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Denver Journal of International Law and Policy

40TH ANNIVERSARY EDITION

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Perspectives on International Law in an Era of Change

Festschrift in honor of Professor Ved P. Nanda


Anjali Nanda
Alissa Mundt
Editors
PERSPECTIVES ON INTERNATIONAL LAW IN AN ERA OF CHANGE


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International Journal Begins Publication

By Art Walsh
Foremost Staff Writer

"The launching of the Denver Journal of International Law and Policy is the occasion for rejoicing," So writes Hardy C. Dillard, judge on the International Court of Justice in The Hague. The launching is scheduled to take place this month, and it will place the University of Denver College of Law in an elite group of a dozen American law institutions which publish journals of that nature.

For more than two years, a dedicated group of students have struggled to organize, edit, and advertise the publication.

According to faculty advisor Ved P. Nanda, "It is a good journal." Justifying its existence, Dillard commented, "It demonstrates that the American law student is keenly aware of the simple fact that many critically important problems requiring analytical treatment transcend national frontiers... and that space limitations prevent orthodox law reviews from coping with the many-faced theoretical and practical dilemmas which these problems generate."

Included in the first volume will be a wide range of topics by noted writers from around the nation and the world. Such topics as the right to travel, responses to crimes of discrimination and genocide, the role of developing countries in arms limitations, and freedom of exploration in outer space, will be covered.

The initial issue will also contain a dedication to Professor Myres McDougal, who has been called "A pioneer for the year 2010." McDougal is not only authority on International Law, having published more than 50 articles and books on various aspects of the subject, but is one of the foremost teachers in the field, having taught many of the nation's leading international jurists and scholars.

Dedication articles will be included from several of his former colleagues and students, and several other of his students will be among those whose academic presentations will be included in the volume.

Other items in the Journal will be an introduction by Dean Robert B. Yegge and editorial comment by Jon Coe, a graduate of the College who was the organizing editor-in-chief of the Journal.

The editorial board now consists of Editor-in-Chief Corby Arnold, Managing Editor Britt Anderson, Publications Editor Chuck Dixon, Articles Editors Andrew Vogt and Bob White. Nanda is faculty advisor.

One of the greatest struggles of the staff has been to secure funding for the publication and students are urged to support the Journal. The first volume, consisting of one issue, will be sold at a student rate of $25.00. Subsequent volumes will have two issues and will be sold at a student rate of $45.00.

Members of the staff are also calling on their fellow students for support in kind — as workers for the Journal. Beginning Oct. 11, a training program for prospective candidates was initiated, and it will continue for several weeks.

Students having the time and interest may work either on the business or literary aspects of the Journal.

The Denver Journal of International Law and Policy exists with a separate but similarly inclined group of students, the International Law Society. The two organizations have given the College a degree of preeminence in the field of international law.
The Denver Journal of International Law and Policy 2011-2012
Ved P. Nanda Selected Publications

Books

Climate Change and Environmental Ethics, Transaction Publishers (editor and contributor) (Fall 2011)

Litigation of International Disputes in US Courts, 2d ed. (with David Pansius), two volumes, Thompson West, annual new releases 1986-2012

The Law of Transnational Business Transactions, 2d ed. (editor with Ralph Lake), three volumes, Thompson West, annual new releases 1981-2012

Law in the War Against International Terrorism (Transnational, Summer 2005)
The Spirit of India – Buddhism and Hinduism (Institute of Oriental Philosophy, Tokyo, Spring 2005), (in Japanese, English translation forthcoming) (with Daisaku Ikeda)


Nuclear Weapons and the World Court (Transnational 1998) (with David Krieger)

Hindu Law and Legal Theory (with S. P. Sinha), (Dartmouth U.K. 1997)


International Environmental Law and Policy (Transnational 1995)

Nuclear Proliferation and the Legality of Nuclear Weapons, (University Press of America 1995) (co-editor with William M. Evan and contributor)


World Debt and the Human Condition: Structural Adjustment and the Right to Development (Greenwood Publishing Group 1993) (co-editor with George W. Shepherd, Jr. and Eileen McCarthy-Arnolds and contributor)

Breach and Adaptation of International Contracts (Butterworth 1992) (with Ugo Draetta and Ralph Lake)

Refugee Law and Policy (Greenwood Press 1989) (editor and contributor)


77 Proceedings American Society of International Law (ASIL 1985) (editor and contributor)


World Climate Change: The Role of International Law and Institutions (Westview Press, 1983) (editor and contributor)


A Treatise on International Criminal Law, two volumes (Charles C. Thomas, 1973) (co-editor with M. Cherif Bassiouani and contributor)

Book Chapters and Law Review Articles

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FOREWORD

It is a distinct pleasure to commemorate the 40th Anniversary of the Denver Journal of International Law & Policy.

In these 40 years the world has changed in ways we could not have imagined. The Journal was one of the first scholarly publications specializing in international law and has remained in the forefront, bringing the best in international law and policy to academic peers and the public, and promoting the rule of law in the international arena.

This celebration is the reward for countless hours of hard work by hundreds of student staff members to meet a uniformly high standard of quality -- the early Journal staffs vividly recall the late nights and weekends sitting in the fourth floor cafe in the old College of Law building downtown, proofreading manuscripts in teams and often having to retype an entire page of text simply to correct a minor error.

The College of Law is duly proud of the Journal and its accomplishments over four decades. I know that the editorial boards of the Journal, in turn, have felt gratitude and appreciation to the faculty who have continued to support it in so many ways. On this special occasion, we must acknowledge the vision of the late Dean Emeritus Robert B. Yegge, who nurtured the Journal with “strategy meetings” at Yegge Peak and took tremendous pride in its maturing on his watch.

It goes without saying that the College of Law treasures the lifelong work and commitment of my friend and colleague Ved Nanda, the standard-bearer of our flagship International Law program and in many ways a mainstay of the College. Congratulations, Ved, on this Festschrift in celebration of your achievements!

Martin J. Katz, Dean
University of Denver Sturm College of Law
April 2012
Dear Ved,

It is no small task to remind you of the impact you have had on so many lives. One can point to the enormous body of your scholarly work, your influence on decision-makers the world over, or your impact on human rights law, environmental law, and so many other substantive areas of law. Your vision has created and sustained the world class international law program at DU’s College of Law where your teaching has informed, and formed, thousands of students over a couple of generations. You founded the Denver Journal of International Law & Policy, which has for four decades given voice to scholars, practitioners and students in many areas of international legal practice. And these are but the tip of the iceberg with respect to your global influence.

And yet, these fantastic accomplishments are only part of the story of your impact. Perhaps your most profound influence has been on your students. That is certainly true in my case. Forty years ago, I arrived at DU knowing only that I wanted a career in “international law” without much understanding of what that might mean or how to achieve that goal. Through you I learned about both. Of course, you taught me what I needed to know about the law. But more, you convinced me that it would really be possible for me to spend my life in the international arena. Your encouragement over the years has helped me achieve my goal. Throughout my years at DU, and in the many years since, you have been a mentor, counselor and friend, offering kind words, sound advice and a warm smile through times of personal and professional challenge.

Since returning to Denver after many years away, it has been deeply gratifying to assist you in developing and implementing plans for the Ved Nanda Center for International and Comparative Law. In a small way this lets me return some measure of the great gifts you have given me over the years. Your legacies are many, varied and significant. It is truly my honor to be one of many partners in advancing this one.
This milestone anniversary of the DJILP is the perfect occasion to celebrate you and your myriad contributions to the global community. It is also the perfect occasion to offer a simple “thank you” for being such a good and great friend.

With the greatest affection, I am

Yours sincerely, Ian

*********

Sharon K. Black, JD '95
DJILP Editor-in-Chief, 1994-1995
Alumni Excellence Award Recipient, 2010

Most of us -- at one time or another -- have met someone who impressed us and positively impacted our lives. Ved Nanda does that every day -- for many people.

Many of us also know Professor Nanda as someone whose life and work has made a true difference in the world – benefiting all citizens of Earth. Those of us in Denver are fortunate to call him “one of our own,” to be able watch his example daily, and to have the pleasure of learning from him.

I have known Ved for more than 20 years, since 1991, and seen him work his “magic” in international law. As Editor-in-chief of the Denver Journal of International Law and Policy (1994-1995) and a practicing attorney in international telecommunications law in Colorado, here is some of what I have learned from him over the years:

1. Live with a purpose. Ved lives the words: “Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope... and crossing each other from a million different centers of energy and daring those ripples build a current that can sweep down the mightiest walls of oppression and resistance.” Robert F. Kennedy

2. Be gracious and treat all with respect. Talk softly and treat everyone you meet with kindness and caring. Ved does this so well. All who know him have experienced it.

3. Live your message. Be proactive and dive into the “tough” stuff. Where the world is unjust, Ved works to change it. When he sees a need, he doesn’t wait for other leaders, but rather asks those he knows to join him, person to person, to find an answer. He lives the phrase: “You must be the change you wish to see in the world.” Mahatma
Gandhi. If everyone joined him in fighting injustice we would make real progress toward humanity.

4. Start now – even if you don’t feel you are ready. Ved lives that: “Nobody needs to wait a single moment to start improving the world.” Anne Frank, and that: “There is no time like the present and no present like the time.” - James Durst.

5. Know that everyone can contribute – in both large and small ways. Ved teaches that: “The world is moved more by the aggregate of each honest worker than the actions of large forces.” He states that: “I am only one, but I am one. I cannot do everything, but I can do something. And I will not let what I cannot do interfere with what I can do.” He knows that great opportunities do not always come, but small ones surround us every day. These are powerful for all who know him.

6. Use your unique skills. In Ved’s opinion, talent, intelligence, and wisdom are worthwhile only if used for good.

7. Be a teacher in whatever you do. Open doors for those who come behind you. Don’t just share your strengths, but help others to learn their own strengths. Ved believes that sharing never decreases one’s impact.

8. Acknowledge those who help and support you in your work. None of us succeeds alone. Katharine and Anjali Nanda and many others walk with Ved in his work, and each of us has our own families and colleagues who sustain us.

9. Don’t expect always to be recognized or paid for what you do. Ved states that: “Real joy does not come from the praise of others, but from doing something worthwhile.” Ved has made a living, lovingly supporting his family in a responsible way, but the fuller measure of his wealth is in what he has given to the world. It is a good lesson for all.

10. Be joyful. Focus on the positive and generous -- not on the deficits. When a snapshot of Ved’s life is taken, eternity will remember him smiling.

11. Work for good in the future; even though you know you will never see the result. Ved encourages us to live life working toward something that will outlast us – to “plant trees, under whose shade we do not expect to sit.”

Such great lessons -- Thank you Professor Ved Nanda!
As a former Editor-in-Chief of the Denver Journal of International Law and Policy, it is a great honor to have an opportunity to recall my association with Professor Nanda. Ved Nanda had a literally life-changing hand in my pursuit of a legal career. Ved was not only an excellent professor, but he used his personal time to help direct and tutor students under his supervision. His patience in explaining how to organize the law journal, deal with publishers, engage in soliciting new articles, and deal with occasional "unruly" staff members, was invaluable assistance. During my third year I had to take turns with my wife in watching our baby daughter, Stephanie. Accordingly, Stephanie was present at numerous law school functions, including Myers S. McDougal Distinguished Lectures. Upon my graduation, Professor Nanda had a special diploma printed for Stephanie as an honorary graduate for all of her time spent at the law school. Professor Nanda even took the time to meet and interact with my entire family, including my wife, children, my parents and even my in-laws. In fact, after moving from Colorado, I attempted to keep in contact with Professor Nanda, who was always very obliging, and who made me feel as welcome as if it had only been yesterday that we had seen each other.

My experience with Professor Nanda was so exceptional that I spoke highly of him to my family. Based upon Ved’s presence at DU, subsequent to my daughter's graduation from college, as she was exploring different law school options, I made an appointment with Ved and introduced him to my daughter, Karissa Christensen Young. Meeting Ved was sufficient to sway her decision into attending the University of Denver, Sturm College of Law. This in itself is not that extraordinary, but, due to my and my daughter’s interactions with Professor Nanda, my son, Zachary Christensen, decided to attend DU, and graduated from the Sturm College of Law in 2009. Following Zachary and Karissa's experiences at DU with Professor Nanda, their younger brother, Zane Christensen, also decided to attend the Sturm College of Law, and is currently a 2L. He, too, has enjoyed extended interaction with Professor Nanda.

All hail Ved Nanda!
Ralph B. Lake, JD ’73
*DJILP* Editor-in-Chief 1972-1973

The *Journal*, like so much of the University of Denver’s best, was the brainchild of Ved Nanda. He encouraged, muscled and ordered a group of his acolytes, myself included, to produce the first few issues with money he had scrounged from generous Denverites. These people had no connection with the University other than the kind of personal devotion to Professor Nanda which virtually everyone he touches quickly develops. Our quarters were a section of the basement of the now twice removed law school building. The "walls" were stacks of cardboard boxes from which late night editorial sessions were sometimes interrupted by the unmistakable sounds of rodent scratching. The *Journal* became the most enjoyable aspect of my law school experience. It is a joy to see how it has flourished into a respected and authoritative source of international legal scholarship.

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Katharine K. Nanda, JD ‘81 & Anjali D. Nanda, JD/MBA ’11

We congratulate the *Denver Journal of International Law & Policy* on its 40th Anniversary volume, the first three issues of which are collected in this book. Our husband and father (and yes, our professor), Ved Nanda, has given tirelessly to his students for so many years, in the spirit of his own mentor, Professor Myres S. McDougal. The *Journal* is a testament to his personal impact upon the international lawyers of tomorrow, and this *Festschrift* is a fitting tribute to his passionate commitment to their education and to the cause of world peace and the rule of law.

******

William K. Olivier, JD ’74
*DJILP* Editor-in-Chief 1973

As a world-renowned scholar and expert on international law, Professor Ved P. Nanda is a treasure of the University of Denver Sturm College of Law. Yet, for all his lofty accomplishments, he is a most humble individual who cares deeply about his students. It was a pleasure to learn international law from Professor Nanda and to work with him on the *Denver Journal of International Law and Policy*. The thing I remember most about him is, when anyone referred to the *Journal* as the “Denver Journal of International Law” in his presence, he always would add emphatically
"and Policy." Every time I think of or refer to the *Journal*, I always hesitate near the end, smile, emphasize "and Policy," and think about Professor Nanda.

Thanks, Ved. You are the best. I wish you and the *Journal* a long continued life.

******
John G. Powell, JD ’88
*DJILP* Editor-in-Chief, 1987-1988

*Ved’s Help*

Since I First Met Ved,

The Berlin wall came down
And Ved helped;
Bloody tyrants have lost impunity
And Ved helped;
R2P grows into customary law
And Ved helped;
A throng learned to work for peace
And Ved helped;
My grandsons live in a safer world
And Ved helped;
Thank you so much for your help
And, Ved, please keep helping.

******
Connie Cox Price, JD ’78
Benefactor of the Ved Nanda Center for
International and Comparative Law

While traveling in India I feel that Ved is everywhere. As I learn more about the history, the culture and Hinduism, I can more fully understand his commitment to education, service and peace. Good thoughts, good words and good deeds: that seems to sum up the basic philosophy. He introduced me to meditation and it is what keeps me grounded, centered and grateful as I navigate life. Ved was the most important person to Jon [Cox, JD 1971, MA 1970] after his father. I feel blessed that our family has had the long and rich relationship with Ved that we have.
When deciding where to go to law school, I called the University of Denver Sturm College of Law and inquired about the international law opportunities. The operator transferred me to Professor Nanda’s office. I recall talking just briefly with his administrative assistant, who told me that Professor Nanda ran the international law program at DU. When I asked more about Professor Nanda, she said, “well, why don’t you talk with him, he’s right here.” Professor Nanda picked up the phone, and as you can imagine, where I would attend law school was a done deal. Professor Nanda was so informative in that humble and persuasive way that is uniquely his, and so very personable and warm, that I had no chance of resistance. DU it would be!

I am so grateful for that very first conversation with Professor Nanda, and the countless conversations with him that followed. I credit Professor Nanda with laying the foundation for all that is international at DU, including the Denver Journal of International Law and Policy, the Philip C. Jessup International Law moot court team, the Willem C. Vis International Commercial Arbitration team, a chapter of Amnesty International, the International Law Society, and of course, the esteemed named lectures and symposia initiated and sustained by Professor Nanda over the years. It is his passion and inspiration that made (and continue to make) these wonderful opportunities possible, and it is his ambition and dedication that have created such a premier international law program at the University of Denver.

The Denver Journal of International Law and Policy, established by Professor Nanda forty years ago, continues to lead the study and practice of international law with relevant and timely analysis. Some of my best memories from law school come from participating on the DJILP staff: finding sanctuary in the DJILP office, late nights with my best friend (the Bluebook), thought-provoking conversation with other staffers stimulated by an article in review, and hosting our guest lecturers, which was a wonderful way to meet practitioners and leaders in the international legal community. I loved my law school experience, and DU’s international law program made all of the difference.

Over the years, I have heard Professor Nanda emphasize the strength and gravity of symbolism. He would pound on the podium and shout, “sym-
bols matter!” And they do. We have flags, mascots, religious icons, gestures, and some would say, certain treaties and international organizations. Symbols communicate, represent, and inspire. This book is a symbol of Professor Nanda’s devotion, intelligence, foresight, and uncanny ability to bring people together. Thank you, Professor Nanda, for who you are and all that you do. Your legacy will far outlast all of us, and your work will continue to guide and encourage students, alumni, practitioners, and scholars throughout the world for many years to come. Through your care and motivation, DU is a meaningful symbol of excellence in all that is international.

*******
Douglas G. Scrivner, JD ’77
DJILP Editor-in-Chief 1976
Founding Benefactor of the Ved Nanda Center

On the occasion of the 40th anniversary of the founding of the Denver Journal of International Law & Policy, which I had the honor of serving as Editor-in-Chief in the mid-1970s, it is appropriate to reflect on the myriad contributions of its founder and mentor, Ved Nanda, not only to the Journal and the Sturm College of Law and the University of Denver but also to international legal studies in the US and around the world.

I had the pleasure of working with Ved throughout my three years at the DU law school from 1974 to 1977, as his student in several classes, as an editor of the Journal, as his research assistant, as conference coordinator for a regional meeting of the American Society of International Law he organized in Denver in 1977, and in other capacities over the years.

It was a great pleasure for my wife and me to help create and fund the Ved Nanda Center for International and Comparative Law, to institutionalize and perpetuate the influence Ved has had for so long.

To think about Ved’s contributions in the traditional academic framework of teaching, scholarship and service is to risk missing much of his impact. But as a teacher, he has touched not only thousands of DU students over almost 45 years but has also, as a visitor and lecturer at institutions and organizations all over the world, brought his excitement and commitment to international law to thousands of others. As a scholar and writer, he has been prolific and wide-ranging, with a portfolio of work that is truly awesome. His service to the law school and to the University (including his stint as Vice Provost for Internationalization, as a result of which DU is a leader in creating international experiences for its undergraduates) are more than matched by his commitment to service through countless societies, as-
associations, and organizations throughout the world. He has also been a wonderful popularizer and explainer of complex issues to the general public through his periodic columns in the Denver Post and elsewhere for many years. And an extraordinary and gracious friend to many.

To the DJILP on its 40th anniversary, congratulations, and to its guiding hand and spirit, our dear friend, Ved Nanda, thank you for all you have done for all of us.

******
Clayton E. Wire, JD '09
DJILP Editor-in-Chief 2008-2009

The Honor was Kindly Mine

As many other University of Denver Sturm College of Law students, I came to DU because of its excellent International Law curriculum. Of course, there really is no way to mention DU and international law without in the same breath mentioning Ved Nanda. In addition to his wide range of articles, participation in internationally significant events and impact on the evolution of international law as we now know it, Professor Nanda was able to establish and maintain a globally recognized International Law program in Denver, Colorado, of all places. The Denver Journal of International Law and Policy and the Nanda Center are truly a testament to the hard work and dedication of Professor Nanda.

During my time at DU I was privileged to serve as the Editor-In-Chief of the Denver Journal of International Law and Policy. Through my experiences with this excellent and ever evolving journal I was able to gain a much deeper appreciation for all the things Professor Nanda has contributed to our legal community. A poignant example of this is the collection of editorial board pictures in the Journal's office, each one portraying Professor Nanda smiling warmly next to a dozen or so young law students. When you look back at the faces of generations of lawyers that Professor Nanda has imbued with a passion for International Law, you realize that he has helped to shape the way that International Law is viewed not only within DU, but also within the American legal community as a whole.

In addition to my time on the Journal I was also privileged to enroll in the Capitals of Europe study abroad program at which Professor Nanda taught. During this program we travelled throughout Western Europe visiting various international tribunals and important sites in international law. It was during this trip that I truly became aware of the significant impact that Professor Nanda has had on International Law throughout
the globe. I distinctly remember Professor Nanda being greeted by judges and dignitaries wherever we went. After you see Professor Nanda warmly greeted by yet another Justice from the ICC, you begin to realize that his impact extends far beyond the walls of the Sturm College of Law.

The experiences that I had at the Denver Journal of International Law and Policy have and will continue to influence me for the rest of my career. Professor Nanda’s respect for life, human rights and peace has left a lasting impression on me. Therefore, on this the 40th Anniversary of the Journal, I would like to say to Professor Nanda that “the honor was kindly mine.”

Clayton E. Wire

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Acknowledgement

The editors pay tribute to and honor the editorial board and staff of the Denver Journal of International Law & Policy, who were so dedicated and who worked so tirelessly to make this anniversary book more than just a reality, but a top quality academic publication. We also acknowledge with deep gratitude the assistance of Ms. Joan Pope, Computer Support, and Ms. Karlyn Shorb, Administrative Director of the Ved Nanda Center for International and Comparative Law, University of Denver Sturm College of Law.
It is a privilege to participate in honoring the great scholar, teacher, and friend Professor Ved Nanda. Under Professor Nanda's leadership, the University of Denver has developed a program that is recognized as a major contributor to many subject areas of international law: human rights, economic development, and international environmental law to mention just a few. Professor Nanda's own scholarship is always on the cutting edge, helping to define the international agenda and tell us what we will be thinking a year from now.

Professor Nanda has also provided long and invaluable service to the American Society of International Law. He chaired the 75th annual program committee and served on the executive council, research projects and committees. Most memorably, together with Professor James Nafziger, we wrote a Jessup moot court problem addressing the international protection of cultural property based in part on the still unresolved dispute over the Elgin or Parthenon Marbles.

Professor Nanda and his wife Katharine have also provided long and valued friendship. Whether consulting over an academic issue, providing hospitality in Denver, or driving through a snowstorm to spend time with a snowbound traveler at the old Stapleton airport, they have always supplied abundant kindness and generous support.

This contribution in honor of Professor Nanda, based on the 2011 Myers McDougal lecture, examines the place of international law in the United States legal system, its importance in the past, and its diminishing role today. The conclusion argues for continuing to apply the legal precedents that give effect to international law as a part of U.S. law, in our national interest and as intended by the authors of the Constitution.

* Manatt/Ahn Professor of Law, The George Washington University Law School. This contribution is a revision of the McDougal Lecture delivered at the University of Denver, Sturm College of Law on February 27, 2011.
1. AT THE ORIGIN

While accepting that the Constitution is a living instrument and must be applied as such, the original text and writings contemporaneous with its drafting are the critical starting point to understanding our legal system and how it was intended to function. The place of international law begins with Article VI of the Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹

The importance of Article VI and other references to international law were discussed by the constitutional drafters in the Federalist Papers.² These writings enhance our knowledge of the original understanding of the role of international law in the U.S. legal system, in some instances providing a stark contrast with current attitudes.

John Jay, Supreme Court Justice and negotiator of the Treaty of Paris that legally settled U.S. independence from Great Britain, wrote in the third Federalist Paper that:

The just causes of war, for the most part, arise either from violations of treaties or from direct violence.

It is of high importance to the peace of America that she observe the laws of nations towards all [foreign] powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies. . . .

Because, under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner. . . .³

Madison added that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”⁴

¹ U.S. CONST. art. VI, cl. 2.
Hamilton and Madison thereafter spoke to the qualifications to be desired for those elected to Congress:

No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate.

A branch of knowledge which belongs to the acquirements of a federal representative is that of foreign affairs. In regulating our own commerce, he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations.

An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many efforts and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind.

Jay then returned to speak of presidential powers, including the treaty-making power, and the role of treaties in the U.S. legal system:

Some are displeased with [the treaty-making power], not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they


DENV. J. INT’L L. & POL’Y

proceeded from the legislature . . . . It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected.

Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.7

Finally, Hamilton spoke on the obligations of the federal judiciary:

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.8

These writings clearly suggest an awareness of the importance of respecting international law and giving it effect in our legal system. Official acts followed along the same lines, especially regarding customary international law or the law of nations, as it was then known. U.S. Attorney General Randolph, a member of the

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Constitutional Convention, issued an opinion on this matter because customary law was not addressed in the same detail in the Constitution, as were treaties. Randolph stated officially that, “The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference.”

While the leaders in federal government were unanimous in their thinking, in practice, then as now, debates over international law were contentious, at least when the self-interest of various states or sectors of the public were involved. The first major incident occurred after George Washington sent John Jay to England to negotiate the terms of independence from Great Britain. By February 1795, reports arrived that Jay had concluded the agreement and Washington convened a special session of Congress on June 8 of that year to debate approval of ratification. The treaty contained trade concessions and England consented to abandon forts on the Great Lakes, but other provisions, such as compensating loyalists for confiscated property, were less popular. Indeed, Washington tried to keep the terms of the treaty in, as he described it, “impenetrable secrecy” until June. The treaty passed with exactly two-thirds of the Senate voting in approval but before Washington could sign it, the text was leaked and uproar ensued. “By the July Fourth celebrations, Jay had been burned in effigy in so many towns that he declared he could have traversed the entire country by the glare of his own flaming figure.” Jay was not the only one vilified: Hamilton had stones thrown at him when he spoke in favor of the treaty at a rally in New York. Opponents surrounded the presidential mansion, called for further war against England and cursed Washington. Washington likened the opposition to the ravings of a mad dog.

A year after ratification of the peace treaty, the Supreme Court was called upon to decide whether the treaty would be enforced in the face of state legislation contrary to some of its provisions on property restitution. In Ware v. Hylton, the Court was clear:
A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State, and paramount to its Legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the State Legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide ....

... [I]t is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.14

The founding period saw some of our most outstanding jurists on the Supreme Court. According to David McCullough’s masterful biography of John Adams, the second president called his proudest appointment that of John Marshall to be Chief Justice of the United States.15 In making the appointment, Adams paid his highest compliments to Marshall: he described the jurist as “plain . . . sensible . . . cautious, and learned in the law of nations.”16 Marshall proved to be all of those, and his legacies remain with us, in particular his knowledge and use of the law of nations. He is particularly cited for two landmark doctrines concerning international law: the Charming Betsy rule of construction and the doctrine of self-executing treaties.17

In the matter of Alexander Murray v. Schooner Charming Betsy, a case concerning neutral shipping, Marshall commented that the parties had observed during the litigation “that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”18 According to Marshall, the principle cited was correct and “ought to be kept in view in construing the act now

15. DAVID MCCULLOUGH, JOHN ADAMS illus. 55 (2002) (noted in caption).
16. Id. (internal quotation marks omitted).
under consideration."\textsuperscript{19} The \textit{Charming Betsy} has provided a canon of statutory construction for over two hundred years, ensuring that legislation is interpreted where possible to conform to obligations under international law unless Congress unmistakably dictates otherwise.\textsuperscript{20}

The doctrine of self-executing treaties emerged in the case of \textit{Foster and Elam v. Neilson}. Appellants sued to recover land that they claimed under a Spanish land grant, in reliance on a treaty concluded in 1819 between the United States and Spain. The treaty provided that all the grants of land made before the 24th of January 1818, by his Catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possessions of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty.\textsuperscript{21}

The Court held that the treaty did not in and of itself operate to ratify or confirm the appellants' title. Marshall, writing for the court, articulated the doctrine of self-executing treaties, noting the general view that, "A treaty is in its nature a contract between two nations, not a legislative act." Therefore, it "is carried into execution by the sovereign power of the respective parties to the instrument."\textsuperscript{22} He went on to add:

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.\textsuperscript{23}

Marshall looked to the language of the treaty, which, he noted, did not say that the land grants "are hereby confirmed."\textsuperscript{24} Had such been its language, it would have acted directly on the subject, and would

\textsuperscript{19} Id.
\textsuperscript{22} Id. at 254.
\textsuperscript{23} Nelson, 27 U.S. at 254.
\textsuperscript{24} Id.
have repealed those acts of Congress that were repugnant to it. Use of the future tense, "shall be ratified" indicated that something more had to be done by the legislature.

Herein follows a lesson for all law students, lawyers and judges. Several years later, another land grant case involving the same treaty, United States v. Percheman, came before the Supreme Court.25 The lawyers presented new evidence, with decisive results. As Marshall describes the matter:

The treaty was drawn up in the Spanish as well as in the English languages; both are originals, and were, unquestionably, intended by the parties to be identical; the Spanish has been translated; and it is now understood, that the article expressed in that language is, that 'grants shall remain ratified and confirmed to the persons in possession of them, to the same extent,' &c., thus conforming exactly so the universally received law of nations.26

Here Marshall noted that although the words "shall be ratified and confirmed" could be viewed as words of contract, stipulating some future legislative act, they did not have to be read that way:

. . . [T]hey may import that they "shall be ratified and confirmed" by force of the instrument itself. When it is observed, that in the counterpart of the same treaty, executed at the same time, by the same parties, they are used in this sense, the construction is proper, if not unavoidable.

In the case of Foster v. Elam, 2 Peters, 253, this court considered those words importing a contract; the Spanish part of the treaty was not then brought into our view, and it was then supposed, that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, it is believed, it would have produced the construction which is now give to the article.27

As this very summary review of some of the early writings and jurisprudence of the United States indicates, the law of nations and treaty obligations of the country were deemed an important part of the law during the early decades following independence. There was a justifiable fear of the costs and consequences of war. The country was young and relatively weak. It depended for its very existence on respect

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26. Id. at 52.
27. Id. at 52.
for international law, the recognition of other nations, and their willingness to engage in trade with the new country.

II. THE MODERN CHALLENGES

In the two centuries since the United States became an independent nation, the government has concluded hundreds of bilateral and multilateral agreements deemed to be in the national interest. It has also demanded respect for the law of nations, now known as customary international law, and enforced it domestically. As in the early days of the republic, however, challenges are often mounted when local interests are seen as affected adversely.

Today, Marshall's legacy is being questioned. A portrait of him in a respected law school's moot court room omits the treaty clause from the text of Article VI that he is shown carrying. Some courts are questioning the constitutional doctrines Marshall formulated and which have not only served this nation well for two centuries, but have become judicial doctrine in many other countries applying international law in their domestic legal systems. In Capitol Records, Inc. v. Thomas, a district judge declined to give effect to the Charming Betsy rule to reconcile the Copyright Act with the World Intellectual Property Organization ("WIPO") Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"). This was despite the evidence that former Presidents, Congress, and the Register of Copyrights have consistently suggested that the Copyright Act implements the WIPO right in question. In Sampson v. Federal Republic of Germany, the Seventh Circuit further diminished the Charming Betsy canon of interpretation. The Court noted that while international law is "part of our law," it does not follow that federal statutes must be read to reflect the norms of customary international law. In Medellín v. Texas, discussed further below, the Supreme Court seemed to suggest, contrary to Foster v. Elam, that treaties are presumptively not self-executing.

In practice, international obligations are sometimes violated at the local level out of lack of knowledge about those obligations. The Vienna Convention on Consular Relations and its Optional Protocol

29. Id. at 1226.
30. Id. at 1210.
32. Id. at 1152.
34. Id. at 491-92.
Concerning the Compulsory Settlement of Disputes, to which the U.S. is a contracting party, requires notification of consular officials whenever a national of one party is detained by officials of another country and also specifies that detainees be informed of their right to consular assistance. Many local police have been unaware of these treaty obligations.

On June 29, 1993, Texas law enforcement authorities arrested José Ernesto Medellín, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellín told the arresting officers that he was born in Mexico, and informed Harris County Pretrial Services that he was not a United States citizen, but rather a Mexican national.

Despite the U.S. treaty obligations, Mr. Medellín was not advised of his right to seek assistance from the Mexican consul, nor was the Mexican consulate notified of his detention. Mr. Medellín claimed he was unaware of his right to seek consular assistance either before or during his capital trial. He was convicted of capital murder and sentenced to death. The Texas Court of Criminal Appeals affirmed his conviction and sentence.

One month later, Mexican consular authorities learned of Mr. Medellín's detention for the first time when he wrote to them from death row. They promptly began rendering him assistance. On March 26, 1998, Medellín filed a state application for a writ of habeas corpus arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his consular rights. The trial court denied relief and the Texas Court of Criminal Appeals affirmed.

Mr. Medellín then turned to the federal courts. He filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas, which was denied, and appealed. While his appeal was pending before the Fifth Circuit, the International Court of Justice decided the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.). In Avena, the ICJ held that the United States was required to give review and reconsideration to the convictions and sentences of 51 Mexican nationals, including Mr. Medellín, whose rights under the Vienna Convention on Consular

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Relations had been violated. Although the effect of the Avena judgment had not been briefed or argued, the Fifth Circuit held that the Vienna Convention was not judicially enforceable. Mr. Medellin petitioned for certiorari on the question of the effect of the Avena judgment in the cases of Mexican nationals whose rights the ICJ adjudicated in Avena.

On December 10, 2004, the United States Supreme Court granted Mr. Medellin a writ of certiorari to decide whether, under the Supremacy Clause of the Constitution, courts in the United States must give effect to the United States' treaty obligation to comply with the ICJ judgment in Avena. While the case was pending before the Supreme Court, the President of the United States announced that the United States would “have[e] State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.” The President also decided to denounced the Optional Protocol giving the ICJ jurisdiction over cases involving the Consular Relations Convention, something permitted by the terms of the treaty.

Given the prospect that Mr. Medellin would obtain relief in the state court, the Supreme Court by a 5-4 vote dismissed the writ as improvidently granted. On March 24, 2005, Mr. Medellin filed an application for post-conviction relief in the Texas Court of Criminal Appeals. That court set the case for briefing and heard oral argument, at which the United States as amicus curiae supported Mr. Medellin’s request for relief. On November 15, 2006, however, the Texas court denied relief, expressly holding that the President of the United States has no authority to enforce the undisputed treaty obligation of the United States to abide by the Avena judgment in the cases of the Mexican nationals addressed in that judgment. Mr. Medellin again sought review by the U.S. Supreme Court, which ultimately held in favor of Texas. The state of Texas executed Mr. Medellin on August 5, 2008.

42. Id. at 60.
46. Id.
49. Id. at 352.
In the meantime, the Oklahoma Court of Criminal Appeals came to a very different conclusion from that of the Texas courts. In Osbaldo Torres v. The State of Oklahoma, the court granted a stay of execution and remanded the case for an evidentiary hearing on whether the lack of consular assistance caused prejudice in the original criminal trial. Justice Chapel explained the rationale for the order, quoting the Supremacy Clause:

There is no question that this Court is bound by the Vienna Convention and Optional Protocol. The federal government's power to make treaties is independent of and superior to the power of the states. Every state or federal court considering the Vienna Convention, for any reason, has agreed that it is binding on all jurisdictions within the United States, individual states, districts and territories. Several courts have expressed concern that any failure of United States courts to abide by the Vienna Convention may have significant adverse consequences for United States citizens abroad. Treaty violations not only undermine the "Law of the Land," but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens.

... The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty. As this Court is bound by the treaty itself, we are bound to give full faith and credit to the Avena decision.

... In order to give full effect to Avena, we are bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar. Common sense and fairness also suggest this result. Torres, like many foreign nationals, was unaware he had the right to contact his consulate after his arrest for murder. Torres's Vienna Convention claim was generated by the State of Oklahoma's initial failure to comply with a treaty. ... [W]e cannot fulfill the goal of a fair and just review of

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Torres’s case if we refuse to look at his Vienna Convention claims on the merits. 52

The Oklahoma judgment seems more consistent with constitutional law than the approach of the Texas courts. However, it was not popular with many in the state. Following the Torres case, the state of Oklahoma presented to its voters in November 2010 a proposed state constitutional amendment. 53 Although, or perhaps because, the proposed text was not reproduced on the ballot, over 70 percent of voters approved it. 54 It would amend Article 7, section 1 of the Oklahoma constitution, instructing the state’s courts when exercising their judicial authority to:

... up hold and adhere to the law as provided in the United States constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law. 55

There are considerable constitutional problems with this provision and on November 9, 2010, the Federal District Court for the Western District of Oklahoma entered a temporary restraining order, enjoining defendants from certifying the election results for State Question 755. 56 In the meantime, some dozen other states 57 have proposed legislation to effectuate similar prohibitions—despite the protests of businesses that will be unable to enforce bilateral investment agreements as a consequence. The laws will also preclude state courts from deciding on issues of Indian law, which are governed by more than 1400 treaties.

52. Id., at *2-4.
55. H.R.J. Res. 1056, supra note 53, at § 1(c).
57. While most of the statutes address sharia law primarily, Louisiana passed in June 2010 a law against “international law” being used in its courts. LA. REV. STAT. ANN. § 9:6001 (2010). South Dakota’s House Joint Resolution 1004, says that no court “may apply international law, the law of any foreign nation, or any foreign religious or moral code with the force of law in the adjudication of any case under its jurisdiction.” H.R.J. Res. 1004, 86th Leg. Assemb. (S.D. 2011).
Oklahoma alone has 38 federally recognized tribes who are directly affected if the new provision goes into force.58

III. WHY?

How can we understand this rejection of international norms that are only binding if the United States government has consented to them through the formation of customary international law or the drafting and ratification of treaties? As noted earlier, the United States was a small country that needed international law for its very existence at the beginning. Should becoming an international super-power produce a change in practice? Some officials and pundits argue U.S. exceptionalism – that being powerful gives the country a right to be exempt from rules that apply to others.59 This is neither good law nor good policy as several examples demonstrate. International law is more important as a part of our legal system than it has been at any point in our history since the founding years.

As to why the challenges are occurring, the explanation may derive in part from the fact that the twentieth century saw vast and almost daily developments in international norms, institutions and procedures. The subject matters being regulated intrude into matters that would have been inconceivable to an eighteenth century agrarian society, when the city of New York had a total population of 10,000 people. Some of the matters dealt with internationally today were not even considered appropriate for federal action in the past.

Looking back, there was rarely, if ever, a period of such rapid global change as the twentieth century. From its beginning, the telegraph and telephone, followed by radio, aviation, and television made it possible to communicate and travel rapidly across borders. And it continues. Three decades ago, a secessionist group on the island of Bougainville faxed its declaration of independence to the central government. Today, revolutions are organized on Facebook and Twitter. The inherent attributes and potential reach of new technology necessitates global cooperation, leading to the formation of the first permanent international institutions.

Much of the resulting international regulation is taken for granted today, such as being able to pick up the telephone and directly call almost any place in the world or fly from one country to another with airlines often registered in different countries. The expansion of subject matter requiring international attention is vast: there are now treaties

on cybercrime,\textsuperscript{60} international adoption,\textsuperscript{61} parental abduction of children,\textsuperscript{62} and criminal cooperation.\textsuperscript{63}

Despite this, we remain in the founding decades of many international institutions and of the efforts to regulate increasingly frequent and complex interactions of individuals, companies, and governments across borders. The difference today is that there is a broad legal framework on many transboundary issues; while lawmaking will of necessity continue as new problems arise, the emphasis has turned to compliance and enforcement.

The international legal system has necessarily changed when presented with each challenge or opportunity. The first decades of the United Nations system and regional organizations like the Council of Europe, the Organization of American States and the European Union were largely devoted to elaborating and giving effect to fundamental new principles in the aftermath of World War II. In particular, international organizations in the post-war period reflected an overwhelming consensus that henceforth human rights must be a matter of international concern and colonial territories must become free.

International organizations also became the venue for negotiating rules and regulations to govern a host of newly-emerging issues. When it became possible to exploit off-shore oil resources, an agreement had to be reached on whether or not a state’s coastal jurisdiction should extend to its continental shelf or whether exploitation should be open to all states.\textsuperscript{64} The launch of \textit{Sputnik} required states to give thought to the legality of satellites passing overhead and to elaborate rules to govern activities in outer space;\textsuperscript{65} the result has not only been an

\begin{itemize}
\item \textsuperscript{60} See Budapest Convention on Cybercrime, Nov. 23, 2001, C.E.T.S. No. 185.
\item \textsuperscript{64} See Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.
\item \textsuperscript{65} See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the “Outer Space Treaty”), Jan. 27, 1967, 610 U.N.T.S. 205 (adopted by the General Assembly in its resolution 2222 (XXI) and entered into force on 10 October 1967); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the “Rescue Agreement”), Apr. 22, 1968, 672 U.N.T.S. 119 (adopted by the General Assembly in its resolution 2345 (XXII) and entered into force on 3 December 1968); Convention on International Liability for Damage Caused by Space Objects (the “Liability Convention”), Mar. 29, 1972, 961 U.N.T.S. 187 (adopted by the General Assembly in its resolution 2777 (XXVI) and entered into force on 1 September 1972); Convention on Registration of Objects Launched into Outer Space (the “Registration
absence of subsequent conflict but a remarkable degree of international cooperation based on the agreements concluded in the 1960s.

Other challenges and opportunities face policy-makers and lawyers today, with inevitable consequences for our legal system.

Migration and movement. A recent survey of U.S. colleges revealed that among large universities, the University of Colorado has the highest number of Peace Corps volunteers (GWU is highest among medium sized schools). These young persons give two years of their lives to contribute to the well-being of those living in other countries. During these two years, as the Oklahoma court in Torres indicated, they are entirely dependent on the rule of law for their well-being—not only the domestic law of the state where they are assigned, but the international rule of law. Without respect for the consular immunities treaty, they will lack the protection of the U.S. government in the event that they are injured, wrongfully arrested, or otherwise in harm's way. Tourists, business travelers and diplomats are also at risk. It will be difficult at best to insist that other countries respect the rights of U.S. nationals if the U.S. ignores the rights of foreign nationals.

A second emerging issue is the increasingly scarce and critical freshwater on which life depends. Freshwater is less than three percent of the total water on earth. Much of it is frozen in ice, and the remainder is found almost entirely in some two hundred and sixty-one trans-boundary river systems and lakes, covering nearly half of the land-surface of the earth. We share water systems with our neighboring states to the north and south, whose populations and economic activities compete to use the waters for drinking, sanitation, irrigation, and industrial activities. Canadian pollution enters the United States and the United States exports it in turn to Mexico. Around the globe, drought, desertification, pollution, and over-extraction lead to water shortages, tensions, and conflicts between states. Water wars are predicted unless agreements are made and upheld. The U.S. is fortunate to have a comprehensive Boundary Convention”), Jan. 14, 1975, 1023 U.N.T.S. 15 (adopted by the General Assembly in its resolution 3235 (XXIX) and entered into force on 15 September 1976); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the “Moon Agreement”), Dec. 18, 1979, 1363 U.N.T.S. 3 (adopted by the General Assembly in its resolution 34/68 and entered into force on 11 July 1984). See also P.J. Blount, Renovating Space: The Future of International Space Law, in this book.


68. See id.
Waters Agreement with Canada,\textsuperscript{69} which has allowed us to avoid major disputes for nearly a century.

Biological resources underlay an estimated forty percent of the global economy.\textsuperscript{70} Some eighty percent of all pharmaceuticals are based on plant genetic resources.\textsuperscript{71} The cures for cancer, macular degeneration, and dengue fever may be found in rapidly disappearing forests where the uses of native plants are known only to indigenous people who are themselves disappearing, along with their cultures, languages and knowledge; over 1000 groups are predicted to disappear within the coming decades.\textsuperscript{72} Species extinction is occurring at a rate estimated to be 1000 times the natural rate.\textsuperscript{73} Of perhaps more immediate concern, more than half the world's commercial fish stocks have reached their yield limit and many fisheries are crashing, taking away the major protein source for nearly a billion people.\textsuperscript{74}

Globally, nearly three billion people, or about half the world population, live on less than two dollars a day and one billion survive on less than two dollars and fifty cents a day.\textsuperscript{75} The Gross Domestic Product of the poorest 48 nations is less than the combined wealth of the world’s seven richest individuals.\textsuperscript{76} In the developing world, one in five children every year do not live to see their fifth birthday.\textsuperscript{77} In addition to the humanitarian disaster this poses, there is a proven


\textsuperscript{70} Convention of Biological Diversity’s Tenth Conference of the Parties (CBD COP 10), INT’L CENTRE FOR TRADE AND SUSTAINABLE DEV., http://ictsd.org/i/events/dialogues/62258/ (last visited Sept. 29, 2011).


\textsuperscript{76} Id.

correlation between poverty and armed conflict: of the 32 countries at the low end of the U.N.’s Human Development Index, 22 have experienced conflict at some point during the past 15 years, including nine of the ten countries at the bottom of the list.\(^7\)

The value of world merchandise exports was US $12.15 trillion in 2009, while world commercial services exports came to US $3.31 trillion.\(^8\) The U.S. imports 13.6 percent of its goods and merchandise.\(^8\) As of April 2010, average daily turnover in global foreign exchange markets was estimated at US $4.0 trillion.\(^8\) Some firms specializing on foreign exchange market had put the average daily turnover in excess of US $4 trillion. Four years earlier the average global turnover totaled US $3.3 trillion.\(^8\)

Half of all revenues for Hollywood films now comes from abroad.\(^8\) McDonald’s has 14,000 restaurants in the United States but 17,000 in 117 other countries.\(^8\) Ninety percent of the 1000 restaurants it opened in 2008 were outside the United States.\(^8\) Boeing’s 777 jet aircraft is assembled in Boeing’s plant in Everett, Washington from a fuselage made in Japan, wingtips coming from Korea, rudders from Australia, dorsal fins from Brazil, the main landing gear from Canada and France, and flight computers from the United Kingdom.\(^8\)

Two-thirds of all this trade is transported by sea, but products are not the only travelers.\(^8\) According to the World Travel and Tourism Council, tourism and its related economic activities employ 200 million people, and transport nearly 700 million international travelers per

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\(^8\) Id. at 151.


\(^12\) Id.


\(^15\) Id.


\(^17\) Id.
year. This figure is expected to double by 2020.89 Foreign visitors are the main source of foreign currency for more than one-third of all countries.60 International telephone calls increased from 33 billion minutes in 1990 to 70 billion minutes in just six years' time.91

Criminal activities have gone international as well, including drug and human trafficking, illicit arms trade, stolen art and artifacts, illegal wildlife trade, dumping of hazardous or toxic products and waste, currency counterfeiting and money laundering, and high tech crime.92 Just one international investment fraud case involved more than 2,000 victims from 60 countries who were defrauded of approximately US $200 million.93 On Sept. 3, 1998, law enforcement agents in 32 U.S. cities and Australia, Austria, Belgium, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, and Sweden raided the homes of suspected internet child pornographers.94 Cooperative transnational law-making and enforcement is increasing in recognition of the fact that law enforcement will not be effective without such agreements and cooperation.

Finally, since 1990, more than three million people have died in armed conflicts and about 25 million people are currently internally displaced because of conflicts or human rights violations.95 Notably, at the beginning of the 1991 Gulf War, the first reservists called up were six lawyers of the 46th International Law Detachment.96

In sum, almost no topic in the professional life of a lawyer remains exclusively regulated by domestic law. The reality is that no country is capable of defending itself and ensuring the welfare of its citizens without international cooperation and the rule of law. In 1946, Hersch Lauterpacht, looking back at the work of one of the founders of international law, Hugo Grotius, commented that even in the 17th

90. Id.
century Grotius opined that "the impact of economic interdependence or of military security [is such] that there is no state so powerful that it can dispense with the help of others." 97 Today, if the United States wants the cooperation of states to combat drug trafficking, it must bargain on other issues like global climate change and agricultural subsidies. If it wants a missile defense system in Eastern Europe, it must cease creating secret prisons and kidnapping for rendition the nationals from those states. The web of global interrelationships is a fact known to all heads of state and government; if not earlier, then certainly it was brought home on September 11, 2001.

The test of the rule of law does not come in ordinary times. As Louis Henkin has famously said, most nations obey most international law most of the time. 98 They do it every time an airplane flies from one country to another, every time the postal service delivers a letter with a foreign stamp on it, every time a foreign ship docks and its cargo is unloaded, every time a foreign film is distributed and shown, every time a diplomat or head of state is received within another state. The question is how well the law is enforced when it is inconvenient, costly, or society is under threat.

Some nations have not performed well in this regard, but it is critical to recognize that the failure is usually of law generally, not just international law. As we have seen in various countries, governments which perceive threats to their power or interests suspend constitutions or give them restricted application, exile or arrest dissidents, harass or kill disfavored minorities, and write memos justifying torture. It is perhaps demanding too much to expect international law to be respected by those who willfully disregard their own national laws and constitutional limitations and those who fail to distinguish threats to their political survival from threats to the national security. Claims that a head of state or government is above the law generally do not stop at international law but demand unlimited executive powers unrestrained by the legislature, the judiciary, or for that matter, conscience or morality.

Respect for the rule of law and political courage are necessary not only to resist the temptations of expanding power, but also to resist public calls for action and demands for retaliatory measures when lives have been taken and enemies fail to respect basic norms of conduct. The U.S. Civil War was a time of enormous bitterness and hostility, sometimes fanned by the press, and there were indeed failures of law, but also examples of where it held despite public pressure. When

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reports of the conditions suffered by Union prisoners in Andersonville were widely reported, the Chicago Board of Trade sent a letter to President Lincoln urging that the federal government set aside an equal number of Confederate prisoners and subject them to the same treatment, ensuring that they would die; the Chicagoans called for "retaliatory measures as a matter of necessity." 99 Instead, on April 24, 1863, President Lincoln approved General Orders No. 100, 100 today known as the Lieber Code, the first modern codification of the laws of war. Article 16 said "Military necessity does not admit of cruelty — that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions." 101 The Lieber Code migrated to Europe, leading to the first Geneva conferences and conventions, emerging into international treaties and customary norms that are binding on all nations.

Thus, in conclusion, the nation must remain with Chief Justice Marshall and those who wrote the Constitution, who believed that the international rule of law needs to be respected and enhanced for our own interest — an interest indivisible from that of the rest of the world. A.H. Robertson, a prominent European human rights lawyer, poetically likened the effort to building the Cathedral of Strasbourg, which took over 350 years to complete, with mistakes along the way. 102 The individuals who began the work and who contributed a stone, window, or a statue, knew they would never see the entire magnificent monument that has stood now for more than five hundred years — no single day passing without some further adjustment or repair or addition being needed. While lawyers must not have the arrogance of thinking that they can solve every societal problem domestically, much less globally, they should also not settle for too little. There are great legal minds in the world, each of which can place his or her stone, statue, or window in the Cathedral being built. As Margaret Mead reportedly said: "Never doubt that a small group of thoughtful, committed individuals can change the world. Indeed, it is the only thing that ever has." 103

101. Id.
102. Interview with A.H. Robertson, in Strasbourg Fr. (1971).
THE FUTURE OF HUMAN RIGHTS
IN THE AGE OF GLOBALIZATION

M. CHERIF BASSIOUNI*

Professor Nanda is far too well known in academic circles for me to add anything new or different about his scholarship and contributions to legal education and to international law and human rights. What I can add, however, is my personal tribute to him as a person of integrity and moral character. We have been friends since 1965, and over the years, we have worked together on a number of academic projects, including the first two volumes on international criminal law ever published in the United States in 1973. Subsequently, we also co-edited another volume on specific crimes arising under international criminal law. During these years, we remained bound by an abiding friendship arising out of mutual respect and affection, and it is my privilege to contribute this manuscript to a volume of the Denver Journal of International Law and Policy, which he founded and which is dedicated to him. The thoughts that follow are in keeping with his concerns about human rights.

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THE EMERGENCE OF HUMAN RIGHTS AS WE HAVE COME TO KNOW IT

The aftermath of World War II brought about a paradigm shift in positive international law with respect to the individual's relationship to the state. The latter ceased to be considered as an object of international law and became a subject thereof. This meant that the individual could not only be the recipient of certain rights but also their rightful claimant from states.

Experts have debated the moral, philosophical, ideological, and historic origins of human rights.¹ Legal historians have found the very concept to be part of legal systems going back five thousand years²

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2. 1-2 Jean Imbert et. al., HISTOIRES DES INSTITUTIONS ET DES FAITS SOCIAUX (1956); 1-3 John Henry Wigmore, PANORAMA OF WORLD LEGAL SYSTEMS (Wm. M. Gaunt
while theologians have found the rights of human beings posited in almost every religion, particularly the Abrahamic faiths, Hinduism and Buddhism. But it was the European Age of Enlightenment that established the philosophical foundations for the nineteenth century liberalism that in turn developed the conceptual framework of the post WWII International Human Rights Law regime.

Postmodernism denies the proposition that there is a master historical account that would help us understand how human rights have come to be and how they have evolved, while on a parallel track, contemporary multiculturalism places every group in a victim category. But, when everybody is a victim and there is no historical framework, how can there be a human rights system other than a chaotic environment where anything and everything goes and where ultimately power prevails? Paradoxically these postmodernism and multiculturalism postulates acknowledge human rights values as primary factors in historical and socio-political transitional phases such as post-colonialism. From post WWII to the era of globalization, no matter what method is used, various stages of history reveal a process of historic thought accretion whose transmission substantiates, within and among civilizations, a theory of historic evolution that leads to the conceptual framework of post WWII human rights articulations. Thereafter, the legal methods of international law were used for the actualization of human rights values and their transference to legally enforceable norms and standards. In turn, this post WWII actualization of human rights is being tested in the transitional phase of globalization by emerging systems, processes, structures, actors, resources, and changing dynamics in the interrelations of states, private sector entities, and individuals and groups. How and when the present transitional phase ends is difficult to identify, but when it does, human rights as we have known it since the end of WWII is likely to take on a new shape. This applies to all three complementary legal regimes, described below, whose "value-oriented goals" encompass human rights.


5. ISHAY, supra note 1.

6. The late professor McDougal and his Yale colleagues are credited with having developed in the 1960s a new framework and methodology for understanding international law. This "New Haven" school, as it became known, employed its own terminology, which includes the term used above. Professor Nanda was an early student of the New Haven school. See MYRES S. MCDouGAL & FLORENTINO P. FELICIANO, LAW
If history teaches us anything, it is that certain fundamental values will survive no matter what historic exigencies may dictate. History does not evolve in cycles but in repetitions triggered by the occurrence of certain human experiences. It may simply be the case that when it comes to human affairs, history records variations on the same themes. How different societies under different circumstances adapt to new or newly perceived realities is like the flow of a river, which in some places runs deep and slow, and in others shallow and fast. At times the river of human history also runs stagnant and even likely runs dry until new confluents energize its flow. The course of the human river, however, keeps going on and maybe, just as it started out in its evolutionary course, it will proceed into its conclusionary one.7

What this transitional phase of globalization means to the general scheme of history is beyond prediction. But that it will affect human rights as we have understood them since WWII seems rather certain.

2. THE THREE COMPLEMENTARY INTERNATIONAL LEGAL REGIMES ENCOMPASSING HUMAN RIGHTS

Since WWII, three different international legal regimes have co-existed whose “value-oriented goals” include the protection of human rights.8 They are: International Humanitarian Law (“IHL”), International Criminal Law (“ICL”) and International Human Rights Law (“IHRL”). These regimes are, at once, complementary and distinct as to, inter alia, their respective spheres of application, subjects, contexts, and normative schemes. These differences, which characterize these regimes whose historical origins are also different, necessarily evidence overlap and gaps in the overall protective scheme of human rights. This would have been avoided had all three been part of an integrated legal regime, which is not the case. But what is significant is that all three international legal regimes recognize: (1) the individual as a subject of internationally established rights and obligations arising directly under international law, (2) these rights and obligations override national law, (3) that they are binding upon states, and (4) that

8. See McDougal & Feliciano, supra note 6; McDougal, Laswell, & Chen, supra note 6.
they require (in different and varying ways) international and domestic enforcement measures, sanctions, and ultimately remedies for victims.9

The recognition of the individual as a subject of international law protected by legal rights limits the powers of the state. It is the other side of the coin that provides for the individual's international criminal responsibility.10 This was first embodied in the Charter of the International Military Tribunal ("IMT")11 and the Statute of the International Military Tribunal for the Far East ("IMTFE"),12 both of which relied on the customary international law of armed conflicts to carry out individual international criminal responsibility based on what was known as war crimes.13 The Charter and Statute added to the core “war crimes” charge, those of “crimes against humanity”14 and “crimes against peace,”15 both of which criminalized conduct that violated the right to life and to physical integrity. Shortly after the IMT and IMTFE concluded their proceedings, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide.16 Since then, aggression, genocide, crimes against humanity, and war crimes became the four core crimes of International Criminal


13. For the failed post-WWI efforts to establish international criminal responsibility, as was subsequently the case after WWII, see M. Cherif Bassiouni, World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System, 30 DENY. J. INT'L L. & POLY 244 (2002).


15. See Whitney Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg Germany, 1945-1946 (1999). See also Yoram Dinstein, The Distinctions Between War Crimes and Crimes Against Peace, in WAR CRIMES IN INTERNATIONAL LAW 1 (Yoram Dinstein & Mala Tabory eds. 1996).

Law ("ICL"). ICL and International Humanitarian Law ("IHL") paved the way for the paradigm shift mentioned above that was indispensable for the establishment of the IHRL regime.

What all three international legal regimes have in common is the protection of certain individual human rights from violations committed by states. Some of these rights extend to collective rights, but they too are posited in the nature of a relationship between a given collectivity and a given state.

The International Human Rights Law Regime (IHRL)

International Human Rights Law applies to states. The first, second, and third generations of human rights under IHRL are not absolute rights that can be claimed by the protected person or persons against other individuals or organizations whether they be IGOs, NGOs, or business legal entities (with some exceptions). Conceptually, the new post WWII paradigm of the individual being the subject of internationally established rights and obligations is only in relationship to a state and even in that respect there are some limitations as to which state that may be. Individual rights are usually limited in their application to the state of nationality or the state of residence with some exceptions for certain human rights violations which are not limited to these two categories of states such as migrant and refugee rights, racial discrimination, and the right to be free from cruel, unusual, and degrading treatment or punishment under the International Covenant on Civil and Political Rights ("ICCPR") Article 15 and the CAT.

The 1948 Universal Declaration of Human Rights and the two 1966 Covenants on Civil and Political Rights ("ICCPR") and Economic

17. Rome Statute of International Criminal Court, supra note 9, arts. 5 – 8.
18. Contra ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006). The author postulates the proposition that human rights protect the individual from any source of harm. The author is ahead of his time, but that is maybe where globalization is heading. This writer is more skeptical though sympathetic to Chapham’s desideratum.
and Social Rights formed the core of what scholars refer to as the "International Bill of Human Rights." While the Universal Declaration was at first deemed declaratory, it subsequently became part of customary international law. The two covenants originated as binding positive international law, though prescriptive in nature. They prescribed that certain individual rights were protected from state infringement, but they did not provide for enforceable remedies even though, in time, many of these individual rights were recognized as constituting part of customary international law and thus presumably binding upon non-state parties.

