity” clashed with the principle of sovereignty, the principle “floundered at the altar of state sovereignty [doctrine].”¹²² The never-ending doctrinal debate on the CHM¹²³ might have been averted had the international community’s expectations of the relevant players been effectively assessed in terms of the policies to be used to secure the expected behavior of them.

However, space law scholarship failed to perceive the significance of McDougal’s interference in what was then the generally accepted pattern of thought in international law, Jenks being its mouthpiece. Neither McDougal and his colleagues nor anyone in the New Haven School expressed further concern for space law. Space law, however, gradually moved towards unusual levels of thinking, mostly under the auspices of epistemic forums such as the IISL.

120. See, e.g., Bozidar Bakotic, *Some Pragmatic Reflections on Article IV of the 1967 Space Treaty*, 25 PROC. COLLOQ. L. OUTER SPACE 73 (1982); P.P.C. Haanappel, *Article XI of the Moon Treaty*, 23 PROC. COLLOQ. L. OUTER SPACE 29 (1980).

121. See, e.g., H. A. Wassenbergh, *Speculation on the Law Governing Space Resources*, 5 ANNALS OF AIR AND SPACE L. 611 (1980) and Frans G. von der Dunk, *Public Space Law and Private Enterprise—The Fitness of International Space Law Instruments for Private Space Activities*, 1999 PROC. PROJECT 2001—WORKSHOP ON LEGAL ISSUES OF PRIVATISING SPACE ACTIVITIES 12 (2001).

122. V.S. Mani, *The Common Heritage of Mankind: Implications for the Legal Status of Property Rights on the Moon and Celestial Bodies*, 39 PROC. COLLOQ. L. OUTER SPACE 31, 31, 33 (1996).

123. See Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?*, 21 WIS. INT’L L.J. 409 (2003).

D. Space Law in the IISL

By the time the Permanent Committee on Space Law of the IAF became the IISL in 1960, the pioneers had sketched a syllabus for future scholars, e.g., dividing zones of space and determining extraterrestrial jurisdiction,¹²⁴ crafting of an agreement,¹²⁵ advocating the peaceful uses of outer space,¹²⁶ and providing doctrinal clarifications.¹²⁷ However, those who followed them, irrespective of the topic they discussed, sought to situate all the items in the syllabus in a comprehensive or particular treaty¹²⁸ and in an agency for enforcement with universalistic ideals.¹²⁹ The accelerating pace of technological growth and the emergence of new applications were to stir scholarly ingenuity. Scholars plunged into the technological dynamism in order to address the challenge; establishing an equilibrium between science and law appeared to be the tool of choice.

124. See, e.g., John C. Cooper, *The Problem of Definition of 'Air Space'* 1 PROC. COLLOQ. L. OUTER SPACE 38 (1958); Henri T.P. Binet, *Toward Solving the Space Sovereignty Problem*, 2 PROC. COLLOQ. L. OUTER SPACE 11 (1959); Andrew G. Haley, *Survey of Legal Opinion on Extraterrestrial Jurisdiction*, 3 PROC. COLLOQ. L. OUTER SPACE 37 (1960).

125. Jean Rivoire, *Design for a Law of Space*, 1 PROC. COLLOQ. L. OUTER SPACE 97 (1958); Escobar Faria, *Draft to an International Covenant for Outer Space—The Treaty of Antarctica as a Prototype*, 3 PROC. COLLOQ. L. OUTER SPACE 122 (1960).

126. Such advocacy had the intention of safeguarding the rights of peoples of all nations to the beneficial results of exploring outer space. See Eilene Galloway, *World Security and the Peaceful Uses of Outer Space*, 3 PROC. COLLOQ. L. OUTER SPACE 93, 93-101 (1960).

127. The most seriously discussed doctrine was "national sovereignty." See Spencer Beresford, *The Future of National Sovereignty*, 2 PROC. COLLOQ. L. OUTER SPACE 4 (1959). However, the principle of "state responsibility" also surfaced. For example, see I.H. Ph. de Rode-Verschoor, *The Responsibility of States for the Damage Caused by Launched Space-Bodies*, 1 PROC. COLLOQ. L. OUTER SPACE 103 (1958).

128. See, e.g., Horsford, *supra* note 118; Meloni, *supra* note 118.

129. Teofilo Tabanera, *Some Suggestions Concerning an Organization for Outer Space*, 11 PROC. COLLOQ. L. OUTER SPACE 207, 208 (1968). Such an organization, says Tabanera, "must be founded on a fundamental basis; the concept of the universality of space law and everything in it included, be it natural or artificial, and which has been put to the service of mankind." *Id.* at 208.

1. Science and Law: A Failed Equation

The idea of a legal-scientific community was first proposed in the IISL by Eilene Galloway.¹³⁰ In her view, the aim of such a community should be “the evaluation of scientific and technological facts which affect the formulation of law.”¹³¹ Afterwards, ironically, she drew a boundary line between the professionals of both realms. “It is part of the training of lawyers to evaluate the significance of facts which make up the social fabric, but it is not usually a part of the scientists’ training to consider the relationship of legal codes to science.”¹³²

The call was repeated by two science-savvy lawyers in the aftermath of the Outer Space Treaty—Harvey Shiffer and Pieter Snyders—that a team of “juridical engineers” was needed for the effective enforcement of the space treaties.¹³³ However, they tipped the scales in favor of scientists, for lawyers and legislators were inexperienced in legislating space and “[i]t is only the scientist who is trained to understand Space and its environment”¹³⁴ Shiffer and Snyders are categorical in this regard:

Legislators must understand that they cannot formulate an effective SPACE LAW for an environment that they do not understand [sic]. No lawyer, no member of the Legal Community, and no so-called political scientist is competent, without the aid of Space scientists and engineers, to fit man’s exploration and exploitation of Space into terrestrial inventory or law.¹³⁵

They then advise lawyers to “avoid burdening Space with the lengthy legal terminology of manifestly outdated earth law with its complicated systems and customs. They should cease ‘ex post facto’

130. Eilene Galloway, *supra* note 33, at 59.

131. *Id.* at 61.

132. *Id.*

133. Harvey Shiffer & Pieter Snyders, *The Need for Enforcement for International Space Treaties*, 10 PROC. COLLOQ. L. OUTER SPACE 237, 239 (1967).

134. *Id.*

135. *Id.*

attempts to devise restraints in accepting progress and Space technological achievements already in man's inventory."¹³⁶

Hence, there should be a team effort by scientists and lawyers. However, Shiffer's and Snyders' views appear extremely parochial. Placing laws within the scientific understanding and usability is one thing and suggesting that the legislator receive tuition on lawmaking from the scientist is quite another. Shiffer and Snyders were presumptuous in their contentions and failed to offer a method to bridge the divide between the scientist and the lawyer and build a scientific-legal community. In fact, such views tend to generate friction among the two communities.

George S. Robinson, in an insightful contribution which he read at the Sixteenth Colloquium on the Law of Outer Space, places sentiments such as Shiffer's and Snyders' in the framework of "anti-intellectualism in the . . . basic science[]."137 However, he reminds us that "[t]he undisciplined disaffection also is with technology[,] where the discontented are sufficiently astute to recognize the distinction between the two [disciplines]."138 For Robinson, these oppositions are false. "There is only one legitimate distinguishing factor between the so-called natural sciences and social sciences."139 That distinguishing factor is methodology, in which the natural sciences study matter, and the social sciences (e.g., law) study behavior patterns.¹⁴⁰ What is, in fact, required is that science and law should get nearer in terms of methodology, without any parochial considerations entering the scheme.¹⁴¹

136. *Id.*

137. George S. Robinson, *Scientific Renaissance of Legal Theory: The Manned Orbiting Space Station as a Contemporary Workshop*, 16 PROC. COLLOQ. L. OUTER SPACE 223, 225 (1973).

138. *Id.*

139. *Id.*

140. *Id.* To be more specific, science "aim[s] to understand, predict, modify, and control aspects of the natural and manufactured world, while law seeks current truth about scientific and other facts of cases in order to serve the much different goal of justice between parties (as well as other societal goals)." SCIENCE, TECHNOLOGY, AND LAW PANEL, A CONVERGENCE OF SCIENCE AND LAW: A SUMMARY REPORT OF THE FIRST MEETING OF THE SCIENCE, TECHNOLOGY, AND LAW PANEL 1-2 (2001).

141. Robinson, *supra* note 137, at 225.

One idea inferable from Robinson's account is that the coexistence of science and law does not mean that scientists and lawyers need to speak a common language; rather, there is a missing element—what Steven Yearley calls “the dark matter”¹⁴²—from the scholars' account of their respective disciplines. Robinson, like Yearley, does not seem to be suggesting that scientists and lawyers should hand over the dark matter to the other side; he calls for a concerted effort to develop realistic philosophical templates within which scientific research can be conducted with a definite focus.¹⁴³ In sum, Robinson advocates a mental posture in which “anthropocentrically oriented values can change to accommodate unique models of value formation dictated by vast changes in . . . scientific knowledge.”¹⁴⁴

However, no scholar seems to have espoused Robinson's idea. Papers on the coexistence of science and law appeared sporadically thereafter in the colloquia. In the 1985 Stockholm Colloquium, George P. Sloup, in his “immodest proposal,” suggested that lawyers pack their bags to go into outer space as participants on long space flights¹⁴⁵ “because they would acquire a much better understanding of the conditions spacefarers will experience on long-duration flights.”¹⁴⁶ If this is not possible, they should, at the minimum, take part in space-flight-oriented training in similar environments at polar bases. Sloup wanted to take this proposal to the following year's session entitled “Space Law Teaching,”¹⁴⁷ but this did not happen. In any event, Sloup's “hollow pragmatism” was miles away from the realization of a science-law balance.

Although technical as well as legal issues were addressed in relation to many space activities and applications, none of the attempts involved balancing technical and legal issues under a proper science-

142. STEVEN YEARLEY, *MAKING SENSE OF SCIENCE: UNDERSTANDING THE SOCIAL STUDY OF SCIENCE* vii (2005) (positing that sociologists' accounting of contemporary society misses “masses” or “dark matter” relating to how society incorporates the language of science into its common lexicon).

143. Robinson, *supra* note 137, at 225.

144. *Id.* at 225-26.

145. George Paul Sloup, *The Training of Astrolawyers: An Immodest Proposal*, 28 *PROC. COLLOQ. L. OUTER SPACE* 235, 235 (1985).

146. *Id.*

147. *Id.* at 238.

law framework (such as the one suggested by Robinson). Scholars and scientists were very often seen to be swapping expertise that most of the time fell short of the scholarly standards which they generally maintained in their respective fields.¹⁴⁸ At a certain point the science-law equation lost its significance.

2. *Pink Clouds*

The awe and excitement generated by the human conquest of space was such that, from the very beginning of the IISL, scholars began to envisage legal issues and proceeded to grapple with them. To a certain extent, this action stemmed from a feeling of inferiority before the scientists, who were recording one feat after another in space; the failing science-law equation added fuel to the fire. However, rather than being futuristic, most of the scholarly conceptions turned out to be quixotic, a situation which Haley characterized as a “pink cloud” in the imagination of lawyers.¹⁴⁹ Ironically, it was Haley himself who sparked a chain of quixotic thoughts by postulating his concept of meta-law—“do unto others as they would have done unto them”—in relation to aliens.¹⁵⁰ Indeed, Shirley Thomas gave serious consideration to Haley’s xenological ideas.¹⁵¹

Can a legal union of a human being and an intelligent being from another planet be performed? Such a question never before has arisen, and considering the magnitude of it, immediate serious

148. This trend was evident even outside the IISL.

149. Andrew G. Haley, *Space Age Presents Immediate Legal Problems*, 1 PROC. COLLOQ. L. OUTER SPACE 5, 18 (1958).

150. In *Space Law and Government* and also in some of his subsequent works, Haley highlighted the concept of meta-law, which refers to the study and development of a system of laws that can be applied in all human relationships with aliens. See HALEY, *supra* note 31, at 395.

151. Not only Thomas, but also McDougal, were apprehensive that the human dignity of the aliens might be neglected. See generally MCDUGAL ET AL, *supra* note 98, at 974-1021 (discussing the implications of the possible interaction between humans and non-earth life forms under the rubric of “astropolitics”).

thought should be given—especially in light of the fact that miscegenation is still forbidden in some areas.¹⁵²

There were even more formidable issues.

What other legal problems would the marriage of a human being with a being from another planet present? If it were biologically possible for this mating to produce an issue, what would be the legal standing and moral rights of the issue, if the family were to remain on earth?¹⁵³

Alien-related legal issues were seen even three decades later. Two space law attorneys foresaw that aliens would be “beings ‘with their own understanding of a kind of rules of behaviour.’”¹⁵⁴ Hence space lawyers should await their arrival with a ready-made code of conduct fashioned after Haley’s meta-law model.¹⁵⁵ However, there is a considerable dilemma here: what if the aliens “were to desire us to act in a manner toward them which would be repugnant to our moral code or sensibilities, scientific or otherwise[?]”¹⁵⁶ In that case, the Outer Space Treaty must broaden its horizons so as to provide a balance between the views of human beings and aliens.¹⁵⁷ Martine Rothblatt, Chairman and CEO of United Therapeutics Corporation, felt that in the absence of “informed consent,” it is perilous to establish contact with aliens.¹⁵⁸ Such an absence of consent could be the reason why other galactic intelligences are constantly avoiding

152. Shirley Thomas, *A Reexamination of the Approach to Space Law*, 10 PROC. COLLOQ. L. OUTER SPACE 337 (1969).

153. *Id.*

154. Patricia M. Sterns & Leslie I. Tennen, *Exobiology and the Outer Space Treaty: From Planetary Protection to the Search for Extraterrestrial Life*, 40 PROC. COLLOQ. L. OUTER SPACE 141, 148 (1997) (quoting Ernst Fasan, *Legal Consequences of SETI Detection*, IAF Paper No. IAA-95-IAA.9.2.04 (1995)).

155. *Id.* See also M. de las Mercedes Esquivel de Cocca, *SETI Draft Second Protocol*, 37 PROC. COLLOQ. L. OUTER SPACE 233 (1994).

156. Sterns & Tennen, *supra* note 154, at 148.

157. *Id.* at 149.

158. Martine Rothblatt, *Exobioethics—Legal Principles for Interaction with Non-Terran Species*, 42 PROC. COLLOQ. L. OUTER SPACE 358, 359 (1999) (“any bother imposed on the life form should only be with its informed consent.”).

contacting us.¹⁵⁹ Rothblatt, however, considers her observations only a facet of space exploration.¹⁶⁰

Pink clouds were not limited to the aliens issue; they appeared in the form of behavioral standards for “spacekind,” which included humans, robots, and other “thinking machines,”¹⁶¹ space cemeteries,¹⁶² town-planning regulations and a legal order for space colonies (UNCOPUOS also has a role in this regard),¹⁶³ and problems of citizenship for space inhabitants.¹⁶⁴

3. “Other Regime” Analogies

Space law, as it is generally understood, has three parallels—air law, the law of the sea, and the Antarctic Treaty. The major similarity between these branches of law is that all regulate areas which have somewhat anomalous physical features. In the IISL, the idea of learning from “other regimes” was first shown by Escobar Faria in the Third Colloquium in 1960 by way of the Antarctic Treaty as a prototype for a future covenant for outer space.¹⁶⁵ The reason why Faria considered the Antarctic Treaty as model is that the Antarctic, like outer space, is a *res communes omnium*; the approach was considered to be effective, as it provided “a large decrease of power” of any state in Antarctica.¹⁶⁶ This principle was pursued to a large

159. *Id.* at 360.

160. *Id.* at 359.

161. George S. Robinson, *Homo Spatialis: A Space Law Dilemma*, 22 PROC. COLLOQ. L. OUTER SPACE 195, 199 (1979) (quoting Yu. A. Petrov, *Habitability of Spacecraft*, in III FOUNDATIONS OF SPACE BIOLOGY AND MEDICINE 157 (M. Calvin & O.G. Gzenko eds., 1975)).

162. Mahulena Hofmann, *Space Cemeteries: A Challenge for the Legal Regime of Outer Space*, 43 PROC. COLLOQ. L. OUTER SPACE 380 (2000).

163. John R. Tamm, *Outer Space Colonization: A Planned Unit Development*, 22 PROC. COLLOQ. L. OUTER SPACE 217, 218 (1979). In describing space colonies, Tamm remarks, “[m]edical assistance must be on hand, but should a ready made security force, a complete legal system with established laws, courts, judges and others learned in the law be provided?” *Id.* at 218. If the colony happens to be international, Tamm considers it illogical to invoke UNCOPUOS. *Id.*

164. Patricia M. Sterns & Leslie Tennen, *The Art of Living in Space: A Preliminary Study*, 21 PROC. COLLOQ. L. OUTER SPACE 245, 253, 254 (1978).

165. Faria, *supra* note 125.

166. *Id.* at 124.

extent in the initial space law negotiations. Nearly three decades later, in 1988, Jiri Malenovsky noted that although the Antarctic is geographically identical to outer space in terms of accessibility and natural resources, there are historical, political, doctrinal, and legal similarities as well which are wholly applicable in the further development of space law.¹⁶⁷ However, by then, with five space treaties in hand, the Antarctic analogy had lost its charm; it was eclipsed by the law of the sea analogy.

In the 1960s and 1970s, the law of the sea was of interest to the space lawyers if for no other reason than the geographical similarities between outer space and the high seas including the seabed. However, with the successful conclusion of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982, space lawyers paid more serious attention to the sea-space analogy. Gyula Gal emphasized the new logic of analogies in the special session *Comparison between Sea and Space in the Exploration and Exploitation Activities* of the Twenty Eighth Colloquium in 1985.

The analogy between social phenomena as objects of legal regulation may support not only application of law, but lawmaking too. Here analogous phenomena may serve as models, may promote understanding of correlation to existing ones of new objects of legislation, and consequently the setting-up of a suitable system of norms.¹⁶⁸

167. Jiri Malenovsky, *The Antarctica Treaty System—A Suitable Model for the Further Development of Space Law*, 31 PROC. COLLOQ. L. OUTER SPACE 312, 313 (1988). Malenovsky explains each similarity. Historically, “[b]oth Antarctica and outer space [were] . . . subjects of intense interest to the international community in the course of the International Geophysical Year” Politically, both the Antarctica Treaty and treaties on outer space were negotiated under the shadow of the Cold War; they constituted “confidence builders for East-West relations.” In legal terms, identical schemes were used in the formulation of the Antarctica Treaty and the Outer Space Treaty: both were first basic and general instruments that were later to be developed into specific and concretized conventions. Doctrinally, both regimes have identical governing principles, such as freedom of exploration. Most of the ideas expressed by Malenovsky are drawn from Chuck Stovitz & Tracy Loomis, *Space Law: Lessons from the Antarctic*, 28 PROC. COLLOQ. L. OUTER SPACE 165 (1985).

168. Gyula Gal, *Territorial Sea and Airspace—Passages to Free Spaces?*, 28 PROC. COLLOQ. L. OUTER SPACE 134, 134 (1985).

However, the drawbacks of analogies were also brought to light. According to Harry H. Almond, mere similarities between social phenomena do not constitute a valid ground for analogies.¹⁶⁹ From a strategic perspective, space activities are different from activities on the high seas, and so are policy goals. Principles with policy content embody the “rule-making” process, which is, in fact, a compromise between the claims and counterclaims made by states while creating rules and standards.¹⁷⁰ Although certain activities might fortuitously share common policy goals as a result of which principles correlate, this is not the general case.¹⁷¹ Similar objections were raised by many commentators in the colloquia.¹⁷²

Despite the relatively large number of papers read in the colloquia on the space-sea analogy, most of the authors were skeptical about a complete reliance on it. After the 1994 amendments to UNCLOS, which yielded new commercial policies for the mining and exploration of sea-bed resources, the space-sea analogy fell into oblivion.

Among all the branches of law, it was air law from which analogies were drawn most; air law has thus influenced space law to a large extent, although this is less apparent in the IISL.¹⁷³ In the first instance, space lawyers attempted to distinguish space law from air law, which was by then a definite branch of law governing aviation. They apprehended a conflict of interests between the 1944 Chicago Convention on International Civil Aviation, which had long accepted the fact that “every state has complete and exclusive sovereignty over the airspace above its territory”¹⁷⁴ with the nature of space

169. Harry H. Almond, *General Principles of Law: An Appraisal of the Correspondence of Principles Relating to the High Seas to Outer Space*, 28 PROC. COLLOQ. L. OUTER SPACE 118 (1985).

170. *Id.* at 119.

171. Almond's exposition has a “policy-oriented jurisprudence” touch, although he does not reject the value of analogies altogether. *See generally id.*

172. *See, e.g.,* Andrzej Gorbiel, *Question of Analogies Between Sea and Space International Law*, 28 PROC. COLLOQ. L. OUTER SPACE 142 (1985); T.E. Wolcott, *Environmental and Historical Differences Render Sea Law of Little Guidance to Development of Space Law*, 28 PROC. COLLOQ. L. OUTER SPACE 172 (1985).

173. It is paradoxical that air law's influence was seen in the academic world more than in the IISL. Also see the section on “Teaching and Students.”

174. Convention on International Civil Aviation, art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

activities.¹⁷⁵ On the whole, sovereignty concerns gave air law the image of a rival in the first few colloquia.¹⁷⁶ However, air law became a subject for analogizing when the potential for space flight became apparent, although sovereignty concerns persisted.¹⁷⁷ Scholars began to draw analogies from air law on issues such as registration of craft, rescue and return of personnel,¹⁷⁸ liability, traffic control, and so forth.¹⁷⁹ In more recent colloquia, air law analogies have been cited mostly in connection with the formulation of law and policies for aerospace vehicles and the pre-flight requirements of space tourists.

In sum, the general trend in the IISL in connection with the “other regime” analogies must be termed “situational adjustments” or characterized as “temporary charm.” The analogies served to a certain extent in offering common ground in some areas and were used at various levels of abstraction, e.g., principles, strategies, and applications. From the perspective of the IISL, the constructive side of analogizing was that it helped dispel scholarly skepticism regarding the negative effects of overlapping legal regimes.

4. Commercialization: From Rules to Strategies

Commercial concerns entered the IISL, for the most part, in the aftermath of the Cold War. A realization that “commercialization” is

175. For similar concerns, see Cooper, *supra* note 124, at 38; Michael Smirnoff, *The Need for a New System of Norms for Space Law and the Danger of Conflict with the Terms of the Chicago Convention*, 1 PROC. COLLOQ. L. OUTER SPACE 105 (1958).

176. See, e.g., Julian G. Verplaetse, *Conflicts of Air- and Outer Space Law*, 3 PROC. COLLOQ. L. OUTER SPACE 145 (1960).

177. In this connection, see V.D. Bordunov, *Space Shuttle Flights and Correlation of Legal Regimes of Air Space and Outer Space*, 25 PROC. COLLOQ. L. OUTER SPACE 211 (1982). Technical aspects are presented in Gyula Gal, *The Space Shuttle Between Air and Space Law*, 24 PROC. COLLOQ. L. OUTER SPACE 103 (1981). See also George P. Sloup, *The Relationship of Air Law and Space Law: A View from the Space Shuttle, Including Its Internal and External Environments*, 19 PROC. COLLOQ. L. OUTER SPACE 202 (1976).

178. I.H. Ph. Diederiks-Verschoor, *Search and Rescue in Space Law*, 19 PROC. COLLOQ. L. OUTER SPACE 152 (1976).

179. For a general discussion on the areas of correlation between the two branches of law, see Martin Menter, *Relationship of Air and Space Law*, 19 PROC. COLLOQ. L. OUTER SPACE 164 (1976).

inter alia privatization¹⁸⁰ made scholars extend the scope of the existing state-centric space treaties to deal with various facets of commercialization and the resulting private participation in space activities.¹⁸¹ This appraisal was followed by attempts to redefine concepts and principles.¹⁸² As the full potential of space applications such as telecommunications, satellite remote sensing, satellite navigation, and space travel became known, scholars flooded the forum with ideas on business-related rights, e.g., intellectual property rights,¹⁸³ and claims relating to insurance,¹⁸⁴ fair business practices,¹⁸⁵ and societal benefits arising out of space applications.¹⁸⁶ Most often

180. Georgy Silvestrov, *The Notion of Space Commercialization*, 33 PROC. COLLOQ. L. OUTER SPACE 88 (1990) (defining commercialization and presents its character, subjects, and scope).

181. Karl-Heinz Bocksteigel, *Reconsideration of the Legal Framework for Commercial Space Activities*, 33 PROC. COLLOQ. L. OUTER SPACE 3 (1990). A thorough review of the 1967 Outer Space Treaty and its scope in dealing with commercialization was conducted in the Fortieth Colloquium in 1997, the year marking the thirtieth anniversary of the Treaty.

182. Terms such as “launching state,” “space objects,” “astronauts,” and “debris” and principles such as state responsibility and liability and Common Heritage of Mankind were discussed. See Karl-Heinz Bocksteigel, *The Terms ‘Appropriate State,’ and ‘Launching State’ in the Space Treaties—Indicators of State Responsibility and Liability for State and Private Activities*, 34 PROC. COLLOQ. L. OUTER SPACE 13 (1991); Vladimir Kopal, *Issues Involved in Defining Outer Space, Space Object, and Space Debris*, 34 PROC. COLLOQ. L. OUTER SPACE 38 (1991); He Qizhi, *Review of Definitional Issues in Space Law in the Light of Development of Space Activities*, 34 PROC. COLLOQ. L. OUTER SPACE 32 (1991).

183. Bradford L. Smith, *An Industry Perspective on Space-Related IPR*, 38 PROC. COLLOQ. L. OUTER SPACE 15 (1995); Carl Q. Christol, *Persistence Pays Off: The Case of Hughes Aircraft Company v. USA, 1976-1999*, 42 PROC. COLLOQ. L. OUTER SPACE 199 (1999).

184. For instance, see David E. Reibel, *Space Insurance and the Legal Aspects of Allocating Risk and Liability among States and Private Entities*, 36 PROC. COLLOQ. L. OUTER SPACE 211 (1993). A national perspective on the issue is given in Hiroshi Yoshida, *Accidents of Space Activities and Insurance*, 36 PROC. COLLOQ. L. OUTER SPACE 221 (1993).

185. Bradford L. Smith, *Towards a Code of Conduct for the Exercise of Intellectual Property Rights (IPR) in Space Activities: Moderation of the Monopoly?*, 39 PROC. COLLOQ. L. OUTER SPACE 176 (1996).

186. Paul B. Larsen, *Use of Global Navigation Satellite System (GNSS) Evidence for Land Surveys: Legal Acceptability*, 38 PROC. COLLOQ. L. OUTER SPACE 285 (1995); Gabriella C. Sgrosso, *Sharing of Remote Sensing Data Concerning Environmental Protection for Public Interest*, 39 PROC. COLLOQ. L.

the potential regulatory framework was also provided. One common feature evident in those frameworks was the substantial shift in approach from rules towards strategic arrangements¹⁸⁷ involving participation by a multitude of non-state actors. This shift towards strategies was seen as the imposition of a new world order. Patrick A. Salin sensed such a shift.

It has become trivial to say that we are at the doorstep of a new society, a new era, etc. . . . It is early to typify the developments we see in our everyday lives and we may need to be more deeply involved in this new era to clearly take notice of the features of that evolution.¹⁸⁸

In addition, there was the optimism that a new legal regime was likely to appear in the near future and that until then some sort of space legislation might evolve, mostly in the form of national space legislation and soft law instruments,¹⁸⁹ yet within the general framework of public international law.

5. Summary

The IISL has been successful in fulfilling the purposes and objectives set out in its statutes. However, what is of interest here is its epistemic culture and in particular what the ethos of the body is.¹⁹⁰

OUTER SPACE 94 (1996).

187. See, e.g., Michel Bourbonniere & Louis Haeck, *Space Imaging: Data Policy and Regulatory Structures*, 42 PROC. COLLOQ. L. OUTER SPACE 278 (1999); Stephan Hobe & Jana K. Hettling, *Challenges to Space Law in the 21st Century—Project 2001 Plus*, 45 PROC. COLLOQ. L. OUTER SPACE 51 (2002); Bertrand de Montluc, *Space Strategy for Europe*, 43 PROC. COLLOQ. L. OUTER SPACE 254 (2000); C. Heather Walker, *In the Giant's Footprint: Bringing MSS Services to Urban Areas*, 44 PROC. COLLOQ. L. OUTER SPACE 194 (2001).

188. Patrick A. Salin, *The New Global Governance Dialogue on International Communications and Outer Space*, 44 PROC. COLLOQ. L. OUTER SPACE 181, 186 (2001). According to Salin, a new governance dialogue is slowly shaping international communications along with their outer space dimension. *Id.*

189. Stephan Hobe, *International Space Law in Its First Half Century*, 49 PROC. COLLOQ. L. OUTER SPACE 373, 379 (2006).

190. See IISL Statutes, http://www.iafastro-iisl.com/additional%20pages/statutes_1.htm (last visited Jan. 21, 2008). Among the many purposes and objectives enshrined in the IISL Statutes, those contained in Article 2(g) are of

Scholarship in the IISL sought to progress in tandem with space activities. The expectation was that it would provide information on the normative and behavioral patterns space activities might generate and glimpses into the unexpected and untoward social consequences of science;¹⁹¹ its failure to do so has become obvious. The failing science-law equation prompted lawyers to envisage legal issues which generated the pink clouds. The perseverance of the scholars created a legal structure for space and they kept the structure alive by interpretative maneuvers. Complete reliance on international law and its principles and values was the norm in the early days, for space activities were considered to be of common good, transcending national interests. Hence, whenever a new international legal regime was found to be successful, scholars vigorously followed its doings and freely borrowed concepts and principles; a failure of that regime, however, meant a swift exit on their part. This was particularly evident in the case of the law of the sea. More recently, a focus on commercial prospects has prompted an amazing reorientation which transformed space law in its entirety into a set of strategical working arrangements.

The whole process is characterized by a nomadism, for the IISL does not have any academic values to promote or an organized academic policy; these shortcomings are notwithstanding the Institute's statutory objectives, however, that are paradigmatic to any organization.¹⁹² The IISL has failed to put forward space law as a coherent branch of law and is responsible for a disjunction with many of the fundamental values of international law which space law cherished during its initial days. Yet, the organization has a legal conscience, and is aware of the changing world of law. The most noteworthy contribution of the IISL is the many thousands of papers read at its colloquia, which have become references for the serious scholar.

particular interest. "[F]ostering the development of space law and studies of legal and social science aspects of the exploration and use of outer space." *Id.*

191. This is a fairly cogent presentation of the content of Article 2(g) of the IISL Statutes. *Id.*

192. *See id.*

*E. Space Law in International Law Textbooks*¹⁹³

According to a symposium¹⁹⁴ on the textbook tradition in international law, textbooks are considered “a treatment of the subject from which one learns, rather than . . . a source of information for those who already know a thing or two about the matters of which it treats.”¹⁹⁵ Textbooks in general are criticized as “intellectual fast food, lacking in both flavor and nutrition.”¹⁹⁶ However, in the context of a discipline such as international law—a topography where the mainstream is riddled with dissenters—textbooks are reflections of the mainstream view.¹⁹⁷

Being a relatively new branch of law, space law did not enter the scheme of textbook authors of international law until the 1960s, although monographs on space law had appeared earlier.¹⁹⁸ Established authors of textbooks and the updaters of the successive editions of such textbooks have included space law in their general scheme for international law. In *Principles of Public International Law*,¹⁹⁹ Ian Brownlie considers outer space, *inter alia*, as a concept in the chapter entitled *Common Amenities and Co-operation in the Use of Resources*.²⁰⁰ Yet, nowhere in that five-page treatment does he

193. The idea of analyzing textbooks was suggested to me by Timo Koivurova, Research Professor, Northern Institute for Environmental and Miroty Law, Arctic Centre. The analysis is limited only to the textbooks written in English.

194. See Symposium, *A Colloquium on International Law Textbooks in England, France, and Germany*, 11 EUR. J. INT'L L. 615 (2000).

195. Colin Warbrick, *Brownlie's Principles of Public International Law: An Assessment*, 11 EUR. J. INT'L L. 621, 628 (2000).

196. David Mitch, *The Role of the Textbook in Undergraduate Economic History Courses: Indispensable Tool or Superficial Convenience*, 50 J. ECON. HIST. 428, 428 (1990). Mitch expresses a doubt at the outset. “Can a textbook adequately capture the complexity of issues, the subtlety of argument, and the richness of evidence so as to convey to its readers the character of the discipline?” *Id.*

197. See Warbrick, *supra* note 195, at 627 (considering text books to be the mouthpiece of the mainstream involves generalization, although this view has been endorsed by scholars such as Warbrick).

198. For information on early space law text books, see generally CHENG, *supra* note 48 and CHRISTOL, *supra* note 63.

199. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (5th ed. 1998). Also, see other editions of Brownlie's work: 1st (1966), 2nd (1973), 3rd (1979), and 4th (1990).

200. *Id.* at 262-67.

prefix or suffix outer space with the term “law,” although he does give a succinct description of the clauses of selected treaties on outer space. Brownlie, however, is justified in his parsimony on the grounds that his focus is only on cooperation in the utilization of resources²⁰¹ and that within that scheme he treats outer space adequately. Indeed, Brownlie’s work is an attempt to present international law as a system and to avoid treating topics in depth.²⁰² To his credit, in the five pages the fundamental principles of international law run as a common thread knitting all space activities together. Brownlie contends “[t]here is no reason for believing that international law is spatially restricted International law, including the Charter of the United Nations, applies to outer space and celestial bodies.”²⁰³ He does not leave even a little room to speculate that space law might have the status of a special branch²⁰⁴ of international law.

