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Tolerance of International Espionage: A Functional Approach

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TOLERANCE OF INTERNATIONAL ESPIONAGE: A FUNCTIONAL APPROACH

CHRISTOPHER D. BAKER*

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INTRODUCTION

Espionage is curiously ill-defined under international law, even though all developed nations, as well as many lesser-developed ones, conduct spying and eavesdropping operations against their neighbors.¹ Examined in light of the realist approach to international relations, states spy on one another according to their relative power positions in order to achieve self-interested goals. This theoretical

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1. See discussion *infra* Part I (noting the tension between the national security benefits that derive from espionage, and the normative and legal dilemmas related to its practice).

approach, however, not only fails to explain international tolerance for espionage, but also inadequately captures the cooperative benefits that accrue to all international states as a result of espionage.

In contrast to realism, the functional theory of international relations comprehensively explains the benefits of global espionage. According to the functionalist approach, states cooperate internationally to effectively fulfill individual domestic obligations. By minimizing friction with their neighbors, states can direct more resources to maximizing national welfare. Also, international cooperation enhances domestic welfare by yielding conditions and opportunities that benefit trade, the environment, and other functional areas that could not be accomplished by states acting individually.

The functional approach to international relations predicts that states achieve peaceful coexistence through cooperation.² Essentially, adherents to this perspective argue that the first step towards global peace is to facilitate international cooperation within discrete, functional activities. In the context of national security policy, functionalists predict that international cooperation throughout state security activities will foster peaceful relations.³

This essay argues that international law neither endorses nor prohibits espionage, but rather preserves the practice as a tool by which to facilitate international cooperation. Espionage functionally permits states not only to verify that their neighbors are complying with international obligations, but also to confirm the legitimacy of those assurances that their neighbors provide. States are more willing to cooperate across various functional lines because espionage is available as a tool by which to monitor foreign behavior.⁴

Part I of this essay briefly explores the legal status of espionage and addresses the unresolved debate among international legal

2. See discussion *infra* Part II.A (discussing the evolution of functionalism and its predictive value in defining the role of espionage in international relations).

3. See *id.* (noting the functional view that peaceful international relationships rely on the cooperation that results from activities such as organized and authorized espionage).

4. See discussion *infra* Part I (defining espionage generally and the role it plays in fostering international cooperation).

scholars regarding espionage's legitimacy under positive law.⁵ Part II argues that espionage's legitimacy is measured most appropriately against the functionalist theory of international relations. After outlining the theory, this essay adopts the functional approach to examining international cooperation within national security frameworks.⁶ In Part III, this essay proposes that spying complements the monitoring and verification regimes positively recognized within many international treaties to better enable functional cooperation. Distinguishable from conventional verification measures, espionage serves as an extension of monitoring regimes, and thereby enables functional cooperation.⁷ This essay concludes that the continued functional relevance of espionage is rooted in the growth of modern, transnational threats that increasingly threaten international security.⁸

I. ESPIONAGE - HISTORICAL DEVELOPMENT AND LEGAL STATUS

Though subject to various technical definitions, "espionage" can be considered a "consciously deceitful collection of information, ordered by a government . . . accomplished by humans unauthorized by the target to do the collection."⁹ This narrow definition conspicuously removes certain electronic surveillance methods, referred to as "national technical means," from the scope of espionage.¹⁰ Even though satellite and aerial reconnaissance

5. See discussion *infra* Part I (stating that positive international law does not specifically endorse espionage as a national defense tool).

6. See discussion *infra* Part II (outlining the functionalist view of espionage's contribution to international cooperation and to the enhancement of national security monitoring regimes).

7. See discussion *infra* Part III (arguing that espionage enables parties to a treaty to monitor each other's compliance).

8. See discussion *infra* Conclusion (concluding that espionage is a necessary tool in the modern era of increased threats to national security).

9. See Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321, 325-26 (1996) (defining generally the meaning of espionage and stating that analysis, planning, and processing of information does not fit within the definition).

10. See Kenneth W. Abbott, *"Trust But Verify": The Production of Information in Arms Control Treaties and Other International Agreements*, 26

implicate normative and legal issues similar to those implicated by human espionage, electronic spying is rarely as territorially-intrusive. Indeed, several international arms control agreements positively authorize states to monitor other parties' compliance using available technical means.¹¹ None of these treaties, however, specifically legitimizes espionage.

National leaders use the information they gain through espionage to make better-informed policy decisions.¹² Though espionage has a rich history, its status under international law is curiously ill-defined.¹³ Although no international agreement affirmatively endorses espionage, states do not reject it as a violation of international law.¹⁴ As a result of its historical acceptance, espionage's legal validity may be grounded in the recognition that "custom" serves as an authoritative source of international law.¹⁵

CORNELL INT'L L. J. 1, 33 (1993) (stating that most international arms control agreements explicitly authorize the use of technical monitoring devices).

11. See *id.* (explaining that, prior to signing the Limited Test Ban Treaty in the late 1980s, the Soviet Union considered aerial reconnaissance a form of espionage).

12. See Demarest, *supra* note 9, at 322-23 (defining espionage as knowledge that states collect to aid in the conduct of their foreign relations, and stating that it involves cycles of steps, including the collection and dissemination of specific kinds of information).

13. See Richard A. Falk, *Forward*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW*, at v (Roland J. Stanger ed., 1962) (citing the Egyptian secret service's commission of international espionage over 5,000 years ago as an early act of spying); see also Loch K. Johnson, *Spies*, *FOREIGN POL'Y*, Sept. 2000, at 18 ("[S]pies . . . have been around in one form or another since the Lord told Moses to 'send men to spy out the land of Canaan.'"); Demarest, *supra* note 9, at 321 ("[I]nternational law regarding peacetime espionage is virtually unstated . . .").