The declarative and prescriptive stages of IHRL were followed by two subsequent stages, the specialization stage of normative prescriptions and the prescriptive stage (described below under "ICL"). The first was characterized by a number of international conventions whose subject matter and normative prescriptions addressed, with varying degrees of specificity, some of the rights that were enunciated in more general terms in the ICCPR. They include women's rights, children's rights, racial equality, migrants' rights, rights of the disabled, and other subject matters of human rights protections. This new stage of normative prescriptive rights provided specificity to different subject matters and offered the promise

24. ICCPR, supra note 21.
32. See ICERD, supra note 20.
of enforcement through the established treaty-bodies. The treaty-bodies were designed as implementation mechanisms for each of these covenants and conventions; they were intended to enhance compliance and reduce violations of the human rights protections guaranteed by these international instruments. But these objectives were hardly achieved. Treaty mechanisms were never assessed in terms of their effect on enhancing compliance and reducing violations. In fact, these mechanisms have proven to be nothing more than procedural devices that limit the consequences of a state party’s violation to the mere issuance of periodic reports by the respective treaty-body. Considering that most of these treaty-bodies are staffed by government officials and former government officials, it is no wonder why so many of these treaty bodies have done so little to induce state parties’ compliance and thus reduce violations.

The declarative and prescriptive stages of IHRL brought about a large number of multilateral instruments, which in turn had an impact on the contents and terminology of national constitutions, criminal legislation, procedural norms, and evidentiary standards. Thus, while it is impossible to assess whether the adoption of these international legal instruments have enhanced state compliance with what is now commonly referred to as international human rights norms and standards, it is nonetheless possible to assess their impact on national normative developments. Thus, the center of gravity of human rights has, as it should, moved from internationalization to nationalization, much as this writer believes that the future of international criminal

36. See NEW CHALLENGES FOR THE U.N. HUMAN RIGHTS MACHINERY: WHAT FUTURE FOR THE UN TREATY BODY SYSTEM AND THE HUMAN RIGHTS COUNCIL PROCEDURES? (M. Cherif Bassiouni & William A. Schabas eds., 2012) (listing the Committee on Elimination of Racial Discrimination; the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee on the Elimination of Discrimination against Women; the Committee against Torture; the Subcommittee on Prevention of Torture; the Committee on the Rights of the Child; the Committee on Migrant Workers; the Committee on the Rights of Persons with Disabilities; and the Committee on Enforced Disappearances).

37. Id.


39. None of them provides for independent fact finding as they are essentially predicated on periodic reports by governments with are then reviewed by the respective treaty bodies who issue periodic reports containing whatever findings and recommendations these bodies elect to make.

40. BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, supra note 10, at 583-671.

justice and ICL and IHL as a whole are destined to follow this path. The future of IHRL, ICL, and IHL is their absorption into national legal systems whose enforcement mechanisms are likely to have a far more effective impact on compliance than any assisting or prospective international set of mechanisms.

The International Criminal Law Regime (ICL)

Following the normative prescriptive stage of IHRL described above, another stage in the development of human rights protections ensued through specialized conventions proscribing violations of certain fundamental human rights as in the case of torture, slavery and slave-related practice, human trafficking, and enforced disappearances. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") remains the most striking example of the prescriptive stage of IHRL through ICL. It criminalizes the commission of torture by any state party to the said convention. Scholars have also concluded that the prohibition of torture as reflected in CAT, the Universal Declaration, the ICCPR, and other regional instruments declaring the prohibition of torture amount to customary international law binding upon all states.

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46. CAT, supra note 22.

47. Universal Declaration of Human Rights, supra note 23.

48. ICCPR, supra note 21.

irrespective of whether a given state is a state party to any of these multilateral conventions.\textsuperscript{50}

The proscription of other international human rights violations reflect certain human values protected by IHRL as in the protection of vulnerable groups such as civilians threatened by “terrorism.”\textsuperscript{51} Fifteen multilateral conventions and seven regional conventions address different manifestations of “terrorism.”\textsuperscript{52} The proscription of certain

\textsuperscript{50} See Rodley & Pollard, supra note 42.


Regional Conventions: Convention of the Organisation of the Islamic Conference on Combating International Terrorism, July 1, 1999, available at http://www.unhcr.org/refworld/publisher,OIC,,,3de5e6646,0.html (deposited with the General Secretariat of the
acts of terror-violence are not only deemed harmful to the state and to international peace and security, but it also constitutes violations of different individual human rights such as the right to life, physical integrity, personal safety and security, and the enjoyment of international means of travel.

States’ efforts at controlling “terrorism” have in turn produced human rights violations when they resulted in the curtailment of certain human rights for those deemed as “terrorists” by states. This is evident in the commission of torture at the Guantanamo facility (Cuba) established by the United States, the commission of torture in Iraq (notably at Abu Ghraib prison) and Afghanistan (notably at Bagram Air Force Base), and extrajudicial executions and torture in the context of what the United States has euphemistically referred to as “extraordinary rendition.”


While ICL is a regime essentially geared to sanction what has come to be regarded as international and transnational crimes, these crimes are committed by individuals and groups in different contexts and for different purposes.\textsuperscript{54} Non-state actors include: (1) groups that pursue ideological purposes by violent means and that are referred to as "terrorists," (2) groups that seek to obtain profit by the use of violence that are referred to as "organized crime"\textsuperscript{55} and, (3) groups that are parties in conflicts of a purely internal and non-international character.\textsuperscript{56} These groups' activities overlap and frequently drift in and out of these legal categories, which reveals the failure of international legislative policy.

The "value-oriented goals"\textsuperscript{57} of these multiple sub-regimes of ICL include not only human rights considerations but the preservation of international peace and security and the security and public interests of


\textsuperscript{55} T. OBOKATA, \textbf{TRANSNATIONAL ORGANISED CRIME IN INTERNATIONAL LAW} 14-19 (2010).


\textsuperscript{57} MCDOUGAL \& FELICIANO, \textit{supra} note 6, at 262-63, 302; MCDOUGAL, CHEN, \& LASWELL, \textit{supra} note 6, at 3-6.
states. The balancing of these interests necessarily affects the goals and methods pursued by states, individually and collectively. That which at one time can tip the scales in favor of human rights, can also tip them in the direction when considerations of security are deemed to affect those pertaining to human rights.

**The International Humanitarian Law Regime (IHL)**

Another international legal regime protecting human rights is IHL. The four Geneva Conventions\(^58\) of August 12, 1949 and the two Additional Protocols of 1977\(^59\) are the normative cornerstones of this regime that also includes the customary law of armed conflict.\(^60\) The IHL legal regime applies to the protection of certain persons, targets, and means employed during the course of international and non-international conflicts but does not extend to purely internal conflicts.\(^61\) The protected scheme of IHL has been interpreted by states as having greater application in the context of conflicts of an international character than conflicts of a non-international character, even though doctrine has equated the protective rights for non-combatants as well as combatants in these two contexts.\(^62\) The practice of states however has not followed the writings of scholars in connection with the same applicability of IHL protections in both contexts, but international tribunals have.\(^63\)

IHL and IHRL overlap, as evidenced by the International Court of Justice ("ICJ") decision in the *Wall* case involving Israel's treatment of

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Palestinians and Palestinian occupied territories. As evidenced in this case, the ICJ held that the two regimes are simultaneously applicable but that IHL, being the *lex specialis*, prevails over IHRL, which is the *lex generalis*, thus there is a gap in the protection of human rights during conflicts of purely internal nature.

IHRL and ICL also overlap in that ICL criminalizes some of the conduct prohibited by IHRL, but in different contexts. An example of the overlap between the two regimes is in connection with combatants in conflicts of an international and non-international character who engage in collateral activities proscribed by ICL as “organized crime” activities, “terrorism,” or drug trafficking. It has not yet been established by the ICJ or by experts how to address the overlap between ICL and IHRL.

More importantly, conflicts can shift from primarily internal to international and during this shift multiple legal regimes are applicable. This overlap will occasionally bring about IHL’s supremacy over ICL and vice-versa.

3. INTERNATIONAL CRIMINAL JUSTICE

Although international criminal justice has made progress with the establishment of such institutions as the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, International Criminal Court, and the mixed model

64. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶106 (July 9).
65. Id. ¶ 105-06.
tribunals, the values of international criminal justice have not yet become part of the goals of globalization. The present stage of globalization has emphasized economic and financial interests over humanistic and humanitarian values and principles. Economic and financial interests, whether in the public or private sectors, continue to prevail over humanistic and humanitarian values. Contemporary economic and financial crises in the world dominate the interests of states to the detriment of their interest in human rights. Moreover, concerns for internal security and stability have prevailed as states' interests over the interests of humanitarian and humanistic values.

Efforts by the international community to advance the theory of universal jurisdiction for certain international crimes, which are designed to protect human rights and prevent genocide, crimes against humanity, war crimes, torture, and extrajudicial executions, have not been successful. Universal jurisdiction remains a desideratum that has been thwarted by the interest of states seeking to advance their state interests. Realpolitik has once again prevailed over the lofty humanistic and humanitarian values reflected in so many international conventions and in the writings of scholars. For maybe similar reasons, states have resisted the proposition that human rights are universal and should be universally enforced. The international community is as reluctant to enforce ICL universally as it is to universally enforce IHRL.

This is evident in the high number of general amnesties provided by states after internal conflicts. The number of amnesties has reached 125 out of a total of 313 conflicts that occurred between 1945 and

72. See Rome Statute of International Criminal Court, supra note 9, art. 1.
Accountability for International Crimes is also an area that is more talked about than carried out, as evidenced by the fact that in the 313 conflicts mentioned above—which resulted in the deaths of at least 92 million—only 727 international prosecutions took place.  

4. GLOBALIZATION AND THE FUTURE OF HUMAN RIGHTS

Globalization has created new spatial and political opportunities for human rights to develop including speed and access to information and social media, which increases the individual’s ability to galvanize one another and generate massive popular movements. New horizons are likely to include individual and political rights as well as collective social, economic and cultural rights. New agents of change have, however, emerged in this transitional phase which have the capability of enhancing future human rights prospects. These agents include international and national civil society and a sensitized private sector economy, which can more directly impact human rights outcomes than any other segment of the globalized society. For those whose interest is to categorize the periods of evolution or development of IHRL, the new horizons of human rights in this globalized era will probably be classified as the fourth generation of human rights. But this new generation of human rights will be based on a number of paradigm shifts whose outcomes cannot be predicted.

First, human rights claims by individuals and collectivities are no longer going to be directed only towards states, for they too will be impacted by the processes of globalization and the uncertainty about what will make state structures and powers is uncertain. Moreover, as the powers of states are diluted in the era of globalization, there exists no specific globalized counterpart or authoritative process to replace the state. Power and decision-making are likely to be more diffused in globalized society than in a Westphalian state based system. At the same time, states have lost a substantial part of their capacity to govern. Thus, a tectonic shift is taking place with respect to states’ decision-making powers and effectiveness that will impact the states’


79. See generally Ishay, supra note 1, at 245-313.

capacity to carry out their obligations under the traditional terms of a “social contract.” \(^{81}\) Whether the shift towards globalized systems and processes is likely to replace that which is being eroded is at least speculative.

Globalization of the world’s economy and financial systems and methods of communication have also resulted in new ways to infringe on individual human rights. This includes predatory economic and financial practices by multinational corporations, control of the right of access to information, intrusions on privacy, and threats to the environment. The transition phase of globalization is witnessing the erosion of states’ powers, in fact, because of the shift in decision-making power to new globalized institutions and processes, and in part because the increased ungovernability of contemporary societies. The reduced capabilities of governments to protect, preserve, and enforce human rights, in the absence of collective exercise of parallel power by the international community in the present context of international relations and the international law systems, have not been substituted by anything new that globalization may eventually offer. This raises a number of issues which include, whether there is something called the global society that could be held accountable for the violation of human rights in this transitional phase to globalization and whether individuals will be able to make human rights’ claims against the global society and if so, in what manner and before what forum?

The first and second generations of human rights were tailored to apply to states where national fora offered the prospects of adjudicating a human rights violation and of obtaining a remedy. The third generation of human rights has proven to be of little effect. The fourth generation of human rights in this transitional phase to a globalized society is not likely to offer better outcomes than its precedent one.

Although globalization mainly encompasses the multiplicity of international processes and collective decision-making bodies consisting mostly of states, the private sector has also developed informal processes that are capable of producing outcomes that are similar to those of structured state control decision making bodies. The impact of these and other phenomena of globalization have not been the same everywhere in the world or similar with respect to different categories of rights. Thus, the expansion of a globalized free market economy that seems to have had the most impact throughout the world, has not necessarily witnessed a concomitant rise of labor rights though it has no doubt energized the discourse on labor rights as human rights throughout the world. The globalization of a free market economy, which requires the free flow of goods and movement of materials across

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national boundaries without hindrances, has extended to the free movement of people across state boundaries but not necessarily to the freedom of people to immigrate without discretionary restrictions imposed by host countries, save for certain minimal rights of asylum. Another unexplained perverse consequence is the regression of the rights of immigrant labor forces and the hardship suffered by refugees fleeing wars, repressive regimes, economic exploitation, and poverty. Western societies, which are economically among the world's most advanced, have been the more resistant to these and other human rights claims deriving from globalization based on their interpretations of cultural relativism and claims of nationalistic cultural rights. Cultural differences continue to stand in the way of the universality of human rights. Last but not least, globalization has not impacted the bottom billion people of the world who live in poverty.

Globalization is not necessarily a recipe for a more harmonious world or for one that is more likely to uphold human rights on a universal and non-discriminatory basis. It is bringing about new realities in the lives of individuals whose traditional family support systems have disappeared or substantially eroded. The state, as has been evident in the last 200 years or so, has not been able to provide a substitute for these support systems other than by offering social services devoid of the human element that is so important in the life of persons. Can one expect a globalized society to do any better? Surely international and national civil society, which will expand in the era of


83. See THE WORLD BANK, THE WORLD DEVELOPMENT REPORT 2011: CONFLICT, SECURITY AND DEVELOPMENT 100 (2011), available at http://wdr2011.worldbank.org/sites/default/files/pdfs/WDR2011_Full_Text.pdf (discussing the correlation between human rights and economic development. According to the 2011 World Development Report, 1.5 billion people live in countries suffering from continual political and criminal violence. This can only be overcome through strengthening of “legitimate national institutions and governance” which provide the foundation for security, justice, employment and, accordingly, the risk of violent conflict. In particular, more than 90 percent of civil wars since 2000 occurred in places that previous civil wars in the last three decades. This sort of endemic violence seriously impacts the capacity of states to develop and escape poverty. It is noteworthy that not a single “low-income fragile or conflict affected[ed]” state has achieved one of the UN's Millennium Development Goals. Poverty is, on average, 20 percent higher in those countries than in their conflict free neighbors. One of the clear lessons is the need to build strong and effective governments with a rule of law, as countries without the requisite governmental institutions are 30-45 percent more likely to see a civil war than those with such institutions. In sum, unemployment, corruption, injustice, exclusion and the systemic violation of human rights remain the strongest causes and predictors of violence). See generally PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING & WHAT CAN BE DONE ABOUT IT (2007) (discussing the correlation between economic development and globalization).
globalization, are not likely to provide a substitute for the traditional (and now maybe historic) support systems of family community, tribe, or village. But no one can anticipate the outcomes of realigning social structures.84

CONCLUSION

Since WWII, human rights norms and standards have developed at the international, regional, and national levels, though with varying degree of effectiveness. Human rights instruments have influenced national constitutions and permeated the legal systems of most states. International criminal justice has also made inroads at the national level, increasingly reaching heads of states who have committed human rights violations. But even though the principle of accountability has been widely recognized, its application is at least symbolic.85

The economic crisis of 2008 and its consequences on world poverty and the crisis of governability are eroding the ability of states to fulfill their part of the traditional "social contract." As a result, states' legitimacy is being undermined and peoples are turning to other ways to protect human rights. What we have come to know as human rights since WWII is increasingly conditioned by economic and socio-political realities evidenced in state practices and in collective state actions and inactions. One such example is the failure of the fledgling principle of the Responsibility to Protect86 to become part of an institutionalized process of decision-making leading to consistent practice by the international community. The failure of the international community to intervene for the protection of peoples from genocide, crimes against humanity, and war crimes is reflected in the 313 conflicts that have erupted in various national contexts since the end of WWII that resulted in 92 million casualties.87 The conduct of states during these conflicts reveals that they intervene mostly when their national interests are at stake and not necessarily when the human rights of peoples are subject to large scale depredations are at risk.

85. Bassiouni, Perspectives on International Criminal Justice, supra note 74, at 284.
87. BASSIOUNI, THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, supra note 78, at 34.
What is more likely to characterize the next phase?

1. The economic disparities between what is called developed, developing states, and the less developed states for the some one billion people of the world are increasing. The bottom billion is likely to increase by 50 percent to 100 percent in the next 20 years (for demographic and economic reasons) while the top billion will likely suffer from the economic crisis that erupted in 2008. Many will fall below the poverty level and the so-called middle class will struggle more to preserve its hitherto economic privileges. States will increasingly be unable to provide the economic and social services they historically offered or promised. Their part of the "social contract" will be increasingly unfulfilled, and the states' legitimacy will be undermined. The globalized system will not be a substitute for state's social and economic responsibilities. Individual human rights will shift from social and political rights reflecting the ideas of liberal democracy to basic needs rights deriving from economic necessities. Distribution of wealth, resources and allocation of public services will become a priority over what will seem as the luxury of individual social and political rights in the exercise of democratic freedoms.

2. The legitimacy of state powers will no longer derive from the protection of liberal democratic freedoms and their exercise by as many individuals as the state may help accede thereto. Rather, state powers will derive from insuring human survivability and public safety. In the process of this focus shift, individual and collective social and political rights will be eroded while emphasis will shift to the exigencies of survivability. This focus shift will be driven by increased difficulties and costs of governments, which has been referred to herein as the governability crisis that seems to have permeated so many governments whether they be in developed, developing, or less developed states. But new factors will emerge at the global level in such dimensions that states' capabilities to confront them will be significantly challenged. This includes famine and natural disasters such as floods, tsunamis, earthquakes, and other consequences of climate change, and industrial disasters whether related thereto or such nuclear ones. In the last few years alone, the world has witnessed a number of these tragic situations in Africa and Asia, evidencing the inability of states to prevent and to effectively respond. As the effects of climate change increase while the global community stands hopelessly unable to

88. THE WORLD BANK, supra note 83, at 1-2.
prevent further deterioration, the impact on the basic human rights to life and safety will increase. The priority of protecting individual human rights will fall in consideration of these new threats.

3. The economic and social factors described above have already resulted in more than 40 failed and failing states out of a total of 194 states.\textsuperscript{90} It is within these states that internal conflicts usually arise necessitating external intervention at enormous costs that other states and the international community are increasingly finding beyond their means. Failed and failing states also impact the stability and economy of neighboring states, thus increasing the range of their negative situations beyond their borders. But it is the enormity of the human harm produced by these states that challenges every conception of human rights.\textsuperscript{91} Will globalization provide for a better solution or will it be an escape hatch for states to resume the status quo of looking the other way irrespective of the harmful human rights outcomes likely to result?

4. The contemporary tension between human rights and security is reminiscent of the historical tensions between states’ exercise of power from time immemorial up to the nineteenth century and the rights of individuals recognized since WWII. No one today argues that states, because they are states, have the right to arbitrarily kill a person or to engage in torture. Instead the contemporary argument is that even though the right to life and physical integrity is recognized, there are exceptions justified by security needs. The United States makes this argument in connection with its usage of drones to attack individuals who are deemed (by a small segment of persons in government, namely military and intelligence establishments) to pose a threat to the security of the United States.\textsuperscript{92} In the same vein, “extraordinary rendition” and torture in Guantanamo, Cuba, Abu Ghraib, and Bagram have been used by U.S. military and intelligence personnel as well as private contractors.\textsuperscript{93} At no time did the Bush Administration, which engaged in this practice, argue that torture was not illegal. What was argued was that these acts either did not constitute torture or were


\textsuperscript{91} THE WORLD BANK, supra note 83, at 3-4.


justified for national security reasons. Seldom is the argument of human rights, let alone the rule of law, given much acknowledgement in political and even legal circles.

The security argument is a *de facto* displacement of the applicability of human rights. In other words, it is a theory of exceptionalism that is gaining public recognition primarily in the United States and in some Western European countries who now join the list of states that have consistently resorted to such exceptionalism as a way of safeguarding their national political interests. The U.S.'s invasion of Iraq and Afghanistan are two such examples, as is NATO's bombing of Libya. All three had one thing in common, regime change, and few raised concerns over the human rights violations caused by these armed attacks.

5. The outlines of a new historical phase for human rights are already identifiable. It will include a new paradigm shift from the protection of individual human rights *vis à vis* states to the predominance of state interests over those of individuals as was the case before WWII. This paradigm shift will emphasize individual responsibilities and the primacy of collective security interests within and between states over the post WWII approach, which emphasized the predominance of certain fundamental individual human rights over state interests. But the decline of human rights in the context of relations between the state and the individual will be counterbalanced by the strengthening of collective rights *vis à vis* states and the international community.

6. A number of indicators point to the erosion of human rights as we came to know them since the end of WWII. What will replace it is difficult to foresee except in one respect. The concept of human rights as the embodiment of human dignity has become both the ethos and the pathos of so many in our seven billion world population. The fact that states and the global society may be unable to deliver their sides of the new social contract will not affect the demand side for human rights. And the demand in keeping with the market laws of free enterprise capitalism, which is an integral part of globalization, will play its part in preserving the supply side, namely states and the institution and processes of the globalized society. What these new processes will be, and how they are likely to produce positive human rights outcomes is of course difficult to predict. But to paraphrase Mark Twain, news about the complete demise of human rights is premature. But news about its transformation is reasonably certain. Whether the new human rights

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outcomes will make a positive contribution to peoples' lives in the new era of globalized society and with respect to what sectors of that society is something crystal ball gazers in our field have yet to discern. But for sure, the new globalized society will face daunting global problems that will take priority over individual human rights if, in the trade-off, the human rights of the masses are better protected, the balance sheet will be acceptable. Considering, however, the dimensions of the problems that the global society faces and will face in light of states' willingness to collectively address what is in the offing, the prospects are not too positive.
The pioneering work of Professor Ved Nanda in the field of international criminal law,¹ as well as his commitment to international justice, inspired the subject to the present article — the legitimacy of international criminal courts.

In his July 10, 2011 opinion piece in the Denver Post, Professor Nanda wrote of the International Criminal Court’s (ICC) issuance of arrest warrants for Moammar Qaddafi, his son Seif al-Islam, and his intelligence chief.² As Libya is not a party to the ICC Statute, the Court’s jurisdiction arose from a Security Council resolution referring the situation in Libya to the Court. Alternatively, the Security Council could have followed past practice and established an ad hoc international criminal tribunal, such as the International Criminal Tribunal for Rwanda, or a hybrid tribunal, such as the Special Tribunal for Lebanon, to prosecute international crimes perpetrated in Libya.

The decision to establish an ad hoc tribunal is necessarily a political one. In elaborating the statute of such tribunal, the Security Council could decide the personal, geographic, and temporal scope of its jurisdiction, as well as the crimes that would fall within its subject matter jurisdiction. The law establishing and shaping the tribunal’s jurisdiction is similarly driven by a political process. The jurisdiction of such a tribunal could be limited temporally to a relatively narrow period of a few months — perhaps January through March 2011. It could be limited geographically to the territory of Libya, or even to subdivisions of Libyan territory. Its personal jurisdiction could be limited to Libyan nationals, or to those fighting on behalf of the Qaddafi regime. It is even conceivable that its personal jurisdiction could be limited to certain named individuals.
The U.S. government has played a key role in establishing and circumscribing the jurisdiction of international and hybrid criminal courts. In so doing, the U.S. has not been shy about insisting on certain jurisdictional exclusions. It is debatable whether the fashioning of the contours of an international tribunal's jurisdiction is subject to any legal constraints. The present article focuses on whether there are constraints of a different nature. Is there a point at which the fine-tuning of a tribunal's jurisdiction deprives it of legitimacy?

This article traces the evolution of policy strands underpinning the U.S. government's attitudes toward international criminal courts and examines how these policy strands converged in a position of support for the Special Tribunal for Lebanon (STL). It also demonstrates how U.S. foreign policy interests helped to shape the contours of the STL. The article then discusses some of the features of the tribunal that flow from these interests, and examines the merits of challenges to the legitimacy of the tribunal made at least in part on the basis of these features. It concludes with an examination of a spectrum of policy choices in relation to the creation of international criminal courts and implications for their legitimacy.

I. THE EVOLUTION OF U.S. POLICY TOWARD INTERNATIONAL CRIMINAL COURTS

Assessing the state of U.S. policy toward international criminal courts is a complex, if not impossible, undertaking. Indeed, there is no coherent U.S. policy on international criminal courts generally. This is attributable on the one hand to the multifaceted nature of international criminal courts, and on the other to the fact that U.S. policy is an amalgamation of diverse views reduced in some cases to written form, which is itself subject to varying interpretations. Policy is also in a continual state of flux, and its fluctuations in this arena are particularly dynamic at the present moment in history.

Nonetheless, examining the behavior of the U.S. government over the past one hundred years or so reveals a pattern of identifiable policy lines relevant to the establishment of international criminal tribunals. The U.S. has been generally supportive of the development of international law, and of the law of armed conflict in particular. It has also supported the establishment of international courts and the incidental development of international legal jurisprudence. Nonetheless, its support of international courts has never been absolute, and has always been subject to competing foreign policy interests.

Its selective use of international courts is most visible, and perhaps most controversial, in the realm of international criminal justice. While the U.S. has been generally supportive of ad hoc international criminal tribunals, it has consistently taken the position that there should be no international criminal court of universal compulsory jurisdiction, and in particular vis-à-vis the United States and its nationals.

U.S. Attitudes in the Pre-World-War II Era

The U.S. has been a strong supporter of the development of the international law of armed conflict since at least the mid-nineteenth-century. However, the issue of whether international law should provide rules regulating armed conflict is quite different from whether there should be an international mechanism to adjudicate whether those rules have been violated.

During the Hague Peace Conferences of 1899 & 1907, the U.S. supported the creation of an arbitral tribunal to resolve inter-state disputes. Although it was unwilling to submit to compulsory jurisdiction matters implicating strong national interests, the U.S. nonetheless welcomed the creation of the Permanent Court of Arbitration, with its purely consent-based jurisdiction, in part because of the role it would play in developing an international jurisprudence.

At the conclusion of World War I, the victorious powers at the Paris Peace Conference considered the creation of an international criminal court to prosecute abuses committed during the war. The U.S. was opposed to the creation of such a court for a range of reasons. Perhaps most significantly, accountability for war crimes simply did not rank high on President Woodrow Wilson’s post-war list of priorities. He was far more concerned with a “moderate peace, a viable democratic government for Germany, and, most of all, a League of Nations to secure future peace.”4 The U.S. delegation was instructed to express serious reservations, rejecting the tribunal and opposing the trial of the Kaiser, who, in the meantime, had found refuge in the neutral Netherlands.5 Specifically, the U.S. argued that there was no “precedent, precept, practice, or procedure” for such a tribunal, and that perpetrators should instead face prosecution before national military justice machinery.6 Specifically, the U.S. favored the creation of a joint, multinational tribunal or commission. In this way “existing national tribunals or national commissions which could legally be called into being would be

5. Id. at 14.
utilized, and not only the law and the penalty would be already declared, but the procedure would be settled.”

The creation of an international criminal court was also considered under the auspices of the League of Nations. Proposals to create such a court never came to fruition. The U.S. view at that time, and indeed the prevailing contemporary position, was that the creation of such a court was premature. Manley Hudson, U.S. jurist and former judge of the Permanent Court of International Justice, wrote in 1944, “[i]nstead of attempting to create an international penal law and international agencies to administer it, perhaps attention may more usefully be given to promoting the cooperation of national agencies in such matters as extradition, judicial assistance, jurisdiction to punish for crime, and coordinated surveillance by national police.” Hudson speculated that “[t]he local impact of anti-social acts inspires the desire of States to safeguard local condemnation and local punishment, and impingement on national prerogatives in this field will become possible only as the need for international action is clearly demonstrated.”

U.S. Attitudes toward International Criminal Courts in the Post-World-War II Era

The horrors of World War II provided the necessary catalyst to overcome the inertia of the international community. In striking contrast to its position at the 1919 Paris Conference, the U.S. was strongly supportive and played a central role in the establishment of both the Nuremberg and Tokyo International Military Tribunals (IMTs). While the U.S. was initially reluctant to endorse the proposal to create these tribunals, Secretary of War Henry L. Stimson is credited with persuading the U.S. government to adopt a “judicial solution” to dealing with Axis war criminals.

Although U.S. support for the creation of the IMTs may appear irreconcilable with the position taken by the U.S. delegation to the 1919 Paris Conference, it is worth noting the similarities between the IMTs and the U.S. counterproposal to create a multinational commission or tribunal. In addition to being run by the military, the tribunals were operating in Germany and Japan, territories over which the U.S. was exercising authority as an Occupying Power. Another key feature of the tribunals is that their personal jurisdiction was expressly limited to those acting on behalf of enemy states. Thus, there was no possibility that those acting on behalf of the Allies would face prosecution.

A key difference from the “mixed tribunals” proposed by the U.S. in 1919, however, is that the IMTs were mandated to prosecute violations

7. Id. at 147.
9. Id.
10. TAYLOR, supra note 5, at 34-35.
of international law, and not the domestic law of any country. Both tribunals were given jurisdiction to prosecute crimes against peace, war crimes, and crimes against humanity.

**Early UN Efforts to Create an International Criminal Court**

From the earliest days of the United Nations, the creation of an international criminal court was on its agenda. In 1946, acting on the initiative of the U.S. delegation, the UN General Assembly affirmed the principles of international law recognized in the Charter and judgment of the Nuremberg Tribunal. Not long after, the U.S. expressed support for the creation of an international criminal tribunal during debates surrounding the drafting of the 1948 Genocide Convention. However, the U.S. also took the position that a treaty creating a permanent court was of such a magnitude as to necessitate a separate project, and thus opposed creating a tribunal in the Genocide Convention itself.

In 1950, the General Assembly designated a Committee that included the U.S. to prepare a preliminary draft convention relating to the establishment of an international criminal court. Initially, there was a wide range of views on the subject, which included strong opposition from the U.K. Although the U.S. appeared supportive, it insisted that the envisioned court should only be able to try individuals whose state of nationality had recognized the court’s jurisdiction by treaty. After five years of work attempting to draft a statute, differences among UN Member States, exacerbated by the Cold War, led the UN to abandon the project. It was not until the Cold War ended in 1989 that the creation of an international criminal court would once again find a place on the UN agenda.

**The International Criminal Tribunals for the Former Yugoslavia and Rwanda**

U.S. support for ad hoc international criminal justice mechanisms was clearly visible in the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The U.S. was the driving force behind the establishment of both tribunals, contributing the greatest share of political and financial muscle. With the end of the Cold War, the U.S. gained a substantial degree of control, primarily through the Security Council, over UN mechanisms, and was thus more inclined to make use of them.

Both the ICTY and ICTR have jurisdiction to prosecute war crimes, genocide and crimes against humanity. However, unlike the IMTs, violations of the jus ad bellum are not within either tribunal’s subject matter jurisdiction. The geographic jurisdiction of both tribunals is strictly limited. For conduct occurring outside the territory of Rwanda, the ju-

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risdiction of the tribunal is limited by nationality. The temporal jurisdiction of the ICTR is limited to calendar year 1994.

Overall, the U.S. has been highly supportive of both tribunals and criticism has generally focused on bureaucratic and financial concerns. Nonetheless, U.S. support has weakened in situations where the work of the tribunals has conflicted with other U.S. foreign policy objectives, such as the ICTY Prosecutor’s review of the NATO bombing of Serbia and the indictment of Radovan Karadzic in the run-up to the Dayton Accords.

*The International Criminal Court*

U.S. policy toward the International Criminal Court has been the most visible and perhaps the most notorious. From the 1998 Rome Conference to the present time, U.S. policy toward the ICC shifted from the traditional U.S. pragmatic approach to firm opposition and then back to pragmatism.

In the early 1990s, the United States was generally supportive of the idea of a permanent international criminal court, but the U.S. was quite clear that such an institution should not have jurisdiction absent either the consent of the state of nationality of the perpetrator or a Security Council referral. After the Rome Conference, at which the United States was not completely successful in having its concerns addressed, U.S. support waned. Nonetheless, it remained engaged in the preparations for the establishment of the Court and ultimately signed the Rome Statute to enable its continued participation.

U.S. support lessened upon the election of George W. Bush, who brought with him an administration that was generally anti-internationalist. This sentiment was augmented following the attacks of September 11, 2001. By the spring of 2002, while the U.S. maintained an official position of neutrality towards the Court, as expressed by the U.S. in its notification that it would not proceed with ratification of the ICC Statute, U.S. opposition to the ICC was clear. This opposition became increasingly visible, manifesting itself in the passage of legislation and the adoption of diplomatic strategies that appeared to constitute frontal attacks against the ICC.

Later developments, including the Security Council’s Darfur referral, the transfer of the Charles Taylor trial to The Hague, and the waiver of legislative sanctions on states cooperating with the ICC, indicated a lessening propensity for ideologically rooted or visceral responses and a recognition of the value of the ICC in the attainment of other foreign policy objectives. Toward the end of the George W. Bush administra-
tion, this led the then State Department legal adviser to characterize the U.S. attitude as “pragmatic.”

**Internationalized, Hybrid and Related Criminal Tribunals**

This pragmatic approach is also visible in U.S. support for so-called hybrid tribunals, such as the Special Court for Sierra Leone (SCSL). The SCSL is distinct from the ICTY and ICTR in number of respects. The Special Court was established by a treaty between the UN and Sierra Leone, and the Sierra Leonean government was heavily involved in its creation. The Court is not a subsidiary body of the Security Council. Oversight is carried out by a Management Committee drawn from a group of interested states (who are also the principal funders), including the United States. The substantive criminal law to be applied by the Court, codified in the Statute of the SCSL, was derived from both international law and domestic law. The personnel of the Court are also mixed, employing both foreign and national staff.

The U.S. was the prime sponsor of the Court as it was an opportunity to build an international justice mechanism that it viewed as preferable to the ICC. The U.S. was also insistent that the SCSL Prosecutor be a UN national with a military background. U.S. support came not only from the Executive branch. For a variety of reasons, the Congress was also extraordinarily and uncharacteristically supportive of the SCSL.

Another key feature of the Special Court for Sierra Leone is found in its jurisdictional limitations. The scope of personal jurisdiction of the SCSL was a matter of concern for a number of UN Member State delegations. These delegations initially sought to limit the personal jurisdiction of the Court to Sierra Leonean nationals. Indeed, this was stipulated in the original draft statute of the Court. In the course of the negotiations, the nationality limitation was dropped in exchange for an exemption for peacekeepers. This exemption is subject to Security Council override, which of course would require the consent of its permanent members.

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14. Id.

15. Id.

16. Id.
The U.S. has also been generally supportive\textsuperscript{17} of the Extraordinary Chambers in the Courts of Cambodia (ECCC). The Extraordinary Chambers differ from the Special Court in a number of respects. They form part of the Cambodian judiciary, they were created on the basis of domestic legislation, and their subject matter jurisdiction is circumscribed by this same domestic law. A treaty between Cambodia and the UN regulates UN participation in the operation of the ECCC. In addition, as with the other hybrids, U.S. support was facilitated by the inclusion of restrictive language in circumscribing the scope of the Chambers' jurisdiction. The Chambers have jurisdiction to prosecute only "Suspects," who are defined essentially as those members of the Khmer Rouge who committed international crimes from 1975 – 1979.\textsuperscript{18}

The U.S. has also been largely supportive of other courts with an international dimension, including the internationalized Kosovo and East Timorese court systems, and the Bosnian War Crimes chamber. Similar to the ad hoc courts mentioned above, the U.S. has provided political, financial and personnel support in the work of each of these institutions. All of these institutions bring justice closer to the national level in some respect, and the establishment of each dovetailed with other U.S. foreign policy objectives.

In general, as hostility toward international institutions increased, the United States began to show increasing support for hybrid institutions. However, as with other international criminal justice mechanisms, U.S. support for the hybrids has been strongly influenced by competing foreign policy objectives, as well as the possibility of prosecution of U.S. nationals, especially U.S. agents.

\textit{The Obama Administration and the Policy of "Principled Engagement"}

The Obama Administration has adopted a policy of "principled engagement" with international organizations, including the International Criminal Court. The generally positive tone adopted by his administration heralded a continuation of the trend toward constructive engagement already in evidence during the latter years of the Bush administration. It also signaled a continuation of a pragmatic approach.

\textsuperscript{17} At times, U.S. political support for the ECCC has been tepid. This is attributable in part to conflicting views within Congress and opposition to the Chambers on the part of a number of human rights NGOs. Congressional ambivalence results from the fact that different Cambodian diaspora groups, as constituencies of several members of Congress, have different views on the Chambers. Although all of these groups want to see an accountability process, they are divided as to whether the Extraordinary Chambers can provide credible justice.

The U.S. under Obama re-engaged with the ICC Assembly of States Parties, and was a highly visible and intensely active participant at the ICC Review Conference in Kampala in June 2010. The large U.S. delegation exerted intense pressure to narrow the definition of the crime of aggression, and to limit its personal scope of application. It strove to ensure that the Court would not have jurisdiction for the crime of aggression over U.S. nationals or nationals of NATO allies. While it was unable to secure agreement on giving the Security Council the exclusive power to trigger aggression prosecutions, the U.S. did succeed in obtaining an exemption for nationals of non-States Parties, even when their conduct occurs on the territory of States Parties.

Nonetheless, the Obama administration has undertaken initiatives that indirectly support the work of the ICC. In October 2011, President Obama “authorized a small number of combat equipped U.S. forces to deploy to central Africa to provide assistance to regional forces that are working toward the removal of Joseph Kony from the battlefield.”19 The ICC has been seeking the arrest of Kony since 2005. At the same time, Obama's announcement of this initiative made no mention of the International Criminal Court arrest warrant, or indeed of any criminal justice response.

Principles and Themes of U.S. Policy toward International Criminal Courts

The U.S. continues to publicly base its policy toward international criminal courts on the following principles.

1. The United States is in principle committed to justice and accountability for all. This does not mean, however, that the United States seeks accountability at any cost. Even in cases in which the U.S. attitude toward international criminal courts is at its most favorable, these institutions are not viewed as ends in themselves. The U.S. approach is pragmatic – each institution is assessed in terms of its ability to advance U.S. interests, which include, but are not limited to, promoting accountability and the rule of law on the international level. When accountability efforts at the domestic level fail, the U.S. resorts to a balancing of interests. When international accountability efforts conflict with strong national interests, those interests will prevail.

2. It is best to prosecute crimes, including all international crimes, at the national level. Prosecution by any other court (including domestic courts of other countries)20 should be the last resort.

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20. There are of course strong parallels with the U.S. position on the exercise of universal jurisdiction.
3. The Security Council should have the final word on prosecution by any other court. The United States is strongly interested in maintaining the primacy of the Security Council in matters of peace and security. The United States regards the existence of the ICC as a threat to this primacy. Most observers assert that this position is a direct consequence of the status of the United States as a permanent member of the Council.

In addition, the historical survey above reveals certain consistent themes underlying U.S. attitudes toward international criminal courts. One consistent element would appear to be the (un)likelihood of prosecution of U.S. nationals. The United States has tended to support international criminal courts when the U.S. government has (or is perceived by U.S. officials to have) a significant degree of control over the court or when the possibility of prosecution of U.S. nationals is either expressly precluded or otherwise remote. This was certainly the case for the post–World War II military tribunals, as well as the Security Council ad hoc tribunals. U.S. support for the hybrid tribunals was similarly facilitated by the inclusion of jurisdictional limitations and other assurances of nonprosecution of U.S. nationals.

If the United States is assured that U.S. nationals will not be prosecuted (or, at least, not without its consent), it will engage in a balancing of interests to determine its level of support or opposition. Ideological leanings will of course color this balancing of interests and at times define some of those interests. To the extent an administration’s ideological strain in favor of criminal accountability is stronger than its ideological strain opposed to the creation of international authority, the prospect of U.S. support of a given international criminal court seems to increase.

II. THE U.S. AND THE SPECIAL TRIBUNAL FOR LEBANON

The Special Tribunal for Lebanon (STL) was established in the wake of the assassination of former Lebanese Prime Minister Rafiq Hariri, and the STL’s jurisdiction is tightly focused on this crime.

France was the driving force behind the creation of the tribunal. France was keen to establish the STL for a number of reasons, including its historical ties to Lebanon as well as the close personal relationship that had existed between Hariri and Jacques Chirac, then President of France. In its quest to have the tribunal established, the French government was willing to accommodate concerns of other permanent members of the Security Council.

The STL was originally envisioned as a hybrid tribunal to be established by bilateral treaty between the UN and Lebanon, modeled after the treaty establishing the Special Court for Sierra Leone. In early 2006, “[r]ecalling the letter of the Prime Minister of Lebanon to the Secretary-General of 13 December 2005 (S/2005/783) requesting inter alia the establishment of a tribunal of an international character to try all
those who are found responsible for” the Hariri assassination, the UN Security Council requested the Secretary General to negotiate an agreement with Lebanon for the establishment of such a tribunal. The Secretary General proceeded to do so. However, the Lebanese government failed to take the necessary internal steps to bring the agreement into force. In response to this impasse, the Security Council decided to use its Chapter VII authority to bring the agreement into force.

The U.S. is extremely supportive of the mission and work of the Special Tribunal for Lebanon (STL). The U.S. is the largest funder, after Lebanon; it is a member of the Tribunal’s Management Committee; and it is actively supporting the extension of the Tribunal's mandate. The U.S. has also made clear that its support is not contingent on the continued support of the Lebanese government. A spokesperson for the U.S. State Department recently stated, “The Special Tribunal’s work represents a chance for Lebanon to move beyond its long history of impunity for political violence. The Lebanese authorities’ support for, and cooperation with, the work of the Special Tribunal for Lebanon is a critical international commitment.”

A review of some of the Tribunal's features demonstrates why U.S. support for the Tribunal is unsurprising. The initial request for the creation of a Tribunal came from Lebanon. Although based in the Hague, it is a hybrid tribunal, with both Lebanese and foreign personnel. The STL, while originally envisioned as being a treaty based court, was ultimately created on the basis of the Security Council’s Chapter VII authority. Oversight is conducted by a Management Committee, of which the U.S. is a member.

The jurisdiction of the Tribunal is very narrowly circumscribed. The STL's jurisdiction encompasses only the assassination of Hariri and other related “attacks” between October 1, 2004, and December 12, 2005. The Tribunal can take jurisdiction over subsequent related attacks only with the consent of the Security Council. Thus, any member of the Security Council may veto jurisdiction over acts committed after December 2005. The tight focus of its jurisdiction lessens the chance of mandate creep, and is backed up by the requirement of Security Council authorization for expansion.

Further, the STL’s subject matter jurisdiction is limited to crimes under Lebanese law, including those “provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terror-

22. The Agreement establishing the Tribunal included a three-year sunset provision.
ism."24 As a hybrid institution, it conformed to the U.S. position that justice should be done as close to the domestic level as possible, and that prosecution should only be internationalized to the extent strictly necessary. Internationalization was deemed necessary for security and for capacity reasons, including bolstering judicial independence. Lebanese law was deemed a sufficient basis for criminal responsibility.

In addition, the Statute of the Tribunal does not expressly abrogate immunities. It also includes a somewhat higher threshold for the liability of superiors than that set forth in the ICC Statute. These features arguably help to keep the Tribunal focused on Lebanese actors by creating additional obstacles to prosecuting foreign officials.

Other foreign policy interests factored into U.S. policy toward the STL. The U.S. had been keen on supporting Lebanon against Syria. The focus on the assassination of the pro-Western / anti-Syria Hariri meant that the tribunal's findings would likely implicate forces unfriendly to the west, namely Hezbollah and Syria.

However, the Statute of the STL was being drafted during the summer of 2006, while an armed conflict raged between Israel and Hezbollah on Lebanese territory. The conflict inflicted extensive harm to life, infrastructure, and property, and was accompanied by grave allegations that international crimes were being committed by Hezbollah and Israeli forces. This of course added an additional dimension to U.S. concern over possible mandate-creep by the Tribunal. As such, the U.S. pushed strongly for the tight jurisdictional limitations.

The U.S. also insisted that the subject matter jurisdiction be limited to crimes under Lebanese law. The U.S. feared that the inclusion of war crimes and crimes against humanity within the Tribunal's jurisdiction would lead to difficult questions as to why its temporal jurisdiction did not extend to the armed conflict with Israel, or perhaps to requests to the Security Council to extend the temporal jurisdiction on that basis.

The U.S. had an unlikely ally in Russia in its attempts to preclude prosecution of foreign officials. Russia was keen to protect Syria, and similarly insisted on the exclusion of international crimes, as well as the exclusion of any abrogation of immunity.

All of these features—the exclusion of international crimes; the absence of a provision abrogating immunity; the heightened standard for superior liability; the tight, event-based jurisdiction; the temporal limitation with extension subject to Security Council approval—make prosecution of U.S. officials or those of U.S. allies highly unlikely, clearing the way for U.S. support.

III. LEGITIMACY AND THE LIMITS OF PRAGMATISM

The legitimacy of the STL has been challenged on a number of grounds. Some have impugned the legitimacy of the STL by reference to the fact that its jurisdiction is focused on only one event; that the applicable criminal law is limited to domestic Lebanese law; that the Statute of the Tribunal, initially drafted as a treaty, could not be brought into force by Security Council resolution; that the temporal jurisdiction was limited to preclude the possibility of prosecuting Israelis for conduct committed in the 2006 armed conflict; that the Statute permits trials in absentia; that the creation of the STL constitutes an impermissible interference in the internal affairs of Lebanon; that it was an inappropriate use of the Security Council's Chapter VII power; and that it constitutes selective justice.

Most of these challenges can be readily dismissed whether by reference to existing, accepted practice or on the level of principle. Nonetheless, it is useful to examine each challenge, as well as their cumulative effect.

That its jurisdiction is focused on only one event: There is no reason in principle to object to the creation of a tribunal with jurisdiction to prosecute conduct related to a single event. To begin with, international criminal justice is still primarily rendered on an ad hoc basis. To the extent that this essentially reduces to a charge of selective justice, it will be addressed below. If for now, we accept the principle of ad hoc justice as legitimate, then the breadth or narrowness of jurisdiction is not of itself problematic. Each ad hoc tribunal created to date has had jurisdictional limitations tied to an event, or series of related events. The jurisdiction of the Rwanda tribunal centers around the genocide that took place there in 1994, and the tribunal's temporal jurisdiction is thus limited to calendar year 1994. Of course there is a difference in the scale of the violence perpetrated there and the Hariri assassination, but that distinction goes to the legitimacy of the decision to create a tribunal in response to the event, which will be addressed below.

That the applicable criminal law is limited to domestic Lebanese law: The STL is not the only hybrid tribunal to apply domestic law. Indeed most of the hybrid tribunals created to date were given jurisdiction to prosecute certain violations of the domestic law of the relevant state. Indeed, the subject matter jurisdiction of the ECCC consists entirely of Cambodian law. Many of those crimes are derived from international law, but the same could be said of the crime of terrorism within the subject matter of the STL. Indeed the STL has drawn upon international law to inform its interpretation of the crime of terrorism under Lebanese law.

That the Statute of the Tribunal, initially drafted as a treaty, could not be brought into force by Security Council resolution: This challenge is limited to the technical issue of the Security Council's legal authority,
and whether that authority extends to the bringing into force of a treaty. If the Security Council is properly acting pursuant to its Chapter VII authority (an issue that will be discussed below), there is no doubt that it would have the power to create the Tribunal and to impose upon Lebanon all of the obligations set forth in the Agreement and Statute of the STL. This is settled by the accepted practice of the United Nations and its Member States in relation to the creation and operation of the ICTY and ICTR.

The particular objection here is thus of a highly technical nature—whether the Security Council can bring into force the treaty as such. It is now generally accepted that the Security Council when acting within the scope of its mandate may impose legal obligations on UN Member States. Indeed, this power has even been interpreted to extend to a quasi-legislative authority, as seen in the Security Council resolutions following the September 11, 2001 attacks in the United States that required all states to adopt domestic legislation to criminalize certain terrorism related conduct. The International Court of Justice has opined that in ascertaining the legally binding character of Security Council resolutions, the touchstone is whether the Council intends to bind Member States. The clearest expression of this intent is the use of the term “decides,” as it is “decisions” of the Security Council that all Member States are legally obliged to carry out under Article 25 of the UN Charter. By expressly invoking its Chapter VII authority and by using the term “decides,” the Security Council clearly demonstrated its intent to legally establish the Tribunal and to impose upon Lebanon the legal obligations contained in the Tribunal’s Agreement and Statute, which were annexed to that Resolution.

More broadly, the Security Council’s Chapter VII authority is now generally understood to include the power to impose legal obligations on all UN Member States, and indeed even on those states that are not members of the UN; to override the non-intervention principle; and, essentially, to substitute its consent for that of Member States (e.g. waiving immunities of a Member State’s officials or substituting consent to a treaty).

That the temporal jurisdiction was limited to preclude the possibility of prosecuting Israelis for conduct committed in the 2006 armed conflict: The exclusion of the 2006 armed conflict from the STL’s jurisdiction follows directly from the ad hoc nature of the tribunal. The STL was created, as are all ad hoc tribunals, to deal with a particular event, or series of connected events, occurring in a particular time and place. Is there a principled basis for excluding crimes committed during the 2006 armed conflict from the jurisdiction of the STL? It is simply that that is not the event for which the tribunal was created. In order to keep the work of the STL focused on the Hariri assassination, the tribunal’s jurisdictional limitations were intentionally designed to prevent mandate-creep. The fact that the international community has not de-
cided to employ a tribunal to deal with the issues that arose in the 2006 armed conflict is a separate matter, and will be addressed below under the charge of selective justice.

That the Statute permits trials in absentia: The STL Statute provides for trials in absentia, and the STL Trial Chamber recently decided to proceed with trials in absentia for the four accused, all of whom are members of or otherwise connected to Hezbollah. Not since the post-World War II IMTs has an international criminal tribunal been empowered to hold trials in absentia. At the same time, the inclusion of this facility in the STL Statute is unsurprising since the domestic law of Lebanon expressly permits trials in absentia within the Lebanese criminal justice system. Trials in absentia are also permitted under international human rights law, subject to certain conditions. The drafters of the Statute included these conditions in the Statute in order to ensure compliance with international human rights law.\(^{25}\)

That the creation of the STL constitutes an impermissible interference in the internal affairs of Lebanon: The Lebanese government, and indeed Lebanese society, is deeply divided between primarily two political camps. Those who assert that the STL is illegitimate regard this political dispute, of which the Hariri assassination is one element, as a purely internal matter, and that interference by foreign states or by the United Nations constitutes a violation of the principle of non-intervention, one of the bedrock principles of the international legal system. The most straightforward response\(^{26}\) to this challenge may be found in Article 2(7) of the UN Charter, which codifies the non-intervention principle. Article 2(7) states, “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” This last phrase is a sufficient rejoinder to claims of unlawful intervention. The Security Council expressly invoked its Chapter VII authority in bringing into force the legal basis of the Tribunal. Whether the Security Council acted properly in invoking its Chapter VII authority in the context of the situation in Lebanon is addressed next.

That it was an inappropriate use of the Security Council’s Chapter VII power: The decision to invoked Chapter VII authority is essentially

25. Id. Sec. III, art. XXII

26. It could also be argued that there has been no interference since the Prime Minister of Lebanon initially requested the establishment of the Tribunal. However, this argument is subject to the challenge that Lebanon failed to take the necessary steps to bring the Agreement into force, necessitating the use of the Security Council’s Chapter VII authority.
a political decision. The Security Council’s official justification for creating the STL is that the climate of impunity for political assassination in Lebanon must be challenged. There have been dozens of political assassinations in Lebanon over the past few decades. The Tribunal’s supporters claim that the prosecution of the perpetrators of the Hariri assassination will serve as a deterrent, discouraging continuation of the practice of assassination as a political tool.

While this decision is essentially political, there are legal restraints on the Security Council’s discretion. The ICTY, in its seminal Tadic Appeal decision of 1995, set forth the legal limits on the scope of the Security Council’s Chapter VII authority. It recalled that article 39 of the UN Charter empowers the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” The ICTY Appeals Chamber held that the Security Council had broad discretion to make this determination and to fashion measures in response. It is not unreasonable for the Security Council to find the political instability in Lebanon to constitute a threat to peace and security. Nor is it unreasonable to determine that a tribunal focused on ending impunity for political assassinations is a measure directed toward the maintenance or restoration of international peace and security. This is supported by ample practice. The Security Council has repeatedly found the situation in Lebanon to constitute a threat to peace and security, and it has used its Chapter VII power in other contexts to create tribunals as measures to maintain or restore international peace and security.

That it constitutes selective justice: In light of the above analyses, it is apparent that the technical legal objections to the STL’s legitimacy are relatively easily overcome. Legitimacy, however, entails more than just legality.

Several of the charges above relate or reduce to the assertion that the STL is illegitimate as it constitutes an instance of selective justice. This is the most complex challenge to the legitimacy of the Tribunal, as it can be understood on a number of levels. It is also the charge against which U.S. policy in relation to the STL is most vulnerable.

On one level, all justice is selective, both in the international legal system and in domestic legal systems. In no legal system is every crime prosecuted. Indeed, it would be impossible to do so. Prosecutorial discretion is a common feature of legal systems around the world. The failure to prosecute every crime does not by itself undermine the legitimacy of assigning criminal responsibility for those crimes that are prosecuted.

This is all the more true in the international legal system, with its lack of central authority and absence of a universal justice system; its
relatively fragile and immature institutions; the challenges in accommodating the diversity of values and of infrastructures of national systems; and the lack of a democratic basis for international authority\textsuperscript{27} as the system is presently constituted. U.S. pragmatism in relation to international courts is a response to this reality.

The U.S. "pragmatic" approach was summed up by former State Department Legal Advisor John Bellinger when he stated in May 2006:

> In our view, such courts and tribunals should not be seen as an end in themselves but rather as potential tools to advance shared international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes. Consistent with this approach, we evaluate the contributions that proposed international courts and tribunals may make on a case-by-case basis, just as we consider the advantages and disadvantages of particular matters through international judicial mechanisms rather than diplomatic or other means.\textsuperscript{28}

A pragmatic approach meant that there was an international criminal tribunal for Rwanda, a hybrid tribunal for East Timor, and no tribunal for Colombia. In this sense, selective justice refers to the decision to employ an international tribunal to deal with the situation in one country or region, and not in another. The idea put forward by the U.S. is that international courts are but one tool in the toolbox, and that the international community should use that tool when it would be appropriate, helpful, and otherwise in its interests. This type of selective justice is a consequence of the political nature of the decision to create a court in a system where courts are not a given. It is seen as an inevitable consequence of the present phase of development of the international legal system, and has been accepted as a legitimate feature in a fragmented system.

To say that international tribunals are policy tools, however, is not to say that the U.S. does not regard them as courts. In a sense, all courts, whether international or domestic, are tools — tools for governance and dispute resolution. They can serve other interests as well. The important caveat is that there are certain features of courts that make them courts, and these features cannot be erased without delegit-

\textsuperscript{27} The United Nations was not designed to be a democratic system. It is embedded in the traditional interstate system. The General Assembly is sometimes referred to as a more democratic organ than the Security Council because each state has a vote in the General Assembly. Of course, it is hardly democratic that China and Tuvalu should each have one vote considering the vast difference in population size. More importantly, there is no requirement that government delegations represent the views of the people of that state.

\textsuperscript{28} John Bellinger, Statement given at George Washington School of Law: International Court and Tribunals and the Rule of Law (May 11, 2006).
imizing the institution as a "court." It might become something else, and might be a legitimate 'something else,' but it would no longer be a court.

An indispensable feature of any court is independence. The notion of judicial independence, and indeed of judicial supremacy in determining and interpreting the applicable law, is deeply rooted in U.S. constitutional history. It is because of this recognition of the independence of courts, and the understanding that courts as independent organs will take on a life of their own, that the U.S. has been careful to front-load jurisdictional limitations that will restrict the scope of who can be prosecuted.

This of course leads to a different kind of selective justice. Instead of referring to the decision to create a tribunal here and not there, selective justice in this sense refers to delineation of the scope of possible accused. Once a decision is taken to employ a tribunal in response to a particular event or series of events, the tribunal's creators have discretion to define its jurisdiction. Are there limits to this discretion?

Certain jurisdictional limitations flow from traditional principles of international law. Thus, limiting jurisdiction by reference to territory would seem uncontroversial. Hence, the territorial jurisdiction of the ICTY extends only to the territories of the former Yugoslavia, which is a reasonable limitation in light of the Tribunal's mandate. But would it be permissible to limit the ICTY's personal jurisdiction to a particular ethnic group? Jurisdictional limitations on grounds of ethnicity, race, religion, gender, or national origin would seem to conflict with basic principles of human rights law, and would arguably deprive a tribunal of legitimacy.

Would it be more acceptable if the limitation were based on nationality? Would it be legitimate if the ICTY's personal jurisdiction had been limited to prosecuting only those of Croatian nationality? Can such a question only be answered by reference to generally accepted facts about a given situation? Another critical feature of courts is evenhandedness. This would clearly be compromised in the case of the ICTY if it were restricted to prosecuting only perpetrators of one nationality.

Is it ever permissible to limit the personal jurisdiction of a tribunal to one group? The ECCC's personal jurisdiction is essentially limited to members of the Khmer Rouge. There would likely be very little objection on the part of states if an international tribunal were established to prosecute exclusively members of Al Qaeda, or even if a tribunal had been established just to prosecute Osama bin Laden.

The IMT at Nuremberg was limited to prosecuting only those acting on behalf of the Axis Powers. Consider also the jurisdiction of the Rwanda tribunal. Some have suggested that the restriction of the Tribunal's jurisdiction to calendar year 1994 essentially meant that only Hutus would be prosecuted. If international crimes were committed by
all parties to these conflicts, are jurisdictional restrictions justified by reference to the relative scale of criminality by group?

Coming back to the Special Tribunal for Lebanon, it might be argued that the selection of the event that would form the focus of the STL’s jurisdiction was essentially a proxy for prosecuting a particular group. As such, even if the Tribunal’s independence is guaranteed, its deployment constitutes selective justice in the narrow sense—that it was essentially deployed against one party in an ongoing political conflict that has deeply divided Lebanon. Is it a case where there is political consensus on the identity of the ‘bad guys’? The U.S. regards Hezbollah as a terrorist organization, but this perception is not universally shared among states. Is it sufficient that Hezbollah is seen as more prone to utilize the tool of political assassination than the other political camp?

It is in this sense that the charge of selective justice resonates to a degree—that the jurisdiction of the STL was not fashioned with an even-handedness with respect to the ongoing political conflict in Lebanon.

Ultimately, however, the legitimacy of the STL can be grounded in a few simple observations. The Tribunal’s jurisdiction is focused on what appears to be the intentional killing of a human being. Murder is universally recognized as a crime. It is criminally prohibited in every legal system in the world. The final characterization of the crime and the determination of criminal responsibility are left to the Tribunal. The STL is mandated to provide a fair process and to comply with international human rights standards. In this manner it provides protection against unwarranted accusations and unjustified assertions of criminal responsibility. The Tribunal’s jurisdiction is broad enough to thoroughly investigate the circumstances surrounding the assassination and to make a reliable determination of criminal responsibility. It is certainly the case that there have been other serious crimes committed in Lebanon and that there are many other victims deserving of justice, but that fact does not delegitimize this murder prosecution.

Nonetheless, of all the ad hoc tribunals created to date, the STL arguably represents the clearest example of the instrumental use of international courts, and as such, comes the closest to legitimacy’s tipping point. Although it may be appropriate for politics to play a role in shaping a court’s subject matter jurisdiction, even in relation to conduct that has already been committed, it must be undertaken with caution. Excessive manipulation of a tribunal’s jurisdiction could compromise the perception of even-handedness and could also lead to a de-contextualization of, and thus misapprehension of, conduct.

