

# WHAT WOULD GROTIUS DO? METHODS AND IMPLICATIONS OF INCORPORATING THE CONTRACT LAW DOCTRINE OF ILLUSORY PROMISES INTO THE LAW OF TREATY INTERPRETATION

## I. INTRODUCTION

The United States and the Democratic People's Republic of North Korea (DPRK), along with four other nations,<sup>1</sup> reached an agreement on September 19th, 2005, whereby the DPRK committed to abandon all nuclear weapons programs and return to the Nuclear Non-Proliferation Treaty.<sup>2</sup> In response, the United States stated that it "has no intention to attack or invade the DPRK with nuclear or conventional weapons."<sup>3</sup> While agreements that reduce the threat of nuclear attack are desirable accomplishments, it appears that the United States and the four other parties did not actually give up anything in exchange for the DPRK abandoning its nuclear weapons program.<sup>4</sup>

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1. Six nations were involved in the negotiations that gave rise to this agreement: the United States, DPRK, Russia, China, the Republic of Korea, and Japan. Press Release, Ministry of Foreign Affairs, People's Republic of China, Joint Statement of the Fourth Round of the Six-Party Talks (Sept. 19, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/53490.htm>.

2. *Id.*

3. *Id.*

4. Under the U.S. Constitution's Fifth Amendment Due Process Clause, it is generally considered a taking (therefore requiring compensation) when the government forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The extent to which this principle should apply to countries suffering a detriment (such as abandonment of a nuclear program) for the good of the global community is beyond the scope of this Note.

Despite the often asserted maxim that all states have equal rights,<sup>5</sup> a cursory review of history reveals a different story.<sup>6</sup> While the more powerful nations often act (or purport to act) in the best interests of the global community, they frequently exploit their superior bargaining position to achieve their objectives.<sup>7</sup> Although these inequalities are slowly disappearing, creating new methods of treaty interpretation could accelerate this process and ensure more equitable bargaining positions. Implementing the contract law requirement of consideration and the doctrine of illusory promises constitutes one possible approach to promoting equal bargaining power in the law of treaty interpretation.

This Note addresses whether the doctrine of illusory promises is a desirable addition to the law of treaty interpretation by examining the general topography of modern international agreements, the history and judicial applications of the illusory promises doctrine, and the possible impact that the doctrine's adoption would have on the field of international agreement interpretation.

Section II provides relevant background information, including the current composition of international agreements, the role of contract law in interpreting international agreements, and a brief summary of the

5. The concept of equality features prominently in many seminal international agreements. Article 1 of the Charter of the United Nations ("U.N. Charter") states that one purpose of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ." U.N. Charter art. 1, para. 2, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993. Article 2 of the U.N. Charter sets out the guiding principles to be followed in pursuit of the purposes contained in Article 1, including "1. The Organization is based on the principle of the sovereign equality of all its Members." *Id.* art. 2, para. 1. The Convention on Rights and Duties of States (Montevideo Convention) states:

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise.

The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

Convention on Rights and Duties of States, Dec. 26, 1933, art. 4, 49 Stat. 3097, 165 L.N.T.S. 19. The United States Supreme Court has also stated: "No principle of general law is more universally acknowledged, than the perfect equality of nations." *The Antelope*, 23 U.S. (10 Wheat) 66, 122, (1825).

6. See generally Werner Morvay, *Unequal Treaties*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 514–17 (Rudolf Bernhardt ed., 1984) (discussing the extreme obligations Western nations forced upon China through a series of treaties in the name of promoting trade by virtue of superior military power); Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567 (1995) (discussing unequal treaties between the U.S. and American Indian tribes made to promote further settlement by taking advantage of superior military power and concepts of treaties and ownership not familiar to the American Indians).

7. The U.N. Charter can be seen as an example of this, despite the assertion that all states have equal standing. The five permanent members of the Security Council are effectively able to overrule the majority of member states in most significant issues. See U.N. Charter, *supra* note 5, art. 24, para. 1; Morvay, *supra* note 6, at 516. Thus, inequalities among states are enshrined in an institution supposedly dedicated to the equal rights of all nations.

consideration requirement of contract law. Section III addresses the possible methods for implementing consideration into the law governing international agreements, as well as arguments for and against this incorporation. Section IV discusses examples of other contract law doctrines used in international law. Finally, Section V presents two historical examples of international agreements and speculates how courts would rule on the validity of those agreements if consideration was required.

## II. BACKGROUND

### A. *Composition of International Agreements*

The modern conception of the nation-state, and consequently the modern conception of international law, began with the Peace of Westphalia in 1648.<sup>8</sup> Today, international agreements vary widely, ranging from minor trade negotiations to massive, near-universal treaties such as the United Nations Convention on the Law of the Sea.<sup>9</sup> The growing number of such agreements has led many to question the significance of these agreements and to what extent they actually bind states.<sup>10</sup>

The Vienna Convention on the Law of Treaties (Vienna Convention) has become the definitive source for interpreting treaty law since it entered

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8. The Peace of Westphalia, *reprinted in* 1 Consol. T.S. 198. Two legal scholars state that the Peace of Westphalia “is for many historians and lawyers the real beginning of the era of ‘modern international relations’ and hence of ‘modern international law.’” MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW CASES AND COMMENTARY* 27 (2d ed. 2001).

9. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. As of April 8, 2007, 153 of the 191 U.N. member countries have signed the Convention on the Law of the Sea. Chronological Lists of Ratifications, Accessions and Successions to the Convention and the Related Agreements, *available at* [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm) (last visited Apr. 7, 2007).