Outer space, like state territory, archipelagoes, and the high seas, is treated as an object of international law in *Oppenheim’s International Law*.²⁰⁵ The editors, Robert Jennings and Arthur Watts, provide a rather extensive treatment of space law, including a brief survey of all the treaties on space. To uphold Oppenheim’s penchant for “worded principles of law” and its preference over policies, Jennings and Watts adopt a dogmatic stance distancing them from any policy considerations for space.²⁰⁶ Clauses of the five space treaties supplemented by references to secondary literature occur throughout the text.

201. Brownlie’s description is primarily about the clauses which promote international cooperation in the utilization of outer space resources, e.g., Article 11(1) of the Moon Treaty, which declares the Moon and its natural resources to be part of the Common Heritage of Mankind. *Id.*

202. Warbrick, *supra* note 195, at 623.

203. BROWNLIE, *supra* note 199, at 262-63 (internal quotation omitted).

204. The expression “special branch” is used in a technical sense to mean various subdisciplines of international law such as space law, the law of the sea, environmental law and trade law, and not to denote just any special activity regulated by international law.

205. OPPENHEIM’S INTERNATIONAL LAW 826-45 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

206. *Id.* For support, see Mathias Schmoeckel, *The Internationalist as a Scientist and Herald: Lassa Oppenheim*, 11 EUR. J. INT’L L. 699, 703-04 (2000). See also Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT’L L. 313 (1908).

Malcolm N. Shaw's *International Law* presents space law in conjunction with air law.²⁰⁷ Shaw introduces space law as a branch of law that substantially modified the *usque ad coelum* concept. However, he proceeds further with the concept. "It soon became apparent that the *usque ad coelum* rule, providing for state sovereignty over territorial airspace to an unrestricted extent, was not viable where space exploration was concerned."²⁰⁸ Although states could not find a precise point separating airspace from outer space, some functional separating point is marked and it has been agreed that beyond that point international law and its principles apply.²⁰⁹ Next, randomly-chosen clauses of space treaties are presented as constituting the regime of outer space.²¹⁰ Telecommunications and the related regulations receive sparing consideration. A bestseller, Shaw's *International Law* is known for its comprehensiveness; the fifth edition has 23 topics. The treatment of most of the subjects gives consideration to the law school curriculum. Given the book's focus on students, Shaw's treatment of space law has only a pedagogical import; the book is, however, inappropriate for assessing the significance of space law.

In *Starke's International Law*, space law appears in the author's discussion on various dimensions and levels of territorial sovereignty.²¹¹ Positioned within the territorial sovereignty discourse, Starke's book, upon a survey of selected clauses of the space treaties, makes certain generalizations as to the fundamentals of international space law. The book puts forward the view that, given the dynamic nature of space activities, "space law cannot be static; . . . it is evolutionary."²¹²

Other textbooks in the field, such as Michael Akehurst's *A Modern Introduction to International Law*,²¹³ in its three-page discussion of outer space, maintains that much of the present law on

207. MALCOLM N. SHAW, *INTERNATIONAL LAW* 284-92 (2d ed. 1986).

208. *Id.* at 285.

209. *Id.* at 286.

210. *Id.* at 286-89.

211. I.A. SHEARER, *STARKE'S INTERNATIONAL LAW* 161-71 (11th ed. 1994).

212. *Id.* at 171.

213. MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 288-90 (1984).

outer space is contained in the Outer Space Treaty. In another work, *International Law: A Student Introduction*, Rebecca M.M. Wallace hastily presents outer space as a territory not appropriated by any state, and that “the exploration [of outer space] is to be conducted ‘in accordance with international law, including the Charter of the United Nations’”²¹⁴ Antonio Cassese, in *International Law*, considers outer space as one among the spatial dimensions of state activities, and he gives a pithy account of the law associated with outer space within the frame of state activities.²¹⁵ In general, emphasis is laid on the principle of *res communis omnium*, although Cassese maintains that it is the ambiguity of treaty clauses which enables major powers to use outer space primarily for their own interests.²¹⁶

All of the textbooks referred to above, regardless of the authors’ scholarly intentions and orientations, include space law in their structure. In relation to many other branches of international law such as environmental law, human rights, and law of the sea, the discussion on space law in the works is brief. In addition, most of the discussions on space law appear to be doctrinal discourses on, for example, territorial sovereignty or whilst discussing various sectors of state activities. None of the discussions breaks the mold of dogmatism; all the textbooks convey the impression that space law is about five treaties and a few resolutions. There is some level of homogeneity in the discussions in that all the works consider the exploration and use of outer space and the related regulations as inseparable from the province of international law.

F. Teaching and Students

In law schools, space law is taught as a component of the general curriculum—mostly as public international law²¹⁷—and as a special

214. REBECCA M.M. WALLACE, *INTERNATIONAL LAW: A STUDENT INTRODUCTION* 94-96 (1986) (quoting Article 3 of the Outer Space Treaty). The book is generally considered a companion to any case book on international law.

215. ANTONIO CASSESE, *INTERNATIONAL LAW* 63-64 (2001).

216. *Id.*

217. There are also a few law faculties where space law is taught as part of private international law, commercial law, or other subjects. For instance, in the case of the University of Lapland, the Institute of Air and Space Law is constituted by the Faculty of Law under the Private International and Comparative Law Chair. In the University of Cologne, the Institute of Air and Space Law, although, when

branch of law in certain institutes.²¹⁸ In law schools, it is generally teachers of public international law who insert space law into their lectures on state jurisdiction or some other doctrine. If the lecturers are adherents of any dissenting schools of thought which reject doctrines, space law is ignored and they present their cause through topics such as human rights or international security. In special institutes, space law is connected to air law. All such institutes have resources and expertise in aviation and space law, which for the most part are used to attract partnerships from both the aviation and space industry.²¹⁹ On the academic side, the balance is considerably in favor of air law, be the focus the syllabus or master's and doctoral dissertation topics.²²⁰ In addition, space law courses lay emphasis on practical issues, leaving the student mostly uninformed about the normative base governing legal relations as well as other societal factors influencing the decision-makers. New entrants thus build their views in a vacuum and approach the issues uncritically; they seek to

under Prof. Karl-Heinz Böckstiegel, belonged to the Chair of International Business Law, has now come under the Public International Law Chair. For the history of the Institute in Cologne, see Horst Bittlinger & Marietta Benkö, *Institute of Air and Space Law University of Cologne 1925-2005*, available at <http://www.ilwr.de/index.php?lang=eng&pageid=23>.

218. See *supra* note 10.

219. On the evolution and trends in academia-industry tie-ups, see Shahid Yusuf, *University-Industry Links: Policy Dimensions*, in *HOW UNIVERSITIES CAN PROMOTE ECONOMIC GROWTH* 1-25 (Kaoru Nabeshima & Shahid Yusuf eds., 2007).

220. Research institutes, such as the IASL of McGill University, were established with the purpose of promoting high-quality research in aviation law. During its initial days, the IASL was patronized by many international aviation organizations, e.g., the International Civil Aviation Organization (ICAO) and other government agencies related to aviation. Even after including space law on its research agenda, the IASL continues to deal mostly with aviation law. The list of L.L.M. and doctoral theses presented before the IASL is available at <http://www.mcgill.ca/iasl/alumni/thesisllm/> and <http://www.mcgill.ca/iasl/alumni/thesis>. For support, see A.B. Rosevear, *McGill's Institute of Air and Space Law*, 14 *U. TORONTO L.J.* 257 (1962) and G.N. Pratt, *The Tenth Anniversary of the Institute of Air and Space Law, McGill University*, 11 *INT'L & COMP. L. Q.* 290 (1962). For an overview of space law teaching, see Gyula Gal, *Study and Teaching of Space Law*, in *SPACE LAW: DEVELOPMENT AND SCOPE* 219-26 (Nandasiri Jasentuliyana ed., 1992).

formulate rules and build governance structures which are far from the realities of international law and society.²²¹

Educational activities, such as the Space Law Moot Court Competition, are held annually and are designed to develop space advocacy through practice and competition. The moot problem tends to be very similar from year to year, set to cover mainly the application of the five space treaties. Students are habituated to construct their memoranda, in addition to the space treaties, on characteristic textbook principles, whereby they totally lack any theoretically- and socially-rooted arguments; seldom does one go beyond the worded principles of *pacta sunt servanda* and *good neighborliness*. In most of the cases, the team which best presents the relevant facts and explains the scientific and technical questions in the light of space treaties make an impact on the judges. In effect, the venture minimizes space law by embedding in the students' mind the feeling that space law is an unworthy career option.

Consequently, space law has been unsuccessful in attracting the finest minds among the new generation scholars in law; the field is seen as lacking substantial intellectual weight. For this reason, many students of international law are tempted to stay away from any serious space law studies. Even those who enter the field are at risk of internalizing the values of the discipline as they have been forged by existing institutions; afterward they become the new heroes and are glorified within the confines of the discipline but lack any real worldview. On balance, it seems that academic priorities are, to a great extent, responsible for the decline of space law.

G. A Closed Group

Space law, since its genesis, has had to confront many conflicting issues and values in its efforts to deal with diverse national interests in space, all against the backdrop of common interests. The absence of any academic values and the general goal of "peaceful uses of outer

221. The essence of this argument is drawn from Thio Li-ann, who used it while referring to a dogmatic bias from which contemporary scholars of international law suffer. See Thio Li-ann, *Formalism, Pragmatism, and Critical Theory: Reflections on Teaching and Constructing an International Law Curriculum in a New (Post-Colonial) Asia*, 5 SINGAPORE J. INT'L & COMP. L. 327, 340, 343 (2001).

space” has created a nomadism among scholars in the discipline. Yet, the pioneers and a few generalist international law scholars, despite the complexity of the task, preserved and elaborated the discipline in terms of the norms and values of international law. However, a perceptible change in the structure of the discipline’s beliefs, which afterward crept into the organizational structures, appears to have taken space law far away from international law. Ironically, those who effected the change were not entirely conscious of the cause of the shift. The discipline eventually developed a closed group, deemphasized and abandoned its traditional international law base, withdrew into itself, and stood insulated from any ideological, doctrinal, and theoretical influences. Space law has never made methodical use of its traditional concepts and approaches since, and has subsequently turned into a unique branch of law, one active in its own ambit.

III. UNIQUE JURISPRUDENCE: A DEFENSE OF SPACE LAW

Had space law been a theoretically and doctrinally robust branch of law, reviewers might not have laughed at it and there would not have been room for an unabashed critique; no one mocks the law of the sea, trade law, or environmental law (although environmental law displays strikingly similar cultural characteristics to space law). Various uncomfortable questions encircle space law: How many principles are left for space law to project as its own? How many of them are functional in the new world order? How many of the beliefs and values of space law influence society? Does space law orient its students to current social demands?

However, answers cannot be put forward in haste. The critique provided above might be parochial, for it simply presents the epistemic culture of space law as is observable. In addition, what if space law has justifications for its present posture? Apparently, space law needs a chance to be heard. To this end, two contentions are derived from the above analysis, which are presented as opposing hypotheses:

- (1) Space law ought to be where it is and as it is and should remain separated from international law as a unique jurisprudence.

- (2) Although it has its own unique characteristics, space law is not a branch of law distinct from international law; there is some imbalance in the pattern of thinking on space law that prompts one to think that it is detached from international law.

Working Method

My working method here will be to integrate selected concepts and theories of epistemology in order to examine the true nature and foundation of the discipline. To this end, I first present a defense of space law as an independent discipline (Hypothesis 1) and, thereafter, a “counter-defense” arguing that it is to be seen as a facet of international law (Hypothesis 2).

This approach is based upon the fundamental epistemological dictum knowledge is true justified belief,²²² i.e., knowledge exists when a belief is true and the cognizer has justification for his or her true belief. The two hypotheses presented above resemble beliefs. Although the general position is that truth cannot have many faces,²²³ this article assumes that truth is a relative phenomenon—relative in terms of culture or ontology—and that there can even be true contradictions. In order to find out the objective reality—the truth—a debate format is developed in which both hypotheses compete for justification.²²⁴ In a debate, each side believes that what it thinks is the truth and puts forward justifications for its beliefs.

222. This view forms the basis of epistemology and has been prevalent since the days of Plato. For a comprehensive survey of the history and development of epistemology, see generally *EPISTEMOLOGY: CONTEMPORARY READINGS* (Michael Huemer ed., 2002) (presenting an anthology of writings about epistemology). The fundamental view based on truth, belief, and justification has been subject to many alterations, the most influential critique being Edmund Gettier, *Is Justified True Belief Knowledge?*, 23 *ANALYSIS* 121 (1963).

223. Gottfried W. Leibniz emphasized that there cannot be anything like true contradictions. For his argument, see *GOTTFRIED W. LEIBNIZ, PHILOSOPHICAL ESSAYS* (Roger Ariew & Daniel Garber eds. and trans., 1989).

224. This debate format is inspired by the Socratic Method, although the article deviates considerably from the more sophisticated facet of the method. For more on the Socratic Method and its application, see Edward J. Conry & Caryn L. Beck-Dudley, *Meta-Jurisprudence: The Epistemology of Law*, 33 *AM. BUS. L.J.* 373 (1996).

Justification is an art.²²⁵ Regrettably, philosophical precision is impossible in the context of justifying beliefs. As such, the technique of justification adopted in the present methodology is a hybrid one, one of belief structures in which one belief is justified by another belief.²²⁶ For example, the belief that space law ought to be where it is and as it is and should remain separated as a unique jurisprudence is justified by another belief (hereinafter the primary belief), which I shall discuss shortly (A). However, the basicity of that belief does not rest upon another belief. In its place, I present a set of supporting beliefs (hereinafter sub-beliefs), whose basicity comes from the coherence of its components.²²⁷

Once both sides provide justifications for their respective beliefs, those beliefs will be kept in balance. The aim of the process is to determine the quantum of truth in the justifications of both sides. Philosophical precision is lacking in this context, too, but it is not altogether unworkable.²²⁸ Truth in the present methodology is taken

225. I call it “art” in consideration of the diverse modes of justification, although each mode is susceptible to criticism. For details, see David Hume, *Of Miracles*, in *EPISTEMOLOGY: CONTEMPORARY READINGS* 227-49 (Michael Huemer ed., 2002).

226. This approach draws on foundationalism. For details on knowledge structures in which one belief is justified by another, see ROBERT AUDI, *THE STRUCTURE OF JUSTIFICATION* 80-86 (1993).

227. This method has been borrowed from coherentism, which holds that beliefs are not justified by a basic belief but from the “epistemic neighborhood” of the belief. In other words, beliefs form a network, where they are justified on the merit of their coherence. See Mathias Steup, *Epistemology*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Winter 2003), available at <http://plato.stanford.edu/entries/epistemology>. A hybrid of foundationalism and coherentism is propounded by Susan Haack, which she calls “foundherentism.” See generally SUSAN HAACK, *EVIDENCE AND ENQUIRY: TOWARDS RECONSTRUCTION IN EPISTEMOLOGY* (1993). On foundationalism and coherentism, see Robert Audi, *Foundationalism, Coherentism, and Epistemological Dogmatism*, 2 *PHIL. PERSP.* 407 (1988).

228. Scholars differ in their perspectives regarding truth. The most influential among these differing perspectives is the identity theory, which asserts that truth is when statements or judgments are in accordance with the way things are. However, even identity theory is subject to interpretations in the form of propositional truth and material truth. For the various interpretations, see Thomas Baldwin, *The Identity Theory of Truth*, 100 *MIND* 35 (1991); Julian Dodd & Jennifer Hornsby, *The Identity Theory of Truth: Reply to Baldwin*, 101 *MIND* 319 (1992); Robert Stern, *Did Hegel Hold an Identity Theory of Truth?*, 102 *MIND* 645 (1993). For a review of

as a state, i.e., a state of conformity between a belief and reality.²²⁹ However, given the absence of a preconceived reality on the basis of which conformity can be determined,²³⁰ that side which offers a superior symmetry between its beliefs and the justifications for them will gain merit. The symmetry thus achieved will be the measure of conformity. An evaluation of conformity between the beliefs and justifications is made to conclude the article.

A. Disjunction: A Voice of Disciplinary Renewal

The finding that space law has become detached from international law is not disputed. However, “disjunction” implies neither a structural weakness nor conceptual erosion of space law. It is not a disintegration of certain dogmas, beliefs and values and the construction of new ones; it is a disciplinary renovation by means of specialization, functional identity, and a new academic and professional vocabulary. Above all, disjunction is an effort to salvage the discipline from becoming totally irrelevant in a new world order. Below, I explain in brief the major changes that law and the legal profession have undergone in the postmodern wave and argue that the disjunction of space law from international law reflects these changes.²³¹

various theories and a linguistic approach to the concept of truth, see Donald Davidson, *The Structure and Content of Truth*, 87 J. PHIL. 279 (1990).

229. This is the core of the identity theory.

230. The advantageous position of a preconceived reality can be found in the Christian epistemology, where Divine will is considered the only and ultimate truth. For a critical discussion, see Richard Davis, *James Fodor's Christian Theory of Truth: Is it Christian?*, 41 HEYTHROP J. 436 (2000).

231. Throughout the article, the concept of postmodern era/postmodernity is used in the sense of an axiomatic conviction that invisible, although not incomprehensible, forces are influencing the world today and that yesterday has become a relic in the archeology of the mind; tomorrow needs to be built. This definition is an amalgam of the views of prominent postmodernists such as Jean-Francois Lyotard, *Answering the Question: What is Postmodernism?*, in POSTMODERNISM: A READER 46 (Thomas Docherty ed., 1993) (“[P]ostmodern . . . [is] that which . . . puts forward the unrepresentable in presentation”); STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 29 (2000) (“[P]ostmodernism [is] . . . total acceptance of the ephemerality, fragmentation, discontinuity, and the chaotic”) (quoting David Harvey); and commentators. See also Elizabeth Atkinson, *The Response Anarchist:*

1. Law and the Legal Profession in a New World Order

Law and the legal profession face considerable challenges in the rapidly changing global conditions. All *aspects* of law—theories, doctrines, pedagogy, research, and patterns of the production of knowledge—have changed. The changes do not occur in one aspect in isolation but are pervasive; their nature, however, varies slightly from one aspect to another because of the conceptual and functional diversity among them. Changes have occurred mainly in the form of 1) a loss of exclusivity;²³² 2) an increased segmentation in the application of abstract knowledge;²³³ and 3) a move towards specialization.²³⁴

Loss of exclusivity is both a progressive and negative concept,²³⁵ although it generally connotes forward motion. It has introduced a multidisciplinary dialectic in every scholarly discourse on law and at the same time allowed intrusion by nonprofessionals, such as paralegals, in professional activity.²³⁶ At the academic level, there is an increasing interest in multidisciplinary studies, which has

Postmodernism and Social Change, 23 BRIT. J. SOC. EDUC. 73, 74 (2002) (listing the characteristics of postmodernism while refuting the criticisms regarding the effectiveness of postmodernism). In the article, “postmodernism” and “postmodernity” have different meanings in the manner articulated by Dunn, who defines postmodernism as “a set of epistemological, theoretical, and political responses to postmodernity.” See ROBERT G. DUNN, *IDENTITY CRISIS: A SOCIAL CRITIQUE OF POSTMODERNITY* 2 (1998).

232. Herbert M. Kritzer, *The Professions are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & SOC’Y REV. 713, 720 (1999).

233. *Id.*

234. *Id.* at 726-27. Kritzer calls these changes collectively “post professionalism.” *Id.* Kennedy expresses a similar sentiment in David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463, 464 (2001). However, Kennedy categorizes the changes as a rise of local identities, fragmentation, and specialization. *Id.*

235. Anthony Welch, *The End of Certainty? The Academic Profession and the Challenge of Change*, 42 COMP. EDUC. REV. 1, 13-14 (1998).

236. For a detailed discussion on paralegals and their role *vis-à-vis* professional lawyers, see HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998). See also Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 L. & SOC’Y REV. 765 (2003).

transformed law beyond its traditional foundation.²³⁷ Legal discourse is no longer contextualized in judicial decisions and doctrines. On the professional side, entry by nonprofessionals²³⁸ and multidisciplinary practice²³⁹ has challenged the professional autonomy of lawyers. The trend has prompted lawyers to gain knowledge of other disciplines, e.g., accounting, engineering, and management.

Segmentation of knowledge and *specialization* are interrelated in that specialization is a result of segmentation. One branch of law where segmentation (commonly known as “fragmentation”) has a serious impact is public international law.²⁴⁰ Norm conflict²⁴¹ and the emergence of self-contained regimes²⁴² are examples of fragmentation. The trend has precipitated the assumption that general law should be modified or excluded from the administration of special areas of international law.²⁴³ Special branches in effect initiated a reform by adopting complex working strategies in place of traditional rule-based international law. Scholars started to achieve a high level

237. A scholarly project supporting this position is proposed in Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1891-1905 (1988).

238. KRITZER, *supra* note 236, at 729 (discussing the interplay between lawyers and non-lawyers in the world of legal advocacy).

239. *See generally* George C. Nnona, *Situating Multidisciplinary Practice within Social History: A Systemic Analysis of Inter-professional Competition*, 80 ST. JOHN'S L. REV. 849 (2006). The concern regarding multidisciplinary practice is expressed in passing in D. Michael Guerin, *The World is Flat . . . and What That Means to You*, 78 WIS. LAW. 2 (2005).

240. For a detailed discussion on the fragmentation of international law, see Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION (A/CN.4/L.682) (2006) [hereinafter ILC REPORT]; Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L L. 27 (2005); Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2004); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

241. Lindroos, *supra* note 240.

242. *See generally* Anja Lindroos & Michael Mehling, *Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO*, 16 EUR. J. INT'L L. 857 (2005).

243. *But see* ILC REPORT, *supra* note 240, para. 129.

of specificity in their knowledge in order to deal with new challenges. From such a perspective, fragmentation is a phenomenon of specialization.

Special branches of knowledge have created special areas of practice, but practitioners have to face the challenges of nonprofessionals, e.g., paralegals, posed by the loss of exclusivity. In order to combat the situation, practitioners need to be super-specialists and in this process they seek the help of law schools, which impart advanced professional skills far beyond those of nonprofessionals. Universities also adapt by introducing courses of vocational relevance, building closer university-business partnerships and adding an instrumental flavor to teaching priorities.²⁴⁴ In sum, the process involved is a reawakening, followed by changes in the “professional vocabulary,”²⁴⁵ patterns of discourse, structure of knowledge and institutions, and methodology.

2. *The “Progressive Sensibility” of Space Law*²⁴⁶

In its first era, space law functioned as a branch of international law characterized by a treaty regime that aimed at ensuring peaceful uses of outer space for the benefit of humankind. However, in the wake of the commercialization of outer space, and prompted by the forces of globalization, space law started responding to continuing global changes. In the initial response, a “hybrid public-private [commercial space] environment,”²⁴⁷ whereby the state provides infrastructure and incentives to the private sector to compete in the market, replaced the state governed and state controlled system. Consequently, what had been a defense and research and development

244. For support, *see generally* Yusuf, *supra* note 219.

245. Specifically on the professional vocabulary of international lawyers and the trends therein, see David Kennedy, *The Twentieth-Century Discipline of International Law in the United States*, LOOKING BACK AT LAW'S CENTURY 386 (Austin Sarat et al., 2002).

246. I have coined the expression “progressive sensibility” on the analogy of Kennedy’s “internationalist sensibility” and “renewalist sensibility.” My understanding of the renewalist wave in international law is to a certain extent shaped by Kennedy’s treatment of the subject in David Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 330 (1994).

247. Gabrynowicz, *supra* note 65, at 1051.

orientation in space activities shifted towards a market orientation.²⁴⁸ New actors in the space sector developed new strategies and policies to facilitate the development of the market,²⁴⁹ resulting in a substantial change in the pattern of knowledge production and focus of research. To be in the race, space lawyers must master the art of corporate management and indulge in the rhetoric of business. They compete with management professionals in areas such as identifying and analyzing an industry's strengths, weaknesses, opportunities, and threats, and assisting in the formulation of optimal policies. In the process they also maintain a social perspective by considering the political, legal, and technological influences likely to impact the industry. Modern space lawyers have come far from the mold of ivory tower theoreticians preoccupied with doctrines; instead, they rightly understand society with its present realities and use that understanding to organize technology for the progress of the world.

On the academic side, throughout the formative and functional years of space law, scholars practiced, professed, and defended the ideals and conceptions of international law. The general principles of international law were considered the factor which fastened space law to the "system"²⁵⁰ of international law, and space law was interpreted and applied in accordance with those principles.²⁵¹ However, in recent years, space law scholars have started to share the common feeling of discontent with the institutions, norms, and principles that govern the international system.²⁵² They understand their pivotal role

248. See generally Hanneke L. Van Traa-Engelman, *Commercialization of Space Activities: Legal Requirements Constituting a Basic Incentive for Private Enterprise Involvement*, 12 SPACE POL'Y 119 (1996).

249. For a comprehensive proposal in this connection with insights drawn from the aviation industry, see PHILIPPE MALAVAL & CHRISTOPHE BENAROYA, *AEROSPACE MARKETING MANAGEMENT* (2002). See also Mike W. Papin & Brian H. Kleiner, *Effective Strategic Management in the Aerospace Industry*, 70 AIRCRAFT ENGINEERING & AEROSPACE TECH. 38 (1998).

250. International law has been characterized as a "system" by many scholars, the most prominent being Ian Brownlie.

251. Such rules for interpreting international law are provided in Article 31 of the Vienna Convention on the Law of Treaties, May 23, 1969. See also Mohammed Bedjaoui, *Classicism and Revolution in the Elaboration of the Principles and Rules of Space Law*, in PERSPECTIVES ON INTERNATIONAL LAW 441-62 (Nandasiri Jasentuliyana ed., 1995).

252. Bedjaoui, *supra* note 251, at 443. Bedjaoui observes: "Over some 20

in leading space law to the new world order and in that role the futility in clinging to the outmoded concepts of international law. They naturally ask, "How can international law provide the stage, when it itself is disorganized"—with its fragmentation, overlapping regimes, proliferation of international tribunals with overlapping jurisdictions, and lack of unity in discourse? To what extent will the practice of its doctrines enable young graduates to advance space law and meet the demands of the new market society? Scholars, quite obviously, have opted to shun everything that stands in opposition to the discipline's advance to the new world order. Accordingly, students are kept away from hollow doctrines and the contextless application of principles; instead, they are vocationally trained to serve the needs of space-related industries such as transportation, telecommunications, remote sensing, and tourism. Academic courses have replaced coursebook-study with practical problems, e.g., case studies and short-term industrial placements. Universities have also built research consortia to meet the demands of the market. In sum, the application, development, and exploration of knowledge has assumed an unprecedented dimension.

All of these changes characterize the "progressive sensibility" of space law—a rational yearning to cross the threshold into a new world—in the larger scheme of disciplinary reform. Radical steps such as closing the group to certain external influences to which the discipline was previously responsive, de-rooting traditional foundations, and restructuring practice and the pattern of discourse point to the fact that space law, like all branches of knowledge, is in a transition from one world order to another new one. When world is at the trough of a cycle, it is quite natural for branches of knowledge to experience an internal agitation amid a reformist consciousness.

The assertion that the changes one witnesses in space law are an inevitability imposed by the world order on all branches of knowledge and that space law has adequately modified its contents and culture to accommodate the global conditions justifies the hypothesis that space law ought to be a closed group and should remain separated from

years, the international community has conceived and elaborated a space law with fundamental principles and rules of conduct; the purpose here is to try to decode these principles and rules, to determine the objectives which explain their selection, to see whether they meet lasting needs or temporary requirements in the conquest of space, and perhaps to explain a certain current trend towards disillusionment." *Id.*

international law as a unique jurisprudence. Below (in B, C, and D), the article presents a set of sub-beliefs justifying this assertion. The sub-beliefs, even though they support the assertion independently, are more compelling in combination.

The first sub-belief is that receptiveness to change is an inherent characteristic of space law. I demonstrate this with reference to the responsiveness shown by the discipline in the past, mainly to policy, technology, and ideology. My arguments also explain why space law did not heed lessons of the Jenks-McDougal debate.

B. Receptiveness: An Inherent Quality

Law is a social institution that develops on its own internal dynamics.²⁵³ The internal dynamics of law work through interactions between various structures and actors, e.g., courts, legislatures, lawyers, and scholars. Internally, law is rational, meaning that it is “structured according to standards of analytical conceptuality, deductive stringency, and rule-oriented reasoning.”²⁵⁴ But law and legal systems are not insulated from external influences, which “are selectively filtered into legal structures and adapted in accordance with a logic of normative development.”²⁵⁵ In practice, an external stimulus acts upon the internal dynamics, resulting in a legal change and substantially modifying the social order, a phenomenon which Gunther Teubner has termed a model of “socio-legal covariation.”²⁵⁶ Generally, it is the forces of politics, ideology, and intellectual movements *inter alia* that act as the stimuli for legal change.

As regards space law, in the past the discipline has shown a high degree of receptiveness to such forces, in particular technological developments. When space technology became the focal point of

253. This is the neo-evolutionary view of law. For neo-evolutionists, law changes in reaction to its own impulses. The prominent scholars who share this view are Niklas Luhman, Jürgen Habermas, Philippe Nonet, and Philip Selznick. For details, see generally PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978) (describing a cross-sectoral emphasis on the relationship between law and social order).

254. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *L. & SOC'Y REV.* 239, 253 (1983) (referring to Habermas).

255. *Id.* at 249 (reviewing neo-evolutionist scholarship).

256. *Id.* at 257.

states' common expectations, there emerged conflicts of interests between technologically advanced countries and those aspiring to comparable levels. What was an emerging branch of law came to incarnate a "law of outer space" to reduce the conflict of interests by assuming functional responsibilities such as regulation, control, and effective management of technology, and afterward sculpt normative structures on the basis of these functional responsibilities. Although it emerged in response to an external stimulus—a technological boom—space law has since substantially broadened the parameters of law in general and its pattern of thinking, e.g., the idea of humankind as a legal subject has provided a disciplined consideration to the social and cultural needs of humanity in an unprecedented manner. In addition, by drawing on the many common-interest-oriented principles, the institutional structures of space law have evoked a sense of "community" among the states in a more vivid and solid manner.²⁵⁷ These instances, on the whole, exemplify the internal dynamics of law reacting to the external stimulus of a technological boom.

Similar reactions to policy and politics are observable in the past, particularly when Cold War witnessed a fluctuating balance of power and technological superiority between the superpowers. With the proliferation of the Soviet arsenal, the United States contrived several defense initiatives, such as "Mutual Assured Destruction" (MAD).²⁵⁸ For international law, MAD rendered meaningless "[t]he notion of necessity as one of the traditional cumulative criteria of lawfulness."²⁵⁹ However, there circulated several misgivings at the U.S. policy desks about the safety of MAD, prompting them to seek alternatives. One alternative that gained popularity was "mutual arms control,"²⁶⁰ which prompted the superpowers to settle for demilitarization. This strategic stance inspired the ongoing negotiations for a space treaty in UNCOPUOS; the protection from

257. Nicolas M. Matte, *Institutional Arrangements for Space Activities: An Appraisal*, 6 ANNALS AIR & SPACE L. 439, 455 (1981).

258. For details of the MAD doctrine, see Nicolas G. Fotion, *Mutual Assured Destruction*, in AN ENCYCLOPEDIA OF WAR AND ETHICS 320-24 (Donald A. Wells ed., 1996).

259. W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT'L L. 859, 860 (1990).

260. ROBERT M. LAWRENCE, STRATEGIC DEFENSE INITIATIVE: BIBLIOGRAPHY AND RESEARCH GUIDE 3-7 (1987).

any “aggressive military” provided in Article IV of the OST carries the marks of this strategic position. Currents of superpower politics in this context infiltrated into the internal structures of law, putting space law onto a new normative course.

Receptiveness to Intellectual Movements: The Failure of Policy-Oriented Jurisprudence

Earlier in this article, space law was criticized for its insensitivity to intellectual movements using the example of McDougal’s policy-oriented jurisprudence, which was a critique of what was at the time the generally accepted pattern of thought in international law. However, while accepting that space law was indeed insensitive to the movement, it is submitted that this insensitivity owed to the erroneous design of the policy-oriented jurisprudence.

Policy-oriented jurisprudence is an intellectual movement which addressed international law in general and space law (and certain other branches of international law) in particular. An intellectual movement is said to have impacted a discipline when the ideas and strategies for the promotion of the movement influence and adequately alter the beliefs, values, and methodologies of the discipline.²⁶¹ The extent of impact generally depends on a correlation between the objectives, ideas, and method of advocacy of the movement and the normative state of the discipline.

Policy-oriented jurisprudence, whose overriding goal was the dignity of men and women in an increasingly universal public order,²⁶² offered a “comprehensive, contextual, problem- and policy-oriented analysis of social problems and the legal responses designed to address them.”²⁶³ However, the promotion of the theory by its proponents evoked the feeling that international law (space law in particular) was being transformed, by altering the very nature of its knowledge, towards the power-oriented realist paradigm.²⁶⁴ It is thus no wonder that Phillip Allott sensed in McDougal’s language “a

261. This impact of an intellectual movement on a discipline differs to a certain extent from the impact intellectual movements have on a society. For a presentation in this vein, see Stuart A. Umpleby, *The Design of Intellectual Movements*, PROC. OF INT’L SOC’Y FOR SYS. SCI. (2002).

262. MCDUGAL ET AL., *supra* note 98, at v.

263. Wiessner & Willard, *supra* note 95, at 97.

²⁶⁴ See PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* xviii (1990).

rebuke to traditional international law.”²⁶⁵ “[There is] extreme subjectivism [in] . . . writing, which is assertoric rather than didactic; concerned almost to the point of being passionate. It is unashamedly and intentionally value-laden.”²⁶⁶

In the same vein, policy-oriented jurisprudence met with stiff resistance from space law scholars, who were accustomed to a rule-oriented approach and whose faith was embedded in positivist thinking. They could not perceive McDougal’s theory as anything but advocacy of realist thinking in space law- and policy-making. However, had McDougal’s theory been presented as a set of intellectual techniques to detect the community process and in that way facilitate the shaping of relevant policies for a just world public order in space, scholars would have been convinced of the methodological rigor of the theory in effectively advancing the rule-oriented system. The theory’s crusader image, however, eclipsed its intellectual pragmatism and utility.