This is also the greatest challenge to the U.S. pragmatist position. The idea of a court comes with a lot of ideological baggage, some of which resounds in other value-laden areas of international law. Indeed,
international law as a whole has been permeated by the development of human rights law, as well as older notions of equality before the law and other principles of natural justice. Although this baggage may not be essential to a court's technical operation, it still serves an important purpose. Courts find their credibility and legitimacy in that baggage.
I. INTRODUCTION

Thinking about the future of international law, as an authoritative process, all but requires us to identify its functions in global society. A key function in the future will be its management of transnational administrative activity, itself organized on a functional basis. Of course, projecting trends of any sort to forty years from now — a biblical-sounding span of time, to be sure — borders on pure speculation. Still, such ambitious forecasting can help reveal the evolving reality and breadth of international law in its administrative mode, fresh ways of defining it, and the options for improving it.

Exactly forty years ago, two proponents of the transnationalist approach to the study of international relations urged "[s]tudents of international law and organizations . . . [to] become involved in the study of transnational relations not merely for the sake of understanding reality, but also in order to help change reality." How true that still is!

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1. This essay, which I was invited to write as a "lightly footnoted think piece" concerning the next forty years of international law, pays tribute to the forty-year history of the Denver Journal of International Law and Policy, on whose Board of Advisors I have had the privilege to serve. I also wish to congratulate and honor the founder and prime mover of the Journal, my esteemed and dear friend, Professor Ved P. Nanda. Although Ved still has the appearance and energy of a 39-year-old, it is now clear from this fortieth anniversary commemoration that outward appearances can be deceiving.

2. I have chosen this phrase, awkward as it may seem, advisedly. The terms "international administrative law" or "transnational administrative law," as currently understood, do not seem broad enough insofar as they usually refer to limited regulation and dispute resolution within confined, rather formal organizational structures. Nor am I even certain that such a distinct body of law exists as yet. On the other hand, international law in a general sense does in fact govern a broad range of transnational administrative activity, and I foresee a robust future not only for the growth of this regime, but also — and this is worth emphasizing — for the increasing prominence of this particular mode of international law in the future.

During the past forty years, the international (or, if you will, transnational) legal system has expanded substantially beyond traditional nation-state relationships, including those within intergovernmental organizations ("IGOs") such as the United Nations and its specialized agencies. The growing democratization and, with it, pluralization of civic society has necessitated that development. Most spectacularly, the individual, only recently endowed with legal personality, has assumed a primary role on the global stage, particularly in the context of human rights. Less visibly, some nongovernmental organizations ("NGOs") have also acquired a limited measure of international legal personality. Countless other NGOs have joined the supporting cast of these international legal actors by initiating international legislation, lobbying within IGOs, interpreting international law, serving as amici curiae, and promoting state compliance with international obligations.4

The resulting complex of communication channels, specialized fora, decision-making bodies, and tribunals for resolving disputes is almost mind-boggling — so much so that considerable attention has been lavished on problems of overlapping and sometimes conflicting legal authority5 and tribunals.6 The aspirations for a neat, federalized world, universal collective security, and highly centralized socioeconomic cooperation — as in the original design for the United Nations — are largely gone, as are the aesthetic and therapeutic virtues of simplicity and centrality in the international system. The system is messier than it was forty years ago, but perhaps also more promising.

The promise of international law will lie in its capacity to fit within the contours of the messy, complex global society based on, but transcending, the traditional nation-state framework of governance. The international legal system will therefore need to be cosmopolitan and capable of productively coordinating public and private processes.

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In keeping with democratic and egalitarian values, these processes will need to be transparent and closely attuned to basic human needs.

Today, efforts are underway to remap an international system left incomplete by Rand McNally and GPS devices. Nation-states and IGOs are no longer the only pieces in the global puzzle. Instead, for reasons of convenience, budgetary restrictions, lack of expertise and otherwise, governments and IGOs have designated, deferred to or co-opted a broad range of NGO and other private entities to manage important transnational activities and the issues and disputes they generate. These activities range from utilities, postal service, and banking to humanitarian relief, sports, and arbitration of commercial disputes. The consequential growth of a “global civil society” is not so much an instance of “privatization” as it is a sensible redeployment of expertise and administrative competence in public-private partnerships.

Forty years ago, the indispensable role of functional NGOs within the international system had already become apparent. Even earlier, in the immediate aftermath of the First World War, the tripartite structure of the new International Labor Organization enabled representatives of labor unions and management to join governments in the initiation, drafting, and supervision of international social legislation. After the Second World War, several studies highlighted the emergence of functional organizations in the new world order and forecast a robust role for them. These organizations included public international utility corporations with limited international legal personality such as the Scandinavian Airlines System (“SAS”), the Basel-Mulhouse Airport, the Franco-Ethiopian Railway Company, the International Moselle Company, and the Central African Power Corporation. A leading international law scholar observed as follows:

Post-war developments have clearly demonstrated that such progress as the nations have achieved towards cooperation for common purposes and objectives have overwhelmingly occurred on the functional level, i.e., by the establishment of specific — bilateral or multilateral — institutions and organizations for

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defined purposes, rather than by general constitutional transfers from national to international sovereignty.\(^\text{10}\)

During the last forty years, several significant NGOs have acquired a limited measure of international legal personality. These include, for example, the International Committee of the Red Cross, a Swiss corporation charged with responsibilities under the Geneva Conventions of 1949 (particularly under Common Article 3); the Olympic Movement, also Swiss-based, as the core family of institutions in the organization of international sports with evolving responsibilities that extend far beyond the quadrennial Olympic Games; and the institutes that serve as surrogates for governments in conducting diplomacy and normal relations with Taiwan. These NGOs, as well as others with or without international legal personality, have indeed "come to assume an enormously important role, not only at the domestic level, but also in global regulation."\(^\text{11}\)

External developments, normally beyond the control of governments, are increasingly instrumental in shaping the global civil society and its expectations. The most important of these developments has been the extraordinary profusion and diffusion of electronic data, new internet technologies, the emergence of the social media, and a resulting informality of transnational decision-making in civic and political affairs.

Meanwhile, despite the efforts to remap the international system, the portrayal of its formal structure is still old-fashioned. The more things change, the more they are viewed in the same way. This is understandable, both because the adjustment of our view of the global order is always gradual and because the Westphalian system of nation-states remains fundamental. Unfortunately, the formal legal structure, as we are apt to envisage it, does not conform to the complex, pluralistic social system that we can almost see growing by the day, and it cannot be relied upon to deal with the serious challenges that confront global society.

We are therefore struggling to define a new legal structure that is equipped to meet challenges beyond the competence of established doctrines, institutions, and jurisdictional limitations. We need to be keenly aware of significant trends in the normative order. One such

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11. Francesca Bignami, From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law, 59 Am. J. Comp. L. 859, 870 (2011) (referring to the "many self-regulatory and public-private schemes that have blossomed at the international level").
trend that we will need to acknowledge in forecasting international law forty years from now is the steady growth in its administrative mode.

II. THE ADMINISTRATIVE FUNCTIONS OF INTERNATIONAL LAW

A. The Formal Structure

The concept and science of international (or transnational) administrative law, as currently understood, is at least one hundred years old. In practice, however, this regime of law has expanded only modestly, cabined as it is by the formal structure of international law. A few leading examples of this regime will suffice to define its limited scope. Employment-related disputes are resolved within the United Nations, its specialized agencies, and other IGOs by administrative tribunals and appellate mechanisms, tempered by advisory opinions of the International Court of Justice. The Appellate Bodies of the World Trade Organization review administrative decisions in disputes among member states. And the exhaustion-of-remedies requirement, as a construct of administrative procedure, may require the pursuit of local administrative remedies by investors and other private parties before they may properly claim the diplomatic protection of their national states against other states.

For the most part, this constricted view of international administrative law fails to include the myriad claims and counterclaims within the purview of often low-level administrative decision-making within IGOs, NGOs, and transnational networks. By and large, the major controversies that beset the global community — armed conflict, environmental damage, climate change, human rights, and so on — escape our blinkered vision of international law in its administrative mode. This is entirely understandable given the strict limitations we impose on the formal structure of international legal authority, the reluctance of governments to expand that authority, and the unwillingness of IGOs to expose their units and individuals to scrutiny, let alone liability, within the international legal process.

The shallowness of the traditional regime of international administrative law is also understandable as a reflection of domestic practices. They, too, formally rely on an outmoded framework that is

12. See, e.g., Paul S. Reinsch, International Administrative Law and National Sovereignty, 3 AM. J. INT'L L. 1, 5-6 (1909); MITRANY, supra note 9, at 145-46 (forecasting (perhaps too optimistically) that the working, and especially the co-ordination, of functional activities would build up not only sectors of international administration but gradually also a body of international administrative law, which in the end might do more toward unifying the ways of the world than attempts at codifying abstract juridical rules and principles. International society will acquire a living body not by our pledging each other in solemn pacts and charters but by our working together in the humble tasks of everyday life).
defined largely in terms of administrative organization and review. The fact remains, however, that the actual scope of administrative authority has expanded greatly at both domestic and international levels. At the international level, this is primarily because of both the external factors noted earlier, globalization, and an increasingly pluralist global society. If so, simple justice would seem to call for more attention by the global community to administrative processes below the level of national governments and beyond an exclusively public domain.

B. A New Model

As we have seen, the formal structure that defines the role of administrative law in the international legal system is inadequate and unrealistic because it fails to embrace the emerging pluralism and breadth of global authority, with its mix of private and public institutions. A realistic portrayal of that role would depict a more complex process by which international law is routinely brought to bear on the process of discrete and often low-level decisions and dispute resolution. This is an empirical observation. Just as important is a normative observation that, in looking to the future, a broader, more realistic concept of international law in its administrative mode will better serve global society in addressing the big issues of the day at their grass roots.

A proposed new model of domestic administrative law, based on comparative insights, recasts it as "an accountability network of rules and procedures through which civil servants are embedded in their liberal democratic societies." This model, though still more or less

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13. Peter J. Spiro, A New International Law of Citizenship, 105 AM. J. INT'L L. 694, 746 (2011) (concluding a persuasive commentary on the internationalization of citizenship and acknowledging that this "is not to say that international law now delivers a comprehensive regulatory regime. States will retain important discretionary powers into the future. But no function of governance will be shielded from international law as a categorical matter, membership decisions included."). The same observations would seem to apply in the context of international law in its administrative mode.

14. See Edward W. Soja, Seeking Spatial Justice 22-23 (2010) (observing that, "[g]lobalization has also been associated with state restructuring and challenges to the political domination of the nation-state as the exclusive political space for defining citizenship, legal systems, and hence justice itself. Struggles for justice, more than ever before, stretch across political scales, from the global to the local . . . [T]he theory of justice needs to be reconstituted in a "post-Westphalian" world, referring to the origins of the now outdated nation-state system. All struggles over democracy, solidarity, and the public sphere revolve around rethinking the concept of justice.").

15. Bignami, supra note 11, at 860-61 (elaborating on the purpose of recognizing the new model by noting that Theories of administration and administrative law have changed dramatically in recent times. The traditional hierarchical image of state bureaucracy has been confronted by an increasingly disaggregated reality of autonomous service-delivery bodies, independent regulatory agencies, newly
political, would replace the orthodox but antiquated model that reposes confidence in expert bureaucracy to accomplish public purposes and therefore focuses largely on formal aspects of administrative organization and review.

In redefining administrative law, this shift from a hierarchical concept, based simply on administrative organization and review, toward an ethically-based approach of accountability to the general public would seem to encourage the best practices of international law in its administrative mode forty years hence. In fact, the architect of the new model of domestic administrative law has noted its potential applicability within the international legal system of administrative governance.\(^{16}\) After all, the correspondence between domestic and international systems is well-established. For example, the European Court of Justice and the European Court of Human Rights have adopted German doctrines of administrative law such as proportionality, equality, and legitimate expectations. The judicial decisions based on these doctrines have been influential throughout Europe, thanks to their dissemination in regional networks of legal elites.\(^ {17}\) Why not global networks? A dichotomy between the pluralist tradition for representing interests in such countries as the United States, and a contrasting neo-corporatist tradition in continental Europe, would not seem to be an impediment. Transnational management would necessarily defer to different structures in different states for the representation of interests so long as accountability for transnational administrative actions is the controlling principle.

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\(^{16}\) Id. at 860, 906 (offering valuable insights into how the new paradigm that she proposes fits within the international legal system by asking, "How should political accountability, interest group representation, judicial review, and diffuse accountability be organized in the European Union, the World Trade Organization, transnational networks of banking regulators, and other sites of global governance? The natural first place to look is to domestic systems of administrative law, with their numerous legal variations, long histories, and rich experience.").

\(^{17}\) Id. at 900.
It has been said that administrative law, however defined, is constitutional law made concrete. Broad requirements are brought down to earth. Transposed to the international level, this observation suggests, similarly, that foundational regimes — "the law of the sea," "human rights law," "the law of armed conflict," and so on — become concrete when they are reduced to specific exercises of administrative authority and discretion. A focus on the accountability of such derivative decision-making, whether public or private, would surely broaden our understanding and use of international law in its administrative mode.

III. THE RELATIONSHIP BETWEEN NGOS AND INTERNATIONAL LAW IN ITS ADMINISTRATIVE MODE

It is well-established that "[a]dministrative law is implicitly functional law, and so is administrative practice." It does not follow, however, that all NGOs, merely by performing a desirable function in global society, need to be integrated into a workable system of international administrative law. Indeed, for reasons of manageability and coherence, the administrative regime should be selective.

Although hundreds of NGOs are experienced actors in international governance — a few with limited international legal personality — their legal status generally is uncertain, as it always has been in the modern era. NGO claims to be acting on behalf of what has been called "global stakeholder communities" have raised endless issues of legitimacy and representativeness.

Some of the skepticism about the legal status of many NGOs is well founded. Although many NGOs have observer status in the Economic and Social Council (ECOSOC) and enjoy other forms of recognition,
the strength of their functional competence is often dubious, as is the
claim of some of them to be acting on behalf of a constructed, global
civic society. Moreover, NGOs are not always blameless, for example,
when they have fomented disorderly, physically injurious protests.\textsuperscript{23}
Much of the skepticism about the legal status of NGOs, however, is
because they are typically lumped together and analyzed uniformly.
This analysis is not only overgeneralized, but often backward. Instead
of asking whether NGOs as a whole bear certain constructed
characteristics of legitimacy and representativeness, each NGO should
be independently analyzed in terms of the normal expectations for
recognition by states under international law, such as effective, self-
regulatory control. Moreover, short of anointing a particular NGO as a
whole with limited international legal personality, states and IGOs
could recognize the legal status of discrete mechanisms within NGOs in
order more fully to portray international law in its administrative
mode.

A current trend that we may expect to continue during the next
forty years is toward a litmus of accountability rather than legitimacy
and representativeness to define the status of NGOs with the
international legal system.\textsuperscript{24} We should ask whether a particular NGO,
or a discrete unit of it, in performing its recognized function or
functions, truly benefits a community of stakeholders and perhaps the
larger global community. Is the NGO adequately regulating itself? Is it
performing its designated functions according to its own charter? What
is it really accomplishing administratively? Posing these questions
brings NGOs squarely within the new model of administrative law
based on the principle of accountability to the public.

Another trend has been described as “the most striking recent turn
of the governance debate . . . at the forward intellectual margin.”\textsuperscript{25} It
involves the inclusion within the ambit of international law of
technocrats linked by intergovernmental networks. Their legitimacy

\textsuperscript{23} \textit{See Sins of the Secular Missionaries}, \textit{ECONOMIST}, Jan. 27, 2000, at 25, available

\textsuperscript{24} \textit{See, e.g., NGO ACCOUNTABILITY: POLITICS, PRINCIPLES & INNOVATIONS} 196, 208-
09 (Lisa Jordan & Peter van Tuijl eds., 2006).

\textsuperscript{25} Kenneth Anderson, \textit{What NGO Accountability Means — and Does Not Mean}
administrative governance, technocratically legitimate forms of global governance arise in
which NGOs are curiously left aside in favor of the technocrats of intergovernmental
networks. The question of political legitimacy proffered by NGOs, as global civil society,
is no longer an interesting issue. Neither, for that matter, is the legitimacy of
international organizations as political organizations as such. ‘Legitimacy,’ in the new
administrative-technocratic model, comes therefore not from any genuinely ‘political’
source at all, but is instead simply a by-product of the competent provision of
administrative services. Legitimacy, in such case, is no longer a matter of
representativeness but merely a matter of who is able to make the internet run on time.").
defined by their competence in providing administrative services. Again, we should ask whether such a network is truly accountable to the public in providing such services.

IV. CONCLUSION

It is a cliché to say that we will all be living increasingly in a diffuse, pluralist world. This trend means that international law in its administrative mode must take myriad administrative practices into account, as they evolve in our cybernetic era of mixed private and public decision-making and dispute resolution. The law must therefore capture the significance of public-private networking and nongovernmental authority, realities that are easily overlooked when we rely on an antiquated concept of administrative law that is limited to formally established structures of organization and review.

A new model of administrative law, based on accountability rather than a hierarchy of formal organization and review, is certainly an idea whose time has come. This new model for the application of international law in its administrative mode can readily embrace both “private” (often NGO) and “public” (often IGO) entities. Although an intergovernmental structure of international law will remain essential, it is likely that a more pluralistic definition of administrative law, couched in requirements of accountability, will substantially expand the horizons, excite the imaginations, and tax the skills of international lawyers during the next forty years.
THE ICJ: ON ITS OWN

EDWARD GORDON*

"[A]n institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life."1

I am honored and pleased to contribute to this Festschrift for Ved Nanda. It was at Ved’s invitation, four decades ago, that I contributed some thoughts to the very first issue of the Denver Journal of International Law and Policy.2 They concerned the International Court of Justice’s abrupt and highly unpopular dismissal of a suit brought by Ethiopia and Liberia challenging the legality of the application of South Africa’s apartheid policy in South West Africa, a territory South Africa administered pursuant to a League of Nations Mandate. In what was expected to be the merits phase of the litigation, the Court had reversed, or seemed to reverse, a ruling it had made four years earlier in the suit’s preliminary objections phase, this time holding that the Applicants had not established that their legal rights in the administration of the Mandate were sufficient to constitute a cause of action.3

The earlier ruling had been obtained by a slim margin: eight to seven.4 Its reversal came on a seven to seven tie vote, broken, pursuant to the Court’s Statute,5 by the casting (i.e., second) vote of the Court’s President, Sir Percy Spender. Judge Spender had been in the minority in the earlier phase, co-authoring a joint dissenting opinion with Judge Sir Gerald Fitzmaurice. The minority in the first phase of the litigation

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became the majority in the second in large part because two judges who had been in the majority the first time were prevented by illness from participating thereafter, and a third was forced to recuse himself from participating in the second phase because of the partisanship implicit in his having been appointed as ad hoc judge by the Applicants prior to being elected to the Court as a regular member.

Dismissal of the Applicants’ claim did not speak to the merits of the case against apartheid, only to the Applicants’ right to sue. Other than among lawyers and legal scholars, though, the distinction was too subtle to matter. What mattered was that the World Court had ruled in favor of South Africa and against opponents of apartheid. Not to reach the merits of the dispute meant leaving the status quo unchanged, with the effect magnified, in this instance, by the ability of the respondent state’s friends to block effective remedial action by the UN’s political organs.

More than the Applicants themselves, and by extension critics of apartheid, it was the Court itself, and by extension international law, that had lost. The ruling came at a critical moment in history. Colonialism was coming to its end. African colonies in particular had gained independence with spectacular speed and decisiveness. The case had been expected to demonstrate to newly independent states, and to their citizens, that the procedures and institutions of traditional international law could be used to promote their distinctive goals in international life. Instead, it left the impression that international law was in cahoots with the past, with the prerogatives of inherited power, and in this instance with white supremacy. That the two judges seen to be principally responsible for the suit’s dismissal – Spender and Fitzmaurice – were of Australian and British nationality, respectively, only reinforced this impression. Both the Court and international law were seen to be on the wrong side of history – and humanity.

Some observers wondered if members of the Court had been influenced by adverse reaction to its Certain Expenses opinion, issued the same year as its ruling in the preliminary objections phase of the South West Africa case. The Certain Expenses opinion had raised – or renewed – suspicion in some quarters that the Court was interpreting its position as the UN’s “principal judicial organ” to mean that it was under an obligation to cooperate with the UN’s political organs, rather than to act as an independent court of law. Could the Court’s subsequent dismissal of Ethiopia and Liberia’s claim have been

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influenced by a feeling that it might be better to not decide the case at all than to be seen as deciding it solely to associate the Court with a politically popular cause?

The impression that the Court had become beholden to UN politics was enhanced in 1971, when the UN Security Council gave the Court an opportunity to redeem itself, politically, by requesting from it an advisory opinion on the compatibility of the application of apartheid in South West Africa with international legal obligations. The Council had already expressed its own views on this subject, leaving the Court in the position of either agreeing with the Council’s opinion or openly defying it. It agreed, deciding by a vote of thirteen to two that South Africa was under a legal obligation to end its administration of South West Africa, and by a vote of eleven to four that members of the UN were under an obligation to recognize the illegality of South Africa’s continuing presence there and the invalidity of acts it undertook on behalf of the territory.

Technically, its opinion in 1971 was not inconsistent with its dismissal of Ethiopia and Liberia’s suit five years earlier. The questions on which its opinion was requested did not relate to standing. But if in 1966 the Court appeared to be an agent of the past, then in 1971 it seemed to be kowtowing to UN politics, getting itself back on the right track politically, but at considerable cost to its credibility as an independent decision process.

Much of my article recounted this history. But its main thrust was directed less at the litigation itself than at the legal community’s reaction to it – not so much its revulsion against the support the Court seemed to have given apartheid in 1966, or its apparent obeisance to the Security Council in 1971, but rather the assumption that in neither instance had the Court acted independently of all political considerations, as a court of law should do. It was a reaction that seemed to me to assume the existence of relatively stable expectations about courts of law as adjudicative institutions. Specifically, it assumed that courts are homogeneous, sui generis, regardless of differences among them in formal structure or in the patterns of interaction with contending social processes that empirically determine how they direct their institutional energies. I found these assumptions unjustified, both logically and empirically.

10. Id. ¶ 118.
11. Id. ¶ 119.
13. See Gordon, supra note 2, at 72-91.
A LEGACY OF AMBIGUITY

Here in the United States, attitudes towards the ICJ as an institution have tended to assume that it was created in the image of the U.S. Supreme Court. The Supreme Court was, indeed, the prototype of an international tribunal that the American delegation proposed when the idea of establishing a permanent international court was first discussed at the diplomatic level, in 1907, at the second Hague Peace Conference. In its idealized form, which is how it was presented to the Conference and to the public, the proposed tribunal's function was to have been simply that of applying existing principles of international law to the facts of an international dispute, as it found them, let the chips fall where they may.

Its advocates argued that the Supreme Court model's suitability to the international arena had been demonstrated by its success in deciding disputes between the states of the American union. Though less than sovereign in an international sense, the American states were every bit as protective of their presumed prerogatives as sovereign states were. If the Supreme Court could settle their disputes, why could ones like it not be equally successful in resolving disputes between sovereign nations?

In retrospect it is easy to recognize that the enthusiasm its advocates brought to the proposal may have struck some delegates as parochial, if not downright arrogant. Institutions like the Supreme Court were not invariably found in other national legal systems. Doubters were disinclined in any event to find merit in the misgivings the Americans expressed about the more traditional model of international arbitration, whose principal mission was understood to be that of settling disputes by finding diplomatic solutions, taking law into consideration but not attributing to it a deciding quality.

To the Americans, the difference between the two approaches was critical. In his instructions to the American delegation Secretary of State Elihu Root had written:

It has been a very general practice of arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlement of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable

15. See JAMES BROWN SCOTT, SOVEREIGN STATES AND SUITS 40-41 (1925).
16. See id. at 245.
obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to submit them to this kind of diplomatic process.  

To lawyers outside the United States, however, the distinction did not appear to be of great moment; Root's argument gained little traction at the Conference. A measure of agreement did exist as to the benefits of a permanent judicial panel, rather than the constantly shifting clusters of judges characteristic of ad hoc arbitral panels. The absence of a permanent judiciary was seen by many to render the rulings of ad hoc tribunals spasmodic, discontinuous, and lacking in coherence, depriving them of any credible capacity to clarify or develop the rules of international law. 

Even this was not invariably regarded as a defect. International law was largely uncodified, the specific content of its norms having not developed to anything like the degree of specificity or certainty that characterized the long-established, comprehensive codes courts in civil law countries apply. Such of its rules as were settled seemed unconnected with one another, gaps between them being so wide that bridging them was seen to afford judges a degree of discretionary authority many states were reluctant to concede to them. Among some observers, even in the U.S., the discontinuity of awards made by ad hoc tribunals was a blessing in disguise, precisely because the rules on which the awards were based applied only to a particular dispute, without generating anything like precedent or “clarifying” existing rules and principles.

17. Id. at 219.
18. See id. at 215.
20. See Herbert Arthur Smith, The American Supreme Court as an International Tribunal 118 (Oxford Univ. Press 1977) (1920): [N]o Court of the Nations can possibly satisfy the world unless it administers a known and written code of international law. On many important questions of international law there is no general agreement and the actual practice of nations has in fact differed widely. It cannot be expected that the nations of the modern world will be willing to leave important rights at the mercy of judges who are fettered by nothing stricter than their own predilections.
21. J.M. Dickinson, a prominent American lawyer, had said: No one ever expected infallibility from any human court .Under the corrective influence of international jurists, unsound doctrine will be repudiated. There will be a constant change in judges. As new cases arise, not having any pride of opinion in the decision of others, they will the more promptly expound as the law that which the enlightenment of the time shall demand, for international law will always develop and stand as the
The feature of the Supreme Court model that appears to have made the least impact on the Conference and may well have been regarded as symptomatic of its advocates' naïveté was its assumption that an international court which ignores the political consequences of its decisions — i.e., where the chips fall — could flourish. The idea of submitting disputes to third-party decision itself represented a substantial concession from the presumed prerogatives of national sovereignty. It was tolerable only because — and to the extent that — it provided an opportunity to resolve international disputes amicably, in a way the parties could live with, so as to prevent the differences between them from festering into a justification for war, which often meant before they could be exploited by domestic political elements.

Nevertheless, if the only models discussed at the 1907 Conference had been those of diplomatic arbitration and adjudication modeled after the Supreme Court, respectively, the differences between them might have been accommodated in a compromise that would have permitted the would-be court to adopt either approach as circumstances warranted and the parties to a dispute preferred. But there were not just two models; there were three. Among small states, both the adjudicative and the arbitral models were received with skepticism. With ample historical justification, they suspected that, whatever its ostensible mission, the proposed court would end up serving the interests of the great powers unless it embodied the principle of sovereign equality. This, they made clear, meant that every state party to a treaty establishing the court had to be empowered to appoint one of its judges. In essence — and as immediately noted — this would have endowed the court with the distinctive earmarks of a constituent assembly.

In the end, the differences between the three models were so substantial they could not be resolved at the Conference. It concluded in stalemate, the delegates able to agree only upon a general outline of

exponent of such international justice and morality as the consensus of nations shall approve.

Foster, supra note 19, at 73-74.
23. See id.
24. The name by which the court was to be known was itself a subject of contention, each suggested name being suspected of harboring a hidden institutional agenda. See William I. Hull, The Two Hague Conferences 378-79 (Kraus Reprint Co. 1970) (1908). The word "court" drew opposition, for example, "Permanent Tribunal of Arbitration" and "Permanent Institution of Arbitration" being suggested as alternatives. In exasperation, Joseph H. Choate, head of the U.S. delegation, finally said to the other delegates: "Give us the baby and you may baptize it as you will!" See James Brown Scott, The Judicial Settlement of International Disputes 57 (1927). The name finally agreed upon, i.e., the Court of Arbitral Justice, was discarded at Versailles. See infra note 27.
a permanent court and the hope that the differences could be resolved by diplomatic negotiation.

VERSAILLES AND THE CREATION OF THE PCIJ

But they could not be, and the outbreak of the First World War put the whole idea of a permanent international court on the backburner until after its conclusion. When discussions began again, prior to, during and after the post-war peace conference at Versailles, the circumstances that had existed in 1907 had changed dramatically. Versailles was a victors' conference, smaller states participated but were given few options beyond accepting positions assigned to them by the powers, which had won the war.\textsuperscript{25}

The influence that the U.S. model exerted in the design of the new international court appears to have peaked during the discussions and in the recommendations of the Advisory Committee of Jurists, a group of experts appointed by the League to recommend a plan of organization for the proposed court. Meeting in The Hague in the summer of 1920, the Committee adhered closely to the plan Root had promoted in 1907, causing one American participant to proclaim afterwards that the Committee's plan was "as closely modeled on the Supreme Court of the American States as one tribunal can resemble another without being identical."\textsuperscript{26}

But the members of the League did not follow all of the Advisory Committee's recommendations. To be sure, the new court was given the bland name \textit{Permanent Court of International Justice (PCIJ)}, rather than that of the \textit{Court of Arbitral Justice}, as the 1907 Conference had proposed (and the U.S. had bitterly opposed).\textsuperscript{27} It was also kept separate from the League, at least formally, again in keeping with the wishes of the U.S., in this instance to leave open the possibility that the U.S. Senate would consent to U.S. participation in a world court even if it ultimately rejected U.S. membership in the League itself.\textsuperscript{28}

To what extent its name and formal separation from the League ever motivated the PCIJ's judges or affected the political community's reactions to their rulings is difficult to say. The separation was more formal than substantive. The PCIJ's budget still had to be approved by the Assembly of the League.\textsuperscript{29} Of at least equal importance, in order to

\textsuperscript{25} See SCOTT, supra note 15, at 222.
\textsuperscript{26} Id. at 221.
\textsuperscript{27} See SCOTT, supra note 24, at 57; Manley O. Hudson, \textit{The Permanent Court of Arbitration}, 27 AM. J. INT'L L. 440, 445 (1933).
\textsuperscript{28} See Ake Hammarskjold, Sidelights on the Permanent Court of International Justice, 25 MICH. L. REV. 327, 336 (1927).
\textsuperscript{29} See id. at 345. The budget of U.S. federal courts has to be approved by Congress, too, a circumstance that gives Congress influence over them, but not to the extent of
break the stalemate that had stymied the 1907 Conference, the Advisory Committee, at the suggestion of Root and his British counterpart, Lord Phillimore, recommended and the League subsequently adopted a compromise under which the judges would be elected by both the Council of the League, which the big powers were expected to (and did) control, and the Assembly, where the influence of the smaller states was expected to be (and was) more substantial, even decisive.30

In any event, differences between the PCIJ and the Supreme Court model were substantial enough to call into question the assumption that the two institutions were cut from the same cloth or in anything like the same size. Beyond the absence of a formal institutional relationship, a crucial difference is that the PCIJ was never accorded compulsory jurisdiction, much less given political machinery to enforce its judgments.31 Either feature would have been an anathema to perceived prerogatives of national sovereignty. Without them the PCIJ, and later the ICJ, was destined to hear cases having far less international significance than ardent advocates of a world court had hoped for.

Another feature separating the PCIJ, and later the ICJ, from the Supreme Court model is the authority to render advisory opinions.32 Early in its own institutional history, the Supreme Court had determined that giving advice, which can be ignored, is incompatible with its adjudicative role. The U.S. opposed giving the PCIJ authority to render advisory opinions for just this reason, as well as because critics in the U.S. Senate regarded the advisory opinions as a device designed to circumvent the ostensible denial of compulsory jurisdiction33 – that is, by allowing the PCIJ to decide issues important to specific disputes that the parties were unwilling to submit to

 preventing them, inter alia, from overturning congressional legislation they deem to be incompatible with the Constitution.

30. See Lord Phillimore, Scheme for the Permanent Court of International Justice, 6 Transactions Grotius Soc'y 89, 90-91 (1920).


32. The final draft of the PCIJ Statute did not mention advisory opinions, the Assembly having eliminated a draft article that explicitly authorized them. The Covenant of the League itself did, however, in Article 14. While empowering the Council of the League to formulate plans for the establishment of the Court, Art. 14 added that “the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly.” Early on, the PCIJ decided that since, by virtue of Article 1 of its Statute it had been established “in accordance with” Article 14 of the Covenant, Article 14 should be considered an integral part of the Statute.

33. Quincy Wright, The United States and the Permanent Court of International Justice, 21 Am. J. Int'l L. 1, 3 (1927); Manley O. Hudson, The Permanent Court of International Justice 1920-1942, at 510-11 (1943) [hereinafter Hudson].
adjudication. As it turned out, advisory opinions became a mainstay of the PCIJ's case load, proving to be of far greater value than had been anticipated.34

Coincidentally, it was one of the Court's advisory opinions that so severely weakened its standing that it virtually ceased to operate soon after the opinion was issued. The Customs Regime case was a political hot potato that the Council of the League sought to avoid by handing it off to the Court.35 The legal question it presented was whether a proposed merger of Germany and Austria's customs offices was consistent with treaty commitments the two countries had made following their defeat in the war. Formality aside, the decisive question was whether the proposed customs union was likely to lead to a political union — a question whose determination entailed an irreducibly political judgment. The Court was unable to deal decisively with the issue, much less to settle the underlying dispute. It decided, by a vote of only eight to seven, that the union was incompatible with an agreement Austria had made not to compromise its political independence. But the majority gave few reasons for their opinion, and the minority included several of the most eminent, learned and impartial members of the Court. Rightly or not, the ruling left the impression that politics, not law, had carried the day.36

Like the South West Africa (Namibia) cases decades later, the 1931 Customs Regime case demonstrated that the line separating political and legal disputes is evanescent, if not utterly illusory, when the litigants are sovereign nations and the issues are of substantial importance to them. Virtually all cases an international tribunal hears have political overtones; the very act of taking a case to an international court politicizes it.37 That the norms of international law themselves are not as insulated from politics as conventional wisdom had assumed was also becoming too obvious to deny in the name of theoretical constructs.

These changes in perception had been occurring independently of the work of the PCIJ. As much as anything, they reflect incursions made by the social sciences in the analysis of law and legal institutions, long hallowed grounds reserved exclusively to an aristocracy of lawyers and legal scholars. What initially had taken the form of criticism from

34. See HUDSON, supra note 33, at 513-24.
35. Customs Regime between Germany and Austria, Advisory Opinion, 1931 PCIJ (ser. A/B) No. 41, at 1 (Sept. 5).
within the ranks of the legal profession – legal realism, as it was known – expanded into an interdisciplinary recognition that, in the final analysis, legal concepts and institutions are not nearly as unique as lawyers and legal scholars maintain; that treating them as unique serves principally to preserve a professional monopoly; and that the idea that law and courts of law are unaffected by the social and political currents in which they swim is untenable.

One of the victims these insights claimed was the idea, originally considered critical to the Supreme Court model, that the application of rules of law in a given case can and should be indifferent to how well it serves the policies the rules were meant to implement. The notion that an international court can be indifferent to social and political outcomes suffered a loss in credibility, other than among those who remain wary of the tendency of policy perspectives to merely rationalize judges' personal or political biases.

REORGANIZING THE COURT

The ambiguity of its institutional role notwithstanding, the PCIJ had been active enough in its first decade to justify hopes that once the world community reorganized itself after the end of the Second World War, the Court could be given a new lease on life. If in the final analysis it had proved to be less than the adjudicative institution the U.S. had wanted, or the dispute-settling, war-preventing diplomatic mechanism other states were hoping for, or the constituent assembly implicit in the principle of sovereign equality applied to the selection of judges, nonetheless until it came a cropper in the Customs Regime case it had shown enough promise to justify its continuation.

This, and little more, accounts for the reestablishment of the PCIJ in the form of the ICJ. In most respects, the language of the ICJ's constitutive instrument follows that of the PCIJ fairly closely – conspicuously so. The significance of the Charter's designation of the ICJ as the UN's "principal judicial organ" is often exaggerated. If it had been intended to endow the Court with a qualitatively different institutional role than that of its predecessor, its legislative history should make the point clearly. It does not. In fact, it suggests only that by the time the UN was established no purpose would have been served

38. See, e.g., John Lawrence Hargrove, The Nicaragua Judgment and the Future of the Law of Force and Self-Defense, 81 AM. J. INT'L L. 135, 143 (1987) ("The business of courts is to apply the law and preserve the integrity of the legal order, without regard to any perceptions of the relative power or moral purity of the parties."); and SHABTAI ROSENNE, THE INTERNATIONAL COURT OF JUSTICE: AN ESSAY IN POLITICAL AND LEGAL THEORY 62 (1961) ("[I]t cannot be too often emphasized that the Court is a court of justice and not of ethics or morals or of political expediency.").

39. Over the eighteen years it was formally in operation (1922-1939), the PCIJ heard twenty-four contentious cases and gave twenty-seven advisory opinions.
by continuing to maintain a formal separation between the Court and the world organization with which it was substantively tied anyway. The implication that either the language of the Charter or the intention of its framers compels the ICJ to defer to the wishes of the political organs of the UN represents little more than political ambition masquerading as original intent.

Whether as a matter of policy the Court should seek to align its judgments and opinions with those prevailing in the political organs of the UN, or for that matter with its own perceptions of where humanity’s best interests lie, are very different questions, ones whose answers must be found, over time, in the world community’s reaction to the Court’s assertions of authority and in the Court’s own prudential adjustment to the institutional limitations under which it operates.

Despite the global implications suggested by the word international in its name, the PCIJ had been a European court. Virtually all the cases it heard involved the interests of European states, many of the legal issues arising from changes in legal relationships and obligations brought about by the outcome of the First World War and treaties entered into upon its conclusion. The most influential of the PCIJ’s judges were Europeans or European-trained, as well.40 In truth, much of the success the PCIJ enjoyed, and the reassuring familiarity it presented to its predominantly European target audience, can be attributed to the mutuality of the judges’ legal training, habits of reasoning and expectations of judicial propriety, and to their familiarity with the codes and traditions of interpretation that form the bases of law throughout Europe.41

These advantages were not available to the ICJ once European states began establishing regional dispute-settlement institutions soon after the ICJ itself was established. Litigants and issues which might once have found their way to the Court were thereafter more apt to be heard by the European Court of Justice or the European Court of Human Rights, instead. In contrast to the early experience of its predecessor, the ICJ, from the outset and for several decades thereafter, had a very light case load. Members of the Court took to openly

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soliciting new cases from governments and from the UN's political organs. International law associations established blue-ribbon panels to suggest ways the Court could be made more accessible and attractive to potential litigants.

The reluctance of non-European states to fill the void has many explanations. One, already noted, lies in the suspicion among newly emerging states that international law, as applied by the ICJ, was too respectful of the past and the past's allocation of power, wealth and status, and insufficiently hospitable to perceived contemporary needs, especially ones entailing the amelioration of inherited inequities. But another, every bit as influential, was the countervailing perception that members of the Court were becoming altogether too sensitive to world politics, and thereby too biased politically to give independent judgments based solely upon existing rules of law.

Given this divergence, and the unresolved conflict among differing perceptions as to the Court's proper institutional role, it is not surprising that no consensus has emerged with respect to the qualities members of the Court should possess or whether it is desirable for them to have had judicial experience prior to their election to the Court. Consensus or not, over time, the fact that so many members of the Court have served in or for their country's foreign ministry, while so few have had prior judicial experience, has served to reinforce the impression that the Court is a quasi-political body whose members lack genuine independence from their governments or the blocs of states that secure their election.

This perception has been intensified as a result of the unseemly and demeaning politicking that attends the selection process itself. To some extent, this is a byproduct of the frequency of elections, a triennial cadence in which one-third of the Court's fifteen judges are elected every three years. The election process is openly political: candidates and their foreign office sponsors lobby for months at a time; vote-trading is commonplace; votes are known to be motivated as much by

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42. See, Paul C. Szasz, Enhancing the Advisory Competence of the World Court, in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE, Vol. II 499, 499-500 (1976) (discussing the creation of UN organs designed to solicit opinions from International Court of Justice in order to address the Court's low caseload).

43. The American Society of International Law established two such panels, their papers published as THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE (Leo Gross ed. 1976), and INTERNATIONAL LAW AT A CROSSROADS (Lori Fisler Damrosch ed. 1987), respectively.


45. See Thomas R. Hensley, National Bias and the International Court of Justice, 12 MIDWEST J. POL. SCI. 568, 568 (1968).

political considerations as by merit, with little or no distinction made between the requirements of a judicial and non-judicial post. Worst of all, the process is almost entirely lacking in public scrutiny or political accountability.47

The possibility that the selection process would become politicized had been foreseen in 1920, when the decision was made to give both the Council and the Assembly of the League a role in the election of the judges. The Root-Phillimore compromise had recommended that nominations be made, not by governments themselves, but by groups of four lawyers each government is free to name to a registry of individuals available to act as arbitrators, known then and now – misleadingly – as the Permanent Court of Arbitration.48 These so-called National Groups, in turn, were expected to consult with professional groups within their own country prior to making their nominations. No one expected the scheme to eliminate political influence in the choice of nominees or in their election. But it was hoped that the professional standing of individuals who are deemed to be qualified to act as arbitrators would ensure that greater attention would be given to the professional qualifications of candidates for the Court than would be likely if governments were left to make the nominations themselves.49

The recommendation found its way into the constitutive instrument of the PCIJ, and later that of the ICJ, but as an option, not a requirement.50 It is still there, but is all but ignored in practice, even by governments like the U.S. that adhere to the formula in form, but reduce the role of their National Group to that of bit players or that name to the Group persons so closely tied to their governments that the distinction between the two is inconsequential.51 As much as the elections themselves, the breakdown of the system intended to assure independent screening of nominees detracts from the capacity of the

47. For an empirically-based analysis of these and similar shortcomings in international judicial elections, see RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN & PHILLIPPE SANDS, SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 1 (2010) [hereinafter MACKENZIE ET AL.].
49. See SCOTT, supra note 15, at 229.
51. The U.S. National Group that in 2010 nominated the State Department’s Principal Deputy Legal Adviser, Joan Donohue, for a place on the ICJ consisted of the Department’s Legal Adviser, two of his predecessors in that post, and a former Deputy Legal Adviser.
judges' own professional standing to imbue their rulings with a compelling authority.52

The onset of the Cold War, coming as it did at the same time as the UN and the ICJ were being established, had something to do with the politicization of elections to the Court. It froze many of the leading states into rival blocs, intensified the political ramifications of everything that went on at the UN, and led to the nomination by some states of candidates whose lack of independence from their government was virtually taken for granted.53 Ironically, the proliferation of international tribunals since the end of the Cold War seems only to have compounded the problem, having transformed what had been a small judicial elite into a sizeable professional corps such that, as one group of scholars put it recently, for lawyers in foreign offices and international organizations an international judgeship has become "a natural part of career progression."54

EXPANSION AND PROLIFERATION

Among the most critical factors bearing upon the evolution of the ICJ to this point has been the unprecedented expansion in the scope of claims made in the name of international law, the degree of specialization that has come with it, and an acceptance within the international law community of a degree of discretionary authority in judicial interpretation that might once have been considered overreaching. In theory, these developments should open up a vast new array of issues for the Court to resolve.55 In practice, this has not yet happened to the extent one might have expected, in part because so many of the issues international law now raises are being handled by specialized dispute-settlement mechanisms like the International Center for the Settlement of Investment Disputes (ICSID), the International Tribunal for the Law of the Sea, the appellate body of the World Trade Organization, the International Criminal Court and ad hoc criminal tribunals.56

52. MACKENZIE ET AL., supra note 47, at 64-66. In contrast, the professional qualifications of the members of the PCIJ were never questioned. WALTERS, supra note 36, at 170.


54. MACKENZIE ET AL., supra note 47, at 58.


56. The high visibility enjoyed by some of these tribunals and the cases they hear attenuates the image the Court once enjoyed as international law's central adjudicative instrumentality. One cannot help but observe that, in contrast to what one would have found at the time the South West Africa (Namibia) cases were decided, the ICJ is seldom referred to these days as the World Court or even the World Court.
The expansion of international criminal law is especially significant in this respect, but so, less dramatically, is the expansion in claims being made in the name of the rights and obligations of individuals and other non-state actors. Generally speaking, these subjects are independent of the rights and obligations of states as such, and since, other than through requests for advisory opinions, only states have access to the ICJ, they are being raised in forums other than court.

Knowing this, the UN’s political organs by now might have acceded to requests to increase accessibility to the Court or to install it at the head of a hierarchy of international courts. They have chosen not to do so, however, instead creating ever more courts, even in the face of arguments that proliferation could lead to a fragmentation of international law.\(^5\)\(^7\) It is not beyond the realm of possibility, in fact, that some foreign offices find the prospect of fragmentation appealing, and are disinclined for this reason alone to establish a judicial hierarchy. Seen from the perspective of political power, after all, institutions like the Court are useful when they lend compelling legal authority to political will, but only so long as their authority is insufficient to enable them to question the legitimacy of that will when it conflicts with fundamental community standards or goals. Blocs of small states are every bit as likely as powerful states to proclaim their adherence to international law while resisting any attempt to endow the judicial system with sufficient authority to apply it to their own actions.

In any event, while the proliferation of international tribunals may increase the risk of fragmentation, it also raises the possibility that, if only for reasons of collective professional or bureaucratic self-interest, proliferation could lead to cross-fertilization, not only in the headiest realms of jurisprudence but in routine matters of practice and procedure as well. If so, it could end up endowing international law with a degree of cohesion – and thereby authority – it has never before had.

It is not difficult, in fact, to envision the emergence of a global common law – a judicially constructed common law, not one pronounced by academics, theologians or apologists for governments, as has been true throughout much of international law’s post-Westphalian history. The absence of a structural hierarchy among international tribunals

does not preclude appreciation of the mutual benefits that symmetry can bring.

CONCLUDING OBSERVATIONS

The obscurity into which the Court seemed to have fallen after the South West Africa (Namibia) cases proved to be ephemeral. It hears more cases today that it ever has. Whether this reflects an increase in confidence, though, is problematical. Some cases submitted to the Court appear to be motivated less by a desire to clarify legal rights than by a desire to obtain diplomatic cover for practical solutions the parties are willing to accept anyway. The ICJ is not likely to be an effective deterrent to the use of military power by militarily powerful states determined to have their way or to play a decisive role in the settlement of inter-state disputes threatening world peace.

But the very breadth of its mission affords the Court an opportunity to amalgamate and blend evolving elements of international law that specialized tribunals do not possess. Ironically, this attribute, aided by the ambiguity of the Court's role, could end up providing it with a central position inverse to its loss of glamour. As it matures according to the requirements of international life, the Court may find itself inadvertently well-positioned to fashion an institutional life of its own making.

THE WAR ON TERROR: WHERE WE HAVE BEEN, ARE, AND SHOULD BE GOING

DAVID ARONOFSKY

It is with pleasure and gratitude that I write this Chapter to honor Professor Ved Nanda and the Denver Journal of International Law and Policy (“Journal”) in commemoration of the Journal’s 40th Anniversary. Before getting to know Professor Nanda as a friend and colleague, I long admired his work and insight into the crucial international law issues of the day while using his ideas in my own teaching. I have participated in several Sutton Colloquium programs since first meeting Professor Nanda in Montana, and always welcome these opportunities to come to the University of Denver to share thoughts. I also greatly appreciate the Journal’s willingness to publish several of my past writings. I have chosen one of these writings here, co-authored with Matt Cooper who is one of Professor Nanda’s very best international law students among the many he has taught and inspired, to assess the war on terror as to where we have been, where we are, and perhaps most importantly, where we should be going.

In 2009, Matt and I wrote that Europe, and particularly the European Court of Human Rights (“ECHR”), seemed to have a much sounder approach, based on established rule of law and human rights law principles set forth in the European Human Rights Convention (“Convention”), than the U.S. in confronting most legal aspects of the war on terror. We looked at case law developments involving extraordinary renditions, military commissions, and related habeas corpus proceedings to challenge them in connection with suspected terrorist detentions, warrantless electronic surveillance, official complicity in aiding human rights violations – including torture against terrorist suspects by overseas governments and their officials – state secrets as a basis to bar legal claims, and the marked U.S. court tendency to dismiss legal claims against the U.S. and its officials on

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various technical grounds. These developments were contrasted with the ECHR decisions allowing lawsuits against European states to proceed. We concluded that the U.S. should follow the European approach of allowing lawsuits challenging alleged violations of basic rights of terrorist suspects to be decided on their legal merits. In retrospect and based on a review of U.S. and European case decisions since publication of our article, nothing has altered my position.

Before getting into reasons, however, I think it is appropriate here to cite some of Professor Nanda's own legal views regarding the War on Terror as it has progressed since the September 11, 2001 tragedy because he has, in many respects, been a voice for all of us in identifying legal issues which matter. For example, in 2001 he reminded us that international law is a fundamental weapon in waging the war on terrorism and stated that "the war against terrorism will be won only if concerted national action is taken . . . for that to happen, we need to provide credible leadership that we can be proud of and we need to take the moral high ground that will set an exemplary precedent."3 That same year, he also noted:

Among policy alternatives to combat terrorism, the use of military force dominates the U.S. agenda today. The implications of this are far-reaching. As historically unprecedented as the challenges are, it would appear that more creative approaches are urgently called for, approaches that do justice to the multi-faceted character of this problem.4

Even more to the point, he cautioned:

The use of military force to combat terrorism must be seen as a new powerful tool being wielded by the United States. Having employed it first in Afghanistan and now in Iraq, the US has been emboldened by its reception at home and seemingly undaunted by criticism of it overseas. Its implications are far-reaching, perhaps especially for the integrity of the law itself.5

Time and circumstances proved Professor Nanda to be an accurate prophet.

Professor Nanda studied the U.S. approach to waging the war on terror as it continued after 9/11, and in 2006 he addressed the issue of

5. Id. at ix.
terrorist suspect detentions head-on by urging that the detainees "must be treated humanely" and with "basic fairness." He captured the sentiments of many by stating that those directing the U.S. war on terror "must not lose sight of the need to strengthen international human rights law and not even inadvertently dilute it." It is with Professor Nanda's foregoing thoughts in mind that we now view where we have been, where we are, and where we ought to be going with the U.S. war on terrorism.

EXTRAORDINARY RENDITIONS

Matt and I sharply criticized the seeming U.S. judicial willingness to condone extraordinary renditions by finding no viable cause of action in U.S. courts to challenge them in Arar v. Ashcroft. After we published our article, the Second Circuit reheard its prior decision en banc and a sharply divided court reaffirmed its initial decision barring any legal claim against U.S. officials or the government itself. The U.S. Supreme Court refused to hear the appeal. Mr. Arar, the plaintiff, was neither a U.S. citizen nor a U.S. permanent resident alien, thus deferring for another day the question of whether U.S. citizens would fare differently in challenging renditions. The Seventh Circuit recently suggested an affirmative answer in a non-rendition overseas torture case, Vance v. Rumsfeld, but the Court recently vacated this three-judge decision and granted en banc review in a development which bodes ill for rendition case plaintiffs. Meanwhile, U.S. district courts seem to follow Arar in rejecting rendition claims by any plaintiffs. In addition, it now seems clear that suits against private, non-governmental defendants participating in rendition are likewise barred whenever plaintiffs require evidence available solely from classified information to sustain them.

Meanwhile, the ECHR goes in a much different direction: "[E]xtraordinary rendition, by its deliberate circumvention of due

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9. Id.
10. 653 F.3d 591, 594 (7th Cir. 2011).
process, is anathema to the rule of law and the values protected by the Convention.\textsuperscript{14} Although the Court recognized that sending suspected terrorists to other countries is permissible, this can only be done when there are strong, legally binding assurances by the sending and receiving countries that all legal rights protected in the Convention will be respected.\textsuperscript{15} As noted in our prior article, the ECHR has little hesitation about granting rule of law primacy over security.

**ENEMY COMBATANT HABEAS LITIGATION**

As Matt and I pointed out in our prior article, the issues of enemy combatants status and their detention conditions, including indefinite detention status, has been one pitting the U.S. Government against the mainstream of international law jurists' views.\textsuperscript{16} We expressed concerns about the limited right of habeas corpus and its viability. Our concerns proved well founded. In case after case since then, detainees in Guantanamo and elsewhere have used habeas to no avail in their efforts to challenge their detentions. The U.S. Court of Appeals for the D.C. Circuit, which now has exclusive jurisdiction over these detainee habeas petitions, has proved a habeas legal graveyard, and its decisions recently prompted a pair of commentators to accuse this Court of “undermining” the right of meaningful habeas review.\textsuperscript{17} Another has identified four individual judges on this Court who seem to steer these cases to predetermined outcomes whenever at least two are on the same judicial panel, making it impossible for detainee habeas petitioners to prevail.\textsuperscript{18} One specific category of cases involves the evidentiary requirements to prove these petitioners belong in detention as either supporters of, or persons who are part of, terrorist organizations like Al-Qaeda, under a lax preponderance standard the D.C. Circuit has yet to find unmet.\textsuperscript{19} This Court most recently reversed a lower court grant of one detainee's habeas petition because federal executive branch actions enjoy a “presumption of regularity” supposedly not considered by the

\begin{thebibliography}{19}
\bibitem{14} Ahmad v. United Kingdom, 51 Eur. Ct. H.R. SE6, ¶ 114 (2010).
\bibitem{15} Id. ¶¶ 104-09.
\bibitem{16} The Military Commissions Act of 2009, enacted October 28, 2009, now refers to such combatants as “alien unprivileged enemy belligerents” and “alien privileged enemy belligerents” but this is a semantic change without any substantive difference – the former face military commission trials and enjoy limited legal rights, while the latter get prisoner of war status even though few detainees in U.S. military custody fall into this category. Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1802(6)-(7)(C), 123 Stat. 2190, 2574 (codified as 10 U.S.C.A. § 948(a) (West 2012)).
\bibitem{17} Jon Connolly & Marc D. Falkoff, *Habeas, Informational Asymmetries, and the War on Terror*, 41 SETON HALL L. REV. 1361, 1383 (2011).
\bibitem{19} See, e.g., Khan v. Obama, 655 F.3d 20, 26 (D.C. Cir. 2011); Almerfedi v. Obama, 654 F.3d 1, 5 (D.C. Cir. 2011); Barhoumi v. Obama, 609 F.3d 416, 424 (D.C. Cir. 2010).
\end{thebibliography}
lower court even though the latter appeared to find ample basis to overcome any such presumption. These results in and of themselves might not warrant serious criticisms given the small numbers of habeas corpus writs granted by U.S. courts generally, but here the law is still unclear about who may be lawfully detained under what status and evidentiary circumstances. As Professor Chesney notes, "[T]he precise boundaries of the government's detention authority remain unclear despite the passage of more than nine years since the first post-9/11 detainees came into U.S. custody." Professor McNeal states it better: "Counterterrorism detention policy in the United States is a mess."

This problem has likely just been exacerbated by President Obama's December 31, 2011 signing of the National Defense Authorization Act of 2012, which now authorizes indefinite military detentions of anyone, including U.S. citizens who are "part of or [have] substantially supported al-Qaeda, the Taliban, or associated forces . . . engaged in hostilities against the United States" or anyone who commits a "belligerent act" against the U.S. or a U.S. ally regardless of whether the detainee committed any such act on a battlefield and even such act is committed in the United States. The ACLU has described President Obama's approval of the legislation as "a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law." There is more to say below about the overall Obama approach to the war on terror and military commissions.

One black letter legal rule regarding detention seems to be emerging from these U.S. cases, namely that non-U.S. citizen and nonresident alien detainees held outside U.S. jurisdiction lose their right to sue even in the face of horrible atrocities such as those seen in Abu Ghraib. This includes suits against the government, government officials, and contractors, with contractors having especially broad immunity.

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The ECHR takes a tough approach contrary to U.S. detention cases by concluding that permissible grounds for detention pursuant to the Convention do "not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time." This rule applies regardless of where detainees are located physically as long as they are within the custody of Convention state's military or civilian authorities. This straightforward approach makes it difficult to see how any Convention state can lawfully turn over someone it has detained to U.S. military commissions.

WARRANTLESS SURVEILLANCE

Another troubling legal aspect of the war on terror cited in our prior article is the use of judicially unsupervised electronic surveillance. We found especially problematic the unavailability of legal redress to challenge the National Security Agency ("NSA") Terrorist Surveillance Program, in essence giving free reign to U.S. national security agencies to monitor international electronic communications. Since that time, one federal appeals court has continued to block judicial access to litigate whether such surveillance even occurred. Another has only recently upheld blanket immunity for U.S. telecommunications companies which aid the government by providing the surveillance means. However, on a more positive legal note for plaintiffs in these cases, two separate federal appellate courts have found that certain organizations and individuals now have standing to challenge the electronic surveillance of U.S. citizens outside the U.S. under the current version of the Foreign Intelligence Surveillance Act ("FISA"), adopted in 2008, which requires judicial approval of such surveillance, but does not require any particularized basis for granting such approval. Whether the award of standing will result in plaintiffs winning these cases on their merits seems far from certain, however, because the government still has a number of defenses (including the "state secrets" argument discussed below) which appear likely to preclude such a result.

In contrast to the surveillance wars in U.S. courts, the ECHR had decided, in its 2008 Liberty decision shortly before we wrote our article, that surveillance without close court supervision is legally impermissible under the Convention. Since that decision the ECHR

28. See id. ¶¶ 84-86.
29. Wilner v. NSA, 592 F.3d 60, 76 (2d Cir. 2009).
has again reviewed the practice on unchecked national security agency surveillance with little or no court supervision. In a stronger statement, the ECHR determined that even the threat of secret surveillance pursuant to nonexistent or inadequate national laws was enough to trigger ECHR jurisdiction in order to challenge the threat under the Convention. The ECHR also rejected the notion that plaintiff ignorance of the surveillance should bar the action for lack of legal injury by noting finding mere unchecked threat enough to sustain the case. The ECHR does not wholly dismiss secret surveillance in the war on terror. In fact, it has upheld it as long as there are clearly written laws which prescribe how and when it will be used, define which categories of persons are susceptible to surveillance, and limit the surveillance time and means to those “strictly necessary for safeguarding democratic institutions.” This approach seems far preferable to the guessing game seen in the U.S., although the Amnesty and Jewel cases noted above may well result in similar rulings.

**Political Question Bars to Litigation & Liability**

Our prior article expressed concerns about U.S. court willingness to apply the political question bar to litigation and liability against the U.S. executive branch, even when basic rights are violated. Since then, our concerns have proved valid as the political question doctrine has shut down judicial review of executive branch decisions to bomb, kill, and falsely accuse innocent people and businesses mistakenly identified as terrorists. The D.C. Circuit explains this with crystal clarity: “The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.” Taken literally, this means an executive branch official can exercise whatever the official discretionarily determines is appropriate in the war on terror regardless of the consequences, as long as there is a significant foreign relations or national security aspect to the decision. In other words, the lawyers who represent client victims of this war can simply drop their cases and go home because quite probably no war on terror decisions involving other countries are non-discretionary in nature.

The ECHR seemingly takes a different approach regarding discretionary decisions in the war on terror:

34. Id. ¶ 30.
37. El-Shifa, 607 F.3d at 842.
It would be contrary to the rule of law for the legal discretion granted to the executive... to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference. ...  

The ECHR has indicated quite strongly that only the judicial branch of government has the power to determine when executive discretion has overreached at the expense of rights protected by the Convention. It is unlikely that the ECHR would ever accept a political question bar to judicial review.

**STATE SECRETS AND UNDISCLOSED EVIDENCE**

Matt and I took issue with U.S. judicial inability or unwillingness to allow litigation by victims legally injured in the war on terror when evidence in the case flowed from state secrets, even when these cases have merit. We also expressed concern about how easily state secrets could be claimed by the U.S. executive branch, which even cites the doctrine to shield publicly available information, as seen in the 2007 El-Masri decision. Since that time, two other federal appellate courts in different circuits have applied the state secrets doctrine to preclude plaintiffs from pursuing their cases. In addition to these state secrets cases, other federal courts have refused to require disclosure of witness identities and other material evidence used to support anti-terrorism criminal convictions. This means that even when terrorism cases wind up in federal criminal court rather than military commissions, the constitutional rights generally available in other criminal cases do not necessarily apply in these.