10. Thus, state sovereignty is both the basis of international law and the cause of its major weakness. The principle of a state’s sovereignty is that there is no power over the state’s population held by anyone else. One of the first to develop this theory of sovereignty was Jean Bodin. JANIS & NOYES, *supra* note 8, at 401. In his treatise, Bodin stated “Maitie or Soueraigntie is the moft high, abfolute, and perpetuall power over the citifens and fubjects in a Commonweale . . . .” JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE*, Book I, ch. 8 (Kenneth Douglas McRae ed., Harvard Univ. Press 1962) (1576). There is no higher power than the state, therefore the only enforcement mechanism for international law is a state’s consent to be bound. Some argue this indicates that states will only abide by international law when it is in their favor. *See, e.g.*, John J. Mearsheimer, *The False Promise of International Institutions*, *INT’L SEC.*, Winter 1994–1995, at 5, 9–12 (asserting that states make decisions about compliance with international law solely in terms of whether compliance will tilt the balance of power in their favor).

into force on January 27, 1980.<sup>11</sup> Article 2 of the Vienna Convention defines “treaty” as “an international agreement concluded between States in written form and governed by international law . . . .”<sup>12</sup>

The realm of treaty law can be divided into three broad categories: those establishing international organizations, such as the Charter of the United Nations (U.N. Charter);<sup>13</sup> those governing individual interactions, such as the Convention on the Taking of Evidence Abroad;<sup>14</sup> and those establishing a *quid pro quo* agreement between states, such as the North American Free Trade Agreement.<sup>15</sup>

A rough analogy can be drawn between these three types of international agreements and three types of traditional domestic law.<sup>16</sup> Treaties establishing international organizations can be compared to constitutional law.<sup>17</sup> Treaties governing individual interactions can be

11. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

The Vienna Convention opened for signature in 1969, but it required 35 ratifications before it would enter into force. *Id.* art. 84. While it has never been applied as a treaty governing treaties, given that both parties to the governed treaty must also be parties to the Vienna Convention, it is widely regarded as an authoritative restatement of the customary international law regarding treaty interpretation. James R. Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303, 310 (2001).

12. Vienna Convention, *supra* note 11, art. 2, para. 1(a). This definition includes international agreements even if they are not formally called treaties. The Restatement (Third) of the Foreign Relations Law of the United States lists many of the other names carried by documents which fall under this definition:

Among the terms used are: treaty, convention, agreement, protocol, covenant, charter, statute, act, declaration, *concordat*, exchange of notes, agreed minute, memorandum of agreement, memorandum of understanding, and *modus vivendi*. Whatever their designation, all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 301 cmt. a (1987).

While the Vienna Convention definition is used for this Note, there is some indication that the requirement of an agreement *between states* is weakening. For example, Scotland is a constituent country of the United Kingdom without traditional foreign relations powers. Govern Pub.com, Scotland, <http://www.governpub.com/Capitals-S/Scotland.php> (last visited Apr. 7, 2007). However, in November of 2005, Scotland signed an agreement with Malawi to provide aid and teachers to the impoverished African nation. Malawi President Hails Scots Link (Nov. 2, 2005), *available at* [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/4398116.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/4398116.stm) (last visited Apr. 7, 2007).

13. See U.N. Charter, *supra* note 5.

14. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, *reprinted in* 8 I.L.M. 37.

15. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993). Most international agreements probably fall into this category (hence its importance).

16. See generally Detleve F. Vagts, *Treaty Interpretation and the New American Ways of Law Reading*, 4 EUR. J. INT'L L. 472 (1993).

17. *Id.* at 475. Both areas deal with creating the structure and powers of entities exerting influence over the others. *Id.*

analyzed using legislative law.<sup>18</sup> Finally, treaties pertaining to *quid pro quo* arrangements resemble contract law.<sup>19</sup> The latter type of treaty, treaties pertaining to *quid pro quo* arrangements, are the focus of this Note.

### B. Contract Law's Role in Interpreting International Law

Given the nature of these treaties, it is not surprising that contract law, rather than legislative or constitutional law, has often been consulted when interpreting *quid pro quo* agreements.<sup>20</sup> Both contracts and *quid pro quo* treaties involve two or more parties who each exchange commitments.<sup>21</sup>

Numerous provisions within the Vienna Convention closely resemble traditional contract law.<sup>22</sup> Article 31 of the Vienna Convention states that terms in a treaty should be interpreted according to their ordinary meaning.<sup>23</sup> Similarly, the Restatement (Second) of Contracts states the general rule that unless the parties had a different intent, words should be construed to have their common meaning.<sup>24</sup>

Further, the doctrine of separability exists in both treaty and contract law. Article 44 of the Vienna Convention addresses separability of treaty provisions.<sup>25</sup> It states that a country cannot seek to invalidate only one clause of a treaty while retaining the rest unless: the clause in question is separable from the rest of the treaty; the clause to be invalidated was not an essential part of the treaty; or performance of the remainder of the treaty would not be unjust.<sup>26</sup> Similarly, separate provisions of a contract

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18. *Id.* Both areas deal with the rules (outside of common law) constraining action by citizens. *See id.* at 498–501.

19. *Id.* at 475. Both areas deal with an exchange of promises or actions in exchange for a return promise or action. *See id.* at 501–03.

20. *See id.* at 491–506 (discussing different approaches to treaty interpretation depending upon the nature of the treaty).

21. *Id.* at 501–03.

22. *See generally* Vienna Convention, *supra* note 11, art. 31.

23. *Id.* “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose . . . .” *Id.* art. 31 (1).

