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On the Nature of Sources of International Law:

Social agreement and Inertia

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Table of Contents

I. Introduction ………………………………………………………………………………….. 1

II. Three Dimensions of Sources of International Law ……………………………………….. 4

1. Sources of International Law: Outermost dimension 5

2. State-'Object' Dimension 7

2.1 States-Law: Legitimacy

2.2. State-State: International Relations (IR)

2.2.1. Political authority

2.2.2. Social agreement

2.2.3. Inertia

3. Each State's own Dimension 12

3.1 State interest

3.1.1 Security interest: Need for survival

3.1.2 Economic interest: Prosperity and economic social cost

3.2 Identity: Pursuit of state's value

III. Paris Agreement: Climate change regime with social agreements ………………………... 15

IV. The Law of the Sea: Reserve of customary international law by social/legal inertia 22

V. Conclusion …………………………………………………………………………....... 32

References ……………………………………………………………………………….… 33

Abstract

Compliance with international law has been researched by many scholars, but none of literature explains with whole structure of the mechanism, just partial aspects, such as interactions, self-interests or norms, separately. However, nature of the law cannot be understood thoroughly in this incomplete manner. I argue the 'Three dimensions of sources of International Law', therefore, which sheds light on dynamics beyond the sources of international law, how the law works and why states obey the law. The most exterior dimension are the sources of the law, treaties, customary international law, general principles of law and Jus Cogens, as products of inner dimensions. The Second layer involves dynamics between states and other objects where legitimacy, between state and law, as well as elements of inter-states, political authority, social agreement, and inertia are operating. Underneath the second dimension is each state's own dimension, state's security interest, economic interest, and pursuit of state's value, which are drives that states strive for meeting within the regime of international law. This systemic framework with basic elements will offer integral understanding of international law, leading to enhanced compliance.

Keywords: Sources of international law, Treaties, Customary International Law, Jus Cogens, Social agreement, Legal inertia, Paris Agreement, The Law of the Sea

I. Introduction

What is the nature of sources of international law? What does exist beyond the sources?

Like all other legal system, there are sources of international law, which perform as a standard whether a law is international law or not. Treaties, customary international law, general principles of international law and Jus Cogens are widely accepted sources of international law up to date, [1] and the International Court of Justice (ICJ) examines this in the article 38 of its statutes, which plays as a milestone for the law.[2]

The article and each source of international law, however, don't elaborate why the law should be complied and what makes states responsible for them. They are products of the beyond dynamics of international law that make states obligated to the law, and the dynamics, or nature, of sources of international law are veiled. Tons of existing literature on the sources of international law articulate only about each of their definitions, legal procedures, and implications on cases, in practical aspect. Account on the characteristics of the sources of international law is not dealt with.

On the other hand, compliance of international law is a well-developed research field, which is one of the most rapidly developing subfields of international legal scholarship.[3] Many scholars agree that interactions, or reciprocities, between state actors are a key that makes states comply with the law. Posner and Goldsmith emphasized that "international law provides a focal point for coordination,"[4] and nations abide by the law

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[1] Weiner, Allen S et al., *International Law*. 8th ed. (Burlington, MA: Aspen Publishing, 2023), p 4.

[2] *Statute of the International Court of Justice,* San Francisco, June 26, 1945, in force October 24 1945, 33 UNTS 933: Article 38 prescribes that

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[3] William C. Bradford, "International Legal Compliance: An Annotated Bibliography," *North Carolina Journal of International Law* 30 (2004): 379.

[4] Eric Posner and Jack L. Goldsmith, "The New International Law Scholarship" University of Chicago Public Law & Legal Theory Working Paper No. 126, 2006.

due to fear of retaliation from counterpart nation, of failure of coordination which will increase social costs of failing, and of reputational loss.[5] Exclusion of state violator from the international cooperation and membership, termed externalized outcasting, was also argued, which is non-violent and carried out outside of the regime, eventually leading to reputation harm. In previous legal concept of enforcement, it was narrowly understood that law matters only if it is enforced internally with violence by traditional bureaucratic organizations like police or militia.[6] Brunnee and Toope stated interactional aspect of international law that contributes to compliance, congruence between its rules and practices as well as reciprocity among actors.[7] "It can exist only when actors collaborate to build shared understandings and uphold a practice of legality."[8] Arbitration also gives a measure of sanction on the law breaches despite absence of centralized adjudication and enforcement agencies.[9]

Self-interest is another salient element of compliance. It has been researched fruitful in the social sciences that collective entities like states act instrumentally based on calculations and to maximize their interests.[10] As a result, they need not to participate in binding treaties unless the law aligns with their own interests. Treaties are designed to meet their member states' interests as they are compromises of states, and joined states are also able to adjust their benefits when they explore, redefine, and discover interests through repeated internal analysis, negotiation and calculation. With these self-adjusting mechanisms, treaties can be adapted to changing interests of states, which maintains compliance.[11] Brunnee and Toope even claimed that "interests and power are the only explanations of state conduct."[12] Interests include economic, or material advantages, naturally. Decision is not a free good, especially when it comes to government, resources for policy and political decisions are limited and costly. Therefore, continuous recalculation of

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[5] Ibid.
[6] HATHAWAY, OONA, and SCOTT J. SHAPIRO, "Outcasting: Enforcement in Domestic and International Law." *The Yale Law Journal* 121, no. 2 (2011): 252–349.
[7] Brunnée, Jutta, and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).
[8] Ibid, p.7
[9] Weiner, 2023. p.28.
[10] Posner and Goldsmith, 2006. p.472.
[11] Chayes, Abram, and Antonia Handler Chayes, "On Compliance," *International Organization* 47, no. 2 (1993): 179–185.
[12] Brunnée and Toope, 2010. p.92

costs and benefits leads to resource shortage. On the contrary, established rules by international law reduce burden of bureaucratic organizations functioning routinely and standard procedures, heightening government efficiency, normal organizational presumption toward compliance.[13] Goodman and Jinks presented as well that material inducement "whereby states and institutions influence the behavior of other states by increasing the benefits of conformity or the costs of nonconformity through material rewards and punishments."[14] is among 3 mechanisms of social influence that drive state behavior following international law: material inducement, persuasion, and acculturation.[15]

Hurd, IR scholar, studied on the reasons of social control, coercion, self-interest, and legitimacy.[16] He argued that asymmetry of power among agents brings compulsion of weaker agent by fear of punishment or physical damage, which is not a voluntary compliance with the rules. Self-interest was also considered as a foundation of most social activities to maximize returns after calculations. Legitimacy, 'the normative belief by an actor that a rule or institution ought to be obeyed"[17], is the last reason that he underscored through the article, which he argued was less attended by scholarship compared to coercion and self-interest. It provides internal reason to obey the law with much more voluntarily motivated compliance than that by coercion.

However, even though fundamentals of compliance with international law needs holistic analysis owing to its complicated nature, the literatures are fragmented, figuring out only partial aspects of international law. None of these accounts fully provide a systemic theoretical framework on the dynamics that make states comply with international law. Three factors Chayes argued, efficiency, interests, and norms don't explain the legal obligation in international society, satisfactorily. Hurd's article figured out important reasons of compliance, but it is not whole picture as well. In addition, self-interest is too basis of every

[13] Chayes and Chayes, 1993. p.178-179.

[14] Goodman, Ryan, and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (New York: Oxford University Press, 2013), p.23.

[15] Ibid, p.22.

[16] Ian Hurd, "Legitimacy and Authority in International Politics." *International Organization* 53, no. 2 (1999): 379–408.

[17] Ibid, p.381.

actor's behavior that is same as a situation, for instance, stating 'the US is constituted of states' rather than listing of names of states. More systemic and precise approach with basic elements is needed. Therefore, I develop a theory, **3 dimensions of sources of international law**, elaborating the nature of sources of the law. This theory provides systemic illustration, why states follow international law in absence of central government of world and which dynamics operate during compliance, with each elemental constituent that should be multidimensional for accurate discernment of the entity. Integrative understanding will offer deepened insight on the most advanced legal regime, international law, leading to enhanced compliance.

