

WITHDRAWING FROM CUSTOM: CHOOSING BETWEEN DEFAULT RULES

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INTRODUCTION

Curtis Bradley and Mitu Gulati's article, *Withdrawing from International Custom*, is a novel, provocative, and important contribution to the scholarship on customary international law. They argue that the current approach to customary international law, the Mandatory View, which holds that states cannot unilaterally opt out of custom but allows states to do so by treaty, is overly restrictive. They propose an alternative approach, the Default View, which would permit states to opt out unilaterally when doing so would not injure another nation. The article raises a number of interesting issues, including how the Mandatory View became the consensus in international law scholarship, the role of the persistent objector principle, and the functional value of maintaining the Mandatory View. The article also forces us to rethink what the current rules regarding withdrawal from customary law are, how the rules have evolved to the current view, and (most importantly) what the best approach going forward is.

This Article addresses some of the issues left open by Bradley and Gulati's work. It attempts to judge what approach is better given the criterion that Bradley and Gulati put forward. Specifically, this article asks whether the functional benefits of the Default View are greater than those of the Mandatory View going forward. Using the authors' standard, I argue that it is unclear whether a shift to the Default View is best for the system. Part I of this article discusses the potential effects of Bradley and Gulati's thesis on treaty law, an issue of significant importance but one that the authors do not currently take into account. I then turn to the core of Bradley and Gulati's argument—how a shift from the Mandatory View to the Default View would affect the system of customary international law. Part II attempts to tease out the essential difference between the Mandatory View and the Default View for states considering changes to customary law, while Part III discusses the conditions that would have to hold for the

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Default View to be beneficial using Bradley and Gulati's functional standard. The thesis proposed by Bradley and Gulati is worthy of discussion and debate, but also it also raises questions and concerns that the authors need to address more fully.

I. TREATY LAW, CUSTOMARY LAW, AND THE DEFAULT VIEW

Bradley and Gulati provide a comprehensive account of the current state of customary international law, a position that they describe as the Mandatory View.¹ Customary law binds all states, even absent a specific indication of consent by the state. There are two means by which states can avoid these obligations: (1) states can claim persistent objector status, although this is only open to states that objected at the time of the custom's formation; or (2) states can deviate from custom by creating a treaty that establishes a different rule.² The treaty rule displaces the customary rule as the operative law between the parties to the treaty, providing the parties with a means of opting out of custom with like-minded states. Thus even under the Mandatory View, customary international law is not always "mandatory." A state can opt out of custom, even after the formation of the customary rule, by creating a treaty regime with other like-minded states. If the treaty has a sufficiently wide membership, it could displace the customary rule entirely.

Bradley and Gulati's Default View offers an alternative to the consensus understanding of when customary international law is binding. They argue that each state should be able to decide unilaterally what parts of customary international law to accept. If a state wants to adopt a policy that is contrary to custom, the state can renounce the customary rule so long as it does not injure other states. The authors' basis for advocating this alternative is twofold. They argue that the Default View is closer to the pre-World War II understanding of custom, although their justification does not rest on history alone. They further contend that the Default View is a better approach to customary international law on functional grounds. This Article only addresses the functional argument.

As an initial consideration when judging the benefits of the two approaches, we must consider the effect the Default View may have on the institution of treaty law. Bradley and Gulati pitch their argument as relating exclusively to the institution of customary law, but the ramifications of their thesis extend to treaty law as well. Treaty law has become the

1. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 208-15 (2010).

2. *Id.* at 211-12.

dominant form for legal rules for many areas of international law, including security law (arms control and use of force), international trade law, and some areas of human rights (the treatment of combatants and non-combatants in war). Yet changes to the rules governing customary law influence treaties as well. The two sources of law are deeply intertwined: shifting to the Default View could have significant ramifications on states' expectations of how existing treaties will be interpreted and on the ability of future treaties to establish clear expectations.