24. RESTATEMENT (SECOND) OF CONTRACTS § 202(3) (1981). “Unless a different intention is manifested, (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning; (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.” *Id.*

25. Vienna Convention, *supra* note 11, art. 44.

26. *Id.*

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a

cannot be invalidated unless it can be shown that the contract contains corresponding pairs of promised performances.<sup>27</sup>

The doctrine of waiver is also present in both treaty and contract law. Article 45 of the Vienna Convention provides that parties to a treaty may no longer invoke a ground for invalidating a treaty if, after the event underlying the grounds for invalidation, the parties expressly agreed the treaty was still valid, or if their subsequent actions may be considered as acquiescence.<sup>28</sup> This provision is nearly identical to the doctrine of waiver from contract law, which requires a party to perform under a contract if they have promised to do so after the other party fails to perform.<sup>29</sup>

The article of the Vienna Convention most closely resembling contract law is Article 60.<sup>30</sup> This article addresses termination of treaties as a consequence of breach and states that a material breach by one party entitles another party to invoke the breach as a ground for terminating the treaty.<sup>31</sup> The article goes on to define a material breach as (among other

treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

*Id.*

27. RESTATEMENT (SECOND) OF CONTRACTS § 240 (1981).

If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.

*Id.*

28. Vienna Convention, *supra* note 11, art. 45.

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty . . . ."

*Id.*

29. RESTATEMENT (SECOND) OF CONTRACTS § 84 (1981). "(1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding . . . ." *Id.*

30. Vienna Convention, *supra* note 11, art. 60.

31. *Id.* "1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke

things) a violation of a provision essential to the treaty.<sup>32</sup> The language used in the Vienna Convention is similar to the terminology most often used to describe a party's power to terminate a contract due to another party's failure to perform.<sup>33</sup>

Finally, a state's ability to suspend a treaty due to a subsequent fundamental change in circumstances under Article 62 of the Vienna Convention is substantially similar to the doctrine of frustration of purpose in contract law. Article 62 allows a party to a treaty to terminate or withdraw from a treaty if a change occurs which is fundamental to the original terms of the treaty and which greatly alters the obligations of a party.<sup>34</sup> Similarly, under contract law, the frustration of purpose doctrine states that if the fundamental reason for a contract is removed, even if it is outside the control of either party, the parties are no longer bound by the contract.<sup>35</sup>

Given that the Vienna Convention is the primary authority on the interpretation of treaties<sup>36</sup> and the similarity between many Vienna Convention provisions to contract law, it is reasonable to conclude that contract law plays a valuable role in the interpretation of treaties. Furthermore, additional contract law doctrines may be useful in solidifying the law of treaties.

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the breach as a ground for terminating the treaty or suspending its operation in whole or in part." *Id.* art. 60(1).

32. *Id.* art. 60(3)(a)–(b). "3. A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty . . ." *Id.*

33. RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981). "In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected . . ." *Id.*

34. Vienna Convention, *supra* note 11, art. 62.

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

*Id.* art. 62(1).

35. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

*Id.*

36. See *supra* note 11 and accompanying text.

### C. *The Doctrine of Illusory Promises*

In U.S. contract law there are three basic elements to any contract: there must be an offer, an acceptance, and consideration.<sup>37</sup> The doctrine of illusory promises is one method the courts use to enforce the requirement of consideration in contracts.<sup>38</sup> It is used to invalidate contracts where one party has not actually bound itself to do anything.<sup>39</sup> The traditional example of an illusory promise is “I will give you ten dollars if I feel like it.”<sup>40</sup>

Courts have traditionally taken two approaches in applying this doctrine.<sup>41</sup> The first, more classical approach, is to find the contract void for lack of consideration.<sup>42</sup> The more modern approach is for the courts to read objective standards into a potential illusory promise.<sup>43</sup>

These two approaches result in opposite outcomes, but the essential principle remains the same: a contract is not binding upon the parties unless each gives up something of value in exchange for the bargain.

37. See generally E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS (2004). Offer is commonly defined as “a manifestation to another of assent to enter into a contract if the other manifests assent in return by some action, often a promise but sometimes a performance.” *Id.* at 204. Farnsworth defines acceptance as “the action (promise or performance) by the offeree that creates a contract (i.e., makes the offeror’s promise enforceable).” *Id.* This Note focuses on the requirement of consideration. Contract law includes many methods for finding an offer and acceptance, which is not a problem under treaty law. The requirement that a treaty be in written form under the Vienna Convention effectively satisfies the offer and acceptance components of a contract, because the obligations of each party are reduced to writing and the consent of each state is clearly shown through the ratification process.

While there are several different interpretations of consideration, one time-honored view is that it requires the promisor to undergo some detriment or to confer some benefit on the other party. *Id.* at 78. In other words, one must give something of value in return for something of value, otherwise the agreement is a mere gift and typically not an enforceable contract. See *id.* at 85–86. The Restatement of Contracts explains that “[a] proposal of a gift is not an offer within the present definition; there must be an element of exchange. Whether or not a proposal is a promise, it is not an offer unless it specifies a promise or performance by the offeree as the price or consideration to be given by him.” RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a (1981). Because there is no element of exchange to a gift, it lacks the essential elements of a contract. FARNSWORTH, *supra*, n.6.

38. FARNSWORTH, *supra* note 37, at 133.

39. Most commonly, this doctrine is used as an affirmative defense when the illusory promisor attempts to enforce a promise made by the other party. *Id.* at 134.

40. See *id.* at 133.

41. *Id.* at 133–34.

42. Without consideration, an essential element of the contract is missing. *Id.* Thus, neither party is bound to perform their promised agreements because there is no actual contract. *Id.*

43. FARNSWORTH, *supra* note 37, at 134–36. Courts are increasingly unwilling to find contracts void, and instead will read language amounting to “I will if I feel like it” to include whether a reasonable person in an identical situation would “feel like it.” See *id.* at 136. For example, if a contract allows a party to terminate it if costs of remediation are “unreasonable,” the court will interpret “unreasonable” to be what a person acting *in good faith* would deem unreasonable. See, e.g., *Bryant v. City of Atlantic City*, 707 A.2d 1072 (N.J. Super. 1998).