II. Three Dimensions of Sources of International Law

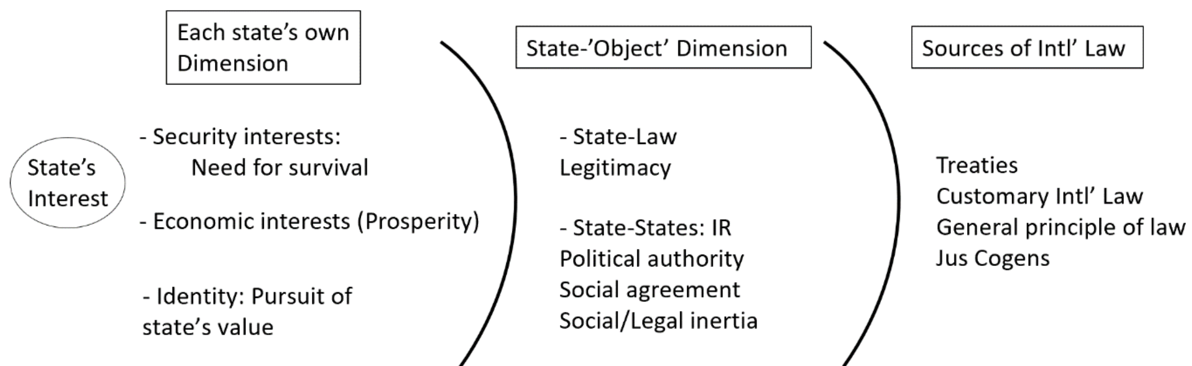

Figure 1. Diagram of 3-dimensions of Sources of International law

I argue there are three dimensions of sources of international law (Figure 1). The most exterior is the source of international law, treaties, customary international law, general principles of law, and *Jus Cogens*, as products of inner dimensions. Then, I classify each element of dynamics into state-'object' dimension and each state's own dimension with a state as an actor. The second state-'object' dimension involves dynamics between state and law as well as other states, which is international relations (IR). For the state-

law, legitimacy leads states' compliance as the law itself has such innate power. The nature I argue working between states, within IR, is political authority, social agreement, and inertia. In the innermost dimension, illustrating each state's own reason to participate and obey the law, exist state's interest for security and economic interest that are main factors which motivates compliance. Nations' identity, pursuit of their own value, is another constituent that makes states obligated, sometimes even contrary to their interests. Of course, law is intricate complex, many factors entangled, thus not only one but also several elements of dimensions accumulate to each source. A state might conclude a treaty for international institutions under the UN because the treaty entails legitimate objective, by political authority of the institution or advanced countries, with the state's agreement to the law, from its own interests regarding security and economy.

The coordination that makes states comply with the law, feared of retaliation, which several scholars argued, results from dynamics in international relations, the second dimension, particularly not only by political authority of powerful countries but also violator's aversion to loss of its own authority within foreign relations, due to its agreement to the law, for the state's own security or economic interest. Additionally, the efficiency, the factor from literature for example, can be analyzed into legal inertia that derives from economic interests of states. This framework theory can offer the greater part of possibilities of foundational reasons states comply with international law as each factor is the elemental nature of the sources of the law.

1. Sources of International Law: Outermost dimension

In the exterior dimension are the sources of international law, treaties, customary international law, general principles of law and Jus Cogens, which are created as an outcome of dynamic from inner dimensions.

Treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and

whatever its particular designation."[18] As is nature, it requires consent of each state to be legally bound by its duties. Treaties are called in various terms like convention, agreement, protocol, charter, statute, and covenant, all equal concepts in international law. The codification of international law, involving every other source of the law, should be in format of treaties at the conclusion, the reason why social agreements of states to be bound to them are substantial.

Article 38 b. of the Statute of the International Court of Justice stipulates that "international custom, as evidence of a general practice accepted as law."[19] Customary law requires usage (*usus*) of the law by state actors and *opinio juris sive necessitates* that is significant characteristics of customary law, the subjective element to ascertain "whether a practice is observed out of a sense of legal obligation or necessity, or, rather, merely out of courtesy, neighborliness, or expediency."[20] This subjective aspect is important because customary international law doesn't need long-standing traditions, opposite to domestic customary law, therefore there should be normative character that "the law is what practice ought to be."[21] Customary International law is a brilliant systemic tool for global governance where centralized government for the world is absent. Further explanation will be elaborated in section 2.3.2. Inertia.

General principles of law, such as justice of due process, are those originally used for legal reasoning in the domestic law at the same time in international legal system.

The Article 53 of Vienna Convention on the Law of Treaties (hereafter VCLT) stipulates that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law," as well as the Article 64 states "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." This gives *jus cogens* a superior order above other international law, voiding its validity if the peremptory norm is violated. Treaties against

[18] *Vienna Convention on the Law of Treaties*. May 23, 1969, United Nations Treaty Series, 1155, 331.
[19] *Statute of the International Court of Justice*, 1945. Art.38.
[20] Bederman, David J. *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010), p.144.
[21] Roberts, Anthea Elizabeth. "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *American Journal of International Law* 95, no. 4 (2001): 761.; Jeong, KyungSu. "(A) study on the current formation of customary international law." Seoul: Korea University, 2002, p.9-20.

jus Cogens, such as genocide, slavery, and piracy, which are generally recognized, are void. It is an advanced legal accomplishment in human history, recognizing boundaries international law should not cross.

2. State-'Object' Dimension

The Second dimension is the one between states and other objects. Legitimacy is dynamic between state and law, the nature of law itself. Political authority, social agreement, and inertia operate inter-states, which is within international relations.

2.1. States-Law: Legitimacy

The origin of legitimacy is still controversial in the field of legal philosophy, between natural law and positivism. Not only Acquinas, but also modern philosophers as Finnis and Dworkin who argue natural law theory consider there is universal superior norm or value that can even evaluate and impact on the most supreme law, which is constitutions of states in nowadays. Positivists like J. Bentham insisted that law is sum of a supreme ruler's order and that's why law makes people obligated and builds legitimacy. H. Kelsen argued there is independent and neutral legal system not impacted by social or political influence and only the 'Basic norm', the origin of legal system, can provide validity of law.[22] H.L.A. Hart, the representative English legal philosopher, perceives law as a system of norms, a union of primary rules of obligation and secondary rules of empowering the first one, leading to internal acceptance of followers.[23] No matter what theory someone thinks of, whether it is value, order, or recognition, law represents legitimacy, orienting the superlative moral norms that make law as law, and legitimacy itself brings compliance with the law, which

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[22] Kelsen, Hans. *Pure Theory of Law* (Berkeley: University of California Press, 1970).
[23] Hart, H. L. A. *The Concept of Law*, Third edition. (Oxford, United Kingdom: Oxford University Press, 2012), p.79-99.

is also in boundary of state's own dimension of the three-dimension theory, as providing internal reason for an actor to abide by a rule,[24] facilitating "the operation of organizations requiring enthusiasm, loyalty, discretion, decentralization, and careful judgment."[25]

International law even manifests evolution of legitimacy concerned with common good of mankind, transcending the frontiers of state, or, which denotes state's pursuit of value in the three-dimension theory. The VCLT, the Vienna Convention concluded in 1969, is the best example. The Convention stipulates default rules on treaties, providing grounds for invalidity of treaties, which is the 'rule of recognition' among the secondary rules that Hart argued, criterion of validity of the rules. It includes error, fraud, corruption, coercion, and conflicting with *Jus Cogens*.[26] Many treaties concluded in colonial states during the time of imperialism are invalid according to provisions, and those against *Jus Cogens* are void. It is the higher level of legitimacy, sublime achievement of mankind.

