India-Pakistan Relations: Legalization and Agreement Design

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ABSTRACT

This Article examines agreements between India and Pakistan to determine if there are design features that played a part in their success or failure. The analysis draws on insights from scholarship at the intersection of international relations theory and international law. The Article attempts to show that India and Pakistan share attributes that are particularly well suited for a positive correlation between increased legalization and compliance, that the law plays a role in norm strengthening, and that legalizing agreements between the two states can create compliance constituencies that act as constraining influences on governments.

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I. INTRODUCTION

This Article examines India-Pakistan relations from a theoretical perspective, in an attempt to determine whether there is a correlation between the commitments embodied in agreements between them, their successful implementation, and the form and structure of those agreements. The Author draws on recent scholarship at the intersection of international relations theory and international law on the design and structuring of agreements to explore pathways to increasing the role of the law in positively impacting the relationship between the two states. Despite the fact that India and Pakistan are nuclear-weapons states with a history of engaging in military confrontations, the international law community has not focused much attention on the design and structure of agreements between them to determine whether there is a correlation between the choice of design, structure, and compliance. International lawyers have been peripheral to the discussion, and there is inadequate attention to the positive contribution that the law can play in finding solutions to the differences between the parties. This Article hypothesizes that these two states share attributes that are particularly suited for a positive correlation between increased legalization and compliance, that legalization plays a role in norm strengthening, and that legalizing agreements between the two states can create compliance constituencies that act as constraining influences on governments.

A review of agreements struck by states shows that they employ a variety of structures to arrive at accord, ranging from official communiqués to treaties. While these agreements exhibit some commonalities in their underlying substance and structure, there is lack of clarity on what motivates states to choose between a communiqué and a treaty, with the result that predictions on what form an agreement might take are fraught with risk. Even after a particular form has been chosen, there is imprecision in terms of differentiating attributes between the various forms. In terms of language, many communiqués contain language that might be readily transposed onto a treaty and vice versa. All of this is rather confusing and makes the task of reform difficult. There have been recent scholarly analyses of agreement design in the multilateral context, but these provide incomplete explanations when applied to

dyads like India-Pakistan.[1] Agreement design scholarship has also largely been institutionalist and has not provided much clarity on what sorts of agreements have the potential from their inception to succeed when the signatories are states with a history of armed conflict.

The Kashmir dispute is one of the bloodiest in contemporary history.[2] The terrible price that India and Pakistan continue to pay for a territory with little economic significance has not brought the parties to the negotiating table in any meaningful way.[3] This is owed to the visceral nature of the dispute as well as the sharp communal and religious divides that characterize Indian and Pakistani societies.[4] The fragility of peace between the countries and the fluctuation of rhetoric depending on the regime in power have meant that most observers have very little hope for a harmonious relationship,[5] which is perhaps one reason for the absence of significant attention by legal scholars to the analysis of the agreements that have been concluded thus far. This hopelessness seems to have become self-fulfilling.[6] There are signs of activity, mainly at the prompting of the US, and the time may be ripe for

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1. *See, e.g.*, Kenneth Abbott & Duncan Snidal, *Hard Law and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Jack Goldsmith & Eric Posner, *International Agreements: A Rational Choice Approach*, 44 VA J. INT'L L. 113 (2003); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM J. INT'L L. 581 (2005); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

2. *See generally* Orde Kittrie, *More Process than Peace: Legitimacy, Compliance and the Oslo Accords*, 101 MICH. L. REV. 1661 (2003).

3. NAZIR KAMAL & AMIT GUPTA, PROSPECTS OF CONVENTIONAL ARMS CONTROL IN SOUTH ASIA 9 (1998), *available at* http://www.cmc.sandia.gov/cmc-papers/sand98-05055.pdf.

4. This seems to be a quality that is shared by some of the other "intranational" conflicts that are currently festering. Although, strictly speaking, the Kashmir dispute is international in the sense that it is between two different nation states, a closer look reveals that it is an "intranational" dispute. *See generally* MONTY G. MARSHALL & TED ROBERT GURR, PEACE AND CONFLICT 2003: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF DETERMINATION MOVEMENTS AND DEMOCRACY (2003), *available at* http://www.cidcm.umd.edu/peace_and_conflict.asp (characterizing the dispute).

5. *See generally* Sumathi Subbiah, *Security Council Mediation and the Kashmir Dispute: Reflections on its Failures and Possibilities for Renewal*, 27 B.C. INT'L & COMP. L. REV. 173 (2004).

6. Kittrie, *supra* note 2, at 1662, suggests that this lack of examination is not unique to the case of India and Pakistan. According to Kittrie, there has been an absence of sufficient examination and analysis by legal scholars even of more high profile conflicts, such as the one between Israel and Palestine. *See id.* He writes that "the legal literature contains virtually no discussion of what in the contents of a bilateral peace agreement's text can maximize the likelihood that the parties will comply with the peace agreement's terms." *Id.*

examining the process of agreement design to maximize the potential for favorable outcomes.

Part II of this Article will examine the relevant theoretical approaches that can be brought to bear in understanding the design and structuring of agreements between India and Pakistan. Part III will provide a historical background to the dispute and will analyze the resulting peace process and agreements, with a view to identifying the degree of legalization and the efficacy of the various agreements that the parties have concluded. Part IV presents an evaluation of the peace process, employing the lenses of the theoretical approaches examined in Part II, and demonstrates that legalization has a positive correlation with compliance in the case of these two high conflict states, with probable applications to other high conflict situations. This Article argues that legalization, apart from the obvious informational, precision, and enforcement advantages, helps solidify the norms cascades that are taking place, and creates and empowers compliance constituencies (developing support for the liberal theory posited by Moravcsik, et al. that places non-state actors at the center of international law). The Article also argues that in the case of politically tumultuous dyads, the dissonance in political choices between competing political actors can only be mediated by hard legalization that has the ability to bind successor governments.

II. THEORETICAL APPROACHES

Public international law scholars tend to argue that in structuring international agreements, states are motivated by the objective to enhance the credibility and enforceability of their agreements.[7] These scholars analogize states to private contracting parties and seek to argue that all else being equal, states will act in the manner of private individuals and structure their agreements as contracts.[8] They will do this because they are motivated by the need to make their promises binding, and in order to do that, they must comply with the obligations undertaken.[9] This compliance, in turn, is ensured by providing mechanisms that measure adherence and deviation. The conventional view argues that, unlike private parties in the contractual context, states are not required to pay damages for breaches of contractually assumed obligations but may have to suffer reputational sanctions (although private parties are susceptible to

7. Guzman, *supra* note 1, at 581.
8. *Id.*
9. *Id.*

reputational sanctions in addition too).[10] In contract law, when there is breach, the court or other tribunal attempts to craft a remedy that bears some correlation between the nonbreaching party's loss and the breaching party's gain. In international law, the nonbreaching state suffers a loss that is not compensated for by the breaching state's loss of reputation, if any. Despite this problem, the concept of "compliance" has influenced scholars examining agreement design in the area of public international law.[11] Thus, they have focused extensively on monitoring mechanisms and the existence of sanctions and sanction-awarding bodies. Scholars also assume that the dominant players are rational states—acting to maximize contractual surplus.[12] Accordingly, in structuring international agreements, states are most concerned about the "impact" that the agreement will have in changing state conduct. It is this concern about impact that will animate states in choosing between "hard" and "soft" law. If states desire to have low impact they are more likely to choose soft law; conversely, high impact will result in a hard law choice.

Abbott and Snidal, the most important functionalist scholars, argue that states choose soft law as a "way station" to hard law, and that it is the preferred option when the subject is one that challenges state sovereignty.[13] They also argue that legalization is a means to increase the credibility of their commitments and that states are motivated by factors such as domestic political costs, the desire to bind successive governments, and the need to motivate citizens to modify their practices when they choose hard law as a means of assuring credibility.[14] According to Abbot and Snidal, credibility is enhanced by the ability of legalization to limit "self-serving auto-interpretation."[15] This is extended when one considers the whole international system, in which the consequences of bad conduct within a particular regime can extend to other aspects of the international law system.[16] They argue that auto-interpretation is limited by arbitral tribunals interpreting and applying hard legal commitments.[17] Abbott and Snidal seem to be expressly limiting the ability of tribunals to apply and interpret hard law. They hypothesize

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10. *See generally* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95 (2002).

11. *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

12. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 27 (1984); *see also* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989).

13. Abbott & Snidal, *supra* note 1, at 423.

14. *Id.* at 426.

15. *Id.* at 427.

16. *Id.*

17. *Id.*

that hard law would result where: "the benefits of cooperation are great but the potential for opportunism and its costs are high," noncompliance is not easy to detect, states want to form clubs of very committed states, and executive agencies within a state want to commit other domestic actors such as the legislature.[18] They argue that hard law is more costly because states are more careful in "negotiating and drafting legal agreements, since the costs of violation are higher."[19]

The argument that domestic political pressures have a role to play in the choice between pledges and contracts is not new.[20] This is certainly true in areas that are hotly contested in the political space. Liberal theorists also argue that credibility is factored into the choice of soft law versus hard law.[21] Otherwise, when credibility is dependant on legislative approval, states are more likely to prefer hard law, unless those states possess other mechanisms to ensure and enhance credibility.[22] Raustiala claims that there is a prevalence of shallowness in hard law and that there is a negative correlation between legality and depth.[23] He argues that pledges are deeper than contracts because they do not raise compliance worries.[24] Hence, states are likely to prefer pledges if they want to make deep commitments rather than shallow ones. Conversely, states will prefer hard law when they are making shallow commitments; for this reason, hard law is likely to exhibit higher levels of compliance. Raustiala then advances the other, seemingly contradictory, functionalist argument that there is a positive correlation between legality and depth—meaning that states embody their agreements in hard law when they are making deep commitments.[25] He writes that both explanations are possible and can be understood by addressing the risk of compliance—there is a negative correlation when a state may not want to comply, and there is a positive correlation when a state wants other states to comply.[26] He proffers a liberal explanation for these correlations, arguing that the correlation between legality and depth will be positive when the domestic constituencies that are pushing for the agreement have political power (which explains hard law in deep commitments such as the

18. *Id.* at 429–30.

19. *Id.* at 434. Abbott and Snidal write that "[l]egal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across states complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements." *Id.*

20. Raustiala, *supra* note 1, at 598.

21. Abbott & Snidal, *supra* note 1, at 426.

22. Raustiala, *supra* note 1, at 600.

23. *Id.* at 601.

24. *Id.*

25. *Id.* at 602.