14. Compare Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW*, *supra* note 13, at 1, 12 (contending that peacetime espionage violates international laws that protect state territorial integrity and political independence), with Julius Stone, *Legal Problems of Espionage in Conditions of Modern Conflict*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW*, *supra* note 13, at 29, 36 (suggesting that, in light of space exploration and reconnaissance, "territorial sovereignty in the old sense of full psychological sacrosanctity is no longer with us").

15. See, e.g., Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 194 (1984) (noting that the Statute of the International Court of Justice codifies the four sources of international law: "international convention, international custom, 'general principles of law recognized by civilized nations,' and writings of court

According to this argument, international espionage is legal because states have spied and eavesdropped on each other throughout history.¹⁶

The lack of consensus regarding the legal status of international espionage should give national leaders cause for concern.¹⁷ In light of such uncertainty, states can expect one another to use any legally-available tool if, by doing so, they will improve their national welfare.¹⁸ Nonetheless, the inadequacy of positive law regarding espionage cannot explain its widespread, international tolerance.

Espionage may derive normative legitimacy as an extension of the state's well-recognized right to self-defense. Some international legal scholars conceptualize self-defense as a "broad" right that permits preemptive strikes in limited circumstances in order to protect national security.¹⁹ Under this broad view, espionage is considered a necessary and legal technique by which to guard a nation's borders.²⁰

and scholars").

16. See, e.g., Wright, *supra* note 14, at 16-17 (noting the work of Lassa Oppenheim, the well-known British jurist, who wrote that espionage is not politically or legally wrong and that there is a general practice of espionage by all states). *But cf. id.* at 16 (suggesting that a frequently-practiced behavior that is accompanied by a "sense of wrong" does not establish a rule of law).

17. See Stone, *supra* note 14, at 34 ("[A]s the law now stands, there is no sufficient warrant for saying that international law does not permit state-authorized espionage in peacetime."); see also Richard A. Falk, *Space Espionage and World Order: A Consideration of the Samos-Midas Program*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW*, *supra* note 13, at 45, 57, 79 n.28 (noting that ample "authoritative doctrine" supports the contention that espionage does not violate international law); Demarest, *supra* note 9, at 331 ("[T]here is no consensus that espionage is a crime outside of a municipal statutory sense.").

18. See Thomas C. Wingfield, *Legal Aspects of Offensive Information Operations in Space*, 9 U.S. AFA J. LEG. STUD. 121, 140 (1999) ("[T]he lack of an international prohibition of espionage leaves decision makers with the usually acceptable liability of merely violating the target nation's domestic espionage law."), <http://www.usafa.af.mil/dfl/documents/wingfield.doc> (last visited April 6, 2004).

19. See Polebaum, *supra* note 15, at 207.

20. See Wright, *supra* note 14, at 17-18 (noting that in 1960, after a U.S. U-2 plane was shot down over the Soviet Union, the Secretary of State defended the act of espionage, stating that "[T]he Government of the United States would be derelict to its responsibility, not only to the American people, but to free peoples everywhere if it did not . . . take such measures as are possible unilaterally to lessen and to overcome [the] danger of surprise attack.").

However, positive international law does not explicitly embrace such an absolute, expansive interpretation of the right to self-defense. Instead, international law, as codified in the United Nations Charter, preserves a state's "inherent right" to self-defense "if an armed attack occurs against" that state.²¹

Even within this framework of positive international law, espionage may be justified by corollary: in order to ensure that the right to self-defense retains substantive meaning, international law must permit states to predict armed attack. Therefore, for states to enjoy the positively-codified right to self-defense, they should retain the right to acquire information that would indicate whether they face imminent armed attack.²²

Similarly, the right to self-defense is hollow unless states are permitted to prepare themselves to repel armed attack. To accomplish this, states must have foreknowledge of the threat and its capabilities. For example, the mere knowledge that a neighboring state harbors hostile intentions does not sufficiently equip the threatened state with the requisite knowledge with which to adequately defend itself. Appreciating an unfriendly state's immediate intentions, capabilities, and weaknesses is essential to defending against attack.

In 1962, the United States conducted U-2 flights over Cuba after eight CIA reports indicated that missile parts from Soviet ships were being unloaded in Cuban ports.²³ Subsequent U-2 imagery confirmed the building of missile sites on the island, but only after another CIA informant within the Soviet military provided drawings of similar sites inside Russia.²⁴ At the height of the crisis, espionage provided

21. See U.N. CHARTER art. 51 (providing that a state may resort to self-defense if confronted with an armed attack).

22. See Stone, *supra* note 14, at 42 ("[S]pying may serve the common-interest function of warning the spying state of the other's preparations for surprise attack.").

23. See Johnson, *supra* note 13, at 24-25 (highlighting the importance of the information that CIA agents collected relating to the activities of the Soviet Union in Cuba).

24. See *id.* at 24 (noting that people, in addition to technology, are important in the collection of information). For example, CIA agents who provided detailed information on Soviet military activities during the Cold War were invaluable to the CIA. *Id.*

sufficient forewarning of a potentially imminent threat, thereby enabling the United States to defend itself.