2.2. State-State: International Relations (IR)

2.2.1. Political Authority

Political authority is elaborated largely in existing literature. Status among states in international relations connects to leadership of powerful countries, even coercion of their norms to others occasionally, with economic sanctions or military measures. Since international organizations (IOs) began to be founded in 19th century, finally the UN system established in 1945, international institutions also have played significant roles of global governance with the UN being a platform for vital interactions among states.[27] Both leading countries and IOs can form public opinion at the international stage including forum in the UN, drive agendas and finally conclude treaties or create new practices.

[24] Hurd, 1999. p.387

[25] Claude, Inis L., Jr. *The Changing United Nations* (New York: Random House, 1967).

[26] *Vienna Convention on the Law of Treaties*, 1969. Art.47-53.

[27] Jacob Katz Cogan, Ian Hurd, and Ian Johnstone, eds., *The Oxford Handbook of International Organizations*, Oxford Handbooks (Oxford: Oxford University Press, 2016), p.91-121.

Tons of UN Conventions cover various issues, not only secondary norms on international law but also security, ocean, environment, economics as well as human rights, crime and dispute resolution, etcetera, creating international order of modern world. Furthermore, powerful countries take lead in the development of customary international law. In the formation of the law of the flag, for instance, Britain was the leading maritime nation from the 18th century to 19th century, and its domestic regulation on the flag responsibility became dominant in international shipping standards which through other states' acceptance and adoption attained the status of customary law.[28]

2.2.2. Social Agreement

States follow international law because they agreed on it. It's straightforward. Treaty is a contract among states, a promise. Social agreement is made so that states voluntarily consent to conclude treaties and they are ratified in each government to affect domestically. In bilateral treaties, principle of reciprocity that breach of obligations causes counterpart's default is primary for compliance, however, there is free-riding problem in multilateral treaties as cooperation between states is difficult to achieve and sustain.[29] Various mechanisms have been implemented to prevent it, especially 'managerial approach' in international environmental law, which will be illustrated in the later section of Paris Agreement.

2.2.3. Inertia

Homeostasis is essential for our stability and continuity of lives. The Sun rises and falls every day, and all living organisms sustain certain level of biological vitals, such as blood pressure, body temperature etc., which is natural homeostasis. Society also needs homeostasis for its functioning and development as there

[28] Mansell, John N. K. *Flag State Responsibility: Historical Development and Contemporary Issues* (Berlin: Springer, 2009), p.37-56.
[29] Mearsheimer, John J. "The False Promise of International Institutions." *International Security* 19, no. 3, (1994): 12.

would be serious confusion and waste of resources if there isn't order and daily routines in social operations. The force leading to the homeostasis of society is social inertia, or institutional inertia.

Inertia, as Newton found in physical science, is a power to persevere in its present state.[30] The force operating in society has the same nature, building stability[31] and durability of society. The mechanism of the social inertia, or institutional inertia which is subset of social inertia, has been actively researched in social science. "Path dependence" theory articulates that processes people use continuously become so entrenched and dominant that it becomes difficult to make changes or induce new path out of established ones.[32] Each step of the theory is revealed as following. First, reactive sequences precede for connected processes. These are series of occasions that subsequent events are linked as a "reactive" result of antecedent actions. Critical junctures are next necessary points where certain route becomes solidified among plural alternatives and reversing to the initial point after the path becomes costly and difficult. "Increasing returns" and "positive feedback" enhance dominance of the path among several options. Increasing returns refers to benefits of users of the path due to the condition the more usage of the path, the more prominent it generates advantages. Positive feedback is a similar phenomenon where the value of the decision increases as same choice is made by more people. Finally, it leads to self-reinforcement and "lock-in" stage, which reproduces the chosen path and perpetuates it with complementary institutions.[33]

While the path dependence theory is habitual, which mainly makes economic profits in return, several authors make distinction of interest factors as well. Watson argues that law can change when interests of society and ruling elites overcome inertia from the most satisfactory rule by the time. In addition, legal reform entails considerable cost, including behavioral adjustment according to the change, thus benefits

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[30] Isaac Newton, *The Principia: Mathematical Principles of Natural Philosophy*, ed. I. Bernard Cohen, Anne Miller Whitman, and Julia Budenz (Berkeley: University of California Press, 2016).
[31] Fukuyama, Francis. *The Origins of Political Order: From Prehuman Times to the French Revolution* (New York: Farrar, Straus and Giroux, 2011), p.40
[32] KINGSTON, CHRISTOPHER, and GONZALO CABALLERO. "Comparing Theories of Institutional Change." *Journal of Institutional Economics* 5, no. 2 (2009): 173.; see also Brulle, Robert J., and Kari Marie Norgaard. "Avoiding Cultural Trauma: Climate Change and Social Inertia." *Environmental Politics* 28, no. 5 (2019): 889.
[33] Mirit Eyal-Cohen, "Unintended Legislative Inertia," *Georgia Law Review* 55, no. 3 (Spring 2021):1223-1232.

must be seen to outweigh the costs.[34] Mirit also points out limited legislative resources, vested interest, and high cost of change as a factor influencing inertia.[35] The institutional change is rendered as a collective-choice process, “in which rules are explicitly specified by a collective political entity, such as the community or the state, and individuals and organizations engage in collective action, conflict, and bargaining to try to change these rules for their own benefit.”[36] Each individual calculates costs and benefits from the change, and it can come into effect when ‘minimum coalition’ agrees to it.[37]

The social inertia is often used for negative implications, cause of inability to adapt to new circumstances, and institutional rigidity connected to political decay.[38] This is true when innovation is needed for evolution of institutions because homeostasis cannot be maintained in every situation as well as should not. In keeping with external circumstances, homeostasis must be broken for a while so that its entity can adapt suitably to the environment. The inertia, however, is not an adverse force itself, neutral power toward social homeostasis, which is fundamental importance for stability of system when the equilibrium is pursued, only negative impediment for change in inverse surroundings. Its meaning depends on societal context of the time.

Furthermore, I coin a term *legal inertia*, a force operating toward homeostasis of society from the law that eventually contributes to stability of society. It is different from the social inertia in aspect of its magnitude by protection of law in society, and ‘normative reason’ to pursue homeostasis for legal predictability and certainty. Law secures legal interests systemically in case there is normative necessity and utility to guarantee them. Once a norm is raised to position of a law, its change requires much more resources and efforts than others with social inertia. In addition, to achieve ‘rule of law’, law should be certain and predictable so that people subjective to the law can comply with it.

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[34] Alan Watson, "Comparative Law and Legal Change," *Cambridge Law Journal* 37, no. 2 (November 1978): 331-332.
[35] Mirit Eyal-Cohen, 2021. p.1196, 1204.
[36] Kingston and Caballero, 2009. p.155.
[37] Ibid, p.156.
[38] Zantvoort, Bart. “Political inertia and social acceleration.” *Philosophy & Social Criticism* 43 (2017): 707–723.; see also Mirit Eyal-Cohen, 2021. p.1206, 1270.

Especially regarding customary international law, both social inertia and legal inertia are fundamental mechanisms. The former one, social inertia, develops certain practices that are necessary for nation's security or correspond to economic interests by mechanisms of path-dependency and cost-benefit analysis. After a certain path is used in the main for some length of time, it gets acknowledged as a custom. When it becomes prevalent behavior in international society is the time that it is on the step for recognition as a customary international law by nations. Not all customs attain status of CIL, it should be recognized as a general practice among nations and there should be normative necessity and utility that construct *opinio juris*. Before the International Law Commission (ILC) was established, this whole process of consolidation of customary law was an object for diplomatic trading between nations as well, but it is the ILC that distinguishes customary international law among several suggestions whether specific custom is the customary law or not these days. Following the recognition of customary international law by the ILC, a custom attains legal status leading to enhanced stability of not only the customary law itself but also society. Legal inertia operates afterward.