### III. INCORPORATING THE DOCTRINE OF ILLUSORY PROMISES INTO INTERNATIONAL AGREEMENTS

#### A. *Methods of Incorporation*

Before the doctrine of illusory promises can have any influence on treaties, it must be accepted into the body of international law. This is a difficult task given that no authoritative listing of what constitutes international law exists.<sup>44</sup> However, Article 38 of the Statute of the International Court of Justice (ICJ) is often referenced as a source for determining what is included in international law.<sup>45</sup>

The requirement of consideration and the doctrine of illusory promises could be incorporated into the established law of international agreements

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44. For various viewpoints on what constitutes the body of international law, see generally Andrew T. Guzman, *Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002) (examining international law from the perspective of compliance); Stephan Hobe, *The Era of Globalisation as a Challenge to International Law*, 40 DUQ. L. REV. 655 (2002) (discussing the development of international law since 1648 and possible new sources of international law in an era of globalization); A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. OF TRANSNAT'L L. 1475 (2003) (discussing the U.S. courts' approach to determining the content of customary international law).

45. Article 38 sets out the components of international law which the ICJ may consider when hearing cases. Statute of the International Court of Justice, art. 38 Jun. 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter ICJ Statute]. ICJ may also consider explicit agreements made between states establishing rules of conduct, as long as those states are parties to the dispute at hand. ICJ Statute Art. 38 (1)(a) (permitting the application of international conventions, whether general or particular, establishing rules expressly recognized by the contesting states). This area of the law would include any treaties signed by both parties to a dispute. Supplementing these definite agreements is general international custom. ICJ Statute Art. 38 (1)(b). International custom can be found by looking at "general practice accepted as law." *Id.* However, this definition leaves room for interpretation and there is a significant amount of dispute over what constitutes a "general practice accepted as law." International custom is generally recognized when 1) there is sufficiently uniform state practice and 2) states follow the custom out of a sense of obligation. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 536 (1993). Other than these two amorphous criteria, there is no definite time which must pass before custom is established. *Id.* Closely related are the "general principles of law recognized by civilized nations." ICJ Statute art. 38 (1)(c). The term "civilized" is generally no longer given much weight. The ICJ Statute was adopted entirely from the establishing statute of the PCIJ. MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 20 (2003). Thus, some terms which were in common usage in 1920 when the PCIJ's statute was written no longer fit. The ICJ will recognize general principles of law if there are a large number of states with similar laws. *See* The AM&S Case, [1982] 2 C.M.L.R. 264 (In finding that the principle of confidential communications between lawyer and client was a general principle of law, the court examined most of the domestic legal systems of Europe, including Belgium, Denmark, France, Germany, the Netherlands, and Greece. The court found that since every system had a similar law, it should be recognized as a general principle of law.) Finally, judges may also consider judicial decisions and "highly qualified" publications from various nations as subsidiary sources. ICJ Statute art. 38 (1)(d). Strictly speaking, Article 38 is only an instruction to ICJ judges about which sources may be consulted; however, it is often regarded as a listing of the sources of international law. JANIS & NOYES, *supra* note 8, at 21.

through any of Article 38's provisions.<sup>46</sup> The most unlikely avenue of incorporation would be under Article 38(1)(a), international conventions, which would require an amendment to the Vienna Convention itself.<sup>47</sup> While this would give the most weight to the doctrine,<sup>48</sup> it would also be extremely difficult to amend a Convention with so many signatories.<sup>49</sup> Due to Article 40, every state which is a party must be notified and has a right to participate in negotiations surrounding a proposed amendment before the Vienna Convention can be amended.<sup>50</sup> Finally, every party to the treaty must agree to the amendment.<sup>51</sup>

Recognition of the doctrine's status as international customary law would also pose significant problems. There is no indication that states require consideration for the formation of international agreements.<sup>52</sup> Since there is no state practice, there can be no *opinio juris* and hence no international custom. However, if states began requiring definite commitments, it might be possible to establish consideration for international agreements as custom.<sup>53</sup>

The Restatement (Third) of Foreign Relations Law provides another possible answer.<sup>54</sup> Section 102 discusses sources of international law and notes that general principles common to the major legal systems can be

46. While Article 38 sets out the categories of international law, there are no set rules regarding what subject matter each category can contain. Thus, so long as the doctrine of illusory promises met the usage requirements for adoption as part of the body of international law, it could fall into any category. *See generally* ICJ Statute art. 38.

47. James R. Crawford, *supra* note 11, at 310.

48. Treaty obligations are one of the few sources of international law besides *jus cogens* norms which are compulsory. RESTATEMENT (THIRD) OF FOREIGN RELATIONS (1987) § 102 cmts. f–k.

49. Currently, there are 45 signatories and 108 parties to the Vienna Convention. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp> (last visited Apr. 10, 2007).

50. Vienna Convention, *supra* note 11, art. 40.

51. *Id.* However, there is some indication that if a sufficient number of states accepted the amendment, it could be considered a part of customary international law. *See generally* ICJ Statute, *supra* note 45; text accompanying note 45 (outlining the requirements for acceptance as international custom). Given that the doctrine does not exist in international law at the present time, even the lengthy amendment process would fail to bring the doctrine into common usage.

52. In fact, there is some indication that consideration is not essential to international contracts. UNIDROIT Principles of International Commercial Contracts, <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> (last visited February 2, 2006). Article 3.2 states that “a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.” *Id.* art. 3.2. Comment 1 explains that the common law requirement of consideration “is of minimal practical importance since in that context (commercial dealings) obligations are almost always undertaken by both parties.” *Id.* at cmt. 1.