Espionage accomplishes the prerequisites essential for states to enjoy the internationally-recognized right to self-defense. For those scholars who argue that espionage's legality derives from the right to self-defense, the lawfulness of a particular act of spying may depend on the sponsor state's motivation.²⁵ If the information sought "contributes to defensive rather than aggressive policies of national defense," the act of espionage arguably would claim greater legitimacy under international law.²⁶

Given that most states outlaw domestic spying, positive recognition of espionage under international law could threaten its normative legitimacy.²⁷ On the other hand, it would be similarly troublesome to prohibit international espionage by treaty or agreement in light of the self-defense functions that espionage serves. The resulting normative dilemma leaves policymakers unable either to recognize or to disavow the legality of spying. As developed in Part III, this dilemma can best be framed by appreciating espionage as a functional tool that enables international cooperation.

II. ESPIONAGE ENABLES FUNCTIONAL SECURITY COOPERATION

A. THE EVOLUTION OF FUNCTIONALISM

Functionalism evolved after World War II as a theory by which to describe and explain international cooperation. Prior competing theories of international relations, such as structural realism and rational institutionalism, explained cooperation as a phenomenon inextricably linked to state-level power and interests.²⁸ Several post-

25. See Falk, *supra* note 17, at 58 (suggesting that "the test for the relative illegality of espionage rests to some degree upon one's judgment of the end being sought.").

26. See *id.* (discussing how states' motivation factors into the legality of government espionage).

27. See Demarest, *supra* note 9, at 330 ("[P]eacetime espionage has always been seen as an issue of domestic law. . .").

28. See Stephen D. Krasner, *Structural Causes and Regime Consequences*:

World War II dynamics combined to reveal the need to conceptualize problem-solving at a global level (an approach not necessarily compatible with power-centric models of international relations). After World War II, an explosion of new states coincided with an acceleration in scientific and technical innovation, giving rise to challenges that required global solutions.²⁹ Functionalism provided the theoretical overlay by which to coordinate state cooperation in solving such complex problems.³⁰

Functionalism predicts that states cooperate in order to maximize national prosperity.³¹ State leaders recognize that in order to discharge domestic obligations associated with providing for the common welfare, they must cooperate with their neighbors. Certainly, establishing cooperative and peaceful relationships with neighbors enables state leaders to focus on achieving national goals associated with social, political, and economic advancement. Once international cooperation is secured, states are not burdened with the friction of unstable foreign relations.

In addition, fostering international cooperation creates opportunities and improves conditions beyond the level that states

Regimes as Intervening Variables, in INTERNATIONAL REGIMES 1, 11 (Stephen D. Krasner ed., 1983) (“[T]he prevailing explanation for the existence of international regimes is egoistic self-interest.”). Krasner defines egoistic self-interest as the “desire to maximize one’s own utility function where that function does not include the utility of another party.” *Id.*; see also ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 49, 50 (1984) (claiming that cooperation can emerge “when shared interests are sufficiently important and other key conditions are met”).

29. See David Mitrany, *The Prospect of Integration: Federal or Functional?*, in FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS 53, 65 (AJR Groom & Paul Taylor eds., 1975) (noting that post-World War II inventions and scientific discoveries raised political, social, and moral issues that transcended any single state or continent).

30. See *id.* (proposing that functionalism provides the most coherent and reasonable approach to many underlying issues and complex global problems).

31. See Lucian M. Ashworth & David Long, *Working for Peace: the Functional Approach, Functionalism and Beyond*, in NEW PERSPECTIVES ON INTERNATIONAL FUNCTIONALISM 1, 6 (Lucian M. Ashworth & David Long eds., 1999) (“[I]n sum, the functional approach emphasized that cooperation across national boundaries occurred because the maximization of social welfare, though a goal of states, was not attainable within the boundaries of each national state separately.”).

could achieve by acting individually. States cannot solve transnational problems such as AIDS, pollution, terrorism, and the drug trade without international cooperation.³² By elevating welfare and global peace above nationalism and prestige, states strive to create the peaceful preconditions that will allow them to achieve their domestic mandates.³³

Recognizing peace as an end in and of itself, functionalists propose that cooperation within the practical domain of common activities is the lynchpin to international relationships.³⁴ This functional approach is reflected in the evolution of international agencies that predate the United Nations, in which international issues were compartmentalized according to subject matter. States could address issues that transcended national boundaries on a multilateral level, where relevant state actors associated with the particular functional area would convene to frame cooperative solutions. As an example, the International Telegraphic Union and the Universal Postal Union represent early attempts to channel common issues pertaining to a discrete set of functional activities.³⁵

Ernst Haas captured the spirit of functionalism in his description of the European Coal and Steel Community (“ECSC”).³⁶ Haas and other functionalists predicted that by joining their mutual coal and

32. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 12 (1999) (suggesting that technology creates new international issues that require transnational solutions).

33. See Charles Pentland, *Functionalism and Theories of International Political Integration*, in *FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS*, *supra* note 29, at 9, 15 (explaining that the creation of an interdependent society through the linking of social and economic issues erodes potential sources of conflict).

34. *E.g.*, Mitrany, *supra* note 29, at 65 (discussing how social, political and technical phenomena challenge the limits of individual states and encourage international cooperation).

35. See James Patrick Sewell, *The United Nations and Functional Conflict Management*, in *NEW PERSPECTIVES ON INTERNATIONAL FUNCTIONALISM*, *supra* note 31, at 105, 107 (analyzing the United Nations’ efforts toward “functional selection and organization of international relations”).

36. See ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES 1950-1957*, 283-317 (1958) (providing a detailed history of the ideology and political expectations of the European integration of this economic sector).

steel interests, France and Germany could establish the preconditions for a peaceful postwar coexistence.³⁷ In linking closely-aligned economic interests, resultant interactions between functionally-related communities yielded greater security.³⁸ According to this functional approach, the building of common institutions would inevitably create trust between France and Germany, and the evolution of increasingly expansive partnerships would yield greater cooperation and security.³⁹ Haas' example of the ECSC well represents the foundational prediction of functionalism: actors recognize that their individual ideological tenets are best achieved by cooperating with other actors who share similar functional characteristics.