The ECHR applies a different standard to evidence denial on national security grounds. Although the ECHR recognizes the need, at times, not to make all evidence used in terrorism cases available to defendants, this need can be met only with great difficulties; independent courts must be able to assess all evidence used in particular cases, in consultation with legal counsel for defendants,

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40. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).
41. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010); Doe v. Cent. Intelligence Agency, 576 F.3d 95 (2d Cir. 2009).
before cases involving secret evidence can proceed. Unlike U.S. courts, the ECHR will readily reject convictions based on lack of access to evidence rather than find reasons to sustain them.

MILITARY COMMISSIONS: ARE THEY LEGITIMATE?

Our prior article joined the large chorus of voices questioning the legitimacy of military commissions in adjudicating many of the detainees caught up in the war on terror. We praised the 2006 U.S. Supreme Court *Hamdan* decision finding military commissions created under a then-applicable federal stature invalid based on U.S. constitutional and international law principles. We also suggested that the Court’s subsequent *Boumediene* decision recognizing Guantanamo detainee habeas rights had left another legal question mark hanging over legislatively created military commissions. Congress nonetheless responded first to *Hamdan* by reconstituting the commissions in 2006 to create their statutory basis; and again in 2009, partly in response to *Boumediene* to set evidentiary parameters for both civil court habeas proceedings and commission cases. Congress again acted last December to refine somewhat how commissions are to function from this point forward. Based on this pattern of congressional enactments, it seems clear the U.S. legislative branch, with executive branch support, will insist on using military commissions in the war on terror as long as the judicial branch allows it.

Whether commissions are constitutionally viable will require yet another U.S. Supreme Court decision, or two, to decide. Meanwhile, opinions about whether they meet fundamental legal safeguards are decidedly mixed as they now hear cases. Two recent commentators with first-hand familiarity of commissions cases generally give the commissions positive assessments, and one, Joshua Dratel, has written a piece well worth reading because he raises points seldom discussed by critics about how experienced civilian criminal defense counsel can practice effectively once the cases get underway. Other commentators deplore these commissions, citing serious ethical, evidentiary and

48. See Obama Signs NDAA, supra note 24 and accompanying text.
substantive rights issues, suggesting something akin to Star Chamber justice.\footnote{50} One military lawyer with actual case experience provides a balanced perspective about the pros and cons of the commissions, before ultimately concluding they should be abolished in favor of using U.S. civilian courts.\footnote{51} The negative critics conclude without exception that these commissions lack validity under U.S. constitutional and international law. Perhaps the harshest criticism of all to date comes from a U.S. military lawyer who represents Guantanamo detainees, when he cites “the legal theory underpinning Guantanamo and the military commissions” as “an assault upon the structure of our form of constitutional government” flowing directly from the architect of Nazi Germany’s legal system used to support the Holocaust.\footnote{52}

The ECHR would likely agree with the harshest commissions’ critics, given the continuous ECHR line of cases concluding that military courts can never try civilian terrorist defendants fairly, or in a manner consistent with Convention safeguards, because they fall too far outside civilian judicial control. We cited the Kenar case in our article to illustrate this legal point.\footnote{53} Since that case, the ECHR has had no military court decision, but a series of recent cases involving British military activities in Iraq make clear that the Convention applies to all aspects of these activities where civilian rights are concerned. The British Government has yet to prevail in any of these cases, arguing special military exigencies as a basis for ignoring Convention rights.\footnote{54} Perhaps more to the point, the ECHR has strongly suggested that countries bound by the Convention would violate it by extraditing suspected terrorists in European detention to the U.S., absent assurances that they would not be tried by U.S. military commissions.\footnote{55}

\footnote{55. Ahmad, 51 Eur. Ct. H.R. SE6, ¶¶ 117, 119.}
THE BUSH AND OBAMA ADMINISTRATIONS: IS THERE A MATERIAL DIFFERENCE?

Professor Nanda minced no words in describing “there is broad consensus that the Bush Administration's war on terror led to violations of international human rights law as well as international humanitarian law . . . both domestically and internationally.”\(^{56}\) Few scholars would dispute this view, which does beg the question of whether the Obama administration has done any better. The answer is a qualified maybe. President Obama has apparently halted renditions, torture, and secret detention facility use.\(^{57}\)

However, despite Obama campaign promises to close Guantanamo, the detainees are still there and their trials by military commissions of dubious validity continue. To date no high or mid-level U.S. civilian or military official has been convicted in civilian or military courts for violating U.S. detainee rights, including officials tied to the infamous Abu Ghraib prison. Contractors have also evaded legal accountability in most cases because “no coherent recourse currently exists, either domestically or internationally, that can hold PCMFs [Private Military Contractor Firms] accountable for mistreatment.”\(^{58}\) Although post-Abu Ghraib legal review occurred during the Bush administration, there is no reason to believe results would differ in the current one. These results are stark regarding the military:

After exhaustive investigations, public fallout, and internal recriminations, eleven enlistees were court-martialed, convicted, and sentenced for their conduct at Abu Ghraib. Their sentences ranged from a reduction in rank and the loss of one-half of one month’s pay to ten years in prison. As for the officers who ran the Abu Ghraib prison, only one, the lieutenant colonel who directed the interrogation center, was charged with crimes relating to the abuse and subsequent cover-up; he was cleared of all charges but for one count of willfully disobeying an order not to discuss the investigation. A few officers were reprimanded and administratively punished for their failures of leadership, including then-Brig. Gen. Janis Karpinski, who lost her star, and Col. Thomas Pappas, who was relieved of command, reprimanded, and fined. Not a

\(^{56}\) Nanda, supra note 7, at 536.


\(^{58}\) Huma T. Yasin, Playing Catch-Up: Proposing the Creation of Status-Based Regulations to Bring Private Military Contractor Firms Within the Purview of International and Domestic Law, 25 EMORY INT'L L. REV. 411, 495 (2011).
single officer, however, was court-martialed for failing to stop the abuse of prisoners. In fact, Maj. Gen. Antonio M. Taguba, the Army investigating officer whose report revealed the extent of military crimes at Abu Ghraib, damaged his own military career by completing such a candid, hard-hitting report. 59

One former military prosecutor who also tried ICTY cases suggests that the notion of command responsibility, used to try numerous high level military officers for legal rights abuses, seems lacking. She persuasively argues that

[a] command climate of zero tolerance for law of war violations, where commanders have strong and targeted incentives to prevent, detect, and punish abuses, would do more than achieve the laudable goal of meeting our obligations under international law. It would also strengthen our military organization and better enable the military to accomplish its missions.60

Obama administration Justice Department attorneys argue as zealously as their Bush administration predecessors against allowing war on terrorism victims legal redress in U.S. courts which, as seen above, routinely accept the arguments. If anything, the Obama lawyers have deepened the habeas legal quagmire since he took office.61 Most scholars assessing the Obama administration approach to the war on terror have harshly criticized it.62 Despite the positive changes President Obama has apparently brought about as noted above, detainees can still be held incommunicado, military commissions continue to try civilians under procedurally defective and ethically problematic rules, detainees are still returned to countries where they can be tortured, and in addition, investigations of past alleged torture in the prior administration have apparently withered on the vine in breach of U.S. Torture Convention obligations.63 Although perhaps some partisanship is expected from a senior Republican Senate staff expert involved with war on terror legislation, one has difficulty arguing with his conclusion that:

62. E.g., Nowak, Birk & Crittin, supra note 57.
63. Id. at 66.
[o]ther than a relatively minor revamping of the military commissions system, President Obama’s pre-election criticism of Bush administration policies and post-election discussion of charting a new course in detention policy has dissolved into paralysis and procrastination. Political demagoguery and legitimate policy differences among senators and congressmen create an environment inhospitable to the development of consensus detention legislation, but those obstacles could be overcome with leadership from the President. Without that leadership, though, detention policy has merely become a tool used by those on both the political left and right for their own electoral reasons.64

Many would agree with Professor Welsh that indefinite Guantanamo detentions lack legitimacy, yet nothing has been done to stop them and the 2012 Defense Reauthorization Act ensures their continuation.65 As Professor Miller notes in comparing Guantanamo detentions to the World War II Korematsu case, President Obama’s claims of authority to maintain indefinite detentions “for many of the remaining Guantanamo detainees, underscore . . . the likelihood that the power he claims will, in Justice Jackson’s dissenting words in the most infamous detention case in our history, lie ‘about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.’”66 Professor Yin recently wrote; “[I]t is now readily apparent that the Obama Administration is pursuing a counterterrorism strategy . . . broadly consistent with that of the Bush Administration.”67

As discussed above, the ECHR applies law rather than political expediency in war on terror cases. The ECHR recognizes command responsibility as customary international law to allow convictions of those who fail to prevent subordinates’ war crimes.68 Our prior article illustrated that the ECHR has long applied strict accountability on Convention states to conduct thorough investigations of human rights

abuses and provide legal redress for violations. These legal obligations continue. The ECHR has also emphasized that any alleged special war on terror considerations cannot override Convention rights and protections, in rejecting practices such as extraordinary rendition as “anathema to rule of law and the values protected by the Convention.” The Obama Administration would do well to study ECHR case decisions protecting basic legal rights and refusing to apply technicalities to undermine them.

WHERE WE SHOULD GO FROM HERE IN THE WAR ON TERROR

The ECHR approach to most aspects of the war on terror discussed above should probably be adopted. Here is what the future likely portends if this happened.

First, the U.S. would not engage in extraordinary renditions or similar activities without serious legal consequences. At a minimum, victims of such renditions would have an automatic right to legal redress and compensation in U.S. courts, or alternatively, some form of U.S. administrative tribunal empowered by a future U.S. law could set reasonable compensation amounts. In addition, those engaged in rendition acts would be subject to criminal liability. If a particular rendition were deemed essential under exigent national security circumstances, a U.S. presidential pardon avoids the criminal exposure problem. Once rendition victims have access to appropriate compensation, suing private individuals and companies, such as Jeppesen, might not be needed and complicated state secrets problems are avoided.

Second, the U.S. should clarify the habeas corpus for Guantanamo detainees in a manner consistent with U.S. constitutional and international law. The ECHR approach requiring all detainees to be scheduled promptly for criminal prosecutions and trials subject to the full panoply of defendant constitutional rights meets these concerns. In the process of cleaning up the detainee habeas legal mess, we should also define detainee status much more precisely so detainees can know with certainty why they are detained. Moreover, because Congress contributed to this mess legislatively, Congress might consider using new legislation to define some specific criteria for detainee habeas corpus writs.

Third, warrantless surveillance of U.S. citizens and permanent resident aliens in their person and in their communications needs tight legal rein by U.S. federal courts. The way to accomplish this is through specified probable cause for surveillance approved by courts. Even if

U.S. citizens and resident aliens are taken care of, however, this does not solve the more complicated issue of protecting basic privacy rights of others as a human right. The ECHR does not distinguish between citizens or resident aliens on the one hand, and nonresident aliens on the other, in limiting such surveillance under the Convention.71 The U.S. should assess how to protect all privacy rights without compromising national security.

Fourth, the U.S. political question bar to litigation and liability should be disallowed in cases involving basic legal rights violations. This is not to say that litigants deserve automatic standing to sue because they must still demonstrate tangible legal injury, but when they do so their lawsuits should proceed.

Fifth, the use of state secrets and undisclosed evidence in all war on terror criminal cases should either cease altogether or face substantial curtailment. The U.S. Government seems able to get quite a few convictions in terrorism-related cases without any apparent need to resort to these flawed legal tools. Facing one's accusers and witnesses who support them reflects a bedrock principle of U.S. constitutional law, as the U.S. Supreme Court has repeatedly stressed.72 This has already become such a serious problem that rather than face the prospect of numerous detainee acquittals, the government has found it necessary or desirable to release hundreds of Guantanamo detainees without charging them.73 Although these releases might well suggest the problem is now self-correcting, nothing precludes widespread detentions from recurring in the future and the detainees still at Guantanamo have yet to see much of the evidence needed to defend themselves. On a related note, either Congress or the U.S. Supreme Court should overturn the D.C. Circuit Court decision barring Confrontation Clause application in detention habeas proceedings because otherwise, detainees may have no way to bring a meaningful habeas writ for lack of available evidence to support it.74

Sixth, military commissions should be eliminated except in cases involving non-US military personnel as defendants. In this regard the ECHR view that military courts can never ensure fair trials for civilians has no persuasive counter-argument. The fact that a growing number of current and former military lawyers with direct Guantanamo case experience now view commissions' elimination as contrary to core U.S.

73. Welsh, supra note 65, at 283-84.
constitutional and international law principles makes the elimination case a legal cinch.

Seventh, President Obama should keep all his campaign promises. The U.S. is the star actor on the world stage as a nation which once led the world in rule of law adherence. The Bush administration opted to sacrifice this role after 9/11 and it should not be forgotten that President Obama won his election in no small part because of his campaign promises to regain it. As seen above, the differences between the Bush and Obama administrations are not legally sufficient, and the recent 2012 Defense Authorization Act reestablishing indefinite detentions takes the U.S. in the wrong direction.

Finally, there should be legal accountability once and for all for U.S. military and civilian personnel, as well as private party accomplices, who choose not to play by the rules of respecting basic individual legal rights in the future. What is done may now already be done, but the ECHR requirement of competent and thorough investigations of all significant legal rights abuses, accompanied by meaningful legal remedies when these abuses are found, is one the U.S. is long overdue to adopt. The imposition of command responsibility on U.S. political and military leadership could fix most of these problems, and if the day ever comes when the U.S. loses a military conflict we may well find it imposed by others.

CONCLUDING COMMENT

The U.S. war on terror has created many casualties. Perhaps the greatest casualty of all is a loss of the core rule of law focus which differentiated the U.S. from so many other countries on the global stage decades before this war began. In order to win it, the U.S. must regain its leadership in not only advocating, but practicing rule of law principles predicated on respect for, and protecting, basic individual rights. As Professor Nanda accurately wrote, the war on terror must "be fought in the realm of ideas." In doing so, the United States "must scrupulously follow principles of international law." Following Professor Nanda's sage counsel here will bring permanent victory to the endeavor.


ESTABLISHING NORMS FOR PRIVATE MILITARY AND SECURITY COMPANIES

DANIEL WARNER

SOME PERSONAL REFLECTIONS

In the Spring of 1992, in a lovely setting in Sweden just north of Uppsala, I attended a conference of the Life & Peace Institute on “The Challenge to Intervene: A New Role for the United Nations?” The setting was lovely. Sigtuna is on beautiful Lake Malaren and the hosts made every effort to see to our comfort.

The actual conference, as I remember, was not as stimulating as the surroundings. What I do remember vividly, however, some 20 years later, was that I made a comment at a plenary session, followed by a comment by a small distinguished gentleman with a decidedly Indian accent. The session soon ended and the distinguished gentleman abruptly walked up to me and announced, “Let’s go for a walk; we are going to be friends for life.”

I was neither shocked nor offended by the comment. Indeed, we went for a long walk along the lake, and continued our conversations bilaterally throughout the conference. In spite of all the efforts of the conference organizers, the conference will not go down in history as having made a major contribution to peace in the world. However, the distinguished gentleman with a decidedly Indian accent had made an astute prediction: Ved and I became friends for life. Whether it is in Denver or somewhere else in the United States, whether it is in Geneva or somewhere else in Europe, whether it is in serious discussions about the world or exchanges about family; the distinguished gentleman with a decidedly Indian accent was more than prescient and we have become more than just friends.

We have not been able to see each other often, but Ved’s friendship has inspired me in several ways. First, he has opened a competition with me that he doesn’t even know about. When Ved was younger, he vowed to visit every country in the world. He did quite well, except that at the time of his travels there were certain large confederated countries that eventually broke up, such as the Soviet Union and Yugoslavia. When I first visited Ashgabat and Almaty, and Skopje and Ljubljana; I was so proud because I felt that I was in places Ved had never seen. I had one upped him.
Second, on my first visit to Denver, Ved introduced me to many people; all of them his best friends, including federal judges. But what I remember most was the way he introduced me to the people working in the university cafeteria as his best friends as well. I had not seen that kind of empathy and openness since I was on the campaign trail with Bobby Kennedy. Everyone admired and loved Bobby, and I sensed that all the people at the university admired and loved Ved in many of the same ways, although Ved was not looking for their votes. He was genuinely concerned about them, as they were about him.

Finally, I can mention one other Nanda inspiration. Several years ago, Ved had an emergency operation that should have required some serious R&R. Instead of resting, he resumed teaching at the university in a wheel chair with 67 stitches still in his leg. Soon after, against doctor's orders and to the consternation of his family and the Chancellor, he flew to Geneva for a meeting of an organization that will remain nameless, but which, like the Sigtuna conference, will never change the world. When I met Ved at the airport and tried to scold him for his irresponsible behaviour, he looked at me with his doleful eyes and said, "Danny, they asked me to come and I just couldn't let them down."

From speaking to youngsters in elementary schools in Denver to explaining international politics in his tuxedo to the Lions Club; from participating in doctoral seminars for Ph.D. students at prestigious universities to vulgarizing complex problems in public media including print and television; and from consulting with the most grass-roots non-governmental organizations throughout the world to advising leaders at the highest levels in the innermost circles of governments, Ved has always been there for all who asked, and in this way, he is also an inspiration to all of us.

At a prestigious international law conference, when former U.S. National Security Advisor and Secretary of State Condoleezza Rice said, "All I know about international law I owe to Professor Nanda," she was speaking for thousands if not millions of people throughout the world. He has not just taught law; he has lived and exemplified a life of dignity and respect for all.

NORM SETTING FOR PMSCs: BACKGROUND

In his distinguished academic career, Ved has written extensively on so many subjects, such as human rights, graduate legal education in the United States, international environmental law, international dispute settlement in the United States, nuclear weapons and the World Court, refugee law and policy, law and transnational business transactions, and law in the war on international terrorism. In all he has written, he has stressed the role of law and particularly international law. He has tried to grasp the role of the normative in
setting some type of standards for societal behaviour within and outside the United States. Whether in the private or public sectors or whether within domestic or international law, as a proper disciple of Myers McDougal, Harold Laswell and the New Haven School of Yale Law School, Ved has always been concerned with the interaction between society and rules and norms, and not only in the formal sense of treaties and domestic legislation. What follows is a very current example of the international community, under Swiss leadership, trying to establish rules and norms in the intersection between public and private sectors, something very close to Ved's interests. In addition, the subject of the intersection and private military and security companies is of the highest importance as violence is no longer limited to interstate conflicts.

Recently, various sources above the state level, such as supranational bodies like the European Union, and below the state level, such as non-state actors like multinational corporations, nongovernmental organizations (NGOs), the media, and armed groups, have challenged the state-centric system initiated in the Peace of Westphalia. In this new environment, there are several new private threats to international security; among them piracy, organized crime, and citizen militias. Where States are no longer able or are unwilling to provide security, private actors have stepped in or governments have hired them to provide security. Private threats to peace and security have increased and private solutions to threats to peace and security have increased as well. States and international organizations, such as the United Nations, are hiring companies to provide traditional public functions in the security sector, including military operations, mission support, and security maintenance. Private companies have also been involved in training police forces and state armed forces as well as collecting intelligence information. In addition, multinational


2. In terms of security sector reform and development, Abrahamsen and Williams makes this point: "As the links between security and development have been increasingly recognized, Security Sector Reform (SSR) has become a central part of development policy. Following a traditional Weberian concept of the state, these programmes are almost exclusively focused on the public security sector, neglecting the extent to which people in developing countries have come to rely on private security providers for their day-to-day security needs." Rita Abrahamsen & Michael C. Williams, Security Sector Reform: Bringing the Private In, 6 CONFLICT, SEC. & DEV. 1, 1 (2006).

3. See Simon Chesterman, 'We Can’t Spy...If We Can’t Buy!': The Privatization of Intelligence and the Limits of Outsourcing Inherently Governmental Functions, 19 EUR. J. INT’L L. 1055, 1055-74 (2008). Chesterman notes that private contractors are more
companies and humanitarian organizations hire private security companies for protection.\(^4\)

In the new security environment, private military and security companies (PMSCs)\(^5\) have developed as important actors in the security sector. Indeed, the growth of private security companies has become a worldwide phenomenon. Certain statistics from the recent Small Arms Survey (Survey) are helpful in understanding the growth of this phenomenon.\(^6\) Based on a review of seventy countries, the Survey estimates that the formal private security sector employs about twenty million people, which exceeds the number of police officers at the global level, and holds between 1.7 and 3.7 million firearms.\(^7\) Estimates show that the security market is worth about $100-165 billion and growing at 7-8 percent.\(^8\) The company G4S, for example, has an estimated 530,000 employees in 115 countries and Securitas has 260,000 people in 40 countries.\(^9\)

Where I am now affiliated, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the Swiss government have been in the forefront of developing norms and principles for States as well as a Code of Conduct for companies in this area; they are trying to bring some set of rules and norms to the behaviour of States and private security firms contracted, to hold the States and firms accountable and to establish some form of oversight. There are several precedents for this effort of private/public partnerships. For example: Voluntary

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5. The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflicts [hereinafter Montreux Document] defines PMSCs as “private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.” Int’l Comm. of the Red Cross, Montreux Document 9 (August 2009), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

6. SMALL ARMS SURVEY 2011, STATES OF SECURITY 101-27 (2011). The Survey refers to private security companies as PSCs while we refer to private military and security companies (PMSCs), but we are talking about the same phenomena as the Survey indicates that such distinction is misleading (p. 102) and we will continue, therefore, to use PMSCs.

7. Abrahamsen and Williams estimate that the ratio of private security guards to police in developed countries is approximately 3:1, while in developing countries it may be as high as 10:1 or more. Abrahamsen & Williams, supra note 2, at 2.

8. SMALL ARMS SURVEY 2011, supra note 6, at 103.

9. Id.
Principles on Business and Human Rights initiative deals with the extractive industry;\textsuperscript{10} John Ruggie is the Special Representative of the UN Secretary-General on Business and Human Rights dealing with "Protect, Respect and Remedy"\textsuperscript{11} in the Global Compact. These two precedents have influenced two recent attempts to establish norms for States and companies in dealing with private security providers. What follows is a brief description of those two attempts.

**THE MONTREUX DOCUMENT**

In 2008, the Swiss Government and the International Committee of the Red Cross (ICRC),\textsuperscript{12} following a series of intergovernmental meetings over a three year period, joined with seventeen countries including, the United States, the United Kingdom, China and France, to endorse an agreement known as the "Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies During Armed Conflicts" (Document).\textsuperscript{13} It is the first international document to describe international law as it applies to PMSCs in the context of armed conflicts and list good practices to help States implement their international obligations through national measures. The Document is designed to be a guide to the legal and practical issues involving PSMCs. The two stated objectives are: 1) to clarify existing obligations of Contracting States, Territorial States and Home States; and 2) to develop good practices, regulatory options and other measures for the same at the national and international levels.\textsuperscript{14} To date, over thirty states have endorsed the Document of twenty-four pages and one hundred operative paragraphs. There are no legal obligations involved.\textsuperscript{15} Indeed, the Preface clearly states that it is "not a legally


\textsuperscript{12} It is somewhat unusual for the ICRC to take this type of initiative and equally unusual for the ICRC to be directly associated with the Swiss Government in this way. The independence of the ICRC from the Swiss Government is extremely important to its particular humanitarian neutrality. For a discussion of the relationship between the ICRC and the Swiss Government and an excellent political understanding of the ICRC, see DAVID P. FORSYTHE, THE HUMANITARIANS: THE INTERNATIONAL COMMITTEE OF THE RED CROSO (2005).

\textsuperscript{13} Montreux Document, supra note 5.

\textsuperscript{14} Id. at 9.

binding instrument and does not affect existing obligations of States under customary international law or [treaty law].”

The Preface of the Document lays out three potential relationships between PMSCs and States: Contracting States, including, as appropriate, when PMSCs subcontract with other PMSCs; Territorial States on whose territory the companies operate; and Home States where the PMSCs are registered or incorporated. The importance of these definitions and the inclusion of all three types overlapping in most of the Document is that “they constitute an explicit recognition by 17 highly affected states that they have a specific duty to protect human rights during the operation of PMSCs operating from their territory, or with whom they contract regardless of the extra-jurisdictional location of the activities of the private entity”.

In Part One, the Document recalls certain existing legal obligations of States regarding private military and security companies. It lays out the lex lata. Contracting States, the Document notes, have an obligation within their power to ensure the PMSCs they contract respect international humanitarian law (IHL). It is “a very public affirmation by a diverse group of states, including the United States, of the applicability of international humanitarian law (IHL) and human rights to contemporary armed conflict.” It is a clear reminder that States do not act in a legal vacuum in their relationships with PMSCs.

The difficulty, as the International Court of Justice (ICJ) saw in the Nicaragua v. United States case, is the degree to which a court can directly attribute the actions of a PMSC to a government. The ICJ, you remember, said that there was not enough evidence to impute responsibility for the flow of arms between Nicaragua and insurgents in El Salvador. Thus, the Document specifically refers to PMSCs contracted by States, eliminating any potential confusion. Article 7 of Part I says, “Although entering into contractual relations does not in and of itself engage the responsibility of Contracting States, the latter

17. Id. at 9-10.
18. Cockayne, supra note 15, at 406. (Italics in the original) Cockayne goes on to recount the controversy during the negotiations concerning the exact nature of that duty.
20. Id. at 12.
22. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. the U.S.), 1986 I.C.J. 14, ¶¶ 109, 115 (June 27). In its judgment, the Court said: “there is no clear evidence [that] the United States . . . actually exercised such a degree of control . . . as to justify treating the contras as acting on its behalf . . . [For the United States to be legally responsible], it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”
23. Id. ¶109.
are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs . . . where such violations are attributable to the Contracting State, consistent with customary international law.‖24 We also note here that the Government of the United Kingdom has decided not to engage any PMSC that has not shown adherence to the Code of Conduct.25

Territorial States, in the Document, also have the obligation, within their power, to ensure PMSCs operating on their territory respect IHL. These States also have the obligation to pass legislation necessary to provide penal sanctions to persons violating the law as well as to prosecute, extradite or surrender persons suspected of having committed crimes under international law on their territory. Home States and other States have many of the same obligations including ensuring respect for IHL, similar to the obligations of the signatories to the Geneva Conventions. Provisions are made for those in violation or in serious breach of IHL.

Of particular importance and in anticipation of the International Code of Conduct for Private Security Service Providers (ICoC), the Document has a section on PMSCs and their personnel. The Document calls for respect for IHL and human rights law imposed by national law, although the status of the personnel is not clear. The Document says in paragraph 24, “The status of the personnel of PMSCs is determined by international humanitarian law, on a case by case basis, in particular according to the nature of the circumstances of the functions in which they are involved.”26 If they are civilians, for example, they cannot be fired upon. If they are incorporated into the regular armed forces of a State or members of a group under a command responsible to the State, then their status changes, as does the question of prisoner of war status according to the relevant Geneva Convention.

There are, as one would imagine, considerable debates in international law concerning the engagement of PMSCs in armed conflicts.27 The question is whether in situations of armed conflict (inter or intrastate) IHL and international criminal law apply to PMSC employees. Most lawyers agree that if serious violations occur, national and international courts can prosecute the employees. IHL and human rights law also apply to States contracting them, States on whose territory they operate, and States where they are incorporated.

Some arguments focus particularly on the status of the employees. Are they civilians or combatants? Most of the employees do not partake

27. See SMALL ARMS SURVEY 2011, supra note 6, at 109.
in actual hostilities, but that can be a blurry distinction if they are involved in guarding a military base or intelligence gathering. The traditional ICRC delineation of civilians and militants loses some of its meaning here. Courts may hold superiors of PMSCs liable for international crimes committed by personnel under their effective authority and control, which, as previously mentioned, is always problematic to prove.\footnote{28} For the moment, courts have prosecuted very few PMSC personnel for IHL, human rights or criminal violations, although incidents of armed violence by employees in Afghanistan and Iraq have caused international furor.\footnote{29}

Part Two of the Document deals with good practices so as to assist States, who are not legally bound, to implement their obligations with the proviso that "any of these good practices will need to be adapted in practice to the specific situation and the State's legal system and capacity."\footnote{30} The Introduction has several caveats repeating the broad spectrum given to States to apply the practices where appropriate and possible. The recommendations, it is noted, may also apply for international organizations, NGOs and companies. The Document makes various suggestions concerning the procedure and criteria for the selection and contracting of PMSCs, as well as the terms of contract with PMSCs, including numerous quality indicators. It encourages Contracting States to monitor compliance to ensure accountability. It gives special attention to the granting and terms of authorization to a PMSC to operate by the territorial State as well as the Home State, including sanctions if violations occur.

The significance of the Part Two is the providing of suggestions or guidance on what good practices by States might be in dealing with PMSCs. There are 73 "good practices" which have the potential to be the cornerstone for the further development of regulating PMSCs, such as the follow-up Code of Conduct.\footnote{31} In general, however, while the final Document lays out the existing laws and the good practices, it definitely moved away from attempts in earlier versions to emphasize victims' rights to finally stress the legal obligations of the parties. In that sense, the Document fell below the expectations of human rights groups such as Amnesty International. But, in general, States were enthusiastic as well as industry representatives as they saw the Document as a positive

\footnote{28} "Prosecution by the International Criminal Court requires that an individual's actions meet criteria for a crime under the ICC Statute. The ICC has jurisdiction over individuals only, not corporations. This means that the Court has jurisdiction over the managers of PSCs for negligence in the prevention of the commission of crimes by their employees." \textit{Id.} at 128 n.13 (citation omitted).
\footnote{29} "In cases such as Iraq . . . PMSC employees were granted immunity from Iraqi law from 2004 to 2009 . . . ." \textit{Id.} at 110.
\footnote{30} \textit{Montreux Document, supra} note 5, at 12.
\footnote{31} \textit{Id.} at 12-26.
step toward clarifying the legal obligations of States and companies as well as finding an operative mechanism for regulation to ensure accountability.

THE ICoC

In response to industry demands, the Swiss government was involved in a second initiative to establish international standards for private security companies. The ICoC\textsuperscript{32} is a supplementary measure to any national governmental measures, but it stands as an outstanding example of an industry trying to self-regulate. Its objectives are to establish clear standards for private security providers based on international human rights law as well as to develop an oversight and compliance mechanism. In its explanation of the ICoC and how to become a Signatory Company, the Swiss Government specifically states that “[t]he ICoC itself creates no legal obligations and no legal liabilities on the Signatory Companies, beyond those which already exist under national or international law. However, you will be publicly affirming your responsibility to respect the human rights of, and fulfill humanitarian responsibilities towards, all those affected by your business activities.”\textsuperscript{33}

After a series of workshops with different stakeholders and a conference at Wilton Park in 2009, the Swiss Government and the stakeholders generally agreed on the need for a structure for the ICoC. Members of the private security industry and the Swiss Government, with the help of certain facilitators such as DCAF, agreed on a final version in September 2010.\textsuperscript{34} Fifty-eight companies finalised and signed the ICoC in November 2010.\textsuperscript{35} By February 1, 2011, the number of Signatory Companies had risen to seventy-one.\textsuperscript{36} Currently, a multi-stakeholder Steering Committee (StC) is developing the operational framework for the oversight institution.\textsuperscript{37} Whereas the Document was mostly a government initiative, the ICoC was an industry reflection on


\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.
what it could do regarding respect for international humanitarian and human rights standards.

The Preamble states that "the Signatory Companies commit to the responsible provision of Security Services so as to support the rule of law, respect the human rights of all persons and protect the interests of their clients."38 The ICoC is recognized as a founding instrument, and the Signatories commit to working with multi-stakeholders to establish objective and measurable standards based on the ICoC with "external independent mechanisms for effective governance and oversight."39 The ICoC mentions Certification as the ultimate goal based on the company's ongoing monitoring, auditing and verification.40

The general provisions of the ICoC relate to performing security services in complex environments. It explicitly states that it neither refers to legally binding obligations nor seeks to limit or prejudice existing international law. It is, quite simply, an example of soft law, such as the Deed of Commitment of the NGO Geneva Call dealing with armed non-state actor groups and the use of antipersonnel mines.41 Just as the Deed of Commitment is not a legal document, although it has been signed by almost forty armed non-state groups in the City Hall of Geneva with the Republic and Canton of Geneva as Depository, the ICoC is a political commitment by companies to voluntarily follow a code of conduct.42

39. Id. at 4.
40. Id.
41. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 291 (2006); Humanitarian Engagement of Armed Non-State Actors, GENEVA CALL, http://www.genevacall.org (last visited Sept. 30, 2011). As far as differences between the ICoC and Geneva Call's (GC's) Deed of Commitment (DoC), . . . the key mechanisms for oversight, certification and implementation of the ICoC are still under discussion, unlike the Geneva Call procedures which are comparatively well in place now. The ICoC process allows companies to sign the ICoC before going through any kind of 'certification' or external monitoring, the procedures for which are expected to be developed by the end of 2011. This is different from the Geneva Call approach, as the organization holds sustained dialogue, meetings and discussions on implementation before an armed non-State actor can sign a DoC. Presumably, once the ICoC procedures are established, signatory PMSCs will need to undergo a similar vetting process before becoming certified and will also be subjected to regular external oversight. But until this happens, there will be no way of assessing whether the more than 150 companies that have already signed the ICoC are actually complying with its important provisions.
42. See GENEVA CALL, supra note 41.
Not only does the ICoC relate to the companies in general, it has very specific principles regarding the conduct of personnel, especially dealing with the use of force, detention, and apprehending persons. Separate sections deal with the prohibition of torture or other cruel, inhuman or degrading treatment or punishment as well as sexual exploitation and abuse or gender-based violence and human trafficking. The ICoC includes management and governance such that the ICoC becomes incorporated into all aspects of company policy. The ICoC also demands diligence as far as the hiring of sub-contractors, with special mention of the management and use of weapons.  

Among the companies that signed in Geneva on November 9, 2010, it is estimated that at least 80 percent of large, internationally-operating companies have signed, but there are many small companies around the world and it is difficult to estimate their importance. It is anticipated that another forty plus companies will be added to the list of Signatories by August 1, 2011, but many of them are small maritime private security companies. Estimates are that companies representing around 80 percent of money spent on international private security services are included in the Signatory Company list.

The Document and the ICoC are reactions to the growing privatization of the use of force and the rapid development of the private security sector. Many government and industry abuses have been well documented and there is no need to review them here. We all know about Blackwater, XeServices LLC and Erik Prince. Reports that the Central Intelligence Agency hired Blackwater to assassinate al-Qaida members or the possible use of PMSCs to conduct authorized peacekeeping operations have been hotly debated. What is important to note, and in relation to much of Ved’s work, is the developing crystallization of norms and principles to deal with the interaction between the public and private sectors, and between the rule of law and societal behaviour and to try to correct abuses. Ved is a lawyer, but he is much more than that and the examples of the Document and ICoC are excellent reminders of the continuing interrelationship between the political and the legal, something very close to Ved’s preoccupations and the New Haven School, which so influenced his career. Questions of security, equality, legitimacy and the protection of human rights are never far from his agenda.

43. See SMALL ARMS SURVEY 2011, supra note 6, at 109.
44. Correspondence from Anne-Marie Buzatu to author (July 27, 2011) (on file with author).
45. Id.
46. Id.
CONCLUSION

I am neither a lawyer nor an international jurist. I do know enough about the law to see in all of Ved’s professional work a driving force that Lon Fuller, the famous Harvard Law School Professor, spoke of as “the inner morality of law” and its “unfolding purpose.” Justice and dignity drive Ved in his personal and professional lives to an extent that inspires and humbles those who try to emulate his example. There are those who write and preach about human rights, and there are those who live human rights. There are those who write and preach about being international; Ved lives the international and he has brought the University of Denver into the forefront of international higher education. In both his personal and professional lives, Ved has been a unique example of humanizing whomever and whatever he encounters.

Indeed, the small distinguished gentleman with a decidedly Indian accent has become more than a friend to me, as he has been to so many people, and for that I feel blessed as should all who have had the privilege to know him and work with him.
PALESTINE’S ADMISSION TO UNESCO: CONSEQUENCES WITHIN THE UNITED NATIONS?

LARRY D. JOHNSON*

BACKGROUND

On October 31, 2011, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) voted to admit Palestine as its 195th Member State. The vote was 107 in favour, 14 against with 52 abstentions. Among those voting against was the United States, which issued a press statement that the vote was “regrettable” and “premature” and undermined the “shared goal of a comprehensive, just, and lasting peace in the Middle East.”1 The statement also stated that while the U.S. would maintain its membership and commitment to UNESCO, Palestinian membership triggered longstanding legislative restrictions which compelled the United States to refrain from making contributions to UNESCO. Palestine’s admission to UNESCO membership was effected by its signature and deposit of its instrument of acceptance of the Constitution of UNESCO on November 23, 2011, at the National Archives of the United Kingdom, the depositary of the Constitution.

Palestine had applied for membership in the United Nations on September 23, 2011.2 In November 2011, the Security Council’s Committee on the Admission of New Members concerning the application of

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2. U.N. Secretary-General, Application of Palestine for Admission to Membership in the United Nations, Note by the Secretary-General, U.N. Doc. A/66/371 (Sept. 23, 2011). The covering Note by the Secretary-General transmitting Palestine's application to the General Assembly made no reference to the receivability of the application. In 1993, when Macedonia submitted its application for membership, the covering Note stated that the Secretary-General was circulating the application "following informal consultations held by the President of the Security Council at the request of the Secretary-General concerning the receivability" of the application. U.N. Secretary-General, Admission of New Members to the United Nations, Note by the Secretary-General, U.N. Doc. A/47/876 (Jan. 22 1993). It remains to be seen in the Palestinian case whether it can be argued that by circulating the application without such consultations and lacking a "without prejudice to receivability" clause, the Secretary-General had concluded, at least prima facie, that the application was receivable as having been submitted by a "State."
Palestine submitted its report. The report indicates that the Committee considered, inter alia, whether Palestine met the criteria for statehood, was a peace-loving State, and was willing and able to carry out the obligations contained in the Charter. Its Chair, in summing up the debate, stated that the Committee was unable to make a unanimous recommendation to the Security Council. As of the writing of this comment, no further action has been taken in the Council regarding Palestine’s application.

This comment will not survey the various repercussions of Palestine’s admission to UNESCO membership in general nor its efforts to become a member of the UN. Rather, it surveys several ways in which the membership of Palestine in UNESCO might have consequences within the United Nations. The three main areas where there might be consequences are: a) observer State status in the General Assembly, b) participation as a State in United Nations conferences and meetings and c) deposit of treaty instruments with the Secretary-General as depositary of treaties.

a) Observer State status in the General Assembly

Neither the Charter nor the rules of procedure of the General Assembly refers to observers. Allowing non-members to observe and participate in the meetings of the Assembly arose purely from practice and ad hoc decisions of the Assembly.

As far as “standing” invitations to intergovernmental organizations and other entities to participate in the work and sessions of the General Assembly, this is always done by specific decision of the General Assembly. More than 80 such organizations and entities have received such standing invitations.

With regard to non-member States, the Secretary-General’s practice of providing observer “facilities” began in 1946 when Switzerland was provided such facilities. This unforeseen development was reported by the Secretary-General to the General Assembly in a 1949 report, which noted that four non-member States (Austria, Italy, the Republic of Korea and Switzerland) had appointed observers to follow the work of the organization at its headquarters. The Secretary-General stated in the report that he had welcomed the observers and that he had given their missions every possible facility “though their status [had] not yet...

4. Observer status is not accorded in the United Nations in general, but rather in particular organs such as the General Assembly. For a summary of the development of non-member participation and observation as of 1978, see Erik Suy, The Status of Observers in International Organizations, in 160 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 75, 75-180 (1978).
been determined.”\textsuperscript{5} The Assembly did not react and has never systematically dealt with non-Member State observers. As stated in a 1994 legal opinion, “[i]n the case of observer States, the General Assembly does not take any action; rather it is the Secretary-General who provides observer facilities to non-Member States which establish permanent offices at Headquarters.”\textsuperscript{6}

The “facilities” accorded to such observers in the Assembly were basically a nameplate and seat at the rear of the meeting room, separated from Member States. Observers also receive access to unrestricted documents as well as access to open meetings of the Assembly, its Main Committees and subsidiary bodies.\textsuperscript{7} As far as any right to participate in meetings, such as making speeches, interventions and the like, “[t]he function of an observer is defined by his title, that is his role is essentially to ‘observe’ . . . he may not automatically take part in the discussion.”\textsuperscript{8} Rather, the observer made statements only after making a request to the presiding officer who consults with the body whether to grant the request (normally speaking after Member States). In the practice of the Assembly in the early years, requests of observer States to speak were normally limited to speaking in the Main Committees of the Assembly, not in the plenary, and were granted by Committees if the observer State had a direct and immediate interest in the matter under discussion.\textsuperscript{9}

It may be noted here that this is in contrast to the practice that began in the 1970s by which organizations, which by virtue of Assembly decision had been given a standing invitation to participate, began speaking in the plenary on matters of direct concern to them. Observer States soon followed to a limited extent, but in each instance, the President of the Assembly would consult the Assembly by informing its members that he or she had received a request from the non-Member State observer to make a statement and if there were no objections, he would grant the request and give the Permanent Observer the floor.\textsuperscript{10}

Over the years, over a dozen non-Member States establishing offices at Headquarters have been provided observer facilities.\textsuperscript{11} But in

\textsuperscript{7} This article will not deal with the question of the privileges and immunities to be accorded to observer States at Headquarters.
\textsuperscript{10} 1978 U.N. Jurid. Y.B. 166, U.N. Doc. ST/LEG/SER.C/16 (noting that until 1975, no observer State had made a statement in the plenary other than Pope Paul VI in 1965, but that beginning in 1975 and 1976, the Assembly granted requests from some observer States to speak in the plenary).
\textsuperscript{11} Austria, Bangladesh, Democratic People's Republic of Korea, Democratic Republic of Viet Nam, Finland, German Democratic Republic, Germany, Federal Republic of, Holy
providing such facilities, the Secretary-General had to make a judgment whether the entity concerned was in fact a State. He made that judgment on the basis of the following:

... [T]he Secretary-General is not in a position to alone decide whether or not a given entity possesses all the attributes of a sovereign State acting on the international plane. It has therefore been established by a practice which goes back to the 1950s that the decisive criterion for determining whether or not an entity is a 'State' for purposes of according observer State facilities is whether or not the applicant in question has been admitted as a member State of one of the specialized agencies of the United Nations.12

If that is the “decisive criterion,” Palestine would seem well placed to simply request observer State facilities of the Secretary-General. But in doing so, it could lose the considerable rights and privileges it has obtained over the years first as a national liberation organization and then as an “entity.” Through a series of resolutions adopted by the Assembly beginning in 1974, Palestine has been granted various rights and privileges which observer States relying solely on facilities granted by the Secretary-General do not enjoy. Indeed, as indicated by a legal opinion in 2000, “Palestine now enjoys several of the rights and privileges of participation otherwise exclusively enjoyed by States Members of the United Nations.”13 He stressed, however, that those “enhanced” rights did not affect the legal status of Palestine.

Because of the disparity between the rights of Palestine by virtue of Assembly decision and the facilities provided by the Secretary-General alone, observer States began to consider the benefits of having an Assembly resolution according them the same or similar rights as enjoyed by Palestine. This is indeed what occurred in 2004, when the Assembly accorded to the Holy See, the sole remaining observer State, “enhanced” rights of participation. These rights were not quite as extensive as those enjoyed by Palestine, but they were certainly more than what it had enjoyed during the previous 30 years by virtue of the Secretary-General’s “facilities.”14

See, Italy, Japan, Kuwait, Monaco, Republic of Korea, Spain, Switzerland and Viet Nam. As of this writing, only the Holy See remains as a non-Member State observer.

12. 1994 U.N. Jurid. Y.B. 463, U.N. Doc. ST/LEG/SER.C/33. Presumably, the Secretary-General would also accord such facilities to non-Member States who are parties to the Statute of the International Court of Justice (ICJ). See “the Vienna formula” discussion infra Part B.


Thus, while Palestine might request the Secretary-General to be accorded the facilities of a non-Member State observer by virtue of its admission to UNESCO and the application of the "decisive criterion" noted above, what would it gain and what would it risk? Unless the Secretary-General declined to follow the established practice, he would simply move the nameplate "Palestine" next to "Holy See" and thereby indicate that Palestine would be considered a non-Member State observer for purposes of observer State facilities in the Assembly. Presumably, this would be to Palestine's political advantage, but could pose risks of losing the "enhanced" rights of participation, which have only been accorded by virtue of Assembly decision. It would be doubtful if the Secretary-General would take it upon himself to conclude that the Assembly-conferred "enhanced" rights of Palestine as an entity could be transferred by his acting alone without Assembly involvement to Palestine as a non-Member State observer.

This returns to the speculation prior to the UNESCO admission that Palestine would seek a General Assembly decision acknowledging, noting, welcoming, or considering Palestine to be an independent, sovereign State on the international plane. In addition, such a resolution would presumably also "grandfather" or "roll over" the rights and privileges that Palestine had enjoyed as an entity to the rights and privileges that it would enjoy as an observer State.

So while in theory, the admission of UNESCO could have an almost automatic consequence in the UN in terms of the Secretary-General providing, on Palestine's request, non-Member State observer facilities, in all likelihood that would not be the preferred choice of action in view of the risks of losing its considerable rights and privileges in the Assembly. A separate, distinct resolution adopted by the Assembly would most probably be sought.

b) Participation as a State in United Nations conferences and meetings

United Nations conferences and meetings may be open not only to members of the Organization, but also to other States, presumably to

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15. The Palestinian National Council proclaimed the "State of Palestine" in November 1988 but the General Assembly has never formally recognized this designation. See G.A. Res. 43/177, U.N. Doc. A/RES/43/177 (Dec. 15, 1988) (noting that the General Assembly "acknowledged" the proclamation, but it chose not to opine on the status of Palestine in the UN. Rather, it decided that the designation "Palestine" should be used in place of that of "Palestine Liberation Organization" within the UN without prejudice to the observer status and functions of the PLO). See also Question of Palestine, U.N. Doc A/44/L.50 (Nov. 29, 1989) (proposing a draft resolution circulated by the Arab States under which the Assembly would have decided that the designation "Palestine" should be construed within the UN "as the State of Palestine"); U.N. GOAR, 44th Sess., 76th mtg. at 2-5, U.N. Doc. A/44/PV.76 (Dec. 6, 1989) (noting that the sponsors decided not to press the draft resolution to a vote).
advance universality of participation of members of the international community, particularly in the drafting and adoption of treaties or instruments aimed at universal adherence. For example, in 1966, when the Assembly decided to convene the Vienna Conference on the Law of Treaties, it invited “States Members of the United Nations, States members of the specialized agencies, States Parties to the Statute of the International Court of Justice and States that the General Assembly decides specially to invite” to participate.16 The “core” of the invitation (States members of the UN or of the specialized agencies and Parties to the Statute of the ICJ, if not already covered by the prior two categories) subsequently became known as the “Vienna formula.” A later example is the 1997 General Assembly resolution convening the Rome Conference on the Establishment of an International Criminal Court, which invited “all States Members of the United Nations or members of the specialized agencies” to participate.17 An even more recent example is the 2009 decision to establish a Preparatory Committee for the 2012 Conference on Sustainable Development (Rio + 20) with the “full and effective participation of all States Members of the United Nations and members of the specialized agencies.”18

The Assembly also on occasion has employed the expression “all States” with regard to a conference or meeting. In 1973, the Assembly requested that “all States” communicate views regarding the World Disarmament Conference19 and that “the Governments of all States” keep the Assembly informed of their disarmament negotiations.20 The 1973 legal opinion explaining how the Secretariat would interpret that language said that the reference to “all States” was to be understood as referring to States members of the United Nations, of the specialized agencies or the International Atomic Energy Agency (technically not a specialized agency), States parties to the Statute of the ICJ and entities which the General Assembly unequivocally considers to be States.21 In 2000, a legal opinion stated that the phrase “open to all States Members of the United Nations or members of the specialized agencies or of the

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17. G.A. Res. 52/160, ¶ 3, U.N. Doc. A/RES/52/160 (Dec. 15, 1997). By 1997, all Parties to the Statute of the ICJ were also members of the UN, hence there was no need to include that category of invitees.
International Atomic Energy Agency” was known as the “all States formula.”

In these circumstances, it is clear that should a United Nations conference or meeting be open to the full participation of States members of the specialized agencies or of “all States,” Palestine should be among the invitees and should participate fully and equally with State members of the UN or of specialized agencies (seated between Palau and Panama).

This possibility may have been the reason behind the invitation formula used for the upcoming “Rio + 20” Conference on Sustainable Development, scheduled to take place in Brazil in June 2012. As indicated above, States invited in 2009 to participate in the Preparatory Committee for that Conference included both members of the UN and members of the specialized agencies. In his August 2011 report on preparations for the Conference, the Secretary-General recommended to the Assembly that it “decide that the Conference shall be open to all States Members of the United Nations and States members of the specialized agencies, with the participation of observers, in accordance with the established practice of the General Assembly and its conference, and in accordance with the rules of procedure of the Conference.”

However, when the Second Committee of the Assembly was presented a draft resolution on the upcoming Conference on November 10, 2011, approximately 10 days after the October 31st vote on the admission of Palestine to UNESCO, the invitation formula did not follow the Secretary-General’s recommendation, but rather provided that “the conference ... will be open to participation by all States Members of the United Nations, the Holy See, in its capacity as Observer State, Palestine, in its capacity as observer, and the European Union, in its capacity as an observer, as well as other intergovernmental organizations ...”. This text, which clearly differentiated the position of the Holy See as an “Observer State” from that of Palestine as an “observer,” was adopted without a vote by the Assembly in the plenary on December 22, 2011 as resolution 66/197.

23. Some governments may not consider Palestine to be a State member of UNESCO, but as far as UNESCO is concerned, it is.
Thus, two entities considered by specialized agencies to be States members (Holy See and Palestine) are limited to observer participation, and the text differentiates the Holy See as an "Observer State" whereas Palestine is an "observer." Moreover, two other States members of specialized agencies but not members of the United Nations, which are also Pacific Small Island States (the Cook Islands, Niue), are excluded altogether. This change in the invitation practice of UN Conferences may have had as its object avoiding having to face the question of inviting Palestine as a full participant in the Conference by virtue of its admission of UNESCO. This may well be the first consequence in the United Nations of the admission of Palestine as a member of UNESCO.

c) Deposit of treaty instruments with the Secretary-General as depositary of treaties

The Secretary-General serves as depositary for numerous multilateral treaties, recording signatures and the deposit of treaty instruments indicating consent of a State to be bound by a treaty (ratification, accession, acceptance). Many such treaties provide final clauses which mirror the "Vienna formula" or the "all States" clauses noted above, when setting out which States are entitled to sign the text and deposit treaty instruments concerning the treaty.

The Vienna Convention on the Law of Treaties of 1969 follows the expanded form of the Vienna formula by providing that it shall be open to signature and deposit of treaty instruments by members of the United Nations and of the specialized agencies, parties to the Statute of the ICJ and to any other State invited by the Assembly to become a party to the Convention. In reference to treaties open to treaty action by "all States" or "any State," the Secretary-General has interpreted those phrases to mean the same as the "Vienna formula." Thus, as a member of a specialized agency, Palestine should be entitled to sign or deposit treaty instruments related to any such treaty. The number of treaties to which this would apply are too numerous to mention, but


27. As long as there is disagreement concerning the status of Palestine within the Assembly, there may not be further invitations along the "Vienna formula" or "all States" lines unless adopted by a vote.


29. See id. Some multilateral treaties are not deposited with the Secretary-General but rather with governments, such as various disarmament treaties (deposited with the
concern has been expressed regarding the possibility of Palestine deposing a treaty instrument to become a party to the Rome Statute of the International Criminal Court (ICC), which is open for the deposit of instruments of accession by “all States.”

The situation is complicated, however, by the fact that in January 2009, Palestine invoked article 12(3) of the Rome Statute in lodging with the ICC a declaration accepting the jurisdiction of the Court “for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since July 1, 2002.” That provision of the Rome Statute allows States not Parties to the Rome Statute to lodge acceptances of jurisprudence with retroactive effect. The Prosecutor of the ICC indicated the declaration would be carefully studied, including whether the declaration of acceptance met statutory requirements.

Thus, Palestine appears to have a choice between becoming a State party to the Rome Statute by depositing an instrument of accession based on its 2011 admission to UNESCO as a member State, or waiting for the result of the Prosecutor’s study of the 2009 declaration of acceptance of jurisdiction as a non-State party, applied retroactively. It should be noted, somewhat counterintuitively, that if Palestine were to become a State Party to the Rome Statute, the ICC would only come into force for Palestine on the first day of the month following the 60th day following the deposit of its instrument of acceptance; no retroactive application is possible in line with standard law of treaties principles. But if it maintained its declaration of acceptance of jurisdiction lodged as a non-State Party, jurisdiction might extend retroactively to the date indicated in its application, July 1, 2002.

Of course, if the Prosecutor were to conclude that the declaration was receivable as having been lodged by a State and as meeting the requirements of the Statute at the time it was lodged, he or she would still have to determine how far back in time jurisdiction would begin, i.e., to the date claimed in the Declaration, to some later time when it was determined that Palestine had achieved statehood, or to the date of Palestine’s admission in UNESCO. This would entail an interesting and not-free-from-difficulty analysis, initially on the part of the Prosecutor. As of the end of January 2012, it is not known whether the admission of Palestine to UNESCO membership will have an impact on the Prosecutor’s study of the declaration.

In general, treaties that are open to the deposit of treaty instruments by States members of specialized agencies should be available to

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Russian Federation, United Kingdom, and United States) and the four 1949 Geneva Conventions on the Protection of Victims of War (deposited with Switzerland).

Palestine as a member State of UNESCO, according to the established practice as described above. In this, as was the case with the other possible consequences, the Secretary-General is spared having to do anything automatically, but can wait an external event — in this case an explicit attempt on the part of Palestine to deposit a treaty instrument. If, for policy or other reasons not discussed here, Palestine decides to forgo taking that action for the time being, the Secretary-General will not be placed in a position of having to choose between established and settled treaty depositary practice and political pressure not to take any action which could be perceived as taking a decision on his own regarding whether or not Palestine is a State on the international plane.

CONCLUSION

In all three circumstances described above, some future external event must occur before the consequences of UNESCO membership would “kick in” at the United Nations: a) a resolution adopted by the General Assembly deeming Palestine to be a non-Member State observer while maintaining its “enhanced” rights of participation; b) invitations issued by the Assembly to “all States” or to States members of specialized agencies, to participate in UN conferences or meetings; and c) Palestine attempts to deposit treaty instruments with the Secretary-General regarding treaties open to “all States” or to States members of specialized agencies.
EARNED SOVEREIGNTY:
The Future of Sovereignty-Based Conflict Resolution

PAUL R. WILLIAMS*

INTRODUCTION

In the coming decades, the world is likely to see continuing conflict arising from the inherent tension between self-determination and territorial integrity. In the 1950's and 1960's, the world grappled with a wave of new states emerging from decolonization. In the 1990s and 2000's, the world witnessed the dissolution of the Soviet Union, Yugoslavia, Czechoslovakia, and the Sudan, as well as the separation of Eritrea from Ethiopia and East Timor from Indonesia. In the 1990's, almost half of all peace agreements failed within five years. In the 21st century, 90 percent of civil wars occurred in countries that had already endured civil war within the last 30 years. As we look toward the horizon, it is safe to say that deep-seated tension will continue to exist between groups seeking to exercise their right to internal or external self-determination, and states looking to preserve their territorial integrity. While some of these conflicts may play out peacefully, we know from experience that the clash between self-determination and territorial integrity leads in most cases to violence met by violence.

If the lessons of the past few years are any indication, it is also likely that the conflict resolution approach of earned sovereignty will be turned to as a means for bridging the impasse between self-determination and territorial integrity. Earned sovereignty is the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity under international supervision. The approach, which has its roots in the Northern Ireland and Bougainville peace agreements, among others, proved successful in structuring the separation of Montenegro from Serbia, East Timor from

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Indonesia, Kosovo from Serbia, and South Sudan from the Sudan. Professor Ved Nanda’s lifetime of work on the question of self-determination played a crucial role in the development of the approach of earned sovereignty.

During the course of advising numerous states and substate entities on questions of self-determination, I have invariably turned to the ideas and concepts developed by Professor Nanda. Professor Nanda has led the field in proposing specific criteria for resolving claims of self-determination. He has always resisted the temptation to adopt a “sovereignty first” or “self-determination first” approach. Rather, he has endeavored to paint a realistic picture of the effect that sovereignty-based conflicts have on the stability of our world, and to identify ways in which these conflicts may be better resolved.

This article will first discuss the significant impact that Professor Nanda’s scholarship has had on the self-determination debate, setting the stage for the development of earned sovereignty. Next, it will trace the development of the earned sovereignty approach to its current status as a widely accepted conflict resolution approach that has been extensively utilized to resolve sovereignty-based conflicts throughout the world. This article will then revisit the elements that make up the earned sovereignty approach and will analyze the successful use of the approach to resolve the conflicts in Kosovo and South Sudan.

**SETTING THE FOUNDATION FOR EARNED SOVEREIGNTY**

Professor Ved Nanda first staked a role in the self-determination debate in the early 1970’s when he wrote about East Pakistan’s right to self-determination. In that first piece, Professor Nanda argued that a set of criteria for self-determination should be developed, and he proposed a basic set of elements to jump-start the discussion. At that time, he urged that claims to non-colonial self-determination were going to rise quickly and sharply, and that the international community would be wise to consider certain of these claims. When Professor Nanda later looked back on the East Pakistani conflict, which had resulted in the birth of Bangladesh, he again argued for the extension of

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2. *Id.* at 336 (arguing that the following factors made self-determination applicable to East Pakistan: (1) the large distance between East and West; (2) the deprivation of human rights to the majority; (3) the ethnic, linguistic, and cultural differences; (4) the economic exploitation of East Pakistan by West Pakistan; (5) the fact that there had been a majority determination by vote of the political direction of Pakistan, which had been forcibly denied; and (6) West Pakistan did not depend upon East Pakistan for its political or economic viability).

3. *Id.* at 322.
self-determination to groups "deprived of the opportunity to participate in the value processes of a body politic." He reasoned that the test for evaluating a claim for self-determination should be "the nature and extent of the deprivation of human rights of the subgroup making the claim."

When Professor Nanda revisited self-determination in the early 1980's after the Soviet intervention in Afghanistan and the Vietnamese intrusion in Cambodia, it was to refine the circumstances under which secession, as an exercise of the right to self-determination, might be considered justifiable. To establish whether a right to secede is legitimate, Professor Nanda suggested focusing on the nature of the group seeking self-determination and its alienation from the "body politic," as well as the group's reasons for wanting to secede and the degree to which its members had been denied basic human rights. His purpose in doing so was to encourage the establishment of criteria for cases in which the severe deprivation of human rights leaves no alternative to secession.

Over a decade later, Professor Nanda reexamined self-determination in light of the post-Cold War environment, which included self-determination claims from the Kurds in Iraq and Turkey, the Tamils in Sri Lanka, and claims for secession in the Balkans, Caucasuses, and throughout Africa. This time around, he analyzed self-determination in a world that had finally caught on to what he had insisted for over two decades — that certain claims for self-determination outside the colonial situation deserve recognition. While Professor Nanda reiterated that the severe deprivation of human rights may justify self-determination claims, he emphasized that there were different results of accepting such claims — "the creation of a state, a federal entity . . . a confederation of states," or "an ethnic power-sharing arrangement." In order to avoid a resort to violence to resolve self-determination claims, Professor Nanda encouraged the creation of mechanisms for pursuing self-determination claims and reconciling competing claims of sovereignty.