26. *Id.*

WTO) and will be negative when the domestic constituencies demanding agreement do not possess much political power.[27]

A. *Functionalist Perspective*

Functionalist theorists argue that states should adopt legalization when the issue is one of commitment or coordination, with the objective of benefiting from cooperative action.[28] According to this view, there is a cost benefit analysis that states engage in when deciding whether to legalize, with the choice depending on legalization's ability to deliver outcomes that are more beneficial than non-legalization.[29] Some of these benefits include the ability of legalization to supply credibility to commitments, lower ex post transaction costs, and supply monitoring mechanisms. Abbott and others posit that harder legalization makes state commitments more credible by creating precise agreements that contain obligations of a higher order.[30] They argue that transaction costs ex ante are higher with hard legalization because of the difficulty of negotiation and obtaining concord on these sorts of agreements.[31] It is likely that as the levels of obligation and precision increase, it will be more difficult for states to bind themselves because of the fear of breaching these obligations and the minimization of wiggle room to make excuses.[32] This initial increased cost may be offset by lower costs after an agreement has been reached because the existence of precise obligations makes enforcement easier and because many hard legalized agreements create tribunals for interpretation and enforcement.[33] Monitoring costs are thus reduced and may justify the expenditure of upfront resources. Abbott and Snidal also point to sovereignty costs (by which they mean incursions on state sovereignty in the subject area) as being a factor that can militate against hard legalization.[34]

The relative power relationship between states is also a factor in determining the extent to which legalization occurs.[35] More powerful

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27. *Id.*
28. Miles Kahler, *The Causes and Consequences of Legalization*, 54 INT'L. ORG. 661, 673 (2000).
29. *Id.* at 664.
30. Abbott & Snidal, *supra* note 1, at 429.
31. *Id.* at 434.
32. *Id.* at 436.
33. *Id.* at 435.
34. *Id.* at 435. *See also* Kahler, *supra* note 28, at 665 ("They hypothesize that a combination of high uncertainty and low sovereignty costs will lead to institutions with lower precision coupled with higher obligation and moderate delegation. High sovereignty costs and low levels of uncertainty are likely to produce greater precision and obligation with less delegation.").
35. *Id.*

states have little or no incentive to legalize when dealing with less powerful states, as they may be able to obtain outcomes that they want without resort to legalization. Kahler argues that the power asymmetry argument is "heavily qualified" by the fact that the strongest advocates for legalization are the United States and Europe, both major players in the legalization game despite being more powerful than other parties to the various international legal instruments.[36] Abbott and Snidal suggest that there is a preference for softer forms of legalization when powerful states are involved, upon the understanding that there will be long term advantages in the form of lowered transaction costs. [37] Kahler suggests that asymmetries may extend beyond those involving mere power—there may be asymmetries in terms of legal skills—that explain the unwillingness of some states, particularly developing ones, to legalize agreements.[38]

B. *Realist and Rational Choice Perspectives*

Realists believe that international law only has effect to the extent that it is the product of a relationship of dominance between nations and is a reflection of this power dynamic.[39] Broadly speaking, the realist perspective denies that international law has any constraining power and claims that if any such power does exist, it is extremely weak.[40] The international legal system is effective only to the extent that the dominant states are willing to shoulder the burdens of being the policemen. Realism is state-centric, focusing on state preferences that are assumed to be, largely, fixed. Rational choice theory has recently been at the forefront of scholarly discussion due to an influential book by Posner and Goldsmith, which argues that "international law emerges from states' pursuit of self-interested policies on the international stage." [41] The conduct of India and Pakistan presents a curious situation for Posner and Goldsmith's thesis, for the two states seem to be in a position where rational self-interest would dictate that they resolve their differences using the law to "clarify[] what counts as cooperation or coordination," unless

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36. *Id.* at 666.

37. Abbott & Snidal, *supra* note 1, at 450.

38. Kahler, *supra* note 28, at 666 (noting that one exception is the example of "small European states [which] are strong proponents of legalization, not only because they wish to constrain the behavior of their more powerful neighbors, but also because they possess legal resources out of proportion to their other capabilities").

39. *See generally* Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545 (2004).

40. *See generally id.*

41. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 13 (2005). "International law is, in this sense, endogenous to state interests. It is not a check on state self-interest; it is a product of state self-interest." *Id.*

one takes the position that these two states are acting irrationally.[42] A fuller examination of rational choice using India-Pakistan interactions as a proxy for demonstrating irrationality in high conflict scenarios is the subject of another article and is not addressed here.

C. *Liberal Perspective*

The chief contribution of the liberal view is the centrality that it confers on non-state actors and the relationship between domestic politics and international law.[43] These non-state actors (whom Moravcsik calls "societal actors") "are on the average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints . . . ."[44] It is premised on a "bottom-up" approach, whereby the preferences of non-state actors "are treated as exogenous causes of the interests underlying state behavior."[45] States are liable to be captured by one or another interest group and act to express those preferences, which are now the state's preferences in international politics.[46] Under this framework, the main battleground for international legalization is the domestic political arena, and "international legal norms are most effectively enforced when they are embedded in autonomous domestic 'rule of law' legal systems through legal incorporation, judicial acceptance, or acceptance by lawyers and litigants."[47] This perspective can make important contributions to understanding the formation of preferences in the India-Pakistan context, because of the diversity of non-state actor political preferences and their possible mediation through legal institutions. Given the possible differences in India's preferences depending on whether it is the Bharatiya Janata Party that is in power rather than the Janata Dal, and the potential implications that such different preferences can have for peaceful relations, it is important to determine what role, if any, a greater use of the law can play in minimizing radical adverse shifts in preferences.[48]

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42. *Id.*

43. Andrew Moravcsik, *Liberal International Relations Theory, A Scientific Assessment, in* PROGRESS IN INTERNATIONAL RELATIONS THEORY: APPRAISING THE FIELD (Colin Elman and Miriam Fendius Elman eds., 2002). *See also* Andrew Moravcsik, *Taking Preferences Seriously: A liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

44. Moravcsik, *Taking Preferences Seriously*, *supra* note 43, at 516.

45. *Id.*

46. *Id.* at 518.

47. Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 393 (2000).

48. A similar dichotomy in preferences in Pakistan would be between the Jamaat-I-islami and the Pakistan Peoples Party.

D. *Consequences of Legalizing Agreements*

Is there a correlation between legalization and compliance with international agreements? Realist scholars deny any such correlation unless the legalization is the product of a power dynamic whereby a powerful state uses legalization on a less powerful state. Functionalist scholars such as Abbott, on the other hand, believe that there is a correlation between legalization and norms. They believe that legalization comes with the promise of greater cooperative and distributive gains.[49] Abbott and Snidal suggest that legalization confers benefits such as enhanced credibility and lower transaction costs, with the caveat that these benefits may be outweighed by other costs that are inherent in legalization such as negotiation costs and sovereignty costs.[50] The relationship between legalization and liberal theory will be in evidence in Part IV of this Article, where it is argued that legalization offers superior advantages over non-legalized agreements because of its ability to engage societal actors that have been marginalized in the India-Pakistan context.

III. THE DISPUTE

A. *Birth of the Nations and Dispute*

Pakistan and India attained independence on August 14 and 15, 1947, respectively.[51] Statehood on communal lines following British colonialism was the result of an acrimonious process of partitioning pre-independent India into Muslim Pakistan and predominantly Hindu India.[52] This redrawing of the maps saw one of the biggest human relocations in history, as people uprooted and moved from villages and towns that they had called home for generations.[53] The

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49. Kahler, *supra* note 28, at 673. Kahler recognizes that "studies that demonstrate high levels of compliance with agreements may well suffer from a selection bias: following functionalist logic, governments will only negotiate agreements and establish institutional rules that they fully intended to follow in any case. An apparently high level of compliance could result from the fact that legalization has not altered government behaviour in the slightest." *Id.*

50. Abbott & Snidal, *supra* note 1, at 448, 455.

51. IndependenceDay.com, http://www.123independenceday.com/ (last visited Apr. 12, 2007).

52. The partition followed the Independence Act, which permitted the leaders of the 565 semi-independent princely states owned by the British to choose either independence (not a viable option) or accession to either India or Pakistan.

53. Several accounts put the number of displaced people at over twelve million. *See, e.g.*, URVASHI BUTALIA, THE OTHER SIDE OF SILENCE: VOICES FROM THE PARTITION OF INDIA 87 (Duke Univ. Press 2000) (1998).

> The departure of barbers, weavers, tailors, goldsmiths, and others en masse to Pakistan crippled certain aspects of life particularly in Delhi. In Pakistan, the

religious hatred predating independence was to linger for over fifty years.[54] The state of Kashmir, which had not acceded to India or Pakistan as of August 15, 1947, was to be the pretext.[55] Both India and Pakistan undertook strenuous efforts to get Kashmir to join them, and the situation was complicated by the fact that the King of Kashmir was a Hindu while the majority of his subjects were Muslims.[56] The King (as any rational actor would) seemed to prefer independence, as he did not want to be part of an Islamic country by joining Pakistan or to cede power by joining secular India. Ultimately, on October 17, 1947, the King, faced with news of a Pakistan army orchestrated infiltration and seeing that he had very little choice, signed the Instrument of Accession, and Kashmir became a part of India.[57] Article 1 of the Instrument of Accession clearly states: "I hereby declare that I accede to the Dominion of India . . . ."[58] The Schedule, which enumerates legislative powers, states that the Dominion legislature (i.e., India) shall have the power

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> departure of account clerks, bankers, lawyers and teachers dealt a similar blow . . . . As a new country, Pakistan had no instant arrangements to print its currency: the mint was in India . . . . So, for about a year, Pakistani currency were printed in India, as was much governmental material and stationary . . . . Pakistani officers (for currency) were trained in India for several weeks and India loaned accountants to Pakistan to help out with accounting work.

54. Jeffrey Weiss, *India and Pakistan—A Cautionary Tale for Israel and Palestine*, 18 CONN. J. INT'L L. 455, 460 (2003).

55. *See* Karen Heymann, *Earned Sovereignty For Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust*, 19 AM. U. INT'L. L. REV. 153, 158 (2003).

56. Anthony Wanis-St. John, *The Mediating Role in the Kashmir Dispute Between India and Pakistan*, 21 FLETCHER F. WORLD AFF. 173 (1997). *See generally* Brian Farrell, *The Role of International Law in the Kashmir Conflict*, 21 Penn. St. Int'l. L. Rev. 293 (2003); Heymann, *supra* note 55.

57. Wanis-St. John, *supra* note 56, at 175. "As a condition for receiving Indian military reinforcements to repel an invasion of Pashtun tribal raiders, Hari Singh signed a letter of accession to India on October 26, 1947." *Id.* This instrument was worked out under the provisions of the Government of India Act 1935, an Act of the British Parliament, which served as the Indian Constitution at the time by virtue of the Indian Independence Act 1947. Instrument of Accession of Jammu and Kashmir State, Oct. 26, 1947, *available at* http://mha.nic.in/accdoc.htm [hereinafter Instrument of Accession]. The relevant provision providing for accessions stated: "An Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof . . . ." *Id.* Maharaja Hari Singh of Kashmir executed the Instrument of Accession, and the Governor General accepted the Instrument. *Id.* This act was acknowledged by the United States in the United Nations Security Council in 1948 by U.S. representative Warren Austin. *See* Embassy of India, *A Comprehensive Note on Jammu & Kashmir: The United Nations*, http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/UN.html (last visited Apr. 12, 2007) (quoting the statement by Austin that "[t]he external sovereignty of Kashmir is no longer under the control of the Maharaja . . . with the accession of Jammu and Kashmir to India, this foreign sovereignty went over to India and is exercised by India").