In current situation where world government is absent, the customary international law working by inertia is a useful legal invention that has capacity to govern states spontaneously since customs that are already practiced widely around the world can be recognized as CIL without nettlesome process of concluding treaties with social agreements. Besides, developed states or international institutions can lead formation of new customs to be pervaded so that they pass into the corpus of customary international law later, as so-called emergent CIL or instant CIL are created recently.

3. Each State's own Dimension

Finally, underneath the second dimension lies each state's own dimension. For state is an actor made up of individuals, it follows the second dimension for its own interest and value. There entail state's security

interest, economic interest, and pursuit of state's value, which are basic drive states endeavor to meet through the law.

3.1. State interest

3.1.1. Security interests: Need for Survival

The principal reason why polity as a state exists is to secure their members' survival and safety in daily lives. Paradoxically, the best politics of state may be a status in which it is so assured that people don't aware of necessity of the state for their protection. Therefore, state, as a main subject of political stage, seeks its own security, as such realists of international relations scholarship even claim that the most basic motive for states is their survival.[39] The security states strive for includes area of military, environmental or economics challenges.[40] Characters of threats in those areas demand inter-states cooperation, which lead to states' agreements in a bid to solutions. States have gathered to conclude numerous international law, specifically treaties, those of NATO (North Atlantic Treaty Organization) which is a collective security system for Europe and North America as a typical example.

3.1.2. Economic interests: Prosperity and economic social costs

At the same time, states rationally seek prosperity and economic social cost. A state is composed of reasonable people, and they calculate cost-benefit and pursue economic social cost naturally in their daily lives and social activities. State, therefore, makes efforts to maximize their profits, maintaining customary practices, participating in beneficial agreements between other states or institutions as well as following the global order to circumvent unnecessary social costs. At the same time, state occasionally decides to bring application of violence as economic measure as Machiavelli thought "in corrupt societies, for example,

[39] Ibid. p.10.
[40] Paris, Roland. "Human Security: Paradigm Shift or Hot Air?" *International Security* 26, no. 2 (2001): 96-101.

violence represented the only means of arresting decadence, a brief but severe shock treatment to restore the civic consciousness of the citizenry."[41] Aforementioned State's own need for survival, and its pursuit of prosperity and economic social cost are nation's states interest, which Hurd referred to 'Self-interest'.

3.2. Identity: Pursuit of state's value

States not only follow their own interests, but also pursue each nation's value, respectively, expressed as its own identity, separated from economic interests.[42] Nation's values "symbolize the community's aspirations, its sense of identity", and, as symbolic representations, they have "some claim on the community to avoid liquidation or transformation on purely technical or economic grounds."[43] Though the identity usually overlaps with its interests, some behaviors based on one's value or identity can be seen "'irrational' from a utilitarian perspective."[44] UN peacekeeping operations under the UN Charter and Status of Forces Agreements (SOFAs) are the prime examples of this element. In short-sighted cost-benefit calculation, the operations are loss of participating countries, but they do so for such value, peace.

Following two sections will exemplify plain and intelligible cases of the theory, climate change regime and the law of the sea, in that those are composed of one outstanding element in each dimension in spite of the fact that international law is complicated complex with several factors of dimensions influenced together, as stated above. The procedural development of social agreement, from UNFCCC of Rio conference to Paris agreement, elaborates how international society has put in great deal of effort to mitigate global

[41] Wolin, Sheldon S. *Politics and Vision: Continuity and Innovation in Western Political Thought*. Princeton Classics ed., Expanded ed. (Princeton: Princeton University Press, 2016), p.221.
[42] Berenskoetter, Felix. "Identity in International Relations," *Oxford Research Encyclopedia of International Studies*, 22 Dec, 2017. p.8
[43] Wolin, 2016. p.408
[44] Berenskoetter, 2017. p.4

warming that threatens states security interests and for somewhat environmental value at the same time. The Law of the Sea is a reservoir of customary international law. Insomuch long history of sailing the sea, inertia has worked principally to create from a custom to customary international law for states interests. The logic of inertia will be articulated.

III. Paris Agreement: Climate change regime with social agreements

Environmental problems were dealt within domestic matters before industrialization.[45] However, as states became more industrialized and developed, serious issues like sulphur dioxide smog and ozone layer depletion, perceived to lethal threat of health, were escalated to international domain. It was essential to coordinate transnationally to solve, not sufficient with just only one state's endeavor. Thus, the first global conference on environment was held in Stockholm in 1972, and the Stockholm Declaration from the conference, though legally non-binding, was fundamental to formation of principles of international environmental law, finally recognized as customary international law of 'Sovereignty and responsibility for the environment' and 'Prevention of harm' by ICJ.[46] Also, the governance authority on environment under the UN, United Nations Environment Program (UNEP), was established from the conference.

Regime of climate change is totally a result of social agreement. Climate crisis came to global notice in late 1980s as scientific knowledge advanced to find out anthropogenic greenhouse gases (GHGs), particularly CO_2, are substantially increasing surface temperature of earth, causing global warming which

[45] Weiner, Allen S., 2023. p.929.

[46] International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons." Advisory Opinion of 8 July 1996. Para 29; International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of 20 April 2010. Para 101.

is climatic, not regional weather problem.[47] With discovery of ozone hole, the U.S. Congress was holding frequent hearings on the matter[48] and international consensus raised it to the UN General Assembly in 1988, where resolution 43/53 adopted "climate change is a common concern of mankind" and "necessary and timely action should be taken."[49] Thus, the meeting endorsed establishment of IPCC (Intergovernmental Panel on Climate Change), a salient intergovernmental body for scientific research on climate change and its policy implications.

In the beginning of preparation for the regime, two models, a general framework agreement on the 'Law of the atmosphere', modeled after '1982 UN Law of the Sea Convention (UNCLOS)', and a convention specific on climate change, modeled on the Vienna Ozone Convention, were considered. The latter one was selected owing to bulkiness of the UNCLOS model, which would be challenging for states bargaining.[50] Furthermore, as environmental law is relatively a nascent legal regime, not only customs for the law among states were not created sufficiently to codify like the UNCLOS but also there was no time to spare on the legislation whole system due to urgency of the issue. On the contrary, treaty could be processed swiftly step by step if each position of states converges into agreement. As a result, in 1990, International Negotiating Committee for a Framework Convention on Climate Change (INC/FCCC) was established under the auspices of the UN General Assembly, and negotiation for the framework convention was undertaken to be opened for signature at the 1992 UN Conference on Environment and Development at Rio de Janeiro. The 1992 Framework Convention on Climate Change (FCCC), however, was broad acknowledgment of general objective and key principles of climate action, specific mitigation targets to be determined later. The framework convention was literally 'framework' of the climate change regime as a start, with main objective of "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent

[47] Intergovernmental Panel on Climate Change (IPCC). *Climate Change 1990: The IPCC First Assessment Report*, ed. J. T. Houghton et al. (Cambridge: Cambridge University Press, 1990).
[48] Urs Luterbacher and Detlef F. Sprinz, eds., *International Relations and Global Climate Change* (Cambridge, Mass.: MIT Press, 2001), p.24.
[49] UN General Assembly, Resolution 43/53, "Protection of global climate for present and future generations of mankind," adopted December 6, 1988.
[50] Luterbacher and Sprinz, 2001. p.31-32.

dangerous anthropogenic interference with the climate system"[51] and the key principle, "common but differentiated responsibilities and respective capabilities"[52] of the parties. The FCCC entered into force on March 21, 1994 on the basis of Article 23 the Convention, and there are 198 parties (197 countries and the European Union ratified) as of July 2024,[53] which is even more than whole membership of the UN, implying its significance for environmental security all over the world.