53. *See* ICJ Statute, *supra* note 45, and accompanying text (asserting that there is no time requirement before a law is considered international custom).

54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS (1987).

considered supplemental to other sources.<sup>55</sup> This is probably the most likely avenue for incorporation. However, there are still several obstacles, including the Restatement's own lack of authority,<sup>56</sup> the question of what constitutes a general principle of law, and whether the doctrine of illusory promises can be considered common to the major legal systems.<sup>57</sup>

The most practical solution is to incorporate the requirement of consideration as an equitable solution rather than as an explicit legal principle.<sup>58</sup> Equity is not explicitly mentioned as a source of law in the section of the statute of the ICJ dealing with international law.<sup>59</sup> However, the ICJ has repeatedly turned to equity in deciding a variety of cases.<sup>60</sup> Other international courts have similarly relied upon equity in reaching their decisions.<sup>61</sup>

Any attempt to officially incorporate the doctrine would face significant challenges. In *The North Sea Continental Shelf Cases*, the ICJ indicated an unwillingness to declare new principles of international law as opposed to declarations that merely "embody or crystallize" pre-existing customary law.<sup>62</sup> Since there is little evidence that the doctrine of illusory promises could be considered customary law,<sup>63</sup> the court will likely be unwilling to recognize the doctrine unless it is asserted in the form of equity.

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55. *Id.* § 102(4).

56. Restatements are generally only persuasive to U.S. law. While courts may consider the works of eminent scholars (see sources section), such works are not binding. *Id.* at Foreword.

57. The foreword to the Restatement (Third) explains that "The formulation of legal rules in a Restatement is the considered opinion of the American Law Institute. As was said of the prior Restatement, it is 'in no sense an official document of the United States.'" *Id.*

58. In addition to equity, there is one more body of law not explicitly mentioned in Article 38: *jus cogens*. *Jus Cogens* is regarded as a compulsory source of international law binding states. SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 207–09 (2d ed. 1984). It is extremely unlikely that the doctrine of illusory promises could be considered *jus cogens*, as only the most extreme crimes fall into this category, such as genocide, piracy, and perhaps torture. *Id.* at 215. In addition, this aspect of international law is compulsory and thus violates the principle of sovereignty. See JANIS & NOYES, *supra* note 8. Thus, it is extremely controversial. SINCLAIR, *supra*, at 207.

59. See ICJ Statute art. 38.

60. See *The Meuse Case*, 1937 P.C.I.J. (Ser. A/B) No. 70 (relying on principles of equity to deny The Netherlands a judgment preventing Belgium from pumping lock water in breach of a treaty when the Netherlands was guilty of the same breach); *The North Sea Continental Shelf Cases* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (using equity in determining which methods should be used to set the territorial boundaries of the North Sea).

61. *The Cayuga Indians Case*, *Nielsen Reports* 203, 307 (1926). (The arbitrator turned to principles of equity in order to award a portion of payments due under a US-Indian treaty to Cayuga Indians living in Canada, despite the fact that the tribe's supposed representatives were located in New York).

62. *The North Sea Continental Shelf Cases*, 1969 I.C.J. at 3, para. 69.

63. See ICJ Statute (setting out the requirements for customary law).

In practice, if this doctrine were to be incorporated, it would probably take on a role similar to the one it plays in contract law. For example, if one state sought to enforce a treaty against another state (possibly by exerting political pressure, or increasingly by bringing a case before an international tribunal, such as the ICJ), and if the defendant state felt that the plaintiff had exacted commitments without making any real promise in return, the defendant state could raise an affirmative defense that the treaty was unenforceable because each side had not made a commitment. If the tribunal finds that the state seeking enforcement has not made a real promise in return for the defendant state's commitment, it could render the treaty unenforceable.

### *B. Arguments in Favor of Incorporation*

Incorporating the doctrine of illusory promises would reduce the vast disparity in bargaining power between strong and weak states in the modern international hierarchy.<sup>64</sup> It is true that the relevant documents defining states and governing their interactions do not mention any specific hierarchy.<sup>65</sup> In fact, the preamble to the U.N. Charter contains language asserting that all states have equal rights.<sup>66</sup> However, throughout the history of the modern nation-state it is clear that all states have not been treated equally. This inequality has manifested itself in an overt form, such as the past requirement that states be recognized by the "civilized" states.<sup>67</sup> It can also be seen in a more subtle form by examining treaties between powerful states and weaker ones.

If the doctrine of illusory promises was used in evaluating international agreements, it would prevent the predation of stronger states on weaker ones.

64. The eight largest economies in the world in terms of GDP (the United States, the European Union, China, Japan, India, Germany, the United Kingdom and France) produce well over half the world's GDP. Rank Order—GDP, The CIA World Factbook, <http://www.cia.gov/cia/publications/the-world-factbook/rankorder/2001rank.html> (last visited Oct. 17, 2007).

65. Article 1 of the Montevideo Convention on Rights and Duties of States, concluded in 1933, defines a state as possessing "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states. See Convention on the Rights and Duties of States, *supra* note 5, art. 1.

66. The preamble states "We the peoples of the United Nations determined . . . to reaffirm faith . . . in the equal rights . . . of nations large and small." U.N. Charter, *supra* note 5, pmbl.

67. At the turn of the century, British scholar Lassa Oppenheim asserted that "a new State before its recognition cannot claim any right which a member of the Family of Nations has towards other members." 1 Lassa Oppenheim, *International Law* § 71 (1905). This view has since fallen to the modern perception outlined in The Montevideo Convention, which states that "[t]he political existence of the state is independent of recognition by the other states." 49 Stat. 3097 art. 3.