This section set out to illustrate that receptiveness is an inherent quality of space law, yet this is not to say that the discipline is particularly vulnerable to sweeping changes. Space law displayed a sense of calculated adaptivity by maintaining a balance between the actions of the catalysts—a technological boom, political trends, and intellectual movements—and the normative requirements of the age. Its resistance to the campaigning of policy-oriented jurisprudence illustrates its rational selectivity. These defenses do not, however, render space law a criticism-free zone; it has been accused of moving towards complex strategies, thereby jettisoning not only its rule orientation but even its communitarian focus. The next section illustrates that, in making such a move, which is a receptive one, space law has built a rational coherence with the free-market ideology of a modernizing world. It is this coherence which justifies the strategic orientation of space law.

C. When in the Market, Be a Marketer

With the end of the Cold War, economic systems all over the world entered a transition from state-controlled planned economies to

265. Philip Allott, *Language, Method and the Nature of International Law*, 45 BRIT. Y.B. INT’L L. 79, 123 (1971).

266. *Id.*

market economies,²⁶⁷ which have their theoretical underpinnings in neoclassical economics. Among the many axioms of neoclassicism,²⁶⁸ focused as it is on the maximization of wealth as the ultimate objective of social organization, the ones that gained a strong foothold in the contemporary market economies were the emphasis on efficiency and unfettered markets. Whereas efficiency is a means to increase wealth: “[p]olicies, which do not promote efficiency . . . will be opposed,”²⁶⁹ and unfettered markets promote the maximization of consumer preferences in relation to goods and services and favor competition.²⁷⁰

In governing modern market economies, power is transferred from the state to the business sector—the standard neoclassical model. In this model, “there are markets for everything, now and for the future; everybody knows everything, and they know the same things; and there are no public goods, no externalities, no transaction costs, and no increasing returns.”²⁷¹ State intervention is favored only in exceptional cases, e.g., providing a suitable legislative code guaranteeing private ownership and ensuring effective competition and free exchange of goods, ensuring law and order, military defense and a welfare system, entering into agreements of various types with

267. See, e.g., EMERGING MARKET ECONOMIES: GLOBALIZATION AND DEVELOPMENT (Grzegorz W. Kolodko ed., 2003) (capturing the causes and impacts of, as well as national and regional perspectives on, the transformation).

268. The assumptions of neoclassical economics are: “1) all human behaviour is individualistic; 2) all human behaviour is exclusively self-interested; 3) all human behaviour is rational and humans are no more than “rational utility maximizers”; 4) welfare is merely and wholly the satisfaction of an individual’s material preferences; 5) efficiency is the exclusive measure of desirability; and 6) unfettered markets are the best way to permit people to achieve their self-interested objectives and achieve allocative efficiency.” Benedict Sheehy, *The Importance of Corporate Models: Economic and Jurisprudential Values and the Future of Corporate Law*, 2 DEPAUL BUS. & COMM. L.J. 463, 470 (2004). Sheehy derives the assumptions from the seven laws set out in DANIEL M. HAUSMAN, *THE INEXACT AND SEPARATE SCIENCE OF ECONOMICS* 51 (1992).

269. Sheehy, *supra* note 268, at 472.

270. See *id.* at 472-73.

271. Adam Przeworski, *The State in a Market Economy*, in TRANSFORMING POST-COMMUNIST POLITICAL ECONOMIES 411, 412 (Joan M. Nelson et al. eds., 1997) (appraising and evaluating scholarly perspectives on the role of the state in a market economy and proposing methods of effective state intervention in markets).

other countries, and implementing political decisions.²⁷² The state is not allowed to take part in any of the internal market processes, which are sustained by the effective strategies and marketing practices adopted by firms. Such strategies pertain to ensuring long-term viability by modifying products and services, successful execution of management decisions, performance enhancement, pricing techniques and customer-focused promotions, to name a few.²⁷³ In order to effectively shape and implement strategies, firms require essential information to be at the disposal of key decision makers; they look at professionals to fulfill this need.

In the early 1980s, new space-inspired technologies were found to have high market potential, one example being telecommunications, with its profound implications for everyday life. Subsequently, new interest groups, which Nathan C. Goldman collectively calls the "citizens' space lobby," were formed.²⁷⁴ They advocated once-outlandish ideas of bringing space to society. "[T]hese space groups often represent the first expressions of later careers in space business."²⁷⁵ Goldman goes on to capture the general mood at the time:

Many entrepreneurs in start-up companies and engineers in established ones receive much inspiration from their memberships in these [groups]. Existing trade associations such as Aerospace Industries Association (AIA) and new organizations such as the Space Business Roundtable (Houston, Texas) signify the growing legitimacy of space advocacy. These people are now part of a new reality²⁷⁶

By the 1990s, most space activities had taken on a market orientation.²⁷⁷ The flood of space activities into the marketplace

272. ARNE JON ISACHSEN ET AL., UNDERSTANDING THE MARKET ECONOMY 4 (1992).

273. Kwaku Appiah-Adu, *Marketing in Emerging Countries: Evidence from a Liberalized Economy*, 15 MKTG. INTELL. & PLAN. 291, 293-98 (1997) (articulating the strategies required for Ghana).

274. NATHAN C. GOLDMAN, AMERICAN SPACE LAW: INTERNATIONAL AND DOMESTIC 111 (1988).

275. *Id.*

276. *Id.* at 112.

277. *Id.* at 112-13. Goldman classifies market-oriented space activities into

rendered state-centric space law inadequate for a market, leaving states the role of overseeing and safeguarding the market. One group of scholars indulged in interpretative theorizing so that the scope of existing space treaties would be adequately broadened to include private participation in space-related markets.²⁷⁸ They persevered with the old knowledge structures of space law and upheld the interventionist role of states in markets. The rest of the scholars in the field, who had already broken through the shell of professional exclusivity, traversed the threshold of the commercial space activities and followed the complex legal and strategic process of the markets. Their proficiency in areas such as market analysis, risk assessment, and strategic counseling would remedy the uncertain regulatory environment in the markets.

The splitting up of space law scholars into these two camps, while creating a two-fold discipline, maintained a complementarity between space law and the state-supervised and market-oriented nature of space activities. In tune with the normative and structural changes, the academic and research institutions in space law adopted the vocabulary of business for the dissemination of knowledge, which was criticized as misrepresenting the reality to students. The next section proves those criticisms to be ill founded.

D. Progressive Thinking: Episteme and Pedagogy in Space Law

Episteme

Two types of criticisms were voiced against space law academia: 1) the IISL was dysfunctional and 2) academic institutions were

five sectors: 1) the communications satellite industry; 2) transportation; 3) services; 4) earth- and space-based installations; and 5) remote sensing and manufacturing. *Id.*

278. See, e.g., Edward A. Frankle, *Once a Launching State Always the Launching State? A Needless Conflict of Treaty Regimes*, 44 PROC. COLLOQ. L. OUTER SPACE 32 (2001); Dimitri Maniatis, *Spring Break 2023—The Law Governing Liability for Damage Caused by Space Objects: From State Responsibility to Private Liability*, 22 ANNALS AIR AND SPACE L. 369 (1997) (suggesting that the existing liability regime adapts to modern realities by a unification of private law); Julie C. Easter, *Sea of Tranquility: The Effect of Space Tourism on Outer Space Law and World Policy in the New Millennium*, 26 SUFFOLK TRANSNAT'L L. REV. 349 (2003) (highlighting the inadequacies of existing treaties and proposing a new framework for space tourism and proprietary rights in space).

promoting the internalization of wrong values. The dysfunctional nature of the IISL lay in its nomadic progress, its failure to bring coherence and its promoting disjunction with international law. The IISL clearly displayed behavior that could give rise to these accusations, but its actions have been erroneously interpreted. Interpretations have been made based on a presumption that the IISL is a movement—revolving around a manifesto—which has strayed from its ideals. Expectations that a coherent body of thought or a shared set of core values among individual viewpoints would emerge from the IISL are also a result of this presumption. However, the IISL is quite far from being a movement; it is in all probability an epistemic community, which according to Peter Haas, is “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”²⁷⁹ Article 2 of the IISL Statute succinctly endorses that it is an epistemic community. “The purposes and objectives of the Institute [the IISL] shall include: (g) The conduct of such other activities as may be considered desirable in fostering the development of space law and studies of legal and social science aspects of the exploration and use of outer space.”²⁸⁰

In its work, the IISL has displayed the characteristics of an epistemic community by providing actors in the space sector with optimal policy choices (particularly evident during the demilitarization negotiations in the 1960s), depictions of global public interests in space, information on the extent to which law can safeguard as well as encourage technological innovations, and accounts of law and its interrelation with the scientific process.²⁸¹ Given that the existential logic of any epistemic forum is to provide interpretations of social and physical phenomena and thereby remove uncertainties in international policy coordination,²⁸² a singular focus on issue areas cannot be expected of them. In the case of the IISL, even if its thinking has tended towards the unusual—its concern for

279. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992) (detailing the structure, role, and behavioral characteristics of epistemic communities).

280. IISL Statutes art. 2(g), http://www.iafastro-iisl.com/additional%20pages/statutes_1.htm (last visited Jan. 21, 2008).

281. *See generally id.*

282. *See Haas, supra* note 279, at 3-4.

aliens—the justification stands that it was consideration for the public excitement over and awe of space exploration that prompted many scientific agencies to turn to the institute for information on the societal impact of deep exploration of the universe. Finally, as regards the shift from one analogy to another, cited as an instance of nomadism in the approach of the IISL, analogizing in the IISL was not the standard practice of identifying with another regime and perceiving similarities but a methodical reckoning in that analogies in the space law context have helped more in finding out the differences between two regimes than in determining similarities. It was an awareness of the normative gap between the regimes that prompted scholars to discard the old analogies and look for new ones.

Pedagogy

In the postmodern era, knowledge structures underwent substantial transformations, with the art of rhetoric and patterns of academic discourse being no exceptions. The validity of knowledge is determined by asking question such as “Is it true?”; “Is it marketable?”; “Is it sellable?”;²⁸³ Can it be quantified? In other words, the validity of knowledge is determined on the basis of economic efficiency and effectiveness, a criterion which Jean-Francois Lyotard calls “performativity.”²⁸⁴ These changes are reflected in various curricular solutions and teaching methods and set educational institutions altogether on a competitive track.²⁸⁵

Under the postmodern influence, as the ideals of science changed into technological dynamism, space law sought to restructure its knowledge and application. As a first step, the IISL carried out an appraisal of the teaching methods used by various institutions.²⁸⁶ Most of the contributors at a session dedicated to the issue recommended broadening the scope of the curriculum in order to come to terms with the new technological and commercial realities. Consequently, space law courses were tailored to meet the needs of

283. Harland G. Bloland, *Postmodernism and Higher Education*, 66 J. HIGHER EDUC. 521, 536 (1995) (quoting Jean-Francois Lyotard, *THE POSTMODERN CONDITION* 108 (1984)).

284. *Id.*

285. *See id.* at 538-39.

286. In this connection, see various contributions to the special IISL session *Space Law Teaching and the History of Space Law*, 29 PROC. COLLOQ. L. OUTER SPACE 205 (1986).

the industry with a large dose of practically and strategically oriented training. A new awareness of current market realities, rather than communitarian perspectives, was imparted to the students, which prompted them to take up competitive careers in astronautics; it is quite obvious that such students decide to stand outside the bounded conventions of social enquiry. This is to say that wrong values were instilled into the students by space law institutes: the institutions simply responded effectively to the demands of the learners for useful, technical, and market-related knowledge.

In the meantime, the loss of state authority in the postmodern world led to a substantial reduction in state funding for higher education, prompting many institutions to mobilize funds from external sources such as multinational corporations to support their research. The outcome of this trend, according to Harland G. Bloland, has been “that research is judged on its ability to aid in the competitive position of the multinational organization[.]”²⁸⁷ In such a situation, space law institutes need to build effective networks and partnerships with industries. To win the confidence of industry partners, institutes need to show their expertise in market strategies rather than engage in value-loaded conceptualization.

E. Methodological Summary and Conclusion

The anomalous normative and functional characteristics displayed by space law derive from a natural impulse to transcend the present realities of the world order and to create a paradigmatically superior branch of law. This is the primary belief pursuant to which space law claimed to be a unique jurisprudence.²⁸⁸ The primary belief is supported by three sub-beliefs: 1) that the rational adaptivity towards the catalysts of change in the past guarantees the progressive sensibility of space law;²⁸⁹ 2) that each functional change space law has effected can be attributed to a global force;²⁹⁰ and 3) that every structural change—in pedagogy as well as episteme—has been effected on the basis of certain value systems (in the present context,

287. Bloland, *supra* note 283, at 541.

288. *See supra* Part III.A.1-2.

289. *See supra* Part III.B.

290. *See supra* Part III.C.

postmodernism).²⁹¹ Even though each sub-belief can be justified on its own merits, what supports the primary belief is the coherence of the three, which can be read to mean that space law has a built-in survival mechanism to protect itself against any crisis due to change. It is the dynamics of this survival mechanism that have inspired the “progressive sensibility” of space law and subsequently moved the discipline to close its doors to certain influences likely to be detrimental to its functioning. In its new posture, space law is internally robust and externally dynamic and deserves a dignified place in intellectual and educational forums.

IV. A COUNTER-DEFENSE

The arguments put forward on behalf of space law are based on the conviction that in the modern world there has been an inevitable and steady deterioration of society and its institutions, a complex state of affairs which international law has proved absolutely inadequate in comprehending and rectifying. It is the resulting disarray that prompted space law to seek normative escape routes. However, in response to the arguments made on behalf of space law, neither the contentions regarding the jumbled state of affairs of the contemporary world order are disputed nor is space law’s normative course or structural changes questioned. What is disputed is the assertion that space law has turned into a sheltered group and entirely dissociated itself from international law.

This part of the article argues that the waves of global change were detected by a group of scholars in international law before the change impacted the special branches of that field. Following the lead of its scholars, international law has acquiesced, streamlined its ways of thinking and organized its functions accordingly, notwithstanding the presence of numerous scholars in the middle of the road. The renewal program of international law has reallocation schemes for virtually every one of its components, including the role of treaties, the tasks of international organizations, terminologies, and the nature and functions of special branches. The transformations within and in the operation of space law have taken place in harmony with the renewal program of international law. If there linger any

291. See *supra* Part III.D.

misgivings on the relationship between space law and international law, they are attributable to a conventionalist understanding of the relationship between international law and its special branches; the bond between international law and space law stands on a new footing.

A. The Renewalist Program of International Law

The ideas and beliefs of international law have a glorious history in the sense that notwithstanding the sporadic turbulence of war, there was a sort of symmetry in the ideas governing the relationship between states. The symmetry took the form of effectiveness of principles, the strength of norms, the harmony between social and legal values, the determinacy of law and the robustness of the legal systems. One significant reason for this symmetry was the low intensity in state interactions, which never required high performance from those ideas. With the intensification of state interactions the classical ideas became dysfunctional, and the theoretical constructs held up by such ideas started to crumble. An extensive reform began in the early twentieth century that saw the creation of institutions, codification of doctrines, and promotion of formalism,²⁹² with the supporting ideas of interstate relations recharged/replaced to serve the new arrangements. By the latter half of the century, even with new structures and rules and an expanding topography, international law had left its past glory—the symmetry—behind it. It started to experience an inexplicable friction in its functioning—overlapping regimes and proliferating institutionalism (with overlapping mandates), which resulted in the antiquation of fundamental values, indeterminacy of principles, fragmentation, and inconsistency between practice and established values. Innumerable odd questions and bizarre concepts related to collective security, free trade, self-contained regimes, global governance, and so forth, floated around the periphery of international law.²⁹³ For the first time, the cynical voice

292. David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INT'L L. 385, 390-97 (1996). According to Kennedy, the renewalist image of the twentieth century for international law is based on a rejection of the significance of the nineteenth century. *Id.*

293. Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT'L L. 341, 342 (1996) (introducing the reason

of a “legal left” or a “Newstream” concerned over the utility and effectiveness of existing knowledge and institutions of international law was heard.²⁹⁴

Given the relativist nature of the Newstream approaches, no off-the-rack program was available,²⁹⁵ although transcendental visions for inner development²⁹⁶ or a critical project²⁹⁷ occasionally flashed across the scholarly horizon. Despite the variations in approach, disenchantment with doctrines or an emphasis on the mode of rhetoric was, however, a frequent and widespread phenomenon among the Newstreamers. With reference to these two characteristics of the Newstream, the next section reveals the new relationship that has come to exist between general international law and its special branches—space law in particular—and thereby affirms the primary belief that the “progressive sensibility” emphasized by space law has been dictated by international law.

for the emergence of a Newstream scholarship within the overall articulation of the Newstream agenda).

294. What constitutes the legal left is a matter of doubt. Generally, Critical Legal Theorists (“the Crits”), who campaign for a deconstruction of existing structures of law, are considered the legal left. However, Thomas Franck has recently juxtaposed the Crits with the realists, who attacked legal formalism and put forward an interest-based theory of law. Franck asks, if the legal left is understood as a group of critics of traditionalism such as the realists, “where does that position the [so called] left?” Thomas M. Franck, *Is Anything “Left” in International Law?*, 1 UNBOUND: HARV. J. LEGAL LEFT 59, 62 (2005). For a seminal work on Critical Legal Studies, see ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983). For an insightful review of the early critical legal scholarship, see Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1 (1986).

295. Koskenniemi describes the Newstream as “best understood as a critical sensibility that examines international law from a wide range of intellectual strands: philosophy, political theory, sociology, anthropology, cultural and women’s studies and so on in order to reassess its meaning, contemporary relevance and future role.” Martti Koskenniemi, *Preface to the Special Issue: New Approaches to International Law*, 65 NORDIC J. INT’L L. 337, 340 (1996). Koskenniemi, however, does not consider the Newstream to be a movement or a program. *Id.*

296. See generally ALLOTT, *supra* note 264.

297. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENTS* (2005).

1. *Lex Specialis and Lex Generalis: Beyond Doctrines*

It is the general understanding that doctrines link special branches to general international law.²⁹⁸ This relationship operates on the basis of the maxim *lex specialis derogat legi generali*.²⁹⁹ However, when doctrines which have been the adhesive die out in a new world order, the linkage is certain to rupture. Contemporary international law scholarship is resplendent with writings analyzing the extent of the rupture, although the analyses end with the consolation that there is still life left in the doctrines. However, progressive-minded scholars do not anguish over the fate of doctrines; for them rhetoric/discourse patterns are the factor uniting isolated “units” of international law into a coherent whole.³⁰⁰ This view retains the traditional understanding that international law is a “structural whole,”³⁰¹ with units³⁰² or

298. Simma and Pulkowski have demonstrated that this is in fact the reality. They demonstrate the linkage between general international law and self-contained regimes (the expression “special branches” has become somewhat archaic) such as the WTO, EC law, diplomatic law, and human rights using the principle of state responsibility. They conclude that “general international law provides a systemic fabric from which no special legal regime is completely decoupled.” Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT’L L. 483, 529 (2006). Rosalyn Higgins supports this position, noting that experiments within the International Court of Justice have shown that no special branch can be litigated outside the domain of international law. Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT’L & COMP. L. Q. 121, 122 (2001).

299. On the concept, application, and functional difficulties of this maxim with respect to international law, see generally Lindroos, *supra* note 240.

300. David Kennedy has reformulated rhetorical modes as the factors uniting international law with units such as “state,” “politics,” and “international society.” See David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT’L L.J. 1 (1988).

301. Piaget defines a structure as “a system of transformations . . . the notion of structure is comprised of three key ideas: the idea of wholeness, the idea of transformation, and the idea of self-regulation.” JEAN PIAGET, *STRUCTURALISM* 5 (Chaninah Maschler trans., 1971). The idea of law being a structure has been recognized since Hans Kelsen. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 123-61 (RUSSELL & RUSSELL 1961) (1945). However, in Kelsen’s view, international law is merely a superior element and not a structure in itself. Yet, many other twentieth century international law scholars in their routine analyses employed the idea of a structure from various dimensions, formally and informally. Even the notion “system,” whereby general international law is linked to the special branches by way of doctrines, evokes the idea of a structure. *Id.*

“elements” being fragments of that whole. Scholars of international law routinely indulge in discourse, a process which generates a certain set of values unique to the “whole.” This type of rhetoric and its operation are well articulated by linguists in “critical discourse analysis,” a method which helps one to identify the role of language in the social process.³⁰³ Without detailing the role of language in the social process,³⁰⁴ suffice it to say that all postmodern social architectures, including international law, are constituted by discourse. A discourse exists in three forms 1) as texts, 2) as discursive practices, and 3) as social practices.³⁰⁵ *Texts* are “either written or spoken discourse”³⁰⁶ which comprise various societal interactions, e.g., diplomatic correspondence, telecasts, scholarly rhetoric. *Discursive practice* is the method of embedding a text into its context, using various techniques.³⁰⁷ In *social practice*, texts are interpreted in terms of the context and social dynamics are assessed.³⁰⁸ In other words, “for any discursive event . . . text producers and interpreters draw upon the socially available resources”³⁰⁹ A social stir is created when all three forms of discourse perform a linear operation.

302. The term “units” is used in a rather broad sense to cover everything (including politics, international organizations, and diplomacy) that international law maintains by means of linkages to its “whole,” special branches being one such unit. This understanding is gained from David Kennedy’s assertion “law is nothing but an attempt to project a stable relationship between spheres it creates to divide.” Kennedy, *supra* note 292, at 8.

303. For a seminal work on critical discourse analysis, see generally NORMAN FAIRCLOUGH, *CRITICAL DISCOURSE ANALYSIS: THE CRITICAL STUDY OF LANGUAGE* (1995) (discussing the role language plays in shaping the order of discourse). On the role of language in the social process, see NORMAN FAIRCLOUGH, *DISCOURSE AND SOCIAL CHANGE* (1995). For a review of the literature on critical discourse analysis covering its methodology, range and operation, see Jan Blommaert & Chris Bulcaen, *Critical Discourse Analysis*, 29 ANN. REV. ANTHROPOLOGY 447 (2000). These works have informed the account presented here, although it does not strictly adhere to the method in all of its particulars.

304. Readers interested in the role of language in shaping society are directed to the sources cited *supra*, note 303.

305. Blommaert & Bulcaen, *supra* note 303, at 448-49.

306. FAIRCLOUGH, *CRITICAL DISCOURSE ANALYSIS*, *supra* note 303, at 4.

307. *Id.* at 10.

308. Blommaert & Bulcaen, *supra* note 303, at 449.

309. FAIRCLOUGH, *CRITICAL DISCOURSE ANALYSIS*, *supra* note 303, at 10.

What generates a discourse? Discourse originates in the mind. The postmodern mind, however, is not a phenomenon in its own right; it is, to quote Richard Tarnas, “an open-ended, indeterminate set of attitudes that has been shaped by a great diversity of intellectual and cultural currents”³¹⁰ The receptiveness to such diverse attitudes owes to the mind’s subjectivity, which has evolved incrementally from the level of the cerebrum through the “interaction of organism and environment.”³¹¹ “Interaction” is the mind’s reflexivity to certain signals transmitted by society, dictated by the cortex of the brain.³¹² In this reflexive process, the mind consistently analyzes the meanings linked to the social customs and habits embedded in it and, whenever required, reorganizes those meanings and understandings.³¹³ This reflexivity and subsequent reorganization are carried out through language and actions. Here lies the structuring role of discourse. In practical terms, the linear operation of the three elements of discourse—texts, discursive practice, and social practice—constitute interaction.

When actors of international law engage in similar interactions, or discourse, values are formed. The actors associate the values with various units, including special branches, again through discourse. When there is a conflict between units or between a unit and the whole, the discourse modes reduce conflicting values into harmony³¹⁴ although the plurality of values remains,³¹⁵ both in the whole as well as among the units. Discourse maintains an axiological harmony.

310. RICHARD TARNAS, *THE PASSION OF THE WESTERN MIND: UNDERSTANDING THE IDEAS THAT HAVE SHAPED OUR WORLD VIEW* 395 (1991).

311. J.D. Stoops, *Society and the Subjective Mind*, 44 *PHIL. REV.* 99, 103 (1935). No analysis of the formation of the subjective mind should overlook the explanatory power of Freud’s psychoanalysis. *See generally* SIGMUND FREUD, *THE EGO AND THE ID* (James Strachey ed., Joan Riviere trans., rev. ed. 1989).

312. Stoops, *supra* note 311, at 112.

313. *Id.*

314. In St. Augustine’s philosophy of axiological monism, God acts as the single value to which all conflicting values can be reduced. *See* CH. PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES: ESSAYS ON RHETORIC AND ITS APPLICATIONS* 62-72 (1979). Perelman presents various positions akin to St. Augustine’s, but concludes that philosophical pluralism acts as a safety valve against “the coercion imposed in the name of a unique value” *Id.* at 71.

315. On the plurality of values in the traditional international law context, see Josef L. Kunz, *Pluralism of Legal and Value Systems and International Law*, 49

While the far-reaching global changes occurred, scholarly minds in space law were psychologically committed to the positivist idea of rules and principles. The reflexive sense of those minds lay dormant under the weight of doctrines, which were impressed upon them by the parent structure—international law. Any scope there might have been for self-criticism was reduced to nothing by certain fixations. Every time the mind responded to a stimulus, it looked at the parent structure for a world-view; every signal from society was perceived in terms of the values held by international law. In effect, there was no direct interaction between the mind and society where space law was concerned. At the same time, certain scholars of international law, who were directly interacting with society,³¹⁶ sensed a change in the patterns of international life. This was followed by an evaluation of the “self” and the designs of knowledge and structures of international law, the outcome of which was an ambivalent feeling—one nihilistic yet self-assured.³¹⁷ However, the scholarly minds interacted effectively with the new environment: new methods and patterns of discourse and ways of working in the discipline were laid down which *inter alia*, as elsewhere, recast the relationship between special branches and international law. In the new scheme, relative autonomy was granted to special branches with regard to certain functions, e.g., framing optimal policies and strategies, setting standards, settling disputes, and educating students.

If these functions are taken together, space law resembles a closed group working on its own. However, the new posture failed to remedy one major handicap in the discipline: if previously it was the aura of doctrines which blinded the scholarly minds in space law to a worldview, it is now the autonomy granted by international law that does so. Interaction with society is nevertheless pursued by the scholarly minds in international law who dictate the progress of space law and of other special branches as well. In other words, the

AM. J. INT'L L. 370 (1955).

316. Even then, among the international law scholars, only a fraction who embraced a multidisciplinary approach had direct interaction with society. The heavy doctrinal conceptualism left the rest no different than their counterparts in space law.

317. I owe this view to a general reading of Outi Korhonen, *New International Law: Silence, Defence or Deliverance?*, 7 EUR. J. INT'L L. 1 (1996).

apparent self-sufficiency of space law is an illusion;³¹⁸ the space law group has committed the grave mistake of assessing the ontology of the discipline on the basis of its illusory autonomy.

*B. Comparable Trends: The Law of the Sea, Human Rights Law,
and Environmental Law*

The emphasis on the progressive-mindedness of space lawyers is encouraging. The subsequent assertion of self-sufficiency for the discipline is also justifiable if one sympathizes with the system of reasoning to which space law was habituated. However, the sentiment that the internal robustness and external dynamism of the discipline constitute a secession from international law is a failure to comprehend the prescriptions of international law. The approach of space law is, nevertheless, not the only one of its kind. Cultural characteristics similar to those of space law can be observed in other special branches of international law as well. This section concisely captures the epistemic characteristics of three such special branches—the law of the sea, human rights, and environmental law—with an emphasis on the scholarly sensibilities prevailing in them during postmodernity.³¹⁹

Law of the Sea (LOS)

“The law of the sea is a microcosm of international law,”³²⁰ and has developed parallel to international law.³²¹ Having been nurtured by the ethical ingenuities and imaginative flights of reflection of the natural lawyers, LOS went on to become the subject of the most comprehensive codification ever seen in international law. The “Grotian tag” attached to the discipline drew many early aspirants to choose LOS for developing their understanding of international

318. ILC REPORT, *supra* note 240.

319. This presentation of the epistemic culture of and scholarly sensibilities in all three branches of law is not based on a comprehensive review of the scholarly works in the respective branches. The objective of this section is only to emphasize certain trends the branches share with space law.

320. M.H. Mendelson, *The Flux and Reflux of the Law of the Sea*, 5 OXFORD J. LEGAL STUD. 285, 285 (1985).

321. See R.P. ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA 1-9 (1981). However, Anand disputes that the euro-centricism of international law is also present in the law of the sea. *Id.*

law.³²² It would not be an overstatement that the expositions of every medieval scholar of international law have a theoretical reliance upon LOS. Whereas traditional scholarship on LOS focused on mapping physical zones of the sea and the pinning of relevant doctrines to those zones, later scholars focused on legitimacy in the exploration of ocean resources and navigation. Over a period of four centuries since Grotius, the discipline imparted meaning to doctrine, ideology, policy, diplomacy, and litigation in international law.

The conclusion of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982 marked the victory of diplomacy over ideology, yet LOS was to plummet to more formidable clashes between ideology and law.³²³ The scholarly omnipresence of McDougal and his policy jurisprudence was felt in this phase.³²⁴ Within a decade, the rise of free trade and the subsequent alterations of UNCLOS³²⁵ also gave rise to a skeptical scholarship, mostly from the southern hemisphere.³²⁶ When the free-trading market economy boomed, maritime activities expanded in tandem with the demands of the market. In response, LOS was fragmented into specialized

322. For an account of Grotius' perspective on the law of the sea and the various factors which influenced his writings on the subject, see FRANS DE PAUW, *GROTIUS AND THE LAW OF THE SEA* (1965).

323. This clash and its causes have been effectively articulated in MARKUS G. SCHMIDT, *COMMON HERITAGE OR COMMON BURDEN?* (1989). The major protester against the UNCLOS regime was the United States, whose objection was primarily based on ideological grounds and "directed against the creation of an 'unaccountable and self-perpetuating world bureaucracy dedicated to regulating and taxing free enterprise.'" *Id.* at 307 (quoting William Safire, Essay, *A Decent Respect*, N.Y. TIMES, Feb. 4, 1985, at A19). There was also dissatisfaction with the deep seabed regime. See generally R.P. Anand, *UN Convention on the Law of the Sea and the United States*, 24 INDIAN J. INT'L L. 153 (1984).

324. See, e.g., MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1987) (discussing how the law of the sea is an important part of the overall decision-making process involved in earth- and space-related law).

325. See Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 33 I.L.M. 1309 (1994). See also The Secretary-General, *Report of the Secretary-General on Outstanding Issues Relating on the Law of the Sea, delivered to the General Assembly*, U.N. Doc. A/48/950 (June 9, 1994).

326. See, e.g., Yogesh Tyagi, *Towards UNCLOS IV?*, 27 J. WORLD TRADE 143 (1993).

subdisciplines under stylish labels, e.g., admiralty law (maritime issues and offenses), shipping law (issues relating to vessels such as carriage of goods and passengers, ship recycling, etc.), and marine law (to some extent used synonymously with LOS, although it gives priority to issues relating to fisheries, pollution, the market, insurance, and so forth). New outlets—consultancies, NGOs, and law firms—were opened to provide expertise on marine, admiralty, and shipping-related issues. However, the most significant spin-off of the new situation was the heterogeneity in the LOS community; with the entry of new professionals such as attorneys, ex-sailors, and managers into the field, lawyers, discussing on and invoking various principles and precedents of LOS, have become few in number. The research themes and the nature of texts in the discipline have slanted noticeably towards applications and strategies in preference to doctrines and rules.

Traditional LOS scholars are struggling to retain their past glory within the scholarly community. Issues that were once part of their domain of analysis are being effectively deliberated and executed by other professionals; while the conventional scholarly discourse is caught up in verbosity, “fieldworkers” get to the bottom of issues with the aid of various organizational models and tools.³²⁷ However, this situation cannot be considered a complete seizure by non-legal professionals, for task allocation to relevant bodies or professional groups seems to be a workable strategy for developing UNCLOS.³²⁸

327. One issue where this seizure by the non-legal professionals is apparent is marine pollution. Where most of the scholarly discourse on marine pollution vacillates over the articulation of the procedural crisis within UNCLOS or suggestions regarding institutional reform or national concerns, management professionals devise objective-level projects providing technical support to implementation operations, e.g., the Decision Support System—a management strategy to combat oil spills, particularly in coastal areas. See S. Zahra Pourvakhshouri & Shattri Mansor, *Decision Support System in Oil Spill Cases*, 12 DISASTER PREVENTION & MGMT. 217 (2003) (reviewing the literature on various oil spill prevention strategies).

328. Alan Boyle has presented various strategies for developing UNCLOS, e.g., reinterpreting UNCLOS, using soft law mechanisms and regional agreements for furthering the objectives of UNCLOS, and integration with other multilateral treaties. Alan Boyle, *Further Development of the Law of the Sea Convention: Mechanisms for Change*, 54 INT’L & COMP. L. Q. 563 (2005). For a case in point regarding the development of UNCLOS, see Kari Hakapää, *Jurisdictional Developments and the Law of the Sea Convention: Some Observations on Vessel-*

If ultimate realization of all schemes is the concern of “somebody else,” what is left for the traditional LOS scholars? Do they not face an “existential crisis?”³²⁹ Asking such questions is in one sense committing the same folly as the space lawyers did (who perceived the autonomy bestowed upon them as liberation from international law), for allocation of tasks to other professionals corresponds to the reorganization of international law’s internal strategies on the basis of the scholars’ interaction with society; traditional LOS scholars engage in that interaction.³³⁰ In addition, implementation of every scheme requires the assistance of scholarly discourse and ratiocination in perceiving a workable approach

Human Rights Law

Contemporary international lawyers will hesitate before they assert exclusivity for the discipline of human rights—as will philosophers, sociologists, and political theorists: heterogeneity is built into the modern human rights community—scholars, lawyers, activists, and the media. Scholars of international law started to discuss human rights under the rubric Human Rights Law (HRL) after the adoption of the UN Charter and the Universal Declaration of Human Rights, the situation Nagendra Singh positively depicted as the end of the “Albuquerque age” and the “dawn of a new era for humanity.”³³¹ The next three decades of HRL scholarship was that of

Source Pollution, in STOCKHOLM DECLARATION AND THE LAW OF MARINE ENVIRONMENT 277 (S. Mahmoudi & N.H. Nordquist eds., 2003).

329. Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 LEIDEN J. INT’L L. 229, 230 (2004) (articulating the extent to which Marxian teachings can help to overcome international lawyers’ existential crisis). “Existential crisis” for Koskenniemi is the uncertainty which an international lawyer feels in the modernist wave and is not strictly limited to the confusion resulting from the fragmentation within a special branch. *Id.*

330. A risk is involved here. If a traditional LOS scholar lacks a multidisciplinary approach and continues to perceive the actions of fieldworkers in terms of his or her traditional way of reasoning, he or she will develop an “existential crisis.” This frame of mind on the part of the traditional LOS scholar is likely to generate a feeling of self-sufficiency among the new professionals of the LOS community.

331. NAGENDRA SINGH, ENFORCEMENT OF HUMAN RIGHTS IN PEACE & WAR AND THE FUTURE OF HUMANITY 5 (1986). On the further development of human rights law, see Theodore S. Orlin & Martin Scheinin, *Introduction, in* THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETATIVE APPROACH 1, 3-17 (Theodore S. Orlin et al. eds., 2000).

rational appraisals and critiques of the human rights instruments and institutions of the UN system.³³² It was an effort to positivize HRL. In contrast, a parallel scholarship burgeoned in the United States highlighting the unconstitutionality of the UN's treaty dimension of human rights: the domestic application of the human rights provisions of the UN Charter and other instruments prompted scholarly skepticism towards the authoritarianism of the UN human rights machinery.³³³ Regardless of the divergence in opinion, human rights lawyers at that time had exclusivity of discourse. In those discourses, the state—the principal “abuser” as well as “guarantor” of human rights—was the object of accusations as well as accolade.³³⁴ With globalization, as global interactions intensified, there was a sudden rise in human rights awareness, resulting in crosscutting human rights, e.g., the right to development, right to environment, collective rights, minority rights and women's rights, what Messer classifies as “third and fourth generation” human rights.³³⁵ The exponential increase in

332. See, e.g., HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1973) (discussing the impact of the UN Charter and Bill of Rights on human rights); John Carey, *Progress on Human Rights at the United Nations*, 66 AM. J. INT'L L. 107 (1972); Josef L. Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L L. 316 (1949); Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754 (1982); Myres S. McDougal & Gerhard Bebr, *Human Rights in the United Nations*, 58 AM. J. INT'L L. 603 (1964) (although McDougal and Bebr considered the UN human rights system a legacy of the great historic movements of the past, it is far from perfect. They suggested that the United Nations should “clarify and demonstrate” to the people of the world that the Organization can provide them with *inter alia* an opportunity to maximize their own personal values); Egon Schwelb, *International Conventions on Human Rights*, 9 INT'L & COMP. L. Q. 654 (1960); Louis B. Sohn, *United Nations Machinery for Implementing Human Rights*, 62 AM. J. INT'L L. 909 (1968); Edgar Turlington, *The Human Rights Commission at the Crossroads*, 45 AM. J. INT'L L. 534 (1951).

333. See, e.g., E.H.C., *The Declaration of Human Rights, the United Nations Charter and Their Effect on the Domestic Law of Human Rights*, 36 VA. L. REV. 1059 (1950) (highlighting, however, the inviolability of the Charter in concluding the article).

334. Sumner B. Twiss, *History, Human Rights, and Globalization*, 32 J. RELIGIOUS ETHICS 39, 39 (2004).

335. Ellen Messer has classified human rights on a chronological basis into four categories: 1) first-generation human rights (civil and political rights), introduced by the Western nations in the aftermath of World War Two; 2) second-generation human rights (socio-economic and cultural rights), added by the socialist

new actors (abusers as well as guarantors) such as transnational corporations, NGOs, and social movements was another notable change in the theory and practice of HRL.³³⁶

Professional fragmentation and the emergence of new practitioners struck HRL at this phase, with “cause lawyers” and “activist-scholars” being the archetypal examples. Cause lawyers (most activists themselves) work hand in hand with the human rights monitoring and reporting agencies for the enforcement of rights,³³⁷ whereas scholar-activists engage in interactions with society in order to enrich their worldview. In this way, they aid the cause lawyers in their endeavor, since they supposedly have a finer-grained worldview than generalist HRL scholars: scholar-activists have a higher perceptivity towards the given social situation, which facilitates a fair presentation and interpretation of the rights in question.³³⁸ The situation seems to bear out “Lawrence Freidman’s observation that ‘law is too important to be left to lawyers.’”³³⁹ Does it mean that conventional HRL scholars/lawyers are inferior in the human rights community? Or, do they, like LOS scholars, face an existential crisis? The Herculean image of scholar-activists is somewhat overemphasized. Having no doubt about their greater perceptivity to social situations, the genuineness of their worldview is doubtful. Even while appraising the social relevance and the power of the arguments of various activist-scholars, one must avoid the projection of their respective orientation, be it ethnic, political, ideological, or gender-based.³⁴⁰ The resulting worldview, which is the basis for every further action by them, will be predisposed towards one or another

states; 3) third-generation human rights (solidarity or development rights), added by the former colonies of Asia and Africa; and 4) fourth-generation human rights (indigenous rights), introduced by indigenous peoples. Ellen Messer, *Anthropology and Human Rights*, 22 ANN. REV. ANTHROPOLOGY 221, 222-23 (1993).

336. Twiss, *supra* note 334, at 50-56 (detailing the emergence and role of each new actor).

337. On the tasks and work of a cause lawyer, see Lisa Hajjar, *Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in Israel/Palestine*, 31 L. & SOC’Y REV. 473 (1997).

338. For support, see Frank Munger, *Inquiry and Activism in Law and Society*, 35 L. & SOC’Y REV. 7 (2001) (presenting the orientation and arguments of various scholar-activists).

339. *Id.* at 8.

340. *See id.*

orientation. Acceptance of all such worldviews coming from different quarters implies a plurality of worldviews which, in effect, undermines the universality of human rights established by international law.³⁴¹ In sum, *law is too important to be left to activists*. However, when interaction with society is left to conventional generalist HRL scholars, who have a broad frame of mind, sterilized of any sort of orientations, the resulting worldview is likely to be less parochial. Yet, considering the relatively higher perceptive power of scholar-activists, conventional HRL scholars accept the plurality of worldviews and engage in discourse to bring coherence to the worldviews fetched by the scholar-activists, thereby maintaining the universality of human rights. However, if HRL scholars attempt to bring coherence through their conventional pattern of thinking, i.e., by threading the worldviews together using doctrines and rules, it is likely that they will develop a sense of futility in their task and anguish over their loss of identity; a multidisciplinary critical outlook and pattern of discourse can overcome such feelings of futility and anguish.

Environmental Law

In the year 1968, when Garrett Hardin's *Tragedy of Commons* exposed the threat that political realism poses to the global environment, it set in motion a chain of legal controls for the protection of the environment.³⁴² At the domestic level, after a grand legislative exercise—a cost and effect analysis with the principles of torts³⁴³—certain dimensions of environmental pollution mainly

341. The universality of human rights has been laid down in Article 55 of the UN Charter and has been reaffirmed in the preamble of the Vienna Declaration on Human Rights, 1993. See Vienna Declaration and Programme of Action, A/CONF.157/2 (July 12, 1993).

342. See generally Garrett Hardin, *The Tragedy of Commons*, 162 SCIENCE 1243 (1968). According to Hardin, self-interest or the desire to maximize one's gain can threaten the existence of a commons, which has limited resources for the community. *Id.* The answer to the tragedy, according to David Wilkinson, is rational use of the commons aided by systems of "self-regulation." See DAVID WILKINSON, ENVIRONMENT AND LAW 7 (2001).

343. For a brief portrayal of the history of environmental legislation in the United States, see Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 4-10 (2007). On the implications of the environmental legislative boom of the 1970s for various segments of American society, see PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN

required international legislative responses.³⁴⁴ However, scholars of international law were concerned over the inadequacy of the existing international legal order to deal with various environmental issues. They sought alternative frameworks, e.g., ones within which “principles from traditional fields of international law can be combined into a coherent order of ‘international environmental law’ [IEL]”³⁴⁵ and “international ecostandards” whereby standards set by technical experts within the treaty framework regulate environmental protection.³⁴⁶ Accordingly, IEL, in contrast to other special branches, diverged from traditional international legal methods although not from the ambit of the doctrines of international law per se.³⁴⁷

In the 1980s, when scholars conclusively agreed that there existed (at least latent) “relative normativity” in international law,³⁴⁸ IEL, impoverished due to the “modesty” of international law principles³⁴⁹ and benumbed by the decentralized nature of the international legal

ENVIRONMENTAL MOVEMENT 121-39 (2003).

344. For example, according to Alexandre Kiss, transboundary pollution and pollution of the interrelated components of the natural environment such as oceans, air, and international rivers require international legislative action. Alexandre Kiss, *The International Protection of Environment*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 1069, 1069-87 (R. St. J. Macdonald & D.M. Johnston eds., 1986).

345. Note, *New Perspectives on International Environmental Law*, 82 *YALE L.J.* 1659, 1660 (1973).

346. Paolo Contini & Peter H. Sand, *Methods to Expedite Environmental Protection: International Ecostandards*, 66 *AM. J. INT’L L.* 37 (1972).

347. For example, Gunther Handl had emphasized the applicability of the principle of territorial sovereignty with regard to transboundary pollution. See Gunther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 *AM. J. INT’L L.* 50 (1975). He attempted to analyze the extent to which a claim made by a state against the transboundary pollution caused to its territory by another state while performing an activity that is lawful per se can be sustained on the grounds of violation of sovereignty. He affirmatively concludes that existence of material damage to the state or its populace can sustain such a claim. *Id.*

348. See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 *AM. J. INT’L L.* 413 (1983).

349. Ian Brownlie, *A Survey of International Customary Rules of Environmental Protection*, in *INTERNATIONAL ENVIRONMENTAL LAW* 1-11 (Ludwik A. Teclaff & Albert E. Utton eds., 1974). Brownlie characterizes customary international law in the absence of any institutions as “modest,” analyzes the principle of state responsibility in environmental issues. *Id.*

system, found in the legislative convenience of the secondary forms of normativity, e.g., “soft law,” a prospect for its development and effectiveness. The resulting innovativeness in environmental lawmaking “ultimately constitut[ed] a powerful factor pushing forward towards a transformation of the fundamental basis of international law.”³⁵⁰ This mechanical utility of environmental law situated it within the structure of international law.

However, in the postmodern era, IEL used its much hyped methodological innovation to slip away from the frontiers of international law. The postmodern era, according to Tuomas Kuokkanen, for IEL “is marked by an increased reliance on technical expertise, recognition of the ambivalent . . . relationship between man and nature, the integration of fields previously considered separate, and the balancing of economic interest and environmental concerns.”³⁵¹

In other words, a dramatic increase in environmental consciousness, the use of interdisciplinary optics to appraise environmental policies and regulation³⁵² and a strategy- and management-oriented approach towards environmental problems³⁵³ signaled the move to postmodernity. In a profoundly integrated (postmodern) world driven by economic ideologies, environmental matters assumed a materialistic dimension and environmental protection, in particular, embraced an objective approach. New strategies and multi-expert systems compatible with the new situation, e.g., Environmental Impact Assessment, bid every environmental professional to toe the line, and international lawyers judiciously rose to the occasion with a new sense of self-identity and a reformulated

350. ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 2 (1991).

351. TUOMAS KUOKKANEN, INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME xxix (2002).

352. Although synergy with science is generally put forward as the case in question, the relevance of other branches of knowledge, for instance, philosophy, in interpreting and shaping environmental policies, strategies, and regulations cannot be overlooked. See JOSEPH R. DES JARDINS, ENVIRONMENTAL ETHICS: AN INTRODUCTION TO ENVIRONMENTAL PHILOSOPHY (3d ed. 2001) (providing insights into how far philosophy can guide in the formulation of methods and decision making concerning environment).

353. KUOKKANEN, *supra* note 351, at 261-86 (presenting a larger management framework under the rubric “environmental governance”).

plan of action. They, in addition to performing specialist functions, employed state-of-the-art methods within the traditional international law frameworks,³⁵⁴ e.g., strategizing and managing within the climate change regime.³⁵⁵ On balance, the situation resembled an advantageous purchase in the face of losing their professional exclusivity in environmental protection.

C. Methodological Summary and Conclusion

In this counter-defense, international law, while concurring with the overall streamlining of space law, refuted the latter's claim of being severed from international law on the grounds that the streamlining has been designed only by the scholars of international law. This is the primary belief (A). The presentation of the epistemic culture of the three branches of international law set out the sub-beliefs (B). However, in this context, it is only the coherent understanding of the attitudes and mores of the scholars of all three of these branches of international law that supports the primary belief and not that of a single branch in isolation. This is apparent from the dissimilar response and adaptations made by the scholars in each branch; while scholars of LOS and HRL retreated from certain specialist roles and committed themselves solely to the task of sustaining and building normativity through societal interaction, IEL scholars traversed the complexities of postmodernity by expanding their knowledge bases and skills. A collective assessment makes obvious the postmodern challenges faced by these branches of law. The commonality between the internal dynamics of these branches of international law and that of space law supports the primary belief as to the defining role of international law.

354. However, Bodansky asserts that "the distinctive characteristics of international environmental problems" do not even require international environmental lawyers to be international lawyers. See Daniel Bodansky, *Does One Need to Be an International Lawyer to Be an International Environmental Lawyer?*, 100 AM. SOC'Y INT'L L. PROC. 303, 306 (2006).

355. For a comprehensive account of the structure and functioning of the climate change regime under the United Nations Framework Convention on Climate Change and its Kyoto Protocol, see FARHANA YAMIN & JOANNA DEPLEDGE, *THE INTERNATIONAL CLIMATE CHANGE REGIME: A GUIDE TO RULES, INSTITUTIONS AND PROCEDURES* (2004).

V. CONCLUSION

Having thus far justified the respective beliefs, space law and international law now stand ready for a relative evaluation of the justifications in terms of reality. Reality in the present methodology is to be ascertained within the frame of a descriptive coherence, i.e., a belief or judgment is true when “its content embraces, or at least belongs to, the one coherent system of the world.”³⁵⁶ Although the article earlier hinted at the difficulty in ascertaining a preconceived reality, a coherent system of order materialized from the arguments of both sides. The coherence is that opinions from both sides converge on the vicissitudes of the world order (even though both sides are programmed to debate contradicting hypotheses or beliefs), e.g., the impact of postmodernity on space law and international law has been verified as corresponding to one another logically. To illustrate, the contentions of space law predicated on its “progressive sensibility” have been vouched for by international law as being in accordance with the script it has for its special branches in a new world order. Hence the point of convergence of opinions is the idea of an inevitably changing world, which constitutes the *reality*. Accordingly, the weight of the arguments of both sides can be gauged on the basis of the extent of coherence an argument has with the idea of an inevitably changing world. In other words, any argument which is irreconcilable within the structure of postmodernism can be dismissed.

Once we subtract the points of convergence from the whole set of arguments made by both sides, what remains is space law’s assertion regarding its disjunction from international law and its resulting feeling of self-sufficiency. It is the only assertion which international law has chosen to oppose. Therefore, an assessment of the truth centers on this point of divergence.

For space law, disjunction from the structural complex of international law is a rational action, as space law is cynical about the reliability of international law given the latter’s disorganized state—a postmodern phenomenon. The disjunction—a postmodern response—was carried out through a decomposition technique, which separated various elements of space law, e.g., profession, education, episteme,

356. Baldwin, *supra* note 228, at 39. See also *supra* Part III (Working Method).

and working methods, from any significant influence of international law and conferred a new meaning on them. However, as convincing as the idea of the “progressive mindedness” of space law is, the notion of severance from international law is equivalently weak. There is little doubt that postmodernism has a fragmentary nature, but it is also true that a fragmented subject has the capability of “self-management.”³⁵⁷ On this point, space law gains merit. However, self-management is one among the many features of an iceberg-like phenomenon; it would be folly to generalize about postmodernism on the basis of a single feature. Although it progresses with diverse and inexplicable techniques, postmodernism has a functional property common to those techniques, one example being the “spoke structure” of intersecting circles depicting social life in a postmodern world.³⁵⁸ The spokes link every *interconnected* sphere to a center, which can be a value system or a conglomeration of beliefs. Postmodernism adopts this basic character in its “regime-building” process. To understand the real architecture and functioning of the spoked structure, the interpreter should have an interdisciplinary approach; a monodisciplinary outlook can only reveal visions of one’s own realm and its peripheries; neither the center nor the spokes, which connect the center to the realm, will be visible.

Space law committed the folly of judging postmodernism through a myopic eye, failing to see beyond the changes in its realm, and decided that it had detached itself from international law—the center. However, as pointed out in the counter-defense, such a mind-set can be found in other branches of international law as well. In addition, the feeling of self-sufficiency among the special branches of international law has been aggravated by a group of scholars who in an orthodox fashion adhere to the traditional international law framework. The plight of this group has, however, been hinted at the counter-defense in the examples of LOS, HRL, and IEL. It is a group which advances with its old techniques of reasoning totally unaware

357. Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC’Y REV. 697, 701 (1992). Handler highlights the self-managing capacity of fragmented subjects in the context of postmodern politics. *Id.*

358. See Bernice A. Pescosolido & Beth A. Rubin, *The Web of Group Affiliations Revisited: Social Life, Postmodernism, and Sociology*, 65 AM. SOC. REV. 52, 62-66 (2000). For a diagrammatic representation of the spoke structure, see Fig. 3, *id.* at 63.

of global realities. Even if aware, they prefer silent adherence, fearful of undermining traditional foundations and ostracism from the scholarly community.³⁵⁹ The group persists in building concept structures with traditional tools and reading the social meanings of such structures through the traditional lens. The process results in attributing strange meanings to postmodern actions, which culminates in a sense of dysphoria and a severe identity crisis among the members of the group. Members of the group who are aware that international law has been fragmented believe that an assemblage of the fragments can overcome any postmodern challenge.³⁶⁰

The renewal program of international law, initiated by the Newstreamers, designed new working methods and patterns of thinking. Their scheme has a system of channeling the constant fluctuations of society directly to the scholarly mind, which through discourse keeps the discipline up to the requirements of postmodernity. The Newstream program of reawakening the mind to the reality that society is constitutive of the mind itself³⁶¹ assimilates the real pulse of postmodernity. When manifest as discourse, the constitutive power of the mind, structures and deconstructs, unites and disunites, coheres and incoheres the various values of postmodern international law.

While the overall balance between the justifications and the derived reality tilts in favor of international law, space law cannot be indicted for any serious misrepresentation of the facts. It can certainly claim to have a progressive sensibility, for the discipline responded constructively to the calls of postmodernity thanks to the built-in survival mechanism present in every branch of law. However, the use of wrong patterns of thinking and obsolete concepts, fueled by the existence of a mainstream that lacked an identity, produced a mistaken feeling of self-sufficiency and independence within the discipline.

The article has accomplished five objectives. First, it has provided a theoretical account of the theory and practice of space law,

359. Korhonen, *supra* note 317, at 15.

360. This is the view of the critics of postmodernism. See Steven L. Winter, *For What It's Worth*, 26 L. & SOC'Y REV. 789, 791 (1992) (highlighting the contradiction in a critic's address).

361. See Philip Allott, *Reconstituting Humanity: New International Law*, 3 EUR. J. INT'L L. 219 (1992) (articulating humankind's changing perceptions of reality towards the world).

a discipline about which little has been studied philosophically. The lack of philosophical criticism has doomed every effort to regulate space activities to be guided by defective normative conceptions, resulting in an overemphasis on archaic instruments, neglect of certain intellectual movements and failing visions. By providing a critique of space law, the article exposed certain weaknesses of the system which have been obscured by the panegyrics of a certain group. However, the debate format of the article dispelled many of the criticisms as being unsustainable and attempted to strike a fair balance between the critique and the reality.

Second, a supra-doctrinal approach to space law was taken, in view of the fact that doctrines are ill-suited tools for clarifying the ontology of a discipline that has existed as a matter of pride and tradition. Hence, while criticizing and justifying beliefs, the article used a logic and vocabulary free from any doctrinal influence. The approach has broken the shell of the ignorant bliss within which the discipline rested, revealing its dilemma in the tumult of postmodernity, and signaling the need to guide the discipline towards a new world order.

Third, the article endeavored to view the fragmentation of international law through the eyes of space law, a fragmented regime. Examining fragmentation has not been the primary objective of the article, but was included given its significance in situating a discipline within postmodernism; it gave the reader an “inverse perspective” on the phenomenon—a sensory illusion that he or she was evaluating fragmentation, while he or she was in fact evaluating only the mechanics of space law³⁶² and international law’s resistance to the contentions of space law.³⁶³ In the process, the article observed that fragmentation is not a negative phenomenon but an important development in the renewal program of international law. However, doctrines no longer have a harmonizing effect on international law.

Fourth, by having McDougal debate with Jenks, the article situated a grand intellectual scheme, otherwise loosely hanging in space law, within the socio-epistemic history of the discipline.

362. *See supra* Part III.

363. *See supra* Part IV.

Fifth, and finally, the article is the second in a series of critical studies on space law,³⁶⁴ the central objective of which is “to lead the discipline into the new world order by preventing it from becoming no more than a relic for the archeology of international law” and to set out an alternative vision which considers the universe as an amalgam of human consciousnesses and which transcends the contemporary society-oriented perspectives on the use and exploration of space.

364. For the introduction to this series, see Sreejith, *supra* note 61.

Bibliography

- Aarnio, Aulis, *The Rational as Reasonable: A Treatise on Legal Justification* (Dordrecht: D. Reidel Publishing Company, 1987).
- Abbott, Kenneth W., "Enriching Rational Choice Institutionalism for the Study of International Law", *University of Illinois Law Review*, vol.2008, no.1, 2008, pp.5-46.
- Abbott, Kenneth W. & Snidal, Duncan, "Values and Interests: International Legislation in the Fight against Corruption", *Journal of Legal Studies*, vol.31, no.1, 2002, pp.S141-S171.
- Abbott, Roderick, "GATT and the Trade Policy Review Mechanism: Further Reflections on Earlier Reflections", *Journal of World Trade*, vol.27, no.3, 1993, pp.117-19.
- Abe, Masao, *Zen and Western Thought* (Basingstoke: Mcmillan, 1985).
- Abhedananda, Swami, *Attitude of Vedanta Towards Religion* (Alcester: Read Books, 2007).
- Aceves, William J., "The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice", *University of Pennsylvania Journal of International Economic Law*, vol.17, no.4, 1996, pp.995-1068.
- Adams, E. M., "The Meaning of Life", *International Journal for Philosophy of Religion*, vol.51, no.1, 2002, pp.71-81.
- Addis, Adeno, "The Concept of Critical Mass in Legal Discourse", *Cardozo Law Review*, vol.29, no.2, 2007, pp.97-148.
- Adiswarananda, Swami, *Four Yogas: A Guide to the Spiritual Paths of Action, Devotion, Meditation, and Knowledge* (Woodstock: Skylight Path Publishing, 2006).
- Adiswarananda, Swami, *The Vedanta Way to Peace and Happiness* (Woodstock: SkyLight Paths Publishing, 2004).
- Adiswarananda, Swami, *Meditation and Its Practices: A Definitive Guide to Techniques and Traditions of Meditation in Yoga and Vedanta* (Woodstock, Skylight Path Publishing, 2003).
- Akehurst, Michael, *A Modern Introduction to International Law* (London: George Allen and Unwin, 1984).
- Akhilananda, Swami, *Hindu Psychology* (London: Routledge, 2001).
- Allott, Philip, "The Human Condition and the Role of Law", *Symposium to Celebrate the 10th Anniversary of the Master of Laws in Human Rights Programme*, The University of Hong Kong, 13 March 2010 (on file with the author).
- Allott, Philip, *Invisible Power 2: A Metaphysical Adventure Story* (Bloomington: Xlibris, 2008).
- Allott, Philip, "Five Steps to a New World Order", *Valparaiso University Law Review*, vol.42, no.1, 2007, pp.99-118.
- Allott, Philip, "The Opening of Human Mind", *European Journal of Legal Studies*, vol.1, no.1, 2007.
- Allott, Philip, "The Idea of International Society", *The Alec Roche Lectures 2006*, New College, Oxford, 15 November 2006 (on file with the author).
- Allott, Philip, *Invisible Power: A Philosophical Adventure Story* (Xlibris: Bloomington, 2005).

- Allott, Philip, "The International Lawyer in Government Service: Ontology and Deontology", *Wisconsin International Law Journal*, vol.23, no.2, 2005, pp.13-23.
- Allott, Philip, *Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002).
- Allott, Philip, "Globalization from Above: Actualizing the Idea through Law", *Review of International Studies*, vol.26, no.5, 2000, pp.61-79.
- Allott, Philip, "The Concept of International Law", *European Journal of International Law*, vol.10, no.1, 1999, pp.31-50.
- Allott, Philip, "European Foreign Policy: After-life of an Illusion", in Martti Koskenniemi, ed., *International Law Aspects of the European Union* (The Hague: Martinus Nijhoff Publishers, 1998), pp.215-29.
- Allott, Philip, "The True Function of Law in the International Community", *Indiana Journal of Global Legal Studies*, vol.5, no.2, 1998, pp.391-413.
- Allott, Philip, "Kant or Won't: Theory and Moral Responsibility", *Review of International Studies*, vol.23, no.3, 1997, 339-57.
- Allott, Philip, "The International Court and the Voice of Justice", in Vaughan Lowe & Malgosia Fitzmaurice, eds., *Fifty Years of the International Court of Justice* (Cambridge: Cambridge University Press, 1996), pp.17-39.
- Allott, Philip, "Mare Nostrum: A New International Law of the Sea", *American Journal of International Law*, vol.86, no.4, 1992, pp.764-87.
- Allott, Philip, "Reconstituting Humanity: New International Law", *European Journal of International Law*, vol.3, no.2, 1992, pp.219-52.
- Allott, Philip, "New International Law: The First Lecture of the Academic Year 20—", in Philip Allott et al., eds., *Theory and International Law: An Introduction* (London: The British Institute of International and Comparative Law, 1991), pp.107-16.
- Allott, Philip, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990).
- Allott, Philip, "The Court and Parliament: Who Whom?", *Cambridge Law Journal*, vol.38, no.1, 1979, pp.79-117.
- Allott, Philip, "Language, Method and the Nature of International Law", *British Yearbook of International Law*, vol. XLV, 1971, pp.79-135.
- Almond, Gabriel A., Chodorow, Marvin & Pearce, Roy Harvey, "What has Happened to the Idea of Progress?", *Contemporary Sociology*, vol.13, no.2, 1984, pp.132-33.
- Almond, Harry H., "General Principles of Law: An Appraisal of the Correspondence of Principles relating to the High Seas to Outer Space", *Proceedings of the Twenty Eight Colloquium on the Law of Outer Space*, 1985, pp.118-21.
- Almond, Harry H., "General Principles of Law: Their Role in the Development of the Law of Outer Space", *University of Colorado Law Review*, vol.57, no.4, 1986, pp.871-83.
- Alston, Philip, "The Myopia of the Handmaidens: International Lawyers and Globalization", *European Journal of International Law*, vol.8, no.3, 1997, pp.435-48.
- Altmann, S.P., "Simmel's Philosophy of Money", *American Journal of Sociology*, vol.9, no.1, 2003, pp.46-68.
- Alvarez, Jose E., "The WTO as a Linkage Machine", *American Journal of International Law*, vol.96, no.1, 2002, pp.146-58.

- Anand, R.P., "UN Convention on the Law of the Sea and the United States, *Indian Journal of International Law*, vol.24, no.2, 1984, pp.153-99.
- Anand R.P., *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff, 1981).
- Anderson, Bruce, "*Discovery*" in *Legal Decision-Making* (Dordrecht: Kluwer Academic Publishers, 1996).
- Anderson, Hilary, "The Process of Self-Integration in Internal Yoga Psychology", *Yoga Journal*, November-December 1976, pp.34-36.
- Anghie, Anthony, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).
- Anghie, Anthony & Chimni, Bhupinder, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts", *Chinese Journal of International Law*, vol.2, no.1, 2002, pp.77-103.
- Anghie, Anthony, "Civilization and Commerce: The Concept of Governance in Historical Perspective", *Villanova Law Review*, vol.45, no.5, 2000, pp.887-911.
- Anghie, Anthony, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard International Law Journal*, vol.40, no.1, 1999, pp.1-80.
- Appiah-Adu, Kwaku, "Marketing in Emerging Countries: Evidence from a Liberalized Economy", *Journal of Marketing Practice: Applied Marketing Science*, vol.4, no.4, 1998, pp.118-29.
- Archer, Clive, *International Organizations* (London: Routledge, 2001).
- Archibugi, Daniele, "Cosmopolitan Democracy and Its Critics: A Review", *European Journal of International Relations*, vol.10, no.3, 2004, pp.437-73.
- Aristotle, *The Politics*, Stephen Everson, ed., (Cambridge: Cambridge University Press, 1988).
- Arnaud, A.-J., "Equity", in Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.4729-34.
- Atkinson, Elizabeth, "The Response Anarchist: Postmodernism and Social Change", *British Journal of Sociology of Education*, vol.23, no.1, 2002, pp.73-87.
- Atmanspacher, Harald, "Quantum Theory and Consciousness: An Overview with Selected Examples", *Discrete Dynamics in Nature and Society*, vol.8, no.1, 2004, pp.51-73.
- Audi, Robert, *The Structure of Justification* (Cambridge: Cambridge University Press, 1997).
- Audi, Robert, "Foundationalism, Coherentism, and Epistemological Dogmatism", *Philosophical Perspective*, vol.2, 1988, pp.407-42.
- Aufrecht, Hans, "Personality in International Law", *American Political Science Review*, vol.37, no.2, 1943, pp.217-43.
- Austin, James H., *Zen and the Meditation: Toward an Understanding of Meditation and Consciousness* (Cambridge, MA: MIT Press, 1998).
- Austin, John, *Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995).
- Aviezer, Tucker, *Our Knowledge of the Past: A Philosophy of Historiography* (Cambridge: Cambridge University Press, 2004).
- Bacchus, James, "The Bicycle Club: Affirming the American Interests in the Future of the WTO", *Journal of World Trade*, vol.37, no.3, 2003, pp.429-41.

- Bagwell, Kyle & Staiger, Robert W., "GATT-Think", *NBER Working Paper 8005*, 2000.
- Bakotic, Bozidar, "Some Pragmatic Reflections on Article IV of the 1967 Space Treaty", *Proceedings of the Twenty Fifth Colloquium on the Law of Outer Space*, 1982, pp.73-76.
- Baldwin, Mark J., "The Basis of Social Solidarity", *American Journal of Sociology*, vol.15, no.6, 1910, pp.817-31.
- Baldwin, Thomas, "The Identity Theory of Truth", *Mind (NS)*, vol.100, no.397, 1991, pp.35-52.
- Balkin, J.M., "Ideology as Cultural Software", *Cardozo Law Review*, vol.16, nos.3&4, 1995, pp.1221-33.
- Balslev, Anindita Niyogi, "An Appraisal of I-Consciousness in the Context of the Controversies Centering Around the No-self Doctrine of Buddhism", *Journal of Indian Philosophy*, vol.16, no.2, 1988, pp.167-75.
- Banerji, Manmatha Nath, "Hindu Psychology: Physiological Basis and Experimental Methods", *American Journal of Psychology*, vol.50, no.1/4, 1937, pp.328-46.
- Barnett, Michael & Finnemore, Martha, "The Power of Liberal International Organizations", Michael Barnett & Raymond Duvall, ed., *Power in Global Governance* (Cambridge: Cambridge University Press, 2005), pp.161-84.
- Barnett, Michael & Finnemore, Martha, "The Politics, Power, and Pathologies of International Organizations", *International Organization*, vol.53, no.4, 2003, pp.699-732.
- Baron, Jane B. & Dunoff, Jeffrey L., "Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory", *Cardozo Law Review*, vol.17, no.2, 1996, pp.431-96.
- Bartels, Lorand, "The Separation of Powers in the WTO: How to Avoid Judicial Activism", *International and Comparative Law Quarterly*, vol.53, no.4, 2004, pp.861-95.
- Baslar, Kemal, *The Concept of Common Heritage of Mankind in International Law* (The Hague: Kluwer Law International, 1998).
- Bassiry, G.R. & Jones, Marc, "Adam Smith and the Ethics of Contemporary Capitalism", *Journal of Business Ethics*, vol.12, no.8, 1993, pp.621-27.
- Batson, C. Daniel, et al., "Two Threats to the Common Good: Self-Interested Egoism and Empathy-Induced Altruism", *Personality and Social Psychology Bulletin*, vol.25, no.1, 1999, pp.3-16.
- Baxter, Hugh, "Bringing Foucault into Law and Law into Foucault", *Stanford Law Review*, vol.48, no.2, 1996, pp.449-79.
- Bayles, Michael, "Hart vs. Dworkin", *Law and Philosophy*, vol.10, no.5, 1991, pp.349-81.
- Bayne, Nicolas, "International Economic Organizations: More Policy Making Less Autonomy", Bob Reinelda & Bertjan Verbeek eds., *Autonomous Policy-Making by International Organizations* (Florence, KY: Routledge, 1998), pp.195-210.
- Beck, A., "Rule of Law and Legal Rules", *Mind, New Series*, vol.82, no.325, 1973, pp.104-05.
- Beck, Anthony, "Is Law an Autopoietic System?", *Oxford Journal of Legal Studies*, vol.14, no.3, 1994, pp.401-18.
- Becker, Carl, "What is Historiography?", *American Historical Review*, vol.44, no.1, 1938, pp.20-28.