Another structure the UNFCCC created was Conference of the Parties (COP) that are held regularly to elaborate detailed plan, which was not specified in the Convention, with updated scientific evidence as well as prepare next steps after the FCCC. The first COP met in Berlin, one year after the UNFCCC entered into force in 1994. The Berlin meeting decided to establish Ad Hoc Group on the Berlin Mandate (AGBM) to negotiate a protocol that quantified reduction commitment of states by 1997, and the Kyoto Protocol was adopted at the COP-3 in 1997. The protocol first specified legal-binding commitment targets on developed countries to reduce their emissions of six GHGs by 5.2% below 1990 levels by 2008-2012, which was top-down approach. However, ratification of the Protocol was slow, and it only entered into force in 2005, even without the US ratifying it, the Bush administration in opposition to its exemption on major sources of GHGs like China and India.[54] Canada also withdrew from the Protocol in 2011, and there are 192 parties as of July 2024.[55]

Although the protocol moved forward with limitation target of developed countries, unprecedented growth of GHGs emissions from rapidly developing countries, as the US claimed, made global community question on the protocol. IPCC and other scientific research reported with evidence as well that commitments under the Convention and the Protocol were not enough to mitigate climate change, therefore, another long

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[51] United Nations, *United Nations Framework Convention on Climate Change* (1992), Art.2.
[52] Ibid, Art.3.
[53] United Nations Framework Convention on Climate Change, "Parties to the Convention and Observer States," UNFCCC, https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states
[54] Weiner, Allen S., 2003. p.966-977.
[55] United Nations, "Kyoto Protocol to the United Nations Framework Convention on Climate Change: Status of Ratification," UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en

dialogue for long-term cooperation and action was launched for a new round of negotiations, which led to the Copenhagen Accord at the COP-15 in 2009. This non-legally binding document adjusted the new reality of developing countries, initiating their first engagement to reduce emissions, and first mentioned 2°C goal to hold increase in global temperature below of it.[56]

To develop legally binding agreement from the Accord, Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was established in 2011, as had been, with strong supports from the EU and small island developing states, at the COP-17 held in Durban. But the ADP changed its working style, from presenting detailed drafts at the negotiation table to leaving space for the Paris agreement in the future, unlike AGBM that worked for negotiation of the Kyoto Protocol.[57] Consequently, the Paris Agreement was concluded in December 2015 with differentiated features, compared to previous instruments. It was the first legally binding international agreement that applied bottom-up approach with voluntary country pledges. In contrast to the Kyoto Protocol, states pledge their own 'Nationally determined contributions (NDCs)' and "each party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve."[58] Moreover, it updated the long-term temperature goal by "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels,"[59] as well as additional aim of global peaking and net zero emissions, stating that "Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this

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[56] Copenhagen Accord, December 18, 2009, United Nations Framework Convention on Climate Change. para 1, para 2.
[57] Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, "Paris Agreement," *United Nations Audiovisual Library of International Law* (2015).
[58] "Paris Agreement." Opened for signature December 12, 2015, United Nations Framework Convention on Climate Change. Art.4(2).
[59] Ibid, Art.2(a).

century."[60] The Agreement entered into force on November 4, 2016, less than a year later of its adoption, and there are 195 parties as of July 2024, all parties to the UNFCCC except Iran, Libya and Yemen.[61]

As the whole process was a bunch of hard nuts to crack due to conflicting interests of states, agreements on climate actions were made in procedural and strategic way. Not only the models of the FCCC in the beginning, between 'Law of the atmosphere' and Convention particular on climate change, but also different situations among states must have been reflected. Alliance of Small Island States (AOSIS) like Malta, Tuvalu and Vanuatu, whose lands are in crisis of sinking because of global warming, were strongly proposing the conclusion of treaty as soon as possible due to their severe security interests. Different from the situation, oil-producing states such as Saudi Arabia and Kuwait in OPEC, concerning their economies seriously damaged, wanted to process slowly. They agreed on the necessity of actions for environmental security, but their economic interest weighed more at the time. Besides, emerging developing countries like BRICS, Brazil, China and India, also insisted that the measures not impede their sovereignty of economic growth. Developed countries of Northern hemisphere were also divided. European countries advocated device used for ozone layer problem while the US, the Soviet Union and Japan criticized unequal cost between states that targets didn't take account of different national circumstances, emphasizing scientific machinery for further actions. [62] As a result, the UNFCCC classified states into 2 groups, Annex I and Annex II, that are developed countries but the latter accountable for financial assistance to developing countries, referred to non-Annex I parties,[63] and the Convention ended up weaker commitments than those already taken voluntarily by OECD countries, just 'framework' identifying general objectives and quantified targets to be discussed.[64]

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[60] Ibid, Art.4(1).
[61] United Nations, "Paris Agreement: Status of Ratification," UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en
[62] Luterbacher and Sprinz, 2001. p.28-31; See also, Weiner, Allen S., 2023. p.970-977.
[63] *United Nations Framework Convention on Climate Change*, 1992. Art.4.
[64] Alan E. Boyle, Catherine Redgwell, and Patricia W. Birnie, *Birnie, Boyle & Redgwell's International Law and the Environment*, 4th ed. (Oxford, United Kingdom: Oxford University Press, 2021), p.381.

It required long discussions to determine specific emission targets of developed countries, reaching to the Kyoto Protocol because the emission reduction was, in other words, synonym of constraint to current industry. The EU first proposed comparatively strong target that reduced 15% of GHGs emissions below level of 1990 by 2010 while the US and Australia suggested weaker one, and the Japan in the middle of them. Finally, the parties came to an agreement of differentiated national targets, ranging from the EU with 8% reduction from 1990 emission level, the US with 7%, Japan for 6%, to Iceland, 10% above the level.[65]

As aforementioned, industrial growth of developing countries made reduction plan without them unfeasible to accomplish the goal, and their security interests of global warming expanded to reconsider economic interests. A milestone negotiation in 2014 between two biggest economies in the world, the US and China, was the very reflection. The joint announcement that China first stated ever their commitments to peaking emissions in 2030 and the US would reduce emissions by 26% in 2025 compared to 2005 led to the next agreement involving all parties, not only developed but also developing countries. The bottom-up approach of the Paris agreement gave more room for states to weigh their security and economic interests from each national domain, inducing a stable coalition with large number of players owing to less costly action in perspective of game theory.

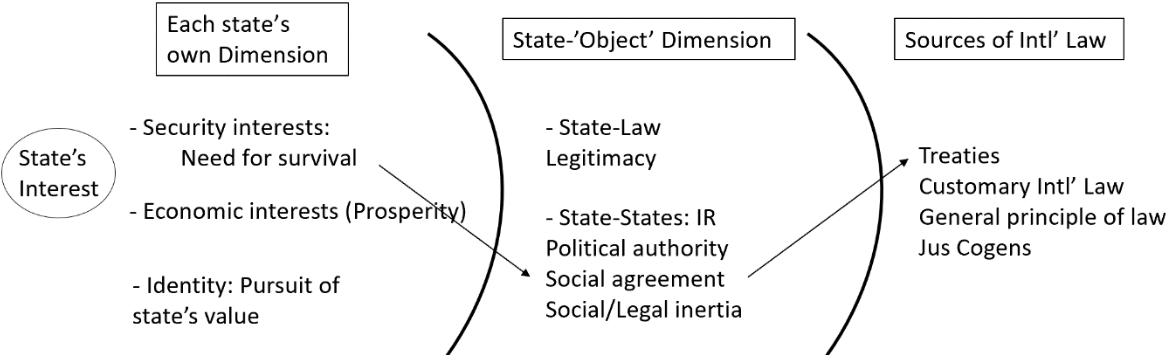

Figure 2. Paris agreement: Case of social agreement (2nd dimension) for security interest (3rd dimension)

[65] "Kyoto Protocol to the United Nations Framework Convention on Climate Change." Opened for signature December 11, 1997. United Nations Framework Convention on Climate Change. Art.3.