58. Instrument of Accession, *supra* note 57, at art. 1. The agreement shows that a set of sovereign powers was retained by the Maharajah.

to make laws with regard to military and defense matters.[59] In addition, India has the power to make law with regard to external relations.[60] Pakistan vigorously contested this accession, and war broke out between the two countries just a few months after independence in 1948.[61] The festering conflict over this act of accession has resulted in three wars and several skirmishes.[62] Kashmir has become the central feature of the relationship between the two countries, and movement on other contested issues is very difficult without first addressing it.[63]

B. *Agreements Between the Parties*

This Part examines the fruits of the peace negotiations that have occurred over the years and tries to understand whether there are structural or design reasons that may have contributed to their success or failure. There have been several agreements of significance since independence. The first of these is the 1960 Indus River Water Treaty.[64] This agreement was necessitated by the geographical complexities caused by partition of the Indus Basin, which left Pakistani Punjab dependant on irrigation facilities that were located in India.[65] This resulted in a fierce dispute, and negotiations were conducted under the aegis of the World Bank.[66] The Treaty was signed at Karachi by President Muhammad Ayub Khan, the President of Pakistan, and Prime Minister Jawaharlal Nehru, the Prime Minister of India.[67] Crucially, one of the signatories of the Treaty was a representative of the World Bank.[68] The Treaty devised an elaborate method of sharing the waters of the Indus and essentially allocated the water from the eastern rivers to India and the water from the western rivers to Pakistan.[69] It also allowed India

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59. *Id.* at sched., art. A.
60. *Id.* at sched., art. B.
61. *Id.*
62. Wanis-St. John, *supra* note 56, at 174.
63. Kashmir seems to be the "core" issue for Pakistan in a way that it is not for India. Pakistani politicians have repeatedly stated that other issues cannot be addressed without solving the Kashmir dispute, whereas the Indian approach has been to de-link Kashmir from other issues on which it believes that progress is possible. *See generally* KAMAL & GUPTA, *supra* note 3. The authors cite a public survey in Pakistan showing that almost 80% of the Pakistani respondents would not accept the status quo in Kashmir, illustrating that the Kashmir issue is a part of the public consciousness in that country in a way that it is not in India. *See generally id.*
64. *See* HENRY L. STIMSON CTR., *The Indus Waters Treaty: A History*, http://www.stimson.org/print.cfm?SN=sa20020116301 (last visited Mar. 28, 2007).
65. *See id.*
66. *See id.*
67. *See* Indus Waters Treaty, India-Pak., Sept. 19, 1960, 419 U.N.T.S. 126 [hereinafter Indus Waters Treaty].
68. *See id.*
69. *See id.*

to utilize water from the western rivers for some agricultural uses and stipulated the storage capacities of the various reservoirs.[70] Article VIII of the Treaty created the Permanent Indus Commission, and each country established an Office of the Commissioner for Indus Waters.[71] The Permanent Indus Commission is comprised of these two commissioners, who are charged with the task of operationalizing the Treaty and facilitating cooperation.[72] Each Commissioner is the representative of his or her government for all matters arising out of the Treaty, and the two are required to meet periodically.[73] Amazingly, over eighty-six such meetings have taken place between the two sides.[74] The Commissioners have the opportunity to tour the rivers every five years.[75] The Treaty also requires them to host ad hoc tours of sites promptly upon request by the Commissioner from the other country.[76]

Apart from serving a monitoring function, these provisions serve as informational safeguards and go a long way in defusing tensions that stem largely from suspicion. By creating provisions that seek to enhance transparency, the Treaty limits prisoner's dilemma problems and serves to increase the likelihood of cooperative outcomes. Kraska writes that the agreement establishes constituencies by:

> broadening the numbers and types of participants throughout the basin, including governments and non-governmental organizations. The negotiations tend to include an array of scientific, technical, environmental, ecological, legal, administrative, economic, and military interests. The involvement of all of these interests has a progressive effect, helping to build an integrated approach to civil government and foreign relations.[77]

The Indus Treaty is high on obligation, high on precision,[78] and high on delegation. Under the Abbott-Snidal model, this is an example of

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70. *See id.*
71. *Id.* at art. VII.
72. *Id.*
73. *Id.*
74. Indus Waters Treaty, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,contentMDK:20320047~pagePK:146736~piPK:583444~theSitePK:223547,00.html.
75. Indus Waters Treaty, *supra* note 67, at art. VIII.
76. *Id.*
77. James Kraska, *Sustainable Development is Security: The Role of Transboundary River Agreements as a Confidence Building Measure (CBM) in South Asia*, 28 YALE. J. INT'L. L. 465, 469 (2003).
78. One example of the precision includes Article VI of the Indus Waters Treaty, *supra* note 67, which makes extensive use of a detailed verification regime, under which both states are required to regularly exchange "daily [ ] gauge and discharge data relating to the flow of the [r]ivers," daily reservoir extractions or releases, and daily withdrawals and escapages from all canals. These data may be requested by the other party as frequently as on a daily basis, if available. *See id.*

hard legalization.[79] The Treaty has continued to survive despite wars that were fought between the two countries and has served its purpose. One author writes that:

> [t]here was intense pressure from hardliners in India for New Delhi to abrogate the Indus Waters Treaty, which would be seen by Pakistan as a threat to cut off water at some point in the future. Many in India went even further, arguing not only that the meeting should be skipped, but that India should abrogate the treaty altogether. Instead, India conducted the commission meetings because it wanted to "show the world that it is behaving responsibly."[80]

The second significant agreement between India and Pakistan is the Rann of Kutch Agreement, which the two nations signed in 1965, after military action over a territorial dispute pertaining to an area called the Rann of Kutch threatened to escalate.[81] Under British coaxing, the two countries agreed to a cease-fire and to submit the dispute to arbitration.[82] The terms of the Agreement provided that the parties would undertake "to implement the findings of the Tribunal in full as quickly as possible," and that the Tribunal should remain intact until its findings had been implemented.[83] The Agreement allowed each party to nominate a non-national as a member of the Tribunal, with its chairman to be appointed by the Secretary General of the United Nations. After the Tribunal rendered its award, the parties jointly demarcated the boundary, and the Tribunal was dissolved on September 22, 1969.[84] The process was a model for cooperation and took only four years.[85] Copeland writes that "[n]either side questioned the authority of the Tribunal, . . . and both sides worked together to implement the decision," and that one of the reasons for the success of the arbitration was that the issues were well defined.[86] This Agreement, under the Abbott-Snidal model, would be an example of hard legalization with a high level of

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79. *See generally* Abbott & Snidal, *supra* note 1.

80. Kraska, supra note 77, at 494.

81. India and Pakistan both claimed the Rann as part of their territory. J. Gillis Wetter, *The Rann of Kutch Arbitration*, 65 AM. J. INT'L L. 346, 346 (1971).

82. *Id. See also* Mukund G. Untawale, *The Kutch-Sind Dispute: A Case Study in International Arbitration*, 23 INT'L & COMP. L. Q. 818 (1974).

83. Wetter, *supra* note 81, at 348.

84. Rann of Kutch Arbitration (India v. Pak.) (The Indo-Pak. Western Boundary Case Trib. 1968), *excerpts reprinted in* 7 I.L.M. 633, 667 (1968).

85. Carla S. Copeland, *The Use Of Arbitration To Settle Territorial Disputes*, 67 FORDHAM L. REV. 3073, 3080 (1999).

86. *Id.*

> [I]mportant to the success of the arbitration was that the dispute over the Rann did not represent a major political dispute between the two countries. The Rann had little economic or strategic value and was sparsely populated. Thus, although large-scale fighting preceded the arbitration proceedings, the dispute was more symbolic than substantive.

Id.

obligation, high level of precision, and high level of delegation.[87] It is perhaps no coincidence that this is one of the most successful Agreements between the two nations. It is also significant that the Agreement was signed on the Pakistani side by a military leader rather than a politician,[88] which supports arguments pertaining to correlation between regime and legalization and the need to enlist the key compliance community—here, the Pakistani army.

The two countries signed the Tashkent Declaration in the immediate aftermath of the second war between them, in 1965.[89] Under the brokerage of the Soviet Union, Indian Prime Minister Lal Bahadur Shastri and Pakistani President Muhammad Ayub Khan met for the Tashkent Conference from January 4th through 10th,[90] with the Soviet Premier Kosygin playing the role of a mediator and facilitating the signing of the document.[91] Under the Declaration, the two countries agreed to "exert all efforts to create good neighborly relations between India and Pakistan in accordance with the United Nations Charter" and affirmed "their obligation . . . not to have recourse to force and to settle their disputes through peaceful means."[92] Both sides agreed to withdraw their troops to positions held prior to the commencement of the hostilities, and in a foreshadowing of the Shimla Agreement, agreed to follow "the principle of non-interference in the internal affairs"[93] and "discourage any propaganda directed against the other country."[94] The language of the Declaration was mainly general and vague, containing such promises as to "consider measures towards the restoration of economic and trade relations, communications, as well as cultural exchanges between India and Pakistan, and to take measures to implement the existing agreements between India and Pakistan."[95] One of the few provisions containing action pertained to the repatriation of prisoners of war.

This Declaration is medium to high on obligation (committing the parties to renounce violent methods to solve disputes), low on precision (as it does not provide much content for the obligations and

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87. *See generally* Abbott & Sinidal, *supra* note 1.

88. Rajat Ganguly, *India, Pakistan and the Kashmir Dispute*, Asian Studies Institute and Center for Strategic Studies, *available at* http://www.vuw.ac.nz/asianstudies/publications/working/Kashmir.html.

89. *The Tashkent Declaration [1966]*, STORY OF PAK., June 1, 2003, http://www.storyofpakistan.com/articletext.asp?artid=A139.

90. *Id.*

91. *See id.*

92. Tashkent Declaration, India-Pak., art. I, Jan. 10, 1966, *available at* http://www.indianembassy.org/South_Asia/Pakistan/Tashkent_Declaration_January_10_1966.html.

93. *Id.* at art. III.

94. *Id.* at art. IV.

95. *Id.* at art. VI.

does not spell out the consequences of violation), and low to nonexistent on delegation. Under the Abbott-Snidal Model, it is an example of low legalization.[96] It is hard to understand the reasons for the contrast between the Tashkent Declaration and the Rann of Kutch Agreement given that they occurred proximately in time to each other. The former is characterized by soft legalization (or no legalization), whereas the latter is an example of successful hard legalization. One can only speculate whether this is because the parties did not intend that their obligations be binding or because they did not appreciate the effect of legalization on ensuring compliance.

The fourth accord of significance is the oft-quoted Shimla Agreement of July 2, 1972.[97] It was signed by Prime Minister Indira Gandhi of India and President Zulfiqar Ali Bhutto of Pakistan in the immediate aftermath of the war between the two nations that resulted in the creation of the new nation of Bangladesh.[98] The first paragraph of the Agreement states,

> The Government of India and the Government of Pakistan are resolved that the two countries put an end to the conflict and confrontation that have hitherto marred their relations and work for the promotion of a friendly and harmonious relationship and the establishment of durable peace in the subcontinent so that both countries may henceforth devote their resources and energies to the pressing task of advancing the welfare of their peoples.[99]

In order to give effect to this exhortative statement of intent, the two parties committed to applying "the principles and purposes of the Charter of the United Nations" in their relations.[100] They also declared that they would "settle their differences by peaceful means through bilateral negotiations or by any other peaceful means" and that both would "prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peace and harmonious relations."[101]

Under the Agreement, the two countries recognized that "the prerequisite for reconciliation, good neighborliness and durable peace between them is a commitment by both the countries to peaceful coexistence, respect for each other's territorial integrity and sovereignty, and noninterference in each other's internal affairs, on the basis of equality and mutual benefit."[102] They also agreed to

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96. *See generally* Abbott & Sinidal, *supra* note 1.

97. Shimla Agreement, India-Pak., July 2, 1972, 858 U.N.T.S. 71, *available at* http://www.indianembassy.org/policy/Kashmir/shimla.htm [hereinafter Shimla Agreement].

98. *Id.*

99. *Id.* at para. 1.

100. *Id.* at para. 2(i).

101. *Id.* at para. 2(ii).

102. *Id.* at para. 2(iii).