B. THE FUNCTIONAL APPROACH TO INTERNATIONAL SECURITY

Functionalism's explanatory and predictive usefulness is not limited to purely economic domains, but is rather an approach readily-adaptable to the international security context. For example, the European Union's Rapid Reaction Force ("RRF") contemplates cooperation among several European states by melding discrete national militaries pursuant to common security interests (namely, defending against common threats).⁴⁰ States achieve international

37. See David Long, *The Security Discourses of the European Union: A Functional Critique*, in NEW PERSPECTIVES ON INTERNATIONAL FUNCTIONALISM, *supra* note 31, at 120, 130 (discussing the theory that reconstruction efforts based on economic interests would be more valuable than diplomatic efforts within the League of Nations). Haas' contribution to the development of functional theory was his incorporation of the "spill-over" concept, which yielded a strain of functionalism referred to as neofunctionalism. See Pentland, *supra* note 33, at 17-18 (explaining that neofunctionalism embraced supranationalism to achieve integration).

38. See Long, *supra* note 37, at 132 (highlighting the close link between economic welfare and security).

39. See *id.* (noting that "[S]ecurity emerges from the overlapping network of functional associations in a number of areas," most notably in social and economic settings and not in those areas related to national security).

40. See Joel Blocker, *Western Press Review: EU's Rapid Reaction Force and Other Subjects* (Radio Free Europe broadcast, Nov. 21, 2000) (explaining that the RRF is tailored to respond to a host of different threats, including crisis management, humanitarian relief and peace-keeping), <http://www.rferl.org/features/2000/10/20102000153143.asp> (last visited Mar. 24, 2004).

cooperation by linking common security interests along the lines of related functional activities. The infrastructure designed to manage the RRF represents a functional model for achieving multilateral cooperation.

While realism has emerged as the dominant theoretical approach to understanding international relationships,⁴¹ functionalism may constructively challenge the realists' conception of cooperation. Adopting a strictly realist perspective, Kenneth Abbott has approached the subject of international cooperation in the context of arms control treaties.⁴² Because competitive security frameworks are unique in the world of international relations, Abbott explains that cooperation depends on satisfying state-level information demands.⁴³ The twin strategies of verification⁴⁴ and assurance⁴⁵ enable parties to ensure that other states are not cheating their international obligations.

Implying that espionage is simply one of many tools available for verifying treaty compliance,⁴⁶ Abbott erroneously conflates two distinct operations. As previously explained, espionage activities are fundamentally different from conventional monitoring techniques.⁴⁷ Verification and assurance measures intended to monitor compliance among treaty partners are positively recognized, defined, and

41. See Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 364 (1999) (explaining that realism is premised on the notion of states, as the principle actors in international law, interact in an environment of anarchy, which focuses on war and peace and embraces security as the overriding goal).

42. See Abbott, *supra* note 10, at 1-3 (examining the provisions within arms control treaties that govern the terms of producing and sharing information).

43. See *id.* at 3 (“[P]roblems of information have been at the heart of arms control policy since the beginning.”).

44. See *id.* at 4 (defining verification as a procedure whereby parties rely on their own efforts and resources to acquire necessary information).

45. See *id.* (defining assurances as a method whereby a party provides another with information through the providing party's own efforts and resources). Assurances may include certifications or physical evidence. *Id.*

46. See *id.* (suggesting that verification methods can encompass a variety of techniques, ranging from public research to espionage).

47. See Roland J. Stanger, *Espionage and Arms Control*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW*, *supra* note 13, at 83, 99 (“[E]spionage is simply covert, unauthorized inspection.”).

scheduled within the framework of the cooperative agreement.⁴⁸ Additionally, the parties need not explicitly recognize many verification techniques in security agreements because they are already legitimate without specific authorization.⁴⁹ For example, the first modern arms control agreement between the United States and Russia relied exclusively on external verification techniques.⁵⁰ The United States depended upon ground-based seismological monitoring stations outside Soviet territory, as well as aircraft outside the Soviet Union, in order to verify compliance.⁵¹

However, positive international law does not recognize espionage, therefore triggering unique international legal issues. The practices of spying and eavesdropping should therefore be separated from verification measures and examined in isolation to determine their impact on international relations.

III. ESPIONAGE - A FUNCTIONAL TOOL FOR SECURITY COOPERATION

The ability of verification and assurance measures to reveal the extent to which parties comply with treaty obligations is limited. Monitoring activities are frequently scheduled and occur in accordance with mutually-agreeable guidelines. As an example, the "Verification Protocol" of the Comprehensive Nuclear Test-Ban Treaty ("CTBT") establishes a procedure that enables states to request an on-site inspection of another treaty member's facilities.⁵²

48. See Abbott, *supra* note 10, at 28-29 (summarizing the rationales for establishing explicit verification and assurance regimes).

49. See *id.* at 4 (stating that states may use many verification techniques "unilaterally, without any explicit agreements").

50. See *id.* at 32 (noting that the Limited Test Ban Treaty was concluded despite the "fear of offensive defection and the lack of trust" that epitomized the relationship between the Soviet Union and the United States).