Treaties exist in part because of custom. The Vienna Convention on the Law of Treaties ("Vienna Convention"), which establishes rules for treaty law, is accepted by some nations—notably the United States—only as customary law.³ Bradley and Gulati's Default View would allow states to withdraw from the Vienna Convention (or parts of the Vienna Convention) unilaterally. This is significant because it would also allow states to change the meaning of a treaty. For instance, many existing treaties take for granted that national governments are responsible for treaty violations by sub-national government actors as a matter of customary treaty law.⁴ A withdrawal from the customary treaty law would allow states to relieve themselves of the responsibility for these actors. Such a change to the customary law of treaties could have significant implications on the meaning of existing treaties, including diplomatic and economic treaties where the federal government is responsible for the actions of sub-national actors.⁵ For instance, the United States government could claim to not be responsible for the actions of the Texas state officials violations of the Vienna Convention on Consular Relations. Similar examples could be made using other common treaty rules that are accepted by states as customary law, including rules on entry in force, ratification, accession, reservations, breach, or amendment.⁶

3. See Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 433-34 (2004).

4. Vienna Convention on the Law of Treaties art. 27, May 23, 1960, 1155 U.N.T.S. 331.

5. See, e.g., *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 20 (Mar. 31) (holding the United States federal government responsible for the actions of Texas officials); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 5 ICSID (W. Bank) . 212 (2002) (holding the Mexican government responsible for the actions of state and local officials).

6. Another issue of importance to U.S. law that the authors' do not explicitly discuss is the how the Default View would affect Alien Tort Claims Act suits. If the United States withdrew from a rule of customary human rights law but other states did not, could federal courts still hear suits based on foreign violations of the human rights customary law rule? The custom would still be international law if the US withdrew, but the jurisdictional basis for the suit might disappear if the rule was no longer part of the United States law.

Stable customary rules are fundamental to the regime of treaty law. Although states can alter the Vienna Convention's treaty rules by explicitly including different procedural provisions, having a default system of treaty law procedures is critical to establishing common expectations and understandings. The Default View threatens to destabilize this shared understanding on the nature of treaty rules. This is a significant cost given the extent to which modern economic and security agreements rest on treaty agreements. And it is a cost that Bradley and Gulati do not address when evaluating the relative costs of benefits of their proposed approach to customary law.

II. DEFINING THE DIFFERENCE BETWEEN THE MANDATORY VIEW AND THE DEFAULT VIEW

The next two parts discuss Bradley and Gulati's article on its own terms. This part examines what the essential difference is between the Mandatory View and the Default View. The next part analyzes what conditions are necessary for the Default View to be a functionally better approach for the international system.

Bradley and Gulati describe the current approach as the Mandatory View, but the current approach does hold that states are always bound to customary international law in their relations with others. The Mandatory View incorporates a type of "default" rule. The default rule requires some agreement from other states, either multilaterally or bilaterally. In practice, states can select a rule different from the customary rule if the parties explicitly decide to do so by treaty. The Default View discussed by Bradley and Gulati is a unilateral version of the Mandatory View's "default rule" approach: the state can choose to opt out of customary law by announcing unilaterally that it no longer intends to follow the rule in the future.⁷

The difference between the two approaches is not whether states can opt out of customary international law—states may opt out under both views—but rather, under what conditions they may do so. The Mandatory View requires the agreement of the partner state or states, while the Default View does not require any external consent although this view might include a notice or no-injury requirement.⁸ Thus, the major divergence between the two views is status of the customary law with regard to states that have not formed treaties to alter the customary rule. The Default View would provide states with far more leeway to opt out of custom with non-treaty partners, while the Mandatory View would maintain custom as a

7. See Bradley & Gulati, *supra* note 2, at 213-15.

8. *Id.* at 11.

legal obligation between non-treaty partners. Yet even this understanding of the Mandatory View may be overly stringent because the decision of states to contract around the customary rule affects the status of the relevant rule as custom. The *opinio juris* element of the customary rule is undermined if many states choose to deviate from it by creating contrary treaty law. For example, customary rules on international investment are currently undergoing such a re-examination.⁹ The traditional rule that states must reimburse foreign investors for any government expropriation has long been contested,¹⁰ but the recent trend towards bilateral investment treaties (notwithstanding the failure to reach a multilateral investment agreement) has led some arbitrators and scholars to conclude that these treaties are reshaping customary international law.¹¹

The extent of the difference between the two views may turn on how broadly the Default View's restriction on notice and no-injury is interpreted. Bradley and Gulati observe that the historical Default View included an injury restriction. In the author's discussion of pre-World War II international law scholars, they note Vattel's understanding was that states are only able to withdraw from custom "at a time when no particular Nation will be affected by the new rule."¹² Bradley and Gulati appear to embrace this restriction in their understanding of the Default View, although the contours of the restriction as interpreted by Bradley and Gulati are ambiguous.¹³ The line could be drawn either with regard to the historical practice or with regard to what the optimal rule would be today (the two might be different). But the authors' present explanation of the boundaries of this injury requirement is too opaque to make any predictions about what customary law would be eligible for withdrawal under the Default View.