To prevent free-riding problem of multilateral treaty as well as non-compliance, 'managerial' mechanisms were the strategy used for climate change regime. Those for fairness, transparency and financial support were key installations. Fairness of measures, the very basis of states contributions, has been guaranteed by scientific research institutions since the Convention, Subsidiary bodies on scientific and technology advice,[66] which were also adopted in consecutive agreements. IPCC has played a crucial role for scientific evidence, as well. Instruments for transparency, monitoring and reporting machineries, have been included essentially as information issue is another important factor of compliance with environmental treaties.[67] Quantified target in the Kyoto Protocol brought a national system for the evaluation of their anthropogenic emissions by sources and removals by sinks, submitting information to ensure their compliance, which will be reviewed by expert review teams.[68] This was reinforced into establishment of Enhanced Transparency Framework (ETF) in the Paris Agreement to measure, report and verity their actions with enhanced transparency.[69] Furthermore, each party shall provide and communicate information of NDC every 5 years with clarity, transparency and understanding,[70] thought of as one of success factors of the Agreement so far.[71] Experience shows compliance with international environmental agreements is best ensured when institutional support exists[72] and financial support has been useful for developing countries keeping pace with mitigation and adaptation to climate change. Since the UFCCC prescribed obligation of Annex II parties to provide financial support and technology transfer to developing country parties,[73] it has been adopted progressively to the Paris Agreement, the only commitments differentiating developed and developing countries in the Agreement.

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[66] *United Nations Framework Convention on Climate Change*, 1992. Art.9.

[67] Michael G. Faure and Jurgen Lefevere, "Compliance with Global Environmental Policy," in *The Global Environment: Institutions, Law, and Policy*, ed. Regina S. Axelrod and Stacy D. VanDeveer (Washington, DC: CQ Press, 2012), p.178.

[68] "Kyoto Protocol to the United Nations Framework Convention on Climate Change", 1997, Art.5, Art.7 and Art.8.

[69] "Paris Agreement," 2015. Art.13.

[70] Ibid, Art.4.

[71] David G. Victor, "Why Paris Worked: A Different Approach to Climate Diplomacy." *Yale Environment 360*, December 16, 2015. https://e360.yale.edu/features/why_paris_worked_a_different_approach_to_climate_diplomacy.

[72] Alexandre Charles Kiss and Dinah Shelton, *International Environmental Law*, 3rd ed. (Ardsley, N.Y.: Transnational Publishers, 2004), p.71-84.

[73] *United Nations Framework Convention on Climate Change*, 1992. Art.4(3)-(5) and Art.11.

Through trial and error in addition to scientific research, social agreement was made with this procedural development in flexible and adaptable manner, which was the key to advancement of climate change regime, definitely significant for survival of mankind. Hope the Paris be successful as time goes on.

IV. The Law of the Sea: Reserve of Customary International Law by Inertia

Historically, from the Roman empire, the sea was free to all based on Roman law, but it became undermined in the Middle Ages, because of continued peril of piracy. After break-up of the Roman empire, anarchy prevailed on the sea without governance authority, which made the sea "common only in the sense of being universally open to depredation." [74] As a result, merchants solidarized to form association for their safety and the better organized the association, the more empowered their influence in maritime area, enforcing maritime laws and customs. The policing role was gradually transmitted to their admiralty jurisdiction under each state and eventually the age of exploration sparked competition among naval states to expand their sovereignty over seas. Each state researched on past law of the sea, leading to legislation new law or formation of customs. Nations that earned fortune from merchant trade, such as the Dutch, sometimes followed the rules in showing respect to the counterpart but conflicts around common interests occasionally occurred wars. There were maritime interests indeed for the states that they indulged in; commercial revenues from trade, maintaining security to protect not only inland invasion but also shipping, an interwoven occupation of coastal states, fisheries, levying taxes from foreign vessels, and so on. These

[74] Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters* (Edinburgh, London: W. Blackwood, 1911), p.5.

factors made naval powers at the time, like the USA and the British empire since the end of 18th century, lead formation of maritime practice.[75]

After all, "almost all of the law of the sea consisted of customary law that was premised on freedom of the sea" until the 20th century.[76] Even though sea is another vast area of earth, majority of which is not involved in any countries, "it is generally agreed that no single state or group of states has sovereignty."[77] Consequentially, this was connected to fact that states rely on customs practiced for a long time, or sometimes made comparatively recently, while their vessels sailing. These customs stand on basis of nations' interests by path-dependency with increasing advantages, aforementioned, which is the very evidence of social inertia. It develops into legal inertia after customs attain status of customary international law, contributing to more constant social stability. This includes rules from CIL on not only territorial boundaries of the sea, of course, such as territorial sea, Exclusive Economic Zone(EEZ), Continental shelf, and high seas but also right of transit passage as well as law of the flag and rights on historic bays and waters, et cetera.

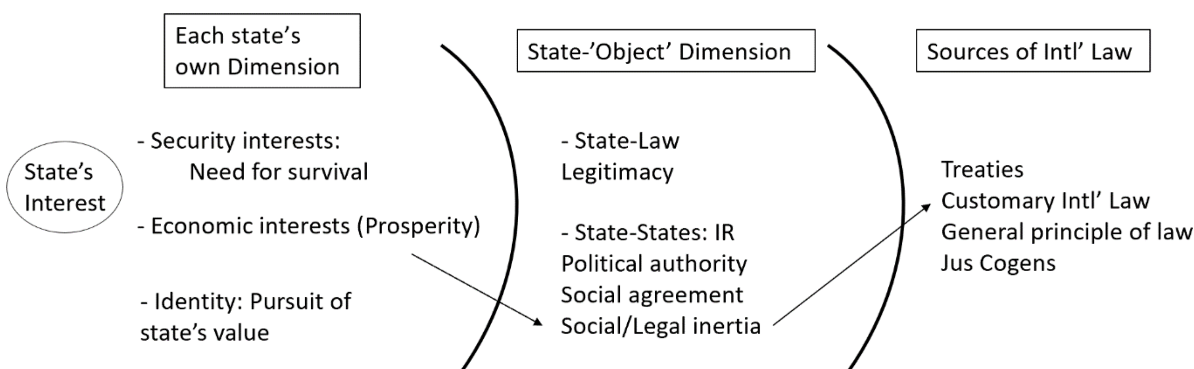

Figure 3. Law of the Sea: Case of Customary international law by (social,legal) inertia (2nd dimension) for state's interest (3rd dimension)

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[75] Fulton, 1911. p.1-22.
[76] Weiner, Allen S., 2023. p.850.
[77] Ibid, p.849.

Straits used for international navigation

Ships can enjoy their rights of passage while navigating not only high seas but also territorial sea as well as international straits.[78] In 17th century, the Dutch jurist Hugo Grotius published a book, *Mare Liberum*, 'Freedom of Seas' in English, which provided theoretical justification against naval monopoly by Portugal and Spain at the time, arguing that the sea must be free. Even though the book conveyed concept applied to vast sea, not small part like bays and straits, the concept of high sea developed from his thesis, partially building legitimacy on the regime of passage through straits as well.[79] However, I argue that the inertia owns the biggest stake for the regime has evolved over centuries like other law of the sea[80] with crystallization of customary international law in accordance with increasing commercial interests.[81]

International straits are defined as "any natural waterway between two coasts, not exceeding a certain width and joining two parts of areas of sea."[82] The Straits of Gibraltar is located between Atlantic Ocean and Mediterranean Sea, separating Europe from Africa when the Bosphorus strait divides Istanbul city into Asia and Europe continent, connecting the Black sea to the sea of Marmara and the Aegean sea. Straits of Dover separate England and France, connecting the English channel with the North Sea. Taiwan Strait (Formosa strait), flowing between China and Taiwan island, straits of Malacca and Singapore, and Sunda strait, main entrances from either Indian ocean or South China sea, as well. These straits "acquired considerable strategic, political, and commercial significance because of the volume of maritime traffic