5. Id. at 85.
7. Id. at 275.
8. Id. at 280.
10. Id.
11. Id. at 452.
12. Id.
In the 21st century, Professor Nanda again lent his expertise to the self-determination debate in light of Quebec's claim to secede from Canada, and the recent developments in Kosovo and East Timor. He argued that the cases of Kosovo and East Timor demonstrated that the international community may be willing to accept unilateral secession claims in exceptional circumstances, particularly when an "undemocratic, authoritarian regime" has prohibited "the 'people' [from] participat[ing] effectively in the political and economic life of the state" and has followed "a pattern of flagrant violations of human rights."

**A GROTIAN MOMENT AT THE UNIVERSITY OF DENVER COLLEGE OF LAW**

In seeking to develop the ability of lawyers to add value to sovereignty-based conflicts, Professor Nanda accepted an offer by the Public International Law & Policy Group to cooperate in organizing a day-long roundtable discussion at the DU College of Law to exchange ideas on the evolving conflict resolution approach of earned sovereignty.

At that time, earned sovereignty was an emerging concept with origins in the peace agreements relating to the state practice of Serbia and Montenegro and East Timor, the Northern Ireland and Bougainville agreements, and the proposed agreements for the Palestine Road Map and Western Sahara. However, despite the ad hoc reliance on the earned sovereignty approach by mediators and parties to conflict, there had been little effort to synthesize the concept or draw attention to its utility for resolving sovereignty-based conflicts. This roundtable, and the subsequent debate that ensued, began to put flesh on this emerging trend we dubbed "earned sovereignty," which came to be recognized as the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity under international supervision.

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14. *Id.* at 325.


Much has changed since that roundtable discussion a decade ago: the concept of earned sovereignty has gained considerable traction in the public international law and conflict resolution communities, and—most significantly—earned sovereignty has proven itself as a reliable mechanism for resolving sovereignty-based conflicts. Earned sovereignty is no longer an "emerging approach," as my colleagues and I once described it; it is now a tried and tested process for resolving conflicts.

The earned sovereignty approach has now been fully realized in both Kosovo and South Sudan, ending years of armed conflict in those states. Additionally, earned sovereignty has been proposed by the Moro in the Philippines, the Tamils in Sri Lanka, and the government of Nagorno Karabagh, as an option for ending conflict and resolving their claims to self-determination.

17. The Memorandum of Agreement on the Ancestral Domain (MOA-AD) that was signed by the government of the Philippines and the Moro Islamic Liberation Front (MILF) in Kuala Lumpur on August 5, 2008, utilized the earned sovereignty approach in an attempt by negotiators to end the protracted conflict between MILF and government forces in the Mindanao area. However, the Philippine Supreme Court enjoined the agreement upon petition from a Christian political leader who claimed they were not represented in negotiations; after that decision, the government backed away from the agreement. The MOA-AD outlined the stages of earned sovereignty, and called upon the parties to later sign a "comprehensive compact" that would guide the transition period. See Eliseo "Jun" Mercado, MOA-AD, Quo vadis?, AUTONOMY & PEACE REV., July–Sept. 2008, at 9, 10-11 (2008), available at http://www.iag.org.ph/cgi-bin/publications/files/Volume%204%20Issue%20No.%203.pdf (describing earned sovereignty as "the new paradigm as used in negotiation with MILF, beginning in December 2006" and explaining the steps of earned sovereignty as outlined in the MOA-AD). For a full text of the MOA-AD, see Collective, GRP-MILF Full Text of Bangsamoro Juridical Entity (BJE) MOA, PINOY PARA SA KALIKASAN (blog) (Aug. 16, 2008, 7:13 AM), available at http://usap angkalikasan.multiply.com/journallitem55/GRP-MILFFull Text-ofBJE MOA-AD. For further discussion by Musib M. Buat, a member of the MILF Peace Panel, on the MILF's continued pursuit of earned sovereignty, see Darwin Wally T. Wee, MILF Still Upbeat on Peace Accord Despite Serious Hitches, ZABIDA, Oct. 9, 2009, available at http://www.zabida.com.ph/component/content/article/186?ed=16.

18. A statement made by the political wing of the LTTE just before the 62nd General Assembly of the UN alluded to the notion of earned sovereignty: "[W]e urge the international community to provide appropriate opportunities to the Tamil people to express their aspirations, as have been given to the people of East Timor and Kosovo." Tamil sovereignty, basis of peace talks – LTTE, TAMILNET (Sept. 24, 2007, 5:37 PM), http://www.tamilnet.com/art.html?catid=13&artid=23362. U.S.-based Tamil legal adviser Visuthanathan Rudrakumaran has said that "leaving the options of 'earned sovereignty,' 'phased out sovereignty,' and 'conditional sovereignty' off the negotiation table will reduce the incentive for the Sinhala Nation to put forward a meaningful power-sharing proposal or even to take the peace process seriously." Earned Sovereignty: East Timor, Kosovo ... Sri Lanka?, DEFENCEWIRE (Sept. 28, 2007, 12:11 AM), http://defencewire.blogspot.com/2007/09/earned-sovereignty-east-timorkosovosri.html.

Earned sovereignty has also gained significant traction in the public international law and conflict resolution communities as a method for resolving sovereignty-based conflicts. While one scholar has hailed earned sovereignty as the "most promising solution in ethnically based conflicts where the prerequisites for self-determination are not met,"20 others have described the advent of earned sovereignty as a re-conceptualization of sovereignty as a divisible entity, calling into question the strength of traditional notions of sovereignty and self-determination.21 Some scholars focus on earned sovereignty's utility for resolving conflicts22 or value as a tool to clarify the transition process, 23 while others focus on the connection the approach draws between dispute resolution and international territorial administration.24 Still others, in seeking to improve upon the method for resolving conflicts, highlight potential dangers of the earned sovereignty approach, including the possibility of withholding power for too long, the need for "ownership" over the process in order to achieve sustainable peace, and the necessity for achievable standards with a clear endpoint.25 This last point has received particular attention – and criticism – in the Kosovo context.26

Moreover, many scholars have thoroughly analyzed the application of earned sovereignty to the "standards before status" policy approach

22. Nathan P. Kirschner, Making Bread from Broken Eggs: A Basic Recipe for Conflict Resolution Using Earned Sovereignty, 28 WHITTIER L. REV. 1131, 1136 (2007) (discussing how exactly earned sovereignty can help to resolve conflicts: "sharing sovereignty fosters dialogue between key stakeholders"; "institution building fosters competence in the substate entity and provides both the stakeholders and the international community with assurance of future competency"; and "determining final status of the substate entity . . . gives the parties an idea of an ultimate reward, a goal that parties can attempt to obtain. . . . [T]he optional elements . . . keep the parties on track by rewarding them for tasks accomplished during the implementation process.").
in Kosovo,\textsuperscript{27} and others have evaluated its application to Bosnia,\textsuperscript{28} South Sudan,\textsuperscript{29} Bougainville,\textsuperscript{30} Aceh,\textsuperscript{31} and East Timor.\textsuperscript{32} Still others have argued for its potential to resolve other conflicts by applying the approach to the Kashmir people,\textsuperscript{33} the Kurds in Iraq,\textsuperscript{34} the ethnic Armenians in Nagorno-Karabakh,\textsuperscript{35} and the Abkhaz in Georgia.\textsuperscript{36}

**EARNED SOVEREIGNTY IN A NUTSHELL\textsuperscript{37}**

Earned sovereignty, as developed in state practice over the last decade, seeks to bridge the approaches of sovereignty and self-determination by providing a mechanism whereby some substate entities may be guided through a process of transition to statehood or heightened autonomy in such a way so as not to undermine the legitimate interests of parent states and of the international community. Earned sovereignty is designed to create an opportunity for resolving sovereignty-based conflicts by providing for the managed devolution of sovereign authority and functions from a state to a substate entity.\textsuperscript{38} In some instances, the substate entity may acquire sovereign authority and functions sufficient to enable it to seek international recognition, while in others the substate entity may only acquire authority to operate within a stable system of heightened autonomy. The approach seeks to promote peaceful coexistence.


\textsuperscript{29} Kirschner, supra note 22, at 1142-50.

\textsuperscript{30} Id. at 1152-58.

\textsuperscript{31} Id. at 1158-66.

\textsuperscript{32} Heymann, supra note 28, at 179-80.

\textsuperscript{33} Id. at 195-97.


\textsuperscript{36} INT'L CRISIS GRP., ABKHAZIA TODAY EUROPE REPORT N°176 3 (Sept. 15, 2006), http://www.crisisgroup.org/-/media/Files/europe/176_abkhazia_today.ashx (follow link to Full PDF report) (The Abkhaz believe that they are currently earning their sovereignty.).

\textsuperscript{37} This section draws heavily from the following articles: Paul Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap between Sovereignty & Self-Determination*, 40 STAN. J. INT'L L. 347 (2004); Williams, Scharf &. Hooper, supra note 16; Williams, supra note 16, at 388-89.

\textsuperscript{38} Williams, Scharf & Hooper, supra note 16, at 350 ("The authority and functions may include the power to collect taxes, control the development of natural resources, conduct local policing operations, maintain a local army or defense force, enter into international treaties on certain matters, maintain representative offices abroad, and participate in some form in international bodies.").
between a state and a substate entity by establishing an equitable and acceptable power sharing agreement; it is not intended solely to promote self-determination claims.

As a conflict resolution approach, earned sovereignty has developed as an inherently flexible process implemented over a variable time period. This approach is defined by three core elements: (1) shared sovereignty, (2) institution building, and (3) a determination of final status. The process may also encompass three optional elements: (1) phased sovereignty, (2) conditional sovereignty, and (3) constrained sovereignty. These optional elements are employed to tailor the earned sovereignty approach to the unique circumstances of the conflict and to the particular needs of the parties. The state and substate entities almost always adopt the elements of earned sovereignty by mutual agreement, but in some cases the international community may support or initiate one or more of the elements of earned sovereignty against the preferences of the state or substate entity.

**Shared Sovereignty:** Each case of earned sovereignty is characterized by an initial stage of shared sovereignty, whereby the state and substate entity may both exercise some sovereign authority and functions over a defined territory. Sometimes international institutions may also exercise sovereign authority and functions in addition to, or in lieu of, the parent state. In rare cases, the international community may exercise shared sovereignty with an internationally recognized state. In almost all instances, an international institution is responsible for monitoring the parties' exercise of their authority and functions.

During the initial stage of shared sovereignty, a provisional framework may be created within which states, substate entities, and international organizations share sovereign authority and functions. If managed constructively, shared sovereignty affords a cooling-off period during which central authorities and aggrieved people can each continue to pledge fidelity to their own, mutually incompatible final aims, while initially suspending violence. The framework for shared sovereignty may vary according to the duration of the sharing period, the substantive division of authority, the parties involved, and the goals to be addressed.

Frequently, shared sovereignty may provide the substate entity with substantial elements of self-government, so as to considerably lessen the interest in outright independence and eliminate the causes of conflict through some form of perpetual autonomy. The period of shared sovereignty may also be designed merely as a way station to independence, with the substate entity exercising nearly all the power and authority of an independent state and equally sharing any remaining authority.
**Institution Building:** During the period of shared sovereignty, prior to the determination of final status, the substate entity, frequently with the assistance of the international community, undertakes to construct new institutions for self-government or to modify those already in existence. The substate entity also works with the international community to develop the institutional capacity for exercising increased sovereign authority.

Because functioning democratic institutions are considered the most effective guarantee to prevent renewed conflict in the long term, promoting the development of democratic institutions has become an essential element of modern peace building. In the short term, institution building is intended to create the capacity for the assumption of sovereign authority and the functions necessary for the establishment of an autonomous entity, or a future independent state. This process usually begins during the initial period of shared sovereignty and may be addressed by a range of domestic and international actors.

**Determination of Final Status:** The eventual determination of the final status of the substate entity and its relationship to the parent state is also an essential element of earned sovereignty. In many instances, the status will be determined by a referendum. In others, it may involve a negotiated settlement between the state and substate entity, often with international mediation. Invariably, the determination of final status for the substate entity is conditioned on the consent of the international community in the form of international recognition.

**Phased Sovereignty:** The first optional element is phased sovereignty. Phased sovereignty involves the measured devolution of sovereign functions and authority from the parent state or international community to the substate entity during the period of shared sovereignty and prior to the determination of final status. The accumulation of sovereign authority and functions may be correlated with the ability of the substate entity to assume these powers, as a reward for responsible state behavior, or a combination of the two.

Depending upon the nature and characteristics of the conflict, it may not always be possible to achieve even preliminary power sharing arrangements. Thus, to enhance the relationship between shared sovereignty and institution building, some earned sovereignty agreements have incorporated the element of phased sovereignty. Phased sovereignty can be useful to promote a smooth transition in those contexts where the adversarial claims of the parties do not allow for immediate devolution of powers. The timing and extent of the devolution of authority and functions may be correlated with the development of institutional capacity and/or conditioned on the
fulfillment of certain benchmarks, such as democratic reform and the protection of human rights.

**Conditional Sovereignty:** The second optional element is conditional sovereignty. Conditional sovereignty may be applied to the accumulation of increased sovereign authority by the substate entity, or it may be applied as a set of standards to be achieved prior to the determination of the substate entity's final status. These benchmarks vary depending on the characteristics of the conflict and generally include conditions, such as protecting human and minority rights, halting terrorism, developing democratic institutions, instituting the rule of law, and promoting regional stability. In most cases, the relationship between the attainment of certain benchmarks and the devolution of authority is not automatic—it is subject to evaluation by a monitoring authority that often involves international institutions. Such evaluation allows for a margin of discretion to determine when and how to successfully push forward the process of devolving authority.

**Constrained Sovereignty:** The third optional element, constrained sovereignty, consists of applying limitations on the sovereign authority and functions of the new state. Constrained sovereignty is often required as a guarantee for the parent state and the international community. For instance, the new entity may be placed under a continued international administrative and/or military presence, or its sovereign authority may be limited with respect to the right of undertaking territorial association with other states. Because the emergence of new states may be destabilizing to the immediate region, the sovereignty of the new state may sometimes be constrained by the international community. This threatening destabilization results either because the state, even after a lengthy period of institution building, remains incapable of exercising effective authority, or because the new state's existence in and of itself creates a destabilizing political dynamic.

**Monitoring Implementation:** Frequently during the process of earned sovereignty, a monitoring mechanism is established to build confidence among the parties, to ensure coordinated implementation of the relevant agreement, to monitor compliance, and to assist in the resolution of any disputes. Although not a substantive component of the earned sovereignty approach, the establishment of credible monitoring mechanisms can often be a critical procedural element in safeguarding the legitimacy and effectiveness of the approach.

**EARNED SOVEREIGNTY IN PRACTICE**

**Kosovo:** Kosovo is a recent case of the successful application of earned sovereignty to resolve a sovereignty-based conflict. Kosovo also represents the most comprehensive example of the use of the optional
element of phased sovereignty to manage the devolution of sovereign authority and functions. The Balkans had endured ten years of regional conflict and violence instigated by Yugoslav President Slobodan Milosevic when NATO airstrikes began in Kosovo on March 24, 1999. After a number of failed negotiated settlements between the warring parties, the United Nations Security Council adopted Resolution 1244 (1999) on June 10, 1999, which set the groundwork for the earned sovereignty of Kosovo. Subsequent to Resolution 1244, the United Nations endorsed a Provisional Constitutional Framework for Kosovo, which provided that both the UN Mission in Kosovo ("UNMIK") and Kosovar entities would exercise most of the functions typically associated with an independent state.

Resolution 1244 essentially followed the basic elements of earned sovereignty: it displaced Yugoslav sovereignty, created mechanisms for establishing democratic self-government and the protection of minority rights, and mandated the resolution of Kosovo's final status. Resolution 1244 provided that the UN initially would assume control of sovereign functions and negotiate a constitutional framework, and then begin the transfer of sovereign functions to Kosovar institutions. Simultaneously, the UN was mandated to pursue a resolution of the final status of Kosovo. However, despite a robust mandate, the UN made sluggish progress and hesitated in transferring substantial sovereign responsibility to the Kosovars and pursuing a resolution of Kosovo's final status.

In 2005, the UN Secretary General appointed former President of Finland, Martti Ahtisaari, as special envoy to work toward a settlement on Kosovo's status. Ahtisaari conducted direct negotiations with both Kosovo's and Serbia's negotiation teams from February to September 2006. The negotiations culminated in Ahtisaari's Comprehensive Proposal for the Kosovo Status Settlement, a plan to protect minority populations and achieve stable and peaceful independence in Kosovo.

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42. Id.
43. Id.
In April 2007, Ahtisaari submitted his plan to the Security Council.\textsuperscript{45} The plan proposed Kosovo's independence, with continued international supervision and support,\textsuperscript{46} while focusing on “protecting the rights, identity and culture of Kosovo's non-Albanian communities, including establishing a framework for their active participation in public life.”\textsuperscript{47} The plan called for: (1) a multi-ethnic democracy protected by the constitution, (2) protection of minority rights and participation, (3) establishment of an impartial and professional justice system, (4) protection of refugee rights, and (5) economic development and security.\textsuperscript{48} The plan also requested the Organization for Security and Cooperation in Europe (OSCE) to assist in the plan's implementation.\textsuperscript{49}

Kosovo declared its independence on February 17, 2008, honoring the Ahtisaari plan's recommendations.\textsuperscript{50} As planned, UNMIK's power dramatically diminished following Kosovo's independence, and the Kosovo government has since increased control over state functions.\textsuperscript{51} Serbia, which intended to retain Kosovo, opposed Kosovo's declaration of independence\textsuperscript{52} and sponsored a General Assembly resolution to submit the question of the declaration's legality to the International Court of Justice (ICJ).\textsuperscript{53} As a result, the ICJ issued an advisory opinion finding that Kosovo's declaration of independence did not violate international law, or Resolution 1244.\textsuperscript{54} Currently, over 70 states recognize Kosovo's independence,\textsuperscript{55} including the United States,\textsuperscript{56} United Kingdom,\textsuperscript{57} France,\textsuperscript{58} and Turkey.\textsuperscript{59}

\textsuperscript{45} Id.  
\textsuperscript{46} Id.  
\textsuperscript{47} Id.  
\textsuperscript{48} Id.  
\textsuperscript{49} Id.  
\textsuperscript{50} Id.  
\textsuperscript{51} Kosovo's Independence, supra note 41.  
\textsuperscript{52} Id.  
\textsuperscript{54} Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 84 (July 22).  
\textsuperscript{56} Background Note: Kosovo, U.S. DEPT OF STATE (Nov. 16, 2011), http://www.state.gov/r/pa/ei/bgn/100931.htm.  
The newly independent Kosovo is a case of successful earned sovereignty, though the process was not without difficulties, particularly the slow transfer of powers from UNMIK to Kosovar authorities and institutions and the lack of an initial timeframe for a referendum. Despite Kosovo’s newly-won statehood, Serbian defiance persists. For instance, in May 2008, Serbian areas of Kosovo held their own local Serbian-only elections, despite UNMIK’s admonition against it.60 Additionally, Serbia continues to support Serbian parallel institutions in Kosovo, including education, health, and welfare,61 and forbids Kosovo Serbs from receiving salaries or any other type of funding from Kosovo’s government.62

In spite of these problems, the nearly nine-year interim period was markedly peaceful compared to the decade of violence that preceded Resolution 1244, and the over three years since independence have seen relatively little violence.

South Sudan: The new Republic of South Sudan represents the most recent successful application of an earned sovereignty approach to conflict resolution. Sudan suffered nearly 50 years of civil war between the predominantly Arab Muslim North (led by the National Congress Party (NCP)), and the predominantly Christian and animist black African South (led by the Sudan People’s Liberation Movement (SPLM)). In 2005, the NCP and the SPLM reached a peace deal with the encouragement and assistance of the international community, and signed a number of agreements that form the Comprehensive Peace Agreement (CPA).63

The CPA provided for a six-year interim period, during which heightened political autonomy was granted to the South and a few key border areas,64 but without an immediate grant of sovereignty or even a


60. Kosovo’s Independence, supra note 41.


62. Kosovo’s Independence, supra note 41.


guarantee of sovereignty at the end of the interim period. The CPA recognized the rights of the Southerners to govern the affairs of their region, and also participate in the National Government located in the North.  

During the interim period, the CPA provided for the South to operate its own government, the Government of Southern Sudan, and gave the substate entity the authority to operate with increased autonomy. While the new Southern government was still accountable to the Government of Sudan in the North, it had its own legislature, executive, and judiciary. The CPA also provided the South with autonomy through institutions parallel to entities in the National Government, and the parties committed to forming an independent Assessment and Evaluation Commission with representatives from the North, South, and international community to monitor the implementation of the agreement. However, the Government of Southern Sudan did not acquire powers equivalent to that of a sovereign state, as it could not seek international recognition or enter into international agreements, and it was still subject to Sudan's ultimate sovereign authority.

The CPA recognized the right of the Southern Sudanese to self-determination, which would be exercised through a referendum vote near the end of the interim period on whether the region would remain a substate entity within the greater Sudan, or attain sovereignty as an independent state. The international community supported the full implementation of the CPA, including the provision on self-determination, with only a few states expressing concern about the impact secession may have on other self-determination movements in Africa and worldwide. The Government of Southern Sudan held its referendum beginning on January 9, 2011, with elections observers from the South, North, and the international community. When the results of the referendum were released on February 7, 2011 with an overwhelming majority in favor of independence, the Government of Sudan was one of the first states to recognize the results and indicate its support for a sovereign South Sudan. At the end of the interim

65. Id.
68. Machakos Protocol, supra note 64, art. 2.4.1, 2.4.2.
69. This power was allocated to the National Government only. Protocol on Power Sharing, supra note 66, sched. B.
70. Machakos Protocol, supra note 64, arts. 1.3, 2.5.

The newly independent South Sudan represents the successful use of earned sovereignty, though the process was not without difficulties. Political relations were tense, particularly in the months leading up to the referendum, over unresolved issues in negotiations and heated rhetoric from political leaders. The dispute over the Abyei area remains unresolved, and the North and the South have recently engaged in violent clashes in the border regions.\footnote{Sudan: Abyei at a Dangerous Tipping Point, INT’L CRISIS GROUP (May 8, 2011), http://www.crisisgroup.org/en/publication-type/media-releases/2011/africa/sudan-abyei-at-a-dangerous-tipping-point.aspx.} The benchmarks delineated in the CPA’s implementation modalities were often missed, and many key modalities were completed in the final weeks before the referendum or postponed for later resolution.

Despite these problems, the six-year interim period was remarkably peaceful in contrast to the decades of violence that preceded the CPA. The long interim period provided time for both the Government of Sudan and the SPLM to disengage from active violent conflict, operate separate governments and institutions and resolve disputes through negotiations. The CPA itself was founded upon the consent of both the NCP and the SPLM, and the exercise of self-determination was not made unilaterally, but through an internationally-recognized vote.\footnote{Sudan’s Comprehensive Peace Agreement: The Long Road Ahead, INT’L CRISIS GROUP (Mar. 31, 2006), http://protection.unsudanig.org/data/south/CPA/ICG%20Sudan%20CPA-The%20Long%20Road%20Ahead%20(Mar06).pdf.} Members of the international community were involved in numerous processes during the interim period, increasing the legitimacy of both governments and the secession process itself, while maintaining pressure on the parties to uphold the agreement. When South Sudan declared independence on July 9, 2011, it was not met with renewed civil war or an illegitimate status, but instead had a quick and peaceful transition to sovereignty.

A BRIGHT FUTURE FOR EARNED SOVEREIGNTY

The conflict resolution approach of earned sovereignty has emerged as a response to the increasingly limited utility of the “sovereignty first” and “self-determination first” approaches to resolving sovereignty-based conflicts. As self-determination movements become increasingly intertwined with global terrorist networks, and as “local conflicts” increasingly undermine regional stability, diplomats are in need of a
larger tool kit of approaches for resolving sovereignty-based conflicts. Moreover, as international human rights norms take on increasing salience, governments, pushed by public opinion, are less willing to permit sovereignty-based conflicts to be resolved through the unrestrained use of force, which frequently leads to massive human rights violations. The earned sovereignty approach has now been utilized to successfully resolve a number of sovereignty-based conflicts around the globe. Professor Nanda's lifetime of contribution to the comprehensive understanding of the principle of self-determination has played a key role in the successful development and application of the conflict resolution approach of earned sovereignty.
INTERNATIONAL LAWLESSNESS, INTERNATIONAL POLITICS
AND THE PROBLEM OF TERRORISM: A CONUNDRUM OF
INTERNATIONAL LAW AND U.S. FOREIGN POLICY

UPENDRA D. ACHARYA*

INTRODUCTION

At the dawn of the 21st century, the world was (as it is today) in the process of working out the power dynamics that would shape this coming century. China, India, Brazil, and many other countries have demonstrated that they are financially and politically stable enough not to be dictated to by the so-called powerful countries. At this time, the United States continues to face the aftermath of the terrorist attacks of September 11, 2001 in New York, Washington D.C., and Pennsylvania. Now the world has begun to analyze whether it should allow the United States' 20th century power monopoly to continue. Will the United States lose its unilateral power base in the 21st century as Great Britain did in the 19th century and continental Europe did in the 18th century? What is the impact that the war on terror has or will have in terms of the sustainability of the power monopoly of the United States? These questions are appropriate this year as the United States and the world community observe the consequences of the decade-long global war on terror that followed the September 11th, terrorist attacks. Since 9/11, many foreign policy practitioners and international legal scholars delivered their perspectives and claim that the event changed the world, the understanding of international law, and the modus operandi and dynamics of international relations. There is also a contrary view that U.S. foreign policy and the approach to international law in that foreign policy has not been world changing. The United States continues to practice the same foreign policy that it did before 9/11, an approach that did not change even after the Bush presidency.1 The purpose of this article is to address the 21st century world and what

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place international law should have in international relations and in U.S. foreign policy. In addressing this conundrum, the article will explore the effects of the global war on terror on international law and U.S. foreign policy, what has resulted from these developments, and what, if anything, should be done to eliminate or reduce any negative consequences.

GLOBAL WAR ON TERROR, OR WAR WITH AL QAEDA

On September 11, 2001 members of al Qaeda hijacked four U.S. commercial aircrafts en route to California from the East Coast.² The al Qaeda members threatened the passengers and attacked the crew members, then redirected the aircrafts to New York and Washington D.C. and used the aircrafts as weapons to attack the United States causing the deaths of 2,973 innocent people.³ On the evening of September 11, 2001, President George W. Bush, in an address to the nation stated:

The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them.⁴

On September 20, 2001, in a speech to a joint session of Congress, President Bush announced that the hijackers were part of an anti-American radical Muslim network known as al Qaeda and whose leader was Osama Bin Laden.⁵ President Bush also accused the Taliban government of Afghanistan of sheltering and supplying terrorists, he demanded that the Taliban government hand over al Qaeda leaders to the United States immediately or share the consequences.⁶

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³. See id. at 4-14 for a detailed account of the attacks. 9/11 causalities: 2,749 people were killed at the World Trade Center, 184 people were killed in the Pentagon, and 40 passengers died in rural Pennsylvania. Those figures do not include the terrorists. Id. at 311 n.188.


⁶. See id. ("[The terrorists] are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to
Bush announced the beginning of the global war on terrorism as follows:

We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war— to the disruption and to the defeat of the global terror network. . . . We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.7

Further, President Bush stated in his 2004 State of the Union Address to Congress, justifying the global war on terror, “[a]fter the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States. And war is what they got.”8

The United States invaded Afghanistan to hunt down terrorists shortly after 9/11. Then in 2003, the global war enterprise extended to Iraq. The United States led a “coalition of the willing” to topple Saddam Hussein’s government, but never found the weapons of mass destruction President Bush had claimed were there.9 Despite the United States’ efforts to bring peace and democracy to these countries, Iraq and Afghanistan are still in chaos a decade later.10

When President Barack Obama took office, the new administration dropped the term “war on terror” and replaced it with “war with al
Qaeda and its affiliates.” This transformation of “Global War on Terror” to “War with al Qaeda” seemed to change the legal framework of the war and make it more limited; however, in reality, Obama’s foreign policies are not significantly different from Bush’s — the “War with al Qaeda” is still a global war. There was an expectation that Obama would adopt an approach based on reasoned judgment rather than a dogmatic ideology, and would dismiss Bush’s black-and-white policy of war on terror (either you’re with us or against us). Instead, Obama kept the Bush administration’s surveillance program intact, the Patriot Act remained on the books, the authority to use rendition continued, the Military Commission was preserved (albeit with more procedural safeguards), the number of unmanned drone strikes increased at suspected terrorist hideouts along the Pakistan-Afghanistan border and in Pakistan (the strikes are suspect from an international law viewpoint and also could be strategically dangerous), and troop levels in Afghanistan were tripled (immediately after Obama received the Nobel Peace Prize). Obama banned the use of waterboarding, but refused to release photographs showing abuse of detainees and a memo about C.I.A. interrogation techniques. Finally, President Obama re-declared that “[o]ur nation is at war” after the Detroit terrorist attempt. The Economist did not hesitate to declare President Obama “[a]nother war president, after all.” The global war on terror continues: Afghanistan and Iraq are still occupied by U.S. troops, and, moreover, the war is expanding into other states including Pakistan, Yemen, and Somalia through the use of unmanned drones.


12. Id. at 515 (noting that the “[Global War on Terror] raised questions about the administration’s real—contrasted with its professed—commitment to faithfully adhere to the rule of law.”); Peter Baker, Obama’s War Over Terror, N.Y. TIMES MAGAZINE, Jan. 6, 2010, at 6, available at http://www.nytimes.com/2010/01/17/magazine/17Terror-t.htm (“I don’t think it’s even fair to call it Bush Lite . . . . It’s Bush. It’s really, really hard to find a difference that’s meaningful and not atmospheric. You see a lot of straining on things trying to make things look repackaged, but they’re really not that different.”).


14. Id. at 5.

15. Id. at 3, 6.

16. Id. at 9.


The war on terror has become global in other ways as well. The United States is no longer the only state fighting a war against terrorism; other states are employing U.S.-style tactics against their own “terrorists.” Instead of using international legal mechanisms for dealing with conflict, some states are taking politically driven unilateral action to suppress dissention within their own states in the name of fighting terrorism. China, for example, has been accused of “opportunistically using the post-September 11 environment to make the outrageous claim that [Muslim Uighurs] in Xinjiang are terrorists” in order to suppress the Uighurs’ religious activities and condemn them as illegal.\(^\text{21}\) Russia’s struggle to control separatists in Chechnya also turned into part of the war on terror after 2001, allowing Putin to justify his use of force, human rights violations, and Geneva Convention violations as a necessary part of the global war on terror.\(^\text{22}\) Taking a non-legal political approach instead of relying on lawful means of conflict resolution as these countries are doing in following the U.S. approach is threatening to create an anarchistic world order and contributing to global disorder and chaos.

**CONSEQUENCES OF THE WAR ON TERROR**

The global war on terror has raised concerns and issues in many areas of international law and international affairs. These include questions regarding the use of force, human rights, international humanitarian law, irregular rendition, torture, the fate of Afghanistan and other countries that are directly or indirectly said to be connected with terrorism, the legality of the United States military campaign, and the extraterritorial reach of individual nations or groups of nations in securing peace and security in the world.\(^\text{23}\) In all of these areas, the international rule of law has been disregarded or violated.

The U.S. War on Terror undermined different rubrics of international law, making international law a primary victim of the

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war. The already questionable status of international law incurred further distrust. First, the war on terror made provisions of the UN Charter confusing with regard to the legality of the use of force. It is clear that, after 9/11 the problem of terrorism was not addressed through the rules of international criminal law as that law is outlined in the UN Charter and a majority of treaties and resolutions. The Bush administration never bothered to determine whether an act of terrorism constitutes an act of aggression in breach of Article 2(4) justifying an armed response in self-defense within the scope of Article 51 of the UN Charter or whether an act of terrorism constitutes an act of aggression in breach of international peace and security that justifies a collective security approach by the Security Council under Chapter VII of the UN Charter. There are three primary sections contained in the Charter of the United Nations that govern the use of force against Member States. First, Article 2(4) of the Charter provides a blanket mandate against the use of force "in any manner inconsistent with the purposes of the United Nations." Second, Article 51 of the UN Charter is the initial legal structure for self-defense when an armed attack occurs against a Member of the United Nations. Third, Chapter VII of the UN Charter empowers the Security Council to take those actions necessary to maintain international peace and security.

The post-9/11 War on Terror has made international law a quiet observer by undermining majority resolutions and treaties related to terrorism and Articles 2(4) and 51 of the UN Charter. Previously, Article 2(4) was limited to state actors; however, after 9/11, a tacit interpretation was advanced that not only state actors but also non-

25. See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .”).
28. Id. art. 2, para. 4. This article expressly indicates that a state is prohibited to use force against another state, it does not bring non-state actors within the scope of this article.
29. Id. art. 51.
30. Id. arts. 39-45.
state actors can violate Article 2(4).32 The entire international community rushed to endorse the use of self-defense as a justification of the United States’ actions against al Qaeda, a non-state actor, in Afghanistan, which in turn eviscerated the thrust of Article 2(4).33 Further, the doctrine of self-defense against the attack by a state under Article 51 of the UN Charter was distorted when the United States included Saddam Hussein’s regime in Iraq in the war on terror and invaded Iraq, giving birth to the concept of preventive self-defense.34 Now force could be used where a state or non-state actor is believed to have plans for an attack, based solely on the unilateral prediction of the country using force that an attack may occur in the near or remote future – even though that prediction may be baseless.35 Furthermore, Chapter VII of the UN Charter was violated as well, because the United States usurped the power and authority of the UN Security Council by acting unilaterally rather than bringing the pursuit of the 9/11 attack organizers before the Council for lawful, collective action.36 On the one hand, the United States declared a global war on terror and made 9/11 a global issue by claiming that the attack breached international peace and security and, on the other, it acted in collective self-defense without letting the Security Council act on the matter of the threat to or breach of international peace and security. This further eroded the legitimacy of the Security Council and of international law.


33. See Dinstein, supra note 32, at 207–08.

34. U.N. Charter art. 51; see George W. Bush, The National Security Strategy Of The United States Of America 15 (2002), available at http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf (“The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”).

35. See Leffler, supra note 1, at 40, for a historical perspective on the United States and preventative foreign policies.

36. Acharya, Terror, supra note 24, at 676–77; see U.N. Charter, arts. 39–45; see also UN Charter art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”); see also Bush, 2004 State of the Union, supra note 8 (“America will never seek a permission slip to defend the security of our country.”).
In the process of fighting the Global War on Terror, the Bush administration focused not only on al Qaeda, but also on terrorist threats generally and on the regimes alleged to harbor terrorists. In order to gather intelligence, the United States resorted to the indefinite detention of terror suspects without charging them or giving them a trial, irregular rendition, torture, and in many cases, the killing of civilians, forsaking basic human rights and violating international humanitarian laws.

The military campaigns in Afghanistan and Iraq caused the deaths of thousands of innocent civilians, frequently in violation of the Geneva Convention Protocol on the Protection of Victims of International Armed Conflicts. In the past 10 years, at least 137,000 civilians were killed in Iraq and Afghanistan. When U.S. AC-130 gunships strafed the farming village of Chowkar-Karez, 25 miles north of Kandahar, Afghanistan on October 22 and 23 2001, killing at least 93 civilians, a Pentagon official said, “[T]he people there are dead because we wanted them dead.” The reason? The villagers sympathized with the Taliban. In two accidental air bombings of villages in eastern Afghanistan resulting in the deaths of 17 people, 15 of them children, the United States neither apologized nor offered compensation. In the infamous Haditha killings of November 2005, U.S. Marines shot and killed 24 Iraqis, including 15 innocent civilians, and then tried to cover up the incident by filing a false report which stated that the civilians

37. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, Dec. 12, 1977, 1125 U.N.T.S. 3 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).


40. Herold, supra note 39.

were killed in a roadside bombing, clearly violating customary international law concerning civilian causalities.42

In addition to the killing of innocent civilians, the War on Terror under the Bush administration ignored the rights of captured terror suspects as well. First, by defining them as "unlawful enemy combatants," which is not a term mentioned in the Geneva Convention or in other treaties concerning the laws of war, the United States government could legally justify not allowing detainees basic rights afforded to prisoners of war under international law.43 "Unlawful enemy combatants" were subject to torture, abuse, and humiliation at Abu Ghraib and other prisons in Iraq44 and habeas corpus violations at Guantanamo Bay.45 In a series of recent cases, the United States Supreme Court attempted to stop the unlawful deprivation of rights taking place at Guantanamo Bay by holding that the statutory and constitutional right to habeas corpus review apply at Guantanamo.46 In

42. Melissa Epstein Mills, Brass-Collar Crime: A Corporate Model For Command Responsibility, 47 WILLAMETTE L. REV. 25, 39 (2010); see also Colin H. Kahl, How We Fight, FOREIGN AFF., NOV./DEC. 2006, at 83, 83–84 (explaining that the attack violated internationally recognized legal principles regarding civilian casualties, as only acceptable as a "byproduct of attacks on legitimate military targets" not exceeding "the anticipated military benefit."); see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.


45. See e.g., Nick Childs, Guantanamo Controversy Rumbles On, BBC NEWS (Oct. 4, 2004), available at http://news.bbc.co.uk/2/hi/americas/3754238.stm; Kenneth Roth, After Guantanamo, The Case Against Preventive Detention, FOREIGN AFF., MAY/JUNE 2008, at 9, 11–12 ("The White House claims that it is waging a ‘global war on terrorism’ and that terrorism suspects worldwide with alleged connections to al Qaeda can thus be arrested as combatants. But since this ‘war’ knows no geographic or temporal bounds, it has become increasingly controversial as a continuing basis for detention, especially because many of the Guantanamo detainees were arrested far from any recognizable battlefield.").

response, Congress took counter-actions to deprive United States courts of their jurisdiction over detainees at Guantanamo Bay, giving the President control over detainees through the use of military tribunals and limited review of detention.47

When President Obama took office in 2008, he made some changes to the Bush detainee policies to conform them to international law. In 2009, President Obama announced he would close Guantanamo Bay in one year.48 He also ordered that prisoners be treated according to the mandates of the Geneva Convention and ordered immediate review of the status of each detainee.49 Despite these initial steps taken to restore human rights to detainees (though Guantanamo Bay still has not been closed), Obama’s policies are still “fundamentally consistent with the positions of the prior administration,” especially with regard to detention of suspected terrorists.50

CONSEQUENCES TO THE UNITED STATES

After 9/11, the United States made Afghanistan and Iraq its concerted focus and drained its financial and leadership capital on these two countries in the name of the war on terror. Many scholars argue that the start of the War on Terror marked the beginning of the decline of American world dominance.51

States citizen being held as enemy combatant be given meaningful opportunity to contest factual basis for his detention); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that the Detainee Treatment Act (DTA) did not deprive Supreme Court of jurisdiction over habeas appeal, pending at time of DTA’s enactment, by alien detained by Department of Defense at Guantanamo Bay, Cuba); Boumediene v. Bush, 553 U.S. 723 (2008) (holding that the habeas corpus privilege and Suspension Clause provided in the United States Constitution applied to detainees held at Guantanamo Bay).


49. Id.


51. See Malcon Fraser, America’s Self-Inflicted Decline, PROJECT SYNDICATE (Aug. 30, 2011), http://www.project-syndicate.org/commentary/fraser2/English ("America’s leadership in world affairs began to weaken with the unilateralism of Bush, and today’s economic problems are reinforcing this tendency."); but see Fareed Zakaria, The Future of American Power: How America Can Survive the Rise of the Rest, FOREIGN AFF., May/June
The War on Terror took a huge economic toll on the United States. According to the Congressional Research Service, as of March 2011 the United States Congress had approved a total of $1.283 trillion dollars of funding for military operations, base security, reconstruction, foreign aid, embassy costs, and veterans’ health care in Afghanistan and Iraq, and for other War on Terror operations since 9/11. \(^{52}\) Military spending now nearly equals that of the rest of the world combined. \(^{53}\) The U.S. budget, which had surplus of $128 billion, was drastically reversed to a deficit of $458 billion. \(^{54}\) Federal debt as a percentage of GDP rose from 32.5 percent in 2001 to 53.5 percent in 2009. \(^{55}\) Now the United States is in a financial crisis at home, while its financial strength and dominance internationally has been seriously weakened, opening the door for emerging nations like China to step up. \(^{56}\)

The War on Terror has also taken a serious toll on the reputation of the United States abroad. The Abu Ghraib abuse scandal, the use of torture, extraordinary rendition, deprivation of habeas corpus rights, and indiscriminate killings of civilians hurt the “moral authority” of the United States. \(^{57}\) President Bush’s “you are either with us or against us” foreign policy and disregard for the United Nations Charter and other international laws succeeded only in alienating potential allies. Although that kind of unilateral action may have worked a decade or two ago, when there existed a unipolar world in which the United States was dominant, it does not work well in the 21st century multipolar or nonpolar world, where the United States is not the only

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\(^{52}\) AMY BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 (2011), available at http://www.fas.org/sgp/crs/natsec/RL33110.pdf; see id. at 1-5, for a breakdown of the costs by operation and agency; see also id. at 10 (estimating the approved budget to reach $1.4 trillion in 2012); see also Leffler, supra note 1, at 37-38 (noting that defense spending went from $304 billion in 2001 to $616 billion in 2008); Stiglitz, supra note 38 (estimating total War on Terror expenditures to be closer to $2 trillion and to reach $3 trillion by the time all the bills are paid for).

\(^{53}\) Stiglitz, supra note 38.

\(^{54}\) Leffler, supra note 1, at 38.

\(^{55}\) Id.

\(^{56}\) Gideon Rachman, Think Again: American Decline, FOREIGN POL’Y (Jan. 2, 2011), http://www.foreignpolicy.com/articles/2011/01/02/think_again_american_decline (“China’s economic prowess is already allowing Beijing to challenge American influence all over the world.”).

\(^{57}\) Stiglitz, supra note 38 (“America’s real strength . . . is its “soft power,” its moral authority. And this, too, was weakened: as the US violated basic human rights like habeas corpus and the right not to be tortured . . . “); see also Kahl, supra note 42, at 84 (describing a survey which showed that citizens from many other states “felt that the United States ‘didn’t try very hard’ to avoid civilian causalities in Iraq.”).
center of power. Because of these factors, the United States must now make extra efforts to convince the world that it still has due regard for international law and can still act collectively with others.

The War on Terror may have also weakened the United States' own security and perpetuated an "endless" war on terror. Animosity toward the United States resulting from military invasions and occupations, use of torture and detention, killing of innocent civilians, bombing villages and homes, and the undercurrent of religious warfare, actually helped terrorist recruiters create more terrorists. Once the War on Terror began, the incidences of terrorism in fact increased, as presumably did the number of terrorists. A 2008 report from the Center for Strategic and Budgetary Assessment, an independent non-partisan think tank, states:

While the United States and its partners in the war on terrorism have made important strides in combating jihadi groups worldwide since September 11th, they have not weakened the jihadi’s will or their ability to inspire and regenerate. . . . Since 2002–2003, however, the overall US position in the [Global War on Terror] has slipped. To be sure, the United States has made considerable progress . . . Those gains, however, have been offset by the metastasis of the al Qaeda organization into a global movement, the spread and intensification of Salafi-Jihadi ideology, the resurgence of Iranian regional influence, and the growth in number and political influence of Islamic fundamentalist political parties throughout the world. Both Salafi-Jihadi and Khomeinist branches of Islamic radicalism have spread rather than receded since 2003. The continued presence of US military forces in Iraq has been a boon for the jihadi movement’s propaganda effort and bolstered the legitimacy of its call to defensive jihad.

Though the recent deaths of Osama bin Laden and several other high-ranking al Qaeda officials have been a positive development for the War on Terror and its reputation, the overreaction to 9/11 and consequences of the War on Terror to the United States and to the


59. Roth, supra note 45, at 16 (arguing that detention begets more detainees).
60. Leffler, supra note 1, at 39.
world have arguably far outweighed the atrocities committed on 9/11 and the progress of the United States thus far in defeating terrorism. This begs the question: who won the Global War on Terror — al Qaeda or the United States?\(^{62}\) Did the United States take the right approach toward defeating terrorism? Or perhaps the question should be: can terrorism be defeated at all?\(^{63}\) To what extent has international law been accommodated in dealing with the problem of terrorism? Can a power (realist) approach resolve this problem? Or do we need to employ legal methods or force of law to address this problem?

U.S. HEGEMONY: IR THEORY AND PASSIVE APPROACH OF INTERNATIONAL LEGALISTS

The declaration of the global war on terror and the political and legal tactics used in support of it have resulted in skepticism regarding the continuation of the leadership of the United States in world affairs. Why did the United States take such a risk to its status in dealing with the problem of terrorism? There may be several known and unknown reasons and answers to this question. One of the answers may be that the United States engaged in a short-term political fix to serve the existing power base of governing elites.\(^{64}\) In other words, U.S. strategy was dominated by a realist approach that unduly minimized the use of international law in international relations and in U.S. foreign policy. What the realist approach does is kill the operational role of international law in international behavior. When a country does not allow existing international standards to play their operational roles in addressing terrorism and other international problems, it drags itself into a long-term process that peels away its power and authority. Afghanistan and Iraq are such examples of the effects of the failure of the United States to follow international legal standards in its foreign policy. Realists imagined a weeklong military campaign to defeat al Qaeda in Afghanistan (an already failed state) and, in the name of the war on terror, the U.S. extended its military reach into Iraq where the suppression of terrorism remains a dream that has been chased for a decade. The situations in Afghanistan and Iraq developed because realists never believed that international law was really law that could be a useful tool to resolve the problem of terrorism.


\(^{63}\) See Haass, *supra* note 58, at 53 ("Terrorism, like disease, cannot be eradicated. . . . The goal should be to reduce the impact of even successful attacks."). I propose that though terrorism may be a disease; it can still be treated with legal tools and judicial means.

\(^{64}\) See Leffler, *supra* note 1, at 37, 41.
The question of whether international law is really law is not new. However, the question of what relevance or force international law can have in shaping states’ behavior in international affairs has received little attention. Now is the time to consider more deeply the question of the relevance and force of international law in addressing the problem of terrorism and its effects in other areas of international law and international relations. The question of the reality of international law is no longer a subject of discussion because of the existence of a large body of international laws, organizations to administer international laws, and the reliance of nations on international laws to either legitimize their actions or enhance their positions in international negotiations. However, the relevance and force of international law is still an important question. In order to address this issue, we need to ponder whether we want to legalize international politics or politicize international law. The answer to this question will reveal how the international community will address terrorism and problems associated with it. The question of whether international politics should be legalized or whether international law should be politicized explores the law and non-law nature of international law in the context of compliance and enforcement. There are scholars who like to believe that international law in fact matters and that nations comply with it. Other scholars argue that

65. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997), for a detailed discussion on why nations obey international law. Professor Koh has discussed and analyzed international political and relation theorists and international legal scholars including Hans Morgenthau, Louis Henkin, Abram Chayes & Antonia Handler Chayes, Oran Young, Thomas M. Franck and many other scholars. He describes obedience of international law from ancient and primitive international law to modern institutional era and post-cold war era of international law. He has mainly focused on the compliance issue of international law analyzing managerial approach of Chayes and fairness approach of Franck and has argued that “richness of transnational legal process can provide the key to unlocking the ancient puzzle of why nations obey.” However, he does not address the issue of international power politics that has been a major obstacle to the structure, function and thus perception of international law.

66. See Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT’L L.J. 193 (1980). The author has analyzed the claim of international politicians that international law is essentially irrelevant in addressing international problems due to vital national interests and has suggested that emergence of international organizations might lead to the path where international law can become relevant in addressing the international problems. He demonstrates his thesis ‘the relevance of international law’ by quoting Morgenthau: “[I]n a world of nuclear weapons systems developed to the current level of technical expertise where the instantaneous destruction of mankind is imminently possible, power politics as a principle for the conduct of international relations has become fatally defective and could ultimately result in the destruction of the human race . . . .” Id. at 217.

67. See Louis Henkin, *How Nations Behave: Law and Foreign Policy* 47 (2d ed. 1979) (asserting that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”); see also Thomas M. Franck,
international law does not matter at all, or, matters only when it serves the interests of the nations concerned in the given circumstances. These divided viewpoints regarding the role of international law in resolving international problems represent various spectrums of international relations theorists and international legal scholars. While the divisions among international relations theorists and international legal scholars are pertinent, Professor Christopher C. Joyner claims that the divided groups of scholars share a "dirty little secret" and further explains: "both groups know that the presence of international law is critical for international relations to occur, and both know that the practice of international politics is essential for international law to evolve and function. But each is still reluctant to admit the necessity of the other." Although both groups share a "dirty little secret," the realist approach of international theory has dominated U.S. policy on the war on terror. The realist approach believes that international relations are governed by a selfish lust for power that defines interests setting the standard that directs political actions and that universal moral principles are only a pretext for the pursuit of national politics where state is the unitary actor. For the realists, international politics is a struggle for power where one state is able to control and influence another state's behavior to serve the interests of the more powerful state. Realists believe that maximizing political

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68. See Charles Krauthammer, The Curse of Legalism: International Law? It's Purely Advisory, THE NEW REPUBLIC, Nov. 6, 1989, at 44. The author dismisses the concept of international law and says international law may be used after the political action of a nation for retroactive legal justification. He states:

Legalism starts with a naive belief in the efficacy of law as a regulator of international conduct. [International relations is not contract law. And treaties are not retained simply because their provisions are fully observed or renounced simply because they are breached. One has to make a larger judgment. . . . That is a policy judgment to which a reading of treaty text, no matter how close, contributes nothing. . . . [International law—is an ass.

Id. at 44, 50. This is purely a realist approach to the conduct of international relations.


71. Kaufman, supra note 69, at 24-29.

72. Joyner, supra note 70, at 251.
advantage rather than justice, morality, or law will prevail in international politics.\textsuperscript{73} According to the realists, in a global condition where there is no superior authority, sovereign states are the only supreme authorities and they must act rationally and their rational actions are lawful when those actions maximize their political, economic, and security interests.\textsuperscript{74} Basically the realists believe that "international law—is an ass."\textsuperscript{75}

There are other approaches in international relations theory that soften the harshness of the realist approach, but do not distance themselves from its substance. International legal scholars like to celebrate the recognition of international law by reference to international relations theory within the sphere of these less harsh approaches. The constructivist approach is one of a few other approaches in which international legal scholars find themselves attached to international law. The constructivists argue that states and their interests are socially constructed by "commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse."\textsuperscript{76} Rather than arguing that state actors and interests create rules and norms, constructivists contend that "[r]ules and norms constitute the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts, and how titles to possessions can be established and transferred."\textsuperscript{77} Thus, constructivists see norms as playing a critical role in the formation of national identities. Similarly, the liberal approach,\textsuperscript{78} neo-liberal approach,\textsuperscript{79} and institutionalist approach\textsuperscript{80} have

\textsuperscript{73} Id.
\textsuperscript{74} Id. at 251-52. This realist approach can be called rational choice theory.
\textsuperscript{75} Krauthammer, supra note 68, at 50.
\textsuperscript{78} See Koh, supra note 65. Mr. Koh states "[t]he determinative factor for whether nations obey can be found, not at a systemic level, but at the level of domestic structure. Under this view, compliance depends significantly on whether or not the state can be characterized as 'liberal' in identity, that is, having a form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law. Flipping the now-familiar Kantian maxim that 'democracies don't fight one another,' these theorists posit that liberal democracies are more likely to 'do law' with one another, while relations between liberal and illiberal states will more likely transpire in a zone of politics." Id. at 2633 (citing Anne-Marie Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 COLUM. L. REV. 1907, 1920-21 (1992);
been identified by international legal scholars as justifications for strengthening the place of international law in international politics.

On the one hand, the realists have undermined the role of international law in international politics. On the other hand, the constructivists, liberals, neo-liberals, and institutionalists have softened their arguments regarding the roles of international law and

Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995); Anne-Marie Slaughter & Alec Stone, *Assessing the Effectiveness of International Adjudication*, 89 AM. SOC’Y INT’L L. PROC. 91, 91 (1995) (positing that “[l]iberal states will rely more heavily on legal rules--such as those established by treaties--to govern their relations, and they will more often rely on adjudication to resolve disputes, both intergovernmental and transnational.

79. See S.G. Sreejith, *Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism*, 9 SAN DIEGO INT’L L.J. 5 (2007). Mr. Sreejith notes that neoliberalism is a ‘global policy regime that comprises free trade and the free flow of resources via market mechanisms.’ *Id.* at 47 (citing GEORGE DEMARTINO, *GLOBAL ECONOMY, GLOBAL JUSTICE: THEORETICAL OBJECTIONS AND POLICY ALTERNATIVES TO NEOLIBERALISM* 125 (2000)). He also notes “neoliberalism is considered the ideology of the process of globalization. Such a view generally provides an economic logic which justifies the emergence of a single global market and upholds the principle of global competition.” *Id.* at 46-47. Mr. Sreejith further states neoliberalism has brought “multinational corporations, NGOs, and other agents of change--a forum built on the principles of universalism, individualism, rational voluntaristic authority, progress, and world citizenship. These institutions are imbued with neoliberal culture, concerns, content, norms, and shape. Although they cannot claim to have totally taken over the baton from the states, they lobby and criticize states, mobilize around and elaborate global cultural principles, and convince states to act on those principles.” *Id.* at 51 (citing John Boli & George M. Thomas, *World Culture in the World Polity: A Century of International Non-Governmental Organization*, 62 AM. SOC. REV. 171, 187 (1997)).

international institutions. Even modern politico-legal realists suggest that international law is nothing more than “an endogenous outgrowth of individual state interests,” that international law can never constrain those interests, and that international laws change as the interests of states change.  

Under this view international law, therefore, has a very limited operational role, and it promotes limited cooperation when states’ interests make cooperation among states desirable. However, Kal Raustiala criticizes this politico-legalist view, noting an enormous growth in the number of international agreements and institutions in the post-war era as evidence that international law has not been dismissed. If these international laws and institutions do not have any roles, he asks, why are states continuing to invest their economic and political resources in creating them? He also argues that credibility, reputation, the inherent market system, and the delegational nature of international law strengthen the role of international law.

Other scholars justify the use of international relations theory in international law as a diagnostic and policy-perspective tool to address international terrorism and other international issues. Although all these efforts to reconcile international relations theory and international law are absolutely comprehensible, they miss a substantial point: the root of international law is derived from a realist approach and all other approaches (constructivism, liberalism, neo-liberalism, institutionalism) are parts of the realist approach. Because all these approaches of international relations theory make international law serve the interests of power in a complex international system of behaviors, less powerful countries struggle to resist the power of dominant countries. First, less powerful countries perceive that

82. Id. (citing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)).
83. Id. at 426.
84. Id. at 429.
85. Id. at 430-33.
86. See Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, International Law And International Relations Theory: A New Generation of Interdisciplinary Scholarship, 92 AM. J. INT’L L. 367, 369, 373-74 (1998). The authors have analyzed the use of an interdisciplinary approach to international law and international relations and have used international relations theory in the development of international law. Id. at 373-74. They argue that international relations theory is valuable in identifying and resolving international terrorism. Id. at 374. The authors have identified six approaches for both international relations theory and international law to make a collaborative research agenda, which are: regime design, process design, basis of shared norms and the role of power, historical and cultural constitutive structures of international affairs, government networks within state regimes, and domestically embedded international institutions (embedded institutionalism). Id. at 369.
international laws are generally made to enforce the hegemony of power and second, they make efforts to negotiate to reduce the influence of power and achieve justice by using existing international legal instruments and institutions. Most international legal scholarship is confined to the second aspect rather than addressing how powerful states create, interpret, and employ international law to maintain the power status quo.

There are other scholars who have addressed the fundamental issues of how international law is either abused or dismissed by power, and international law has come to resemble the 19th century imperial international law. International law as reflected in the UN structure can be justified on the grounds that because the Security Council’s purpose is rendering order and justice, it can act in furtherance of that purpose to solve any problem when the Council’s five permanent members find a solution politically feasible. Otherwise, international law becomes little more than an object to be manipulated by realists in a political theatre. Other than a few international legal scholars who explore the roots of international law, scholars pursue the argument that the development of international law took place within the evolution of international relations theories. Therefore, there is a tendency of international legal scholars not only to admit the importance of international relations theory but also treat it as a primary discipline and international law as a secondary discipline.

The foreign policy of the United States as reflected in its international behavior appears to be based on the realist approach of international relations theory rather than international law. After the 9/11 event, the (dis)recognition of the role of international law in addressing the global problem of terrorism has been prevalent in U.S. foreign policy (as prescribed by realist theory). This prevalence has

87. Acharya, War on Terror, supra note 24, at 658-59 (describing how 13 international treaties created to address terrorism were agreed to before 9/11 without the treaties or the parties having an acceptable definition of terrorism).
91. Joyner, supra note 70, at 249-50.
not only posed questions regarding the behavior (rule of law) of states and non-state actors concerning terrorism, value (equality) among nations and peoples of the world, and democracy (process and transparency) in the governance system of the modern-day world, but also has downgraded the status of U.S. foreign policy and its insistence on unilateral international behavior. This declining opinion of U.S. foreign policy may be credited to the U.S. disregard of international law and its sole reliance on the realist approach. International legal scholars have further contributed to this negative perception by justifying the realist approach mirrored in U.S. foreign policy within the framework of existing international law. If this is the case, then international legal scholars have promoted a power politics agenda and have been oblivious to important legal aspects prescribed by the UN Charter and other international laws, such as human rights law and humanitarian law (limited human rights of civilians in the war zone, treatment of captured detainees, irregular rendition, indefinite detention without charge, and death of civilians). The use of self-defense measures, particularly through unmanned drone attacks, is one example of U.S. foreign policy that undermines the basic tenets of the laws of war. Drone attacks do not allow opponents to participate in the

the US) can and should take responsibility in maintaining international order and international peace and security against the threat of terrorism, not rely on international law and institutions. Anghie, supra note 89, at 292. The United States adopted the self-defense measures under Article 51 rather than collective security measures under Chapter VII of the UN Charter. Many legal scholars have recognized the US adoption of self-defense measures while recognizing the problem of terrorism is global and poses a threat to international peace and security. See Id. at 293-94. If the problem of terrorism is a global one and poses a threat to international peace and security, it must be dealt with by adopting the collective security measures. Because the operational role of international law is undermined there has not been tendency to distinguish self-defense measures from collective security measures as to when each should be applied. This non-distinction is credited to the realist approach in its foreign policy and submission of international legal scholars to this approach. The perception that the United States can demonstrate its power in keeping and maintaining international law and order by adopting self-defense measures in order to deal with the global war on terror has caused undue human, economic, and political (long-run) burdens.

93. See Anghie, supra note 89, at 291-307 (arguing that President Bush invoked nineteenth century principles of international law and that his foreign policy is dominated by the realist approach); see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (3d ed. 2008) (arguing that international law on the use of force after 9/11 is more speculative than ever before); see also Kaufman, supra note 69, at 29 (discussing Hans Morgenthau); see also GOLDSMITH & POSNER, supra note 82, at 225-26. Both Morgenthau and Goldsmith are lawyers by training who argue that international law is useful if it corresponds with the interests of powerful states.

94. See John Yoo, Using Force, 71 U. CHI. L. REV. 729, 732 (2004). The author argues that it is naive to rely on international law and international institutions for international peace and security and self-preservation due to the lack of effectiveness of international law and institutions.
conduct of war in the same way that terrorist attacks do not give opportunity to the attacked party to fight back.  