This is an area that the authors (or others) need to flesh out more if we are to have a realistic picture of how the Default View would function. We could have a robust form of this restriction—no withdrawal that affects the interests of another state is permitted – or a weak form—withdrawal is permitted so long as it is not opportunistic. These two forms of the

9. See ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 536 (John H. Jackson ed., 2d ed. 2008).

10. See *id.* at 536-37.

11. Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 128-30 (2003).

12. Bradley & Gulati, *supra* note 1, at 217 (quoting EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* 385-86 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

13. See *id.* at 213-23, 250-51 & 252.

restriction have very different implications for when the Default View permits withdrawal in areas where customary law is influential.

For example, in international investment law, the robust form of the injury restriction would seem to prevent states from withdrawing from customary rules to respect foreign investment with regard to any *existing* investments.¹⁴ Withdrawing from these customary rules would adversely affect the interests of foreign private investors, and by extension, the investors' home state. States would be free to withdraw from customary rules regarding *future* investments, although, as a domestic policy option, this might be significantly less politically desirable to the host government.

By contrast, the weak form of the restriction would allow the state to withdraw from customary rules on investment with regard to existing investments, so long as the state was not acting opportunistically. This could occur where a state did not take an ownership interest in the property wished to enact rules to restrict the property's use, such as rigorous environmental standards. Some investment arbitration panels have found environmental regulation to be a form of expropriation, and thus the state might want to withdraw from customary rules out of concern that the environmental regulations would run afoul of international investment rule.¹⁵ Here, the state would not be acting opportunistically—the regulations could be adopted in a non-discriminatory manner and with no intent to appropriate the foreign investment.

A different issue arises with the customary law of human rights. In this area of law, states have interest in the global respect for human rights, not just the human rights of its nationals. Thus, a state's interests are implicated whenever there is an alteration of human rights law with regard to any person anywhere. Under the robust form of the restriction, states would never be allowed to withdraw from human rights custom. Under the weak form of the restriction, the issue would be whether the state was acting opportunistically—for instance, withdrawing human rights guarantees during periods of political unrest or during elections. The weak

14. The substance of customary international law regarding foreign investment is contested. *See, e.g.*, LOWENFELD, *supra* note 9, at Part VI. Nonetheless, customary international law is still viewed by many scholars as including minimum standards for foreign investment. *See, e.g.*, SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 55 (2008). Arbitration panels also frequently find that customary international law includes minimum standards. *See, e.g.*, Loewen Group v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), 7 ICSID (W. Bank) 442 (2005) (holding that the trial in question and the verdict rendered are incompatible with "minimum standards of international law").

15. *See, e.g.*, Metalclad Corp., *supra* note 5. For a discussion of these issues, *see generally* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30 (2003).

version may therefore allow states to withdraw from some non-*jus cogens* human rights protections during periods of relative social and political calm.

In short, the difference between the Mandatory View and the Default View need not be tremendous, although it is hard to know its true extent given the current formulation of the Default View. The Mandatory View permits states to withdraw from custom by treaty—that is, withdraw with bilateral or multilateral consent—while the Default View allows states to withdraw from custom unilaterally, subject to an injury restriction. The stronger the Default View’s restrictions on withdrawal, the more the Mandatory View and Default View converge. Yet there is still a significant area where a shift from the Mandatory View to the Default View would be important.

III. THE COSTS AND BENEFITS OF SHIFTING FROM THE MANDATORY TO THE DEFAULT VIEW

As Bradley and Gulati discuss, shifting between these regimes has costs and benefits.¹⁶ My discussion draws on the points that they raise and evaluates the costs and benefits using the standards that Bradley and Gulati do.¹⁷ Both the Mandatory View and the Default View incorporate the use of default rules, but each permits states to withdraw from custom on different terms. Adopting the functional view that Bradley and Gulati take, which approach is best depends on the relative costs of each.¹⁸ This Part evaluates those costs and examines the conditions in which each approach would be optimal.

A. Defining the Costs and Benefits

One state’s withdrawal from custom can impose significant costs on other states. The Mandatory View provides some protection to this class of potentially injured parties. The withdrawing state must seek the consent of the other states through treaty negotiations. The affected state can thus demand compensation for any injury during treaty negotiations. So long as the withdrawing state’s benefit from establishing a new rule is greater than the costs of the change to the other state, a treaty should be possible.¹⁹

16. See Bradley & Gulati, *supra* note 1, at 241-54.

17. This Part’s discussion of the Default View incorporates the weak form of the restriction on the state’s ability to withdraw from custom so that the two views will not converge.