In addition, incorporating the doctrine of illusory promises would clarify a country's obligations under a treaty. Explicit language and promises would be required, thereby making it easier to determine when a country was in breach of its obligations. By requiring definite commitments, any agreement reached would be more likely to result in actual change. This would add legitimacy to international law and dispel the notion that it does not have much effect on the way states behave.

### *C. Arguments Against Incorporation*

While it may be true that there is a distinct power divide between developed and developing nations, implementing the doctrine of illusory promises as a piecemeal attempt to remedy this inequality may be counterproductive. Simply because a difference in influence exists between countries does not mean that every agreement they reach is unfair. The rule of law prevails in the majority of international interactions, and states are seldom in a position to coerce one another into unfavorable agreements.

Attempting to incorporate the doctrine of illusory promises into treaty law could be significantly detrimental for several reasons. First, while the doctrine is recognized in the U.S., not all countries utilize it in their domestic law. While few rules of law must be universally accepted to be deemed international custom, there must at least be a significant number of countries subscribing to the proposed law.<sup>68</sup> It would be extremely risky to rest the fate of one's case on such a tenuous premise, and if a party had a better argument, the court would likely accept that argument before deciding to recognize the doctrine.

Applying the doctrine of illusory promises would also make it more difficult to enter into international agreements. By preventing general statements of intent from being a valid promise, it would require states to make more concrete statements such as "The United States will not invade North Korea so long as it abides by all international agreements and refrains from hostile actions." This language is much stronger than general statements of intent, and any state, especially the U.S., may be reluctant to make such a commitment.<sup>69</sup> Since agreements incorporating the doctrine

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68. In determining whether the principle of lawyer-client confidentiality should be included in customary law, the European Court of Justice examined the municipal laws of several of the European Union's central members. Upon finding that lawyer-client communications were afforded some degree of confidentiality in most E.U. countries, the court ruled that such communications should be considered privileged as part of international law. *The AM&S Case*, (1982) 2 C.M.L.R. 264.

69. The United States has been consistently reluctant to enter into international agreements

would require deeper commitments, such requirements would reduce the number of agreements. Therefore, if the primary goal is to increase international interaction, incorporating the doctrine of illusory promises may reduce the number of such interactions and become a detriment to the evolution of international law.

Apart from merely reducing the number of agreements, incorporation of this doctrine may threaten the legitimacy of international law. If cases were brought before the ICJ against a country which the ICJ did not think would abide by a ruling, it is possible that the ICJ would find a legal contrivance in order to avoid hearing the case. This occurred in *The South–West Africa Cases* during the 1960s.<sup>70</sup> Those rulings seriously jeopardized the legitimacy of the court, because it was widely recognized that the ICJ had refused to acknowledge that the parties had a legal claim, despite an earlier decision that the parties had standing. The presumed reason was that the court was sure that South Africa would not abide by an adverse ruling. The court was unwilling to decide a case that could not be enforced. There are, however, also examples where countries abide by decisions in international disputes, despite a severe present detriment, such as Libya's decision to pay Texaco \$76 million in crude oil in compensation for Libya's nationalization of the oil company's assets.<sup>71</sup>

While powerful countries are those more likely to make illusory promises in exchange for promises from lesser countries, the same powerful countries are also less likely to abide by rulings of international courts. Thus, if the ICJ did adopt the doctrine, it would most likely be

which it feels would unduly constrain its domestic and international actions, such as the Kyoto Protocols and the Rome Statute of the International Criminal Court.

70. Ethiopia and Liberia sought to enforce several provisions of the League of Nations Mandate which South Africa maintained for southwest Africa. Despite an earlier court ruling that both Ethiopia and Liberia had standing, in 1966 the ICJ ruled that neither party had a legal right or interest because South Africa's duty to issue reports was to the League of Nations, not individual members. *Ethiopia v. South Africa; Liberia v. South Africa*, 1966 I.C.J. 6, 325, 166 WL 2, available at <http://www.icj-cij.org/docket/index.php?p1=3dp2=3&code=esadcase=46dk=c1> (last visited Aug. 21, 2007). Commentators have observed that "[i]t might have been disastrous for the Court to reach the merits yet see its decision ignored by the major powers who alone were capable of compelling South Africa's compliance through Security Council action." Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399, 413 (1997). Since 1966, the ICJ has ruled against major powers and seen its decisions respected, so this may be less of a concern today. See *The Elsi Case (U.S. v. Ital.)* 1989 I.C.J. 15 (where the ICJ ruled against the United States in its claim that Italy had violated a Treaty of Friendship, Commerce and Navigation [FCN Treaty] by seizing a manufacturing plant owned by the U.S. defense contractor Raytheon); *The North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3. But see *The Rainbow Warrior Case (N.Z. v. Fr.)*, 82 I.L.P. 500 (in which France ignored provisions of a previous arbitration provision).