The void of collective security measures and the adoption of self-defense measures in the global problem of terrorism have led to a tacit competition between the terrorists and the United States, and may have created a cycle of perpetual war. Therefore, perhaps the solution to the problem of terrorism has been lingering particularly since the 9/11 event and may continue to linger, which could result in a situation where politics (power) can have unfettered discretion to abort law (justice) on both sides of the war of terror — one, giving rise to terrorist groups and invisible networks of those groups, and, two, giving rise to short-term, national-interest driven political tactics to suppress the problem. If power politics is the principle to resolve international problems, then both sides politicized international law. The launchers of terrorist activities argue that their actions are not the cause but the effect of domination and dehumanization, and suppressors of terrorist activities argue that security within their territory and global peace and security are of the supreme primacy with or without international legal guidance. In this scenario, if international law is employed, it will be used only to justify the interests of power.

**CONCLUSION**

With the analysis made above, we can arguably come to the conclusion that there are two approaches to address the problem of terrorism — first, the legal approach and second, the political approach. Both approaches have been utilized to address terrorism because the legal approach has a minimal role within the scope of the realist theory, where power politics is the primary element in addressing the problem of terrorism and where law and legal elements have a limited supporting role, being applied only when they serve the interests of power. The global war on terror from Afghanistan to Iraq, Pakistan, Yemen, and Somalia, and its techniques — indefinite detention, irregular rendition, torture, and detention without charges — have killed international law. The cause of death was that, historically,
international law was not believed to produce a legal solution to international problems, including terrorism. The role of international law is within the domain of international relations theory. It has been used for *ex post facto* justification of political decisions for the purpose of serving national interests and power politics.98 This is the very reason why international governance and institutional processes under the UN structure lack democratic methods. Therefore, the existing system of international governance does not have complete faith in democracy and rule of law.99 On the one hand, it neither supports a formal majority ruling nor establishes a process for governance by majority. On the other, treaties related to terrorism are designed to exclude terrorist activities conducted by powerful nations. International politics either dictates that weaker nations submit their loyalty to powerful nations or confront the consequences, or requires nations to cooperate when the interests are shared. This way, international law and institutions confirm that powerful nations' activities are legitimate and civilized.100 It does carry some value (peace, security, equality, justice etc.) in its linguistic formality, but does not really bother with the question of whether those values can be achieved. When these conditions remain intact regarding the application of international law, the world is not as safe as we hope it to be. If United States foreign policy dealing with the problem of terrorism continues disregarding the principles of international law, basing its policy on international relations theory (the realist approach) and if American international legal scholars continue to embrace the approach that international law is a subsystem in a broader system of a realist approach of international relations theory, neither the problem of terrorism is resolved nor will U.S. foreign policy be uplifted. The 21st century may well become a post-American world where the United States will lose its appetite for global leadership. The international power dynamics is a zero-sum game (contrary to what Obama stated during his first visit to

99. GERRY J. SIMPSON, GREAT POWERS AND OUTLAW STATES 165-93 (2004). The author suggests that the great powers were focused on maintaining power privilege during the creation of the UN Charter and they were successful in taking the policing power in international affairs by pushing their hegemony over less-powerful countries. This way the great powers legalized a class division between powerful and powerless countries through the UN Charter.
China)\textsuperscript{101} if it is exercised without reference to the standards of international rule of law. Even a prominent advocate of the modern realist school, Hans Morgenthau, at the Hoffmann's Seminar on American Foreign Policy admitted that "power politics as a principle for the conduct of international relations has become fatally defective and could ultimately result in the destruction of the human race through a suicidal . . . [w]ar."\textsuperscript{102} Therefore, it is important for U.S. foreign policy to respect the international rule of law and democratic process in the international system of governance. The United States has a greater opportunity and responsibility than any other nation to promote the international rule of law and the virtues thereof in its foreign policy by respecting international law, complying with it, and making it the standard for international relations. The exercise of power without regard to international law and the conduct of war as a manifestation of power will neither resolve the problem of terrorism nor serve the interests of the United States' foreign policy. It will only help establish (and has already created) a never-ending process of war on (or of) terror.

\textsuperscript{101} President Obama during his first visit to China, said, "Power does not need to be a zero-sum game, and nations need not fear the success of another... We welcome China's efforts to play a greater role on the world stage." See Rachman, supra note 56.

\textsuperscript{102} See Boyle, supra note 66, at 217.
A NOTE TO STATES DEFENDING HUMANITARIAN INTERVENTION: EXAMINING Viable ARGUMENTS BEFORE THE INTERNATIONAL COURT OF JUSTICE

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INTRODUCTION

Humanitarian Intervention (HI) has been a central topic of controversy within international law scholarship for many years. This controversy is unsurprising because HI inevitably pits several of the most fundamental international norms as opposing forces: state sovereignty and the prohibition on the use of force versus the duty of states to prevent human rights atrocities and protect human life. HI takes many forms, but it is best defined as intervention into the sovereign territory of another state, without the host state's consent, for the purpose of halting atrocity crimes, such as genocide, ethnic cleansing, crimes against humanity, and war crimes.¹ It is conducted in one of two ways, with Security Council (SC) authorization or without such authorization.² In either case, HI categorically conflicts with notions of state sovereignty, and, in most instances, the prohibition on the use of force. Despite such conflict, HI through the SC has been universally accepted.³ “Unauthorized” HI, on the other hand, has been


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more controversial. The primary question addressed herein is whether states would have a good faith means to justify HI if one day brought before the International Court of Justice (ICJ).

The central concentration with regard to this question is on the evolution of HI within customary international law. This subject is not new, and since the inception of the UN Charter (hereinafter the Charter) numerous authors have examined the component parts of custom (state practice and opinio juris) with regard to HI. This process has revealed many different approaches to this perplexing problem, as well as a myriad of conclusions. This study differs primarily in method, as it is written with a focus on the practical application of the HI doctrine and viable good-faith arguments for states before the ICJ. This study also differs by demonstrating the importance of evaluating opinio juris in a contemporaneous fashion. In other words, through historical analysis of several humanitarian interventions, this study illustrates that when investigating custom it is much more telling to assess the statements and actions (or inactions) of states at the time an intervention is taking place. Subsequent diplomatic statements cannot be ignored, but undue weight should not be given to statements most likely aimed at discouraging abuse of this potentially dangerous doctrine and not the doctrine itself. Doing so is the only viable means of truly understanding whether the international community believes an intervening state should be exonerated for undertaking a true humanitarian intervention. Through such an approach, it is possible to discern an acceptance by states that unauthorized HI is lawful (or at least legally justified) in extreme circumstances, when truly taken for humanitarian reasons and when conducted proportionately to that purpose.

Existing in conspicuous parallel with HI is the newly emerged “Responsibility to Protect” doctrine (R2P). While HI and R2P are intertwined, it is erroneous to refer to the doctrines interchangeably. HI deals with a “right” of states to intervene in the affairs of other states, whereas R2P deals with the “responsibility,” and perhaps even a

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legal duty, to prevent "atrocity crimes." Notably, R2P primarily places the onus of protection on the state in which atrocities are occurring, and only secondarily upon the international community. However, the 2005 World Summit Outcome clearly articulates that the international community, including each Member State of the United Nations (UN), also has some form of responsibility for crimes of mass atrocity, even when occurring outside their own state borders. While R2P's contours are still evolving, its unanimous adoption by the General Assembly (GA) has solidified the doctrine somewhere in international law. While the predominant focus herein is on the legal "rights" of states to respond to atrocity crimes and not their "responsibility" to do so, this study will conclude by evaluating the potential interplay between the two doctrines in front of the ICJ.

**THE UNITED NATIONS CHARTER ALLOWS FOR HUMANITARIAN INTERVENTION**

The Charter is the necessary starting point when analyzing whether HI is lawful, and for that matter, whether it is even possible for such a doctrine to arise through customary law alongside the Charter. Although HI is admittedly nowhere to be found within the Charter, it is well accepted that customary law and the Charter can exist in parallel. However, some authors have rightly pointed out that the Charter could preclude the possibility of a customary exception to the prohibition on the use of force, even for strictly humanitarian reasons, if the customary norm were inconsistent with the terms of the Charter.

With regard to HI, the opponents' syllogism goes like this: the Charter, in Article 2(4), specifically prohibits the threat or use of force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"; this prohibition is comprehensive, except for the explicit exceptions articulated in the Charter, namely Security Council authorization and Article 51 self-defense; and, therefore, even if HI

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7. World Summit, supra note 5, ¶ 138.
8. Id. ¶ 139.
9. Id.
10. Id.
12. E.g., MICHAEL BYERS, WAR LAW 100 (2005).
arose through the component elements of custom (state practice and opinio juris), HI would still be a violation of international law because it would violate the superior and affirmative obligations under the Charter. In its essence, the argument is based on principles of lex specialis, and also grounded in the provisions of Article 103 of the Charter, which affirms that the Charter prevails over all inconsistent norms.

This is an admittedly compelling argument. Indeed, if the prohibition on the use of force were absolute, apart from the Charter's explicit exceptions, then Article 103 would bar a customary norm from overriding its terms, unless of course it rose to the level of jus cogens (a status HI has clearly not achieved). This recognition is extremely important, but many proponents of HI have regrettably overlooked it. Nevertheless, there is an answer to this sound argument, and it rests in the fundamental principles of treaty interpretation, as articulated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), which are also considered to be custom.

The reason states have recourse to these principles lies in the ambiguity of the terms of Article 2(4). Some argue the language "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" is not ambiguous, and that the provision is a comprehensive ban on force. However, the inability of both states and international jurists to come to agreement over the Article's full extent lends credible evidence to the contrary. Consequently, recourse to principles of

13. See id. at 99-100.
16. Id. arts. 31-32.
18. VCLT, supra note 15, art. 31.
20. Compare, e.g., Nanda et al., supra note 4, at 864-65 (arguing that individual states should be allowed to intervene when international organizations cannot), and FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 6 (3d ed. 2005) (arguing that states may intervene to prevent "severe tyranny or anarchy" in other states), with W. Michael Reisman, Editorial Comment: NATO's Kosovo Intervention, Kosovo's Antinomies, 93 AM. J. INT'L L. 860, 861-62 (1999) (arguing that the general prohibition on the use of force should be read narrowly), and Simma,
treaty interpretation is necessary to resolve the contours of Article 2(4) and to determine if HI is absolutely prohibited. Doing so provides insight into the modern meaning of the provision as well as the underlying purposes of the UN Charter.

VCLT Article 31 mandates three primary means of interpretation. The first requires “good faith” interpretation in accordance with the ordinary meaning of the terms “in their context and in the light of [the treaty’s] object and purpose.” The second calls for examination of the context surrounding the treaty, including the preamble and annexes, any agreement relating to the treaty’s conclusion, and any instrument made in connection with the conclusion of the treaty. The third, which is of utmost importance here, entails examination of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” as well as any relevant rules of international law. It bears explicit mention that all steps are required; none is mutually exclusive to the others.

With regard to the first step, there are good faith arguments on both sides. Opponents of HI can legitimately argue that the Charter was put in place in the wake of WWII to prevent states from abusing their power and invading the sovereignty of others — abuse that during WWII led to the most horrendous atrocities the world had ever seen. Specifically, it could be argued that the context of the Charter’s inception points to a full prohibition on the use of force, except when authorized by the Security Council, for the very purpose of preventing such abuse. Likewise, the very first words of Article 1(1) are “[t]o maintain international peace and security,” thereby indicating the primary importance of respecting state sovereignty and refraining from using force against other states. Going a step further, opponents could even argue, in good faith, that the principles regarding respect for human rights are subsidiary to this fundamental purpose.

On the other hand, proponents of HI can point to the second part of UN Charter Article 1(1), which envisions “effective collective measures”

supra note 19, at 2-3 (stating that Article 2(4) is meant to be “of a comprehensive nature”).

21. VCLT, supra note 15, art. 31.
22. Id. art. 31, para. 1.
23. Id. art. 31, para. 2.
24. Id. art. 31, para. 3 (emphasis added).
26. See, e.g., Simma, supra note 19, at 3.
27. U.N. Charter art. 1, para 1 (emphasis added).
to respond to threats to the peace, Article 1(3), which highlights the need "[t]o achieve international co-operation in solving international problems, and in promoting respect for human rights," as well as Article 55, which recognizes that conditions of stability, which includes universal observance of human rights, "are necessary for peaceful and friendly relations among nations." Moreover, proponents of HI can certainly argue, likewise in good faith, that the very same purpose that underlies the rationale for both non-use of force and HI are one in the same – the protection of human life.

Therefore, though collective forceful measures through the SC may have been the ideal means envisioned for protecting human life at the time the Charter was formed, once the mechanism breaks down (i.e., because of a P5 veto), the fundamental right to life itself is what is deserving of protection, not the means for protecting the right.

In either case, a teleological approach to Article 2(4) does not fully answer the question. To the contrary, it seems necessary to simply accept that the Charter's object and purpose is two-fold – to maintain international peace and security and to ensure protection for fundamental human rights – both of which embody the most fundamental of rights, the right to life.

Consequently, the next step is to turn to Article 31(3) of the VCLT, namely paragraph (b), which mandates examination of "subsequent practice." Doing so allows examination of Member States' present agreement to the Charter, which has come to be accepted as dispositive with regard to a treaty's binding force (as opposed to the framers' original intent). The ICJ has adopted this approach on multiple occasions. In Namibia, for example, when examining Article 22 of the Covenant of the League of Nations, the Court explicitly stated, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." Likewise, in Nicaragua the Court held that the Charter "by no means covers the whole area of the regulation of the use of force," specifically referring to the area of non-intervention as an example, and proceeding to examine custom to qualify the terms of the

30. Id. art. 1, para. 3.
31. Id. art. 55 (emphasis added).
32. See id. art. 27.
33. VCLT, supra note 15, art. 31, para. 3 (emphasis added).
Judge Alvarez similarly addressed the issue of Charter interpretation in the Admissions Case, stating:

The text [of the Charter] must not be slavishly followed. If necessary, it must be vivified so as to harmonize it with the new conditions of international life. When the wording of a text seems clear, that is not sufficient reason for following it literally, without taking into account the consequences of its application.  

As a result, to determine the true confines of Article 2(4), subsequent practice must be examined. Therefore, whether a customary norm has arisen, and whether Article 2(4) and the Charter allow for HI are in fact two parts of the same inquiry. Thus, the Charter does not absolutely prohibit a customary norm of HI.

Though unnecessary, the Court could also look to the preparatory work, or travaux préparatoires, of the San Francisco Conference to reach the conclusion that Article 2(4) is not absolute. At the Conference, there was much discussion and debate as to what terms should be included within Article 2(4). Many proposals were made and rejected before settling on the current language. Included among them was a proposal put forth by Norway, by which the Norwegian representative suggested including the language in Article 2(4) – “not approved by the Security Council as a means of implementing the purposes of the Organization” – to unambiguously affirm that only the Council could authorize force under Article 2(4). However, after much consideration, including discussion that the inclusion of the language – “against the territorial integrity or political independence of any member state” – would leave ambiguity, the drafting committee chose to reject the specific language, instead adopting the existing open-ended terminology. This suggests that states were conscious of the evolving nature of international law, and that they allowed for this reality. Thus, as former ICJ President Rosalynn Higgins has averred, Article

37. Admission of State, 1950 I.C.J. at 17.
40. Id. at 346.
41. Id. at 346-47.
2(4) and the prohibition on the use of force should be treated as evolving norms. Doing so allows for customary HI.

**SECURITY COUNCIL INTERVENTION HAS CHANGED THE CONTOURS OF STATE SOVEREIGNTY**

Security Council-authorized HI perfectly exemplifies the evolution President Higgins referenced. Though now accepted as lawful, the legality of SC-authorized HI was also once controversial. The reason for this stems from Article 2(7) of the Charter, notions of inviolable state sovereignty, as well as the explicit limits laid out in the Charter regarding the SC's ability to use force only in situations where "necessary to maintain or restore international peace and security." While these concepts have not been outmoded, their parameters are in continual evolution and have undergone significant modification in the past 54 years. This is seen through the actions of the SC, the pronouncements of the ICJ, the international reaction to SC intervention, and most recently with the unanimous adoption of the 2005 World Summit Outcome document by the General Assembly. Each is examined below.

State sovereignty has always taken center stage in international law, and was explicitly recognized in Article 2(7) of the Charter, which states: "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ." For a long time, so-called human rights affairs were considered to fall under this provision, and the SC refrained from acting, no matter how egregious states' human rights violations were. However, beginning with the close of the Cold War, the SC found new life and began to act, under Article 42 of Chapter VII of the Charter, to intervene in situations of extreme human rights affairs.

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43. See, e.g., Mohammed Ayoob, *Humanitarian Intervention and International Society*, 7 Global Governance 225 (2001). Ayoob argues that human rights abuses and internal conflicts are domestic matters and that they therefore do not fall under Chapter VII and should not even be considered by the Security Council. It must be noted, however, that Ayoob is arguing that human rights abuses and internal conflicts should be considered "removed from the purview of Chapter VII," not that state practice has shown otherwise. Id. at 228.

44. U.N. Charter art. 42 (emphasis added).

45. World Summit, supra note 5, ¶¶ 138-39, 152.


suffering, even when contained within one state’s borders.\textsuperscript{48} Such interventions include Somalia (1991), Haiti (1993-94), Rwanda (1994), East Timor (1999), and Bosnia-Herzegovina (1992), among others, and they represent a chapter in international law that gave hope to many that the UN system was beginning to work as originally envisioned — for security \textit{and} the protection of human life.

To find proper authority for such SC authorized humanitarian interventions does not take much creativity. Clearly the SC has primary responsibility for international peace and security.\textsuperscript{49} It also has the authority to authorize force in situations that threaten such peace and security.\textsuperscript{50} In turning to both Article 55 of the Charter,\textsuperscript{51} as well as the direct effects of atrocity crimes, such as massive refugee flows, strained international relations, the potential for civil and regional war, the strain on international economic relations, and the mere fact that such crimes shock the conscience of mankind,\textsuperscript{52} it is well accepted that the SC has the prerogative to determine whether situations of genocide, ethnic cleansing, and crimes against humanity are indeed “threats to international peace and security” and thereby take action to abate the threat or breach if it indeed exists.\textsuperscript{53} This led states to explicitly accept SC intervention for human rights purposes.

The primary importance of this development is the recognition that situations of mass atrocity are no longer solely domestic matters shielded behind the guise of territorial sovereignty.\textsuperscript{54} Instead, as the

\begin{footnotesize}
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\item \textsuperscript{48} See Cassese, \textit{supra} note 28, at 26.
\item \textsuperscript{50} U.N. Charter art. 42.
\item \textsuperscript{51} Article 55 recognizes that the preservation of human rights is a necessary condition for the maintenance of international peace and security. U.N. Charter art. 55.
\item \textsuperscript{52} See, e.g., R2P, \textit{supra} note 5, ¶ 4.13, at 31 (recognizing there must be limitations to the non-intervention rule for exceptional circumstances).
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ICJ has now recognized on multiple occasions, atrocity crimes inhere a legal interest in their protection for all states. In addition to SC action itself, this view is further demonstrated by the response of the international community, which has either openly praised the SC or refrained from condemning its actions. In the most pronounced showing of international support for such action, the General Assembly unanimously adopted the World Summit Outcome in 2005, which contained explicit provisions accepting the “Responsibility to Protect” beleaguered populations, and if necessary, the willingness to act forcefully through the SC under Chapter VII. Such a showing of unanimous international solidarity is unusual in international relations, and it speaks loudly to states' concerns with preventing atrocity crimes. More importantly, it speaks to the position of the international community that two types of action are unequivocally lawful: (1) non-forceful measures aimed at the perpetrators of atrocity crimes, whether authorized or not; and (2) forceful measures taken through the SC. In sum, the SC has changed the debate regarding humanitarian intervention, and issues of sovereignty have been virtually removed from the discussion.

The Use of Force and Evolution of “Independent” Humanitarian Intervention

Conceptions of “sovereignty” no longer preclude humanitarian intervention. However, because the Article 2(4) prohibition on the use of force still stands, the next question to be answered is what recourse does the international community have when non-forceful measures do not sufficiently counteract atrocity crimes and when the SC is either unwilling or unable to take action. In other words, is humanitarian intervention without SC authorization ever lawful? Or, in the alternative, is it ever justified by “necessity” so that the wrongfulness of a state’s action would be precluded before a court of law such as the ICJ?

56. World Summit, supra note 5, ¶ 139.
57. See U.N. Charter art. 2, para 2 (supporting this outcome by mandating that all Member States fulfill their Charter obligations in good faith in order to be ensured the rights and benefits resulting from membership).
58. Eckert, supra note 54, at 50, 52 (pointing out that sovereignty is now viewed as entailing not only rights, but responsibilities, and when states fail those responsibilities, they forfeit a part of their sovereignty).
The question of HI’s legality has been addressed many times, with varying conclusions. Many scholars still maintain that HI is absolutely forbidden under international law, while others forcefully argue that a right to HI has emerged under customary international law. Most interestingly, a number of scholars posit that HI is not yet lawful, but perhaps “justified.” The latter is a seemingly sound position, but this approach has not fully addressed the true real-world consequences of such a determination. If justified, does that mean legal liability would still arise if a country were brought before the ICJ and found to have acted in accordance with the HI doctrine? Or does it suggest some form of estoppel or necessity doctrine, as adopted by the ICJ in the Gabčíkovo-Nagymaros Project, which would preclude state wrongfulness? The actions of states speak loudly to this query and evidence an acceptance by states that, in certain extreme and limited circumstances, intervening states should not be condemned or held legally liable for their humanitarian actions. This evidence is outlined below.

Note: For the purpose of this analysis, humanitarian intervention taken without SC authorization, but supported by the international community (or at least not widely condemned), will be termed “independent” humanitarian intervention. This designation intentionally avoids using the term “unilateral” intervention because unilateral intervention connotes intervention by a single state or small group of states with little international support. However, there is little evidence that HI without widespread international support would ever be justified. Thus, the two must be distinguished and it should be clear that the conclusions reached regarding arguments available to


60. E.g., Cassese, supra note 28, at 25 (stating that “from an ethical viewpoint resort to armed force was justified. Nevertheless, as legal scholar I cannot avoid observing in the same breath that this moral action is contrary to current international law.”); Franck, supra note 59, at 226 (arguing “the unlawfulness of [humanitarian intervention] was mitigated, to the point of exoneration,” because the circumstances were brutally calamitous).

61. For details of what elements must be fulfilled to fall within the doctrine, see infra Part 5.

intervening states are only with regard to "independent" humanitarian intervention.

The General Assembly and Uniting for Peace: The Often-Overlooked Origins of Independent Humanitarian Intervention

The international community collectively addressed the often underappreciated possibility of inaction on the part of the Security Council as early as 1950.63 Faced with SC inaction in response to Russian Vetoes during the Korean War, the General Assembly passed resolution 377 (V), more commonly referred to as “Uniting for Peace.”64 The resolution states that should the SC, because of lack of unanimity of the permanent members, fail to exercise its primary responsibility to maintain international peace and security, then states, upon “recommendation” of the GA, may resort to “armed force when necessary, to maintain or restore international peace and security.”65 To ensure that the Resolution would have effect, the GA created the “emergency special session” (ESS) to ensure prompt action in the face of a SC stall.66 Accordingly, an ESS can be called within 24 hours in one of two ways, either (1) at the request of the GA upon a two-thirds majority vote, or (2) on the basis of a procedural vote in the SC, which cannot be blocked by a P5 veto.67

The Resolution can be viewed as the beginning of independent humanitarian intervention in the modern era for several reasons. First, the resolution was passed with a vote of 52 to 5, with two abstentions, which indicates wide international support.68 Additionally, Uniting for Peace has been invoked ten times since its inception,69 and in at least two instances, first in the Suez Canal and then in Namibia, the GA did in fact call upon states to render military assistance.70 The response of the ICJ in both the Wall Opinion and Certain Expenses affirmed the legality of these “peacekeeping” operations under the authorization of the GA, and indirectly, of the underlying Uniting for Peace Resolution.71

63. See Uniting for Peace, supra note 49, at 10.
64. Id.
65. Id. ¶ 1.
69. ESS, supra note 66.
71. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 28 (July 9); Certain Expenses of United Nations:
Moreover, the ICJ has explicitly found that a series of GA resolutions such as those following Uniting for Peace "may show the gradual evolution of the opinio juris required for the establishment of a new rule,"72 and that opinio juris may be deduced by carefully examining the "attitude of States towards certain General Assembly resolutions . . . ."73 Because Uniting for Peace allowed for force without going through the SC, manifest evidence indicates a shift away from a SC monopoly on the use of force as early as 1950.

All in all, the Uniting for Peace Resolution, its subsequent implementation, and the response of the international community illustrates widespread state support for the position that the SC is neither solely responsible for maintaining peace and security nor does it hold a monopoly on the use of force.74 More importantly, it affirms that states will be justified, in limited circumstances, in acting without SC authorization. In short, Uniting for Peace provides an alternative to the SC when peace and security is threatened, and proclaims that authorization is not always necessary for states to be justified in the use of force.

INDEPENDENT HUMANITARIAN INTERVENTION: CASE STUDIES

Uniting for Peace confirms that the Security Council is not the only means to address atrocity situations. However, the Resolution could conceivably work against proponents of independent HI, as it is yet another mechanism available (arguably through the Charter) to those states willing to intervene in situations of mass atrocity. In other words, to have their actions legitimized, states should request a vote through the GA to act through Uniting for Peace before taking matters into their own hands. In fact, it could feasibly be argued that if a state could not attain the two-thirds required support of the GA, then it is not justified in taking independent action anyway. Uniting for Peace also seems to answer questions of urgency, as an ESS can be convened within 24 hours.75 This scenario presents a compelling argument: because proponents point to the P5 veto as the predominant change in circumstance justifying HI, and because the international community has already addressed situations of veto deadlock by allowing Uniting

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72. Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 70-71 (July 8); see also Wall, 2004 I.C.J., ¶ 3 (separate opinion of Judge Al-Khasawneh) ("[R]esolutions . . . while not binding, nevertheless produce legal effects and indicate a constant record of the international community's opinio juris.").
75. ESS, supra note 66.
for Peace actions, states must attempt to go through the GA in order to claim independent HI is justifiable.

While utilizing Uniting for Peace might be desirable, this argument is not fully persuasive for two reasons. First, even if Uniting for Peace provides an alternative mechanism, the GA is not “authorizing” force per se, as only the SC has the power to do. Instead, it is merely recognizing an independent means for states to act – with international support. Therefore, there is no legal requirement that the GA “authorize” forceful HI. Second, state practice indicates that such a process is not necessary in the face of atrocity crimes. Proponents of independent HI point to a variety of interventions to support independent HI, none of which utilized Uniting for Peace, but which nonetheless lead these distinguished publicists to conclude that HI is lawful. 76 Some attention is given, for example, to interventions undertaken in the 1970s by India into East Pakistan, Vietnam into Cambodia, and Tanzania into Uganda. 77 Others also mention intervention by Belgium into the Congo in the 1960s, 78 Syria’s Invasion of Lebanon in 1976, 79 France’s invasion into the Central African Republic in 1979, 80 as well as India’s invasion of Sri Lanka in 1987. 81 Admittedly, it is difficult to maintain that these interventions in themselves led to a custom of HI, primarily due to the concomitant (and primary) reliance of the intervening states on claims of self-defense for legal justification. 82 Nonetheless, they represent a development by which states began to recognize that intervention for humanitarian motives might deserve a place in modern international law. More importantly, states began to justify their actions based on HI in a way that resembled opinio juris, even if not yet explicitly doing so by claiming “legality” through HI.

Moving to the 1990s, however, a discernible trend became apparent: for the first time, states began to intervene solely upon humanitarian justifications, and they began to do so with the explicit

76. E.g., TESÓN, supra note 59, at 418; Charney, supra note 47, at 838; Greenwood, supra note 59, at 931; Nanda et al., supra note 4, at 862; Reisman, supra note 20, at 860; Rogers, supra note 4, at 732.
79. BREAU, supra note 59, at 33.
80. Id.
81. Id.
82. See, e.g., CHESTERMAN, supra note 1, at 1, 73, 79, 117.
support of regional organizations. Four such interventions dominate the discussion. First, in 1992, the U.S., U.K., and Coalition forces intervened in Iraq, without SC authorization, to maintain no-fly zones over parts of both northern and southern Iraq to protect the Kurdish and Shi’i populations, respectively. Second, the East African Community of West African States (ECOWAS) engaged in two humanitarian interventions, one into Liberia beginning in the early 1990s and then into Sierra Leone towards the end of the same decade. Again, in neither situation did the SC authorize intervention prior to ECOWAS’s use of forceful measures. Finally, the most conspicuous and highly scrutinized HI is, of course, the unauthorized intervention by the North Atlantic Treaty Organization (NATO) forces into Kosovo and surrounding regions in 1999.

This brings this study to the heart of the matter – whether there exists sufficient evidence of the two component parts of customary international law to conclude that HI is acceptable under modern international law.\(^83\) Necessarily, this analysis begins with the “individual” actions and statements of states, but is more fully analyzed by also examining the “collective” actions and statements of states through a diverse array of international organizations. The case studies below provide for such a process.

**Iraq 1991-1992**

In the wake of “Operation Desert Storm,” members of the international community again invaded Iraq, this time without explicit SC authorization, to establish no-fly zones aimed at protecting Kurdish groups in the north and Shi’i groups in the south.\(^84\) Both groups had faced decades of persecution and gross human rights violations under the reign of Saddam Hussein.\(^85\) In the late 1980s, for example, chemical weapons were used to target the Kurdish population, leading Human Rights Watch to conclude that the acts amounted to genocide.\(^86\) Approximately 182,000 Kurds were murdered during this period, and some equated the action with the Nazi campaign against the Jews.\(^87\) Despite the destruction of nearly 5,000 Kurdish villages and the

\(^83\) For further background on the interventions addressed herein, Professor Susan Breau presents a very comprehensive and well-written review on the factual background of each intervention. BREAU, supra note 59, at 33-147.

\(^84\) Id. at 87.

\(^85\) Id.

\(^86\) Id. at 88; HUMAN RIGHTS WATCH/MIDDLE EAST, IRAQ’S CRIME OF GENOCIDE: THE ANFAL CAMPAIGN AGAINST THE KURDS 17-19 (1995).

\(^87\) BREAU, supra note 59, at 89; SHERI LAIZER, MARTYRS, TRAITORS AND PATRIOTS: KURDISTAN AFTER THE GULF WAR 2 (1996); see also, e.g., SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 172, 203 (2002).
displacement of countless individuals, the remaining Kurds staged a meager rebellion in March 1991. Hussein again went on the offensive, targeting Kurd civilians with napalm and brutal targeted bombing campaigns. By early May, over one million refugees had fled to Iran and nearly 500,000 to Turkey. Simultaneously, the Shi'i Muslim population in the south of Iraq was also subjected to gross mistreatment. Though differing in extent, with no indications of genocidal intent, the Shi'i were denied basic rights, expelled to neighboring countries, and subjected to artillery attacks. By early 1991, both conflicts undoubtedly involved extensive atrocity crimes and the clear targeting of distinct ethnic groups.

In April 1991, several countries wrote letters to the SC asking for a SC meeting to designate the situation in Iraq “a threat to international peace and security.” After extensive international pressure, the SC finally passed Resolution 688, which “demand[ed] that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression . . . .” In doing so, however, Resolution 688 was not passed under Chapter VII, nor did it set up safe havens or no-fly zones. China and Russian veto threats prevented any UN-authorized forceful action.

The lack of SC authorization did not prevent forceful humanitarian intervention, however. On April 17, 1991, “Operation Provide Comfort” was implemented under the leadership of the United States, the United Kingdom, and France, with substantial support from Germany, Italy,

89. BREAU, supra note 59, at 89.
94. See id.
95. BREAU, supra note 59, at 95.
and the Netherlands. A large northern area of Iraq was officially declared a "no-fly" zone, and safe havens were provided for the beleaguered Kurdish populations. Threats of forceful action kept Iraqi forces from entering the predominately Kurdish areas. The second phase of the intervention, which mirrored the first, began in southern Iraq in August 1992. Despite GA condemnation of Iraq's human rights abuses, there was no SC authorization in either situation. The no-fly zones in both regions continued until 2003.

The primary justification for the unauthorized intervention was humanitarian necessity. Coalition forces explicitly proclaimed that they were "operat[ing] under international law . . . [which] recognizes extreme humanitarian need." The intervening states concurrently relied upon Resolution 688, claiming "a rubric exists within 688 to avoid need for a separate resolution" and that the action was "consistent with United Nations Security Council Resolution 688." However, to clarify, the acting states did not claim that their action was authorized per se. Instead, they argued that the circumstances in Iraq, which amounted to a humanitarian disaster, justified their actions despite a lack of explicit SC authorization. Notably, the states made explicit claims that their actions were not only justified, but lawful. As a result, Operation Provide Comfort was carried out with an opinio juris placing independent humanitarian intervention within the realm of customary law.

In response to the humanitarian intervention, the world responded with tacit approval. The UN Secretary-General celebrated that the principle of non-intervention "cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity . . . ." Likewise, the SC did not even consider any resolution in opposition to the no-fly zones and safe havens; and in a debate before the GA in 1992 to consider the human rights

97. Id.; Breau, supra note 59, at 95.
situation in Iraq, several states explicitly supported the intervention.\textsuperscript{105} Admittedly, a number of states also argued that the intervention could not be justified based on either a right to unilateral intervention or on the basis of SC authorization.\textsuperscript{106} Yet, when GA Resolution 47/145 was passed, the resolution failed to mention the intervention or condemn the actions of the Coalition Forces.\textsuperscript{107} In the end, states did not act to condemn the actions of the intervening states, either legally or politically.

\textit{Liberia 1990-1997}

Corresponding with intervention in Iraq, human rights atrocities were unfolding in West Africa that could no longer be ignored. After years of civil strife and several failed coups, in late 1989 Charles Taylor and his rebel troops (the NPFL) invaded across the Ivory Coast border to challenge Liberian President Samuel Doe's power.\textsuperscript{108} A "campaign of savage violence" immediately ensued, in which civilians became the target of malicious reprisals by both sides.\textsuperscript{109} The devastation was so great that it attracted widespread international attention, and both sides were accused of "ethnic purging."\textsuperscript{110} Massacres were frequent, sexual violence was rampant, and torture was common, prompting hundreds of thousands to flee in search of refuge in the neighboring countries of Guinea, Ivory Coast, and Sierra Leone.\textsuperscript{111} Large-scale war crimes and crimes against humanity were unmistakable.

In response, the Economic Community of West African States (ECOWAS) created a transnational peacekeeping force (ECOMOG) to intervene and protect the civilian population from the ongoing atrocity crimes.\textsuperscript{112} In similar fashion to the concurrent "no-fly zones" in Iraq, the intervention was conducted in parallel to the United Nations and the SC, but it was forcefully led by a regional organization without gaining prior SC authorization.\textsuperscript{113} From the beginning, ECOWAS took

\begin{thebibliography}{99}
\bibitem{105} BREAU, \textit{supra} note 59, at 101-02.
\bibitem{106} Id.
\bibitem{108} BREAU, \textit{supra} note 59, at 75-76.
\bibitem{111} BREAU, \textit{supra} note 59, at 76-77.
\bibitem{112} SEAN D. MURPHY, \textit{HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER} 150 (1996).
\bibitem{113} See BREAU, \textit{supra} note 59, at 78-83
\end{thebibliography}
many steps to peacefully settle the conflict. However, after peaceful means failed, a "total peace plan was adopted." Part of the plan was to provide ECOMOG with a mandate for armed intervention.

Again, the primary justification for intervention into Liberia was humanitarian necessity, namely the need to protect human life and address the threat to international peace and security. The justification was made despite a marked absence of SC authorization to use force. And in similar fashion to coalition forces in Iraq, ECOWAS's belief that its action was legal was readily apparent. In 1978 ECOWAS created a Protocol on Non-Aggression, which affirmed the members' obligations to refrain from aggressive uses of force under Article 2(4) of the Charter. Nevertheless, ECOWAS explicitly chose to use force without SC authorization. Thus, ECOWAS's forceful actions in Liberia and subsequent justifications provide evidence of not only a customary norm of independent humanitarian intervention, but also reveal the organization's belief that the Charter does not prohibit such action. In other words, the members of ECOWAS concluded their humanitarian actions were non-aggressive, in line with Article 2(4), and lawful. Once more, the requisite opinio juris element to custom was manifest.

The tremendously positive international reaction buttressed ECOWAS's position. The explicit support of the SC itself is most notable. In November 1992, the SC passed resolution 788, which primarily did three things: first, it imposed a complete embargo on all deliveries of weapons to Liberia; second, it declared the situation to be a "threat to international peace and security"; and, finally, it actually endorsed and commended the unauthorized ECOWAS intervention. In the meetings to resolution 788, countries as diverse as the United States, Russia, and China all commended the ECOWAS intervention and its role in resolving the conflict. Likewise, in 1991, the President of the SC stated: "The members of the Security Council commend the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia," repeating these sentiments

114. MURPHY, supra note 112, at 149-50.
115. BREAU, supra note 58, at 79.
116. Id. at 79-80.
again in May 1992.123 In the words of Professor Breau, "the international community as represented in the Security Council was unanimous in this approval notwithstanding that there had not been any type of enabling resolution by the United Nations."124

Sierra Leone 1998

The crisis in Sierra Leone somewhat mirrored the disaster in neighboring Liberia, leading to the displacement of hundreds of thousands of Sierra Leoneans (about one tenth of the population).125 Not only was the conflict in Sierra Leone similar to Liberia, but it also had a direct link, as Charles Taylor had sent troops across the border from Liberia in March 1991 in retaliation for Sierra Leone's provision of an ECOMOG base in 1990.126 The Liberian NPFL joined forces with the Sierra Leonean Revolutionary Patriotic Front (RUF), and the groups set up a permanent headquarters in Sierra Leone.127 This led to protracted conflict between the existing government and several rebel groups competing for power. Within 18 months of the conflict, at least 400,000 civilians had been displaced,128 and in April the government was overthrown.129 The war continued, however, and attacks upon the civilian population persisted. By late 1994, the RUF attacks had spread to nearly all parts of the country.130

Throughout the conflict, numerous reports emerged documenting the grave extent of the atrocities. The International Committee of the Red Cross warned, for example, that something needed to be done to stop the disaster from turning into another Rwanda.131 The United

124. BREAU, supra note 59, at 85. Professor Breau notes that the Organization of African Unity also supported ECOWAS's humanitarian intervention, even going so far as to provide financial assistance, and that Western states, including the United States, Great Britain, and the European Union, also supported the action by contributing financial assistance. Id. at 84 (emphasis added).
125. Id. at 103. Throughout this time, there were several instances of ECOMOG and British involvement at the request of the existing government. The intervention that this study focuses on, however, is the ECOWAS intervention of February 1998, which again occurred independently of Security Council authorization, and was conducted without consent for the purpose of bringing the humanitarian disaster to an end.
126. Id.
129. BREAU, supra note 59, at 103.
130. Id.
131. Id. at 104.
States issued similar reports of torture, rape, and sexual slavery, and Amnesty International reported that 250,000 Sierra Leonean refugees had fled to Guinea and Liberia. Médecins Sans Frontières also released reports that armed groups in Sierra Leone were "implementing a policy of terror against civilians." Widespread atrocity crimes were unquestionable.

Heeding these warnings, ECOWAS again took action. And following a May 1997 coup, the organization convened and issued a final communiqué, urging: "that no State recognize the regime installed following the coup of May 25, 1997, and that every effort be made to restore the lawful government by a combination of three measures, i.e.: the use of dialogue; the application of sanctions, including an embargo; and the use of force." But despite continued pressure, by the end of 1997 it was apparent that the rebel groups were not disarming and the diplomatic peace efforts were not succeeding. ECOWAS thus reconvened and issued the final communiqué, once again specifically referencing "the use of force." In early 1998, ECOMOG engaged in both bombing campaigns and ground operations. The SC had not authorized the forceful actions.

The ECOWAS communiqués set forth the justifications for its actions. The organization referred to the "bloodshed and other loss of human life," the increase of refugees in other neighboring countries, and the threat to peace and security in the region. In similar fashion to intervention in Liberia, the actions were justified by humanitarian

133. BREAU, supra note 59, at 105.
134. Id.
138. BREAU, supra note 59, at 108.
139. See S.C. Res 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997) The Resolution did not authorize force, but stated the Council was "gravely concerned" at the . . . deteriorating humanitarian conditions" in Sierra Leone, and reiterating that the SC had “determined” that the situation constituted a “threat to international peace and security in the region.” Id.
140. BREAU, supra note 59, at 111. Notably, ECOWAS also referred to restoring the democratically elected government of Kabbah, self-defense of the ECOMOG troops, and humanitarian disaster. Id.
necessity. And like the previously mentioned interventions, the international community responded with approval. In the debates surrounding SC Resolution 1132, the participating states praised ECOWAS’s continued attempts to halt the conflict.\textsuperscript{141} The President of the SC similarly praised ECOWAS,\textsuperscript{142} and the UN Secretary-General applauded the diplomacy of ECOWAS and the contributions made by ECOMOG officers in removing the military junta.\textsuperscript{143} The SC even took the extra step and passed multiple resolutions once again “commending” both ECOWAS and ECOMOG for their intervention into Sierra Leone.\textsuperscript{144} For the third time in less than a decade, there was patent support for independent humanitarian intervention.

\textit{Kosovo 1999}

Clearly the most important precedent for independent HI is NATO’s intervention into Kosovo in 1999. Not only was the intervention followed by the clearest claims of humanitarian intervention as a legal right,\textsuperscript{145} but it also received near universal reaction from states, as well as innumerable commentaries from international lawyers.\textsuperscript{146} The foremost justification by NATO was that Former Republic of Yugoslavia (FRY) authorities were carrying out massacres, grave breaches of human rights, mass expulsions of a particular ethnic group (ethnic cleansing), and that the humanitarian catastrophe constituted a threat to peace and security.\textsuperscript{147} It thus claimed that its intervention was “necessary” to prevent the humanitarian catastrophe. The situation prompted apt consideration of the question: “Should one remain silent and inactive only because the existing body of international law proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of human compassion?”\textsuperscript{148} Perhaps the two options are not so exclusive.

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\textsuperscript{146} See, e.g., Cassese, supra note 28, at 28-29.
\textsuperscript{147} Id. at 25; see U.N. SCOR, 54\textsuperscript{th} Sess., 3988th mtg. \textit{passim}, U.N. Doc. S/PV.3988 (Mar. 24, 1999).
\textsuperscript{148} Cassese, \textit{supra} note 28, at 25.
\end{flushleft}
The conflict in Kosovo stemmed from Slobodan Milosevic’s refusal to recognize Kosovo as autonomous. The refusal led to increased tensions in the region, and reports of violence against the civilian population began to surface as early as 1990. For the next several years, hostilities continued to escalate, accompanied by numerous reports of discriminatory mistreatment, arbitrary detention, forced disappearances, and torture. In 1998, full scale armed conflict was underway. And on October 3, 1998, the UN Secretary-General issued a report to the SC describing the targeting and mass killing of civilians in Kosovo, comparing them to the atrocities seen earlier in Bosnia and Herzegovina, which included the Srebrenica genocide and other instances of massive ethnic cleansing.

On October 9, 1998, NATO Secretary-General Javier Solana proclaimed “the danger of a humanitarian catastrophe” in Kosovo “loomed large.” He contended that “a brutal campaign of forced deportation, torture and murder” plagued the region, and that the humanitarian catastrophe was evidence that the threat was spreading and intensifying. This contention was supported by a myriad of other reports by international organizations operating in the area. The SC, through Resolution 1199, even expressed grave concern at the fighting in Kosovo “and in particular the excessive indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the [UN] Secretary-General, the displacement of over 230,000 persons from their homes.” The full extent of the situation finally caught the attention of the international community by early 1999, and the atrocities in Kosovo were deemed ethnic cleansing.

149. See Breau, supra note 59, at 120; Keesing’s Record of World Events 37725-26 (Vol. 36, Sept. 1990).
154. Cassese, supra note 28, at 28; see also Simma, supra note 19, at 7.
156. Id.
158. Breau, supra note 59, at 125.
By the time NATO intervened in March of 1999, peaceful means of settling the conflict had been exhausted. Multiple meetings had been called, the SC had imposed arms embargos, various international diplomats visited Belgrade, and multiple peace talks were held in the region. A verification mission was also attempted under the authorization of the UN to allow NATO flights over the Kosovo region. However, all efforts failed, and the cease-fire collapsed by early 1999. NATO made further efforts at negotiation at Rambouillet, but Milosevic failed to agree to international terms for protecting Kosovo civilians, stating "he would rather face air-strikes than a peacekeeping force." In response, because the SC was unable to take decisive action, NATO commenced the most publicized independent humanitarian intervention to date, and bombing began on March 24, 1999.

At the time of the intervention, the international community responded with tacit approval. In the words of Antonio Cassese, no state or group of states took the action "that would have been obvious" in the presence of significant disapproval: to bring the matter before the General Assembly. Regional organizations seemed content with the intervention, convening no official sessions, and, the SC likewise called no emergency meeting to order. In fact, when given the opportunity to unequivocally condemn NATO's intervention, the SC refused, defeating (by a vote of 12 to 3) a Draft Resolution put forth to denounce NATO for violating Articles 2(4), 24, and 53 of the UN Charter. By voting against the resolution, the SC tacitly pronounced that the circumstances of NATO's intervention did not violate those provisions, effectively endorsing HI. A contrary conclusion would entail a finding that the SC itself acted contrary to its responsibilities under the

159. Cassese, supra note 28, at 28.
162. BREAU, supra note 59, at 127.
163. Id.
165. BREAU, supra note 59, at 131.
166. Id. at 132.
States Defending Humanitarian Intervention

Going even further, SC Resolution 1244, which subsequently authorized force under UN auspices, contained no criticism whatsoever of NATO's use of force, not even implicitly.\(^1\)

Not only did states tacitly approve of NATO's intervention, but many actually took the extra step and openly supported the action. For example, while attending the emergency SC session, Albania and Bosnia-Herzegovina explicitly commended NATO's action.\(^1\) The European Union also sent a communication to the Secretary-General endorsing the NATO intervention.\(^1\) Both responses showed that Europe, the continent most affected by the tragedy, supported the intervention. Beyond Europe, states as diverse as the members of the Organization of Islamic States publically supported the action, expressing “regret” that the SC failed to uphold its primary responsibility under the Charter.\(^1\) The only states explicitly speaking out against the intervention at the time included the FRY, Russia, China, Cuba, Belarus, Ukraine, Namibia, India, and, ambiguously, Mexico.\(^1\)

Equally, if not more, important to the discussion on custom are the justifications put forth by the acting states themselves. Subsequent to the intervention, NATO states invoked HI as their sole justification, referencing it both explicitly and implicitly as a legal doctrine. For example, both the United Kingdom and the Netherlands explicitly stated at the SC Emergency Session for Kosovo that NATO's action was legal.\(^1\) Belgium also invoked “humanitarian intervention” before the ICJ in *Legality of the Use of Force*.\(^1\) The United States, Germany, Canada, and France similarly responded, referring to NATO's action as “justified and necessary to stop the violence and prevent an even greater humanitarian disaster.”\(^1\) NATO's 19 members echoed this position.

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\(^{172}\) Breaux, *supra* note 59, at 143-44.


\(^{174}\) Cassese, *supra* note 4, at 792.


\(^{177}\) U.N. SCOR, 54th Sess., 3988th mtg. at 4, 5, 8, 16, U.N. Doc. S/PV.3988 (Mar. 24, 1999); Breaux, *supra* note 59, at 137 (quoting U.S. Secretary of State Madeline K.
through NATO's official justification of "avert[ing] a humanitarian catastrophe." NATO had previously gone even further and codified HI in its Parliamentary Assembly. In sum, the justifications of NATO states and the international community demonstrate a strong opinio juris in favor of this proposition: in situations of extreme necessity, where the SC fails to uphold its primary responsibility to maintain peace and security, states may be justified in undertaking “independent” humanitarian intervention.

**EVALUATING OPINIO JURIS: CONTEMPORANEOUS STATE ACTION SPEAKS LOUDER THAN SUBSEQUENT DIPLOMATIC DEFLECTION**

In the wake of Kosovo's intervention, the international community engaged in substantial dialogue over the legitimacy of NATO's action, as well as the doctrine of humanitarian intervention itself. This dialogue has continued to date, pitting many states and many of international law's most highly qualified publicists on opposite sides of the fence: some claim that independent HI can be lawful in extreme circumstances while others claim that independent HI is always manifestly unlawful. Others delicately scale the fence, arguing that HI is legitimate, but not yet lawful. No matter the conclusion, discerning opinio juris has always proved perplexing to international lawyers studying humanitarian intervention. This is the result of often conflicting state actions and official statements, incompatible acts and statements across time, ambiguous acts of diplomacy, and, in some instances, an inconclusive absence of action and/or comment altogether. This creates an extremely arduous process.

To illustrate: as shown above there is significant opinio juris favoring independent HI, especially on behalf of acting states. Nevertheless, numerous states have subsequently, and explicitly, rejected a “right” to HI. Most notably is the joint statement of the Group of 77 (G77), which proclaims to reject “the so-called 'right' to humanitarian intervention . . . .” Assuming that this statement

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180. See, e.g., TESON, supra note 20, at 6; Nanda et al., supra note 4, at 866-67; Reisman, supra note 20, at 861; Rogers, supra note 4, at 735.

181. See, e.g., BYERS, supra note 12, at 100; Simma, supra note 19, at 2-3.

182. See, e.g., Franck, supra note 59, at 226; Cassese, supra note 28, at 25.

represents the position of all G77 Member States, this evidences the stance of approximately 130 states. Out of the approximate 200 states that make up the international community, this is at least a two-thirds majority. Thus, the natural reaction may be to conclude that even if the remaining states demonstrate the belief that HI is lawful, it would be insufficient to overcome this majority and form a customary norm. Note, however, that the ICJ has explicitly held that “the mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those states.” In other words, one must look beyond these declarations and evaluate state action.

There is a marked difference between this pronouncement made at the 2000 South Summit and the practice of G77 members when actually faced with humanitarian atrocities. In fact, practice among these states, coupled with their legal statements at the times of intervention, seem rather to affirm some form of HI instead of rejecting it outright. For example, while sitting on the SC, six states from G77 endorsed the right of HI by voting against the Draft Resolution to halt NATO intervention—in effect, they voted in favor of NATO action (Argentina, Bahrain, Brazil, Gabon, Gambia, and Malaysia). Similarly, the 15 members of ECOWAS, all of which are members of the G77, have each resorted to HI themselves, as shown above, justifying their actions on humanitarian grounds. Additionally, the African Union (AU), whose 53 members also all belong to the G77, has not only endorsed HI, but has codified independent HI in its Charter without any mention of need for SC authorization. Furthermore, subsequent to NATO’s forceful intervention, the Organization of the Islamic Conference Contact Group on Kosovo issued a statement to the SC stating: “in view of the failure of all diplomatic efforts, due to the intransigence of the Belgrade authorities, a decisive international action was necessary to prevent humanitarian catastrophe and further violations of human rights in Kosovo.” Presupposing that this statement reflected the views of the Organization of Islamic Conference at the time, which seems reasonable

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187. Member States, ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS), http://www.ecowas.int/ (Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo).
188. Member States, GROUP OF 77, http://www.g77.org/doc/members.html.
190. OIS Letter, supra note 173, at 2 (emphasis added).
based on the lack of objection to the letter, this represents another 29 states, not counting the 28 that are also members of the AU.¹⁹¹

Therefore, what “right” the G77 states are actually rejecting is unclear because at the time of these interventions, the large majority of these states responded with both active and passive acceptance.¹⁹² These responses speak much louder than subsequent diplomatic proclamations purporting to reject humanitarian intervention. If these states truly believed that humanitarian action was manifestly unlawful, they should have, and likely would have, spoken out against the action as it was occurring. To provide comparison, in other situations of aggression, such as when Iraq invaded Kuwait, states have been quick to complain and call on the SC and UN for action.¹⁹³ Moreover, the SC itself has been willing to condemn the inappropriate use of force swiftly and unambiguously, such as when Uganda invaded the Democratic Republic of Congo for reasons clearly not amounting to HI.¹⁹⁴ Finally, when given the opportunity to address the situation in its totality at the World Summit in 2005, the GA accepted the “Responsibility to Protect,” and refused to unequivocally declare that independent HI outside of the SC was never allowed.¹⁹⁵ This would have been the ideal forum in which to make such a proclamation; and an absence of such a pronouncement speaks loudly to the impracticability of proclaiming that independent humanitarian intervention is never acceptable.

So how should these inconsistencies be evaluated? Ultimately, when adding the actions and statements of various individual states, as well as the NATO states and EU states, a total of at least 119 states have supported independent HI is some form or another.¹⁹⁶ And they


¹⁹². See Declaration of the South Summit, supra note 183.


¹⁹⁵. See World Summit, supra note 5, ¶¶ 138-39.

¹⁹⁶. 28 NATO States, 53 African Union States, 28 OIS states (which are not also AU members), Venezuela, Russia (which has claimed R2P in Georgia), Bosnia-Herzegovina
have done so while the situation was unfolding. Obviously, official diplomatic statements attempting to clarify states' positions on an issue cannot be ignored when determining whether a state is acting out of a sense of legal obligation (the requirement for *opinio juris*). However, to more clearly flush out the true motives of the acting states, state practice must be evaluated *concurrently* with *opinio juris*. Doing so more accurately evidences what states really believe is acceptable under international law. It is all too easy to support an action (or acquiesce to that action) while it is occurring, and later purport to reject a similar action likely for fear that any ensuing doctrine would be abused. However, the possibility of abuse does not mean that action is unlawful when done correctly. Rather, abusive situations are unlawful; non-abusive situations are lawful. Self-defense, for example, has been abused countless times. This has not caused states to claim the right no longer exists. The same can be said for true humanitarian intervention.

Even without distinguishing the true actions of “objecting” states to this extent before, numerous authors have concluded that a customary right to HI exists. This analysis should serve to bolster their contentions. Consequently, if brought before the ICJ, states have a good faith argument that a “right” to independent humanitarian intervention exists.

**THE DOCTRINE OF NECESSITY**

While there is a good-faith argument that a “right” to independent humanitarian intervention exists akin to the “right” of self-defense, there is yet another viable argument available to states enacting true humanitarian interventions. In the wake of Kosovo, distinguished international jurists Antonio Cassese and Thomas Franck both came to the conclusion that HI is *not yet legal, but justified*. The “justified” conclusion may seem paradoxical at first, raising the question: if HI is justified, then how would it serve international justice to find the particular justified intervention unlawful if a country were brought before the ICJ? In reality, such an outcome would not serve international justice. Nevertheless, without explicitly posing a possible remedy, the conclusion of these venerated jurists inadvertently hints at a viable defense: the state of necessity (“necessity”).

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Necessity, which is only available in extremely rare situations, precludes the wrongfulness of state actions that are otherwise considered technically illegal.\textsuperscript{199} The doctrine can be paralleled to domestic processes that excuse illegal behaviors, despite the lack of an established and defined defense like duress, self-defense, or insanity. For example, states almost always allow certain classes of persons to escape legal liability when acting for the greater good of society, such as a fire fighter who must destroy personal property to prevent a fire from spreading, or a police officer who is forced to trespass on private property to apprehend an armed criminal. Lay citizens can similarly be exonerated for their illegal acts if necessary to prevent a greater harm, such as a child stealing a bicycle to escape from a kidnapper, or a person running a stop sign to get a dying spouse to the hospital. Most times these defenses are not explicitly defined in statutes, but are rather applied by judicial bodies in the interests of upholding a clear means to justice. The notable commonality, as with HI, is the belief that the unlawful action is necessary to prevent greater harm.

Although “necessity” is not a rule of law strictly speaking, the doctrine has a long history of acceptance in international law.\textsuperscript{200} It has been implemented by numerous international tribunals, and also employed by the ICJ on several occasions,\textsuperscript{201} with each coming to the conclusion that the doctrine holds a central place in international jurisprudence and can serve to justify otherwise unlawful actions. The Draft Articles on State Responsibility (DASR) describe the current customary version of necessity,\textsuperscript{202} demonstrating that necessity does not invalidate the international obligation concerned; “rather [it] provide[s] a justification or excuse for non-performance while the circumstance in question subsists.”\textsuperscript{203}

To escape wrongfulness of an otherwise illegal action, three criteria must be fulfilled. First, the act must be “the only way for the State to safeguard an essential interest against a grave and imminent peril.”\textsuperscript{204} With HI, it is fairly simple to conclude that in some circumstances the use of force will be the only way to stop genocide, ethnic cleansing, war crimes, and crimes against humanity — the prevention of which is

\textsuperscript{199} DASR, supra note 78, art. 25, at 80; Gabčikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, ¶ 50 (Sept. 25).
\textsuperscript{200} E.g., DASR, supra note 78, art. 25, at 80; Legal Consequences of Construction of Wall in Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 140 (July 9); Gabčikovo, 1997 I.C.J. ¶ 51.
\textsuperscript{202} DASR, supra note 78, art. 25, at 80.
\textsuperscript{203} Id. ¶ 2, at 71.
\textsuperscript{204} Id. art. 25, at 80.
unquestionably an essential interest of the international community. Second, the state must not have contributed to the situation of necessity. This would have to be determined on a case-by-case basis, but it is clearly conceivable that this element will also usually be fulfilled in a true humanitarian intervention. Finally, the act must “not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.” The third element is the most problematic and thus deserves further analysis.

The two international interests most impacted by HI are state sovereignty and the prohibition on the use of force. Both are without question among the most “essential” interests of all states. However, as illustrated above, when states fail to protect their own populations from genocide and other atrocity crimes, they forfeit a part of their sovereignty and lose the protection of the principle of non-intervention. Thus, in the case of atrocity crimes, “sovereignty” does not preclude the necessity doctrine.

The interplay between the necessity doctrine and the use of force is a more complex situation. In the commentary to the DASR, the International Law Commission (ILC) contends, “the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations,” using the rules relating to the use of force as a possible example. Therefore, at first glance necessity could appear inapplicable to HI. However, when the DASR was drafted, the authors also specifically addressed the possible applicability of necessity to HI and were unable to determine whether a state of necessity could be applicable or not. The conclusion at the time was that “the question of whether measures of forcible humanitarian intervention . . . may be lawful under modern international law is not covered by article 25.” In other words, the authors of the DASR did not conclude either way whether the doctrine of necessity is applicable to HI.

The greatest obstacle to overcome for necessity to work with HI is the pronouncement of the ICJ that necessity may not be invoked “if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international


206. DASR, supra note 78, ¶ 20 at 84; see also Gabcikovo, 1997 I.C.J. ¶¶ 51–52.

207. Id.

208. ¶ 21, at 84.

209. Id.

210. Id.
This poses a problem because the prohibition on the use of force is commonly referred to as a peremptory or *jus cogens* norm. However, it is important to note that there is no consensus among international jurists (or states) as to the scope of the prohibition. In fact, distinguished publicists have concluded that even accepting the undefined proposition that the non-use-of-force is *jus cogens*, even characterization as *jus cogens* does not prohibit international evolution of the norm’s contours. Thus, it is conceivable that exceptions to the non-use-of-force principle could evolve through custom.

Consequently, if any prohibition on the use of force has attained definable *jus cogens* status, it would be appropriately categorized as the prohibition on the “aggressive” use of force. And as HI is no longer considered aggression, it is not precluded by *jus cogens*. A contrary finding would mean that when acting through *Uniting for Peace*, the international community — through the General Assembly — violated this very peremptory norm. Going further, HI is aimed at halting atrocity crimes, including genocide and crimes against humanity. These are also considered peremptory norms of international law, thus pitting two peremptory norms against each other. If a state is violating its *erga omnes* obligations by committing atrocity crimes, that state would logically be precluded (by the unclean hands doctrine, for example) from claiming that a state cannot use force against it to halt these atrocities.