[78] United Nations, *United Nations Convention on the Law of the Sea (UNCLOS),* Treaty Series 1833, no. 31363 (1982): Art. 17-32, 86-87, 90.
[79] Tullio Treves, "Historical Development of the Law of the Sea," in *The Oxford Handbook of the Law of the Sea*, ed. Donald Rothwell, Alex G. Oude Elferink, Karen N. Scott, and Tim Stephens (Oxford: Oxford University Press, 2015), p.4.; Mohd Hazmi bin Mohd Rusli, "A Historical Overview of the Legal Status of Straits Used for International Navigation Under International Law," *AALCO Journal of International Law* 1, no. 2 103, 2012. p.104-107.
[80] Weiner, Allen S., 2023. p.872.; see also Bing Bing Jia, *The Regime of Straits in International Law*. (Oxford [England] : New York: Clarendon Press ; Oxford University Press, 1998), p.1.
[81] Donald Rothwell, "International Straits," in *The Oxford Handbook of the Law of the Sea*, ed. Donald Rothwell et al. (Oxford: Oxford University Press, 2015).
[82] Jia, 1998. p.4.

passing through those waters."[83] The regime of passage through international straits is literally path-dependent by its nature where practices were formed.

Straits have been used for important waterway for shipping over centuries.[84] Straits of Gibraltar was one of major reference points for numerous routes when ships navigated through not only Atlantic Ocean, to Lisbon, England, even to New York and Panama canal, as well as all Mediterranean ports, such as Lyons and Naples.[85] The straits of Dover, also called English channel, was a starting place toward the world for English vessels in addition to international highway essential for foreigners willing to visit England.[86] Bosphorus strait has been the only way that Black Sea coastwise states like Romania and Georgia can access to other seas including Mediterranean sea.[87] In order to navigate ocean between South China sea and Shanghai, Korea, and Japan, Taiwan (Formosa) strait was highly used, for example, from Singapore, Manila, Hong Kong to Shanghai, Nagasaki or Yokohama, with favorable current while sailing.[88] Straits of Malacca and Singapore as well as Sunda straits were gateways for access to not only states on the shore of Indian ocean but also further eastward sailing toward China from ports in Africa, such as Cape town, Aden and Mombasa, which were another datum points for sailing in Asia. Besides, there were lots of other straits used for a passage and sailing ships even relied more on straits than steamed ships because they were susceptible to ocean conditions.[89]

Sailors preferred coastal waters, typical straits in general. Straits were popular for navigation because of their adjacency to land, which means they were safe with less unfavorable conditions, such as turbulent sea and pirates, as well as easier approach to supplies needed.[90] The more frequently crossed the straits, the

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[83] Rothwell, 2015. p.115.
[84] Tommy Koh, "Straits Used for International Navigation," in *Building a New Legal Order for the Oceans* (NUS Press, 2020), p.94.
[85] Great Britain. Hydrographic Department and Henry Boyle Townshend Somerville. *Ocean Passages for the World: Winds and Currents* (London: His Majesty's Stationery Office, 1923), p.95-98 and p.135-136.
[86] Great Britain. Hydrographic Department and Henry Boyle Townshend Somerville, 1923.
[87] Ibid, p.137.
[88] Ibid, p.372-394.
[89] Ibid, p.190-222, p.425-578.
[90] Jia, 1998. p.25.

more surveyed and well-known to sailors, strengthening safety of the path. As it became active passage with more users, commercial trade was brisk along the way, which are 'increasing returns' in formation of social inertia. This increased seaworthiness of the way positively again, and the transit so perpetuated that usage of straits for international navigation became custom among nations, "accommodation of the mutual rights and interests of littoral States and maritime States."[91]

The custom was codified into several treaties, bilateral or multilateral,[92] which in turn solidified its practice, before the modern concept of CIL as combination of general state practice and *opinio juris* emerged in 19th century.[93] It was universally accepted that ocean highways remain unrestricted for commerce and communications in peace time by the beginning of 19th century, as a result of *Mare Liberum* exceeding *Mare Clausum* by support of maritime superpower at the time, the British Empire, as well as other European states and the US owing to commercial interests. Ships enjoyed freedom of navigation if straits were wide enough over 3-mile rule of territorial sea through corridor of high seas, but if it was covered within territorial sea, then the right of innocent passage could be applied.[94] It then acquired legal status of customary international law where geographical essentiality of straits and being used for international navigation[95] were the utilities that should be kept by the law, through the legal inertia in other words, which were also adopted later as criteria with which the International Court of Justice judges whether a part of sea is 'straits used for international navigation'.

The demand for codification of international regulations on straits, which more enhances legal inertia, became high in late 19th century as international interactions and communication surged. Several attempts were made, however, they didn't bring satisfactory results. The Institut de Droit International, a Nobel peace

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[91] Rothwell, 2015. p.115.
[92] United Nations; Office for Ocean Affairs and the Law of the Sea. *Law of the Sea: Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*. (New York, Office for Ocean Affairs and the Law of the Sea, United Nations, 1992), p.7.
[93] Francesca Iurlaro, *Invention of Custom: Natural Law and the Law of Nations, Ca. 1550-1750*, 1st ed. (Oxford, United Kingdom: Oxford University Press, 2021), p.206.
[94] R. P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (The Hague; Boston: Martinus Nijhoff; distributed in the U.S. by Kluwer Boston, 1983), p.149-151, 181-183.
[95] Jia, 1998. p.3–58.

prize awarded private organization researching on international law, tried to formulate definition of straits, not incorporated into international agreement,[96] while considering "Straits which serve as usual passages from one free sea to another may never be closed."[97] 1930 Hague conference on codification convened by League of Nations also acknowledged the innocent passage as a customary international law, but failed to converged agreements on straits.[98] It was the Corfu Channel case in 1949 that the first clarification of legal status of straits as well as definition was pronounced by the ICJ.

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.[99]

The court provided decisive criteria of international straits, "geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation,"[100] which were legal interests needed to be secured. The judgment truly entrenched legal inertia of the customary international law with setting a precedent and significantly impacted on development of the regime of straits by the ILC later.

The mission of codification was then handed to the International Law Commission (ILC), established by the UN general Assembly in 1946 for "the promotion of the progressive development of international law and its codification"[101] and to "survey the whole field of international law with a view to selecting topics for codification."[102] It shall be called the 'agent of legal inertia and change' because it is the Commission that creates legal inertia by recognizing the customary international law to be codified into international law, and at the same time, revises it reflecting any changes occurred. The ILC selected the topic on straits

[96] Ana G. López Martín, *International Straits: Concept, Classification and Rules of Passage* (Berlin; London: Springer, 2010), p.4-6.
[97] Jia, 1998. p.25.
[98] Mohd Hazmi bin Mohd Rusli, 2012. p.112-114.; See also Jia, 1998. p.35.; López Martín, 2010. p.6-9.
[99] *Corfu Channel* (United Kingdom v. Albania), 1949 I.C.J. Rep. 4. p.28.
[100] Ibid.
[101] *Statute of the International Law Commission*, United Nations General Assembly Resolution 174 (II), November 21, 1947. Art. 1(1).
[102] Ibid, Art.18(1).