18. Of course we can have non-functional goals as well. Others in this symposium address this issue so I limit my discussion to evaluating the author’s claims on their own terms.

19. The ability of states to alter rules by treaty should also permit the emergence of efficient rules under the Mandatory View.

The Default View does not protect against such harm to the same degree. The withdrawing state may decide to opt out of the custom unilaterally. Thus the Default View would permit a state to withdraw from custom even when the costs of the withdrawal are higher for the rest of the world than the benefits to the withdrawing state.²⁰ Here, the international system may experience a loss of welfare that would not have been possible under the Mandatory View. Under the Default View, states might still engage in treaty negotiations to establish an alternative rule, but the injured states would be seeking a treaty with the withdrawing state. Unlike the Mandatory View, the withdrawing state would not have to compensate the injured state for any damage done. Rather, the withdrawing state would be able to extract some concessions from the injured state as the price of agreeing to the new treaty rule.

The disadvantage of the Mandatory View, as Bradley and Gulati note, is the possibility for high transaction costs or holdout problems.²¹ Negotiating bilateral or multilateral alternatives to custom can be expensive, particularly for smaller states. States may also resist forming mutually beneficial treaties in an attempt to gain a greater share of the joint gains.²² However, these costs also exist under the Default View. If a withdrawing state opts out of a customary rule and thereby creates a net loss for the international system, then these same transaction costs may be incurred as states attempt to negotiate an alternative rule through treaty law. Under the Default View, the withdrawing state would simply be the state be in the position to hold out from the agreement and extract more of the joint gains from any subsequent agreement.

B. Evaluating Each Approach

Both approaches to customary law allow states to opt out of custom but do so on different terms. Consequently, much of the analysis of which approach is more desirable depends on our perception of the value of contemporary customary international law. If most international custom could be altered without any loss to the international system, then the

20. We observe escape clauses in treaties where the benefits to one state of exiting the treaty are higher than the costs to the treaty partners. See Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 298 (1991) ("A politically Pareto optimal escape clause would not allow parties to revoke concessions at will, but constrains escape to circumstances in which the gains to the party avoiding concessions exceed the costs to its trading partners.").

21. See Bradley & Gulati, *supra* note 1, at 41-42 (discussing the holdout problem under the Mandatory View).

22. See generally James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269 (1998).

Mandatory View appears to impose unreasonably high transaction costs on states attempting to opt out of custom. Beneficial changes to international custom (i.e. changes that result in more gain for the withdrawing state than losses to other states) may not occur because of transaction costs. I will call these Type A costs—net beneficial alterations to customary law that are not undertaken because of the transaction costs of negotiating the change. But if most international custom is a net benefit for the international system—that is, changes to the custom would impose greater costs on the international system than benefits gained by the withdrawing party—then the Default View is overly permissive. The Default View would allow one state to impose a net cost on the international system unilaterally. These are Type B costs—unilateral changes to customary law that impose a net cost.

At a system level, we are interested in minimizing the combination of Type A and Type B costs. The decision of whether to adopt the Mandatory View or the Default View depends on our relative concern about Type A costs (which are minimized by the Default View) and Type B costs (which are minimized by the Mandatory View). If we have good *ex ante* beliefs about what type of cost is more likely in different categories of custom, then we could adopt specific rules for different categories of custom. For instance, the Mandatory View could govern human rights law, while the Default View could govern international investment law. If we do not have good *ex ante* beliefs about different categories of custom, then the best approach would be a uniform rule for all custom.

Evaluating the two approaches along functional lines, we need to have a belief about the quality of customary international law. If customary international law already incorporates rules that are net welfare increasing for the international community, then a shift towards the Default View may be welfare decreasing. Bradley and Gulati do not provide us a reason to believe that current international law is in need of significant change. They argue that the fact that the system of international customary law has not been changed does not mean that customary international law is efficient.²³ While this is a valid point, the authors fail to make the affirmative case that the rules established by customary international law (either all or some) are inefficient at the system level. Without such a case, the argument for the Default View remains incomplete.

CONCLUSION

Curtis Bradley and Mitu Gulati have proposed a novel and provocative approach to international law. Their work has and will spur

23. Bradley & Gulati, *supra* note 1, at 242.

debate on the historic approaches to customary international law, the evolution of the current consensus view on international law, and whether we should maintain this consensus view in the future. Yet even on the authors' own functional standard, it is unclear whether a shift to the Default View is desirable. Significant questions remain, including the effect of a change on treaty law, the contours of the Default View, and whether a system of unilateral withdrawal from custom would be beneficial for the international system.