In any case, despite the DASR’s avoidance of the doctrine’s applicability to HI, because the doctrine of necessity is also a customary norm, its permissible uses as a norm of procedure can also evolve just as substantive customary norms. Put another way, if there is widespread belief on the part of states that HI is warranted by “necessity” in certain circumstances, the doctrine can evolve to cover this area of international law as well, notwithstanding its association with the use of force. Consequently, whereas there is sufficient evidence to find HI lawful (as demonstrated above), there is even greater evidence showing that HI is accepted as legitimate and “necessary” in certain extreme circumstances. In fact, HI is accepted to such a degree that states are willing to accept humanitarian

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212. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 29 (2d ed. 2004).
intervention without condemnation.\textsuperscript{216} Therefore, it can reasonably be argued that in such circumstances the legal wrongfulness of HI should also be precluded, even if a court were to find that no "right" to independent HI exists.

A close examination of an extreme situation demonstrates why such an argument is desirable. In some situations, the only thing standing between preventing genocide and standing idly by while a Rwanda-type situation unfolds is the unwillingness of a P5 member to give its vote. Following the absolutist argument, then, it is conceivable that there could be a circumstance in which 191 members of the UN were in favor of intervention, but because China, for example, vetoed action, it would be automatically illegal. And upon this finding of illegality, the intervening states, even if made up of these 191 nations, could be held liable before the ICJ. This result is obviously absurd and would be contrary to the very idea of state-developed international law. Admittedly, such a clear-cut circumstance will never come to fruition. However, what occurred in the above interventions is not far off—Security Council action was blocked by virtue of the veto, or threat of the veto, and with substantial international support, states acted to uphold the responsibility that the SC failed to uphold. Necessarily then, there is a gray area that allows for the use of this justification, even if only on a case-by-case basis.

Thus, the true problem is discerning whether a particular intervention is legal or justified under the circumstances, not whether all interventions are per se lawful or unlawful.

\textbf{WHEN IS INDEPENDENT HUMANITARIAN INTERVENTION EXCUSABLE?}

In sum, there are essentially two arguments available to states that muster the political will to intervene for humanitarian purposes: a customary "right" to humanitarian intervention or the "necessity" to put a stop to atrocity crimes, which precludes the wrongfulness of the act. But are they really different? The distinction is somewhat trivial on a practical level. Clearly, the two methods vary legally: one accepts as lawful a certain action (an exception); and the other merely precludes the wrongfulness of an otherwise illegal action (a justification). However, with regard to their application to independent HI, they are essentially the same: (1) the outcome is the same (i.e., a state will or will not be held legally liable under the doctrine of state responsibility); (2) the process is the same (i.e., allowable use has emerged through custom,); and, more importantly, (3) the method of reaching the

\textsuperscript{216} See supra Section 4; see also, e.g., OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 126 (1991); Louis Henkin, Kosovo and the Law of "Humanitarian Intervention," 93 AM. J. INT'L L. 824, 826 (1999); Franck, supra note 3, at 858-59; Byers & Chesterman, supra note 2, at 177.
outcome is also the same (i.e., the same universally-accepted elements for a true humanitarian intervention must be fulfilled, as discussed below).

Despite considerable controversy over whether humanitarian intervention is ever acceptable, there has been near universal agreement on the necessary elements for legitimate intervention if it were to take place.\textsuperscript{217} They can be summed up in six categories. First, the purpose must be to prevent mass atrocities, including genocide, ethnic cleansing, crimes against humanity, and rampant war crimes, which the local government is either committing or unable to stop. Second, the SC must be unable to uphold its responsibility to maintain peace and security because of the use or threat of the veto by one of its permanent members. Third, intervention must be necessary (i.e., all reasonable peaceful means have been exhausted). Fourth, the action must be proportionate (the use of force must truly be for humanitarian purposes and limited in extent and scope stopping those atrocities). Fifth, the HI must not be opposed by a majority of states. Finally, the intervention must not pose a greater threat to international peace and security than the atrocities that it is meant to stop. There is little, if any, controversy over these elements.\textsuperscript{218}

The real issue is with timing. Whether it is appropriate to find an intervention legal or justified requires a case-by-case determination.\textsuperscript{219} In particular, special attention must be given to whether intervention would cause (or has caused) greater tensions throughout the world, thereby threatening international peace and security. Remember, the underlying rationale for humanitarian intervention in the first place is the protection of human life. If intervention threatens even greater loss of life by creating a world war, for example, it would obviously not be desirable, lawful, or justified. Likewise, if an intervention is not proportionate and causes greater destruction than it was alleged to prevent, it will also not be justified. Additionally, the action must be both necessary and widely supported by the international community.

All of these elements must be sufficiently fulfilled to fall under either the exception of HI or the doctrine of necessity. However, it is not possible to fully assess these elements prior to intervention. Thus, in most cases it will be a necessary evil to fully judge the justifiability of humanitarian intervention only after the fact. This invariably poses a problematic risk for states considering independent humanitarian

\textsuperscript{217} R2P, supra note 5, at 32-37.

\textsuperscript{218} See, e.g., Statement by the Rep. of the U.K., U.N. SCOR, 54th Sess., 3988th mtg. at 11-12, U.N. Doc. S/PV.3988 (Mar. 24, 1999); R2P, supra note 5, at 32-37; Cassese, supra note 28, at 27. This consensus has emerged through the valuable work of several independent commissions acting at the bequest of the General Assembly and other regional organizations. See, e.g., R2P, supra note 5.

\textsuperscript{219} E.g., World Summit, supra note 5, ¶ 139.
intervention, but such is the reality of one of the most difficult doctrines in international law. Nonetheless, difficulty does not proscribe legality. And when discussing legal liability, determining whether a state acted consistently with its international obligations is always an after-the-fact analysis anyway. The question analyzed herein is not whether states should intervene, but whether the ICJ could conceivably excuse a state if one day it did act to put an end to atrocity crimes. The answer is yes.

LOOKING FORWARD

If a state is brought before the ICJ and alleges HI as a defense, how the court rules is of no small consequence. In fact, the rationale relied upon could very well put the entire international community in the position of having to choose between (1) taking action and testing the scope of the non-use-of-force principle or (2) remaining inactive and risking violation of its responsibility to protect targeted civilian populations. The reason for this stems from prior ICJ jurisprudence.

In the 2007 *Genocide* opinion, the ICJ recognized that all states have a legal obligation to take action to prevent genocide.220 This obligation arises from Article 1 of the Genocide Convention221 — a norm also widely recognized as custom.222 In short, the Court held that the obligation of states to prevent genocide is both “normative and compelling,” extending beyond the responsibilities of the competent UN organs:

> Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs. 223

Accordingly, states are instructed that they have an obligation to employ “all means reasonably available to them, so as to prevent genocide so far as possible.”224 When a state does not take “all measures . . . within its power,” then it incurs legal responsibility.225 The Court addresses several considerations when determining whether a state should be responsible for failure to prevent genocide — namely capacity to influence the situation, political links to those responsible

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221. See id. ¶ 426.
224. Id. ¶ 430.
225. Id.
for genocide, and geographical proximity to the events. However, the Court also explicitly notes that the required action must be "within the limits permitted by international law." 226

This brings this discussion to the crux of the matter. In Genocide, the Court did not address whether outside states could (or should) use force to protect civilian populations. Indeed, in that case it would have been improper for the Court to do so. But if the Court were to someday rule that there is a "right" to humanitarian intervention, this pronouncement could instantly transform the R2P from an aspirational doctrine to one potentially requiring forceful actions (at least in regards to preventing genocide). In other words, because the prohibition on the use of force is the only norm preventing states from taking forceful action in the face of genocide, once a right to use force for HI is recognized, nothing proscribes states from using forceful measures. And if there is no legal proscription on the action, states could conceivably be held responsible for not taking "all measures within their power" to prevent genocide (and possibly other atrocity crimes), 227 including force.

Creating such a legal requirement would admittedly be extremely confounding. Evaluating issues such as whether using force was actually within a state's capacity, 228 whether all states could be simultaneously held liable for the same failure, and whether states with greater military capacity or in closer proximity are more liable for the failure would be exceedingly arduous. Nevertheless, avoiding this legal predicament is something the ICJ will have to consider when in fact it is called upon to answer the controversial question of whether independent HI is ever acceptable in modern international law. In this vein, because the international community has demonstrated acceptance of independent HI in rare circumstances, perhaps relying on the necessity doctrine would be the Court's more prescient option.

226. Id.
227. While the ICJ decision clearly only refers to and applies to genocide as such, the movement in the international community is towards equating atrocity crimes such as ethnic cleansing and other crimes against humanity with genocide — with all necessitating the same responsibility to protect. Therefore, depending on the change in custom with regard to these norms, the responsibility to prevent could also conceivably be applicable to these crimes as well.
228. It should be noted, however, that ability to succeed is not an allowable excuse — at least under the current rationale of the Genocide opinion. The Court held: "As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them." Genocide, 2007 I.C.J. ¶ 438.
CONCLUSION

In conclusion, the evolution of humanitarian intervention provides states with two viable defenses if brought before the International Court of Justice: (1) the right to humanitarian intervention and (2) the doctrine of necessity. Because of the marked incongruities in states' responses to HI, discerning the outcome of this evolution is not easy. Nevertheless, by giving due weight to the contemporaneous statements and actions (or inactions) of states at the time interventions have taken place, rather than being misled by subsequent diplomatic statements aimed at discouraging abuse of the independent HI doctrine, it is possible to recognize an opinio juris of states that HI is lawful (or at least legally justified) when truly taken for humanitarian reasons, when conducted proportionately to that purpose, and when international peace is not put in greater peril because of the intervention.

The tension between sovereignty, permissible uses of force, and the prevention of atrocity crimes is unavoidable. Even so, this evolution towards independent humanitarian intervention was somewhat inevitable considering the world's foremost priority of protecting human life. In fact, the evolution was prophesized at the time of the Charter's inception by the likes of former ICJ judge Philip C. Jessup. Judge Jessup concluded that if the SC were unable "to act with the speed requisite to preserve life," individual states would be justified to act in lieu of the ineffective "collective measures under the [SC]."229 Indeed, prior to the inception of the UN Charter, the international community openly accepted independent HI.230 However, upon establishment of the Charter, states resolved to refrain from the use of force,231 and to take collective action — through the UN — to maintain international peace and security.232 Notably, states never rejected the idea of HI per se. Instead, they agreed to the terms of the Charter, believing that the SC would guide the collective actions of Member States and act "on their behalf."233 When this ideal failed to materialize, independent HI reemerged.

Whether states take the next logical step and realize the connection between this "right" and their "responsibility" to protect beleaguered populations from atrocity crimes is yet to be seen. As it has always been, the biggest obstacle to the prevention of mass atrocities is the not the existence of non-permissive legal doctrines — it is the lack of political will.

229. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 170 (1948).
232. Id. art. 42.
233. Id. art. 24, para. 1.
R2P=MDGs
IMPLEMENTING THE RESPONSIBILITY TO PROTECT THROUGH THE MILLENNIUM DEVELOPMENT GOALS

JENNIFER MOORE*

INTRODUCTION

In 1945 the United Nations was founded on the audacious notion that the use of military force – "the scourge of war" – should be contained at all cost.1 Then in 1948 the UN General Assembly recognized the interconnected web of civil-political rights and socio-economic rights by adopting the Universal Declaration of Human Rights, inspiring the world community to protect the full spectrum of rights as the surest path to durable peace and human security.2 Yet in the twenty-first century states continue to pursue geopolitical interests through military interventions, in violation of the UN Charter, and armed forces continue to target civilians, in violation of humanitarian law. Moreover, despite the post-Holocaust pledge "never again," crimes against humanity have continued to proliferate around the globe, from Cambodia and Argentina in the 1970's, to Bosnia and Sierra Leone in the 1990's, to Darfur and Sri Lanka in recent years.3 Finally, states and international institutions prioritize civil liberties at the expense of social rights, despite overwhelming evidence that pervasive under-development and entrenched socio-economic inequality lead inexorably to armed conflict.

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3. E.g., Kelly Dawn Askin, "Never Again" Promise Broken Again. Again. And Again, 27 CARDOZO L. REV. 1723, 1723-29 (2006); see also Daisy Sindelar, Post-Holocaust World Promised 'Never Again' – But Genocide Persists, Radio Free Europe Radio Liberty (Jan. 26, 2005), http://www.rferl.org/content/article/1057096.html; see also JENNIFER MOORE, HUMANITARIAN LAW IN ACTION WITHIN AFRICA 1-2 (Oxford University Press 2012) (referencing genocides in Bosnia, Croatia, Rwanda and Darfur in recent years, as well as humanitarian emergencies in Afghanistan, Burundi, Colombia, the Democratic Republic of the Congo, Kosovo, Liberia, Sierra Leone, Somalia, Sudan, Sri Lanka, and Uganda over the past two decades).
This essay is a peaceful call to arms based on the understanding that an essential way to fight the most egregious and widespread human rights abuses is through a broad-spectrum approach to human security grounded in the Millennium Development Goals and a new, non-military, understanding of humanitarian intervention. The responsibility to protect, often cited as a justification for military force to stop genocide, crimes against humanity, and other widespread human rights abuses, is better seen as a commitment by all nations to strengthen their own social welfare and human rights systems, and for those nations with more resources to assist those with less to do the same.

Section A below reviews the United Nations’ early emphasis on constraining the use of military force and promoting human rights in both civil-political and socio-economic terms. Section B contrasts the prevailing contemporary responses of the international community to varying types of human rights abuses. Section C focuses on two important twenty-first century developments in international law: the responsibility to protect (R2P) and the Millennium Development Goals (MDGs). I conclude by arguing that a socio-economic vision of humanitarian intervention provides the international community with a vital opportunity to return to first principles regarding the meaning of human dignity and security.

A. THE UNITED NATIONS IN INFANCY: PREVENTING WAR AND PROTECTING HUMAN RIGHTS

The Vision of the UN Charter

The Members of the United Nations, in the Preamble to its Charter, pledge themselves “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person . . .”4 The prevention of war and the protection of human rights are fundamental to the form and function of the United Nations, reflected in the mandate of two of its primary organs: the Security Council, in its charge to maintain peace and security; and the Economic and Social Council, in its call to enhance human security and promote human rights.5

In the realm of war and peace, Article 2(4) of the U.N. Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .”6 Qualifying this general

5. See id. arts. 39, 62.
6. Id. art. 2, para. 4.
prohibition, Chapter VII of the Charter empowers the Security Council to order or permit the use of military force where necessary "to maintain or restore international peace and security," and Article 51 recognizes the right to "individual or collective self-defense."7 Thus, despite the Preamble's recognition of the "scourge of war," the Charter seems to express a qualified acceptance of the use of force.

In addition to the language of the Charter, a customary norm of humanitarian intervention has been cited from time to time to justify military intervention in the name of ending widespread human rights abuses, as in the late 1970's when Tanzanian troops defeated Idi Amin in Uganda and Vietnamese forces removed Cambodia's Khmer Rouge government. Humanitarian intervention was one proffered rationale for the U.S. military intervention in Iraq in 2003.8 Thus, alongside the difficulty of legally reconciling a treaty-based general prohibition against the use of force with a customary basis for exceptional circumstances in which force is justified, the norm of humanitarian intervention may be prone to a certain self-serving application by states.9

Despite the potential for manipulation of the norm, humanitarian intervention remains a compelling concept, particularly in the face of crimes against humanity. The United Nations' recent articulation of the responsibility to protect, discussed below, is a contemporary interpretation of this long-standing tradition. Yet R2P is short-changed when conceived as a mere mandate to use force. Its deeper potential lies in obviating the need for military intervention through the provision of development assistance that enhances socio-economic conditions of life throughout the developing world.

The Universal Declaration of Human Rights

In affirming human dignity, the Universal Declaration of Human Rights (UDHR)10 remains the mother lode of modern human rights instruments. The significance of the UDHR is unquestioned, whether it is considered to be customary international law, an amplification of the

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7. Id. arts. 39, 51.
9. See JENNIFER MOORE, HUMANITARIAN LAW IN ACTION WITHIN AFRICA 52 ("The potential corruption of the responsibility to protect in the cynical service of national self-interest is dramatically illustrated by the US rationalization for launching the Iraq war in 2003 and Russia's characterization of its invasion of South Ossetia in 2008.").
10. See generally Universal Declaration of Human Rights, supra note 2.
human rights provisions in the Charter, or the blueprint for a new wave of international human rights treaties. Chief among its progeny are the two International Covenants, adopted in 1966; and three regional human rights treaties, covering Europe, the Americas and Africa, respectively. The human rights enumerated in the UDHR encompass basic physical and psychic integrity, as in the rights to life, humane treatment, equality, and due process; liberty rights, including political participation and freedom of expression; and welfare rights, spanning education, health care, and a decent standard of living.\(^\text{11}\) A core principle of the Universal Declaration is the interdependence and inseparability of so-called socio-economic and civil-political rights. The UDHR Preamble proclaims "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want . . . as the highest aspiration of the common people."\(^\text{12}\) Despite this integrated vision of human rights, when the international community sat down to draft treaty language in 1966, it carved out two separate spheres in the form of two international covenants, one dealing with economic, social and cultural rights, the other with civil and political rights.

B. PUTTING HUMAN RIGHTS LAW TO THE TEST: REMEDIES FOR CIVIL-POLITICAL VIOLATIONS AND SOCIO-ECONOMIC DEPRIVATIONS

Human rights are too often honored in the breach. All too often, students of human rights law explore their subject matter through narratives of human rights violations in countries around the world. What they quickly learn is that the mechanisms for enforcing the norms, through prevention and remedial measures, are limited in scope and impact. Judicial and quasi-judicial bodies are mandated to identify violations, call for reforms, and sometimes impose tort-like reparations, but such action is not uniformly taken. A common distinction is drawn between instances of political repression and experiences of social misery. States are more frequently found liable for denials of civil liberties than they are called to account for deprivations of social welfare.

A welfare-centered vision of humanitarian intervention would help correct the disequilibrium in the implementation of civil-political and socio-economic human rights. Our first task is to trace the historical roots of this double standard, originating in the decision to draft two separate international covenants in the decades following the adoption of the Universal Declaration of Human Rights in 1949.

\(^{11}\) Id. ¶¶ 1-3, 5-7, 11, 18-19, 21-26.
\(^{12}\) Id. Preamble.
Repression of Civil Liberties

A variety of human rights treaties have empowered judicial or quasi-judicial bodies to hear allegations of violations of civil and political rights. The first to do so was the 1966 International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{13} which entered into force in 1976. The ICCPR codified a number of peremptory norms of international law, namely the prohibitions against torture, slavery, and extra-judicial execution. In addition, the treaty spans a broad spectrum of civil and political liberties, including due process and fair trial rights, freedom of movement, privacy, freedom of conscience and religion, free expression, freedom of assembly, the right to participate in government, and the equal protection of the law. These norms are also set forth in the Universal Declaration of Human Rights. The Civil and Political Covenant further recognizes the right of all peoples to self-determination, and devotes a separate article to the equal rights of men and women.\textsuperscript{14}

Article 2 of the ICCPR obligates each state party “to respect and to ensure to all individuals . . . the rights recognized . . . without distinction of any kind.” The “respect and ensure” language in the Civil and Political Covenant implies a relatively high degree of state obligation encompassing the state’s duty to refrain from violations by its own agents and its responsibility to prevent and punish violations by non-state actors. The ICCPR also created a Human Rights Committee (HRC) with limited powers to interpret treaty provisions. States may sue each other in the HRC, alleging violations of enumerated rights. Furthermore, for states that have ratified a Protocol to the ICCPR, individuals may bring claims against their signatory governments for violations of their rights under the treaty. The HRC communicates its conclusion to the individual and the state as to whether specific provisions of the covenant have been violated.\textsuperscript{15}

Other treaties that concentrate on civil and political rights are the African [Banjul] Convention on Human and People’s Rights, the American Convention on Human Rights, and the [European] Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{16} These treaties have created courts and/or commissions of


\textsuperscript{14.} Id. arts. 1, 3.


human rights with jurisdiction to respond to petitions brought by individuals against their governments, as well as inter-state complaints. These judicial bodies have the capacity to determine if the responsible state party has breached a particular human rights norm and to require that the state make reparations for the harm it perpetrated, or which occurred under its watch. They may also call on the state to reform its legal system to prevent such violations from replicating themselves in the future.\textsuperscript{17}

\textbf{Deprivations of Social Welfare}

In contrast to the consequences when there are violations of civil and political rights, the available remedies for breaches of economic and social rights are more limited. Yet despite the more qualified treaty language regarding state obligations to guarantee socio-economic rights, compelling legal, moral, and pragmatic arguments support state responsibility to promote social welfare by guaranteeing decent living conditions for all.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)\textsuperscript{18} was adopted in 1966 alongside the ICCPR, and, like its companion treaty, entered into force in 1976. The ICESCR recognizes a broad spectrum of socio-economic rights, including freedom of choice in employment, fair wages, safe working conditions, collective bargaining, social security, an adequate standard of living, health care, and education. These rights are articulated in similar form in the Universal Declaration of Human Rights. In addition, the Economic and Social Covenant contains two articles that virtually mirror two provisions of the Civil and Political Covenant: those devoted to the right of all peoples to self-determination, and the equal rights of men and women.\textsuperscript{19}

In contrast to the ICCPR, Article 2 of the Economic and Social Covenant requires state parties "to take steps, individually and through international assistance and co-operation, especially economic and

\textsuperscript{Fundamental Freedoms, adopted Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).}

\textsuperscript{17.} Despite their emphasis on civil-political rights, two of the three regional treaties also cover socio-economic rights to a limited extent. The Banjul Charter has three provisions relating to the rights to work, health, and education, respectively. Banjul Charter, supra note 16, arts. 15-17. The American Convention includes one provision by which parties "undertake to adopt measures . . . with a view to achieving progressively . . . the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States . . . ." American Convention, supra note 16, art. 26.


\textsuperscript{19.} Id. arts. 1, 3.
technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized . . . [which shall] be exercised without discrimination of any kind. . . .”\textsuperscript{20} In effect, the ICESCR made the enjoyment of economic and social rights dependent on state priorities in the allocation of resources or on the largesse of the international community.

The Economic and Social Covenant did not create a quasi-judicial body with powers commensurate with those of the Human Rights Committee created under the Civil and Political Covenant. Nevertheless, despite important limitations on its mandate, the ICESCR did constitute a Committee on Economic, Social and Cultural Rights with certain important responsibilities. State parties must report to the Economic and Social Committee on their progress in promoting the rights to education, health care, social security, and so forth. The committee can also issue “general comments” broadly interpreting certain provisions of the treaty, as it has on a spectrum of socio-economic rights, including housing, food, education, health, and water.\textsuperscript{21} However, unlike the Human Rights Committee, the Economic and Social Committee is not mandated to hear inter-state or individual petitions. It also lacks the power to issue injunctive or remedial relief when a state is found to have violated treaty provisions, including the rights to food, affordable health care, free public education, or a decent standard of living.

Socio-economic human rights violations are as worthy of mandatory reparations and individual accountability mechanisms as are abuses of civil and political rights. Socio-economic deprivations are widespread, and the statistics are especially dramatic when we look at the globe through a comparative lens. If we consider the countries of the industrialized world in the aggregate, gross national income (GNI) per capita averages at nearly $40,000 per year.\textsuperscript{22} Yet across the sixty least developed countries (LDCs) of the United Nations, in contrast, GNI per capita averages at less than $1,400 per year. Across the industrialized countries, life expectancy on average is eighty years, but for the LDCs overall, life expectancy is less than sixty years. In the richest countries of the world, average time in school is eleven years, whereas in the poorest countries it is under four years.\textsuperscript{23}

\textsuperscript{20} Id. art. 2.


If the indices of underdevelopment, economic inequality, human insecurity, and material deprivation are not enough to compel the world community to prioritize socio-economic rights, then perhaps the correlation between war and poverty will. There are significantly more wars, particularly civil wars, in poorer countries than there are in richer countries. Specifically, for the decade between 1997 and 2006, the probability of armed conflict in the world’s most developed countries was less than two percent. For the same period, the probability of armed conflict for the least developed countries was nearly 40 percent. Data linking underdevelopment to armed conflict and other humanitarian emergencies suggest there is a compelling argument for human rights-based interventions that are constructive rather than coercive in nature, entailing investments in social infrastructure rather than military firepower.

C. THE UNITED NATIONS AT THE MILLENNIUM: R2P AND THE MDGs

The responsibility to protect is an emergent principle of state accountability for massive human rights violations, developed as an antidote to international paralysis in the face of recurring and enduring humanitarian tragedies from Bosnia to Rwanda and Darfur. Arguably more ambitious than humanitarian intervention, which purports to justify a state’s military action to stop abuses in another state, R2P implies the state's obligation to end such abuses.

“The Responsibility to Protect” was the title of a paper published in December 2001 by the International Commission on Intervention and State Sovereignty, established by the Government of Canada, exploring a principled basis for “intervention on human protection grounds.” The Commission’s recommendations were cited by then-U.N. Secretary General Kofi Annan in his 2005 report to the UN General Assembly entitled “In Larger Freedom.” R2P was endorsed by 150 members of the General Assembly during the 2005 session. As a source of international law, the concept is still in the throes of progressive
development. Annan recommended that the Security Council adopt a resolution formalizing R2P, but such action has not yet been taken.

In 2009, during the term of Annan’s successor Secretary-General Ban Ki-moon, the General Assembly reevaluated the responsibility to protect, inviting the testimony of Edward Luck, Ban’s special advisor on R2P. Luck recommended a three-stage approach: first, calling upon the state of origin to fulfill its primary responsibility to protect the people residing on its territory from massive human rights abuses; second, encouraging the home state to call on other states for help in the event it is unable to stop violations on its own; and third, if necessary, requiring the international community to intervene to provide lifesaving assistance, with military action a last resort.27

During the debate regarding implementation of R2P, several state representatives and experts challenged the wisdom of the principle, most notably and eloquently the Assembly President himself, Rev. Miguel D’Escoto Brockmann of Nicaragua. D’Escoto cautioned that R2P was ripe for abuse by powerful countries, and suggested that “R2I” – the right to intervene – was a more candid term of art.28

The potential for corruption of the responsibility to protect in the cynical service of national self-interest is dramatically illustrated by the U.S. rationalization for launching the Iraq war in 2003, and Russia’s characterization of its invasion of South Ossetia in 2008. But the prevailing critique of R2P may obscure two competing and compelling realities. First, the more long-standing norm of humanitarian intervention already tolerates military intervention by another state in extreme human rights emergencies, so the risk of a superpower overreaching is not a new one. Second, the most challenging aspect of R2P is not that it permits military intervention, but that it may require states to provide assistance to states facing humanitarian crises, including food, shelter, sanitation, and medical care.29

Envisioning R2P primarily in terms of military engagement is shortsighted. The untapped potential of the responsibility to protect is in challenging the developed states to assume a larger responsibility for redistributing their own considerable economic resources in promoting and protecting socio-economic rights in the developing world. The Millennium Development Goals (MDGs) provide a framework for assessing development priorities and material conditions of life for

28. Id.
people in the global South and for channeling the resources of the global North to respond to those needs.\textsuperscript{30}

The Millennium Development Goals

In 2000, the UN General Assembly convened to grapple with the stark realities of human insecurity throughout the globe, in the form of widespread poverty, failures in primary health care, illiteracy, environmental degradation, and the widening development gap between rich and poor countries. With a sense of urgency, the General Assembly sought to establish specific quantitative benchmarks for improved material conditions of life, particularly for people residing in the developing world. The fruit of these discussions was the adoption of the United Nations Millennium Declaration, which set forth specific goals for the international community to meet by 2015. The eight Millennium Development Goals (MDGs) comprise: (1) reducing extreme poverty and hunger by one half; (2) achieving universal primary education; (3) promoting gender equality; (4) cutting child mortality by two thirds; (5) lowering maternal mortality by three quarters; (6) fighting HIV/AIDS; (7) strengthening environmental sustainability; and, (8) building a global partnership for development.\textsuperscript{31}

The Millennium Development Goals are just that: they constitute soft law. Nevertheless, the Millennium Declaration is a springboard for the progressive development of stronger protections for socio-economic human rights. It establishes an aspirational framework from which to interpret obligations under treaty or customary law. Limited progress toward realizing the Millennium Development Goals suggests the need for better enforcement of socio-economic rights, as well as a vision of humanitarian intervention that focuses on enhancing material and community well-being rather than the application of military force.

PROGRESS TOWARD THE MDGs

\textit{Halving Poverty and Hunger}

According to the United Nations’ yearly progress report on the Millennium Development Goals, the international community is on track to meet the goal of halving the number of people living on less than $1.25 a day, the marker of extreme poverty. The global poverty rate, at 46 percent in 1990, was down to 27 percent in 2005, and is projected to be at or below 15 percent by 2015.\textsuperscript{32} In Sub-Saharan

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\item[\textsuperscript{31}] Id. ¶¶ 19-21.
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\end{footnotesize}
Africa, the poverty rate has also decreased, although less markedly than the global rate, from 58 percent in 1990, to 51 percent in 2005, and is projected to hit 36 percent by 2015.33 Not only does Africa lag behind global trends, but also the gap between the regional and global poverty rates is widening. Relatively speaking, if projections are accurate, the Sub-Saharan African poverty rate in 2015 will be over 200 percent of the overall world poverty rate, whereas in 1990 it was only around 25 percent higher than the global rate.34

Unlike the global poverty rate, which is steadily decreasing, there has been a notable lag in progress toward reducing the incidence of hunger worldwide. In 1990, around 20 percent of world's population had difficulty meeting their daily nutritional needs. While that percentage had decreased to 16 percent in 2000, it was still at 16 percent in 2007, and based on UN projections it will not meet the target level of 10 percent by 2015.35 The lack of a strong correlation between improvements in the poverty rate and decreases in the hunger rate suggests a “disconnect” between marginal increases in income and improved access to food.36 Food availability and affordability are likely to further deteriorate given our current global financial crisis, which is characterized by increasing volatility in the price of staple foodstuffs. Moreover, food insecurity is regarded as the most important catalyst for civil strife, more significant even than increasing levels of poverty.37 Thus, enhancing food security, alongside income generation, is essential to development assistance and should be at the heart of articulating a socio-economic vision of humanitarian intervention.

Universal Primary Education

In the developing world as a whole, the percentage of children completing a full course of primary school increased from 82 percent to 89 percent over the past decade. Despite this progress, universal primary education is not expected to be attained by 2015, based on current projections. Nevertheless, the situation in Sub-Saharan Africa has improved more than any other region, going from 58 percent to 76 percent over the same period. Thus, in contrast to the poverty rate, in the field of primary education the gap between rich and poor countries is narrowing, at least from the perspective of Sub-Saharan Africa.38

33. Id.
34. Id.
35. Id. at 11.
36. Id.
37. See Per Pinstrup-Andersen & Satoru Shimokawa, Do Poverty and Poor Health and Nutrition Increase the Risk of Armed Conflict Onset?, 33 FOOD POL’Y 513, 519-20 (2008) (concluding that government policies that improve access to food and health care enhance stability).
For education to have its full impact on enhancing the quality of life, the pipeline must continue beyond the primary level. Access to secondary and post-secondary education, particularly for women, enhances other socio-economic rights and furthers other MDGs, as we shall see below.

**Promoting Gender Equality**

The United Nations measures progress toward gender equality chiefly in terms of gender parity in education, primary through tertiary; access to income-generating activities; and representation in national legislatures. Focusing on work, while women's involvement in non-agricultural employment is increasing, it is not targeted to reach 50 percent by 2015. In 1990, women filled 35 percent of all non-farm-related jobs, to men's 65 percent, and by 2009 they were up to 40 percent, and by 2015, women are expected to constitute 41 percent of all non-farm wage-earners. The situation for women in Africa lags behind global trends but is still improving steadily and at an even higher rate: in 1990 women were 24 percent of the non-agricultural workforce, in 2009 they were up to 33 percent and in 2015, the figure is projected to be 36 percent. More progress in women's equal access to employment will be enhanced by advancements in women's level of education, which in turn will serve the socio-economic conditions of life for other members of their families and communities.

**Reducing Child Mortality**

The United Nations uses the term "child mortality" to refer to the death of a child before reaching five years of age. The fourth Millennium Development Goal is to cut the incidence of child mortality by two-thirds over a 25-year period. Worldwide deaths of children under five have already declined by one-third over the past two decades, from 12.4 million per year in 1990 to 8.1 million in 2009. It is feasible that child mortality will decrease by the same amount by 2015. However, the child mortality rate in Sub-Saharan Africa is twice the mean for the developing world overall, and the gap between Africa and the other regions in terms of infant mortality appears to be widening. In concrete terms, one in eight African children dies before her fifth birthday, whereas worldwide one in 16 children die before age five.

Indicators of progress in the struggle to help children survive their first five years reveal the proverbial glass as half empty and half full. For example, in four African countries, the national child mortality rate

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39. Id. at 21.
40. Id. at 21-22, 26.
41. Id. at 24.
42. Id. at 25.
has already decreased by 50 percent over the past twenty years. However, it is essential that child mortality rates not be viewed in a vacuum. The improved quality of children's lives requires the overall enhancement of socio-economic conditions in their families and communities. Illustrating the interconnected web of human rights protections, children whose mothers are educated have greater chances of survival into healthy adulthood, and their future prospects improve as their mothers attain higher levels of education.

**Lowering Maternal Mortality**

The specific millennium development target for women in their childbearing years is to reduce maternal mortality by three-quarters. Worldwide, deaths of women during and immediately after childbirth have been reduced by around 35 percent over the past two decades, still a far cry from the 75 percent goal. Once again, there are regional disparities. Nearly nine out of ten women who die in childbirth reside in Sub-Saharan Africa or South Asia. Moreover, for most women who do not survive childbirth, the immediate cause of death is avoidable, as in cases of hemorrhage, sepsis, or malaria.

In yet another illustration of the inter-connections between health and other attributes of social status, women who die in childbirth are more likely to have had less schooling, to have given birth to more children, and to have experienced more gender-based discrimination than women who survive childbirth. The data on women's reproductive health reinforces the broader lesson that enhancing women's equality and full participation in community life should be at the heart of development policy, and a central aspect of welfare-based humanitarian intervention.

**Combating HIV/AIDS and Other Preventable Diseases**

The United Nations defines the HIV incidence rate as the number of people out of 100 who are newly infected with HIV during a given year. The global number of new cases peaked in 1997, and between 2001 and 2009 dropped by 25 percent, from 0.08 to 0.06, meaning that in 2009, six people out of ten thousand were newly infected with HIV, as compared to eight a decade before. In Africa, the HIV incidence rate in 2009 was 0.4, which is over six times the global rate of new infections. Nevertheless, Africa's AIDS incidence rate has been shrinking even faster than the global rate, down from 0.57 in 2001,
signifying a 30 percent decrease in new HIV cases over the past decade.\(^{48}\)

Along with battling HIV/AIDS, the sixth MDG also targets improved prevention and treatment of other serious diseases such as tuberculosis and malaria. With regard to malaria, the increased numbers of children who now sleep under treated bed nets are evidence of advances in prevention. Properly used bed nets dramatically reduce malaria transmission by preventing the mosquito carriers from alighting on the skin of children during the evening hours when the mosquitoes sting. In Sierra Leone, for example, just two percent of children were sleeping under mosquito-blocking nets in 2000, and by 2010 the percentage of protected children had increased to 26 percent. The figures for other African countries are even more dramatic: in Tanzania, two percent of children protected in 2000 had increased by 2010 to 64 percent of children who were sleeping under bed nets.\(^{49}\)

**Strengthening Environmental Sustainability**

The MDG relating to the environment is to reverse the loss of environmental resources, particularly forests and water, and to cut emissions in greenhouse gases. With respect to woodlands, deforestation in some regions, particularly in Africa and South America, is partially offset by afforestation, or the natural expansion of forests, particularly in Asia and Europe. Nevertheless, the net impact has been the average yearly loss of 5.2 million hectares of forest throughout the past decade. Only the rate of deforestation is decreasing, down from a yearly average of 8.3 million hectares of lost forest over the decade from 1990 to 2000.\(^{50}\)

Regarding greenhouse gases, global carbon dioxide emissions continue to rise, from 21.8 billion metric tons in 1990 to 30.1 billion metric tons of carbon emissions in 2008, a 38 percent increase. At least the rate of increased emissions has slowed, from a 2.9 percent increase from 2006 to 2007, down to a 1.7 percent increase from 2007 to 2008. However, at least part of this slowdown in increased emissions is related to the decreased economic activity associated with the current global financial crisis.\(^{51}\)

Sustainable water usage varies throughout the globe, from plentiful supplies to extreme depletion, in the case of North Africa and Western Asia. According to indicators used by the United Nations, if a country or region withdraws 25 percent or less of its renewable water resources at a given time, water resources are considered to be abundant.

\(^{48}\) Id. at 36-37.  
\(^{49}\) Id. at 43-44.  
\(^{50}\) Id. at 48-49.  
\(^{51}\) Id. at 49-50.
Contrastingly, if 60 percent or more water resources are withdrawn, a situation of scarcity is said to be approaching. Finally, if 75 percent or more water resources are exploited, sustainable limits have been exceeded. While most regions of the world still have plenty of surface water and groundwater for the time being, including South America, Sub-Saharan Africa and South-East Asia, two regions are approaching scarcity and two have exceeded sustainable bounds. Central Asia exploits 56 percent of its renewable water resources and Southern Asia utilizes 58 percent of its supply. Northern Africa is withdrawing 92 percent of its surface water and groundwater and Western Asia is utilizing a quantity of water that amounts to an astounding 166 percent of the available supply.52

Global statistics regarding the depletion of environmental resources are sobering, to say the least. We are moving backwards: the world’s population as a whole is engaging in increasingly unsustainable patterns of resource exploitation. Humanitarian intervention, often focused on immediate conditions of violence, repression, and social misery, should also take into account the long-term impact of the depletion of our shared global environment. Militaristic interventions may exacerbate resource wars, whereas a greener vision of humanitarian intervention can concentrate on alleviating the competition for scarce resources that fuels armed conflict in the first place.

**Galvanizing a Global Partnership for Development**

The eighth and final MDG, the global partnership for development, encompasses commitments by industrialized countries to provide economic assistance to developing countries in the form of emergency aid, longer-term development programs, and debt relief. In essence, the final MDG is the strategy for funding the MDGs overall. In 2010, net aid to developing countries by developed countries was nearly 130 billion dollars, which amounted to less than half of one percent of the combined national incomes of the wealthier countries, or 0.32 percent. Nevertheless, this was the highest yearly level of combined global development assistance on record.53

Despite the development assistance record set in 2010, the 130 billion dollars still represented a 19 billion dollar deficit according to pledges that had been made by eight of the world’s wealthiest countries in 2005 at a development aid summit held that year in Gleneagles, Scotland. Moreover, the aid gap had a harsher impact on certain regions of the developing world, especially Sub-Saharan Africa, which in 2010 received fourteen billion dollars less assistance than had been

52. *Id.* at 52.
53. *Id.* at 58.
promised in 2005. The recent shortfall in development assistance is attributed to various sources, including the global financial crisis, and the fact that a disproportionate amount of African assistance was pledged by European countries that are among those hardest hit by the economic recession.

The current MDG donation target challenges each industrialized country to give 0.7 percent of its national income to development assistance. While several Nordic states already exceed this benchmark and nations such as the United Kingdom and Belgium are close to meeting it, other wealthy countries lag behind. For example, in 2009 the United States gave only 0.2 percent of its national income in aid to developing countries, while devoting nearly 5 percent of its gross domestic product that same year to military spending. At the same time, the United States is the biggest donor in absolute terms as opposed to relative terms, giving nearly twenty-nine billion dollars in development assistance in 2009.

If developed countries respond to the MDG development assistance challenge, increasing the proportionate share of their combined national incomes from 0.32 percent to 0.7 percent, their generosity would double the yearly allocation of funds, from 130 billion to 260 billion dollars, devoted to poverty alleviation, women’s empowerment, child protection, health promotion, and environmental sustainability around the world. Ambitious as that increased sum may appear, 260 billion will not get us all the way to 2015 and the full implementation of the MDGs. To begin with, it is very close to the figure, 250 billion dollars, that the World Health Organization estimates will be necessary for successfully meeting MDGs in the health sector alone.

Full implementation of the Millennium Development Goals will require new and creative financing methods, beyond the scope of this essay. One example worthy of further analysis is the strategy of social financing, promoted by Nobel laureate Muhammad Yunus as a means of stretching the development dollar. Under this approach, anti-malaria bed nets are purchased through the sale of special bonds and new schools are constructed on commercial credit, with individual donor countries serving as guarantors. For Yunus, “[t]he concept of

54. Id. at 58-59.
55. Id. at 59; see also OECD, TABLE 1: NET OFFICIAL DEVELOPMENT ASSISTANCE IN 2009 (Apr. 14, 2010), http://www.oecd.org/dataoecd/17/9/44981892.pdf.
innovative financing is that successful financial instruments in the private sector are recast to suit development objectives . . . ."\textsuperscript{59}

CONCLUSION: WHY R2P REQUIRES DEVELOPMENT ASSISTANCE

The responsibility to protect is an ambitious project spearheaded by the United Nations. R2P also represents a vital opportunity for the world community to transform its understanding of humanitarian intervention. Rather than a new license to intervene militarily, R2P challenges and obligates nations to affirm and realize socio-economic rights in the developing world. Countries coming out of prolonged armed conflict urgently depend upon socio-economic development to avoid relapsing into violence and brutality. The Millennium Development Goals provide a framework for defining and prioritizing the most essential development needs, as well as a blueprint for investing and focusing development assistance in individual countries. Implementing a social welfare vision of R2P through the MDGs will require innovative fundraising strategies, including the transformation and channeling of private credit in the public interest.

Improving women's access to food, employment, education, and reproductive and other health services are at the heart of the Millennium Development Goals. Such efforts are also crucial in fighting poverty, protecting children, lessening economic inequality, and preventing social instability and armed conflict at the global level, and therefore should be central aspects of the responsibility to protect.\textsuperscript{60}

The Millennium Development Goals are essential benchmarks for countries at risk of war and repression as well as those struggling to emerge from armed conflict and humanitarian emergencies. When states embrace R2P through the MDGs, they commit to a human security partnership with countries in socio-economic distress in the pursuit of long-term conflict resolution. For human rights activists, this human welfare-centered vision of the responsibility to protect is an essential reminder that social justice and civil liberties are equal pillars of and partners in the global human rights movement.

\textsuperscript{59} Id.
\textsuperscript{60} THE MILLENNIUM DEVELOPMENT GOALS REPORT 2011, supra note 32, at 26.
REFLECTIONS ON "DEVELOPMENT," "DEVELOPING COUNTRIES" AND THE "PROGRESSIVE DEVELOPMENT" OF INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY LAW

EDWARD KWAKWA*

I. INTRODUCTION

The concept of development is moving to centre stage in substantive discussions on intellectual property (IP) and international trade (trade) matters. As part of this trend, developing countries have, in recent years, become much more active participants in ongoing discussions and negotiations in the areas of trade and IP. In particular, there is a growing understanding by countries of the potential of trade and IP as a tool for development, and thus, the implications of trade and IP rules on the socio-economic development of countries. Partly as a result of this trend, the concept of development has also become a much debated topic in ongoing trade and IP discussions and norm-making.¹

This article looks at the trend of increasing developing country participation and the concomitant increase in attention to the concept of development in trade and IP discussions. It concludes that this trend is also having an impact on the progressive development of international trade and IP law.

The article is presented in three parts. Part II briefly describes the terms "development" and "developing countries," and Part III discusses the extent to which the concept of development has permeated discussions and actual norm-making at the World Intellectual Property

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Organization (WIPO) and the World Trade Organization (WTO), while Part IV presents some final observations.

II. "DEVELOPMENT" AND "DEVELOPING COUNTRIES"

Webster's Dictionary defines development as "the act, process, or result of developing," or "the state of being developed." It is this broad sense in which the term is used in this article. The concept of development is receiving increased attention and recognition, and playing an enhanced role in international law. Discussion in this article will, however, be limited to its use and impact in the specific and limited context of discussions and activities at WIPO and WTO.

Development has been on the international relations agenda for decades. As Michael Cowen and Robert Shenton stated over a decade ago, development is one of "the central organizing concepts of our time."

There are several examples of international organizations (IOs) that have traditionally dealt with development. These include: the Food and Agricultural Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD), the International Monetary Fund (IMF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Industrial Development Organization (UNIDO), the World Bank (IBRD), and the World Health Organization (WHO). More recently, development is playing a much bigger role.

2. WIPO is a Geneva-based Specialized Agency of the United Nations (UN) whose mandate is to promote the creation, dissemination, use and protection of works of the human mind for the economic, cultural and social progress of humankind. For a comprehensive account of the history, mission, structure, and activities of WIPO see WORLD INTELL. PROP. ORG., WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 3-8 (2nd ed. 2004). The WTO is a permanent negotiating forum whose principal mandate is to trade liberalization within a rules-based system. The five main functions of the WTO are provided in Article III of the WTO's constituent instrument. See Marrakesh Agreement Establishing the World Trade Organization art. 3, Apr. 15, 1994, 1867 U.N.T.S. 154, available at http://www.wto.org/english/docs-e/legal_e/04-wto_e.htm.


In the United Nations, for example, the Millennium Development Goals (MDGs), which were adopted in 2000, have become the yardstick against which progress in any other area is measured, and several other UN system organizations closely monitor, and strive to help attain the MDGs.6

While development has had more of a history, and is easier to understand in the context of organizations such as the United Nations and the World Bank, it is a much newer phenomenon in the context of organizations such as WIPO and the WTO. Also noteworthy is the fact that development now permeates the activities of other IP institutions that do not have development within their objectives or mandates. A prime example of this is manifested in the statement of the President of the European Patent Organisation (EPO) on the rationale behind international cooperation in the international patent system. 7


7. The European Patent Office (EPO) is an IO that was established in 1977 to strengthen cooperation between the states of Europe in respect of the protection of inventions. A few years ago, however, in a landmark document that proposed the fundamental features of a new cooperation policy between the EPO and its member states, the President of the European Patent Office (one of the two main organs of the EPO) stated in clear terms that cooperation, “seen from a broad perspective, aims to improve the contribution of the patent system to the innovation capacity and economic
The concept of development has recently been at the forefront in intellectual property and trade discussions. In WIPO, for example, the Member States established what is referred to as the "Development Agenda" at their 2004 annual meetings. As part of this agenda, in 2007, the General Assembly of WIPO adopted 45 (out of over 100) recommendations aimed at integrating the development dimension in all WIPO's activities. It established a Committee on Development and Intellectual Property whose task, among others, was to work on development-related issues at WIPO. The Development Agenda provides the following, among other things: (1) WIPO technical assistance must be "development-oriented . . . taking into account the priorities and special needs of developing countries . . . as well as the different levels of development of Member States," (2) WIPO must "further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate," and (3) "WIPO's legislative assistance shall be, inter alia, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries.

The Development Agenda was streamlined through WIPO's revised Program and Budget for the 2008-2009 biennium, and has since been provided for in all subsequent Program and Budgets. Against this background, it is instructive to note that the concept of development itself does not appear anywhere in WIPO's mandate.
Development has had an equally prominent role in the WTO. As Asif Qureshi points out, the Doha Round negotiations under the auspices of the WTO “had been orchestrated as a ‘development round,’ and its agenda was intended to integrate development into the very ‘architecture’ of the international trading system.” By launching the Doha Development Agenda in 2001, the WTO Members “placed development issues and the interests of developing countries at the heart of the WTO’s work.” Indeed, paragraph 19 of the WTO’s Doha Ministerial Declaration mandates WTO’s TRIPS Council to “take fully into account the development dimension.”

The concept of development plays a key role in other aspects of WTO’s activities. The legal status or the binding nature of various concepts at the heart of development, such as principles of less-than-full reciprocity, and special and differential treatment, have been extensively debated.

As relates to the concept of “developing countries,” it is important to start with certain caveats. It should be pointed out at the outset that the concept of “developing countries” is not an exact or clearly defined one in international law, and is even less so in the multilateral trade or IP context. The term “developing countries” is used with reckless abandon in discussions in multilateral fora. Too often, the term is unaccompanied by any explanation of its precise scope or meaning. While any number of plausible definitions of the term “developing countries” is conceivable, in this article, the reference is to all countries except those that are referred to as countries in transition to a market economy, and those that are generally perceived to belong to the group of industrialized countries.


16. The term, for purposes of this article, therefore excludes all industrialized countries, as well as all the countries in transition to a market economy, most of which were part of the former Soviet bloc. The term however includes such economically advanced countries as Singapore, China, and the Republic of Korea.
The concept of “developing countries” also includes the so-called “least-developed” countries (LDCs).\(^{17}\) While this may be a somewhat arbitrary definition, I am unaware of the existence of a more scientific or precise definition. More importantly, the proposed definition serves adequately the import of this article.

The developing countries reflect a diverse range of interests and sometimes differ considerably in their respective positions on various subjects. While there are areas of significant commonality, their concerns and interests naturally differ from developing country to developing country. It is also a truism that some arguments and issues apply more to certain developing countries than to others. A developing country such as Ghana may have a completely different set of priorities than, say, Brazil. Similarly, a net food-importing developing country’s interests will not necessarily be coterminous with those of a developing net food-exporting country; nor will a developing oil exporting country pursue the same policies and interests as a developing oil importing country.

There are certain defined groups or bodies that cut across developed and developing country interests. The Cairns Group has among its nineteen members, sixteen developing countries.\(^{18}\) The

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17. The fifty countries currently on the list of LDCs are: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People’s Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen, and Zambia. See U.N. DEPT’ OF ECON. & SOC. AFFAIRS, STATISTICS DIVISION, WORLD STATISTICS POCKETBOOK 2010: LEAST DEVELOPED COUNTRIES, at vii, U.N. Sales No.E.11.XVII.4 (2011), available at http://www.unhrls.org/UserFiles/File/LDC%20Pocketbook2010-%20final.pdf. The most recent country to join the United Nations, South Sudan, will no doubt be added to the LDC list. The category of LDCs was officially established in 1971 by the UN General Assembly with the objective of attracting special international support for this poorest and weakest segment of the international community. The list of LDCs is reviewed every three years by the Economic and Social Council of the United Nations (ECOSOC). In general, the criteria used to determine whether a country falls within the category of LDCs include: (i) the Gross Domestic Product (GDP) per capita, (ii) a composite index (the Augmented Physical Quality of Life Index) based on indicators of life expectancy at birth, per capita calorie intake, combined primary and secondary school enrollment, and adult literacy; and (iii) a composite index (the Economic Diversification Index) based on the share of manufacturing in GDP, the share of the labor force in industry, annual per capita commercial energy consumption, and UNCTAD’s merchandise export concentration index. See UN Recognition of the Least Developed Countries, UNITED NATIONS CONF. ON TRADE AND DEV., http://www.unctad.org/Templates/Page.asp?intItemID=3618&lang=1 (last visited Feb. 14, 2012).

18. The Cairns Group is a group of nineteen agricultural exporting countries, accounting for over 25 percent of the world’s agricultural exports. It is comprised of
Organization for Economic Cooperation and Development (OECD), while traditionally comprised of industrialized countries, now includes developing countries such as Chile, Mexico and Republic of Korea.\textsuperscript{19} It also includes some countries in transition and/or central European and Baltic countries, such as the Czech Republic, Estonia, Poland, Slovakia and Slovenia.\textsuperscript{20} Also noteworthy is the fact that most of the world’s poor live in certain middle-income countries, although those countries may no longer be perceived as typical developing countries.\textsuperscript{21}

III. THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY LAW

The Developing Countries in the WTO

Historically, the developing countries have not been as active in the WTO as their developed country counterparts have been.\textsuperscript{22} The reasons include lack of adequate participation and representation at WTO meetings, and financial constraints (which affect their human, institutional and infrastructural capacity).\textsuperscript{23} Given the extreme importance of the multilateral trading system and the impact of decisions made at WTO, the developing countries need to participate...
much more effectively in the WTO. The developing countries could benefit a lot more by using WTO as a forum to promote their agenda.\textsuperscript{24}

The WTO is one of very few international organizations whose constituent instrument specifically provides for decision-making by consensus.\textsuperscript{25} This effectively gives each of the WTO's Members a veto power,\textsuperscript{26} which implies that the developing countries may be much more powerful at WTO than they are in the UN General Assembly or Security Council. The process of taking decisions by consensus is in the interest of developing countries because through consensus, each individual WTO Member is able to retain a right of veto, thus making all WTO Members equal in decision-making.\textsuperscript{27} Even if there were a vote, it is by no means certain that developing countries would always vote as a block, given their diverse interests. The point remains that the veto power that each of the WTO Members has is, in effect, analogous to that wielded by the five veto powers on the Security Council.\textsuperscript{28} In my view, this alone provides a compelling reason why the developing countries should be more engaged in the WTO.

The WTO brings various benefits to developing countries. For example, the rule-based nature of the multilateral trading system arguably creates certainty or fosters predictability. It is also easier and more beneficial for developing countries to negotiate in a multilateral forum such as the WTO, and in the context of the whole gamut of international trade, than on a bilateral basis, often in the context of more narrow or specific aspects of trade. In the June 2011 issue of \textit{Foreign Affairs}, Susan Schwab, former U.S. Trade Representative, suggested that, given the apparent failure of the Doha Round negotiations, WTO Members should proceed on a plurilateral basis.\textsuperscript{29} The problem with plurilateralism, apart from not being representative enough, is that it encourages selectivity and exclusivity where like-minded countries negotiate and agree on rules that best suit their

\begin{footnotesize}
\textsuperscript{24} There is no dearth of literature on the relationship between developing countries and the multilateral trading system. \textit{See}, e.g., ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (1987); SRINIVASAN, supra note 22; THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES (Will Martin & L. Alan Winters eds., 1996); Celso L. N. Amorim, \textit{The WTO From the Perspective of a Developing Country}, 24 FORDHAM INT'L L. J. 95 (2000).


\textsuperscript{26} \textit{Id.}


\textsuperscript{28} \textit{See} U.N. Charter arts. 23, 27; The WTO...Why it Matters, supra note 27.

\textsuperscript{29} Susan C. Schwab, \textit{After Doha: Why the Negotiations Are Doomed and What We Should Do About It}, FOREIGN AFF. 104-05, 115-16 (2011).
\end{footnotesize}
interests and goals. The danger is that those rules could subsequently find their way into bilateral agreements between developed and developing countries, through negotiations in which the developing countries will, in all likelihood, have less leverage than they would have had in the multilateral setting. A rule-based multilateral trading system also reduces the chances of unilateralism or mitigates the effects of such unilateralism. In theory, the multilateral trade rules within the WTO framework, while providing developing countries with export market access, should also protect them from the arbitrary protection/subsidies of other powerful countries. Integration into the world trading system should therefore be seen as the key to higher growth and poverty reduction in the developing countries.

The success of the industrialized countries, and their satisfaction with the world trading system, is not at issue. This is already a generally accepted fact. But the real test of the WTO will be not the success or the happiness of the developed countries with the multilateral trading system, but rather the extent to which WTO is able to integrate the developing countries into the multilateral trading system.

Whereas it is widely believed that the developing countries did not achieve significant trade benefits in the Uruguay Round, it may be fair to argue that they had several of their concerns addressed in Doha; for example, in the area of IP rules pertaining to more affordable medicines to combat epidemics, such as HIV-AIDS and tuberculosis. It is instructive to recall that the only amendment there has been to any WTO Agreement since the adoption of the Uruguay Round texts in 1994 is the amendment in respect of Article 31(f) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). This amendment seeks to make permanent a decision on patents and public health originally adopted in 2003 that was driven by concerns for the particular health needs of developing countries.

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30. The ongoing Doha Round was launched in November 2001. It is known as the Doha Development Round, a decision that was taken "to overcome the reluctance of developing countries, who were increasingly unhappy about the outcomes of the previous Uruguay Round, to engage in a new negotiating round" UN-OHRLLS Newsroom Doha: The Non-"Development" Round, UNITED NATIONS OFF. HIGH REPRESENTATIVE FOR LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES (Jan. 6, 2012), http://www.unohrlls.org/en/newsroom/current/?type=2&article_id=120&print=1.


Another reason why the developing countries should be more engaged in the WTO is the benefits they get by virtue of their status and membership as developing countries. There are several provisions in the WTO Agreements that speak to the special position of the developing countries. A significant amount of WTO's work entails trying to assist the developing countries to more fully integrate into the multilateral trading system. This effort is based on the tacit assumption and, indeed, on the explicit assertion that the trade system is good for the developing countries. For example, the special and differential treatment provisions are known to be an integral part of the multilateral trading system. Their general aim is to ensure that the developing countries "secure a share in the growth in international trade commensurate with the needs of their economic development." But a more effective regime and implementation of the special and differential treatment provisions could greatly inure to the benefit of the developing countries, as cogently argued by Edwini Kessie.

Also noteworthy is the fact that developing countries obtain technical assistance from the WTO Secretariat. Part of this assistance entails the provision of legislative advice, including interpretation and implementation of obligations under the multilateral agreements.

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33. See Work on Special and Differential Provisions, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Feb.19, 2012) (describing the various special and differential treatment provisions provided to developing countries in order to treat them more favorably than other WTO Members).


35. These special and differential treatment provisions have not operated satisfactorily to date, and it is arguable that they have not brought developing countries the widely anticipated benefits. Worse yet, as demonstrated by Edwini Kessie, the provisions are largely of a hortatory and legally non-binding nature. See Edwini Kessie, Enforceability of the Legal Provisions Relating to Special and Differential Treatment Under the WTO Agreements, 3 J. WORLD INTELL. PROP. 955, 974 (2000). See also Kessie, supra note 15 (showing, among other things, how the special and differential treatment provisions could be made more beneficial (in their implementation) to developing countries).

36. According to the WTO, it budgets annually about CHF 30 million for technical assistance activities. Financing of TRTA, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/teccop_e/financing_trta_e.htm (last visited Feb. 10, 2012). The WTO's mandate in respect of technical assistance is provided for in various WTO Agreements and decisions, and further clarified and enhanced in the 2001 Doha Ministerial Declaration. It has sometimes been suggested that WTO's trade-related technical assistance is often aimed at ensuring that developing countries comply with their obligations under the WTO rules, rather than at helping them to determine what their interests are and how best to adopt trade and economic policy conducive for their own special needs.
trading system. This ultimately contributes to advancing the corpus of international trade law.

In terms of the progressive development of trade law, the developing countries are engaged in ongoing efforts aimed at infusing trade agreements, policies and practices with the development dimension. Two examples will suffice here. The first concerns part of the Doha mandate issues relating to creating a multilateral register for wines and spirits, and extending the higher (Article 23 of TRIPs) level of protection beyond wines and spirits. "The TRIPs Agreement requires a review of Article 27.3(b) which deals with patentability or non-patentability of plant and animal inventions, and the protection of plant varieties." This was further broadened by Paragraph 19 of the 2001 Doha Declaration, which requested the WTO's TRIPs Council to also review the relationship between the TRIPs Agreement and the UN Convention on Biological Diversity, the protection of traditional knowledge and traditional cultural expressions (or folklore).

The developing countries in WTO have managed to put development-related issues at the forefront of most major trade initiatives, and are actively engaged in discussions aimed at progressively developing international trade law in respect of such matters as the scope of protection for geographical indications, and issues relating to patentability, biological diversity and traditional knowledge.