in 1956 after commenced its task in 1949,[103] and stance of the Commission toward regime of straits was not different at all. The definition of 'passage' from the Preparatory Committee for the Hague Codification Conference, "navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland water, or of making for the high sea from inland waters."[104] was accepted by the ILC as well and incorporated in Article 14 of the 1958 Convention on the Territorial Sea which was concluded after the first UN Conference on the Law of the Sea (UNCLOS I). The Commission also considered the meaning of 'innocence' to be codified: "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state."[105] In terms of innocent passage, there was general agreement that merchant ships were free from unjustified closure by coastal states during innocent passage through straits joining two parts of the high seas whereas that of warships had been controversial. States allowed the passage of foreign warships in practice, not because of their rights but by authorization of coastal states, leading to conditions for passage, prior notice or consent.[106] However, after the ICJ declared that the innocent passage of warships through straits used for international navigation is also customary international law, the ILC also confirmed the principle,[107] and adopted the functional criterion of the Court from the Corfu Channel Case, which was necessary clause regarding authorization or notification of warships.[108] The geographical criterion from the Corfu Channel Case was modified to embrace straits leading to internal waters of coastal states on account of its value for maritime traffic,[109] and the Article 16(4) of the Convention stipulated that "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."[110] This codification of

[103] United Nations; Office for Ocean Affairs and the Law of the Sea, 1992. p.4.
[104] United Nations, *Convention on the Territorial Sea and the Contiguous Zone*. April 29, 1958. 516 U.N.T.S. 205. Art. 14(2).
[105] Ibid, Art. 14(4).
[106] Jia, 1998. p.78-101.
[107] United Nations, *Yearbook of the International Law Commission*, 1954. Vol. II. U.N. Doc. A/CN.4/SER.A/1954/Add.1. p.159.
[108] López Martín, 2010. p.15.
[109] Ibid.; Jia, 1998. p.209.
[110] *Convention on the Territorial Sea and the Contiguous Zone*, 1958. Art. 16(4).

the customary international law is manifestation of legal inertia, which enhances itself again through the code.

There followed the state practice under UNCLOS I. British and Australian naval units navigated through Balabac Strait of the Philippines, the British officer stating in 1964: "under international law there is no obligation to seek the prior authorization of a coastal State for the passage of a warship of another State through an international strait."[111] The coastal states of the Strait of Hormuz and the Bab-el-Mandeb had recognized the right of innocent passage as well. In 1960s, American vessels had difficulties in passage through straits forming Northeast Passage that were part of the territorial sea of the Soviet Union. The US argued their right of innocent passage of all ships through straits used for international navigation between two parts of the high seas, but the Soviet Union regarded the straits not as international straits, and required prior notification or authorization on the grounds of the law of straits in Article 16(4) of the 1958 Convention.[112]

The CIL of passage through international straits confronted a challenge when the reign of traditional 3-mile rule of territorial sea was passed on to the 12-mile at the UNCLOS III, held in 1974. It was resistance against existing legal order by states that gained independence from colonial empires at the second session of the Conference with 51 states claiming 12-mile territorial sea and 25 states for 3-mile limit.[113] This change affected regime of straits because there are 116 straits wide between 6 and 24 miles in the world, which means high sea corridors when territorial sea of 3 miles is applied would disappear and those straits would be under sovereignty of coastal states, causing impediment to interests of states freedom of passage. However, legal inertia is not a refusal to alter, but a force toward homeostasis, which operated toward creating new legal regime of straits as well, *transit passage*. To be specific, the way of custom using straits as well as the legal interest for protection, normative necessity and utility of passage through them, remained same, just legal context changed to 12-mile territorial sea. The two superpowers at the time, the US and the

[111] United Nations Security Council, *Official Records, 19th year, 1150th meeting*, September 15, 1964, New York.
[112] Jia, 1998. p.102-104.
[113] Koh, 2020. p.94-95.

USSR, were explicitly concerned about freedom of transit that it should be preserved despite extension of the territorial sea. There were other maritime nations supporting the freedom, like France and Japan, whereas group of states such as Malaysia, Indonesia, Greece, the Philippines and Spain endorsed a draft that straits be dealt as one entity with the territorial sea under modified innocent passage.[114]

Consequentially, legal inertia created a new regime of transit passage with the draft article submitted by the British delegation that balanced between the other two proposals, distinguishing straits from the territorial sea, on the principle of package deal and of consensus at the Conference in 1982.[115] Transit passage, adopted as a section 2 in the part III of the LOSC (Law of the Sea Convention or UN Convention on the Law of the Sea, also known as UNCLOS), is defined in article 38: "all ships and aircraft enjoy the right of transit passage, which shall not be impeded… Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[116] Although many maritime nations, like the US, the UK and France, and some scholars assert the regime of transit passage reflected existing practice, its status as customary international law is discreet so far. Majority opinion is that transit passage was an invention of UNCLOS III, and has yet become part of CIL as its general practice is not evident outside of the Convention. It can be rather presumed as emergent or instant customary international law, a customary rule in the course of emergence, which holds high potential to be a part of international custom in near future.[117] Legal inertia will lead into the law as well.

Main dynamic that creates the law of the sea is the inertia, as illustrated, because of its heavy reliance on custom when legislated. The law of the flag, not only the regime of straits, is another excellent example

[114] Jia, 1998. p.129-138.; Mohd Hazmi bin Mohd Rusli, 2012. p.122-124.
[115] Mohd Hazmi bin Mohd Rusli, 2012. p.124-125.
[116] *United Nations Convention on the Law of the Sea (UNCLOS)*, 1982. Art.38.
[117] Jia, 1998. p.168-210.; Mohd Hazmi bin Mohd Rusli, 2012. p.128-130.

how inertia worked in evolution of conventional custom, flying flags as a symbol of vessels' nationalities, into the concept of flag state jurisdiction in the law of the sea. Briefly, since ancient maritime affairs, flags of ships were signs to identify allegiance of them, which referred to nationality after modern polity of states, 'nation', transpired after the peace of Westphalia.[118] It was the UK, the leading naval power of 18th and 19th century, that led this social inertia of using flags evolve into flag state responsibility that manages activities of ships in the ocean as well as establishes "standards for construction, loading, operation and navigation of ships,"[119] as a result of drastic increase of maritime traffic following the invention of steam powered vessels, which was main driver of the legislation of domestic law to secure safety while sailing,[120] prime for states security and economic interests as well. The British empire was so powerful at the time that other maritime states synchronized, implying that not only the inertia but also political authority affected together for this case (See also section 2.2.1), the standards of the British through bilateral or multilateral treaties, later generally practiced among states as a customary international law by legal inertia. This phase of development by the force, inertia, is typical in regards of the regime of the sea.

[118] Richard Barnes, "Flag States," in *The Oxford Handbook of the Law of the Sea*, ed. Donald Rothwell et al. (Oxford: Oxford University Press, 2015), p.304-306.
[119] Mansell, 2009. p.38.
[120] Ibid, p.1-69.

V. Conclusion

The '3-dimension theory' provides integral framework of the international law, enlightening dynamics working together in multidimensions beyond the sources of the law. Legitimacy is the foundational element of the source that runs through whole legal system. In international relations, political authority works for driving important agendas in global stage, leading to concluding treaties or new practices. Social agreement is another foundation of international law as agreements to be bound to the treaties are essential where there isn't one world government. Inertia especially operates in the customary international law that is a magnificent invention to derive a universal law in absence of ditto. The compliance via 'transnational legal process' that Koh argued, a strategy with internalized default patterns of compliance, is exactly working by inertia.[121] Furthermore, in the age of space exploration, the historical development of maritime customary international law will be the compass to form that of space law as it is the beginning of formation.

Each nation's interest, security and economic interest, is the underneath reason states comply with international law and participate in codification. States need it for their survival and economic prosperity, thus reaching social agreement or creating inertia in IR, as we could see in the cases. Lastly, States not only follow their own interests, but also pursue each state's value, expressed as its own identity that has relation with legitimacy, sometimes separated from economic interests.

Deepened insight on dynamics beyond international law will enhance states' compliance with the rules eventually. On further research, legal inertia toward homeostasis of society should be shed more light on. In conclusion, this theoretical framework will also offer an analogy of legal validity to entire legal system.

[121] Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106, no. 8 (1997): 2599- 2659.

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