- Beckerman, Wilfred, "Sustainable Development: Is It a Useful Concept?", *Environmental Values*, vol.3, no.3, 1994, 191-209.
- Bedau, Hugo, "Bentham's Theory of Punishment: Origin and Content", *Journal of Bentham Studies*, vol.7, 2004.
- Bederman, David J., *International Law in Antiquity* (Cambridge: Cambridge University Press, 2001).
- Bedjaoui, Mohammed, "Classicism and Revolution in the Elaboration of the Principles and Rules of Space Law", in Nandasiri Jasentuliyana ed., *Perspectives on International Law* (London: Kluwer Law International, 1995), pp.411-62.
- Beebe, Barton, "Law's Empire and the Final Frontier: Legalizing the Future in the Early Corpus Juris Spatialis", *Yale Law Journal*, vol.108, no.7, 1999, pp.1737-73.
- Bello, Judith H., "The WTO Dispute Settlement Understanding: Less Is More", *American Journal of International Law*, vol.90, no.4, 1996, pp.416-18.
- Benedict, K., "Global Governance", Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.6232-37.
- Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation* (Kitchener: Batoche Books, 2000).
- Benvenisti, Eyal & Downs, George W., "The Empire's New Clothes: Political Economy and the Fragmentation of International Law", *Stanford Law Review*, vol.60, no.2, 2007, pp.595-631.
- Benvenisti, Eyal, "Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law", *American Journal of International Law*, vol.90, no.3, 1996, pp.384-415.
- Berend, I.T., "Capitalism", in Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.1454-59.
- Beresford, Spencer, "The Future of National Sovereignty", *Proceedings of the Second Colloquium on the Law of Outer Space*, 1959, pp.4-10.
- Bessette, J. M., "Accountability: Political", in Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.38-41.
- Bhagwathi, Jagdish, "The Capital Myth: The Difference between Trade in Widgets and Dollars", *Foreign Affairs*, vol.77, no.3, 1999, pp.7-12.
- Bhagwathi, Jagdish, *Protectionism* (Cambridge: MIT Press, 1988).
- Bhala, Raj & Attard, Lucienne, "Austin's Ghost and DSU Reform", *International Lawyer*, vol.37, no.3, 2003, pp.651-76.
- Bhala, Raj, "Marxist Origins of the 'Anti-Third World' Claim", *Fordham International Law Journal*, vol.24, no.1, 2000, pp.132-57.
- Bhala Raj, "The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)", *American University International Law Review*, vol.14, no.4, 1999, pp.845-53.
- Bhala, Raj, "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)", *Florida State University Journal of Transnational Law and Policy*, vol.9, no.1, 1999, pp.1-151.
- Bhala, Raj, "WTO Dispute Settlement and Austin's Positivism: A Primer on the Intersection", *International Trade Law and Regulation*, vol.9, no.1, 2003, pp. 14-25.

- Bhala, Raj, "The Power of the Past: Towards de Jure State Decisions in WTO Adjudication (Part Three of a Trilogy)", *George Washington International Law Review*, vol.33, no.4, 2001, pp.873-978.
- Bhattacharyya, Kalidas, "Vedanta as Philosophy of Spiritual Life", in Krishna Sivaraman, ed., *Hindu Spirituality: Vedas Through Vedanta* (London: The Crossroad Publishing Company, 1989), pp.231-58.
- Bhattacharyya, Sibajiban, "Epistemology of Testimony and Authority: Some Indian Themes and Theories", in Bimal Krishna Matilal & Arindam Chakrabarti, eds., *Knowing from Words* (Dordrecht: Kluwer Academic Publishers, 1994), pp.69-98.
- Bidwell, Percy W., "Tariff Reform: The Case for Bargaining", *American Economic Review*, vol.23, no.1, 1933, pp.137-46.
- Bilder, Richard B., "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs", *American Journal of International Law*, vol.56, no.3, 1962, pp.633-84.
- Bilimoria, Purusottama, "Akanksa: 'Expectancy' in Sentential Comprehension: An Advaita Critique", *Journal of Indian Philosophy*, vol.9, no.1, 1981, pp.85-100.
- Binet, Henri T.P., "Toward Solving the Space Sovereignty Problem", *Proceedings of the Second Colloquium on the Law of Outer Space*, 1959, pp.11-16.
- Bjarup, Jes, "Epistemology and Law According to Alex Hägeström", *Scandinavian Studies in Law*, vol.29, 1985, pp.11-48.
- Blim, Michael, "Capitalisms in Late Modernity", *Annual Review of Anthropology*, vol.29, 2000, pp.25-38.
- Boland, Harland G., "Postmodernism and Higher Education", *Journal of Higher Education*, vol.66, no.5, 1995, pp.521-59.
- Blommaert, Jan & Bulcaen, Chris, "Critical Discourse Analysis", *Annual Review of Anthropology*, vol.29, 2000, pp.447-66.
- Bloomfield, Lincoln P., "Outer Space and International Cooperation", *International Organization*, vol.19, no.3, 1965, pp.603-21.
- Bocksteigel, Karl-Heinz, "The Terms 'Appropriate State', and 'Launching State' in the Space Treaties: Indicators of State Responsibility and Liability for State and Private Activities", *Proceedings of the Thirty Fourth Colloquium on the Law of Outer Space*, 1991, pp.13-16.
- Böckstiegel, Karl-Heinz, "Reconsideration of the Legal Framework for Commercial Space Activities", *Proceedings of the Thirty Third Colloquium on the Law of Outer Space*, 1990, pp.3-10.
- Bodansky, Daniel, "International in Black and White", *Georgia Journal of International and Comparative Law*, vol.34, no.1, 2006, pp.1-20.
- Bogason, Peter & Musso, Juliet A., "The Democratic Prospects of Network Governance", *American Review of Public Administration*, vol.36, no.1, 2006, pp.3-18.
- Bogdandy, Armin von, "Law and politics in the WTO: Strategies to Cope with a Deficient Relationship", *Max Planck Yearbook of United Nations Law*, vol.5, 2001, pp.609-74.
- Bohman, James, "International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions", *International Affairs*, vol.75, no.3, 1999, pp.499-513.
- Boldizar, Alexander & Korhonen, Outi, "Ethics, Morals, and International Law", *European Journal of International Law*, vol.10, no.2, 279-311.

- Boli, John & Thomas, George M., "National and Global Political Trends: World Culture in World Polity: A Century of International Non-Governmental Organizations", *American Sociological Review*, vol.62, no.2, 1997.
- Bordunov V.D., "Space Shuttle Flights and Correlation of Legal Regimes of Air Space and Outer Space", *Proceedings of the Twenty Fifth Colloquium on the Law of Outer Space*, 1982, pp.211-13.
- Bourbonniere, Michel, "Space Imaging: Data Policy and Regulatory Structures", *Proceedings of the Forty Second Colloquium on the Law of Outer Space*, 1999, pp.278-89.
- Boyer, Robert & Salliard, Yves, eds., *Regulation Theory: The State of Art* (London: Routledge, 2002).
- Boyle, Alan, "Further Development of the Law of the Sea Convention: Mechanisms for Change", *International and Comparative Law Quarterly*, vol.54, no.3, 2005, pp.563-84.
- Boyle, James, "Ideals and Things: International Legal Scholarship and the Prison-house of Language", *Harvard International Law Journal*, vol.26, no.2, 1985, pp.327-59.
- Brennan, Patrick McKinley, "The Place of 'Higher Law' in the Quotidian Practice of Law: Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys", *Georgetown Journal of Law and Public Policy*, vol.7, no.2, 2009, pp.438-79.
- Brewster, Rachel, "Unpacking the State's Reputation", *Harvard International Law Journal*, vol.50, no.2, 2009, pp.231-69.
- Brij Lal Sharma, "Authority and Obedience in Vedanta", *International Journal of Ethics*, vol.46, no.3, 1936, pp.350-363.
- Brown, Brian Edward, *The Buddha Nature: A Study of the Tathagatagarbha and Alayavijnana* (Delhi: Motilal Banarsidass, 1991).
- Brown, Mackenzie D., "The Philosophy of Bal Gangadhar Tilak: Karma vs. Jnana in the Gita Rahasya", *Journal of Asian Studies*, vol.17, no.2, 1958, pp.197-206.
- Brown, Richard Harvey, "Rhetoric, Textuality, and the Postmodern Turn in Sociological Theory", in Steven Seidman, ed., *The Postmodern Turn: New Perspectives on Social Theory* (Cambridge: Cambridge University Press, 1994), pp.229-41.
- Brownlie, Ian, *Principles of Public International Law* (Oxford: Clarendon Press, 1998).
- Brownlie, Ian, "The Place of Individual in International Law", *Virginia Law Review*, vol.50, no.3, 1964, pp.435-62.
- Bruce, Alexandra, "Amit Goswami. Ph.D. & Monistic Idealism", in *The Definitive Unauthorized Guide to What the Bleep Do We Know!?* (New York: The Disinformation Company, 2005), pp.101-13.
- Bruns, Gerald L., "Law and Language: A Hermeneutics of the Legal Text", in Gregory Leyh, ed., *Legal Hermeneutics: History, Theory, and Practice* (California: University of California Press, 1992), pp.23-25.
- Buchanan, Allen & Keohane, Robert O., "The Legitimacy of Global Governance Institutions", *Ethics & International Affairs*, vol.20, no.4, 2006, pp.405-37.
- Buchanan, Ruth, "Writing Resistance into International Law", *International Community Law Review*, vol.10, no.3, 2008, pp.445-54.

- Buckel, Sonja & Fischer-Lescano, Andreas, "Gramsci Reconsidered: Hegemony in Global Law", *Leiden Journal of International Law*, vol.22, no.3, 2009, pp.437-54.
- Burger, Bruce, *Esoteric Anatomy: The Body as Consciousness* (Berkeley: North Atlantic Books, 1998).
- Bush, Wendell T., "The Background of Instrumentalism", *Journal of Philosophy*, vol.20, no.26, 1923, pp.701-14.
- Byron, George Gordon, *The Works of Lord Byron: Letters and Journals* (London: Elibron Classics, 2005).
- Callahan, Colleen M., McDonald, Judith P., & O'Brian, Anthony P., "Who Voted for Smoot-Hawley?", *Journal of Economic History*, vol.54, no.3, 1994, pp.683-90.
- Campbell, Tom, *Seven Theories of Human Society* (Oxford: Oxford University Press, 1981).
- Carey, John, "Progress on Human Rights at the United Nations", *American Journal of International Law*, vol.66, no.1, 1972, pp.107-09.
- Carty, Anthony, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press, 1986).
- Cass, Deborah Z., "Navigating the Newstream: Recent Critical Scholarship in International Law", *Nordic Journal of International Law*, vol.65, nos.3&4, 1996, pp.341-83.
- Cassese, Antonio, *International Law* (Oxford: Oxford University Press, 2001).
- Castree, Noel, "The Spatio-temporality of Capitalism", *Time & Society*, vol.18, no.1, 2009, pp.26-61.
- Castro, Carlos J., "Sustainable Development: Mainstream and Critical Perspectives", *Organization & Environment*, vol.17, no.2, 2004, pp.195-225.
- Caves, Richard E., "The Multinational Enterprise as an Economic Organization", in Jeffrey A. Frieden & David Lake eds., *International Political Economy: Perspectives on Global Power and Wealth* (London: Unwin Hyman, 1991).
- Cerny, Philip G., "Globalization and the Erosion of Democracy", *European Journal of Political Research*, vol.36, no.1, 1999, pp.1-26.
- Cerny, Philip G., "Globalization and the Changing Logic of Collective Action", *International Organization*, vol.4, no.4, 1995, pp.595-625.
- Chander, Anupam, "Globalization and Distrust", *Yale Law Journal*, vol.114, no.6, 2005, pp.1193-1236.
- Charlesworth, Hilary, "Feminist Methods in International Law", *American Journal of International Law*, vol.93, no.2, 1999, pp.379-394.
- Charlesworth, Hilary, Chinkin, Christine, & Wright, Shelly, "Feminist Approaches to International Law", *American Journal of International Law*, vol.85, no.4, 1991, pp.613-45.
- Charnovitz, Steve, "Rethinking WTO Trade Sanctions", *American Journal of International Law*, vol.95, no.4, 2001.
- Charnovitz, Steve, "Opening the WTO to Nongovernmental Interest", *Fordham International Law Journal*, vol.24, no. 2, 2000, pp.173-216.
- Chatterjea, Tara, *Knowledge and Freedom in Indian Philosophy* (Oxford: Lexington Books, 2002).
- Chaudhury, Pravas Jivan, "Vedanta as Transcendental Phenomenology", *Philosophy and Phenomenological Research*, vol.20, no.2, 1959, pp.252-63.

- Chayes, Abraham & Chayes, Antonia Handler, "On Compliance", *International Organization*, vol.47, no.2, 1993, pp.175-205.
- Cheng, Bin, *Studies in International Space Law* (Oxford: Clarendon Press, 1997).
- Chiapello, Eve, "Reconciling the Two Principal Meanings of the Notion of Ideology: The Example of the Concept of the 'Spirit of Capitalism'", *European Journal of Social Theory*, vol.6, no.2, 2003, pp.155-71.
- Chimni, B.S., "Prolegomena to a Class Approach to International Law", *European Journal of International Law*, vol.21, no.1, 2010, pp.57-82.
- Chimni, B.S., "International Law Scholarship in Post-colonial India: Coping with Dualism", *Leiden Journal of International Law*, vol.23, no.1, 2010, pp.23-51.
- Chimni, B.S., "The Past, Present and Future of International Law: A Critical Third World Approach", *Melbourne Journal of International Law*, vol.8, no.2, 2007, pp.499-515.
- Chimni, B.S., "Retrieving 'Other' Visions of the Future: Sri Aurobindo and the Ideal of Human Unity", in Branwen Gruffydd Jones, ed., *Decolonizing International Relations* (Lanham: Rowman & Littlefield Publishers, Inc., 2006), pp.197-217.
- Chimni, B.S., "The World Trade Organization, Democracy, and Development: A View from the South", *Journal of World Trade*, vol.40, no.1, 2006, pp.5-36.
- Chimni, B.S., "Third World Approaches to International Law: A Manifesto", *International Community Law Review*, vol.8, no.1, 2006, pp.3-27.
- Chimni, B.S., "Alternative Visions of Just World Order: Six Tales from India", *Harvard International Law Journal*, vol.46, no.2, 2005, pp.389-402.
- Chimni, B.S., "An Outline of a Marxist Course on Public International Law", *Leiden Journal of International Law*, vol.17, no.1, 2004, pp.1-30.
- Chimni, B.S., "International Institutions Today: An Imperial Global State in the Making", *European Journal of International Law*, vol.15, no.1, 2004, pp.1-37.
- Chimni, B.S., "WTO and Environment: Shrimp-Turtle and EC-Hormones Cases", *Economic and Political Weekly*, 13 May 2000, pp.1752-61.
- Cho, Sungjoon, "Linkage of Free Trade and Social Regulation", *Chicago Journal of International Law*, vol.5, no.2, 2005, pp.625-74.
- Chomsky, Noam, *Knowledge of Language: Its Nature, Origin, and Use* (New York: Praeger, 1986).
- Christol, Carl Q., "Persistence Pays Off: The Case of Hughes Aircraft Company v. ISA, 1976-1999", *Proceedings of the Forty Second Colloquium on the Law of Outer Space*, 1999, pp.199-207.
- Christol, Carl Q., "The Moon Treaty Enters into Force", *American Journal of International Law*, vol.79, no.1, 1983, pp.163-68.
- Christol, Carl Q., *The Modern International Law of Outer Space* (New York: Pergamon Press, 1982).
- Cirakman, Elif, "Transcendence and the Human Condition: Reflections on Kant, Heidegger, and Levinas", *Analecta Husserliana*, vol.84, 2005, pp.315-37.
- Clark, John A., "The Definition of the General Will", *Ethics*, vol.53, no.2, 1943, pp.79-88.
- Clooney, Francis X., "What's a God? The Quest for the Right Understanding of Devta in Brahmanical Ritual Theory (*Mimamsa*)", *International Journal of Hindu Studies*, vol.1, no.2, 1997, pp.337-58.
- Coase, Ronald, "The Problem of Social Cost", *Journal of Law and Economics*, vol.3, 1960, pp.1-44.

- Cocca, Aldo Armando, "The Common Heritage of Mankind: Doctrine and Principle of Space Law—An Overview", *Proceedings of the Twenty-Ninth Colloquium on the Law of Outer Space*, 1986, pp.17-24.
- Cocca, de las Mercedes Esquivel de M., "SETI Draft Second Protocol", *Proceedings of the Thirty Seventh Colloquium on the Law of Outer Space*, 1994, pp.233-43.
- Cochran, Clarke E., "Political Science and 'The Public Interest'", *Journal of Politics*, vol.36, no.2, 1974, pp.327-55.
- Cohen, Harlan Grant, "Finding International Law: Rethinking the Doctrine of Sources", *Iowa Law Review*, vol.93, no.1, 2007, pp.65-129.
- Contini, Paolo & Sand, Peter, "Methods to Expedite Environmental Protection: International Standards", *American Journal of International Law*, vol.66, no.1, 1972, pp.37-59.
- Cooper, John C., "The Problem of Definition of 'Air Space'", *Proceedings of the First Colloquium on the Law of Outer Space*, 1958, pp.38-44.
- Copoeru, Ion, "A Schutzian Perspective on the Phenomenology of Law in the Context of Positivist Practices", *Human Studies*, vol.31, no.3, 2008, pp.269-77.
- Corell, Hans, "The Role of the Legal Adviser of the Department of State", *American Journal of International Law*, vol.85, no. 2, 1991, pp.358-73.
- Corny, Edward J., & Beck-Dudley, Caryn L., "Meta-Jurisprudence: The Epistemology of Law", *American Business Law Journal*, vol.33, no.4, 1996, pp-373-450.
- Crandall, David P., "Knowing Moral Human Knowledge to be True: An Essay on Intellectual Conviction", *Journal of Royal Anthropological Institute*, vol.10, no.2, 2004, pp.307-26.
- Crane, Robert D., "The Beginnings of Marxist Space Jurisprudence"? *American Journal of International Law*, vol.57, no.3, 1963, pp.615-25.
- Crane, Robert D., "Soviet Attitude toward International Space Law", *American Journal of International Law*, vol.56, no.3, 1962, pp.685-723.
- Creed, Barbara, "From Here to Modernity: Feminism and Postmodernism", in Joseph Natoli & Linda Hutcheon, eds., *A Postmodern Reader* (Albany: SUNY, 1993).
- Creed, Gerald W., "'Family Values' and Domestic Economies", *Annual Review of Anthropology*, vol.29, 2000, pp.329-55.
- Croley, Stephen P. & Jackson, John, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments", *American Journal of International Law*, vol.90, no.2, 1996, pp.193-213.
- Crotty, James R., "Keynes and Capital Flight", *Journal of Economic Literature*, vol.21, no.1, 1983, pp.59-65.
- Crucini, Marco J., "Sources of Variation in Real Tariff Rates: The United States 1900-1940", *American Economic Review*, vol.84, no.3, 1994, pp.732-43.
- d'Aspremont, Jean, "The Foundations of the International Legal Order", *Finnish Yearbook of International Law*, vol.18, 2007, pp.261-97.
- Dass, Ram, *Paths to God: Living the Bhagavad Gita* (Westminster, MD: Crown Publishing Group, 2004).
- Dau-Schmidt, Kenneth G. & Brun, Carmen L., "Lost in Transition: The Economic Analysis of Law in the United States and Europe", *Columbia Journal of Transnational Law*, vol.44. no.2, 2006, pp.602-21.
- Davidson, Donald, "The Structure and Content of Truth", *Journal of Philosophy*, vol.87, no.6, 1990, pp.279-328.

- Davis, Richard, "James Fodor's Christian Theory of Truth: Is it Christian?", *Heythrop Journal*, vol.41, no.4, 2000, pp.436-48.
- De Pauw, Frans, *Grotius and the Law of the Sea* (Brussels: Editions de l'Institut de Sociologie, 1965).
- Degen, Robert A., *The Triumph of Capitalism* (New Brunswick: Transaction Publishers, 2008).
- DeGrange, McQuilkin, "Comte's Sociology", *American Sociological Review*, vol.4, no.1, 1939, pp.17-26.
- Dehejia, Harsha V., *The Advaita of Art* (Delhi: Motilal Banarsidass, 1996).
- Des Jardins, Joseph R., *Environmental Ethics: An Introduction to Environmental Philosophy* (Belmont, CA: Wadsworth, 2001).
- Desan, Christine, "Out of the Past: Time and Movement in Making the Present", *Unbound: Harvard Journal of the Legal Left*, vol.1, 2005, p.39.
- Dewey, John, "Austin's Theory of Sovereignty", *Political Science Quarterly*, vol.9, no.1, 1894, pp.31-52.
- Diederiks-Verschoor I.H.Ph., "Search and Rescue in Space Law", *Proceedings of the Nineteenth Colloquium on the Law of Outer Space*, 1976, pp.152-59.
- Dietrich, Michael, *Transaction Cost Economics and Beyond: Towards a New Economics of the Firm* (London: Routledge, 1994), pp.15-30.
- Diggs, B.J., "The Common Good as Reason for Political Action", *Ethics*, vol.83, no.4, 1973, pp.283-93.
- Dingwerth, Klaus & Pattberg, Philipp, "Global Governance as a Perspective on World Politics", *Global Governance*, vol.12, 2006, pp.185-203.
- Doan, Frank C., "An Outline of Cosmic Humanism", *Journal of Philosophy, Psychology and Scientific Methods*, vol.6, no.3, 1919, pp.57-64.
- Dodd, Julian & Hornsby, Jennifer, "The Identity Theory of Truth: Reply to Baldwin", *Mind (NS)*, vol.101, no.402, 1992, pp.319-22.
- Doherty, Martha, "A Contemporary Debate among Advaita Vedantins on the Nature of Avidya", *Journal of Indian Philosophy*, vol.33, no.2, 2005, pp.205-41.
- Donnelly, Jack, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development", *California Western International Law Journal*, vol.15, no.2, 1985, pp.473-509.
- Dorsey, Gray L., "The McDougal-Lasswell Proposal to Build a World Public Order", *American Journal of International Law*, vol.82, no.1, 1988, pp.41-51.
- Duckworth, Douglas S., "Two Models of the Two Truths: Ontological and Phenomenological Approaches", *Journal of Indian Philosophy*, vol.38, no.3, 2010.
- Duckworth, Douglas S., "De/limiting Emptiness and the Boundaries of the Ineffable", *Journal of Indian Philosophy*, vol.38, no.1, 2010, pp.97-105.
- Dunoff, Jeffrey L. & Trachtman, Joel P., "Economic Analysis of International Law", *Yale Journal of International Law*, vol.24, no.1, 1999, pp.1-59.
- Dunoff, Jeffrey L. & Trachtman, Joel, "The Law and Economics of Humanitarian Law: Violations in International Conflict", *American Journal of International Law*, vol.93, no.2, 1999, pp.394-409.
- Dunoff, Jeffrey L., "Resolving Trade-Environment Conflicts: The Case for Trading Institutions", *Cornell International Law Journal*, vol.27, no.3, 1994, pp.607-28.
- Duxbury, Neil, "English Jurisprudence between Austin and Hart", *Virginia Law Review*, vol.91, no.1, 2005, pp.1-91.

- Duxbury, Neil, "Why English Jurisprudence is Analytical"? Jane Holder et.al. ed., *Current Legal Problems 2004* (Oxford: Oxford University Press, 2005), pp.1-52.
- E.H.C Jr., "The Declaration of Human Rights, the United Nations Charter and Their Effect on the Domestic Law of Human Rights", *Virginia Law Review*, vol.36, no.8, 1950, pp.1059-84.
- Easter, Julie C., "Sea of Tranquility: The Effect of Space Tourism on Outer Space Law and World Policy in the New Millennium", *Suffolk Transnational Law Review*, vol.26, no.2, 2003, pp.349-83.
- Eberie, Edward J. & Grossfeld, Bernhard, "Law and Poetry", *Roger Williams University Law Review*, vol.vol.11, no.2, 2006, pp.352-402.
- Ehlermann, Claus-Dieter & Lockhart, Nicolas, "Standard of Review in WTO Law", *Journal of International Economic Law*, vol.7, no.3, 2004, pp.491-521.
- Ellis, Jaye, "International Regimes and the Legitimacy of Rules: A Discourse-Ethical Approach", *Alternatives*, vol.27, 2002, pp.273-300.
- Epstein, David & O'Halloran, Sharyn, "The Partisan Paradox and the U.S. Tariff: 1877-1934", *International Organization*, vol.50, no.2, 1996, pp.301-24.
- Erneling, Christina E. & Johnson, Martel David, eds., *The Mind as a Scientific Object: Between Brain and Culture* (Oxford: Oxford University Press, 2005).
- Etzoni, Amitai, "The Dialectics of Supranational Unification", *American Political Science Review*, vol.56, no.4, 1962, pp.927-35.
- Ewing, Sally, "Justice and the Spirit of Capitalism: Max Weber's Sociology of Law", *Law & Society Review*, vol.21, no.3, 1987, pp.487-512.
- Fairclough, Norman, *Critical Discourse Analysis: The Critical Study of Language* (London: Longman, 1995).
- Fairclough, Norman, *Discourse and Social Change* (Cambridge: Polity Press, 1995).
- Fakhri, Michael, "Law as the Interplay of Ideas, Institutions, and Interests: Using Polyani (and Foucault) to ask TWAIL Questions", *International Community Law Review*, vol.10, no.3, 2008, pp.455-65.
- Falk, Richard, "Towards Global Democracy: A Plea for Moral Globalization", *Australian Yearbook of International Law*, vol.26, 2007, pp.1-18.
- Falk, Richard, "The United Nations System: Prospects for Renewal, in Deepak Nayyar ed., *Governing Globalization* (Oxford: Oxford University Press, 2002).
- Falk, Richard A., "In Pursuit of the Postmodern", in David Gray Griffin, ed., *Spirituality and Society: Postmodern Visions* (Albany: SUNY Press, 1988), pp.81-98.
- Farer, Tom J., "International Law and Political Behavior: Toward a Conceptual Liaison", *World Politics*, vol.25, no.3, pp.430-77.
- Faria, Escobar, "Draft to an International Covenant for Outer Space – The Treaty of Antarctica as a Prototype", *Proceedings of the Third Colloquium on the Law of Outer Space*, 1960, pp.122-27.
- Fasching, Wolfgang, "Consciousness, Self-Consciousness, and Meditation", *Phenomenology and the Cognitive Sciences*, vol.7, no.4, 2008, pp.463-83.
- Faux, Jeff, "Without Consent: Global Capital Mobility and Democracy", *Dissent*, vol.51, no.1, 2004, pp.43-50.
- Fawcett, J.E.S., *International Law and the Uses of Outer Space* (Manchester: Manchester University Press, 1968), pp.29-34.
- Feldman, Stephen, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (Oxford: Oxford University Press, 2000).

- Fichtelberg, Aaron, *Law at the Vanishing Point: A Philosophical Analysis of International Law* (Aldershot: Ashgate Publishing Company, 2008).
- Fidler, David P., "Revolt Against or from within the West? TWAIL, the Developing World, and the Future Direction of International Law", *Chinese Journal of International Law*, vol.2, no.1, 2003, pp.29-75.
- Finlayson, Jock A. & Zacher, Mark W., "The GATT and the Regulations of Trade Barriers: Regime Dynamics and Functions", *International Organization*, vol.35, no.4, 1981, pp.561-602.
- Finnemore, Martha & Sikkink, Kathryn, "International Norm Dynamics and Political Change", *International Organization*, vol.52, no.4, 1998, pp.887-917.
- Fisher, William F., "Doing Good? The Politics and Antipolitics of NGO Practices", *Annual Review of Anthropology*, vol.26, 1997, pp.439-64.
- Fligstein, Neil & Dauter, Luke, "The Sociology of Markets", *Annual Review of Sociology*, vol.33, 2007, pp.6.1-6.24.
- Fligstein, Neil, *The Architecture of Markets: An Economic Sociology of Twenty-First Century Capitalist Societies* (Princeton: Princeton University Press, 2003).
- Fligstein, Neil, *Markets, Politics, and Globalization* (Uppsala: Acta Universitatis Upsalensis, 1997).
- Fligstein, Neil, "Markets as Politics: A political-Cultural Approach to Market Institutions", *American Journal of Sociology*, vol.61, no.4, 1996, pp.656-73.
- Flood, Gavin, *Tantric Body: The Secret Tradition of Hindu Religion* (New York: Palgrave MacMillan, 2006).
- Flory, Maurice, "Adapting International Law to the Development of the Third World", *Journal of African Law*, vol.26, no.1, 1982, pp.12-20.
- Footer, Mary E., *An Institutional and Normative Analysis of the World Trade Organization* (Leiden: Koninklijke Brill NV, 2006).
- Ford, Jane, *A Social Theory of the WTO: Trading Cultures* (New York: Palgrave MacMillan, 2003).
- Fort, Andrew O., "Reflections on Reflection: *Kutastha*, *Cidabhasa*, and *Vrittis* in the *Pancadasi*", *Journal of Indian Philosophy*, vol.28, no.4, 2000, pp.497-510.
- Fort, Andrew O., "Knowing Brahman While Embodied: Sankara on Jivanmukti", *Journal of Indian Philosophy*, vol.19, no.4, 1991, pp.369-89.
- Fort, Andrew O., "The Concept of Saksin in Advaita Vedanta", *Journal of Indian Philosophy*, vol.12, no.3, 1984, pp.277-90.
- Fotion, Nicolas G., "Mutual Assured Destruction", in Donald A. Wells, ed., *An Encyclopedia of war and Ethics* (Westport: Greenwood Publishing Group, 1996).
- Foulke, Roland R., "Definition and Nature of International Law", *Columbia Law Review*, vol.19, no.6, 1919, pp.429-66.
- Frakes, Jennifer, "The Common Heritage of Mankind Principle and the Deep Sea Bed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?", *Wisconsin International Law Journal*, vol. 21, no.3, 2003, pp.409-34.
- Franck, Thomas, "Is Anything 'Left' in International Law?", *Unbound: Harvard Journal of the Legal Left*, vol.1, Spring, 2005, pp.59-63.
- Franck, Thomas M., *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).
- Franck, Thomas M., "The Private Lachs: Life as Art", *American Journal of International Law*, vol.87, no.3, 1993, p.429.

- Frankle, Edward A., "Once a Launching State: Always the Launching State? A Needless Conflict of Treaty Regimes", *Proceedings of the Forty Forth Colloquium on the Law of Outer Space*, 2001, pp.32-42.
- Freud, Sigmund, *Ego and the Id* (New York: W. W. Norton, cop., 1989).
- Freundlieb, Dieter, *Dieter Henrich and Contemporary Philosophy: The Return to Subjectivity* (London: Ashgate, 2003).
- Friman, Linda Johanna, "War and Peace in Outer Space: A Review of the Legality of the Weaponization of Outer Space in the Light of the Prohibition on Non-Peaceful Purposes", *Finnish Yearbook of International Law*, vol.16, 2005, pp.285-319.
- Fukuyama, Francis, *The End of the History and the Last Man* (New York: Avon Books, 1992).
- Fulton, James S., *Science and Man's Hope* (New York: Bookman Associates, 1954).
- Gabrynowicz, Joanne I., "Space Law: Its Cold War Origins and Challenges in the Era of Globalization", *Suffolk University Law Review*, vol.37, no.4, 2004, pp.1041-65.
- Gal, Gyula, "Study and Teaching of Space Law", in Nandasiri Jasentuliyana ed., *Space Law: Development and Scope* (Westport: Praeger, 1992), pp.219-26.
- Gal, Gyula, "Territorial Sea and Airspace: Passages to Free Space", *Proceedings of the Twenty Eighth Colloquium on the Law of Outer Space*, 1985, pp.134-39.
- Gal, Gyula, "The Space Shuttle between Air and Space Law", *Proceedings of the Twenty Fourth Colloquium on the Law of Outer Space*, 1981, pp.103-04.
- Galindo, George Rodrigo Bandeira, "Martti Koskenniemi and the Historiographical Turn in International Law", *European Journal of International Law*, vol.16, no.3, 2005, pp.539-59.
- Galloway, Eilene, "Consensus as a Basis for International Space Cooperation", *Proceedings of the Twentieth Colloquium on the Law of Outer Space*, 1978, p.108.
- Galloway, Eilene, "The Community of Law and Science", *Proceedings of the First Colloquium on the Law of Outer Space*, 1958, pp.59-62.
- Galloway, Jonathan F., "Worldwide Corporations and International Integration: The Case of INTELSAT", *International Organization*, vol.24, no.3, 1970, pp.503-19.
- Gardner, Richard N., "The Bretton Woods-GATT System After Sixty Five Years: A Balance Sheet of Success and Failure", *Columbia Journal of Transnational Law*, vol.47, no.1, 2008, pp.31-71.
- Garoupa, Nuno & Ulen, Thomas S., "The Market for Legal Innovation: Law and Economics in the Europe and the United States", *Alabama Law Review*, vol.59, no.4, 2008, pp.1555-1633.
- Gathii, James Thuo, "Rejoinder: Twailing International Law", *Michigan Law Review*, vol.98, no.6, 2000, pp.2066-71.
- Gehring, Thomas, *Dynamic International Regimes: Institutions for International Environmental Regimes* (Berlin: Peter Lang, 1994).
- Geisinger, Alex C. & Michael Stein, "Rational Choice, Reputation and Human Rights Treaties", *Michigan Law Review*, vol.106, no.6, 2008, pp.1129-42.
- George, Venus A., *Authentic Human Destiny: The Paths of Shankara and Heidegger* (Washington D.C.: The Council for research in Values and Philosophy, 1998).
- Gerber D., "A Note on Woody on Dewey on Austin", *Ethics*, vol.79, no.4, 1969, pp.303-08.