"refrain from the threat of use of force against the territorial integrity or political independence of each other."[103] Recognizing the state of hysteria that existed on both sides of the border, the governments committed to taking "all steps within their power to prevent hostile propaganda directed against each other. Both countries will encourage the dissemination of such information as would promote the development of friendly relations between them."[104] This is a key clause because it comes amidst a backdrop of hysterical and one-sided media coverage in both countries and at a time when each country had a tendency to demonize the other. Political speeches were often replete with demogogic language that was calculated to inflame passions and incite hatred. The clause, at least in theory, sought to co-opt key constituencies into the peace process by committing them to toning down the rhetoric. With regard to immediate normalization of relations following the war, the Agreement committed both sides to "resume communications, postal, telegraphic, sea, land including border posts, and air links including over flights," "promote travel facilities," "[resume] trade and cooperation in economic and other agreed fields," and "[promote] exchanges in the fields of science and culture."[105]

With regard to de-escalating tensions along the border, both sides agreed to withdraw troops and maintain the cease-fire line as the border.[106] Both sides also committed to periodic meetings to

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103. *Id.* at para. 2(vi).
104. *Id.* at para. 3.
105. *Id.* at para. 4.
106. *See id.* at para. 6(ii).

> In Jammu and Kashmir, the [L]ine of [C]ontrol resulting from the ceasefire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from threat or the use of force in violation of this [L]ine.

This is an important part of the agreement, and the Line of Control (LOC) has grown over time into something approximating a permanent border. The dividing line between the two regions is the LOC. *See* Michael Fathers, *Play Nice*, TIME ASIA, Feb. 5, 2001, at 18, *available at* http://www.time.com/time/asia/magazine/2001/0205/kashmir.html (noting that the Shimla Agreement established the LOC as the informal border between India and Pakistan); *see also* Shimla Agreement, *supra* note 97, at para. 6(ii) ("[T]he line of control resulting from the ceasefire of December 17, 1971, shall be respected by both sides . . . ."); Charles Sanctuary, *Analysis: Contentious Line of Control*, BBC NEWS, Jan. 4, 2002, http://news.bbc.co.uk/1/hi/world/south_asia/377916.stm (confirming that the LOC basically matches the frontline at the end of the 1947 war). The LOC became the flash point for many cross-border incursions and a constant build-up of troops. *See* INT'L CRISIS GROUP, KASHMIR: CONFRONTATION AND MISCALCULATION 9 (2002) (describing the nuclear use policies of India and Pakistan in the Indo-Pak conflict), *excerpt available at* http://www.crisisgroup.org/home/index.cfm?l=1&id=1864.

ensure that the peace process continued.[107] The Shimla Accord continues to have rhetorical value to this day, and even pronouncements by militant Islamic groups based in Pakistan bear this out.[108]

An examination of the Shimla Accord using the legalization lens reveals that it is medium to high on obligation; it commits the states to peace by "prevent[ing] the organization, assistance or encouragement of any acts detrimental to the maintenance of peace and harmonious relations."[109] It is relatively low on precision because it does not stipulate in detail how these objectives are to be achieved or the consequences of a violation of the obligations assumed. It is also low to non-existent on delegation, as the Accord is silent on implementing agencies, enforcement, monitoring, and interpretation.[110] Under the Abbott and Snidal Model, the Shimla accord is an example of low legalization.[111] This may signal the fact that the parties did not intend to undertake serious obligations and saw the Accord only as a stopgap measure. This could certainly be true in the case of Pakistan, as it had suffered enormously in the 1971 war, losing east Pakistan entirely and suffering the ignominy of Indian forces deep into its western territory.[112] Pakistan had clear incentives to avoid hard legalization as it would be negotiating from an inferior bargaining position and would not want to undertake obligations that it would find hard to get out of. Given the shrewdness of Pakistani President Zulfikar Bhutto, this conclusion is inescapable.

It remains something of a mystery as to why India gave up the enormous bargaining advantage that it possessed by virtue of victory in the 1971 war to push for a legally binding agreement that was structured as an exemplar of hard legalization. Given the precarious nature of democracy in Pakistan, India should have had every reason to reduce the agreement to hard legalization in order to have the assurance that the Pakistani army would consider it binding. If the obligations enshrined in the Shimla Accord had been supported by high levels of precision and delegation, the chances of its success would have been significantly enhanced. In contrast to the Rann of Kutch Agreement, which was an example of hard legalization, the

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107. Shimla Agreement, *supra* note 97, at para. 8.

108. *See, e.g.*, *Shimla Accord Still Relevant: Jamiat Chief*, REDIFF INDIA ABROAD, July 17, 2003, http://www.rediff.com/news/2003/jul/17pak.htm (quoting the statement by the Chief of the Pakistani religious organization Jamiat Ulema-e-Islam, Maulana Fazal-ur Rehman: "Kashmir is a big issue but both the countries have the Shimla Agreement as a guiding principle to solve their disputes bilaterally").

109. Shimla Agreement, *supra* note 97, at para. 2(ii).

110. *See id.*

111. *See generally* Abbott & Sinidal, *supra* note 1.

112. *See generally* The 1971 India-Pakistan War Site, http://www.subcontinent.com/1971war/1971war.html (last visited Apr. 11, 2007).

Shimla Accord is regarded as a failure insofar as it has failed to resolve the differences between the parties—although it is no small fact that there has been no full-scale war since its adoption.[113] The Accord may also be a limited success because it established bilateralism as the dominant approach to solving disputes between the states.

In 1988, India and Pakistan entered into an agreement to prohibit the attacking of each other's nuclear installations. [114] According to the agreement, "Each party shall refrain from undertaking, encouraging or participating in, directly or indirectly, any action aimed at causing the destruction of, or damage to, any nuclear installation or facility in the other country."[115] For the purposes of the agreement, it appears that no distinction was made between civilian and military nuclear facilities. The operative term states that "nuclear installation or facility" includes "nuclear power and research reactors, fuel fabrication, uranium enrichment, isotopes separation and reprocessing facilities as well as any other installations with fresh or irradiated nuclear fuel and materials in any form and establishments storing significant quantities of radioactive materials."[116] The agreement requires each nation to notify the other about the precise locations of the respective nuclear facilities.[117] The agreement is high on obligation, reasonably high on precision, and low on delegation. It appears to be couched in the language of hard legalization, and compliance is difficult to measure in the absence of a full-blown war following the agreement.

In 1992, India and Pakistan entered into an agreement that provided for "the complete prohibition of chemical weapons."[118] The agreement included a commitment to abjure from developing,

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113. One author argues that the Agreement is actually a stumbling block: "Because of its strict requirement of bilateralism, the Agreement has been viewed as a roadblock preventing any real progress." Farrell, *supra* note 56, at 315.

114. The preamble of the Agreement declares that "[t]he Government of the Islamic Republic of Pakistan and the Government of the Republic of India, hereinafter referred to as the Contracting Parties, reaffirming their commitment to durable peace and the development of friendly and harmonious bilateral relations; conscious of the role of confidence building measures in promoting such bilateral relations based on mutual trust and goodwill." Agreement Between India & Pakistan on Prohibition of Attack Against Nuclear Installations and Facilities pmbl., Dec. 31, 1988, *available at* http://www.indianembassy.org/South_Asia/Pakistan/Prohibition_Attack_Nuclear_Dec_31_1988.html.

115. *Id.* at art. 1(i). It was signed by Humayun Khan, Foreign Secretary of Pakistan, and K.P.S. Menon, Foreign Secretary of India. *Id.*

116. *Id.* at art. 1(ii).

117. *Id.* at art. 2 ("Each Contracting Party shall inform the other on 1st January of each calendar year of the latitude and longitude of its nuclear installations and facilities and whenever there is any change.").

118. Agreement on Chemical Weapons, India-Pak., 1992, *excerpt available at* http://www.thenti.com/e_research/official_docs/inventory/pdfs/indpakch.pdf.

possessing, or using chemical weapons, as well as to refrain from assisting, encouraging, or inducing anyone to engage in the development, production, acquisition, stockpiling, or use of chemical weapons.[119] At the time of the signing of the agreement, both parties declared that they did not possess stockpiles of chemical weapons. This agreement is high on obligation, high on precision, and high on delegation.

Whether it was seriously intended or not, in 1997 Pakistan put forth a proposal for a non-aggression treaty.[120] While the treaty suggested limitations on nuclear weapons and missile development, it is unlikely that there was much substance to these proposals since both countries continued their missile and nuclear weapons programs with, if anything, even greater vigor. The landscape on the Indian side was dramatically altered by the victory of the pro-Hindu Bharatiya Janata Party (BJP) in March 1998.[121] Those who expected the BJP's ascent to power to translate into a worsening of relations with Pakistan were in for a surprise, as the peace process made significant progress under the BJP's rule.

The BJP had historically assailed the Congress Party for following a policy of "minority appeasement," being soft on Muslim fundamentalism, and failing to put Pakistan in its place. In an attempt to signal its intention to be tough, almost immediately after taking office in 1998, the government conducted four nuclear tests.[122] There was predictable condemnation from the international community, and the fear of an arms race escalated.[123] Pakistan felt compelled to respond, and shortly thereafter, conducted its own tests. Sanctions were imposed on both countries and, faced with the specter of a nuclear war in one of the most populous regions of the world, the international community turned its attention to promoting dialogue between the two countries.[124]

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119. *Id.*

120. *See* Press Release, Nuclear-Test-Ban Treaty Prompting Nuclear-Weapon Technology Race, India Tells Disarmament Committee, U.N. Doc. GA/DIS/3084 (Oct. 17, 1997), *available at* http://www.un.org/News/Press/docs/1997/19971017.GADS3084.html.

121. *See* Surya Prakash, *The 1998 Election Marks a Watershed*, PIONEER, Apr. 13, 1998, *available at* http://www.hvk.org/articles/0498/0082.html.

122. For an archive of related stories, see Global Beat, South Asian Nuclear Crisis http://www.bu.edu/globalbeat/pubs/india.html (last visited Apr. 11, 2007)

123. Ashok Sharma, *India conducts nuclear tests, angering rival Pakistan and world*, STAR-LEDGER, May 12, 1998 ("Japan, Australia and New Zealand condemned India's tests. All three said they had recalled or planned to recall their ambassadors - the strongest diplomatic protest short of cutting off relations. Some officials in Japan, India's largest donor, called for a suspension of aid.").

124. Steve Chapman, *Nuclear security blanket*, WASH. TIMES, Nov. 22, 1998. *See* Uttara Choudhury, *Seven years after going nuclear, India and Pakistan thriving, Agence* FRANCE-PRESSE, June 2, 2005 (writing that sanctions imposed by the United States on India included "a selective ban on bilateral and multilateral loans and a blacklist of 40 Indian and Pakistani agencies and their 200 subsidiaries that U.S. firms

In February 1999, Pakistan Prime Minister Nawaz Sharif and Indian Prime Minister Atal Behari Vajpayee resolved to negotiate, and in a highly symbolic move, Mr. Vajpayee traveled to Lahore by bus. The two sides issued a joint communiqué, known as the "Lahore Declaration."[125] This is the most important agreement between the two sides in recent history. Under the Declaration, each side

> shall intensify their efforts to resolve all issues, including the issue of Jammu and Kashmir; shall refrain from intervention and interference in each other's internal affairs; shall intensify their composite and integrated dialogue process for an early and positive outcome of the agreed bilateral agenda; shall take immediate steps for reducing the risk of accidental or unauthorised use of nuclear weapons and discuss concepts and doctrines with a view to elaborating measures for confidence building in the nuclear and conventional fields, aimed at prevention of conflict; reaffirm their commitment to the goals and objectives of SAARC and to concert their efforts towards the realisation of the SAARC vision for the year 2000 and beyond with a view to promoting the welfare of the peoples of South Asia and to improve their quality of life through accelerated economic growth, social progress and cultural development; reaffirm their condemnation of terrorism in all its forms and manifestations and their determination to combat this

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were banned from dealing with" and that they were estimated to have an impact of $1.14 billion by the Indians); *Japan lifts sanctions on India, Pakistan*, PTI NEWS AGENCY (New Delhi, India), Oct. 26, 2001 (noting "Japan is lifting the sanctions on India in the hope of easing tension in the region and to seek New Delhi's political involvement in Afghanistan after the ruling Taleban falls from power"). *See also Government torn on lifting Pakistan sanctions*, DAILY YOMIURI AND THE YOMIURI SHIMBUN (Tokyo, Japan), Oct. 19, 2001.