51. See *id.* at 33-34 (adding that in 1963, the United States deployed two specialized surveillance satellites).

52. See Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT'L L. 405, 448-49 (2003) (noting that the CTBT establishes a "global verification regime" which relies on a number of techniques to ensure compliance); see also Abbott, *supra* note 10, at 28-29 (citing several rationales for "why states sometimes find it necessary or desirable to spell out explicit

Thus, states can prepare in advance of an inspection, and potentially create an inaccurate and misleading veneer of compliance.⁵³

Similarly, the conventional information-yielding regimes characteristic to some international security arrangements may supply only a limited amount of data necessary to maximize global order. For instance, India successfully camouflaged preparations for a 1999 nuclear test because it knew the schedule of satellite orbits in the vicinity of the testing facility.⁵⁴ Even when national technical means are more difficult to defeat, such methods cannot look inside closed buildings, provide insight into the decisions of foreign policy councils, or reveal the foreign policy intentions of state leaders.⁵⁵

Taken together, conventional verification and assurance techniques represent an incomplete method for yielding information sufficient to satisfy states that parties to an agreement are complying with their international obligations. Because of these limitations, it is unlikely that states would ever risk the consequences of foreign “defection” from international security agreements unless they retained the ability to covertly monitor their neighbors’ behavior.⁵⁶

arrangements for the production of information *ex ante*, in their agreements”).

53. See, e.g., John J. Fialka, *White House Claims of Soviet Test Ban Cheating Are Challenged by New Bomb Detection System*, WALL ST. J., Mar. 20, 1986 (highlighting the reality of the challenges that verification poses), 1986 WL-WSJ 279650; Jack Anderson, *Arms-Treaty Compliance Hard to Verify*, WASH. POST, Sep. 28, 1984, at E7 (illustrating the difficulty of confirming suspected violations of arms control treaties), 1984 WL 2014063. *But see* Stanger, *supra* note 47, at 91 (suggesting that the Russian government openly scuttled the test ban treaty and resumed testing nuclear weapons because “they did not believe they could test effectively without detection”).

54. See Johnson, *supra* note 13, at 22 (explaining that, as technological advancements give rise to increasingly sophisticated espionage methods, target countries become more apt at evading detection).

55. See *id.* at 25 (commenting that, despite technological advances, “the need for reliable agents is continual”); see also Stanger, *supra* note 47, at 92 (“[I]t is precisely in providing reliable information regarding intention that inspection is least satisfactory.”). Further highlighting the practical impacts of these limitations, the author argues that “[p]hysical inspection . . . would not reveal whether there was any intention to launch.” *Id.*

56. See Abbott, *supra* note 10, at 16 (defining “defection” as a party’s offensive or defensive motivation to abandon its treaty obligations). A party is encouraged to offensively defect when cheating on the other unknowing treaty members will yield a more profitable outcome. *Id.* at 16-17. A party defensively defects to protect against the losses that it perceives will result when another party

In addition to general doubt regarding the effectiveness of physical inspection regimes in monitoring international compliance, a state's assurances are similarly subject to manipulation.⁵⁷ Assurances represent a monitoring technique in which state parties to an agreement are required to provide other parties with information that demonstrates the assuring party's compliant behavior.⁵⁸ Therefore, prior to cooperating, states must balance the likelihood that verification regimes will achieve the desired threshold of information against the risks that a party will evade a treaty and escape detection.⁵⁹

Given the potentially-unreliable mechanics of measuring compliance, it is hardly conceivable that states would otherwise functionally cooperate pursuant to their national security interests.⁶⁰ However, with the availability of espionage, states are more willing to enter into potentially-risky cooperatives. When armed with such tools as spying and eavesdropping, states enjoy greater certainty that they will be able to validate international compliance, or at least detect when other participants are failing to comply with the treaty.⁶¹

Espionage also serves to increase trust between parties where international security-related agreements that rely on affirmative

terminates its obligations. *Id.* at 20-21.

57. See Stanger, *supra* note 47, at 97 (finding that doubt as to the effectiveness of physical inspection has led to the pursuit of inspection alternatives, such as the use of lie detectors); Abbott, *supra* note 10, at 41-42 (describing assurance mechanisms, such as data exchange and notification provisions, that parties to arms control agreements have employed).

58. See Abbott, *supra* note 10, at 23-24 (providing examples of assurances, including promulgated legal restrictions; visible enforcement activities; and records and documents that describe inventories, inspection results, and other relevant data).

59. See Stanger, *supra* note 47, at 90-91 (commenting that the decision to implement a test ban, as an arms control arrangement, is a choice between two risks: the risk of nuclear proliferation if there is no test ban treaty and the risk that the other side will try to evade the treaty if one exists).

60. See Abbott, *supra* note 10, at 24 (stating that the strategy of assurance gives each individual party the power to control the process of assembling and conveying its own information about its defense capabilities).

61. See Johnson, *supra* note 13, at 25 (commenting on the diverse goals that are advanced through spying and espionage, ranging from detecting violators of U.N. sanctions to waging war against international drug trafficking).

assurances of compliance are concerned. Without espionage, countries could be required simply to accept the information provided by other treaty partners as accurate. Mutual trust between treaty parties increases when espionage affirms that the assurances provided are accurate.⁶² States will be more willing to cooperate with other states in the future if their espionage confirms that the assurances provided by these parties are truthful.⁶³

A. ESPIONAGE FACILITATES COOPERATIVE NEGOTIATIONS

Functionalism predicts that overlapping layers of cooperation yield improved international security when distinct communities work to achieve consensus on matters of mutual interest.⁶⁴ Espionage facilitates this cooperation at the “common activity” level by enabling states to better understand their neighbors’ security needs and concerns.⁶⁵

Spying and eavesdropping provide information that permits state leaders to better appreciate their partners’ negotiating positions, and thereby encourages the facilitation of strategic dialogue. Initially, uncertainties regarding a negotiating partner’s preferences, intentions, and capabilities may either prevent the formation of a cooperative forum, or may adversely affect the substantive negotiations once the parties agree to cooperate.⁶⁶ Also, a state leader

62. See Abbott, *supra* note 10, at 26 (“[S]tates seeking to convey assurances may find some foreign monitoring desirable as a way to channel information . . .”).