- Gereffi Gary, & Korzeniewicz, Miguel, *Commodity Chain and Global Capitalism* (Westport: Greenwood, 1994).
- Geroski, P.A., *Market Dynamics and Entry* (Oxford: Blackwell, 1991).
- Gettier, Edmund, "Is Justified True Belief Knowledge?", *Analysis*, vol.23, 1963, pp.121-23.
- Gibbard, Allan & Varian, Hal R., "Economic Models", *Journal of Philosophy*, vol.75, no.11, 1978, pp.664-77.
- Giddens, Anthony, *The Consequences of Modernity* (California: Stanford University Press, 1990).
- Giplin, Robert G., "The Richness of the Tradition of Political Realism", *International Organization*, vol.38, no.2, 1984, pp.287-304.
- Glucklich, Ariel, *The Sense of Adharma* (Oxford: Oxford University Press, 1994).
- Goldman, Nathan C., *American Space Law: International and Domestic* (Ames: Iowa State University Press, 1988).
- Goldsmith, Jack L. & Posner, Eric A., *Limits of International Law* (Oxford: Oxford University Press, 2005).
- Goldsmith, Jack L. & Posner, Eric A., "Understanding the Resemblance between Modern and Traditional Customary International Law", *Virginia Journal of International Law*, vol.40, no.2, 2000, pp.639-72.
- Goldsmith, Jack L. & Posner, Eric A., "International Agreements: A Rational Choice Approach", *Virginia Journal of International Law*, vol.44, no.1, 2003, pp.113-43.
- Goldsmith, Jack L. & Posner, Eric A., "A Theory of Customary International Law", *University of Chicago Law Review*, vol.66, no.4, 1999, pp.1113-77.
- Goodrich, Peter, "The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction", *Law and Critique*, vol.10, no.3, 1999, pp.343-60.
- Gorbiel, Andrzej, "Question of Analogies between Sea and Space International Law", *Proceedings of the Twenty Eighth Colloquium on the Law of Outer Space*, 1985, pp.142-44.
- Gotlieb, A.E., "Legal Advisers and Foreign Affairs: A Comment", *University of Toronto Law Journal*, vol.16, no.1, 1956, pp.158-65.
- Grant, Ruth W. & Keohane, Robert O., "Accountability and Abuses of Power in World Politics", *American Political Science Review*, vol.99, no.1, 2005, pp.29-43.
- Gray, Glenn J., "Heidegger 'Evaluates' Nietzsche", *Journal of the History of Ideas*, vol.14, no.2, 1953, pp.304-09.
- Grieco, Joseph M., "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism", *International Organization*, vol.42, no.3, 1988, pp.485-507.
- Guerin, Michael, "The World is Flat ... and What that Means to You", *Wisconsin Lawyer*, vol.78, no.11, 2005, p.2.
- Guest, Stephen, ed., *Positivism Today* (Aldershot: Dartmouth, 1996).
- Gulati, Ranjay & Gargiulo, Marti, "Where do Interorganizational Networks Come From?", *American Journal of Sociology*, vol.104, no.5, 1999, 473-506.
- Gupta, Bina, "Samkara's Notion of Saksin", in Nagendra Kr. Singh ed., *Encyclopaedia of Hinduism* (New Delhi: Anmol Publications, 2000).
- Gupta, Bina, *The Disinterested Witness: A Fragment of Advaita Vedanta Phenomenology* (Evanston: Northwestern University Press, 1998).

- Gupta, Joyeeta, "Global Sustainable Development Governance: Institutional Challenges from a Theoretical Perspective", *International Environmental Agreements: Politics, Politics, Law and Economics*, vol.2, no.4, 2002, pp.361-88.
- Gurvitch, Georges, *Sociology of Law* (London: Routledge & Kegan Paul, 1947).
- Guzman, Andrew T., *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008).
- Guzman, Andrew T., "Saving Customary International Law", *Michigan Journal of International Law*, vol.27, no.1, 2005, pp.115-76.
- Guzman, Andrew T., "The Design of International Agreements", *European Journal of International Law*, vol.16, no.4, 2005, pp.579-612.
- Guzman, Andrew T., "A Compliance-Based Theory of International Law", *California Law Review*, vol.90, no.6, 2002, pp.1823-87.
- Haack, Susan, *Evidence and Enquiry: Towards Reconstruction in Epistemology* (Oxford: Blackwell, 1993).
- Haanappel P.P.C., "Article XI of the Moon Treaty", *Proceedings of the Twenty Third Colloquium on the Law of Outer Space*, 1980, pp.29-34.
- Haas, Peter M., "Introduction: Epistemic Communities and International Policy Coordination", *International Organization*, vol.46, no.1, 1992, pp.1-35.
- Habito, Ruben L.F., "Compassion out of Wisdom", in Stephen Garrard Post, ed., *Altruism and Altruistic Love: Science, Philosophy, and Religion in Dialogue* (Oxford: Oxford University Press, 2002), pp.362-75
- Hafner, Gerhard, "Pros and Cons Ensuing from Fragmentation of International", *Michigan Journal of International Law*, vol.25, no.4, 2004, pp.849-63.
- Haggard, Stephan & Simmons, Beth, "Theories of International Regimes", *International Organization*, vol.41, no.3, 1987, pp.491-517.
- Hajjar, Lisa, "Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in Israel/Palestine", *Law & Society Review*, vol.31, no.3, 1997, pp.473-504.
- Hakapää, Kari, "Jurisdictional Developments and the Law of the Sea Convention: Some Observations on Vessel-Source Pollution", in S. Mahmoudi & N.H. Nordquist, eds., *Stockholm Declaration and the Law of Marine Environment* (The Hague: Kluwer, 2003), pp.277-85.
- Halabi, Yakub, "The Expansion of Global Governance into the Third World: Altruism, Realism, or Constructivism", *International Studies Review*, vol.6, no.1, 2004, pp.21-48.
- Haley, Andrew G., *Space Law and Government* (New York: Appleton-Century-Crofts, 1963).
- Haley, Andrew G., "Survey of Legal Opinion on Extraterrestrial Jurisdiction", *Proceedings of the Third Colloquium, on the Law of Outer Space*, 1960, pp.37-92.
- Haley, Andrew G., "Space Age Presents Immediate Legal Problems", *Proceedings of the First Colloquium on the Law of Outer Space*, 1958, pp.5-27.
- Hall, Stephen, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism", *European Journal of International Law*, vol.12, no.2, 2001, pp.269-307.
- Halpin, Andrew, "Ideology and Law", *Journal of Political Ideologies*, vol.11, no.2, 2006, pp.153-68.

- Halttunen, Rauno, "Justification as a Process of Discovery", *Ratio Juris*, vol.13, no.4, 2000, pp.379-91.
- Hamburger, Joseph & Hamburger, Lotte, *Troubled Lives: John and Sarah Austin* (Toronto: University of Toronto Press, 1985).
- Handl, Gunther, "Territorial Sovereignty and the Problem of Transboundary Pollution", *American Journal of International Law*, vol.69, no.1, 1975, pp.50-76.
- Handler, Joel F., "Postmodernism, Protest, and the New Social Movements", *Law & Society Review*, vol.26, no.4, 1992, pp.697-732.
- Hardin, Garrett, "The Tragedy of Commons", *Science*, vol.162, no.3859, 1968, pp.1243-48.
- Harris, D.J., *Cases and Materials on International Law* (London: Sweet and Maxwell, 2004).
- Harrison, B., *Lean and Men* (New York: Basic Books, 1994).
- Harrison, Ross, *Bentham: The Arguments of the Philosophies* (London: Routledge, 1999).
- Hart, H.L.A., *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon, 1982).
- Hart, H.L.A., *Concept of Law* (Oxford: Clarendon Press, 1961).
- Hart, H.L.A., "Positivism and the Separation of Law and Morals", *Harvard Law Review*, vol.71, no.4, 1958, pp.593-629.
- Harvey, David, "Neoliberalism as Creative Destruction", *Annals of the American Academy of Political and Social Science*, vol.620, no.1, 2007, pp.21-44.
- Hasenclever, Andraes, Mayer, Peter, & Rittberger, Volker, *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997).
- Hass, Ernst B., *The Uniting of Europe: Political Economic, and Social Forces, 1950-1957* (Stanford: Stanford University Press, 1958).
- Hausman, D.M., "Economics, Philosophy of", in Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.4159-65.
- Hausman, Daniel M., *The Inexact and Separate Science of Economics* (Cambridge: Cambridge University Press, 2002).
- Hausman, Daniel M., "Rational Choice and Social Theory: A Comment", *Journal of Philosophy*, vol.92, no.2, 1994, pp.96-102.
- Hawking, Stephen W., *A Brief History of Time* (New York: Bantam Books, 1998).
- Hawkins, Bradley K., *Buddhism* (London: Routledge, 1999).
- Heidegger, Martin, *What is Philosophy?* Jean T. Wilde & William Kluback trans. (Lanham: Rowman & Littlefield Publishers, 1956).
- Heiskanen, Veijo, "Architexture: An Outline of an Alternative Philosophy of Global Governance", *Finnish Yearbook of International Law*, vol.17, 2006, pp.233-60.
- Heiskanen, Veijo, "The Regulatory Philosophy of International Trade Law", *Journal of World Trade*, vol. 38, no.1, 2004, pp.1-36.
- Heiskanen, Veijo, *International Legal Topics* (Helsinki: Finnish Lawyers' Publishing Company, 1992).
- Held, David, et al., *Global Transformations: Politics, Economics, and Culture* (Cambridge: Polity Press, 1999).
- Heller, Thomas C., "Structuralism and Critique", *Stanford Law Review*, vol.36, nos.1&2, 1984, pp.127-98.

- Henderson, Lynne N., "Legality and Empathy", *Michigan Law Review*, vol.85, no.7, 1987, pp.1574-653.
- Henkin, Louis, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff Publishers, 1995).
- Heydebrand, Wolf, "Process Rationality as Legal Governance: A Comparative Perspective", *International Sociology*, vol.18, no.2, 2003, pp.325-49.
- Higgins, Rosalyn, "Respecting Sovereign States and Running a Tight Courtroom", *International and Comparative Law Quarterly*, vol.50, no.1, 2001, pp.121-32.
- Higgins, Rosalyn, "McDougal as Teacher, Mentor and Friend", *Yale Law Journal*, vol.108, no.5, 1999, pp.957-60.
- Hiriyanna, M., *Outlines of Indian Philosophy* (Delhi: Motilal Banarsidass, 1993).
- Hiscox, Michael J., "The Magic Bullet? RTAA, Institutional Reform, and Trade Liberalization", *International Organization*, vol.53, no.4, 1999, pp.668-91.
- Hobbes, Thomas, *Leviathan* (Cambridge: Cambridge University Press, 1991).
- Hobe, Stephan & Hettling, Jana K., "Challenges to Space Law in the 21st Century – Project 2001 Plus", *Proceedings of the Forty Fifth Colloquium on the Law of Outer Space*, 2002, pp.51-55.
- Hodgkiss, Philip, *The Making of the Modern Mind* (New York: Anthlone Press, 2001).
- Hoekman, Bernard M., & Kostecki, Michael, *The Political Economy of the World Trading System: from GATT to WTO* (Oxford: Oxford University Press, 1995).
- Hoekman, Bernard M., "New Issues in the Uruguay Round and Beyond", *The Economic Journal*, vol.103, no.421, 1993, pp.1528-39.
- Hoffman, Geoffrey, "Critique, Culture, and Commitment: The Dangerous and Counterproductive Paths of International Legal Discourse", *Nova Law Review*, vol.29, no.1, 2005, pp.211-85.
- Hofmann, Mahulena, "Space Cemeteries: A Challenge for the Legal Regime of Outer Space", *Proceedings of the Forty Third Colloquium on the Law of Outer Space*, 2000, pp.380-89.
- Hogan, John C., "Legal Terminology for the Upper Regions of the Atmosphere and for the Space Beyond the Atmosphere", *American Journal of International Law*, vol.51, no.2, 1957, pp.362-75.
- Hollands, Edmund H., "Schleiermacher's Development of Subjective Consciousness", *Philosophical Review*, vol.15, no.3, 1906, pp.293-306.
- Hollinger, David A., "T.S. Kuhn's Theory of Science and Its Implication for History", *American Historical Review*, vol.78, no.2, 1973, pp.370-93.
- Hollis, Duncan B., "Private Actors in Public International Law: Amicus Curiae and the Case of the Retention of State Sovereignty", *Boston College International and Comparative Law Review*, vol.25, no.2, 2002, pp.235-55.
- Hope, Wayne, "Conflicting Temporalities: State, Nation, Economy, and Democracy under Global Capitalism", *Time and Society*, vol.18, no.1, 2009, pp.62-85.
- Horelick, Arnold L., "Outer Space and Earth Bound Politics", *World Politics*, vol.13, no.2, 1961, pp.323-29.
- Horsford, Cyril E.S., "The Need for a Moon Treaty and Clarification of the Legal Status of Space Vehicles", *Proceedings of the Ninth Colloquium on the Law of Outer Space*, 1966, pp.48-49.
- Horwitz, Morton J., "The Rise of Legal Formalism", *American Journal of Legal History*, vol.19, no.4, 1975, pp.251-64.

- Houben, Jan, "The Sanskrit Tradition", in Wout van Bekkum, ed., *The Emergence of Semantics in Four Linguistic Traditions* (Philadelphia: John Benjamins Publishing Company, 1997), p.49-145.
- Howse, Robert, "From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trade Regime", *American Journal of International Law*, vol.96, no.1, 2002, pp.94-117.
- Howse, Robert, "The Legitimacy of the World Trade Organization", Jean-Marc Coicaud & Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo: United Nations University 2001), pp.355-407.
- Hsiung, Bingyuan, "The Commonality Between Economics and Law", *European Journal of Law and Economics*, vol.18, no.1, 2004, pp.33-53.
- Hudec, Robert, Kennedy, Daniel, & Sgarbossa, Mark, "A Statistical Profile of GATT Dispute Settlement Cases 1948-1989", *Minnesota Journal of Global Trade*, vol.2, no.1, 1993, pp.4-101.
- Huemer, Michael, *Epistemology: Contemporary Readings* (London: Routledge, 2002).
- Hull, Cordell, *Memoirs of Cordell Hull* (New York: Mcmillan, 1948).
- Hume, David, *A Treatise of Human Nature* (Oxford: Oxford University Press, 1981).
- Hunt, Alan, "The Theory of Critical Legal Studies", *Oxford Journal of Legal Studies*, vol.6, no.1, 1986, pp.1-45.
- Hurwitz, Bruce A., *State Liability for Outer Space Activities* (Dordrecht: Martinus Nijhoff Publishers, 1991).
- Hurwitz, Deena R., "The Politics of the People, Human Rights, and What is Hidden from View", *George Washington International Law Review*, vol.37, no.1, 2005, pp.293-307.
- Hussein, Abdirahman A., *Edward Said: Criticism and Society* (New York: Verso, 2002).
- Huxley, Aldous, "The Minimum Working Hypothesis", in Christopher Isherwood, ed., *Vedanta for the Western World* (Hollywood: Vedanta Society of Southern California, 1945).
- Hwang, Jun-shik, "A Sense and Sensibility of Legal Obligation: Customary International Law and Game Theory", *Temple International and Comparative Law Journal*, vol.20, no.1, 2005, pp.111-31.
- Ikenberry, John G., "Rethinking the Origins of American Hegemony", *Political Science Quarterly*, vol.104, no.3, 1989, pp.375-400.
- Indich, William M., *Consciousness in Advaita Vedanta* (Delhi: Motilal Banarsidass Publishers, 1980), pp.67-116.
- Ingo, Merlinda D. & Nash, John, eds., *Agriculture and the WTO: Creating a Trading System for Development* (Washington DC: World Bank, 2004).
- Irwin, Douglas A., "GATT in Historical Perspective", *The American Economic Review*, vol.85, no.2, 1995, pp.323-28.
- Isachsen, Arne Jon, Hamilton, Carl, & Gylfason, Thorvaldur, *Understanding the Market Economy* (Oxford: Oxford University Press, 1992).
- Isayeva, Natalia, *Shankara and Indian Philosophy* (New York: State University of New York Press, 1993).
- Ivan Vlastic, "The Space Treaty: A Preliminary Evaluation", *California Law Review*, vol.55, no.2, 1967, pp.507-19.
- Jackson, John H., "Sovereignty-Modern: A New Approach to an Outdated Concept", *American Journal of International Law*, vol.97, no.4, 2003, pp.782-802.

- Jackson, John H., "Afterword: The Linkage Problem—Comments on Five Texts", *American journal of International Law*, vol.96, no.1, 2002, pp.118-25
- Jackson, John H., *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000).
- Jackson, John H., "Dispute Settlement and the WTO: Emerging Problems", *Journal of International Economic Law*, vol.1, no.3, 1998, pp.329-51.
- Jackson, John H., "The WTO Dispute settlement Understanding - Misunderstandings of the Nature of Legal Obligation", *American Journal of International Law*, vol.91, no.1, 1997, pp.60-64.
- Jackson, John H., "Appraising the Launch and Functioning of WTO", *German Yearbook of International Law*, vol.39, 1996, pp.20-41.
- Jackson, John H., "The World Trade Organization: Watershed Innovations or Cautious Small Step Forward", *World Economy*, vol.18, no.1, 1995, pp.11-31.
- Jackson, Robert, *Sovereignty* (Cambridge: Polity Press, 2007).
- Jacobini, H.B., "Some Observations Concerning Jeremy Bentham's Concepts of International Law", *American Journal of International Law*, vol.42, no.2, 1948, pp.415-17.
- Jakubczak, Marzenna, "Towards Knowing Ourselves: Classical Yoga Perspective", *Journal of Human Values*, vol.10, no.2, 2004, pp.111-16.
- James, Michael, *Happiness and the Art of Being* (Victoria: Trafford Publishing, 2007).
- Janis, M.W., "Jeremy Bentham and the Fashioning of International Law", *American Journal of International Law*, vol.78, no.2, 1984, pp.405-18.
- Janzen, Henry, "Kelsen's Theory of Law", *The American Political Science Review*, vol.31, no.2, 1937, pp.205-26.
- Jasentuliyana, Nandasiri, "A Survey of Space Law as Developed by the United Nations", Nandasiri Jasentuliyana, ed., *Perspectives of International Law* (London: Kluwer Law International, 1995), pp.349-83.
- Jay, Martin, "The Life World and Lived Experience", in Hubert L. Dreyfus & Mark A. Wrathall, eds., *A Companion to Phenomenology and Existentialism* (Malden: Blackwell Publishing Ltd., 2006), pp.91-104.
- Jenks, Wilfred, "Seven Stages in the Development of Space Law", *Proceedings of the Eleventh Colloquium on the Law of Outer Space*, 1968, pp.246-63.
- Jenks, Wilfred, *Space Law* (New York: Frederick A. Praeger, 1966).
- Jenks, Wilfred, *Law, Freedom, and Welfare* (New York: Oceana Publications, 1964).
- Jenks, Wilfred, "The International Control of Outer Space", *Proceedings of the Third Colloquium on the Law of Outer Space*, 1960, pp.3-15.
- Jenks, Wilfred, *The Common Law of Mankind* (New York: Frederick A. Praeger, 1958).
- Jenks, Wilfred, "Craftsmanship in International Law", *American Journal of International Law*, vol.50, no.1, 1956, pp.32-60.
- Jenks, Wilfred, "International Law and Activities in Space", *International and Comparative Law Quarterly*, vol.5, no.1, 1956, pp.99-114.
- Jenks, Wilfred, "The Conflict of Law-Making Treaties", *British Yearbook of International Law*, vol.30, 1953, pp.401-50.
- Jenks, Wilfred, "The Need for an International Legislative Drafting Bureau", *American Journal of International Law*, vol.39, no.2, 1945, pp.163-79.
- Jennings, Robert & Watts, Arthur, *Oppenheim's International Law, Volume I, Peace* (Harlow: Longman, 1992).

- Jervis, Robert, "Security Regimes", *International Organization*, vol.36, no.2, 1982, pp.357-78.
- Jiang, Tao, "Storehouse Consciousness and the Unconscious: A Comparative Study of Xuan Zang and Freud on the Subliminal Mind", *Journal of the American Academy of Religion*, vol.72, no.1, 2004, pp.119-39.
- Jodoin, Sébastien, "International Law and Alterity: The State and the Other", *Leiden Journal of International Law*, vol.21, no.1, 2008, pp.1-28.
- Johnson, Kathryn Ann, "The Social Construction of Emotions in the Bhagavad Gita: Locating Ethics in a Redacted Text", *Journal of Religious Ethics*, vol.35, no.4, 2007, pp.655-79.
- Jouannet, Emmanuelle, "Universalism and Imperialism: The True-False Paradox of International Law", *European Journal of International Law*, vol.18, no.3, 2007, pp.379-407.
- Joyner, Christopher C., "Legal Implications of the Concept of Common Heritage of Mankind", *International and Comparative Law Quarterly*, vol.35, no.1, 1986, pp.190-99.
- Kaku, Michio, *Parallel Worlds: A Journey Through Creation, Higher Dimensions, and the future of the Cosmos* (New York: Doubleday, 2005).
- Kang, Sung Yong, "An Inquiry into the Definition of *tarka* in Nyaya Tradition and Its Connotations of Negative Speculation", *Journal of Indian Philosophy*, vol.38, no.1, 2010, pp.1-23.
- Kant, Immanuel, *Critique of Pure Reason*, Trans. & Eds. Paul Guyer & Allen W. Wood (Cambridge: Cambridge University Press, 1998).
- Kant, Immanuel, *Religion and Rational Theology*, trans. & eds., Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1996).
- Kant, Immanuel, *Lectures on Logic* (Cambridge: Cambridge University Press, 1992).
- Kapur, Devesh, "Processes of Change in International Organizations", in Deepak Nayyar ed., *Governing Globalization* (Oxford: Oxford University Press, 2002).
- Keane, John, *Global Civil Society?* (Cambridge: Cambridge University Press, 2003).
- Kearney, M., "The Local and the Global: The Anthropology of Globalization and Transnationalism", *Annual Review of Anthropology*, vol.24, 1995, pp.547-65.
- Kebede, Messay, "Science and Ideology via Development", *Journal of Value Inquiry*, vol.26, no.4, 1992, pp.483-94.
- Keech, William, "Politics, Economics, and Politics Again", *Journal of Politics*, vol.53, no.3, 1991, pp.597-611.
- Kekes, John, "The Informed Will and the Meaning of Life", *Philosophy and Phenomenological Research*, vol.47, no.1, 1986, pp.75-90.
- Kelly, Claire R., "Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on other Actors and Regimes", *Berkeley Journal of International Law*, vol.24, no.1, 2006, pp.79-128.
- Kelsen, Hans, *Principles of International Law* (Clark, N.J: Lawbook Exchange, 2003).
- Kelsen, Hans, *The General Theory of Norms* (Oxford: Clarendon, 1991).
- Kelsen, Hans, *The General Theory of Law and the State* (New York: Russell & Russell, 1945).
- Kennedy, D., "Legal Formalism", Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), 8634-38.

- Kennedy, David, "The Mystery of Global Governance", *Ohio Northern University Law Review*, vol.34, no.3, 2008, pp.827-60.
- Kennedy, David, "Challenging Expert Rule: The Politics of Global Governance", *Sydney Law Review*, vol.27, no.1, 2007, pp.5-28.
- Kennedy, David, "The Politics of the Invisible College: International Governance and the Politics of Expertise", *European Human Rights Law Review*, vol.2001, no.5, 2001, pp.463-97.
- Kennedy, David, "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream", *New York University Review of Law & Social Change*, vol.31, no.3, 2007, pp.641-59.
- Kennedy, David, "My Talk at the ASIL: What is New Thinking in International Law?", *American Journal of International Law*, vol.94, no.1, 2000, pp.104-24.
- Kennedy, David, "Images of Religion in International Legal Theory", in Mark W. Janis & Carolyn Evans, eds., *Religion and International Law* (The Hague: Martinus Nijhoff Publishers, 1999), pp.145-53.
- Kennedy, David, "The Discipline of International Law and Policy", *Leiden Journal of International Law*, vol.12, no.1, 1999, pp.9-133.
- Kennedy, David, "International Law and the Nineteenth Century: History of an Illusion", *Nordic Journal of International Law*, vol.65, nos.3&4, 1996, pp.385-420.
- Kennedy, David, "The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law", *American University Journal of International Law and Policy*, vol.10, no.2, 1995, pp.671-716.
- Kennedy, David, "A New Stream of International Law Scholarship", *Wisconsin International Law Journal*, vol.7, no.1, 1988, pp.1-49.
- Kennedy, David, *International Legal Structures* (Baden-Baden: Nomos Verlagsgesellschaft, 1987).
- Kennedy, David, "The Sources of International Law", *American University Journal of International Law and Policy*, vol.2, no.1, 1987, pp.1-96.
- Kennedy, David, "The Turn to Interpretation", *Southern California Law Review*, vol.58, no.1, 1985, pp.251-75.
- Kennedy, Duncan, "The Role of Law in Economic Thought: Essays on the Fetishism of Commodities", *American University Law Review*, vol.34, no.4, 1985, pp.939-1001.
- Kennedy, Duncan, "The Political Significance of the Structure of the Law School Curriculum", *Seton Hall Law Review*, vol.14, no.1, 1983, pp.1-16.
- Kennedy, Duncan, "Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940", *Research in Law and Sociology*, vol.3, 1980, pp.3-24.
- Kennedy, Duncan, "Form and Substance in Private Law Adjudication", *Harvard Law Review*, vol.89, no.8, 1975, pp.1685-778.
- Keohane, Robert O., "Rational Choice Theory and International Law: Insights and Limitations", *Journal of Legal Studies*, vol.31, no.1, 2002, pp.S307-S319.
- Keohane, Robert O., *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).
- Keohane, Robert O., "The Demand for International Regimes", *International Organization*, vol.36, no.2, 1982, pp.325-55.
- Keohane, Robert O. & Nye, Joseph S. Jr., *Power and Interdependence: World Politics*

- in Transition* (Boston: Little, Brown, 1977).
- Keohane, Robert O., "International Organization and the Crisis of Interdependence", *International Organization*, vol.29, no.2, 1975, pp.357-65.
- Khrebtukova, Alexandra, "A Call to Freedom: Towards, a Philosophy of International Law in an Era of Fragmentation", *Journal of International Law & International Relations*, vol.4, no.1, 2008, pp.51-103.
- Kim, C.L., "The Amicus Brief Issue at the WTO", *Chinese Journal of International Law*, vol.4, no.1, 2005, pp.85-120.
- Kindleberger, Charles P., "Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides", *International Studies Quarterly*, vol.25, no.2, 1981, pp.242-54.
- Kindleberger, Charles, *The World in Depression: 1929-39* (Berkeley: University of California Press, 1973).
- King, Chris, "Quantum Cosmology and the Hard Problem of the Conscious Brain", in Jack A. Tuszynski ed., *The Emerging Physics of Consciousness* (Heidelberg: Springer-Verlag, 2006), pp.407-56.
- King, Michael, "The 'Truth' about Autopoiesis", *Law & Society Review*, vol.20, no.2, 1993, 218-36.
- Kirloskar-Steinbach, Monika, "Toleration in Modern Liberal Discourse with Special Reference to Radhakrishnan's Tolerant Hinduism", *Journal of Indian Philosophy*, vol.30, no.2, 2002, pp.389-402.
- Kiss, Alexander, "The International Protection of Environment", in R. St. J. Macdonald & D.M. Johnston, eds., *The Structure and Process of International Law* (Dordrecht: Martinus Nijhoff, 1986), pp.1069-87.
- Klabbers, Jan, "The Paradox of International Institutional Law", *International Organizations Law Review*, vol.5, no.1, 2008, pp.151-73.
- Klabbers, Jan, "Two Concepts of International Organization", *International Organizations Law Review*, vol.2, no.2, 2005, pp.277-93.
- Klabbers, Jan, "Constitutionalism Lite", *International Organizations Law Review*, vol.1, no.1, 2004, pp.31-58.
- Knorr, Klaus, "On the International Implications of Outer Space", *World Politics*, vol.12, no.4, 1960, pp.564-84.
- Koivurova, Timo, "The International Court of Justice and Peoples", *International Community Law Review*, vol.9, no.1, 2007, pp.157-80.
- Kolodko, Grzegorz, ed., *Emerging Market Economies: Globalization and Development* (London: Ashgate, 2003).
- Koons, Judith E., "Earth Jurisprudence: The Moral Value of Nature", *Pace Environmental Law Review*, vol.25, no.2, 2008, pp.263-339.
- Kopal, Vladimir, "United Nations and the Progressive Development of International Space Law", *Finnish Yearbook of International Law*, vol.7, 1996, pp.1-58.
- Kopal, Vladimir, "Issues Involved in Defining Outer Space, Space Object, and Space Debris", *Proceedings of the Thirty Forth Colloquium on the Law of Outer Space*, 1991, pp.38-44.
- Korhonen, Outi, "International Lawyer: Towards Conceptualization of the Changing World and Practice", in Jens Drolshammer & Michael Pfeifer, eds., *The Internationalization of the Practice of Law* (The Hague: Kluwer Law International, 2001), pp.373-84.

- Korhonen, Outi, "New International Law: Silence, Defence or Deliverance?", *European Journal of International Law*, vol.7, no.1, 1996, pp.1-28.
- Kornhauser, Lewis A., "The Great Image of Authority", *Stanford Law Review*, vol.36, nos.1&2, 1984, pp.349-89.
- Koskenniemi, Martti, "Miserable Comforters: International Relations as New Natural Law", *European Journal of International Relations*, vol.15, no.3, 2009, pp.395-422.
- Koskenniemi, Martti, "The Advantage of Treaties: International Law in the Enlightenment", *Edinburg Law Review*, vol.13, no.1, 2009, pp.27-67.
- Koskenniemi, Martti, "The Politics of International Law: 20 Years Later", *European Journal of International Law*, vol.20, no.1, 2009, pp.7-19.
- Koskenniemi, Martti, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization", *Theoretical Enquires in Law*, vol.8, no.1, 2007, pp.9-36.
- Koskenniemi, Martti, "Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law", *No Foundations*, vol.4, no.2, 2007, pp.7-28.
- Koskenniemi, Martti, "International Law: Constitutionalism, Managerialism and the Ethos of Legal Education", *European Journal of Legal Studies*, vol.1, no.1, 2007.
- Koskenniemi, Martti, "The Fate of Public International Law: Between Technique and Politics", *Modern Law Review*, vol.70, no.1, 2007, pp.1-30.
- Koskenniemi, Martti, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Report of the Study Group of the International Law Commission (A/CN.4/L.682)*, 13 April 2006.
- Koskenniemi, Martti, *From Apology to Utopia: Structure of International Legal Arguments* (Cambridge: Cambridge University Press, 2006).
- Koskenniemi, Martti, "International Law as Therapy: Reading the Health of Nations", *European Journal of International Law*, vol.16, no.2, 2005, pp.329-41.
- Koskenniemi, Martti, "International Law in Europe: Between Tradition and Renewal", *European Journal of International Law*, vol.16, no.1, 2005, pp.113-24.
- Koskenniemi, Martti, "International Legislation Today: Limits and Possibilities", *Wisconsin International Law Journal*, vol.23, no.1, 2005, pp.61-93.
- Koskenniemi, Martti, "What Should International Lawyers Learn from Karl Marx?", *Leiden Journal of International Law*, vol.17, no.2, 2004, pp.229-46.
- Koskenniemi, Martti, "Legal Cosmopolitanism: Tom Franck's Messianic World", *New York University Journal of International Law and Politics*, vol.3 no.2, 2003, pp.471-86.
- Koskenniemi, Martti, "What is International Law For?", in Malcolm D. Evans, ed., *International Law* (Oxford: Oxford University Press, 2003), pp.57-81.
- Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (Cambridge: Cambridge University Press, 2002).
- Koskenniemi, Martti, "Letter to the Editor of the Symposium", *American Journal of International Law*, vol.93, no.2, 1999, pp.351-61.
- Koskenniemi, Martti, "Special Issue: New Approaches to International Law", *Nordic Journal of International Law*, vol.65, no.3&4, 1996, pp.337-40.
- Koskenniemi, Martti, "The Politics of International Law", *European Journal of International Law*, vol.1, no.1&2, 1990, pp.4-32.