125. Lahore Declaration, India-Pak., Feb. 21, 1999, *available at* http://www.usip.org/library/pa/ip/ip_lahore19990221.html [hereinafter Lahore Declaration]. The preamble to the Lahore Declaration states that:

> The Prime Ministers of the Republic of India and the Islamic Republic of Pakistan, [s]haring a vision of peace and stability between their countries, and of progress and prosperity for their peoples; Convinced that durable peace and development of harmonious relations and friendly cooperation will serve the vital interests of the peoples of the two countries, enabling them to devote their energies for a better future; Recognising that the nuclear dimension of the security environment of the two countries adds to their responsibility for avoidance of conflict between the two countries; Committed to the principles and purposes of the Charter of the United Nations, and the universally accepted principles of peaceful co- existence; Reiterating the determination of both countries to implementing the Simla Agreement in letter and spirit; Committed to the objective of universal nuclear disarmament and non-proliferation; Convinced of the importance of mutually agreed confidence building measures for improving the security environment; Recalling their agreement of 23rd September, 1998, that an environment of peace and security is in the supreme national interest of both sides and that the resolution of all outstanding issues, including Jammu and Kashmir, is essential for this purpose . . . .

Id. at pmbl.

> menace; shall promote and protect all human rights and fundamental freedoms.[126]

Clearly, the Lahore Declaration contains some lofty objectives, but the language is worded in such generalities that it is impossible to enforce. Under the Abbott-Snidal Model, it would be high on obligation, low on precision, and low to non-existent on delegation.[127] Although the Declaration frequently uses the word "shall," the absence of any content and precision coupled with the complete absence of enforcement and monitoring mechanisms militates against it being a binding agreement. This lack of authorativeness was destined to be the agreement's downfall; just a few months after entering into the Declaration, Pakistani-backed insurgents, under the charge of the military establishment (without apparent political backing) launched a campaign in Indian-Kashmir that required Indian military action to evict them. When matters seemed to be escalating with the possibility of Indian reprisals beyond Kargil,[128] President Clinton pressured the Pakistani Prime Minister to withdraw the insurgents.[129] However, the military establishment appeared to be beyond the control of the elected representatives, and the humiliating withdrawal from Kargil culminated in a coup orchestrated by General Pervez Musharraf.[130]

Suspected to be the architect of the military actions in Kargil, Musharraf had no credibility as a peace partner. After the exiling of the two former prime ministers Bhutto and Sharif, and the cementing of Musharraf's grip on power, India invited him for a summit in Agra.[131] Mr. Musharraf kindled hopes of building on the Lahore Declaration, but instead the summit ended in recriminations and rancor.[132] The Indian side felt that they had been used by a canny Mr. Musharraf to bolster his credibility in Pakistan and to grandstand on the global stage.[133] There are no drafts of the agreement or records that would explain what caused the failure to arrive at an agreement, and it is hard to pin blame precisely.[134]

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126. *Id.*

127. *See generally* Abbott & Snidal, *supra* note 1.

128. *See* GlobalSecurity.org, *1999 Kargil Conflict*, http://www.globalsecurity.org/military/world/war/kargil-99.htm (last visited Apr. 12, 2007).

129. BRUCE RIEDEL, AMERICAN DIPLOMACY AND THE 1999 KARGIL SUMMIT AT BLAIR HOUSE 4 (2002).

130. Gaurav Kampani, *The Military Coup in Pakistan: Implications for Nuclear Stability in South Asia*, CNS REP., Oct. 1999, http://cns.miis.edu/pubs/reports/gaurav.htm.

131. *Agra Summit at a Glance*, BBC NEWS, July 17, 2001, http://news.bbc.co.uk/2/hi/south_asia/1430367.stm.

132. *Id.*

133. Sultan Shahin, *Something to Declare After All*, ASIA TIMES ONLINE, Jul. 18, 2001, http://www.atimes.com/ind-pak/CG18Df02.html (discussing India's distrust of Musharraf after the coup).

134. *See Agra Summit at a Glance*, *supra* note 131.

According to some, "Pakistan's insistence on the *settlement* of the Jammu [and] Kashmir issue, as a pre-condition for the normalization of relations," was the breaking point.[135]

In the immediate aftermath of the 9/11 attacks on the World Trade Center, Kashmiri separatists attacked the state legislature in Srinagar (located in Indian Kashmir), killing thirty-eight people.[136] Perhaps emboldened by this attack, militants associated with Lashkar-e-Taiba assaulted the Indian parliament in New Delhi and killed fourteen people on December 13, 2001.[137] Almost reflexively, India alleged that Pakistan was responsible for both attacks, and there was talk in India of bombing terrorist camps in Pakistan. Alarmed at the prospect of war and its impact on its operations in Afghanistan, the United States induced both sides to return to the negotiating table.[138] India agreed to stop its military deployment along the border, and Pakistan pledged to destroy terrorist camps inside its border. These agreements have not been reduced to writing, and there does not appear to be any guarantee of compliance or a monitoring agency to evaluate the situation.

The War on Terror and the attendant military operations by the United States in Afghanistan focused more attention on the region. The danger that a fundamentalist Pakistan presented also served to convince the United States of the need for greater involvement in South Asia. Satisfied that its position with regard to Pakistan-inspired militancy in Kashmir was finally being appreciated by the United States and encouraged by the growing economic relationship

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135. A.G. Noorani, *The Truth About Agra*, FRONTLINE, Jul. 16-29, 2005, *available at* http://www.hinduonnet.com/fline/fl2215/stories/20050729002104400.htm. According to an author on the Pakistani side, "Pakistani officials maintain that the Indians backtracked thrice on an agreed draft following pressure from some of their cabinet ministers opposed to the peace process. The Indians objected to the formulation of the proposed declaration which reportedly said that, 'The settlement of the Kashmir issue would pave the way for normalisation of relations between the two countries.'" Zahid Hussain, *A Bridge Too Far*, NEWSLINE, Aug. 2001, http://www.newsline.com.pk/NewsAug2001/coverstory1.htm. The Indian Prime Minister Vajpayee said, "During the talks, he [General Musharraf] took a stand that the violence that was taking place in Jammu and Kashmir could not be described as 'terrorism.' He continued to claim that the bloodshed in the State was nothing but the people's battle for freedom." *Musharraf to Blame for Summit Failure*, HINDU, Sept. 27, 2006, *available at* http://www.hindu.com/2006/09/27/stories/2006092711440100.htm. According to Vajpayee, it was this stand that resulted in the failure of the Agra Summit. *Id.*

136. *Bombing at Kasmir Assembly Kills at Least 29*, CNN.COM, Oct. 1, 2001, http://edition.cnn.com/2001/WORLD/asiapcf/south/10/01/india.kashmir/index.html.

137. Embassy of India, Terrorist Attack on the Parliament of India, http://www.indianembassy.org/new/parliament_dec_13_01.htm (last visited Apr. 12, 2007).

138. Anjana Pasricha, *New Hopes of Peace Between Rivals India, Pakistan Faded by Year's End*, VOICE OF AM., Dec. 25, 2001, http://www.voanews.com/english/archive/2001-12/a-2001-12-25-26-New.cfm?textmode=0.

between India and Pakistan, India became more responsive to U.S. entreaties to mend relations. In May 2003, Pakistani Parliament members visited New Delhi, and in July of the same year, members of the Indian Parliament visited Islamabad.[139] A few months later, a ceasefire was reestablished in Kashmir.[140] In January 2004, Prime Minister Vajpayee met President Musharraf while attending the meeting of the South Asia Association for Regional Cooperation in Islamabad.[141] This meeting heralded a new round of negotiations, called the Composite Dialogue.[142] However, there has not been much progress beyond this meeting, and a comprehensive peace agreement is still elusive.

IV. EVALUATION AND ANALYSIS

This Part will analyze the success (or the lack thereof) of the agreements that were discussed in Part III. The principal tool of analysis is the elegant analytical lens of legalization. The two broad peace agreements, Shimla and Lahore, are written in general language without any specific actionable items. The other agreements—chiefly the Indus Waters Treaty, the Rann of Kutch Agreement, the Nuclear Prohibition on Attack Agreement, and the Chemical Weapons Agreement—are all drafted with specific undertakings by both governments. Not surprisingly, it is these more specific agreements that have been the most successful. An analysis of the peace agreements does not reveal any discernible larger, longer-term strategy either; the agreements appear to be ad hoc and lack long-term vision. Unlike the Oslo Accords, which are said to be the product of the four-fold methodological strategies of "open-ended gradualism," "constructive ambiguity," "bilateralism," and "reciprocity," the only two methodological approaches that apply to the peace accords between India and Pakistan are "bilateralism" and "reciprocity."[143] Gradualism is clearly not visible, as there does not appear to be any overarching policy of incremental agreement building.[144] The progress made in each agreement has not been

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139. *Pakistan 'to Restore India Links,'* CNN.COM, May 6, 2003, http://www.cnn.com/2003/WORLD/asiapcf/south/05/06/india.pakistan/index.html.

140. In November 2003, India agreed to a Pakistani offer of a cease-fire agreement. *Timeline: Conflict over Kashmir*, CNN.COM, Nov. 25, 2003, http://www.cnn.com/2003/WORLD/asiapcf/south/02/06/kashmir.timeline/.

141. Ayaz Gul, *India, Pakistan Leaders Move to Thaw Relations*, VOICE OF AM., Jan.05, 2004, http://www.voanews.com/english/archive/2004-01/a-2004-01-05-25-India.cfm.

142. Indo-Pak Composite Dialogue 2004-05: A Profile, IPCS Special Report 12, February 2006, http://www.ipcs.org/IPCS-Special-Report-12.pdf

143. Kittrie, *supra* note 2, at 1670.

144. *Id.*

carried over to the subsequent one. It is also clear that bilateralism has been a key determinant in the agreements because India has steadfastly refused outside intervention and has consistently negotiated directly with Pakistan without any intermediaries.[145] Reciprocity is also a key feature, serving as the driving force for concessions by both sides.[146] It requires that each side emphasize its own performance upon satisfactory performance by the other.[147] This has, not surprisingly, contributed to tit-for-tat conduct. The following paragraphs will identify some of the key variables that have contributed to the limited success of many of the agreements concluded and will outline some factors that can facilitate better outcomes.