63. See Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT’L L. J. 93, 119 (2003) (framing international law as an “interactive game,” whereby prospective treaty partners who are “repeat players” are likely to accumulate increasing amounts of their partners’ trust over time).

64. See Long, *supra* note 37, at 120, 132 (establishing that security, from a functionalist perspective, results from an integrative and community-oriented approach).

65. See Abbott, *supra* note 10, at 29 (stating that assurance procedures enhance interactive communications between parties entering into an agreement and allow the parties to communicate their concerns).

66. See Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 692-95 (2003) (noting that states entering into an international agreement will typically view the prospective compliance of other states with skepticism).

may be hesitant to bargain with a negotiating partner whom he suspects of misrepresenting other strategic issues that bear on treaty compliance.⁶⁷ Accordingly, espionage can yield information about a foreign state that encourages an otherwise hesitant party to negotiate.⁶⁸ In this sense, espionage creates a cooperative opportunity for parties with similar functional interests to negotiate mutually-beneficial outcomes.⁶⁹

Espionage also provides a pool of information that a state could potentially share with its allies.⁷⁰ This type of intelligence pooling is codified as one of the “interdiction principles” of the recently-conceived Proliferation Security Initiative (“PSI”), which represents the commitment of eleven member states to countering the proliferation of weapons of mass destruction.⁷¹ In pledging to exchange intelligence gathered by their individual intelligence agencies,⁷² PSI members have already demonstrated the effectiveness

67. See *id.* at 694-95 (commenting that the perceived risk of non-compliance by one state may affect its treaty negotiations with another). “On one hand, opportunistic States may attempt to push the level of commitments higher (than would be the case in the absence of the compliance dilemma) On the other hand, non-opportunistic States may push the level of commitments lower to counteract such pressures.” *Id.*

68. See Abbott, *supra* note 10, at 28-29 (highlighting that states may be more confident and willing to enter into an agreement once they are certain that the current participating states have adequate assurance procedures in place).

69. See *id.* at 27 (providing that assurances further states’ goals of “promoting cooperation and keeping the agreement intact”).

70. See *id.* at 18 (suggesting that where international compliance with treaties must be assured through observation, states may benefit from large, multilateral agreements that can reduce the costs of observation through the pooling of information between states).

71. See U.S. Department of State, *White House Fact Sheet* (Sept. 4, 2003) (noting that one of the Proliferation Security Initiative (“PSI”) “interdiction principles” is to provide for “the rapid exchange of relevant information” while “protecting the confidential character of classified information provided by other states . . .”), at <http://www.state.gov/t/np/rls/fs/23764.htm> (last visited Apr. 21, 2004). See generally U.S. Department of State, White House Press Release (Sept. 4, 2003) (providing background information concerning the PSI), <http://www.state.gov/t/np/rls/prsrl/23809.htm> (last visited Apr. 21, 2004).

72. See Rebecca Weiner, *Proliferation Security Initiative to Stem Flow of WMD Materiel*, Center for Nonproliferation Studies (June 16, 2003) (commenting that PSI members have pledged to share intelligence on arms trafficking), <http://cns.miis.edu/pubs/week/030716.htm> (last visited Apr. 21, 2004); see also

of intelligence collaboration in accomplishing the mutual goal of counter-proliferation.⁷³ Such collaboration facilitates international cooperation at the functional level on two planes. First, distributing intelligence gained through espionage solidifies the commitments that allies make to one another.⁷⁴ Espionage is a dangerous endeavor, and by shouldering the burden of the consequences that may accrue from committing espionage, nations that share the fruits of their espionage activities reaffirm to their allies that they are committed to the peaceful achievement of mutually-stated goals.⁷⁵

Second, espionage helps other states make difficult political decisions by better informing their decision makers with necessary data.⁷⁶ Espionage permits parties to complement positive law verification and assurance measures with other relevant information that facilitates functional cooperation. During negotiations, critical

Interview by the Arms Control Association with John Bolton, *The New Proliferation Security Initiative* (Nov. 4, 2003) (noting that the intelligence services of the eleven PSI member nations have consulted on “how to arrange the expeditious sharing of information when it is appropriate to support an interdiction operation . . .”), <http://www.armscontrol.org/aca/midmonth/November/Bolton.asp> (last visited Apr. 21, 2004).

73. See, e.g., Ellen Nakashima, *Insider Tells of Nuclear Deals, Cash; Pakistani Scientist Netted \$3 Million*, WASH. POST, Feb. 21, 2004, at A1 (noting that, in October 2003, Italy seized a shipment of nuclear weapons components en route to Libya after receiving intelligence from PSI members Britain and the United States); see also GlobalSecurity.org, *Proliferation Security Initiative* (noting that, in August 2003, Taiwan detained a North Korean ship carrying chemicals that can be used to make rocket fuel based on intelligence provided by the United States), at <http://www.globalsecurity.org/military/ops/psi.htm> (last visited Apr. 21, 2004).

