Ascribing a Voice to Silent States

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International law ascribes a 'voice' to silent States through the concept of acquiescence. A State is taken to *accept* (e.g. signifying *opinio juris* for custom identification or agreement for treaty interpretation) when it does not object, despite the fact that it is '*in a position to react* and the circumstances called for some reaction' (see Conclusion 10(3), 2018 ILC Draft Conclusions on Custom Identification; Conclusion 10(2), 2018 ILC Draft Conclusions on Subsequent Agreements and Practice in relation to Treaty Interpretation).

International courts and tribunals refuse to infer acquiescence from State silence, during a period when the silent State had been deprived of 'a fully operational government and administration,' such as when it is afflicted by armed conflict (e.g. ICJ, *Somalia v Kenya*, [79]). However, beyond such situations, there is no evidence that the law today considers a silent State's resources when determining whether it is 'in a position to react' (separately from having knowledge of the claim/conduct calling for a silent State's reaction).

Although, under international law, all States are formally equal, in reality, they differ in terms of economic capacity. Because formal equality does not represent reality, it leads to substantive inequality in international law-making. For instance, owing to lack of resources, less economically powerful States are likely to be taken to accept claims made by powerful States.

Two models may be proposed to address substantive inequality within acquiescence: one may be called the 'average State model'; and another may be called the 'differentiated legislative diligence model'.

Under the 'average State model', 'being in a position to react' would be a fixed standard applicable to all States: the capability of the 'average State'. However, two challenges arise. First, on what basis should 'the average State' be defined? Should economic criteria be employed, such as the GDP of a State that stands in the middle when ranking the GDP of all States? Or should it be defined by reference to the number of civil servants in a State's Foreign Affairs' Ministry? Different States may be more or less able to react, because being interested in particular fields they have 'invested' resources in those more than in others. Second, if the law followed this model, some States would still be expected to perform at a level that exceeds their real capacity; their capacity would be below that of the 'average State'. The justification behind this model is not substantive equality, but 'reasonableness'.

Instead, the 'differentiated legislative diligence model' is inspired by two ideas. On the one hand, international law is a decentralized order made through the interaction (claims and reactions) of States. In such context, all States bear 'legislative due diligence'. They are expected to object, in the face of consistent legal claims. If they do not object, they are taken to accept. On the other hand, some due diligence obligations in environmental or human rights law are subject to the capabilities of each party (e.g. Art 6 CBD) or 'to the maximum of [each party's] resources' (Art 2 ICESCR). The model of 'differentiated legislative diligence' would entail that *all* States bear 'legislative diligence', but differentiation would be made based on each State's capabilities.

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However, four challenges arise. First, formal equality was a great achievement of the decolonization process for which developing States fought eagerly and successfully. Sitting on the same footing on the 'law-making table' across all fields of international law is not the same as undertaking specific obligations on the condition that you will perform them with the means available to you.

Second, differentiation in assessing whether a silent State's capacity is 'impaired' from reacting means that less powerful States would have a 'silent veto' in law-making (or become 'silent persistent objectors'). Assuming that this radical change of the law became acceptable, it would obstruct law-development.

Third, the method for determining 'capability' is unsettled, even in areas where the term is often used. In its 2024 *Advisory Opinion on Climate Change*, ITLOS reasoned that, pursuant to Article 194(1) of the Law of the Sea Convention, 'States with greater [capabilities must do more to reduce emissions] than States with less means and capabilities' (*Climate Change Advisory Opinion*, [227]). Yet, it did not explain how 'less' and 'greater' capabilities must be determined.

Fourth, differentiated standards may cause lack of legal clarity and determinacy. Even if this approach did not undermine the capacity of the law in general to govern behaviour, it would *not* be beneficial to less powerful States. When rules are indeterminate, powerful States have more leeway to exert pressure.

Perhaps 'differentiated legislative diligence' should be maintained in a different aspect of 'being in a position to react'. Construed knowledge of the circumstances that call for one's reaction is based on multiple elements, such as, the silent State's capability in a particular field; the claim's/conduct's context; and the subject-matter's significance for the silent State. Transposing the reasoning of ITLOS' Seabed Disputes Chamber that '[w]hat counts in a specific situation is the […] technical capability available to a given State in the relevant scientific and technical fields' (*Responsibilities with Respect to the Area*, 2011, [162]) means asking whether a silent State has the technical capacity to *know* (and *understand*) the claims of acting States. For instance, in space or cyberspace law, States with technical capabilities and interest have construed knowledge of other States' claims in these fields. This was the ICJ's reasoning (by analogy) in *Anglo-Norwegian Fisheries* (p. 139). However, it would be more difficult to establish the construed knowledge of States which lack capabilities/interests in these fields (see Azaria, *British Yearbook of International Law*, 2024, Section B.ii).

Addressing substantive equality when determining whether a State is 'in a position to react' and thus acquiesces involves a clash between values: substantive equality and law determinacy. Answers to *conflicts of values* can be given by those who make international law (States). I hope that my exposition of the advantages and challenges of different options offers a fruitful framework for further reflection.