A. *Narrowing the Trust Deficit*

"There has been trust deficit in our relations with Pakistan. But we cannot stand still," said Prime Minister Manmohan Singh at a recent press conference.[148] This seems to be the classic "prisoner's dilemma" scenario: a lack of information about the intentions of the other country exists for each side and prevents cooperation. The distrust is compounded by the lack of precision in the commitments that the parties have made and continue to make, which results in each party's awareness that those commitments can be manipulated based on preferences that may change over time depending on the political actor who is in power. Legalization may affect this problem positively insofar as it provides relevant information to both parties and facilitates cooperative behavior. Moreover, legalization plays a salutary role by enhancing the precision of the commitments, thus limiting opportunistic auto-interpretations and increasing the cost of such opportunistic conduct. Legalization's other key feature, delegation, results in third-party monitoring and enforcement, increasing the incentives for cooperation and the costs of opportunism. It limits state behavior to a narrowly circumscribed range of conduct that is ordered along rules and processes that make, implement, and enforce those rules. Legalization also brings into play

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145. *See generally* Sumathi Subbiah, *Security Council Mediation and the Kashmir Dispute: Reflections on its Failures and Possibilities for Renewal*, 27 B.C. INT'L & COMP. L. REV. 173 (2004).

146. Fareed Zakaria, *India: Asia's Other Superpower Breaks Out*, NEWSWEEK, Mar. 6, 2006, at 34–36.

147. GEOFFREY WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 115 (2000).

148. *Indo-Pak Relations Suffering from 'Trust Deficit': PM*, TIMES OF INDIA, Sept. 24, 2006, http://timesofindia.indiatimes.com/articleshow/2022986.cms. Singh also commented, "I sincerely believe that our two countries have to find ways and means to get over the problems, that include terrorism." *Id.*

the legal system and process, limiting the range of plausible arguments that states can make to evade commitments.

B. *Centralization*

While a strong case can be made for legalization in the India-Pakistan context based purely on its dimensions of obligation, precision, and delegation, the political rubric within which legalization operates here provides further support. Legalization's effect on compliance seems to be related to another variable—the degree of centralization in decisionmaking. While a superficial analysis might lead one to conclude that hard legalization is the reason for greater compliance, a more careful analysis would focus on disaggregating other variables that may contribute to enhanced compliance. Otherwise, the fact that compliance has been enhanced after legalization may be due to the subject area of legalization and the degree to which decisionmaking in that area is concentrated or centralized. Intuitively, legalization ought to enhance cooperative behavior for higher degrees of centralized decision-making. This point is elegantly made by Lutz and Sikkink in the context of human rights practices in Latin America.[149] They suggest that "international norms and the pressures exercised to enforce them will be more effective in securing compliance when decisions are made by a handful of powerful, central political actors than when decisionmaking is decentralized." [150] Centralized decisionmaking seems to be the motivating force in Latin America, and conditions are quite similar in Pakistan, which has been subject to military coups similar to those in many Latin American countries.[151] In the context of Indo-Pakistan relations, if the oft-repeated Pakistani claim that terrorism is being fomented by Kashmiri freedom fighters over whom Pakistan has no control is true, an agreement that is an example of hard legalization is unlikely to be of much use. No agreement, regardless of its degree of legalization, signed by the centralized Pakistani leadership can ensure that terrorism on the Indian side stops. In contrast, if the Pakistani establishment has a high degree of control over these "freedom fighters" through its financial, military, or political support of them, an agreement that exemplifies hard legalization will enhance compliance because the tap can be turned off by the President of Pakistan, the Pakistani army, or another

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149. *See* Ellen Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633, 639 (2000) (writing that "if torture decisions are decentralized, even where state policy categorically outlaws the practice, police and security officers at local or regional levels may continue to use it to extract confessions in criminal cases, intimidate local political actors, or to strike fear . . .").

150. *Id.*

151. *Id.*

central actor. The high level of centralized decisionmaking authority should lead India to desire hard legalization, but that has not been the case so far.

The centralization of power may operate conversely, too. Under the Moravcsik model, state preferences are shaped by competing domestic actors that are constantly vying for political space. If a societal actor, that had been marginalized at the time the then centralized authority entered into a certain agreement, is successful in attaining power, erstwhile agreements, regardless of whether they are exemplars of hard legalization or not, have very little chance of survival. This might help explain, partly, India's reluctance to pursue hard legalization with Pakistan.

C. *Norms Cascade—Terrorism*

The process of disaggregating reasons to account for enhanced compliance in cases where there is hard legalization may reveal another factor—coincidence of a norms cascade. Legalization may be serving to buttress a norm that has affected behavior and caused compliance. For example, functionalists would argue that the norm against the use of chemical weapons was strengthened by its embodiment in the Chemical Weapons Convention of 1997. This strengthening also serves to prevent retrogression.[152] Lutz and Sikkink suggest that legalization interacted with political processes in mutually strengthening ways and "underscored the increasing strength of the norm consensus."[153] In the context of Latin America, the norm strengthening seems to have limited the range of acceptable political conduct, for example, by removing military coups as an acceptable option.[154]

The legalization of peace agreements between India and Pakistan may have a role to play in strengthening a norms cascade pertaining to state suppression of terrorism, which occurred after 9/11. According to Sunstein, "Norm cascades occur when societies are presented with rapid shifts toward new norms."[155] Lutz and Sikkink suggest that "norms cascades are collections of norm-affirming events. These events are discursive events—that is, they are verbal or written statements asserting the norm."[156] These events appear to happen "[a]fter norm entrepreneurs have persuaded a critical mass of

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152. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1940 (3d ed. 1993) (defining retrogression as "a reversal in development or condition" and as "a passing from a higher to a lower or from a more to a less specialized state or type of organization or structure in the course of the development of an organism").

153. Lutz & Sikkink, *supra* note 149, at 658.

154. *Id.*

155. CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 34–38 (1997).

156. Lutz & Sikkink, *supra* note 149, at 655.

states to become norm leaders and adopt new norms."[157] At that point, "the norm reaches a threshold or tipping point."[158] States are moving toward a point where justification of terrorism on any grounds is problematic.[159] There is increasingly very little room for international actors to justify acts of terrorism.[160] This is a change from the situation that existed before 9/11, when arguments that seemed to provide moral legitimacy to terrorists were routinely peddled, mainly on the plea that they were exercising their right to self-determination.[161] In the post-9/11 world, there appears to be a norms cascade against such pleas, and there is certainly a critical mass of states that denounce terror regardless of the justification.[162] This list includes states as far apart on the political spectrum as the United States and Saudi Arabia.[163] Such a norms cascade against support for terrorism would aid Pakistan in legalizing an agreement because the Pakistan leadership could tell its anti-India constituency that they are sailing against the wind and that support for terrorists cannot be a viable basis for foreign policy. Here the norm provides an exogenous basis for structuring the agreement in a legal form and will allow Pakistan to take steps to crack down on terrorists without losing face. It will take away the main sticking point for India—Pakistan's unstinting support for cross-border terrorists—and will help to create a climate for a legalized solution that reinforces this norm.

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157. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 896, 901 (1998).

158. *Id.*

159. The problem in the India-Pakistan context appears to be a denial of this norms cascade by President Musharraf in his autobiography:

> [The United States and Europe t]oo often equate all militancy with terrorism; in particular, they equate the struggle for freedom in Indian-held Kashmir with terrorism . . . . Pakistan has always rejected this broad-brush treatment . . . . It is not just that one mans terrorist can be another mans freedom fighter; sometimes a man can be a legitimate freedom fighter in one context and a terrorist when he does something else.

Chidanand Rajghatta, *Mush Memoir May Increase Trust Deficit*, TIMES OF INDIA, Sept. 27, 2006, http://timesofindia.indiatimes.com/articleshow/2030212.cms.

160. *See generally* Denis G. Touret, *Terrorism and Freedom in International Law*, 2 HOUS. J. INT'L L. 363 (1980).

161. *See generally id.*

162. *See, e.g.*, Finnemore & Sikkink, *supra* note 157, at 901–04. The authors propose two hypotheses about what constitutes a "critical mass" and state that "although it is not possible to predict exactly how many states must accept a norm to 'tip' the process . . . empirical studies suggest that norm tipping rarely occurs before one-third of the states in the system adopt the norm. It also matters which states adopt the norm." *Id.* at 901.

163. *See* Matthew Clark, *Saudis Determined to Uproot Terrorism*, CHRISTIAN SCI. MONITOR, Dec. 7, 2004, *available at* http://www.csmonitor.com/2004/1207/dailyUpdate.html?s=rel.

D. *Regime Change and Rule of Law Societies*

The relationship between the kind of regime that a state possesses and compliance with international obligations is a problematic one. Simmons disaggregates democracy as a variable and finds that although domestic actors, who are more favorably inclined to legalization, may be more influential in democracies, there is a negative correlation between democracy and compliance.[164] She states that rules and popular pressures can pull in opposite directions in international law compliance.[165] She provides the evidence of territorial disputes in Latin America, which did not indicate a "democratic effect" with regard to compliance.[166] She does, however, find a strong and significant relationship between compliance and societies that are founded on the rule of law.[167] One of the key goals of the India-Pakistan peace agreements is to reduce the number of incidences of terrorism.[168] The fact that Pakistan is a state that has been frequently accused of fomenting and supporting terrorism is not unrelated to its status as a closed and undemocratic society. One author writes that "in the modern international system, democracies have almost never fought each other."[169] As seen in the example of Hamas, many Islamists think democracy is heresy and that one should only be ruled by God's laws (this thinking can be seen in Pakistan as well).[170] Since this Islamic doctrine is valued more than the democratic process, it is hard to say if democracy will be a negative force—by allowing radical fundamentalist political elements to enter the mainstream—or a positive one.[171] Regardless of these risks, historical experience suggests that ushering in democracy in Pakistan can only help the process of peace. If India believes that there is a positive correlation between a democratic regime in Pakistan and compliance with peace agreements, then it might choose not to negotiate with President Musharraf and thus signal to the people of Pakistan that they need to oust their dictator if they are interested in peace. Such a course would embolden societal actors

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164. *See* Beth Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 573 (2000).

165. *Id.*

166. *Id.*

167. *Id.*

168. *See, e.g.*, Lahore Declaration, *supra* note 125, at pmbl. (stating that the "respective Governments . . . reaffirm their condemnation of terrorism in all its forms and manifestations and their determination to combat this menace").

169. BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD 4 (1994).

170. Steven Hill, *Vote System Gave Hamas Huge Victory*, NEW AM. FOUND., Feb. 8, 2006, http://www.newamerica.net/publications/articles/2006/vote_system_gave_hamas_huge_victory.

171. *Id.*

who are opposed to the current regime to mobilize international opinion against Musharraf. If he is seen to be an obstacle to peace, there could be a realignment of societal actors to have their preferences for peace replace the existing state preference.

E. *Domestic Politics and Legalization*

Domestic politics plays a role in shaping state preferences, particularly because of the disproportionate impact of particular interest groups. The legal constituency is one such actor and has a strong interest in legal structures in agreement design because it represents an opportunity to expand influence by participating in advising, drafting, and interpreting these instruments. In the commercial context, legal agreement structures might help to generate new revenue streams for lawyers.[172] Some models focus on domestic politicians as the relevant actors.[173] Under these theories, politicians approach the task of structuring and concluding international agreements as a means to appeal to voters or, in the case of nondemocratic societies, to selected constituencies such as the police and the army.[174]

In the India-Pakistan context, the extent of friction is consistent with liberal theory, which states that "where an attempt by dominant social groups in one country to realize their preferences through state action necessarily imposes costs (negative externalities) on dominant social groups in other countries, governments face a bargaining game with few mutual gains and a high potential for interstate tension and conflict."[175] The increase in transparency that legalized agreements offer could present a way to minimize the dominant role played by certain elites. In the case of Pakistan, the dominant social groups trying to realize their preferences through state action at the expense of groups in India are the army and the religious parties. The employment of non-legal agreements ensures that these elites have a monopoly on the debate and that other players in the political spectrum are shut out. Given that the Pakistan Army has ruled the country for a significant part of that country's history, other civil society actors have been completely shut

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172. *See* Kahler, *supra* note 28, at 667. Kahler also lists the judiciary and business entities as powerful constituencies in the context of legalization. In other cases, the risk of these revenue streams being threatened by legalization has had the opposite effect, and the legal community has been the primary opponent of legalization. One example of this is the stinted opposition of the English legal profession to the United Kingdom's ratification of the United Nations Convention on Contracts for the International Sale of Goods, 1980.