71. *The Texaco/Libya Arbitration*, Jan. 19, 1977, 17 I.L.M. 1.

invoked to prevent powerful countries from exacting treaty obligations from weaker ones. If these countries did not abide by the ICJ's rulings, incorporating the doctrine would hurt the legitimacy of the court and perhaps cause a setback in the development and respect of international law.<sup>72</sup>

#### IV. OTHER CONTRACT DOCTRINES IN INTERNATIONAL AGREEMENTS

##### A. *Doctrine of Frustration/Impossibility of Performance*

In the *Case Concerning the Gabčíkovo-Nagymaros Project*, Hungary relied on several provisions of the Vienna Convention that closely resemble contract law in an attempt to terminate a treaty concluded with the former Czechoslovakia.<sup>73</sup> Hungary claimed it was not bound by the treaty due to the impossibility of performance doctrine.<sup>74</sup> Impossibility of performance, while considered to be part of customary international law,<sup>75</sup> is restated in Article 61 of the Vienna Convention.<sup>76</sup>

This is similar to the impossibility doctrine in U.S. contract law. Under the impossibility doctrine, if, for example, total failure of a wheat crop occurred due to unforeseen diseases, it would be impossible for a nation to supply grain according to the terms of a treaty, as the farmer could not even supply a buyer. This impossibility would absolve the party to the contract from their obligation. In this case, the court refused to find Hungary protected by the doctrine since it was possible to complete the

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72. International law is based on consent. The ICJ has no jurisdiction except when the states involved both accept that jurisdiction. (ICJ Statute art. 36). In addition, after the ICJ has made its ruling, there is no enforcement mechanism through the ICJ itself. AMR, *supra* note 45, at 38. Typically, the ICJ has relied on mobilization of shame (the embarrassment a country suffers in front of the international community if it ignores the UN) to ensure compliance. Oscar Schachter et. al., *Compliance and Enforcement in the United Nations System*, 85 AM. SOC'Y INT'L L. PROC. 428, 437 (1991). However, as more countries are subjected to this approach, its effectiveness diminishes.

73. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hun. v. Slov.) 1997 I.C.J. 3.

74. *Id.* at para. 102.

75. *Id.* at para. 99.

76. Vienna Convention, *supra* note 11, art. 61.

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it, if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

*Id.*

essence of the treaty, because an “economic joint investment consistent with environmental protection and which was operated by the two contracting parties jointly,” could still be fulfilled.<sup>77</sup>

Hungary also argued that there had been such a shift in circumstances (such as changes in the political climate, diminishing economic viability of the project, increased environmental knowledge, and changed international norms that the treaty should be rendered invalid under the doctrine of fundamental change in circumstances, or *rebus sic stantibus*).<sup>78</sup> This doctrine is also recognized as customary international law and is embodied in Article 62 of the Vienna Convention.<sup>79</sup> After reviewing the evidence, the court found that the changes cited did not amount to a fundamental change in circumstances, as they did not fundamentally affect the original purpose of the treaty.<sup>80</sup>

#### *B. First Material Breacher: The Meuse Case*

In *The Meuse Case*, the Permanent Court of International Justice (“PCIJ”)<sup>81</sup> used equity principles to deny the Netherlands relief in its claim against Belgium over a lock and pumping system.<sup>82</sup> The court reasoned that since the Netherlands had a lock causing the same problems as the Belgian lock, and the Dutch lock had been put into operation first, it would not be just to allow the Netherlands to enforce a treaty it had broken first.<sup>83</sup>

The equity principles cited by the court are almost identical to the first material breacher doctrine.<sup>84</sup> In contract law, if one party breaches an agreement, that party cannot bring suit against another party to the contract for a subsequent breach.<sup>85</sup> This principle is also embodied in Article 60 of the Vienna Convention.<sup>86</sup>

77. Case concerning the Gabčíkovo-Nagymaros Project, 1997 I.C.J. 3 at para. 103.

78. *Id.* at para. 104.

79. *Id.*; see also Vienna Convention, *supra* note 11, art. 62.

80. Case concerning the Gabčíkovo-Nagymaros Project, 1997 I.C.J. 3 at para. 155.

81. The PCIJ is the precursor to the ICJ. It was formed under the League of Nations and functioned as the judicial arm of that body. When the ICJ was created through the United Nations Charter, most of its defining statutory language was taken directly from the PCIJ statute.

82. *The Meuse Case*, 1937 P.C.I.J. (Ser. A/B) No. 70, at 23–24.

83. *Id.*

84. *Id.*

85. FARNSWORTH, *supra* note 37, at 509–12.

86. Vienna Convention, *supra* note 11, art. 60.



## V. APPLYING THE DOCTRINE OF ILLUSORY PROMISES TO SELECTED CASES

After studying the background of modern international agreement law, instances where contract law doctrines have been used in interpreting international agreements, and the history of the doctrine of illusory promises, this Note now examines how the ICJ (or PCIJ) might have ruled if these doctrines had been incorporated into the law of treaty interpretation when the cases were decided.

### A. *The Eastern Greenland Case*

The *Eastern Greenland Case* came before the PCIJ in 1933.<sup>87</sup> This case involved a dispute between Denmark and Norway, in which the former claimed that the latter had violated an agreement by objecting to Denmark's claim to all of Greenland.<sup>88</sup> The Danish Minister of Foreign Affairs reported that "the Danish Government . . . is prepared to reply that Denmark has no interests in Spitzbergen, and that it has no reason to oppose the wishes of Norway in regard to the settlement of this question."<sup>89</sup> The Danish government then expressed the hope that Norway would not interfere with Danish claims to all of Greenland.<sup>90</sup> The Norwegian Minister later replied that "the Norwegian Government would not make any difficulties in the settlement of this question (Danish claims to Greenland)."<sup>91</sup> When Norway later tried to assert that Eastern Greenland should be controlled by Norway given that Norwegian settlers occupied the area, Denmark brought suit before the PCIJ to enforce Norway's commitment not to interfere with Danish claims to sovereignty.<sup>92</sup>

The court found that Norway was obligated not to contest Denmark's claims to Eastern Greenland.<sup>93</sup> If the court had implemented the doctrine

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87. *The Eastern Greenland Case* (Den. v. Nor.) 1933 P.C.I.J. (Ser. A/B) No. 53, at 22.