- Koskenniemi, Martti & Leino, Päivi, "Fragmentation of International Law? Postmodern Anxieties", *Leiden Journal of International Law*, vol.15, no.3, 2002, pp.553-79.
- Köchler, Hans, "Phenomenological Skepticism", *Man and World*, vol.15, no.3, 1982, pp.247-58.
- Krasner, Stephen D., "Multinational Corporations, in Jeffrey A. Frieden & David Lake, eds., *International Political Economy: Perspectives on Global Power and Wealth* (London: Unwin Hyman, 1991).
- Krasner, Stephen D., "Structural Causes and Regime Consequences: Regimes as Intervening Variables", *International Organization*, vol.36, no.2, 1982, pp.185-205.
- Krishan, Yuvraj, *The Doctrine of Karma* (Delhi, Motilal Banarsidass, 1997).
- Krishnananda, Swami, *The Philosophy of Life* (Rishikesh: The Divine Life Society, 1992).
- Krishnanda, Swami, *The Philosophy of Panchadasi* (Rishikesh: The Divine Life Society, 1992).
- Kritzer, Herbert M., "The Professions are Dead, Long Live the Professions: Legal Practice in a Postprofessional World", *Law & Society Review*, vol.33, no.3, 1999, pp.713-59.
- Kritzer, Herbert M., *Legal Advocacy: Lawyers and Nonlawyers at Work* (Ann Arbor: University of Michigan Press, 1998).
- Krueger, Anne O., ed., *The WTO as an International Organization* (Oxford: Oxford University Press, 1998).
- Kucherov, Samuel, "Legal Problems of Outer Space: USA and Soviet Viewpoints", *Proceedings of the Second Colloquium on the Law of Outer Space*, 1959, pp.64-74.
- Kunz, Joseph L., "Pluralism of Legal and Vale Systems and International Law", *American Journal of International Law*, vol.49, no.3, 1955, pp.370-76.
- Kunz, Joseph L., "The United Nations Declaration of Human Rights", *American Journal of International Law*, vol.43, no.2, 1949, pp.316-23
- Kuokkanen, Tuomas, *International Law and the Environment: Variations on a Theme* (The Hague: Kluwer Law International, 2002).
- Kuyper, P.J., "The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-contained Regimes?", *Netherlands Yearbook of International Law*, vol.25, 1994, pp.227-57.
- Lachapelle, Richard, Deborah Murray, & Sandy Neim, "Aesthetic Understanding as Informed Experience: The Role of Knowledge in Our Art Viewing Experiences", *Journal of Aesthetic Education*, vol.37, no.3, 2003, pp.78-98.
- Lachs, Manfred, "Foreword", *Manual of Space Law Vol.1*, Nandasiri Jasentuliyana & Roy S.K. Lee, eds., (New York: Oceana Publications, 1979).
- Lachs, Manfred, "The International Law of Outer Space", *Recueil Des Course*, 1964 III.
- Lafleur, Laurence J., "Time as a Fourth Dimension", *Journal of Philosophy*, vol.37, no.7, 1940, pp.169-78.
- Lamy, Pascal, "The Place of the WTO and its Law in the International Legal Order", *European Journal of International Law*, vol.17, no.5, 2007, pp.969-84.
- Landes, William & Posner, Richard A., "Altruism in Law and Economics", *American Economic Review*, vol.68, no.2, 1978, pp.417-21.

- Lane, Silvia T. Maurer, "Ideology and Consciousness", *Theory & Psychology*, vol.9, no.3, 1999, pp.367-78.
- Lange, Margaret, "Legal Theory and International Law in Austin, Hart, and Kelsen", *Mini-ASPA, 2004* (on file with the author).
- Langhelle, Oluf, "Sustainable Development: Exploring the Ethics of Our Common Future", *International Political Science Review*, vol.20, no.2, 1999, pp.129-49.
- Larsen, Paul B., "Use of GNSS Evidence for Land Surveys: Legal Acceptability", *Proceedings of the Thirty Eighth Colloquium on the Law of Outer Space*, 1995, pp.285-92.
- Larson, Gerald James, *Classical Samkhya: An Interpretation of Its History and Meaning* (Delhi: Motilal Banarsidass, 1969).
- Lash, Scott, "Capitalism and Metaphysics", *Theory, Culture, & Society*, vol.24, no.5, 2007, pp.1-26.
- Lauterpacht, H., "The Grotian Tradition in International Law", Richard Falk *et. al.*, ed., *International Law: A Contemporary Perspective* (Boulder: Westview Press, 1985).
- Lauterpacht, Hersch, *International Law and Human Rights* (New York: Garland Publishing Inc., 1973).
- Lawrence, Robert M., *Strategic Defence Initiative: Bibliography and Research Guide* (Colorado: Westview Press, 1987).
- Leaman, Oliver, *Key Concepts in Eastern Philosophy* (London: Routledge, 1999).
- Leathley, Christian, "An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?", *New York University Journal of International Law and Politics*, vol.40, no.1, 2007, pp.259-306.
- Leben, Charles, "Hans Kelsen and the Advancement of International Law", *European Journal of International Law*, vol.9, no.2, 1998, pp.287-305.
- Lecerle, Jean-Jacques, "Postmodernism and Language", in Roy Boyne & Ali Rattansi, eds., *Postmodernism and Society* (London: McMillan, 1990), pp.76-96.
- Lee, Keekok, *The Natural and the Artifact: The Implications of Deep Science and Deep Technology for Environmental Philosophy* (Maryland: Lixington, 1999).
- Lee, Simon & McBride, Stephen, "Introduction", in Simon Lee & Stephen McBride, eds., *Neo-liberalism, State Power and Global Governance in the Twenty-First Century* (Dordrecht: Springer, 2007), pp.1-24.
- Leebron, David W, "Linkages", *American Journal of International Law*, vol.96, no.1, 2002, pp.5-27.
- Leff, Arthur Allen, "Economic Analysis of Law: Some Realism about Nominalism", *Virginia Law Review*, vol.60, no.3, 1974, pp.451-82.
- Leibniz, Gottfried, *Philosophical Essays*, Roger Ariew & Daniel Garber, eds. & transl. (Cambridge: Hackett Publishing Company, 1989).
- Lemaitre, Julieta, "Legal Fetishism at Home and Abroad", *Unbound: Harvard Journal of the Legal Left*, vol.3, 2007, pp.6-18.
- Leone, Homo, "The Vedantic Absolute", *Mind: New Series*, vol.21, no.81, 1912, pp.62-78.
- Leuba, James H., "The Yoga System of Mental Concentration and Religious Mysticism", *Journal of Philosophy, Psychology, and Scientific Methods*, vol.16, no.8, 1919, pp.197-206.
- Levine, Marvin, *The Positive Psychology of Buddhism and Yoga* (Mahwah: Lawrence Erlbaum Associates, 2000).

- Levy, Steven A., "INTELSAT: Technology, Politics and the Transformation of a Regime", *International Organization*, vol.29, no.3, 1975, pp.655-80.
- Lewis, John S. & Lewis, Christopher F., "A Proposed International Legal Regime for the Era of Private Commercial Utilization of Space", *George Washington International Law Review*, vol.37, no.3 2005, pp.745-67.
- Lewis, Martin W., "Is there a Third World?", *Current History*, November 1999, pp.355-58.
- Li-ann, Thio, "Formalism, Pragmatism, and Critical Theory: Reflections on Teaching and Constructing an International Law Curriculum in a New (Post-Colonial) Asia", *Singapore Journal of International and Comparative Law*, vol.5, no.2, 2001, pp.327-54.
- Lie, John, "Sociology of Markets", *Annual Review of Sociology*, vol.23, 1997, pp.341-63.
- Lindroos, Anja & Mehling, Michael, "From Autonomy to Integration? International Law, Free Trade and the Environment", *Nordic Journal of International Law*, vol.77, no.3, 2008, pp.253-73 at 260-67.
- Lindroos, Anja & Mehling, Michael, "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO", *European Journal of International Law*, vol.16, no.5, 2006, pp.857-77.
- Lindroos, Anja, "Addressing Norm Conflict in a Fragmented Legal System: The Doctrine of *Lex Specialis*", *Nordic Journal of International Law*, vol.74, no.1, 2005, pp.27-66.
- Lissitzyn O.J., "The American Position in Outer Space and Antarctica", *American Journal of International Law*, vol.53, no.1, 1959, pp.126-31.
- Llewellyn, K.N., "On the Good, the True, the Beautiful, in Law", *University of Chicago Law Review*, vol.9, no.2, 1942, pp.224-65.
- Lloyd & Freeman, M.D.A., *Lloyd's Introduction to Jurisprudence* (London: Stevens, 1985).
- Lloyd, Dennis, *The Idea of Law* (Middlesex: Penguin Books, 1981).
- Lowe, Vaughan, "Sustainable Development and Unsustainable Arguments", in Alan Boyle & David Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999), pp.19-38.
- Lynch, Cecelia, "A Neo-Weberian Approach to Religion in International Politics", *International Theory*, vol.1, no.3, 2009, pp.381-408.
- Liotard, Jean-François, "The Postmodern Condition", in Steven Seidman, ed., *The Postmodern Turn: New Perspectives on Social Theory* (Cambridge: Cambridge University Press, 1994), pp.27-38.
- Liotard, Jean-Francois, "Answering the Question: What is Postmodernism?", in Thomas Docherty, ed., *Postmodernism: A Reader* (New York: Harvester Wheatsheaf, 1993), pp.35-46.
- Mackaay, Ejan, "History of Law and Economics", in Boudewijn & Gerrit De Geest, *Encyclopedia of Law and Economics, Vol.I. The History and Methodology of Law and Economics* (Cheltenham: Edward Elgar), pp.65-117.
- Madhavananda, Swami, *Vivekachudamani of Sri Sankaracharya 1926* (Calcutta: Kuntaline Press, 1926),
- Madison, James, "The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection", *Federalist*, no. 10, 22 November 1787.

- Madsen, David, "The Scholar, the Scientist, and the Society: Unifying the Intellectual Community", *Journal of Higher Education*, vol.38, no.2, 1967, pp.96-101.
- Madsen, Jacob B., "Trade Barriers and the Collapse of World Trade during the Great Depression" *Southern Economic Journal*, vol.67, no.4. 2001, pp.848-68.
- Mahadevan, T.M.P., *Superimposition in Advaita Vedanta* (New York: APT Books, 1985).
- Makkonen, Timo, "Between Anti-Essentialism and Anti-Everything: Is there Anything? On Critique, Cross-Disciplinarity and Culture", in Jarna Petman & Jan Klabbers eds., *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden: Koninklijke Brill NV, 2003), pp.251-60.
- Malaval, Philippe & Benaroya, Christophe, *Aerospace Marketing Management* (Dordrecht: Kluwer, 2002).
- Malenovsky, Jiri, "The Antarctica Treaty System: A Suitable Model for the Further Development of Space", *Proceedings of the Thirty First Colloquium on the Law of Outer Space*, 1988, pp.312-18.
- Mälksoo, Lääri, "The Science of International Law and the Concept of Politics: The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur'ev/Tartu 1855-1985", *British Yearbook of International Law*, vol.76, 2005, pp.383-501.
- Malley, Robert, "The Third Worldist Moment", *Current History*, November 1999, pp.359-69.
- Mani V.S., "The Common Heritage of Mankind: Implication for the Legal Status of Property Rights on the Moon and Celestial Bodies", *Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space*, 1996.
- Maniatis, Dimitri, "The Law Governing Liability for Damage Caused by Space Objects: From State Responsibility to Private Liability", *Annals of Air and Space Law*, vol. XXII, 1997, pp.369-401.
- Marks, Stephen, "The Human Right to Development: Between Rhetoric and Reality", *Harvard Human Rights Journal*, vol.17, 2004, pp.137-68.
- Marks, Susan, "State-Centrism, International Law, and the Anxieties of Influence", *Leiden Journal of International Law*, vol.19, no.2, 2006, pp.339-47.
- Marks, Susan, "Big Brother is Bleeping US: With the Message that Ideology Doesn't Matter", *European Journal of International Law*, vol.12, no.1, 2001, pp.109-23.
- Marmor, Andrei, "Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory", *Law and Philosophy*, vol.10, no.4, 1991, pp.383-412.
- Mathiason, John, ed., *Invisible Governance: International Secretariats in Global Politics* (Bloomfield: Kumarian Press, 2007).
- Mathur, D.C., "The Concept of Self in the Upanishads: An Alternative Interpretation", *Philosophy and Phenomenological Research*, vol.32, no.3, 1972, pp.390-96.
- Matsushita, Mitsuo, "The Sutherland Report and its Discussion of Dispute Settlement Reforms", *Journal of International Economic Law*, vol.8, no. 3, 2005, pp.623-29.
- Matte, Nicolas Mateesco, "The Common Heritage of Mankind and the Outer Space: Toward a New International Order for Survival", *Annals of Air and Space Law*, vol.12, 1987, pp.313-36.
- Matte, Nicolas M., "Institutional Arrangements for Space Activities: An Appraisal", *Annals of Air and Space Law*, vol.61, 1981, pp.439-59.

- Matte, Nicolas M., "The Convention on the Registration of Objects Launched into Outer Space", *Annals of Air and Space Law*, vol.1, 1976, pp.231-41.
- Mavroidis, Petros, "Surveillance Schemes: The GATT's New Trade Policy Review Mechanism", *Michigan Journal of International Law*, vol.13, no.2, 1992, pp.374-414.
- McCulloch, Gary, "Disciplines Contributing to Education? Educational Studies and the Disciplines", *British Journal of Educational Studies*, vol.50, no.1, 2002, pp.100-19.
- McDonald, Judith A., O'Brien, Anthony P., & Callahan, Colleen M., "Trade Wars: Canada's Reaction to the Smoot-Hawley Tariff", *Journal of Economic History*, vol.57, no.4, 1997, pp. 802-26.
- McDougal, Luther L., "Professor Myres S. McDougal's Contribution to Legal Education", *Mississippi Law Journal*, vol.66, no.1, 1996, pp.27-36.
- McDougal, Myres & Burke, William T, *The Public Order of Oceans: A Contemporary International Law of the Sea* (New Haven: New Haven 1986).
- McDougal, Myres S. & Reisman Michael W., "International Law in Policy-Oriented Perspective", in R. St. J. MacDonald & Douglas M. Johnston eds., *The Structure and Process of International Law: Essays Legal Philosophy Doctrine and Theory* (The Hague: Martinus Nijhoff, 1983), pp.103-29.
- McDougal, Myres, "International Law and Social Science: A Mild Plea in Avoidance", *American Journal of International Law*, vol.66, no.1, 1972, pp.77-81.
- McDougal, Myres & Bebr, Gerhard, "Human Rights in the United Nations", *American Journal of International Law*, vol.58, no.3, 1964, pp.603-04.
- McDougal, Myres, Lasswell, Harold, & Vlassic, Ivan, *Law and Public Order in Space* (New Haven: Yale University Press, 1963).
- McDougal, Myres S. & Lasswell, Harold, "The Identification and Appraisal of Diverse Systems of Public Order", *American Journal of International Law*, vol.53, no.1, 1959, pp. 1-29.
- McDougal, Myres S. & Lipson, Leon, "Perspectives for a Law of Outer Space", *American Journal of International Law*, vol.52, no.3, 1958, pp.407-31.
- McDougal, Myres S., "The Law School of the Future: From Legal Realism to Policy Science in the World Community", *Yale Law Journal*, vol.56, no.8, 1947, pp.1345-55.
- McDougal, Walter A., "Technocracy and Statecraft in the Space Age: Toward the History of a Saltation", *American Historical Review*, vol.87, no.4, 1982, pp.1010-40.
- McFee, Graham, *Sport, Rules, and Values: Philosophical Investigations into the Nature of Sport* (London: Routledge, 2004).
- McGivern, Brendan P., "Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives", *The International Lawyer*, vol.36, no.1, 2002, pp.141-57.
- McMahon, C.E., "Images as Motives and Motivators: A Historical Perspective", *American Journal of Psychology*, vol.86, no.3, 1973, pp.465-90.
- McMichael, Philip, *Development and Social Change: A Global Perspective* (Thousand Oaks: Pine Forge, 1996).
- McMurtry, John, "The Contradictions of Free Market Doctrine: Is There a Solution?", *Journal of Business Ethics*, vol.16, no.7, 1997, pp.645-62.

- Megill, Allan, *Karl Marx: The Burden of Reason* (Oxford: Rowman & Littlefield Publishers, 2002).
- Melissaris, Emmanuel, *The Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (London: Ashgate, 2009).
- Meloni, Giovanni, "International Liability for Space Activity", *Proceedings of the Tenth Colloquium on the Law of Outer Space*, 1967, pp.185-201.
- Mendelson M.H., "The Flux and Reflux of the Law of the Sea", *Oxford Journal of Legal Studies*, vol.5, no.2, 1985, pp.285-91.
- Menter, Martin, "Relationship of Air and Space Law", *Proceedings of the Nineteenth Colloquium on the Law of Outer Space*, 1976, pp.164-74.
- Mercuro, Nicholas & Medema, Steven G., *Economics and the Law: From Posner to Post-Modernism* (Princeton: Princeton University Press, 1997).
- Meron, Theodor, "Norm Making and Supervision in International Human Rights: Reflections on Institutional Order", *American Journal of International Law*, vol.76, no.4, 1982, pp.754-78.
- Messer, Ellen, "Anthropology and Human Rights", *Annual Review of Anthropology*, vol.22, 1993, pp.221-49.
- Michalopoulos, Constantine, *Developing Countries in the WTO* (London: Palgrave, 2001).
- Mickelson, Karin, "Rhetoric and Rage: Third World Voices in International Legal Discourse", *Wisconsin International Law Journal*, vol.16, no.2, 1998, pp.353-419.
- Miéville, China, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Koninklijke Brill NV, 2005).
- Miller, Barbara Stoler, trans., *The Bhagavad Gita: Krishna's Counsel in Time of War* (New York: Bantam Classic, 1986).
- Miller, Jeremy M., "The Science of Law: The Maturing of Jurisprudence into Fundamental Principles in Fairness", *Western State University Law Review*, vol.13, no.2, 1986, pp.367-411.
- Miller, Richard S., "Legal Scholarship, Realism, and the Search for Minimum World Order", *World Politics*, vol.17, no.3, 1965, pp.478-94.
- Miller, Vincent, "New Media, Net Working and Phatic Culture", *Convergence*, vol.14, no.4, 2008, pp.387-400.
- Mills, Jonathan, "The Substance of Law", *Intercollegiate Review*, vol.27, no.1, 1991, pp.47-53.
- Milne, Joseph, "Advaita Vedanta and Typologies of Multiplicity and Unity: An Interpretation of Nondual Knowledge", *International Journal of Hindu Studies*, vol.1, no.1, 1997, pp.165-88.
- Misztal, Barbara A., *Theories of Social Remembering* (Berkshire, McGraw-Hill Education, 2003).
- Mitch, David, "The Role of Textbooks in Undergraduate Economic History Courses: Indispensable Tool or Superficial Convenience", *Journal of Economic History*, vol.50, no.2, 1990, pp.428-31.
- Mitchell, Wesley C., "Bentham's Felicific Calculus", *Political Science Quarterly*, vol.33, no.2, 1918, pp.161-84.
- Mitrany, David, *A Working Peace System* (Chicago: Quadrangle Press, 1966).
- Mohanty, J.N., "The Structure of the Religious World", *Sophia*, vol.37, no.1, 1998, pp.103-16.

- Monroe, K.R., "Altruism and Self-interest", Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.415-18.
- Monroe, Kristen Renwick, *Heart of Altruism: Perceptions of a Common Humanity* (Princeton: Princeton University Press, 1996).
- Monroe, Kristen Renwick, "A Fat Lady in a Corset: Altruism and Social Theory", *American Journal of Political Science*, vol.38, no.4, 1994, pp.861-93.
- Montague, Pepperell Wm., "The Human Soul and the Cosmic Mind", *Mind. New Series*, vol.54, no.213, 1945, pp.50-64.
- Montero, Barbara, "The Epistemic/Ontic Divide", *Philosophy and Phenomenological Research*, vol.66, no.2, 2003, pp.404-18.
- Montini, Massimiliano, "The Interplay between the Right to Development and the Protection of the Environment: Patterns and Instruments to Achieve Sustainable Development in Practice", *African Yearbook of International Law*, vol.10, 2002, pp.181-223.
- Moorhead, Richard, "Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales", *Law & Society Review*, vol.37, no.3, 2003, pp.765-808.
- Mortensen, Jens L., "The Institutional Requirements of the WTO in an Era of Globalization: Imperfection in the Global Economic Polity", *European Law Journal*, vol.6, no.2, 2000, pp.176-204.
- Muller, Max, *The Six Systems of Indian Philosophy* (Varanasi: Chowkhamba Sanskrit Series, 2008).
- Munger, Frank, "Inquiry and Activism in Law and Society", *Law & Society Review*, vol.35, no.1, 2001, pp.7-20.
- Muni, Rajarshi, *Yoga: The Ultimate Spiritual Path* (St. Paul, MN: Llewellyn Publications, 2001).
- Munro, William Bennett, "Physics and Politics: An Old Analogy Revised", *American Political Science Review*, vol.22, no.1, 1928, pp.1-11.
- Murthi, Arun S.K., "The Maulavidya Controversy Among Advaita Vedantins: Was Sankara Himself Responsible?", *Journal of Indian Philosophy*, vol.37, no.2, 2009, pp.149-77.
- Mustafa, Tariq, "Development of Objective Criteria to Evaluate the Authenticity of Revelation", *Zygon*, vol.43, no.3, 2008, pp.737-44.
- Mutua, Makau, "What is TWAIL?", *Proceedings of the American Society of International Law*, April 2000, pp.31-40.
- Nagler, Michael, *Upanishads* (Tomales: Nilgiri Press, 2007).
- Narasimham, P., "The Vedantic Good", *Mind: New Series*, vol.24, no.93, 1915, pp.37-59.
- Navone, J.J., "Sankara and the Vedic Tradition", *Philosophy and Phenomenological Research*, vol.17, no.2, 1956, pp.248-55.
- Nayyar, Deepak, "Towards Global Governance", in Deepak Nayyar ed., *Governing Globalization* (Oxford: Oxford University Press, 2002).
- Nazarene, Robert, "We Are The Land Where Every Man", *African American Review*, vol.38, no.1, 2004, p.156.
- Newfarmer, Richard S., "Multinationals and the Marketplace Magic in the 1980s", in Jeffrey A. Frieden & David Lake eds., *International Political Economy: Perspectives on Global Power and Wealth* (London: Unwin Hyman, 1991).

- Nicholson, Hugh, "The Shift from Agnostic to Non-Agnostic Debate in Early Nyaya", *Journal of Indian Philosophy*, vol.38, no.1, 2010, pp.75-95.
- Nnona, George C., "Situating Multidisciplinary Practice within Social History: A Systemic Analysis of Inter-professional Competition", *Saint John's Law Review*, vol.80, no.3, 2006, pp.849-921.
- Nogosian, S.A., *Islam: Its History, Teaching, and Practices* (Bloomington: Indiana University Press, 2004).
- Nonet, Philippe & Selznick, Philip, *Law and Society in Transition: Toward Responsive Law* (New York: Harper, 1978).
- Norman, George & Trachtman, Joel P., "The Customary International Law Game", *American Journal of International Law*, vol.99, no.3, 2005, pp.541-58.
- Note, "Sympathy as a Legal Structure", *Harvard Law Review*, vol.105, no.8, 1992, pp.1961-80.
- Nussbaum, Martha C., "The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis", *Journal of Legal Studies*, vol.29, no.2, 2000, pp.1005-36.
- Nussbaum, Martha C., "Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics", *University of Chicago Law Review*, vol.64, no.4, 1997, pp.1197-214.
- O Riain, Sean, "States and Markets in an Era of Globalization", *Annual Review of Sociology*, vol.26, 2000.
- O'Connell, Mary Ellen, "New International Legal Process", *American Journal of International Law*, vol.93, no.2, 1999, pp.334-51.
- Oetken, Paul J., "Form and Substance in Critical Legal Studies", *Yale Law Journal*, vol.100, no.7, 1991, pp.2209-28.
- Okafor, Obiora Chinedu, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective", *Osgoode Hall Law Journal*, vol.43, nos.1&2, 2005, pp.171-90.
- Oldmeadow, Harry, "Shankara's Doctrine of Maya", *Asian Philosophy*, vol.2, no.2, 1992, pp.131-46.
- Oliveira, Pedro, "Altruism's Inextinguishable Fire: Annie Besant's Testimony", *The Theosophist*, vol.129, no.1, pp.24-29.
- Olivelle, Patrick, trans., *Upanisads* (Oxford: Oxford University Press, 1996).
- Onuf, Nicholas, "The Constitution of International Society", *European Journal of International Law*, vol.5, no.1, 1994, pp.1-19.
- Onuma, Yasuaki, "When was the Law of International Society Born?: An Inquiry of the History of International Law from an Intercivilizational Perspective", *Journal of the History of International Law*, vol.2, no.1, 2000, pp.1-66.
- Oppenheim, L., "The Science of International Law: Its Tasks and Methods", *American Journal of International Law*, vol.2, no.2, 1908, pp.131-56.
- Orlin, Theodore S. & Scheinin, Martin, "Introduction", in *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach* (Turku: Institute for Human Rights, Åbo Academy, 2000), pp.1-26.
- Ostas, Daniel T., "Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard Posner", *American Business Law Journal*, vol.36, no.1, 1998, pp.193-238.
- Oye, Kenneth A., "Explaining Cooperation under Anarchy: Hypothesis and Strategies", *World Politics*, vol.38, no.1, 1985, pp.1-24.

- Pack, Spencer J., *Capitalism as a Moral System: Adam Smith's Critique of the Free Market Economy* (Aldershot: Edward Elgar, 1991).
- Papin, Mike W. & Kleiner, Brian H., "Effective Strategic Management in the Aerospace Industry", *Aircraft Engineering and Aerospace Technology*, vol.70, no.1, 1998, pp.38-44.
- Paramahansa, K.R., *Dharma* (Friendswood: TotalRecall Publications, 2008).
- Paramahansa, K.R., *The Philosophy of the Upanisads* (Friendswood: TotalRecall Publications, 2008).
- Parmar, Pooja, "TWAAIL: An Epistemological Inquiry", *International Community Law Review*, vol.10, no.4, 2008, pp.363-370.
- Pathak, R.S., & Dhokalia, Ramaa Prasad, Editorial Note, in R.S. Pathak, & Ramaa Prasad Dhokalia, eds., *International Law in Transition: Essays in Memory of Nagendra Singh* (Dordrecht: Martinus Nijhoff, 1992).
- Patterson, Dennis, *Law and Truth* (Oxford: Oxford University Press, 1996), pp.22-42.
- Patton, Laurie L., *Bringing Gods to Mind: Mantra and Ritual in Early Indian Ritual Sacrifice* (Berkeley: University of California Press, 2005).
- Patton, Laurie L., *Bringing the Gods to Mind: Mantra and Ritual in Early Indian Sacrifice* (Berkeley: University of California Press, 2004).
- Paul, Joel R., "The New Movements in International Economic Law", *American University Journal of International Law and Policy*, vol.10, no.2, 1995, pp.607-17.
- Pauwelyn, Joost, "The Transformation of World Trade", *Michigan Law Review*, vol.104, no., 2004.
- Pauwelyn, Joost, "The Role of Public International Law in the WTO: How Far Can We Go?", *American Journal of International Law*, vol.95, no.3, 2001, pp.535-78.
- Pauwelyn, Joost, "Enforcement and Counter Measures in the WTO: Rules are Rules - Toward a More Collective Approach", *American Journal of International Law*, vol.94, no.2, 2000.
- Payton, Robert L. & Moody, Michael P., *Understanding Philanthropy: Its Meaning and Mission* (Bloomington: Indiana University Press, 2008).
- Peczenik, A., "Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law", in E. Pattoaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence Vol.4* (Dordrecht: Springer, 2005).
- Peczenik, Alexander, Lindahl, Lars, & van Roermund, Bert, eds., *Theory of Legal Science* (Dordrecht: D. Reidel Publishing Company, 1984).
- Pepin, Eugene, "Proposals for the Future Work of the Permanent Legal Committee of the International Astronautical Federation", *Proceedings of the Second Colloquium on the Law of Outer Space*, 1959, pp.123-24.
- Percival, Robert V., "Environmental Law in the Twenty-First Century", *Virginia Environmental Law Journal*, vol.25, no.1, 2007, pp.1-35.
- Perelman, Ch., *The New Rhetoric and the Humanities* (Dordrecht: D. Reidel Publishing Company, 1979).
- Pescosolido, Bernice A. & Rubin, Beth A., "The Web of Groups Affiliations Revisited: Social Life, Postmodernism, and Sociology", *American Sociological Review*, vol.65, no.1, 2000, pp.52-76.
- Peters, Anne, "There is Nothing more Practical than a Good Theory: An Overview of Contemporary Approaches to International Law", *German Yearbook of International Law*, vol.44, 2002, pp.25-37.

- Piaget, Jean, *Structuralism* (London: Routledge and Kegan Paul, 1971).
- Picavet, E., "Methodological Individualism in Sociology", Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.9751-55.
- Polinsky, Mitchell A., *An Introduction to Law and Economics* (Boston: Little Brown and Company, 2nd Edition, 1989).
- Posner, Eric A., *The Perils of Global Legalism* (Chicago: The University of Chicago Press, 2009).
- Posner, Eric A., "International Law: A Welfarist Approach", *University of Chicago Law Review*, vol.73, no.2, 2006, pp.487-543.
- Posner, Richard, *Economic Analysis of Law* (Austin: Wolters Kluwer, 2007).
- Posner, Richard, "Legal Scholarship Today", *Harvard Law Review*, vol.115, no.5, 2002, pp.1314-26.
- Posner, Richard, *Overcoming Law* (Cambridge: Harvard University Press, 1995).
- Posner, Richard, "Law and Public Order in Space (Book Review)", *Harvard Law Review*, vol.77, no.7, 1964, pp.1370-74.
- Potter, Pitman B., "International Law of Outer Space", *American Journal of International Law*, vol.52, no.2, 1958, pp.304-06.
- Potter, Pitman B., "The Logic of International Relations and Organization", *American Political Science Review*, vol.44, no.3, 1950, pp.661-68.
- Potter, Pitman B., "The Future of International Law", *American Journal of International Law*, vol.37, no.4, 1943, pp.632-34.
- Pourvakhshouri, Zahra S. & Mansor Shattri, "Decision Support System in Oil Spill Cases", *Disaster Prevention and Management*, vol.12, no.3, 2003, pp.217-21.
- Prakash, Gyan, "Subaltern Studies as Postcolonial", *American Historical Review*, vol.99, no.5, 1994, pp.1475-90.
- Pratt G.N., "The Tenth Anniversary of the Institute of Air and Space Law. McGill University", *International and Comparative Law Quarterly*, vol.11, no.1, 1962, pp.290-93.
- Przeworski, Adam, "The State in a Market Economy", in Joan M. Nelson *et al.*, eds., *Transforming Post-communist Political Economies* (Washington D.C.: National Academy Press, 1997).
- Punnett, J.T., "Ethical Alternatives", *Mind*, vol.10, no.37, 1885, pp.85-99.
- Purvis, Nigel, "Critical Legal Studies in Public International Law", *Harvard International Law Journal*, vol.32, no.1, 1991, pp.81-127.
- Qizhi, He, "Review of Definitional Issues in Space Law in the light of Development of Space Activities", *Proceedings of the Thirty Fourth Colloquium on the Law of Outer Space*, 1991, pp.32-37.
- Radhakrishnan, S., "The Ethics of the Vedanta", *International Journal of Ethics*, vol.24, no.2, 1914, pp.168-83.
- Radhakrishnan, S., "The Vedanta Philosophy and the Doctrine of Maya", *International Journal of Ethics*, vol.24, no.4, 1914, pp.431-51.
- Rajagopal, Balakrishnan, *International Law from Below: Developments, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).
- Rajagopal, Balakrishnan, "From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions", *Harvard International Law Journal*, vol.41, no.2, 2000, pp.529-78.

- Rajagopal, Balakrishnan, "Locating the Third World in Cultural Geography", *Third World Legal Studies*, 1998-99, pp.1-20.
- Rajvanshi, Anil K., *Nature of Human Thought: Essays on Mind, Matter, Spirituality and Technology* (Phaltan: NARI, 2004).
- Rao, P.K., *International Environmental Law and Economics* (Malden: Blackwell Publishers, 2002).
- Rao, P.K., *World Trade Organization and the Environment* (London: Palgrave, 2000).
- Ratie, Isabelle, "Remarks on Compassion and Altruism in the Pratyabhijna Philosophy", *Journal of Indian Philosophy*, vol.37, no.4, 2009, pp.349-66.
- Raustiala, Kal, "Form and Substance in International Agreements", *American Journal of International Law*, vol.99, no.3, 2005, pp.581-614.
- Raveh, Daniel, "Ayam, aham asmiti: Self-consciousness and Identity in the Eighth Chapter of the Chandogya Upanisad vs. Sankara's Bhasya", *Journal of Indian Philosophy*, vol.36, no.2, 2008, pp.319-33.
- Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979).
- Reibel, David E., "Space Insurance and the Legal Aspects of Allocating Risk and Liability among States and Private Entities", *Proceedings of the Thirty Sixth Colloquium on the Law of Outer Space*, 1993, pp.211-20.
- Reisman, Michael, "Theory about Law: Jurisprudence for Free Society", *Yale Law Journal*, vol.18, no.5, 1999, pp.935-39.
- Reisman, Michael, "International Law after the Cold War", *American Journal of International Law*, vol.84, no.4, 1990, pp.859-66.
- Riesman, Michael, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (New Haven: Yale University Press, 1971).
- Renesch, John, "Humanizing Capitalism: Vision of Hope; Challenge for Transcendence", *Journal of Human Values*, vol.14, no.1, 2008, pp.1-9.
- Risse, Thomas, "Transnational Actors and World Politics", in Walter Carlsnaes, Thomas Risse, & Beth Simmons, eds., *Handbook of International Relations* (London: Sage Publications, 2002) pp. 255-74.
- Rivoire, Jean, "Design for a Law of Space", *Proceedings of the First Colloquium on the Law of Outer Space*, 1958, pp.97-102.
- Rivoire, Jean, "How to Introduce the Law into Space", *Proceedings of the Second Colloquium on the Law of Outer Space*, 1959, pp.129-33.
- Roberts, Anthea Elizabeth, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *American Journal of International Law*, vol.95, no.4, 2001, pp.757-91.
- Robertson, Ronald, *Globalization: Social Theory and Global Culture* (London: Sage, 1992).
- Robinson, George S., "Homo Spatialis: A Space Law Dilemma", *Proceedings of the Twenty Second Colloquium on the Law of Outer Space*, 1979, pp.195-208.
- Robinson, George S., "Scientific Renaissance of Legal Theory: The Manned Orbiting Space Station as a Contemporary Workshop", *Proceedings of the Sixteenth Colloquium on the Law of Outer Space*, 1973, pp.223-39.
- Rode-Verschuur I.H. Ph. de, "The Responsibility of States for the Damage Caused by Launched Space-Bodies", *Proceedings of the First Colloquium on the Law of Outer Space*, 1958, pp.103-04.
- Roemer, John E., "Market Socialism: A Blueprint", *Dissent*, vol.37, no.1, 1991.