173. Moracvsik, *Liberal Theory of International Politics, supra* note 43, at 521.

174. David L. Richards, *Perilous Proxy: Human Rights and the Presence of National Elections*, 80 Soc. Sci. Q. 648, 648-65 (1999).

175. Moravcsik, Liberal Theory of International Politics, supra note 43, at 521.

out of the process of structuring agreements with India. There has been no freely elected Parliament for significant periods to debate the form and substance of the agreements. This has robbed the process of accountability and has ensured that there has not been an opportunity for other actors to participate in the competition to realize their preferences through state action. It might be advantageous to foster the participation of actors who have no vested interest in war (unlike the army). Legal agreements are advantageous over non-legal agreements in this regard, because they trigger a constitutional process with deliberative fora and interpretative tribunals that have to be involved at different stages. Political agreements, on the other hand, are negotiated in secret upon the pretext that they have national security implications, are frequently opaque on content, and are not justiciable once concluded. Thus, there is a link between international legalization and domestic politics that has favorable implications for the peace process.

When conducted in the full public glare of the democratic political process, the sovereignty cost imposed by the agreement translates into a loss of support for the political leader from constituencies that are opposed to the agreement. The other aspect of domestic politics pertains to the leaders' desire to join high status clubs of civilized states that are signatories to legal agreements. [176] This is a salient point for leaders who have obtained power through illegitimate means. Achieving membership in high status clubs by committing their states to international agreements bolsters their fragile image and gives them a small modicum of legitimacy. In this scenario, international law either has exogenous power as a legitimizing influence or coincides with some other normative power that achieves this result. The status-conferring potential of international law agreements has not been fully understood, and it is not the domain of this Article to embark on a full exegesis of the relationship between illegitimate leaders and their attitudes toward international law. It must be noted, however, that actions like that of the Commonwealth in suspending Pakistan from its membership because of the military coup, have the potential to strip its leadership of esteem and thereby convince it to follow certain asserted norms.

The employment of legalized forms in agreement design may also be a tool in the context of domestic politics used by one domestic institution to constrain the powers of other institutions. This is particularly true when foreign policy is contentious domestically and there is competition amongst various groups seeking to express their preferences through state action. In such situations, every foreign policy decision tends to become a hotly contested decision that is liable to be questioned and even overturned by other rival institutions

176. Kahler, *supra* note 28, at 670.

that may not see eye-to-eye with the executive branch or the particular political leader involved. By committing the state to a legalized agreement, the political leader or the executive branch may be aiming to limit the ability of rival institutions to challenge their actions. The demand for legalization in these scenarios may also come from the other parties to the agreement; these parties might believe that a non-legalized agreement to which the political leader or executive adheres will not be worth much due to the domestic dissonance in the state. For this reason, they might insist on legalization to ensure that the agreement does not become a victim of domestic politics. Legalization protects the other parties by binding rival institutions and successor governments (with the caveat that the agreement can be denounced by successor governments in some circumstances).[177] This interaction of liberal theory with legalization presents interesting insights for India-Pakistan relations.

F. *Compliance Constituencies*

The employment of legalized forms has the ability to mobilize compliance constituencies that can improve the compliance levels of international agreements.[178] It empowers these constituencies and enhances their ability to influence governments by holding governments accountable to obligations that were entered into by the state. Legalization has a powerful signaling function because it comes with ex ante informational and negotiating costs, and the costs and benefits are articulated so that winners and losers are better identified than they would be through non-legal agreements, which are to a large extent shrouded in secrecy.[179] By their very nature, legal agreements might require approvals from different governmental agencies, and this approval entails a high level of disclosure and debate. Parties that are most likely to gain from the agreement will have an incentive to legalize it and thus make certain their gains. It will also bolster actors who have a vested interest in holding the state to its bargain to utilize domestic institutional processes to prevent opposing actors from revisionistic preference alteration.[180]

It must be remembered that triggering the operation of the legal process also has a greater potential to mobilize those opposed to the international agreement. Goldstein and Martin argue that in the context of trade agreements, "a number of factors suggest that increased information is likely to favor proprotectionist

177. *Id.* at 668.
178. *Id.* at 675.
179. *Id.* at 663.
180. For a discussion on revisionist strategies versus revisionist preferences, see, Moravcsik, *supra* note 43, at 521.

mobilization."[181] They mention "experimental evidence that actors tend to react more strongly to losses than to gains, again favoring protectionist groups in this mobilization dynamic."[182] The India-Pakistan context seems to suggest the opposite. The only mobilized actors in the current non-legalized scenario appear to be the ones against peace—the hawks on both sides. On the Pakistani side, this group includes the army, the intelligence agency (called the Directorate for Inter-Services Intelligence or ISI), the various Islamic parties, and the terrorist organizations.[183] On the Indian side, it is comprised mainly of some radical elements in the Hindu far right.[184] It appears unlikely that the anti-peace groups could get any more mobilized than they are at present. The pro-peace groups, on the other hand, are divided and are not yet mobilized into a core constituency that can articulate views in a coherent manner. Legalization may serve to mobilize this constituency, and the potential for gains due to informational advantages may serve a powerful signaling function. Specifically, it has the potential to allow business groups to see the possibility for greater economic interaction with resultant profits, thus incentivizing them to become bigger champions for a lasting peace than they currently are. Economic operators value certainty to a greater degree than political actors; therefore, legalization should have particular appeal for them.[185] They are also more accustomed to contract-based dealings, and legalization gives them a vehicle that is familiar and easy to enforce.[186]

In order to create a coherent compliance constituency that transcends the border, the trust barrier must be crossed. The lack of trust between the two sides is a major cause of the failure of the peace agreements attempted so far and also of the muted reactions from pro-peace constituencies.[187] Both sides are suspicious of the other and believe that each is determined to extract advantages without giving anything in return.[188] Thus, the peace negotiation process has turned into a war strategy, with the result that there are

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181. Judith Goldstein & Lisa Martin, *Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603, 608 (2000).

182. *Id.*

183. *See generally* Hassan Abbas, *Pakistan Through the Lens of the "Tripple A" Theory*, 30 FLETCHER F. WORLD AFF. 181 (2006).

184. *See* Stephen P. Cohen, *Causes of Conflict and Conditions for Peace in South Asia*, *in* RESOLVING REGIONAL CONFLICTS 105, 110 (Roger E. Kanet ed., 1998).

185. Kahler, *supra* note 28, at 671.

186. *Id.*

187. Cohen, *supra* note 184, at 108.

188. Stephen P. Cohen, an expert on India-Pakistan relations describes the conflict between the countries as a "paired minority" conflict—each side sees itself as the vulnerable entity, exposed to constant attack from more powerful outsiders. *See id.* at 109–10.

no winners. A key to the distrust that persists between the two countries is the perceived absence of good faith.[189] Consider, for example, a simple act such as India's decision to construct a fence inside its border to prevent incursions in Kashmir. Pakistan objected to this act as a violation of earlier agreements.[190] The agreement that the Pakistani side is referring to is purportedly the Shimla Agreement.[191] Upon a perusal of the Agreement and the sections extracted in this Article, it is hard to see if there is, in fact, a violation. The Shimla Agreement makes clear that the border dispute is unsettled, and in that sense, the Pakistanis might contend that the fencing makes the Line of Control the permanent border.[192] The Pakistanis have also sought to equate the fencing with that done by the Israelis.[193] This analogy has been rejected by the United States Department of State on the ground that the Indian fencing is entirely within its own territory.[194] Thus, it would appear that the Pakistani argument is without much merit, as the Line of Control is the de facto border anyway, and the Indian action is not changing anything. This sort of argument would have been harder to make if the Agreement had been an example of hard legalization, with its attendant attributes of obligation, precision, and delegation.

A study of the India-Pakistan peace agreement process reveals a significant lack of activity by non-state compliance constituencies, suggesting that there is a vacuum that can be usefully filled. Informal exchanges between the people can create such compliance constituencies and build confidence enormously. Such exchanges are a recent phenomenon and are a welcome change from the hostility that existed in the past. One example of this is the Eleventh World Punjab Conference in Patiala (Indian Punjab) held in 2004, which featured Chaudhary Pervez Elahi, Chief Minister of Pakistan's Punjab Province, as chief guest.[195] There was even a Punjab Games.[196] Not surprisingly, Punjabi leaders demanded rapid normalization of Indo-Pak relations, more trade, tourism, and a bus service between Patiala and Lahore.[197] Punjab was a large state in

189. Zakaria, *supra* note 146, at 34–36.

190. Syed Saleem Shahzad, *Kashmir at the Heart of the Problem*, ASIA TIMES ONLINE, Feb. 15, 2004, http://www.atimes.com/atimes/South_Asia/FB16Df01.html.

191. Shimla Agreement, *supra* note 97.

192. *See id.*

193. Sudha Ramachandran, *India: No Sitting on the Fence*, ASIA TIMES ONLINE, Dec. 3, 2003, http://www.atimes.com/atimes/South_Asia/EL03Df05.html.

194. Krishnadev Calamur, *India's Fence Sparks Little Debate*, SPACE DAILY, Mar. 10, 2004, http://www.spacedaily.com/news/nuclear-india-pakistan-04d.html.

195. C. Raja Mohan, *The Next State of Peace Process*, HINDU, Sept. 27, 2004, *available at* http://www.hindu.com/2004/09/27/stories/2004092704441100.htm.

196. C. Raja Mohan, *This Week in Patiala, Two Punjabs Become One Again*, INDIAN EXPRESS, Dec. 2, 2004, http://www.indianexpress.com/res/web/pIe/full_story.php?content_id=60025.

197. *Id.*

pre-independent India and is now divided between India and Pakistan, and Punjabis are a distinct and powerful group in the cultural lives of both countries, playing a dominant role in the one thing that unites both countries—Bollywood.[198] It is the breadbasket of both countries and has affluent populations that stand to gain from increased commercial interactions.[199] Indian-Punjab has endured enormous losses due to terrorist activity in the early 1980s, allegedly at the incitement of Pakistan, and the enlisting of Punjabis on both sides of the border can have a highly symbolic effect on the peace process. This compliance constituency can serve as a model for the analogously situated Kashmir. It might also facilitate a more active role for the largest, but dormant, constituency—India's Muslims. The informational advantages offered by legalized agreements can help India's large Muslim population to play a major role by electing politicians who are more favorable to peaceful relations with Pakistan. With legalization comes voting records in Parliament, and the airing of opinions in the public sphere. The pan-Islamic solidarity might also motivate more moderate Muslims in Pakistan to pressure actors there to adopt less hawkish positions upon the idea that the negative externalities that their actions impose on India will have to be borne by their Muslim brethren as well. India's Muslim population has been largely marginalized in the peace process, mainly because of suspicion by the Hindus about their true loyalties, and this must change.