88. *Id.* at 44. After World War I, numerous shifts in boundaries occurred. During the peace conference at Versailles, a committee was formed to determine which country should be able to lay claim to Spitzbergen. *Id.* at 55–57. Spitzbergen is an archipelago in the Arctic Ocean north of Norway. Svalbard, CIA World Factbook *available at* <http://www.cia.gov/cia/publications/the-world-factbook/geos/sv.html> (last accessed Oct. 17, 2007).

89. *The Eastern Greenland Case*, 1933 P.C.I.J. No. 53, at 69–70.

90. *Id.* at 70.

91. *Id.*

92. *Id.* at 28.

93. *Id.* at 73. The Court reasoned that the statement by Norway's Foreign Minister was binding upon Norway because it was a response to a request by the diplomatic representative of a foreign nation to a specific individual who had authority to make commitments on such matters. *Id.* at 71.

of illusory promises, however, it could have reached two different conclusions, depending upon the approach used.<sup>94</sup> If it took the traditional approach, it would have found that Norway was under no obligation not to interfere with Denmark's claims to Greenland. For there to be an agreement, there must be mutual assent to an exchange and consideration.<sup>95</sup>

The Danish minister's words did not constitute a binding promise because, while he stated what Denmark was prepared to do, he did not manifest any commitment that Denmark would indeed forego its objections. Because Denmark did not make a binding promise, there was no bargain. Therefore Norway could not be bound by its promise and would be allowed to maintain its objection to Denmark's assertion of sovereignty over Eastern Greenland.

However, if the court applied the modern approach, it would likely have interpreted the exchange to contain unstated objective criteria and found that Norway was still bound not to object to the sovereignty claim. If the court had followed this approach, it might have determined that the language "is prepared to reply" bound Denmark not to object unless in good faith there was a reason not to continue for the agreement.

#### *B. The September 19th Joint Statement*

As previously stated, the U.S., DPRK, Russia, China, ROK, and Japan reached an agreement on September 19, which included the phrase "The United States affirmed that it has no nuclear weapons on the Korean Peninsula and has no intention to attack or invade the DPRK with nuclear or conventional weapons."<sup>96</sup>

This statement can be construed as an illusory promise because the first part, pertaining to nuclear weapons, is merely a statement of fact and does not impose any obligation on the U.S. not to introduce nuclear weapons in the future.<sup>97</sup> The second part is equally illusory, since while at the time of signing there may have been no intent to invade, the U.S. could still mount an attack the next day if it so chose, arguing that intentions had changed. These statements would take the form of binding promises if small modifications, such as the U.S. making any transfer of nuclear weapons

94. See Part II.C of this Note for an explanation of the two methods of applying the doctrine of illusory promises. See also FARNSWORTH, *supra* note 37, § 2.13.

95. See RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981).

96. Press Release, Ministry of Foreign Affairs, *supra* note 2.

97. Contract law is generally only concerned with promises or actions in the future. FARNSWORTH, *supra* note 37, § 1.1.

public or manifesting an intent not to invade so long as no hostile actions, were made to the agreement.

If another party to this agreement refused to follow its obligations, as indeed the DPRK has by refusing to give up its nuclear weapons program without first being given a light water reactor, the U.S. might not be able to enforce the agreement because its “promises” do not constitute an obligation and therefore the U.S. cannot demand the promise made in consideration for its illusory promises be fulfilled.

If the U.S. did bring a case against the DPRK before the ICJ for breaching the September 19th agreement, the court could take two approaches.<sup>98</sup> First, it could take the more traditional approach and deem the entire agreement unenforceable because of a lack of consideration. The court would therefore rule that the U.S. did not make a definite commitment and therefore there was no valid agreement. Second, the court could take the modern approach and interpret the U.S.’s statement that it “has no intention to attack or invade the DPRK with nuclear or conventional weapons” to contain some sort of reasonableness or good faith standard. Thus, should the U.S. attack or invade the DPRK, they would have to show some reasonable or good faith reason that the previous peaceful intent changed. The objective standards would limit the behavior of the U.S., making the promise binding. The court would then hold that the agreement had all the necessary components for enforcement and could hold against the DPRK.

## VI. CONCLUSION

Historically, stronger states have prevailed over weaker ones. While this trend has taken many forms, from the Romans conquering their neighbors to the requirement that a state be civilized and recognized before being admitted into the international community, this hierarchy seems to be persistent throughout history.<sup>99</sup>

Recently, the international community has started moving away from this trend. Following the U.N. Charter’s declaration that all states have equal rights<sup>100</sup> and the disappearance of the discriminatory policy of

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98. See *supra* note 94.

99. For a summary of Rome’s influence on neighboring states, see HISTORY OF THE ROMAN EMPIRE FROM THE DEATH OF MARCUS AURELIUS TO THE ACCESSION OF GORDIAN III (Edward C. Echols, trans., University of California Press 1961). Surviving treaties with Rome indicate that it was able to extract significant concessions from other groups. See 1 *Maccabees* 8:1-29 (describing a peace treaty between the Jews and Romans whereby the Jews agreed to give aid if Rome was attacked).

100. U.N. Charter, *supra* note 5, pmbl.

recognition, some scholars argue that states now have more equal footing on the global diplomatic stage.<sup>101</sup> This trend could be furthered by incorporating the doctrine of illusory promises into the laws of treaty interpretation in order to limit the ability of powerful states to exact concessions from weaker states in exchange for vague commitments.

If treaties could be invalidated under this doctrine, international agreements would be more likely to contain meaningful commitments by each side. However, more stringent requirements would also likely result in fewer agreements. If fewer, more significant international agreements are desired, the doctrine of illusory promises should be incorporated into treaty law. However, if more international commitments are desired, regardless of their enforceability, the doctrine should not be accepted.

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101. JANIS & NOYES, *supra* note 8, at 403.

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