- Romar, Edward J., "Noble Markets: The Noble/Slave Ethic in Hayek's Free Market Capitalism", *Journal of Business Ethics*, vol.85, no.1, 2009, pp.57-66.
- Rosenau, James N., "Governance, Order, and Change in World Politics", in James N. Rosenau & Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), pp.1-29.
- Rosenblum, Bruce, *Quantum Enigma: Physics Encounters Consciousness* (New York: Oxford University Press, 2006).
- Rosevear A.B., "McGill's Institute of Air and Space Law", *University of Toronto Law Journal*, vol.14, no.2, 1962, pp.257-60.
- Ross, Hamish, *Legal Theory Today: Law as a Social Institution* (Oxford: Hart Publishing, 2001).
- Rothblatt, Martine, "Exobioethics: Legal Principles for Interaction with Non-Terran Species", *Proceedings of the Forty Second Colloquium on the Law of Outer Space*, 1999, pp.358-60.
- Rothwell, Charles E., "International Organization and World Politics", *International Organization*, vol.3, no.4, 1949, pp.605-19.
- Roy, Ramashray, "Beyond Ego's Domain: Emotion, Rationality, and Prajnana", *Psychology and Developing Societies*, vol.11, no.1, 1999, pp.1-24.
- Rubin, Edward L., "The Practice and Discourse of Legal Scholarship", *Michigan Law Review*, vol.86, no.8, 1988, pp.1835-1905.
- Ruggie, John G., "Multilateralism: The Anatomy of an Institution", *International Organization*, vol.46, no.3, 1992, pp.561-98.
- Ruggie, John G., "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order", *International Organization*, vol.36, no.2, 1982, pp.379-415.
- Russell, Bertrand, *Human Knowledge: Its Scope and Limits* (London: George Allen & Unwin, 1948).
- Sagan, Carl, *Pale Blue Dot: A Vision of the Human future in Space* (New York: Random House, 1994).
- Sagoff, Mark, "On Preserving the Natural Environment", *Yale Law Journal*, vol.84, no.2, 1974, pp.205-67.
- Sakakibara, Tetsuya, "The Relationship between Nature and Spirit in Husserl's Phenomenology Revisited", *Continental Philosophy Review*, vol.31, no.3, 1998, pp.255-72.
- Santayana, George, *Letters of George Santayana, Volume 5, Book 5: 1933-1936. The Works of George Santayana* (Cambridge, MA: MIT Press, 2003).
- Satter, Beryl, *Each Mind a Kingdom: American Women, Sexual Purity, and the New Thought Movement, 1875-1920* (Berkeley: University of California Press, 1999).
- Satz, Debra & Frejohn, John, "Rational Choice and Social Theory", *Journal of Philosophy*, vol.91, no.2, 1994, pp.71-87.
- Schäfer, Lothar, "Nonempirical Reality: Transcending the Physical and Spiritual in the Order of the One", *Zygon*, vol.43, no.2, 2008, pp.329-52.
- Schatz, Sayre P., "Assertive Pragmatism and the Multinational Enterprise", in Jeffrey A. Frieden & David Lake eds., *International Political Economy: Perspectives on Global Power and Wealth* (London: Unwin Hyman, 1991).
- Schauer, Frederick, "(Re)Taking Hart", *Harvard Law Review*, vol.119, no.3, 2006, pp.852-83.

- Schiller, F.C.S., "The Place of Metaphysics", *Journal of Philosophy, Psychology and Scientific Methods*, vol.17, no.17, 1920, pp.455-62.
- Schirato, Tony & Web, Jenn, *Understanding Globalization* (London: Sage Publications, 2003).
- Schlag, Pierre, "A Brief Survey of Deconstruction", *Cardozo Law Review*, vol.27, no.2, 2005, pp.741-52.
- Schlag, Pierre, "The Aesthetics of American Law", *Harvard Law Review*, vol.115, no.4, 2002, pp.1047-1118.
- Schlag, Pierre, "The Problem of Transaction Costs", *Southern California Law Review*, vol.62, no.6, 1989, pp.1161-1700.
- Schmidt, Markus G., *Common Heritage or Common Burden?* (Oxford: Clarendon Press, 1989).
- Schmitt, Carl, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum* (New York: Telos Press, 2003).
- Schmoeckel, Mathias, "The Internationalist as a Scientist and Herald: Lassa Oppenheim", *European Journal of International Law*, vol.11, no.3, pp.699-712.
- Schrijver, Nico, "Introducing the Book", in Nico Schrijver ed., *International Law and Sustainable Development: Principles and Practice* (Leiden: Brill Academic Publishers, 2004).
- Schwartzman, Micah, "Judicial Sincerity", *Virginia Law Review*, vol.94, no.4, 2008, pp.987-1027.
- Schwebel, Stephen M., "Remarks on the Role of the Legal Advisor of the US State Department", *European Journal of International Law*, vol.2, no.1, 1991, pp.131-34.
- Schwelb, Egon, "International Conventions on Human Rights", *International and Comparative Law Quarterly*, vol.9, no.4, 1960, pp.654-75.
- Scobbie, Ian, "Slouching towards the Holy City: Some Weeds for Philip Allott", *European Journal of International Law*, vol.16, no.2, 2005, pp.299-313.
- Segger, Marie-Claire Cordoneir, "Sustainable Development in International Law", in Hans Christian Bugge & Christina Voigt, eds., *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2008), pp.85-199.
- Seltzer, Lawrence H., "The Mobility of Capital", *Quarterly Journal of Economics*, vol.46, no., 1932.
- Sen, Amartya K., "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory", *Philosophy and Public Affairs*, vol.6, no.4, 1977, pp.317-44.
- Sen, Ashok, "String Theory and Einstein's Dream", in Spenta R. Wadia ed., *Legacy of Albert Einstein: A Collection of Essays in Celebration of the Year of Physics* (River Edge: World Scientific Publishing Co., 2007), pp.25-46.
- Sgrosso, Gabriella C., "Sharing of Remote Sensing Data Concerning Environmental Protection for Public Interest", *Proceedings of the Thirty Ninth Colloquium on the Law of Outer Space*, 1996, pp.94-104.
- Shabecoff, Philip, *Fierce Green Fire: The American Environmental Movement* (Covelo, CA: Island Press, 2003).
- Shackelford, Scott J., "The Tragedy of the Common Heritage of Mankind", *Stanford Environmental Law Journal*, vol.28, no.1, 2009, pp.109-69.
- Shah-Kazemi, Reza, *Paths to Transcendence According to Sankara, Ibn Arabi, and Meister Eckhart* (Bloomington: World Wisdom, Inc., 2006).

- Sharma, Arvind, *Sleep as a State of Consciousness in Advaita Vedanta* (Albany: SUNY Press, 2004).
- Sharma, Subhash, "Routes to Reality: Scientific and Rishi Approaches", *Journal of Human Values*, vol.7, no.1, 2001, pp.75-83.
- Shattuck, Cybelle, *Hinduism* (London: Routledge, 1999).
- Shaw, Malcolm, *International Law* (Cambridge: Grotius Publications, 1986).
- Shearer I.A., *Starke's International Law* (London: Butterworths, 1994).
- Sheehy, Benedict, "The Importance of Corporate Models: Economic and Jurisprudential Values and the Future of Corporate Law", *DePaul Business and Commercial Law Journal*, vol.2, no.3, 2004, pp.463-514.
- Shelton, Dinah, "The Participation of Nongovernmental Organizations in International Judicial Proceedings", *American Journal of International Law*, vol.88, no.4, 1994, pp.611-42.
- Shiffer, Harvey & Snyders, Pieter, "The Need for Enforcement for International Space Treaties", *Proceedings of the Tenth Colloquium on the Law of Outer Space*, 1967, pp.237-41.
- Shukla, S.P., "From the GATT to the WTO and Beyond", in Deepak Nayyar, ed., *Governing Globalization* (Oxford: Oxford University Press, 2002).
- Shulman, David, "Illumination, Imagination, and Creativity: Rajasekhara, Kuntaka, and Jagannatha on Pratibha", *Journal of Indian Philosophy*, vol.36, no.4, 2008, pp.481-505.
- Silvestrov, Georgy, "The Notion of Space Commercialization", *Proceedings of the Thirty Third Colloquium on the Law of Outer Space*, 1990, pp.88-92.
- Simeon, D., "Subaltern Studies: Cultural Context", Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.15241-45.
- Simma, Bruno, "Universality of International Law from the Perspective of a Practitioner", *European Journal of International Law*, vol.20, no.2, 2009, pp.265-97.
- Simma, Bruno & Pulkowski, Dirk, "Of Planets and the Universe: Self-contained Regimes in International Law", *European Journal of International Law*, vol.17, no.3, 2006, pp.483-529.
- Simma, Bruno, "Self-contained Regimes", *Netherlands Yearbook of International Law*, vol.16, 1985, pp.111-36.
- Simon, Herbert A., "Altruism and Economics", *American Economic Review*, vol.83, no.2, 1993, pp.156-61.
- Simpson, Gerry, "On the Magic Mountain: Teaching Public International Law", *European Journal of International Law*, vol.10, no.1, 1999, pp.70-92.
- Simpson, Peter Phillips, *Vices, Virtues, and Consequences: Essays in Moral and Political Philosophy* (Washington D.C.: The Catholic University of America Press, 2001).
- Simsarian, James, "Outer Space Cooperation in the United Nations", *American Journal of International Law*, vol.57, no.4, 1963, pp.854-67.
- Sinclair Ian, "The Practice of International Law: The Foreign and Common Wealth Office", in Bin Cheng, ed., *International Law: Teaching and Practice* (London: Stevens & Sons, 1982), pp.117-34.
- Singh, Nagendra, *Enforcement of Human Rights in Peace and War and the Future of Humanity* (Dordrecht: Martinus Nijhoff, 1986).

- Singh, Prabhakar, "Colonised's Madness, Colonizer's Modernity and International Law: Mythological Materialism in the East-West Telos", *Journal of East Asia and International Law*, vol.3, no.1, 2010, pp.67-97.
- Singh, Rana P.B., "Nature and Cosmic Integrity: A Search in Hindu Geographical Thought", *GeoJournal*, vol.26, no.2, 1992, pp.139-47.
- Sisson, Edward O., "What is Philosophy? A Proposed Definition", *Philosophical Review*, vol.57, no.2, 1948, pp.167-75.
- Sivananda, Swami, *Practice of Karma Yoga* (Tehri-Garhwal: Divine Life Society, 2001).
- Salin Patrick A., "The New Global Governance Dialogue on International Communications and Outer Space", *Proceedings of the Forty Forth Colloquium on the Law of Outer Space*, 2001, pp.181-86.
- Slaje, Walter, "Liberation from Intentionality and Involvement: On the Concept of Jivanmukti According to the Moksopaya", *Journal of Indian Philosophy*, vol.28, no.2, 2000, pp.171-94.
- Slaughter, Annie Marie, Tulumello, Andrew S., & Wood, Stepan, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship", *American Journal of International Law*, vol.92, no.3, 1998, pp.367-97.
- Sloup, George P., "The Training of Atrolawyers: an Immodest Proposal", *Proceedings of the Twenty Eighth Colloquium on the Law of Outer Space*, 1985, pp.205-39.
- Sloup, George P., "The Relationship of Air Law and Space Law: A View from the Space Shuttle, including its Internal and External Environments", *Proceedings of the Nineteenth Colloquium on the Law of Outer Space*, 1976, pp.202-14.
- Smart, Ninian, *The World's Religions 2nd Edition* (Cambridge: Cambridge University Press, 1989).
- Smirnoff M., "The Need for a New System of Norms for Space Law and the Danger of Conflict with the Terms of the Chicago Convention", *Proceedings of the First Colloquium on the Law of Outer Space*, 1994, pp.105-09.
- Smirnoff, Michel, "The Role of IAF in the Elaboration of the Norms of Future Space Law", *Proceedings of the Second Colloquium on the Law of Outer Space*, 1959, pp.147-55.
- Smith, Bradford L., "Towards a Code of Conduct for the Exercise of IPRs in Space Activities" Moderation of the Monopoly?", *Proceedings of the Thirty Ninth Colloquium on the Law of Outer Space*, 1996, pp.176-82.
- Smith, Bradford L., "An Industry Perspective on Space Related IPR", *Proceedings of the Thirty Eighth Colloquium on the Law of Outer Space*, 1995, pp.15-21.
- Sneed, Joseph D., "Structuralism and Scientific Realism", *Erkenntnis*, vol.19, no.1-3, 1983, pp.345-70.
- Snidal, Duncan, "The Limits of Hegemonic Stability Theory", *International Organization*, vol.39, no.4, 1985, pp.579-614.
- Snow, Marcellus, "INTELSAT: An International Example", *Journal of Communication*, vol.30, no.2, 1980, pp.147-56.
- Sodré, Muniz, "For a Feeling of Humanism: The Political Emergence of the Emotions", *Diogenes*, vol.52, no.2, 2005, pp.71-78.
- Sohn, Louis B., "United Nations Machinery for Implementing Human Rights", *American Journal of International Law*, vol.62, no.4, 1968, pp.909-12.

- Sokal, Alan D., "Transgressing Boundaries: Towards a Transformative Hermeneutics of Quantum Gravity", *Social Text*, vol.46/47, 1996, pp.217-52.
- Sokal, Alan D., *A Physicist Experiments with Cultural Studies*, LINGUA FRANCA, May/June, 1996.
- Spiro, Peter J., "Globalization, International Law, and the Academy", *New York University Journal of International Law and Politics*, vol.32, no.2, 2000, pp.567-90.
- Sreenivasan, Gopal, "What is the General Will?", *Philosophical Review*, vol.109, no.4, 2000, pp.545-81.
- Stadler, Sara K., "The Bulls and Bears of Law Teaching", *Washington and Lee Law Review*, vol.63, no.1, 2006, pp.24-77.
- Stahler-Sholk, R., "Revolution", in Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.13299-302.
- Stein, A., "Realism/Neorealism", Neil J. Smelser & Paul B. Baltes, eds., *International Encyclopaedia of the Social & Behavioural Sciences* (Oxford: Elsevier, 2001), pp.12812-15.
- Stein, Arthur A., *Why Nations Cooperate: Circumstances and Choice in International Relations* (Ithaca: Cornell University Press, 1990).
- Steinberg, Richard S., "Judicial Law making at the WTO: Discursive, Constitutional, and Political Constraints", *American Journal of International Law*, vol.98, no.2, 2004, pp.247-75.
- Stephan, Paul B., "Barbarians Inside the Gate: Public Choice Theory and International Economic Law", *American University Journal of International Law and Policy*, vol.10, no.2, 1995, pp.745-67.
- Stern, Robert, "Did Hegel Hold and Identity Theory of Truth?", *Mind (NS)*, vo.102, no.408, 1993, pp.645-47.
- Stern, W.B., "Kelsen's Theory of International Law", *The American Political Science Review*, vol.30, no.4, 1936, pp.736-741.
- Sterns, Patricia M. & Tennen, Leslie I., "Exobiology and the Outer Space Treaty: From Planetary Protection to the Search for Extraterrestrial Life", *Proceedings of the Fortieth Colloquium on the Law of Outer Space*, 1997, pp.141-49.
- Sterns, Patricia M. & Tennen, Leslie, "The Art of Living in Space: A Preliminary Study", *Proceedings of the Twenty First Colloquium on the Law of Outer Space*, 1978, pp.245-68.
- Stigler, George J., "The Theory of Economic Regulation", *The RAND Journal of Economics*, vol.2, no.1, 1971, pp.3-21.
- Stiglitz, Joseph E., *Globalization and Its Discontents* (New York: Norton, 2002).
- Stoops J.D., "Society and the Subjective Mind", *Philosophical Review*, vol.44, no.2, 1935, pp.99-119.
- Stovitz, Chuck & Loomis, Tracy, "Space Law: Lessons from the Antarctic", *Proceedings of the Twenty Eighth Colloquium on the Law of Outer Space*, 1985, pp.165-71.
- Strauss, David A., "On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia's The Rule of Law as a Law of Rules", *University of Chicago Law Review*, vol.75, no.3, 2008, pp.997-1013.
- Strickland, Donald A., "Physicists' View of Space Politics", *Public Opinion Quarterly*, vol.29, no.2, 1965, pp.223-35.

- Stuntz, William J., "Christian Legal Theory", *Harvard Law Review*, vol.116, no.6, 2003, pp.1707-49.
- Sunstein, Cass R., "Trimming", *Harvard Law Review*, vol. 122, no.4, 2009, pp.1049-94.
- Sunstein, Cass R., "Problems with Rules", *California Law Review*, vol.83, no.4, 1995, pp.956-1026.
- Sunter, Andrew F., "TWAAIL as Naturalized Epistemological Inquiry", *Canadian Journal of Law and Jurisprudence*, vol.20, no.2, 2007, pp.475-507.
- Swaine, Edward T., "Rational Custom", *Duke Law Journal*, vol.52, no.2, 2002, pp.559-627.
- Sztompka, Piotr, *Society in Action: The Theory of Social Becoming* (Chicago: University of Chicago Press, 1991).
- Tabanera, Teofilo, "Some Suggestions concerning an Organization for Outer Space", *Proceedings of the Eleventh Colloquium on the Law of Outer Space*, 1968, pp.207-09.
- Taekema, Sanne, *The Concept of Ideals in Legal Theory* (The Hague: Kluwer Law International, 2003).
- Tagore, Rabindranath, *The English Writings of Rabindranath Tagore: Volume 4 Essays* (New Delhi: Atlantic, 2007).
- Taki, Hiroshi, "Opinio Juris and the Formation of Customary International Law: A Theoretical Analysis", *German Yearbook of International Law*, vol.51, 2008, pp.447-66.
- Tamm, John R., "Outer Space Colonization: A Planned Unit Development", *Proceedings of the Twenty Second Colloquium on the Law of Outer Space*, 1979, pp.217-20.
- Tapper, Colin, "Austin on Sanctions", *Cambridge Law Journal*, vol.24, no.2, 1965, pp.271-87.
- Tarnas, Richard, *The Passion of the Western Mind* (New York: Random House, 1991).
- Tebbit, Mark, *Philosophy of Law: Introduction* (Florence, USA: Routledge, 2000).
- Teubner, Gunther, *Law as an Autopoietic System* (Oxford: Blackwell, 1993).
- Teubner, Gunther, "Substantive and Reflexive Elements in Modern Law", *Law & Society Review*, vol.17, no.2, 1983, pp.239-86.
- Thaler, Richard H. & Sunstein, Cass R., *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).
- Thomas, Shirley, "A Reexamination of the Approach to Space Law", *Proceedings of the Eleventh Colloquium on the Law of Outer Space*, 1968, pp.336-38.
- Thompson, Alexander, "Rational Choice Theory to International Law: The Promise and Pitfalls", *Journal of Legal Studies*, vol.31, no.1, 2002, pp.S285-S306.
- Thompson, Kevin, "Forms of Resistance: Foucault on Tactical Reversal and Self-formation", *Continental Philosophy Review*, vol.36, no.2, 2003, pp.113-38.
- Tiller, Emerson H. & Cross, Frank B., "What is Legal Doctrine", *Northern Western University Law Review*, vol.100, no.1, 2006, pp.517-34.
- Timalsina, Sthaneshwar, *Consciousness in Indian Philosophy: The Advaita Doctrine of 'awareness only'* (Oxford: Routledge, 2009).
- Tirtha, Swami Sadashiva, *Bhagavad Gita for Modern Times* (Bayville: Ayurvedic Holistic Centre Press, 2007).
- Tladi, Dire, *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (Pretoria: Pretoria University Law Press, 2007).

- Toews, John E., "Historiography as Exorcism: Conjuring Up 'Foreign' Worlds and Historicizing Subjects in the Context of the Multiculturalism Debate", *Theory and Society*, vol.27, 1998, pp.535-64.
- Torella, Raffaele, "How is Verbal Signification Possible: Understanding Abhinavagupta's Reply", *Journal of Indian Philosophy*, vol.32, nos.2&3, 2004, pp.173-88.
- Trachtman, Joel P., *The Economic Structure of International Law* (Boston: Harvard University Press, 2008).
- Trachtman, Joel P., "Building the WTO Cathedral", *Stanford Journal of International Law*, vol.43, no.1, 2007, pp.127-67.
- Trebilcock, Michael J. & Howse Robert, *The Regulation of International Trade* (London: Routledge, 1995).
- Tunkin, G.I., *Theory of International Law* (London: Ruskin House, 1974).
- Turlington, Edgar, "The Human Rights Commission at the Crossroads", *American Journal of International Law*, vol.45, no.3, 1951, pp.534-38.
- Twibell, Ty S., "Circumnavigating International Space Law", *ILSA Journal of International and Comparative Law*, vol.4, no.1, 1997, pp.259- 95.
- Twiss, Sumner B., "History, Human Rights, and Globalization", *Journal of Religious Ethics*, vol.32, no.1, 2004, pp.39-70.
- Tyagi, Yogesh, "UNCLOS IV?" *Journal of World Trade*, vol.27, no.1, 1993.
- Unger, Roberto M., *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983).
- Unger, Roberto Mangabeira, "The Critical Legal Studies Movement", *Harvard Law Review*, vol.96, no.3, 1983, pp.561-675.
- Urbina, Sebastián, *Legal Method and the Rule of Law* (The Hague: Kluwer Law International, 2002).
- Vagts, Detlev F., "International Economic Law and the American Journal of International Law", *American Journal of International Law*, vol.100, no.4, 2006, pp.769-82.
- Vagts, Detlev F., "International Relations Looks at Customary International Law: A Traditionalist's Defence", *European Journal of International Law*, vol.15, no.5, 2004, pp.1031-40.
- van Aaken, Anne, "Defragmentation of Public International Law Through Interpretation: A Methodological Proposal", *Indiana Journal of Global Legal Studies*, vol.16, no.2, 2009, pp.483-512.
- van Aaken, Anne, "To Do Away with International Law? Some Limits to the 'Limits of International Law'", *European Journal of International Law*, vol.17, no.1, 2006, pp.289-308 at 294-97.
- Van Bijlert, Victor A., "The Ethics of Modernity in Indian Politics: Past and Present", *Journal of Human Values*, vol.9, no.1, 2003, pp.53-64.
- van Krieken, Robert, "Legal Informalism, Power, and Liberal Governance", *Social and Legal Studies*, vol.10, no.1, 2001, pp.5-22.
- van Traa-Engelman H.L., "Commercialization of Space Activities: Legal Requirements Constituting a Basic Incentive for Private Enterprise Involvement", *Space Policy*, vol.12, no.2, 119-28.
- Vargas, Everton Vieira, "Global Challenges and the Shaping of International Law", *Brazilian Yearbook of International Law*, vol.1, 2006, pp.166-89.

- Verplaetse, Julian G., "Conflicts of Air- and Outer Space Law", *Proceedings of the Third Colloquium on the Law of Outer Space*, 1960, pp.145-51.
- von Bernstorff, Jochen, "Sisyphus was an International Lawyer: On Martti Koskenniemi's 'From Apology to Utopia' and the Place of Law in International Politics", *German Law Journal*, vol.7, no.12, 2006, pp.1015-35.
- von der Dunk, Frans G., "Public Space Law and Private Enterprise: The Fitness of International Space Law Instruments for Private Space Activities", *Proceedings of the Project 2001 – Workshop on Legal Issues of Privatising Space Activities*, 19th July, 1999, pp.12-39.
- Voyiakis, Emmanuel, "International Law and the Objectivity of Value", *Leiden Journal of International Law*, vol.22, no.1, 2009, pp.51-78.
- Vranes, Erich, "The Definition of 'Norm Conflict' in International Law and Legal Theory", *European Journal of International Law*, vol.2006, no.2, 395-418.
- Wadegaonkar, Damodar, *The Orbit of Space Law* (London: Stevens and Sons, 1984).
- Wagensberg, George, "In Favour of Scientific Knowledge: The New Museums", in Svante Lindqvist, ed., *Museums of Modern Science* (Canton: Science History Publications, 2000), pp.129-38.
- Wakefield, Neville, *Postmodernism: The Twilight of the Real* (London: Pluto Press, 1990).
- Waldron, Jeremy, "'Transcendental Nonsense' and System in the Law", *Columbia Law Review*, vol.100, no.1, 2000, pp.16-53.
- Walker, Heather, "In the Giant's Footprint: Bringing MSS Services to Urban Areas", *Proceedings of the Forty Forth Colloquium on the Law of Outer Space*, 2001, pp.194-201.
- Walker, Neil, "Out of Place and Out of Time: Law's Fading Co-ordinates", *Edinburgh Law Review*, vol.14, no.1, 2010, pp.13-46.
- Walker, Teresa, "Globalism: The New Market Ideology by Manfred Steger", *Logos*, vol.2, no.2, 2003, pp.148-55.
- Wallace, Rebecca, *International Law: A Student Introduction* (London: Sweet and Maxwell, 1992).
- Wallace, Vesna A., *A Inner Kalacakratantra: A Buddhist Tantric View of Individual* (Cary, NC: Oxford University Press, 2001).
- Waluchow, Wil J., *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).
- Warbrick, Colin, "Brownlie's Principles of Public International Law: An Assessment", *European Journal of International Law*, vol.11, no.3, 2000, pp.621-36.
- Warren, Mark, "Nietzsche's Concept of Ideology", *Theory and Society*, vol.13, no.4, 1984, pp.541-65.
- Wassenbergh, Henry A., "Speculation on the Law Governing Space Resources", *Annals of Air and Space Law*, vol.v, 1980, pp.611-25.
- Waters, Malcolm, *Globalization* (London: Routledge, 1995).
- Weber, Max, *Economy and Society: An Outline of Interpretative Sociology*, eds., Guether Roth & Claus Wittich (Berkeley: University of California Press, 1978).
- Weeramantry, C.G., *Universalizing International Law* (Leiden: Martinus Nijhoff, 2004).
- Weeramantry, C.G., *The Lord's Prayer: Bridge to a Better World* (Liguori: Liguori/Triumph, 1998).
- Weinrib, Ernest J., "Legal Formalism: On the Immanent Rationality of Law", *Yale Law Journal*, vol.97, no.6, 1988, pp.949-1016.

- Welch, Anthony, "The End of Certainty? The Academic Profession and the Challenge of Change", *Comparative Education Review*, vol.42, no.1, 1998, pp.1-14.
- Wendt, Alexander, "Anarchy is what States Make of it: Construction of Power Politics", *International Organization*, vol.46, no.2, 1992, pp.391-425.
- Wendt, Alexander, "Social Theory as Cartesian Science: An Auto-critique from a Quantum Perspective", in Stefano Guzzini & Anna Leander, eds., *Constructivism and International Relations: Alexander Wendt and His Critics* (Oxon: Routledge, 2006), pp.181-219.
- Wendt, Alexander, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).
- Wendt, Alexander, "Anarchy is what States Make of It", *International Organization*, vol.46, no.2, 1992, pp.391-425.
- Whicher, Ian, *The Integrity of the Yoga Darsana: A Reconsideration of Classical Yoga* (Albany: State University of New York, 1998).
- Wiessner, Siegfried & Willard, Andrew T., "Policy-Oriented Jurisprudence", *German Yearbook of International Law*, vol.44, 2001, pp.96-112.
- Wiessner, Siegfried & Willard, Andrew R., "Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity", *American Journal of International Law*, vol.93, no.2, 1999, pp.316-34.
- Wild, Payson S., "What is the Trouble with International Law"? *American Political Science Review*, vol.32, no.3, 1938, pp.478-94.
- Wilkinson, David, *Environment and Law* (Florence, KY: Routledge, 2001).
- Wilkinson, Rorden, *Multilateralism and the World Trade Organization: The Architecture and Extension of International Trade Regulation* (London: Routledge, 2000).
- Winham, Gilbert R., "An Interpretative History of Uruguay Round", in Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer, *The World Trade Organization: Legal, Economic, and Political Analysis* (New York: Springer, 2005), pp.3-25.
- Winter, Steven L., 'For What It's Worth', *Law & Society Review*, vol.26, no.4, 1992, pp.789-818.
- Winters, Alan L., "The Road to Uruguay", *Economic Journal*, vol.100, no.403, pp.1288-1303.
- Wolcott, T.E., Environmental and Historical Differences Render Sea Law of Little Guidance to Development of Space Law, *Proceedings of the Twenty Eighth Colloquium on the Law of Outer Space*, 1985, p.172.
- Wolfson, Martin H., "Neoliberalism and the Social Structure of Accumulation", *Review of Radical Political Economics*, vol.35, no.3, 2003, pp.255-62.
- Wolfson, Martin, "What is Philosophy", *Journal of Philosophy*, vol.55, no.8, 1958, pp.322-36.
- Woods, James Haughton, trans., *The Yoga Sutras of Patanjali* (Cambridge: Harvard University Press, 1923).
- Woody, Susan M., "The Theory of Sovereignty: Dewey Versus Austin", *Ethics*, vol.78, no.4, 1968.
- Wriston, Walter B., "Agents of Change are Rarely Welcome", in Jeffrey A. Frieden & David Lake, eds., *International Political Economy: Perspectives on Global Power and Wealth* (London: Unwin Hyman, 1991).

- Yamin, Farhana & Depledge, Joanna, *The International Climate Change Regime: A Guide to Rules, Institutions, and Procedures* (Cambridge: Cambridge University Press, 2004).
- Yaran, Cafer S., *Islamic Thought on the Existence of God: Contribution and Contrast with Contemporary Western Philosophy of Religion* (Washington D.C.: The Council for Research in Values and Philosophy, 2004).
- Yearley, Steven, *Making Sense of Science: Understanding the Social Study of Science* (London: Sage Publications, 2004).
- Yoshida, Hiroshi, "Accidents of Space Activities and Insurance", *Proceedings of the Thirty Sixth Colloquium on the Law of Outer Space*, 1993, pp.221-27.
- You, Jong-II, "The Bretton Woods Institutions: Evolution, Reform, and Change", in Deepak Nayyar, ed., *Governing Globalization* (Oxford: Oxford University Press, 2002).
- Young, Michael K., "The Role of the Attorney-Adviser in the U.S. Department of State: Institutional Arrangements and Structural Imperatives", *Law and Contemporary Problems*, vol.61, no.2, 1998, pp.133-53.
- Young, Oran, *Governance in World Affairs* (Ithaca: Cornell University Press, 1999).
- Young, Oran, *International Governance: Protecting the Environment in a Stateless Society* (Ithaca: Cornell University Press, 1994).
- Young, Oran, "Regime Dynamics: The Rise and Fall of Regimes", *International Organization*, vol.36, no.2, 1982, pp.277-97.
- Young, Oran, "International Law and Social Science: The Contributions of Myers S. McDougal", *American Journal of International Law*, vol.66, no.1, 1972, pp.60-76.
- Zhukov, Gennady & Kolosov, Yuri, *International Space Law* (New York: Praeger, 1984).
- Zilberman, David B., *Analogy in Indian and Western Philosophical Thought* (Dordrecht: Springer, 2006).
- Zleptnig, Stefan, "The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority", *European Integration Online Papers*, vol.6, no.17, 2002.
- Zohar, Danah & Marshall, Ian, *The Quantum Society: Mind, Physics and a New Social Vision* (London: Bloomsbury, 1993).

Ashwattha

The concept of *Ashwattha* appears in *Bhagavad Gita* thus: The *Ashwattha*—that has roots in the sky and branches on the earth—is eternal. The Vedas are its leaves, and those who understand this truth understand the Vedas¹. The branches of this tree represent sense objects; they are cultured by *Gunās* (qualities). The aim of life is to understand this truth and sever the roots with the weapon of detachment.² There is also reference to the inverted tree in *Katha Upanishad*.³ It depicts the tree as the *Brahman*, the perennial truth that cannot be severed.⁴

However, the painting of *Ashwattha* used in the book-cover reflects the concept as it is drawn on both *Bhagavad Gita* and *Katha Upanishad* and construed in a meta-ontological sense. That is, *Ashwattha* is reflection of *Brahman* in basic human consciousness. In other words, the *Brahman*—the pure consciousness—is subject to the duality of sense perceptions of basic consciousness, and when basic consciousness reflects *Brahman* through senses, *It* appears inverted, as *Ashwattha*. In the pure consciousness there is no inversion, there is no *Ashwattha*.

¹ (Ch.15, Verse 1) *Urdhva mulamadrah sakhamashwattham prahuravyayam | Chandamsi yasya parmani yastam veda sa vedavit ||*

² Ch.XV, Verse 3 & 4. For an elucidation on *Ashwattha* as it appears in *Bhagavad Gita*, see Swami Sadashiva Tirtha, *Bhagavad Gita for Modern Times* (Bayville: Ayurvedic Holistic Centre Press, 2007, pp.155-60).

³ (Ch. VI, Verse 1) *Urdhavamulovakshakha eshoshvatta sanatanah | tadeva shukram tadbrahma tadevamrutamuchyate | tasmimllokah shritah sarve tadu natyeti kakshana etadvai tat ||* (The inverted tree is bright, it is the eternal *Brahman*. It has all the worlds contained in it. No one is outside of it).

⁴ K.R. Paramahansa, *The Philosophy of the Upanisads* (Friendswood: TotalRecall Publications, 2008), pp.135, 35.