Common sporting interests also offer the opportunity to create viable compliance pressures. Cricket, the dominant sport in both countries, is a passion that unites the masses and prompted India and Pakistan to resume mutual cricket tours after more than twenty years of obdurate refusal to play in each others countries (despite playing in neutral venues).[200] The visit of the Indian cricket team for the so-called "friendship series" in 2004 saw ordinary Pakistanis expressing a level of hospitality and friendship towards visiting Indian fans that was stunning even by sub-continental standards.[201]

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198. *Id.*

199. *See* Official Website of Punjab, India, Agriculture Scenarios, http://punjabgovt.nic.in/AGRICULTURE/AGRICULT1.HTM (explaining that Punjab is small because it "occupies only 1.5 per cent of the geographical area of the country and big because around two-thirds of the food grains procured annually in the country come from this state").

200. Huw Richards, *Cricket: India-Pakistan Test: Can Sports Salve International Wounds?*, INT'L HERALD TRIB., Mar. 29, 2004, *available at* http://www.iht.com/articles/2004/03/29/cricket_ed3__10.php.

201. Fauzia Salman, Op-Ed., *Seeds of Peace on Cricket Field*, BALTIMORE SUN, Feb. 20, 2007, *available at* http://www.baltimoresun.com/news/opinion/oped/bal-op.cricket20feb20,0,6264119.story?coll=bal-oped-headlines. *See also Hello Brother!*, TELEGRAPH, March 6, 2004 ("Almost each of the 8,000 Indians who went to Pakistan for the 2004 cricket series had a story to tell of a shop-keeper who wouldn't take

Recent years have seen a spurt of high-visibility persons from both sides exchanging visits, and the liberalization of visa regulations is expected to increase such interactions even further.[202] With greater interaction has come a better appreciation for the common culture, must acutely exemplified by the popularity of Indian movies in Pakistan.[203] It has helped that General Musharraf and his wife are huge Bollywood fans! This interest has not gone unnoticed by filmmakers keen on cashing in on the revenue potential of an enlarged market. Films that have cross border appeal with characters from both countries are obvious candidates. One example in this genre is the Hindi movie *Veer-Zaara*, a love story between an Indian Hindu rescue pilot and a Pakistani Muslim girl who travels to India, followed shortly thereafter by the besotted pilot's trip to Pakistan to seek her hand in marriage.[204] The Indian pilot is played by the leading Bollywood actor who happens to be Muslim, while the Muslim woman is portrayed by a Hindu actress.[205] The shift in tone towards Pakistan is a dramatic change from the Bollywood films that were made in the immediate aftermath of the Kargil incident, which were more in the nature of propaganda films for the Indian army. That Indian films are so popular in Pakistan—despite the fact that such films have been banned in Pakistan since 1965—is a living testament to the power of culture to unite people. Several Pakistani actresses have moved to Bombay to seek work, and this is likely to have a salutary effect on the popularity of Indian films in Pakistan.[206]

The general shift in attitudes at a layperson level has been met by burgeoning of several citizen initiatives that are tailored to foster interaction across the border. Such initiatives include friendship societies, lectures, and concerts, with participants across the political

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money, a taxi-driver who refused the fare and the perfect stranger who called them home for dinner."), *available at* http://www.telegraphindia.com/1050306/asp/look/story_4455715.asp; Rasheeda Bhagat, *Cosmopolitan Karachi*, HINDU BUSINESS LINE, April 5, 2004 ("Sample this e-mail sent by an Indian professional to her friends in India and which was forwarded to me by a friend from Karachi: 'It was an overwhelming experience at Karachi's National Stadium where the Pakistanis were throwing chocolates at the Indian fans cheering their team. Quite a few were carrying the flags of both countries imaginatively stitched together. The guy on the street selling *bhuttas* refused to accept money from us and so did some restaurant owners saying that we were their guests!'"), *available at* http://www.thehindubusinessline.com/life/2004/04/05/stories/2004040500020100.htm.

202. Ruhi Batra, *Pak Visa Processing to Begin Today*, TIMES OF INDIA, Mar. 4, 2004, http://timesofindia.indiatimes.com/articleshow/533367.cms.

203. Pakistani film festivals increasingly feature Indian movies. *See* Press Trust of India, *Pakistan To Host Indian Film Festival*, HINDUSTAN TIMES, June 1, 2006, http://www.hindustantimes.in/news/181_1710906,001100030009. htm.

204. Anita Gates, *Lovers Sing in the Rain (and Elsewhere)*, N.Y. TIMES, Nov. 13, 2004, at B18.

205. *Id.*

206. *Pakistan to Show Bollywood Film*, BBC NEWS, Jan. 23, 2006, http://news.bbc.co.uk/1/hi/entertainment/4639216.stm.

spectrum.[207] Highly visible and symbolic events, such as the lighting of candles at the Wagah border on independence days, have also served to create a climate of peace.[208]

V. CONCLUSIONS

The liberal international law theories have important implications for India-Pakistan relations when studied alongside insights from legalization theory. The opportunity that the legal process provides for non-state actors to participate in the shaping of state preferences, and the employment of institutions other than the executive, seems to be a key feature in agreements that have been successful. These features are notably absent in some agreements between India and Pakistan, such as the Lahore and Shimla accords, both of which are regarded as failures.[209] It bears noting that the agreements that have been successful (Rann of Kutch, Indus Water, and Chemical Weapons) all exhibit hard legalization under the Abbott-Snidal framework.[210] There is definitely a lesson to be learned here; the correlation suggests cautious optimism for legalized agreements that exhibit high levels of obligation, precision, and delegation. The evidence of conduct between India and Pakistan also shows that what Abbott and Snidal would characterize as soft legalization is not regarded either as law or as a constraining influence by either state.[211] Military action has not been prevented by the Shimla and Lahore agreements, and both sides disregard them with impunity when it suits them. This is in distinct contrast to those agreements that are characterized by hard legalization and are observed as legal and binding despite the onset of military conflict. The conclusion seems powerful that India and Pakistan do not place much value on non-legal agreements in terms of compliance and do

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207. One citizen initiative is the India-Pakistan Neemrana Initiative, which hosts discussions by retired diplomats, academics, and military personnel. Navnita Chadha Behera, *Need To Expand Track-Two Diplomacy*, ASIA TIMES ONLINE, July 16, 2003, http://www.atimes.com/atimes/South_Asia/EG16Df03.html. Another is the India-Pakistan Soldiers for Peace, which is comprised of retired military personnel from India and Pakistan. *Id.* It works as a pressure group to influence political leaders. *Id.* Chambers of commerce have also been arranging meetings between the two sides to explore opportunities to increase trade. *Id.* Educational institutions, which date back to pre-partition days, such as the RIMCO Old Boy's Network, Doon School Old Boy's Society, and Kinnaird College for Women, have been organizing reunions. *Id.*

208. *Pakistan Delegation Takes Part in Vigil*, HINDU, Aug. 16, 2004, *available at* http://www.hindu.com/2004/08/16/stories/2004081602611200.htm.

209. Sukumar Muralidharan, *Deadlock at Agra*, FRONTLINE, July 21-Aug. 3, 2001, *available at* http://www.hinduonnet.com/fline/fl1815/18150040.htm.

210. *See generally* Abbott & Snidal, *supra* note 1.

211. *See generally id.*

not believe that they are bound by obligations contained in such agreements.

The functionalist argument that soft law is advantageous because of lower contracting costs—meaning the expenditure in terms of drafting time, negotiation, and ratification—may have to be modified in the context of states like Pakistan. Abbott and Snidal argue that hard legalization is more costly because states are more careful in "negotiating and drafting legal agreements, since the costs of violation are higher."[212] In fact, costs are incurred in the case of non-legal agreements as well; experts will still be consulted, differences between competing interests must still be resolved, and negotiation is still just as contentious since proponents of various interests argue just as vigorously (as exemplified so powerfully in the Agra summit previously discussed).[213] In the Pakistani context, the added contracting costs (if any) imposed by legalization may be offset by the fact that the only parties who will be added to the negotiation process are those who are most likely to support peaceful relations and who have been excluded by the secret nature of political agreement negotiation. Those opposed to peaceful relations are already part of the process and the externalities imposed by them must be borne in any event. Raustiala's argument that the risk of opportunistic conduct may be the causal variable that "suggests that pledges will be observed only when the risk of opportunism is low and uncertainty is high,"[214] has great salience here. In the case of India and Pakistan, the trust deficit creates conducive conditions for opportunistic conduct and suggests that hard legalization may be preferable.

Hard legalization is also supported by liberal theory, which suggests that credibility is factored into the choice of soft law versus hard law.[215] When credibility is dependent on legislative approval, states are more likely to prefer hard law, unless there are other institutional mechanisms to ensure and enhance credibility.[216] Raustiala writes that in "more technocratic and arcane areas, the available empirical evidence suggests that the prevalence of pledges roughly, if inconsistently, rises as uncertainty rises—as functional theory predicts."[217] He provides examples to support both the functionalist claim that uncertainty influences the form of

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212. Abbott & Snidal, *supra* note 1, at 434 ("Legal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across states complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements.").

213. *See supra* text accompanying notes 126–30.

214. Raustiala, *supra* note 1, at 593. "[T]he risk of opportunism may be central to the choice between legal and nonlegal agreement." *Id.* at 594.

215. *Id.* at 600.

216. *Id.*

217. *Id.*

international agreement and the liberal claim that pledges are "most common in areas of low domestic salience."[218] Given that Pakistan is not a democratic society and is subject to capricious regime changes, it would be in India's interest to enhance the credibility of Pakistan's commitments by insisting on hard legalization. Such insistence would give India the opportunity to read signals conveyed by the key constituencies as a result of the debate over the high levels of obligation, precision, and delegation, and to hone its own negotiating strategy after gauging the seriousness of the other side. It would also prevent successor governments from unraveling soft law commitments on the plea that they are not binding. Domestic politics would identify the key actors ranged on either side of the debate and the various tradeoffs that can facilitate agreements are more visible.

Insisting on hard legalization will also focus attention on obligation—a dimension of legalization upon which the Abbott-Snidal thesis does not elaborate.[219] Their theory would not suggest an answer to the question of whether obligations can be legitimately entered into by a military dictator who seizes power in a coup.[220] If the answer is in the negative, hard legalization will not help India very much as long as President Musharraf leads Pakistan. It may be possible to mitigate the democratic deficit by other processes that legalization triggers—for example, parliamentary deliberation and debate—to the extent that Pakistan's current constitutional structure allows it. In any event, hard legalization is preferable even under this view because it has informational advantages over non-legalization or soft legalization: in the latter instances, there is no room for participation by parties other than the nominees of the illegitimate power holder, and there is no way in which the other side can gauge the reaction of the legitimate players to the proposed agreement.

There must also be a greater appreciation of the role of international law norms in the process. There is some evidence that legalization interacts with a norm cascade that may be in process in a mutually reinforcing manner. Specifically, the certain norm cascade against state support or justification of terrorist activity has the potential to facilitate legalization in the India-Pakistan context. Legalization can therefore ensure that there is no regression of this norm, and it can play a salutary role in strengthening other norms such as rule of law, transparency, and democracy, none of which are well established in Pakistan. It can also facilitate the role of norm entrepreneurs by enlisting their participation in the agreement process.

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218. *Id.* at 601.
219. *See* Abbott & Snidal, *supra* note 1, at 426.
220. *See generally id.*

Finally, in contrast to other areas that have been subject to empirical examination with the legalization lens, there is room for cautious optimism about the positive correlation between hard legalization and compliance when the actors are high conflict states. This Article invites an empirical examination of other high conflict states, such as Israel and Palestine, using the legalization framework to determine if the positive correlation is pervasive.