74. See Keith B. Richburg, *A Close European Ally Hopes to Fortify U.S. Partnership*, WASH. POST, May 1, 2002, at A18 (conveying that, after the terrorist attacks on the United States on September 11, 2001, Spanish Prime Minister Jose Maria Aznar met with President Bush to discuss new intelligence-sharing arrangements as part of an effort to strengthen the United States’ and Europe’s strategic relationship), 2002 WL 19157559.

75. See *id.* (providing that Aznar and Bush shared mutual perspectives on terrorism, similar interests in Latin America, and a common desire to promote membership growth in NATO).

76. See *Wassenaar Arrangement and the Future of Multilateral Export Controls: Hearing Before the Comm. on Governmental Affairs*, 106th Cong. 39 (2000) (statement of Mr. Henry D. Sokolski, Executive Director of the Nonproliferation Policy Education Center) (stating that in 1990, France provided the United States with information about Iran’s weapons program, yielding “a better intelligence brief than [the United States] could give them”).

information regarding a party's preferences is typically difficult to acquire through conventional sources.⁷⁷ The challenge of appreciating a negotiating partner's preferences is compounded by the fact that a state's desired outcomes may shift due to changing geopolitical circumstances.⁷⁸ Therefore, espionage is especially useful for developing this type of information because the sources and methods that spies employ are tailored to account for real-time information adjustments.⁷⁹

B. ESPIONAGE FACILITATES COOPERATIVE COMPLIANCE

In contrast to their realist counterparts, functionalists discount the notion that international cooperation derives from rules that become valid only through threat of sanction.⁸⁰ Instead, functionalists predict that states view peace as a "superordinate goal," and will cooperate with other states to achieve peace regardless of the prospective imposition of punitive sanctions.⁸¹ In this sense, espionage buttresses the functional approach to international cooperation. Espionage may be thought of as a tool that enables "super-validation" of international compliance with security agreements. With espionage available as a means by which to ensure parties are upholding their

77. See Abbott, *supra* note 10, at 14 (commenting that it is difficult to obtain information about states' preferences since such information is often "secret, self-serving, or distorted"). "In a complex collective entity like a state, full sets of cardinal or interval preferences may never be clearly defined." *Id.*

78. See *id.* at 15 (stating that strategic situations may change because of factors such as popular perception, technological advances, and changes in government).

79. See Johnson, *supra* note 13, at 22, 24 (detailing the results of the Congressionally-appointed Aspin-Brown Commission, created in 1995, which investigated the value of clandestine intelligence-gathering in relation to other, more conventional techniques). The Commission concluded that the CIA offered the best "up-to-date information," as well as "better insights into the evolving humanitarian crisis in Burundi" and "the attitudes of leaders in surrounding nations" than the other techniques the Commission studied. *Id.*

80. See Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 276 (1940) (stating that a rule of international law is invalid when the violation of such rule does not result in a sanction).

81. See A.J.R. Groom, *Functionalism and World Society*, in FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS, *supra* note 29, at 93, 98 (explaining that functionalism predicts that states will move beyond their conflicts to achieve peace).

end of a security bargain, nations are more likely to cooperate within functional areas to achieve peace.⁸²

Even after negotiations for a security agreement yield mutually-agreeable terms, circumstances may prevent national leaders from soliciting the required domestic support necessary to adopt the treaty. Realist “defenders of sovereign prerogatives” may not be willing to commit a country to the obligation to give credible assurances, and thus, political circumstances may preclude national leaders from brokering an international security agreement.⁸³ To gain consensus, nations may be forced to negotiate a watered-down monitoring regime that appeases domestic leaders and assures them that the state is not surrendering its sovereign integrity.⁸⁴

Parties to an international security agreement are unlikely to cooperate absent a rigorous verification and assurance regime.⁸⁵ However, if domestic constraints only permit state parties to enter into agreements that are backed by weak verification measures, nations may nevertheless cooperate if espionage is available to complement the insufficient compliance regime. Therefore, functional cooperation results from freeing states of the political costs that national leaders may suffer if they opt into an overly stringent verification regime. Instead, the availability of espionage allows for substantive verification to occur “under the radar.”⁸⁶

In sum, the advantages that espionage offers over legally-binding verification and assurance regimes tip the scales in favor of

82. See Abbott, *supra* note 10, at 29 (noting that assurance procedures can address noncompliance concerns and serve as a check on states suspected of violating an agreement).

83. See *id.* (noting that governments can more easily obtain political and bureaucratic cooperation with other states when general and specific assurances are presented).

84. See *id.* at 28-29 (explaining that states may prefer more general assurance commitments, or may seek to place limits on the monitoring activities they consent to in order to garner support for the agreement while preventing other states from accessing highly-sensitive information).

85. Cf. Hewitson, *supra* note 52, at 488 & n.452 (suggesting that, while unilateralist behavior undercuts international cooperation, strengthened treaties and verification regimes improve the prospects for achieving cooperation).

86. See Demarest, *supra* note 9, at 330 (“[C]overt action is not espionage, but some espionage activities may constitute covert action.”).

functional cooperation. Absent a sufficiently stringent monitoring regime, antagonistic parties may not cooperate, especially in the strategic context of global security.⁸⁷ However, espionage enables nations to cooperate functionally, secure in the knowledge that they will be able to counter noncompliance.⁸⁸

Where verification and assurance measures may not illuminate noncompliance with a treaty until it is too late to remedy the derogation, espionage allows for real-time detection of violators.⁸⁹ Evidence of noncompliance gained through espionage can preempt crisis situations before tensions escalate beyond a point at which a cooperative solution is still possible.⁹⁰ For example, North Korea revealed its secret nuclear weapons program in October 2002, eight years after an agreed framework effectively committed the communist state to freezing any progress made toward developing nuclear weapons.⁹¹ North Korea's abrupt announcement amounted to a confession that it intentionally deceived the international community regarding its nuclear ambitions. This revelation precipitated an international crisis for the United States, as well as its strategic partners in the far East.⁹²

The nature of the revelation virtually eliminated any possibility of resolving the underlying disputes diplomatically, as states had been

87. See *supra* note 85 and accompanying text (commenting on barriers to cooperation).

88. See *supra* note 82 and accompanying text (asserting that espionage serves as a tool that enables states to achieve peace).

89. See Stone, *supra* note 14, at 36-37 (pointing out that historical conceptions of espionage developed before the evolution of instantaneous radio communications and satellites); see also Johnson, *supra* note 13, at 22 (noting that methods of espionage have evolved from radio transmissions to satellite surveillance).

90. See Johnson, *supra* note 13, at 25-26 (establishing how espionage may function as an "early-warning system" and serve as a check on the misbehavior of other states).

91. See generally Phillip Saunders, *Confronting Ambiguity: How to Handle North Korea's Nuclear Program*, ARMS CONTROL TODAY, Mar. 1, 2003, at 11 (providing background on North Korea's announcement and subsequent withdrawal from the Nonproliferation Treaty), 2003 WL 16228468.

92. See *id.* (elaborating on the differing assessments of North Korea's objectives and commenting that the inability to decipher North Korea's true intentions has caused rifts between the United States and its allies).

misled to believe that North Korea's nuclear program was exclusively aimed at peaceful uses.⁹³ Effective espionage may have revealed North Korea's nuclear violations years before its program became entrenched. As a result, North Korea could have been confronted with evidence of its transgressions, thereby maximizing the potential for an agreeable resolution.

CONCLUSION

The global security environment that has evolved since the fall of the Soviet Union has precipitated a wide range of volatile international hazards. New threats have replaced the relatively predictable strategic stand-off characteristic of the preexisting bipolar confrontation between the United States and its communist foe.⁹⁴ Terrorism, weapons proliferation, management of scarce resources and environmental conservation, ethnic and religious conflict, and illegal immigration dominate state foreign policy agendas.⁹⁵ Indeed, the international terrain is ripe for continued reliance on espionage as a means by which to develop information about neighboring states.⁹⁶

The utility of espionage will gain momentum as a recognized technique of self-defense as these strategic hazards increasingly threaten isolated regions previously thought immune from global conflict.⁹⁷ Espionage is a readily-pursuable avenue by which state leaders may obtain intelligence, especially in lesser-developed countries that may find sophisticated national technical means to be

93. See Jonathan D. Pollack, *The United States, North Korea, and the End of the Agreed Framework*, 56 NAVAL WAR COLLEGE REV. 11, 42 (2003) (noting the likelihood that the United States was "caught flat-footed by the speed and decisiveness with which Pyongyang had reactivated its long-dormant plutonium program").

94. See *id.* at 26 (referencing threats from North Korea and other hostile nations, as well as from fellow democracies).

95. See Demarest, *supra* note 9, at 342 (listing numerous threats to international peace and security).

96. See Johnson, *supra* note 13, at 26 (concluding that espionage remains a necessary tool for monitoring the international misbehavior of unpredictable states).

97. See *supra* notes 19-26 and accompanying text (describing the practice of espionage as the exercise of a state's right to self-defense).

economically infeasible.⁹⁸ Namibia, for instance, organized its first central intelligence service only seven years ago, citing terrorism, ethnic conflict, and trafficking in drugs, arms, and diamonds as threats requiring the conduct of espionage.⁹⁹

International verification and assurance regimes provide a valuable framework for understanding interactions between states.¹⁰⁰ Prospective treaty partners must satisfy strategic informational demands prior to entering negotiations, during negotiations, and throughout performance of the brokered agreement. The twin strategies of verification and assurance capture these critical information requirements.

As this essay suggests, states should not consider espionage merely one of the many “arrows” in the verification “quiver.” Instead, the international community should examine espionage in isolation to measure, accurately and completely, its contribution to cooperative dialogue.¹⁰¹ In the international security context, espionage is not treated as other positively-recognized and structured monitoring strategies.¹⁰² The legal status of espionage is also less developed than conventional, legally-binding monitoring agreements.

This essay has proposed that espionage is most appropriately considered to be a tool that enables functional cooperation.¹⁰³ In adopting a functional approach, this essay has demonstrated that espionage encourages and enables international security agreements that parties would otherwise be hesitant to broker. At the functional level of international security activities, espionage therefore enables

98. See Johnson, *supra* note 13, at 18 (noting that lesser-developed nations also partake in the transnational intelligence game).

99. See *id.* (highlighting Namibia as an example of a lesser-developed nation that has practiced espionage).

100. See *supra* Part III.A (illustrating how espionage facilitates negotiations towards international agreements).

101. See *supra* Part II.B (concluding that espionage triggers unique international legal issues and should be viewed in isolation from verification measures).

102. See *generally supra* Part II.B (elaborating on the functional approach to international security).

103. See discussion *supra* Part III.A (discussing how espionage facilitates cooperative negotiations).

cooperation. International security arrangements are unique in terms of the potential consequences of defection. It is therefore unlikely that states will negotiate security agreements unless they are permitted to employ all available means to monitor compliance. The availability of spying and eavesdropping encourages states to negotiate frameworks that are domestically-acceptable.

So enabled, a heightened level of international cooperation is achieved, ultimately yielding increasingly frequent iterations of state-to-state transactions. As a result of this cooperation, espionage ultimately contributes to greater possibilities for facilitating inter-activity dialogue.