The Developing Countries in WIPO

Whereas WTO has 153 Members as of today, WIPO has 185 Member States. There are many more developing country members of

41. Members and Observers, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatweto_e/tif_e/org6_e.htm (last visited Feb. 11, 2012); Member States, WORLD INTELL. PROP. ORG., http://www.wipo.int/members/en/ (last visited Feb. 11, 2012). Having deposited its instrument of accession to the WIPO Convention on Dec. 2, 2011, Vanuatu will become the 185th Member State of WIPO on Mar. 2, 2012. WTO's 153 Members are also likely to have increased by the time this article is published. In particular, Vanuatu was authorized by the WTO General Council to ratify its accession package by Dec. 31, 2011, and thus become the WTO's 154th Member thirty days after depositing an instrument of ratification to the WTO Agreement. Likewise, the Ministerial Session of WTO from Dec. 15 to 17, 2011 authorized Samoa to accept its accession package by June 15, 2012 and thus become a WTO Member thirty days after ratifying its accession package; and
WIPO than there are of the WTO. The arguments provided earlier to demonstrate the need for the developing countries to be more engaged in WTO, apply a fortiori to the need for them to engage in WIPO.42

Historically, IP has been more known, discussed and protected in the developed countries than has been the case in developing countries. This is also a trend that is now changing. For starters, all the recent adherents to the WIPO Convention happen to be developing countries.43 Recent discussions in WIPO have seen more assertive developing country positions than was the case in the first three decades of the Organization’s existence. A few examples will be given here; in 2004, the Development Agenda was introduced in WIPO largely as a result of the efforts by Argentina and Brazil.44 There has since been established an informal group of countries known as the “Development Agenda Group,” which takes positions and makes statements on behalf of its Members on almost every issue that is being debated in various fora in

Montenegro has been given up to Mar. 31, 2012 to do so, while the Russian Federation is authorized to ratify the terms of its entry within 220 days from Dec. 16, 2011, after which it will become a fully fledged Member of WTO thirty days after it notifies the ratification to the WTO. See Accessions News Archive, WORLD TRADE ORG., http://wto.org/english/news_e/archive_e/acc_arc_e.htm (last visited Feb. 19, 2012).

42. In respect of technical assistance, WIPO’s assistance to Member States is only in the field of IP, not in the broader WTO trade field. WIPO provides its developing country Member States with legislative advice in connection with its cooperation for economic development program, including advice on how best to exploit the flexibility under international treaties in implementing their obligations. For information relating to WIPO’s advice on flexibilities under the TRIPs Agreement, see generally Advice On Flexibilities Under The TRIPS Agreement, WORLD INTELL. PROP. ORG., www.wipo.int/ip-development/en/legislative_assistance/advice_trips.html (last visited Feb. 19, 2012).

43. Looking back at accessions to the WIPO Convention since 2000, it is significant that all but one of the fourteen countries that joined WIPO between 2000 and January 2012 are developing countries. They are, in alphabetical order, and with the year they joined in brackets: Afghanistan (2005); Antigua and Barbuda (2000); Belize (2000); Comoros (2005); Djibouti (2002); Dominican Republic (2000); Iran (Islamic Republic of) (2002); Maldives (2004); Montenegro (2006); Myanmar (2001); Seychelles (2000); Syrian Arab Republic (2004); Tonga (2001); and Vanuatu (2012). See Contracting Parties, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id =1 (last visited Feb. 13, 2012). The only country on the list that does not fall within our definition of developing countries is Montenegro. And as is well known, Montenegro’s declaration of continued application of (or accession to) the WIPO (and other conventions) was necessitated by the break-up of Serbia and Montenegro, and the confirmation of Serbia as the continuing State as from June 6, 2006. Treaties and Contracting Parties, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1951C (last visited Feb. 19, 2012).

The effect has been to ensure that issues pertaining to development are built into all discussions and made part of any substantive texts that are adopted. This will no doubt be replicated at future diplomatic conferences convened under the auspices of WIPO to adopt treaties in any area of IP.

Another example of more assertive developing country positions can be found in WIPO Member State discussions relating to the draft substantive patent law treaty (“SPLT”). In 2000, the Member States of WIPO, through the Standing Committee on Patents (“SCP”), started discussions on a treaty aimed at harmonizing substantive patent law. At several points in the discussions between 2000 and 2004, there was unanimous agreement on the need to include draft provisions on a number of issues of direct relevance to the grant of patents. Of particular significance were issues relating to the definition of prior art, novelty, inventive step or non-obviousness, and industrial applicability or utility. In subsequent meetings, however, some developing countries asserted the need to include other issues that were directly relevant to development and developing countries. At the June 2005 session of the SCP, Brazil submitted a statement on behalf of a group of developing country Member States known as “Friends of Development.” The statement suggested that the discussions include not only the earlier agreed issues mentioned above, but also provisions on the transfer of technology, anti-competitive practices, and the

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45. For a sample statement from DAG Member India, see WIPO Gen. Assembly Report of the Fortieth (20th Ordinary) Session, ¶ 88, Sept. 26-Oct. 5, 2011, WIPO Doc. WO/GA/40/19 (2011) [hereinafter WIPO Assembly Report] (stressing that the DAG “attached great importance to the efforts to develop an effective normative framework for harmonizing exceptions and limitations to copyright in specific sectors.” The DAG viewed exceptions, exclusions and limitations as an “intrinsic and essential part of the IPRs framework that brought much needed balance between private interests and larger public interest in the context of national public policies and development goals.”); id. ¶ 143 (explaining that the DAG “attached great importance to the work of the IGC, as the protection of GRs, TK and TCEs was a national priority for its members.”); id. ¶ 58 (stating that “the real essence of the [Development Agenda] lay in bringing about a conceptual transformation in how Members viewed IP and how they sought to use it for the betterment of mankind everywhere through appropriate norm-setting, protection, enforcement and technical assistance.”).


47. Id.

48. Id.

49. Id.

safeguarding of public interest flexibility, among others.\textsuperscript{51} All attempts to make progress on the negotiations in respect of the SPLT have not resulted in any agreement on the modalities and scope of the future work of the SCP.\textsuperscript{52} This development in respect of the SPLT is a good example of the new influence of the developing countries in effectively having a say in issues and outcomes aimed at progressively developing IP law.

To give yet another example, there exists a WIPO Committee known as the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC has been in existence since 2000, and has been debating issues relating to how best to protect traditional knowledge, traditional cultural expressions (or folklore) and genetic resources.\textsuperscript{53} For the first time last year, the IGC agreed to recommend to the WIPO General Assembly, and that Assembly agreed that the IGC should, in the 2012-2013 biennium, “expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.”\textsuperscript{54} The IGC is thus in the process of deliberating on a proposed Treaty to protect these three non-traditional areas under IP law.\textsuperscript{55} It is widely expected that the Member States of WIPO may be at the point where they will convene a diplomatic conference in the next few years with the express aim of adopting a treaty on traditional knowledge, traditional cultural expressions and genetic resources. This point has been reached as a result of the very active and indeed predominant participation of developing countries in the relevant WIPO processes.\textsuperscript{56}

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\textsuperscript{51} Draft Substantive Patent Law Treaty, supra note 46.
\textsuperscript{52} Id.
\textsuperscript{53} For a primer on traditional knowledge, traditional cultural expressions and genetic resources, see Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore, WORLD INTELL. PROP. ORG., http://www.wipo.int/tk/en (last visited Feb. 19, 2012).
\textsuperscript{54} WIPO Secretariat, Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), ¶ 16(a), WIPO Doc. WO/GA/40/7 (Aug. 12, 2011). The General Assembly also decided that the IGC should “submit to the 2012 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2012 will take stock of and consider the text(s)and progress made and decide on convening a Diplomatic Conference, and will consider the need for additional meetings, taking account of the budgetary process.” See id. ¶ 16(d).
\textsuperscript{55} Id.
IV. Conclusion

We have recalled that the developing countries now form the majority of WIPO and WTO’s membership. To be sure, over 75 percent of WIPO Member States and WTO Members are developing countries.\(^57\)

This preponderance of developing country members in WIPO and WTO is a recent development which has been accelerated by the attainment of independence of several developing countries in the last few decades.

Whereas developing countries did not have much of a role in the formation and the initial discussions that took place in both organizations, they have now become major players as well as stakeholders in the multilateral IP and trade discussions. There is also a deeper understanding of the potential of IP and trade as tools for development, and thus their implications on the socio-economic development of countries.\(^58\)

There is little doubt that developing countries will continue to swell the ranks of the WTO and WIPO. There is even less doubt that the concept of development will correspondingly play a major role in discussions and negotiations at both institutions.

In terms of developments in substantive IP and trade law, predictions are more difficult.\(^59\) I have no doubt, however, that within the next decade, the Member States of WIPO will have adopted a Treaty in the area of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources. This will be a landmark development and a paradigm shift in the IP law regime, given the

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\(^{57}\) Namibia, Pakistan, Peru, South Africa, Tanzania, Thailand and Zimbabwe, adopting “a joint recommendation to advance the work of WIPO to establish an international legal instrument (or instruments) for the effective protection of genetic resources, traditional knowledge and folklore.”.

\(^{58}\) For the respective lists of WTO Members and WIPO Member States, see Members and Observers, supra note 41; Members States, supra note 41.

\(^{59}\) Indeed, WIPO has recently included on its website a theme on the importance of IP for the economic development of nations. Intellectual Property for Development, WORLD INTELL. PROP. ORG., http://www.wipo.int/ip-development/en (last visited Feb. 13, 2012). The WTO Agreements also recognize the link between trade and development. See Trade and Development, WORLD TRADE ORG., http://www.wto.org/english/tratop_devel_e/devel_e.htm (last visited Feb. 13, 2012). It may well be that the growing interest among developing country members of WTO is partly attributable to the fact that WTO discussions, unlike discussions in its predecessor organization GATT, now include a wider range of issues (namely services and IP), thus having greater impact on economic development. But see STEFAN DE VYLDER, THE LEAST DEVELOPED COUNTRIES AND WORLD TRADE 92 (2d ed. 2007) (arguing that many WTO issues “are considerably more difficult, and more politically controversial, than previous GATT agreements” largely because “[a] new regime was constructed which affects developing countries to a much greater degree and which is much more mandatory in nature than was previously the case.”).

\(^{59}\) As the famous Yogi Berra quip goes, predictions are hard to make, especially when they are about the future!
general reluctance to date to include traditional knowledge, traditional cultural expressions and genetic resources within the ambit of IP that needs protection.\textsuperscript{60} Similarly, it is possible that the Member States of WIPO will have adopted a treaty that aims to progressively develop international patent law by including provisions not only on commonly accepted terms such as grace period, prior art and inventive step, but also development-related concepts such as transfer of technology, prior informed consent and benefit sharing. Substantive discussions at WTO will also likely continue to reflect development-related concerns. In particular, it is doubtful that any new amendment to any of the WTO Agreements will be adopted if the particular amendment does not meet the consent or perceived interests of developing countries. IP and trade law will continue to be progressively developed along lines that increasingly take into account the development dimension as well as the interests and concerns of the developing countries.

These are only predictions that have a bearing on the subject of development, developing countries and the progressive development of international law in the trade and IP areas. But there will certainly be several other developments in the general areas of trade and IP. Those other developments and predictions need a more extensive elaboration and much more space than I have in this limited article.

\textsuperscript{60} In this regard, it is instructive to note that in August 2010, the African Regional Intellectual Property Organization (ARIPO) and its Member States adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. According to the ARIPO website, when the Protocol enters into force, it will empower the custodians and holders of traditional knowledge and expressions of folklore to utilize their knowledge for socio-economic development and wealth creation. The implementation of the Protocol will curtail the ongoing misappropriation, bio-piracy and prevent illicit claim of traditional knowledge-based inventions and patent applications and enable the ARIPO Office to register traditional knowledge and expressions of folklore that are trans-boundary and multicultural in nature, the so-called regional traditional knowledge and expressions of folklore. The Protocol will furthermore provide a framework for national legislative developments on the protection of the resources.

POVERTY, ISLAMIST EXTREMISM, AND THE DEBACLE OF DOHA ROUND COUNTER-TERROISM: PART THREE OF A TRILOGY - TRADE REMEDIES AND FACILITATION *

RAJ BHALA**


I am grateful to my spring 2011 Advanced International Trade Law class for many excellent research papers, which provided many insights and sources incorporated into this article, including the papers by Hannah Sandal and Joseph R. Billings, both of the University of Kansas School of Law Class of 2011, and Sarah R. Schmidt, Class of 2013.

This article assumes familiarity with Parts One and Two of the Trilogy, and my five prior publications on the Doha Round, at least with the relevant substantive concepts and events that occurred between the launch of the Round in November 2001 and negotiations as of July 2009:


2) Chapters 3 and 4 of the International Trade Law textbook, referenced above, particularly concepts and terms in the negotiations, and the status of those talks through the July 2007 Draft Modalities Texts issued by Ambassadors Crawford Falconer (New Zealand) and Donald Stephenson (Canada), Chairmen of the Agriculture and Non-Agricultural Market Access negotiations, respectively.

3) Doha Round Schisms: Numerous, Technical, and Deep, 6 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 5-171 (fall/winter 2008), which covers the Round through the July 2008 collapsed Ministerial meeting.
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5) Doha Round Betrayals, 24 Emory International Law Review 147-183 (summer 2010), which considers the Round from July 2009 through December 2009.

Portions of this article are drawn from the Texas piece. All errors are the responsibility of the author.

I. Synopsis

This article is the third and final part of a trilogy, the argument of which is that the Doha Round is a failed instrument of counter-terrorism. The Round, launched in November, 2001, was supposed to make the world safe for free trade, but not simply to realize net economic welfare gains from reductions in barriers to cross-border flows of goods, services, and intellectual property. Rather, the original intent was to connect those gains to the threat posed by violent extremist organizations ("VEOs") in the post-9/11 world. The gains were intended to be channeled, in no small part, to poor, marginalized Muslim communities that otherwise might be recruitment grounds for VEOs acting (falsely, to be sure) in the name of "Islam."

As the Doha Round dragged on through the first and now second decade of the new millennium, the commercial self-interest of World Trade Organization ("WTO") Members dwarfed their shared political economic interest. They lost sight of the common good in fighting poverty, thereby attacking one factor exploited by VEOs. They invented (post hoc, of course) new reasons for the Round, such as fighting the global economic slump (as Part One concludes). Their behavior became a reason in itself as to why implementing the initial vision for the Round proved difficult, such as the negotiating positions of China (as Part Two concludes). Plausible or not, all such reasons spelled a collective failure to follow through on the founding promise of the Round: drawing a clear link between freer trade, poverty alleviation, and threat reduction.¹

Part One of the trilogy advances this argument in the context of trade liberalization in agricultural products. Part Two does so in the context of trade liberalization in industrial products ("non-agricultural market access," or "NAMA"), and services trade. Part Three makes the argument in the context of trade remedies, so called "rules" covering antidumping ("AD"), countervailing duties ("CVD"), and fishing subsidies. It also does so in the context of trade facilitation, which refers to customs procedures. As with Parts One and Two, the context of Part Three is technical. The devil, in the sense of straying from the initial purpose of the Doha Round, is in the details, in the sense of lengthy, mind-numbing draft modalities texts. The Texts critically analyzed here are the December 2008 Draft Rules Text,² April 2011

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This Part completes the trilogy with comments on the missing middle “D” in the Doha Development Agenda (“DDA”). It also charts out, in a preliminary manner, potential special dispensations in international trade law for Islamic countries. Consequently, Part Three concludes where Part One began, and where the Doha Round did, too: with thoughts about how to link trade liberalization to poverty alleviation, and thereby reduce vulnerability to Islamist extremism. These concluding observations, like those of Parts One and Two, support the trilogy’s overall argument that the Round is not about trade liberalization, poverty alleviation, or reducing threats from VEOs.

II. NO REMEDY FOR REMEDIES

Formally entitled the Draft Consolidated Chair Texts of the AD and SCM Agreements, this 94-page document includes a so-called “Road Map for Discussion” to help reach agreement on fishing subsidies, as well as trade remedies against dumping and subsidization. The basic goal of Doha Round rules negotiations is to “clarify and improve” disciplines. After all, since the WTO was born on 1 January 1995 (and as of November 2009), Members have launched over 3,500 AD investigations (with developing countries—particularly Argentina,
China, India, and South Africa – accounting for the majority of such cases) and 202 CVD investigations. Chairman Valles conceded up front there was essentially nothing novel in his “new” Draft. On all three topics – AD, CVD, and fishing subsidies – the disagreement among WTO Members was serious, with no obvious prospect of convergence, and easily sufficient to scupper a successful outcome to the Round.

What was new, however, was the activism in the December 2008 Draft Rules Text. There was far less of it than in its predecessor. Rather than proposing specific compromise language, as he had done in the previous iteration, the Chairman took a bottom-up approach, and offered such language only on points where Members had reached a consensus on a solution. Because they had reached so few consensuses, the new Text was more of an essay with questions and issues than a legal document. Indeed, as to fishing subsidies, Members essentially forced the Chairman to abandon the proposals he tabled in November 2007 and return to the proverbial “drawing board.” In respect of AD and CVD remedies, the December 2008 and November 2007 Draft Texts were nearly identical, except for the unmistakable emphasis in the new Text on points of disagreement in lieu of proposed language to facilitate accord. The Chair inserted these points in bold, and put them in square brackets, at the relevant spots in the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping, or “AD”, Agreement) and Agreement on Subsidies and Countervailing Measures (“SCM” Agreement). Because these insertions replaced draft AD and CVD provisions, giving the documents the sense of reverse momentum, it was ineluctable that the later Text was less advanced than its predecessor. Moreover, depending on the perspective of the Member, the reversal was especially troubling.

9. New Draft Consolidated Chair Texts, supra note 2, 1.
10. These Agreements are reprinted in a variety of sources, including RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE – DOCUMENTS SUPPLEMENT, 339-66, 431-78 (3rd ed. 2008).
11. See, e.g., The Bureau of National Affairs, Direction of WTO Talks “Unacceptable,” U.S. Steelworkers President Gerard Says, 26 Int'l Trade Rep. (BNA) 12 (Jan. 1, 2009) (reporting that United Steelworkers (USW) President Leo W. Gerard and his union strenuously objected to any re-writing of AD or CVD rules that would weaken America's trade defenses, such as a prohibition on zeroing, a requirement to separate out causal factors in determining injury, a mandatory termination of orders under Sunset Reviews, a ban on disbursing AD duties or CVDs to aggrieved domestic industries, a lesser duty rule, or a public interest test).
By April 2011, WTO Members registered little progress in reaching consensus on rules about AD, CVD, or fishing subsidies. Accordingly, in his cover note to the April 2011 Rules Document, the Chairman of the Negotiating Group on Rules said he chose to prepare a revised legal text on AD, i.e., a new WTO AD Agreement, but not one on CVDs or fishing subsidies. Regarding the April 2011 Draft AD Agreement, the Chairman stated:

This should not be understood to mean that I perceive significant signs of convergence on the major "political" issues. To the contrary, it is noticeable that the new text contains the same twelve bracketed issues as the 2008 Chair text. The 2008 Chair text on anti-dumping does however contain extensive un-bracketed language on a wide range of technical but nevertheless important issues, and our work over the past two plus years has pointed to a few areas where useful changes to that language might be warranted. In short, therefore, arguably a new text on anti-dumping can usefully reflect some limited progress, and in any event it can serve to give a clear idea of where things stand.\(^\text{12}\)

As for CVDs, the Chairman elected to prepare a report instead of a revised text:

I have chosen to prepare a report rather than a text for the following reasons. First, as with anti-dumping, there have been no significant signs of convergence on bracketed issues as reflected in the 2008 Chair text on subsidies and countervailing measures. Furthermore, unlike in the area of anti-dumping the amount of un-bracketed text in the area of subsidies and countervailing measures is limited, and some of that language (such as that relating to regulated pricing and to the role and interpretation of the Illustrative List of Export Subsidies) is controversial. And while on certain more technical issues un-bracketed language has gained some traction, there are very few useful changes to be proposed at this point. In the area of transposition of possible changes in anti-dumping provisions to their counterpart CVD provisions, insufficient discussion has occurred to date to allow the identification of

\(^{12}\) Agreement on Implementation of Article VI, supra note 3, at 201 (emphasis added).
legal language reflecting convergence. Finally, a significant number of substantive new proposals have been submitted during the past few months. Due to time pressure, the Negotiating Group has not yet fully explored the degree to which any elements of convergence can be found in respect of these proposals. Thus, I see no advantage to preparing a new SCM text at this juncture.13

Likewise, as for fishing subsidies, the Chairman stated gloomily:

2. After careful consideration of the current state of play . . . I have concluded that I am not now in a position to present a revised legal text on fisheries subsidies. Rather, the only option available to me at this juncture for both capturing such progress as has been made, and more significantly, for identifying the numerous remaining gaps in Members' positions, is to present a detailed narrative report.

3. In reaching this conclusion in these difficult circumstances, I have heard very clearly the main message from Members to Chairs that for now, any Chair-produced documents must be of a bottom-up nature. That is, Members have made plain that they would not welcome compromise proposals from Chairs that would seek artificially to bridge the real gaps in positions that remain. Applying this standard to the fisheries subsidies negotiations, at present there is too little convergence on even the technical issues, and indeed virtually none on the core substantive issues, for there to be anything to put into a bottom-up, convergence legal text, and there are no fisheries subsidies disciplines already in existence to which we could refer or revert. Nor would a text with either a small range of options, or with all positions and proposals presented as "options," be feasible. The former would require me to pick and choose, and thus would not be bottom-up. The latter would probably be impossible to produce as one text that was comprehensible. In any case, such a text would be nothing more than a compilation of

13. Id. (emphasis added); see also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Negotiations on Subsidies and Countervailing Measures: Report by the Chairman, ¶ 2 TN/RL/W/254 (Apr. 21, 2011) [hereinafter Negotiations on Subsidies and Countervailing Measures], available at www.wto.org/english/tratop_e/dda_e/chair.../adpsubsidies_e.doc (providing the same summary).
proposals, which I consider could only impede movement toward convergence.

6. After those discussions ended [in 2009, following issuance of the December 2008 Rules Text], Members began to submit new proposals. While initially there were only a few, by late 2010 and to date in 2011 proposals proliferated . . . . While many of the proposals contain new ideas and some suggest new approaches on certain issues, unfortunately in their totality (and with a few exceptions) these could not be characterized as convergence proposals. Rather, they generally reflect and elaborate on the already well-known positions of their proponents. Nor has there been movement toward convergence over the course of the debate on the proposals. Thus, in spite of many meetings since the beginning of the year [2011] – indeed a nearly-continuous session of the Negotiating Group – and in spite of the wealth of new proposals, little tangible progress on the core issues has been made. In short, notwithstanding intensive work and greater clarity in scoping several issues, the fisheries subsidies negotiations remain in more or less the same impasse as at the end of 2008 . . . with positions if anything hardening since then.14

Thus, as of April 2011, the textual landscape for Doha Round rules negotiations was slightly more confusing than it had been in December 2008. On AD, Members had produced a revised AD text, but it looked like the November 2007 and December 2008 Draft Texts. As for CVD and fishing subsidies rules, they still were working with the December 2008 Draft Text, but supplemented it with the April 2011 Rules Document.

A. Twelve AD Fights

In respect of AD, the December 2008 Draft Rules Text highlighted 12 key areas of dispute. So, too, did the April 2011 Draft AD Agreement. They were as follows:15


15. These areas are set out in bold and brackets in the New Draft Consolidated Chair Texts after the Article, and replace draft proposals set out in the same places in the Draft Consolidated Chair Texts. These areas also are set out in bold and brackets in the
\*Zeroing (Article 2.4:2 of the AD Agreement)

In December 2008, the Chairman best summarized the impasse: “Delegations remain profoundly divided on this issue. Positions range from insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts.”

Similarly, in April 2011, he observed zeroing:

remains among the most divisive in the anti-dumping negotiations, and there have been few signs of convergence. Positions range from insistence on a total prohibition on zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts. Some delegations however hold more nuanced positions, and there is openness among some delegations to undertake a technical examination of this issue in particular contexts, such as for example the third ("targeted dumping") methodology provided for in Article 2.4.2.

Put succinctly, the rest of the world – and that included Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Taiwan, Thailand, and Turkey that banded together in a group totaling 16 WTO Members called “Friends of Antidumping Negotiations” (“FANs”) – insisted on a ban on zeroing. The assertion was the amount of dumping (positive dumping margins) should be reduced (offset) by non-dumped sales (negative dumping


16. New Draft Consolidated Chair Texts, supra note 2, art. 2.4.2, chairman’s note ("Zeroing").

17. Agreement on Implementation of Article VI, supra note 3, art. 2.4.2, chairman’s note ("Zeroing") (emphasis added).

18. Daniel Pruzin, Dumping: Antidumping Critics Argue Latest Report Highlights Need for Doha Rules Agreement, 26 Int’l Trade Rep. (BNA) 637 (May 14, 2009); Daniel Pruzin, Dumping, Countervailing Duties: China Urges Ban on Zeroing in Dumping Investigations as Part of WTO Rules Talks, 23 Int’l Trade Rep. (BNA) 695 (May 4, 2006); Daniel Pruzin, Dumping: WTO Members React to Revised Rules Text; U.S. Insists on Including Zeroing Provisions, 26 Int’l Trade Rep. (BNA) 203-04 (Feb. 12, 2009); Rules, supra note 7. That the U.S. is the only country opposing a ban on zeroing has been widely reported. See, e.g., Daniel Pruzin, WTO: Senior Officials to Address Talks on Rules; Advocates Call for Progress in Light of Crisis, 26 Int’l Trade Rep. (BNA) 1605 (Nov. 26, 2009).
margins). Without that ban, the deck would remain stacked against respondent producer-exporters, as dumping margins would be inflated artificially, and the use of the AD remedy would be abusive.

The FANs spoke from experience, as the United States ("U.S.") frequently used zeroing when calculating dumping margins against their exporters. The FANs were successful in causing a major change in the Draft Text from November 2007. The earlier Text embodied the American position, permitting Simple Zeroing in original investigations, and both Simple and Model Zeroing in Administrative and Sunset Reviews. Nonetheless, the U.S. adamantly stuck to its position there would be no successful conclusion to the Doha Round unless Members agreed to overrule legislatively the string of what it regarded as erroneous Appellate Body precedents against zeroing. Only that solution, said the U.S., would allow it and other Members to impose an AD duty on the full amount of dumping—a right they have under Article 9:3 of the AD Agreement. Consequently, the likelihood that the FANs and U.S. might agree on a compromise, such as to ban zeroing in all contexts except targeted dumping, was dim.

- **Causation (Article 3:5 of the AD Agreement)**

Members could not agree on how to handle three practical causation questions that arise in virtually every AD case. First, should it be mandatory to separate and distinguish the allegedly injurious effects of (1) dumped imports and (2) other factors, so as to avoid attribution of those effects to dumped imports when, in fact, other factors might be the cause? Second, to what extent is a quantitative, as distinct from a qualitative, analysis of non-attribution necessary? Third, to what degree should the allegedly injurious effects of dumped imports be weighed against those effects from other factors?

In April 2011, the Chairman summarized the positions among WTO Members:

*Delegations continue to hold widely diverging views on issues relating to causation of injury.* Recent discussions

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have focused on two issues: whether it should be mandatory to separate and distinguish the effects of dumped imports and other factors, and the extent to which authorities should be required to conduct a quantitative (as opposed to qualitative) analysis of non-attribution. Although there seems to be a shared view that authorities should carefully consider the effects of factors other than dumped imports, and ensure they are not attributed to dumped imports, there are substantial gaps regarding the degree of precision that can or should be required.21

The importance of resolving causation issues cannot be overstated.

Through a series of trade remedy cases over several years, the Appellate Body had grappled with such issues. As a general principle of law across legal systems, it is unjust to impose liability against a party that is blameless. That the Members could not agree on how to manifest this principle, in light of the WTO jurisprudence that had emerged, was evidence of how little progress they had made.

- Material retardation (Article 3:8 of the AD Agreement)

Dumping is not actionable unless it causes or threatens to cause injury, or unless it materially retards the establishment of a domestic industry. How tightly should the term “material retardation” be defined? When is an industry “established”? The Chairman said in the April 2011 Draft AD Agreement:

There is a broadly expressed view that the provisions of the Agreement regarding material retardation would benefit from amplification and clarification, and many elements of the 2007 Chair text attract broad support. There are however widely divergent views on the core issue of when an industry is “in establishment.” Most notably, while some delegations consider that an industry might still be in establishment even if there was some domestic production, other delegations consider that once there is any domestic production an industry is no longer “in establishment,” and in such cases the proper analysis is one of current injury or threat.22

21. Agreement on Implementation of Article VI, supra note 3, art. 3.5, chairman’s note (“Causation of Injury”) (emphasis added).
22. Agreement on Implementation of Article VI, supra note 3, art. 3, para. 8 (first emphasis added).
In other words, some Members argued an industry might still be in the process of getting established, even if there is a small amount of domestic production. Other Members said any such production means the industry is established, and thus the injury analysis must focus on actual injury or threat thereof.

- **Definition of domestic industry (Article 4:1 of the AD Agreement)**

  What criteria should be used to exclude (1) producers that are related to exporters or importers, and (2) producers that also are importers, from the definition of a domestic industry? That definition is essential in delineating the class of petitioners potentially entitled to AD relief, as well as determining at the outset whether the petitioners have standing to bring an AD case. The Chairman explained in April 2011:

> There are widely varying views about the need for criteria governing this exclusion, and about the nature of any possible criteria. In particular, some delegations consider that the rules should be precise, reflecting numerical criteria, and directive in nature. Other delegations believe that any criteria should not be too prescriptive, as the assessment must be case by case. Yet other delegations do not exclude such producers and believe that no changes to these provisions are necessary.\(^{23}\)

In essence, four issues were at stake.

First, should producers that are related to exporters or importers, or that are themselves importers, be excluded from the “domestic industry” that would benefit from an AD remedy? Assuming the answer is “yes,” then, second, what degree of affiliation should trigger the exclusion? That is, how close can a producer be to an exporter or importer before that producer is cast out of the universe of petitioners? Closely connected to the second issue, third, is how the proximity should be measured? Would precise, numerical criteria, or a loose, case-by-case analysis be better? Following logically from the third issue, fourth, how should the measurement criteria be selected? In particular, which criteria would both protect the sovereignty of Members, and be less expensive and time-consuming to administer?\(^{24}\)

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23. *Id.* art. 4, para. 1 (emphasis added).

• Definition of subject product (Article 5:6 of the AD Agreement)

Should a provision be added concerning the product under consideration – i.e., the good subject to an AD investigation or subject merchandise – to clarify how that product is defined? The Chairman stated in the April 2011 Draft AD Agreement:

While many delegations consider that a provision on this issue would be useful, concerns have been expressed that such a provision could have “vertical” as well as “horizontal” implications (e.g., with respect to the inclusion of parts), as well as implications in respect of subsequent proceedings. These concerns have caused some delegations to link this issue to the outcome of discussions on anti-circumvention, while other delegations reject any such linkage. There are also differences of view regarding, inter alia, how broadly the product under consideration should be defined, the role of physical and market characteristics in determining the product under consideration, and when and how [the] product under consideration should be determined.25

Some Members argued a new provision defining “subject merchandise” would focus the scope of an investigation, hence the above reference to linking the issue to anti-circumvention. The U.S. had first-hand experience with problems of circumvention created by Chinese producer-exporters subject to AD orders. But, other Members feared a definition, if too broad, might implicate related products in a vertical and horizontal sense and thereby bring (for example) parts of a product into an investigation. That outcome would be unfair to the implicated producer-exporters. Redolent of the controversies of defining a “like product” under Article III of the General Agreement on Tariffs and Trade (“GATT”), Members also failed to agree on the extent to which criteria such as physical and market characteristics should be used to “subject merchandise.”26

• Information requests to an affiliated party (Article 6:8 of the AD Agreement)

Members could not agree on how to treat an interested party in an AD investigation that has been asked for information.27 Some Members

25. Agreement on Implementation of Article VI, supra note 3, art. 5, para. 6 (emphasis added).
26. See id.
27. See Agreement on Implementation of Article VI, supra note 3, art. 6, para. 8.
thought such a party should not be deemed non-cooperative if it fails to provide data about an affiliate that it does not control. Other Members thought a deemed exemption would encourage non-cooperation based on an excessively narrow view of “control.”

bullet Public Interest Test (Article 9:1 of the AD Agreement)

The November 2007 Text included a public interest requiring each WTO Member to have a procedure whereby no AD remedy could be imposed without taking due account of the views of interested domestic parties. They include industrial and retail users of the subject merchandise and domestic-like product, and suppliers of inputs to the domestic industry. The European Union (EU) backed this proposal. The U.S. stood in opposition, on the ground these changes would infringe on the sovereignty of a Member to impose and collect AD duties in the manner it deems suitable.

In the December 2008 Text, the Chairman summarized aptly the wide gap in positions over these topics:

Participants are sharply divided on the desirability of a procedure to take account of the representations of domestic interested parties when deciding whether to impose a duty. Some consider that such a procedure would impinge on Members’ sovereignty and would be costly and time-consuming, while others support inclusion of such a procedure. Issues related to any such procedure include the extent to which any such procedures should apply in the context of Article 11 [administrative and sunset] reviews, whether the ADA’s [AD Agreement] requirement for a judicial review mechanism should apply to decisions pursuant to any such procedure, and the extent to which WTO dispute settlement should apply.

In April 2011, the Chairman repeated the first two sentences (above), but modified the third sentence, as follows:

Issues related to any such procedure include the elements that can or should be taken into account in any

28. Id.
30. New Draft Consolidated Chair Texts, supra note 2, art. 9, para 1.
public interest proceeding, the extent to which any such procedures should apply in the context of Article 11 reviews, whether the ADA's requirement for a judicial review mechanism should apply to decisions pursuant to any such procedure, and the extent to which WTO dispute settlement should apply.\(^{31}\)

This modification indicates the disagreement among Members had widened further. Not only did it include procedures, judicial review, and dispute settlement, as it had before, but also included the elements to consider in a public interest hearing. In other words, the Members could not agree on what “public interest” meant.\(^ {32}\)

These disagreements pitted the U.S. against the EU and many other Members. But, they also divided constituencies within many Members. Predictably, consumer groups championed a public interest test, and producer groups steadfastly opposed it.

- *Lesser Duty Rule (Article 9:1 of the AD Agreement)*

Also included in the November 2007 Text was a lesser duty rule. Such a rule states a WTO Member need only impose an AD duty up to the level necessary to rectify dumping, which may be less than the full amount of the dumping margin. The EU backed this rule, as its AD law contains one. The U.S. stood in opposition, for the same reason it opposed a public interest test: infringement on the sovereignty of a Member to impose and collect AD duties in the manner it deems suitable.\(^ {33}\)

In the December 2008 Text, the Chairman summarized aptly the large gap in positions over the issue:

On lesser duty, many delegations strongly support inclusion of a mandatory lesser duty rule. Other delegations oppose the inclusion of such a rule, with one delegation noting that it was not practically possible to calculate an injury margin. Among those supporting a mandatory lesser duty rule, there are varying views about

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31. Agreement on Implementation of Article VI, supra note 3, art. 9, para. 1 (emphasis added).
32. Id.
the appropriate degree of specificity for any new rules and the extent to which those rules should prescribe or prioritize particular approaches to determining the appropriate level of duty.  

The situation scarcely had changed by April 2011, with the Chairman providing a similar summary at that time:

Many delegations strongly support inclusion of a mandatory lesser duty rule. Other delegations oppose with equal conviction the inclusion of such a rule, with one delegation noting that it was not practically possible to calculate an injury margin. Among those supporting a mandatory lesser duty rule, there are varying views about the appropriate degree of specificity for any new rules and the extent to which those rules should prescribe or prioritize particular approaches to determining the appropriate level of duty. Some delegations have indicated that at a minimum language in the current Agreement regarding the desirability of applying a lesser duty should be maintained.

Here again, the issue pitted not only the U.S. against the EU and many other Members, but also divided constituencies within many Members. Predictably, consumer groups championed a lesser duty rule, and producer groups steadfastly opposed it.

- Anti-circumvention (Article 9:5:3 of the AD Agreement)

Should an express set of rules to deal with circumvention of an existing AD order be added? Circumvention occurs when a foreign producer-exporter that is the target of an AD order seeks to evade the order by shipping (1) subject merchandise in parts or unfinished forms, (2) a slightly modified version of the merchandise, or (3) components to a third country, assembling them in the third country, and then sending them to the importing country that maintains the order. If so, then what numerical thresholds should be used to find dumping, injury, and causation? Should anti-circumvention measures apply to all imports of the product in question from a country, or target only imports from a

34. December 2008 Draft Rules Text, supra note 2, art. 9, para. 1 (emphasis added).
35. Agreement on Implementation of Article VI, supra note 3, art. 9, para. 1 (emphasis added).
specific producer-exporter, i.e., should the measures be country — or company — specific?

Members disagreed on all these questions. As the Chairman summarized in the April 2011 Draft AD Agreement:

Delegations disagree as to whether there should be specific rules on anti-circumvention. Some delegations consider that the only appropriate reaction to perceived circumvention is to seek initiation of a new investigation, while other delegations consider that anti-circumvention is a reality, and that rules on anti-circumvention are necessary to achieve some degree of harmonization among the procedures used by different Members. To the extent that rules are included, delegations disagree, inter alia, what types of circumvention should be addressed (with particular concern expressed regarding the use of anti-circumvention measures in respect of exports originating in a third country), whether numerical thresholds are desirable, whether findings of dumping, injury and causation should be required and whether anti-circumvention measures should be company-specific or country-wide.

Thus, one group, including the U.S. and EU, argued special multilateral rules are needed, especially to harmonize the existing array of national-level rules. They were dismayed at the deletion from the November 2007 Text of a specific provision that would have allowed a WTO Member to extend the scope of an AD order if that Member discovered an exporter covered by the order sought to circumvent it. Another group, including China, felt victimized by American and European anti-circumvention measures, and opposed any inclusion in the Draft Text of anti-circumvention rules. This group said the only appropriate response to alleged circumvention is to launch a new AD investigation.

- Sunset reviews (Article 11:3 of the AD Agreement)

The Members disputed the appropriate criteria for initiating and conducting a sunset review (that is, a review of an AD order five years

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37. See id.
38. Agreement on Implementation of Article VI, supra note 3, art. 9, para. 5.3 (emphasis added).
after its imposition). Members also disagreed sharply on what ought to happen after a sunset review. In the April 2011 Draft AD Agreement, the Chairman explained:

Delegations have widely differing views regarding various aspects of the sunset issue. There is sharp disagreement as to whether there should be any automatic termination of measures after a given period of time and, if so, after how long. On the two extremes of this issue are those delegations that favour automatic termination after five years without any possibility of extension and those that reject the principle of automatic termination altogether. Other issues dividing delegations include whether there is a need for additional standards and criteria governing sunset determinations and, if so, what standards and criteria would be most appropriate; what rules should apply to the initiation of sunset reviews, including whether there should be limitations on ex officio initiation, and proposed standing and evidentiary thresholds for initiation; and the timeframes for completion of investigations.40

In brief, some Members argued an AD remedy must terminate automatically after five years, with no possibility of extension. Others – such as the U.S. – rejected automatic termination, and were pleased by the deletion of a proposal in the November 2007 Text that would have capped the duration of any AD remedy at 10 years.41

- Third country dumping (Article 14:4 of the AD Agreement)

Should the rules allowing for investigation and prosecution of a dumping claim on behalf of a third country (i.e., that dumping in an importing country is causing injury to a domestic industry not in that country, but in a third country) be scrapped, or should they be revised to make them operational (i.e., more user-friendly, and thereby more practical than as set out in the AD Agreement)? Alternatively, should the possibility of a third country dumping action be eliminated entirely from the Agreement? The Chairman stated in the April 2011 Draft AD Agreement:

40. Agreement on Implementation of Article VI, supra note 3 (emphasis added).
Some delegations support new rules that would eliminate the requirement for Council for Trade in Goods approval to take anti-dumping action on behalf of a third country, as in their view the current rules are unworkable. Other delegations do not rule out such new rules, but consider that many other issues about how such actions would be taken would need to be resolved before they could reach a judgment on the desirability of operationalizing anti-dumping action on behalf of a third country. Yet other delegations question whether it is desirable to operationalize this provision at all, with certain delegations preferring that the provision be deleted entirely.42

The three-way split among Members again illustrated the lack of progress since December 2008. Third-country dumping, while not insignificant, ought not to have been a vexatious issue. Surely hard work, coupled with flexibility, could have produced a compromise for such an action, subject to strict, technical disciplines.

- Special and Differential (S & D) treatment (Article 15 of the AD Agreement)

On a topic of manifest interest to poor countries in the Islamic world, there was no consensus among WTO Members as to whether developing and least developed countries ought to get any preferential treatment beyond the modest special regard they are supposed to be accorded under the AD Agreement. In the April 2011 Draft AD Agreement, the Chairman explained:

The Group has continued to examine issues relating to special and differential treatment for developing Members, both as exporters and as users of anti-dumping. While some delegations advocate flexibilities for the investigating authorities of developing Members, for example in respect of initiation of investigations, other delegations are cautious about such flexibilities, particularly in light of the fact that many developing Members are now active users of anti-dumping. Regarding technical assistance, some delegations propose creation of a trade remedies facility that would assist smaller and resource restricted developing Members to develop the capacity to use such remedies. While some delegations oppose any facility that would assist Members

42. Agreement on Implementation of Article VI, supra note 3, art. 14, para. 4 (emphasis added).
to use trade remedies, others consider that all Members have an equal right to use trade remedies in a WTO-consistent manner.\textsuperscript{43}

So, after a decade of multilateral negotiations ostensibly dedicated to development, Members could agree neither on whether poor countries ought to have S & D treatment in respect of AD actions, nor on whether they should get legal training to handle them.

To close observers of the Doha Round, none of these 12 controversies was a surprise. That is because their origins lay in the birth of the Round. The U.S. consistently maintained that modifying AD (or other trade remedy) rules to improve transparency and due process were acceptable.\textsuperscript{44} But, the U.S. cautioned, substantive modifications to rules were not, as that would exceed the Doha Round negotiating mandate. The fact the December 2008 Rules Text and April 2011 Draft \textit{AD Agreement} could highlight controversies, but not suggest language to resolve them, underscored their severity.

This fact also underscored how the Round drifted from its original purpose growing out of the September 11 terrorist attacks. AD (and other trade remedies) can sharply circumscribe the market access of producer-exporters from developing and least developed countries to developed country markets. Ensuring an AD investigation is not abused for protectionist purposes that serve narrow domestic industry interests in the U.S. or other developed country, but undermine long-term national security interests in both the petitioner and respondent countries, is a matter WTO Members ought to have considered. Neither side gains if jobs and incomes are lost in a poor country because the merchandise of a producer-exporter in that country is knocked out of an important export market by an AD duty. The Members also ought to have considered ways to bolster the technical legal capacity of developing and least developed countries to bring and defend AD cases. Neither side gains if those jobs and incomes are lost either because the poor country was unable to combat \textit{bona fide} dumping in its own market, or fight a case effectively when the behaviour of one of its producer-exporters is challenged abroad.

\textsuperscript{43} Agreement on Implementation of Article VI, supra note 3, art. 15 (emphasis added).

\textsuperscript{44} See Daniel Pruzin, \textit{WTO: WTO Members Approve New Rules Chair; U.S. Maintains Hard Line on Antidumping}, 27 Int'l Trade Rep. (BNA) 1072 (July 15, 2010).
B. Five CVD Fights

As for CVDs, the December 2008 Draft Rules Text and April 2011 Rules Document emphasized five critical areas of unresolved controversy:  

- **Calculation of the Amount of a Subsidy (Article 14(c) of the SCM Agreement)**

Should a new provision be added covering government financing of loss-making institutions? The provision would deal with official loan or loan guarantees provided to institutions that incur long-term operating losses and also with funding to state-owned enterprises ("SOEs") that are not credit- or equity-worthy. As the Chairman explained in the April 2011 Rules Document:

> This issue originated in a proposal by the European Union to create a new category of prohibited subsidies covering the provision by virtue of government action of financing to a wide range of industries on terms and conditions inadequate to cover the long-term operating costs and losses of such financing, where this benefited exported goods.

Some Members argued the addition was needed to discipline trade-distorting financing schemes, which had proliferated in the fall 2008 with the onset of a global economic recession. Other Members fiercely opposed any change, because it would discriminate against SOEs. Still other Members, mindful of the global financial crisis triggered in September 2008, did not want to constrain their policy space to deal with prudential measures during a financial crisis.

- **Export Competitiveness (Article 27:5-6 of the SCM Agreement)**

Article 27:5 of the SCM Agreement accelerates the period during which a developing country must phase out its export subsidies from eight years (calculated from the date of the entry into force of the WTO Agreement, i.e., 1 January 1995) to just two years, if the country has

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47. Negotiations on Subsidies and Countervailing Measures, supra note 13, para. 5.

48. Id. ¶ 8.
reached export competitiveness in the subsidized product.49 Article 27:6 defines “export competitiveness” as a share in world trade of that product of at least 3.25 percent calculated for two consecutive calendar years. Egypt, India, Kenya, and Pakistan found two problems with these rules.50

First, they said they sought to lengthen the period during which the export competitiveness of a product is determined.51 They called for a change to a five-year moving average. By using a moving average over five-years, aberrational determinations of export competitiveness due to temporary market fluctuations would be avoided. Second, they advocated the flexibility to allow for the re-introduction of an export subsidy to a product that loses its export competitiveness.52 The SCM Agreement is silent as to whether a subsidy can be reintroduced under this circumstance.

But, many Members resisted these proposals.53 Some Members thought a five-year base period is too long, and queried how to operationalize the flexibility to reintroduce an export subsidy.54 Other Members opposed any change to the measurement period, and were skeptical of reintroducing an export subsidy, as it would upset the balance between minimizing trade-distortive effects of such subsidies on the one hand, and the need for subsidies in poor countries on the other hand.55

- S & D Treatment (Article 27:6 of the SCM Agreement)

The SCM Agreement entitled developing countries to phase out export subsidies over a longer period of time than developed countries. It also allowed them to keep these subsidies in respect of a particular product until they had reached export competitiveness in that product market (defined as 3.25 percent of world trade in 2 consecutive years). Members argued over two questions.

First, should the definition of a product that could receive an export subsidy be refined? Second, should a developing country be free to restore a subsidy if it loses export competitiveness in a product market, after having reached competitiveness, and if so, under what criteria and for how long? In failing to resolve their differences, they again missed

50. Id. ¶ 27.6; Negotiations on Subsidies and Countervailing Measures, supra note 13, ¶ 9.
52. Id.
53. Id. ¶¶ 9-11.
54. Id. ¶ 11.
55. Id.
an opportunity to fashion rules that could be of help to Islamic 
countries.

- Export credits and market benchmarks (Annex I, Illustrative List 
of Export Subsidies items (j)-(k), of the SCM Agreement)

Should export credits continue to be measured in terms of the cost 
incurred by the subsidizing government to provide these credits? Or, 
should they be gauged by the benefit they confer on a recipient? Some 
Members, especially developing countries, said the existing cost-to-
government methodology was both inconsistent with the general 
definition of a “subsidy” in Article I of the SCM Agreement, and 
disadvantageous to developing countries.56 As the Chairman explained 
in the April 2011 Rules Document:

This issue was first raised in a proposal by Brazil to 
amend item (j) and the first paragraph of item (k) of the 
Illustrative List of Export Subsidies (Annex I) to reflect a 
benefit to recipient basis for identifying prohibited export 
subsidies in the forms of export credits and guarantees, in 
place of the existing cost to government-based language. 
One concern underlying the proposal is that the generally 
higher government costs of funds in developing compared 
with developed countries means that a cost-to-government 
standard for export credits and guarantees will put 
developing country exports of capital goods at a structural 
disadvantage. If the developing Member provides export 
credits at rates covering its cost of funds, the rates will be 
systematically higher than those offered by developed 
countries using their own cost of funds as the benchmark. 
If the developing country were to match the terms offered 
by the developed country, it would have to provide credits 
at below its own cost of funds, and thus would run afoul of 
the prohibition in the first paragraph of item (k). A further 
concern behind the proposal is that the cost to government 
language of the provision is inconsistent with the 
Agreement’s general definition of “subsidy.”57

In other words, a developing country was at special risk of running 
afoul of the rules on prohibited export subsidies and being subject to an 
especially high CVD rate, because of the relatively higher cost of funds 
in developing versus developed countries. The idea championed by

56. Negotiation on Subsidies and Countervailing Measures, supra note 13, ¶ 12.  
57. Id.
Brazil was to account for this reality by measuring export credits and guarantees based on the benefit to recipients, not the cost to the government. Yet, other Members opposed this development-friendly idea as development-unfriendly.\textsuperscript{58}

Opponents argued using the benefit-to-recipient approach would boost costs for developing country borrowers, because it would reduce predictability (i.e., increase uncertainty) for government agencies that grant export credits, and thereby reduce the overall amount of financing available.\textsuperscript{59} In turn, the cost of financing would rise, and purchasers of financed goods would pay more for those goods. Those purchasers often are other developing countries, which tend to import rather than export capital goods, and are helped by such goods financed with inexpensive export credits. Finally, opponents contended, the cost-to-government is the internationally accepted standard methodology.

- **Export credits and successor undertakings (Annex I, Illustrative List of Export Subsidies item (k), of the SCM Agreement)**

Should changes the Organization for Economic Cooperation and Development (OECD) might make in its Export Credit Arrangement automatically have effect in the *SCM Agreement*? The Chairman set out the problem in the April 2011 Rules Document:

15. This issue originated in the same proposal by Brazil on export credits [discussed above], which in respect of the second paragraph of item (k) [of the of the Illustrative List of Export Subsidies (Annex I) to the *SCM Agreement*] proposed that any changes made to the “undertaking” referred to therein following the conclusion of the Uruguay Round would need to be adopted by consensus of WTO Members. For Brazil this is an issue of systemic concern, as the “undertaking” in question is the Arrangement on Officially Supported Export Credits, to which only a small number of WTO Members are parties, and changes to which are negotiated and approved at the OECD. Via the second paragraph of item (k), however, that undertaking establishes a safe harbour from the *SCM Agreement*’s prohibition for certain export credit practices, and panels have interpreted the provision’s reference to “successor undertaking” to mean the most recent version of the Arrangement adopted by its parties. Brazil thus is concerned that this interpretation means that a small

\textsuperscript{58} Id. ¶¶ 12, 14.

\textsuperscript{59} Id. ¶ 14.
group of countries operating outside the WTO can change WTO rules applicable to all Members. A number of delegations, including some parties to the Arrangement, objected to this proposal, which in their view would be fatal to the Arrangement. They consider that the Arrangement works well to discipline export credits, and that the frequent updating that it requires to remain current with market developments could easily be blocked at WTO by a Member for political reasons unrelated to the Arrangement itself.

17. . . On the one hand, some delegations consider that any rules that will be binding on WTO Members must be adopted by consensus decision of those Members. In this regard, the clarification was made that only changes to the “interest rates provisions” of the Arrangement would need to be submitted to the WTO for approval, as only these provisions are relevant to the safe harbor in the second paragraph of item (k). Others, however, remain concerned over the potential for WTO Members to veto evolutions of the Arrangement. They note that only a small number of non-OECD countries actually provide medium- and long-term export credits, and that these countries often are invited to participate in negotiations of revisions to the Arrangement. They consider that the OECD has expertise in the area, and note its recent outreach initiatives to expand participation in the Arrangement. In their view, WTO Members with no interest in export credits should not have the opportunity to block necessary changes to the Arrangement, and one institution should not be able to block the coming into force of agreements reached in another institution. . . .60

In brief, some Members thought changes in the OECD Arrangement should take effect through the SCM Agreement, essentially for the sake of efficiency, and because the OECD has expertise in the field. Others demanded the right to veto, in the WTO context, any changes made by the OECD, so that the subset of Members participating in that Arrangement could not change the rules on export credits for the entire Membership.

60. Id. ¶¶ 15, 17 (emphasis added).
In October 2010, China started a sixth battle over the SCM Agreement. It proposed that the Agreement be amended to include an Annex with disciplines on the use of “facts available” in CVD investigations, akin to the Annex in the AD Agreement.

The proposal served China’s self-interest: China was stung by the large number of CVD investigations launched against Chinese exports, particularly since 2007, when the DOC altered its long-standing policy against imposing the CVD remedy on imports from non-market economies (“NMEs”), of which China is one. “Facts available” may come from a petitioner in a CVD investigation, or sources of information other than the respondent foreign producer-exporter. An investigating authority may rely on such facts if the respondent either does not produce information it requests, or fails to provide useable information. Many CVD cases brought in the U.S. against Chinese merchandise have resulted in the imposition of CVDs on the basis of facts available.

So, proposed China, a new Annex to the SCM Agreement ought to create a safe harbour: an investigating authority must consider the “reasonable ability of the interested Member [i.e., the exporting country from which subject merchandise is shipped] or the interested party [i.e., the respondent] to supply a response” to a request for information. Critically, the authority, said the proposal, “shall not maintain a request for the information . . . if presenting the information as requested would result in an unreasonable extra burden on the interested Member or the interested party.” On its face, the proposal was problematic. How could an investigating authority in an importing country judge the “reasonable ability” of the target foreign country or respondent, especially given that they have an incentive to claim disability? Would the standard of “unreasonable extra burden” engender rounds of litigation at the WTO as to what it means? In brief, if the Chinese proposal was aimed at combating what it called biased and abusive CVD investigations, then surely the proposal erred too far in the other direction, and would impede fact-finding – that is, obstruct justice – via frivolous claims of disability and burden.

63. Id.
64. Id.
65. Id.
C. No Remedy for Small-Scale Muslim Fisherman, Either

As if the aforementioned battles on AD and CVD were not enough in number or intensity, fishing subsidies were the topic of yet fiercer conflict. On these subsidies, the December 2008 Draft Rules Text and April 2011 Rules Document were more disheartening than on AD and CVD. WTO Members had leapt backwards from where they appeared to have been in November 2007.

Fishing subsidies are not extraneous to negotiations about trade remedies. Rather, they concern governmental support in a particular sector, and thus are squarely within the kind of measure subject to a classic trade remedy, namely, a CVD. Moreover, their link to poverty is obvious. "Over two billion people depend on fish as a major source of protein and income."66 Bangladesh, Malaysia, Indonesia, Somalia, and Yemen are among the examples.67 That also is true of non-Muslim countries with large Muslim coastal communities, including India, the Philippines, and Thailand.68 Such countries are not necessarily the most blameworthy in terms of causing or exacerbating the over-fishing crisis.

Rather, it is developed countries that have considerable resources to subsidize large-scale commercial fishing fleets. The long-distance fishing fleets of the EU and China are not commercially viable, and survive only because of government subsidies for fuel, other operational expenses, and vessel construction and maintenance.69 For example, this support allows foreign fleets to obtain more, bigger, and faster boats than they otherwise would have.

Even when developed countries seek to cut such subsidies and provide alternative support to their fisherman to use environmentally sustainable catch methods, the fishermen do not always behave. In May 2011, for example, an undercover operation by the EU Fisheries Commission to crack down on illegal fishing discovered Italian fishermen use drift nets (which span several kilometres in length) to catch swordfish and Atlantic bluefin tuna.70 The tuna, which migrate

66. See Amy Tsui, Members of Congress Ask USTR to Ensure WTO Talks Include End to Fishery Subsidies, 28 Int'l Trade Rep. (BNA) 1167 (July, 14 2011) (quoting a letter dated 6 July 2011 to U.S. Trade Representative Ambassador Ron Kirk from 12 Senators and 30 Members of the House of Representatives).
68. See Tsui, supra note 66.
69. See Tsui, supra note 66.
70. Guy Dinmore & Eleonora de Sabata, Covert Mission Finds Sicily Skippers Still Use Drift Nets, FIN. TIMES May 2011, at 21-22 (stating that as a result, the European Court of Justice (ECJ) is likely to impose significant monetary penalties against Italy). See generally Seth Korman, Note, International Management of a High Seas Fishery:
to the Mediterranean Sea, along with dolphins, sharks, turtles, and whales, and some birds, are endangered species, all of which are ensnared in drift nets. Thus, the EU banned drift nets in 2002, and subsidized its fishermen to desist from their use. The Italian fishermen pocketed the subsidy, flouted the ban — and Italian authorities, including the Coast Guard, did nothing. Consider, then, the impact on the countries of the Southern and Eastern Mediterranean — all of which, save for Israel, are Muslim. Their smaller-scale fishermen suffer from stock depletion caused by their European counterparts.

Nonetheless, from the American perspective, the link between disciplines on fish subsidies to promote sustainable development, on the one hand, and alleviating poverty and susceptibility to Islamist extremism on the other hand, was lost. In the words of four former U.S. Trade Representatives (USTRs), William Brock, Carla Hills, Susan Schwab, and Clayton Yeutter, in an April 2011 letter to President Barack H. Obama, America viewed the matter as an opportunity to “set a historic precedent by showing that trade can directly benefit the environment while promoting jobs, exports, and open markets.” That is, at stake for the U.S. was an environmental measure that would not interfere with market access for American fish exports.

America focused on its commercial and recreational fisheries interests, which account for over two million jobs in the U.S. For U.S. policy in the Doha Round, the possibility subsidies by foreign governments might be at cross-purposes with America’s counter-terrorism efforts was of marginal (if any) importance. Rather, they mattered because they undermined opportunities for American exporters in third countries, by putting American fisherman at a disadvantage. For example, by cutting operating costs of foreign producers and exporters, they injured American coastal communities. Even environmental groups, such as Mission Blue, Oceana, and the World Wildlife Fund (WWF) emphasized fishing subsidies “undermine[] U.S. trade opportunities in potential export markets” by “creating an uneven playing field and reducing the stocks on which U.S. fishers depend.” In truth, both rationales matter, or should.


71. Dinmore & de Sabata, supra note 70.

72. Id.


74. See Tsui, supra note 66.

Unsurprisingly, by April 2011, the only points on which WTO Members agreed were incontrovertible facts:

- A global crisis of overcapacity and overfishing exists, with over 85 percent of the world's fisheries being overexploited, fully exploited, depleted, or in need of recovery, and with 63 percent of fish stocks around the world requiring rebuilding.\(^{76}\) In April 2011, the Chairman intoned:

The longstanding blockage in these negotiations exists in spite of the strong consensus among delegations of all sizes and levels of development that the state of global fisheries resources is alarming and getting worse. Indeed all delegations, when referring to data, rely on the same statistics – those published by the FAO [United Nations Food and Agriculture Organization] – the latest of which show that 85 per cent of world fish stocks are either fully- or over-exploited. All recognize that this is a crisis of exceptionally serious implications for all humankind, and particularly for the poor in many countries who are heavily dependent on fisheries as a source of nutrition and employment. Nor is there disagreement that developing as well as developed countries are major participants in global capture fishing, and that all countries face a common problem and share responsibility to contribute to finding solutions, although not necessarily on a uniform basis.\(^{77}\)

- The crisis is due in part to the $30-34 billion annually (as of 2006) governments grant as fishing subsidies, including $20 billion (equivalent to 20-25 percent of revenues) to increase the capacity of fleets to fish for longer periods, more intensively, and at further distances. As the Chairman put it: "most [Members] agree that subsidies play a major role in contributing to these problems [of overcapacity and overfishing], and that this is what is behind the

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77. Negotiations on Fisheries Subsidies, supra note 14, ¶ 12.
negotiating mandate to strengthen disciplines on fisheries subsidies, including through a prohibition.”

- Overall, annual fishing subsidies (as of 2010) equal about 20 percent of the value of the world catch of fish.

- Seven industrialized countries account for 90 percent of the subsidies – Canada, the EU, Japan, Korea, Russia, Taiwan, and the U.S.

- Fishing subsidies provided by the EU and Japan have helped contribute to a worldwide fishing fleet that is about 250 percent larger than needed to fish at sustainable levels. Ominously, Brazil and China are increasing their subsidies nearly to the level of the industrialized countries. Over 50 percent of the large vessels that engage in unsustainable fishing are Chinese, and the Communist Party supports them with fuel subsidies.

- The crisis has adverse economic and environmental effects. It also has impacts on nutrition and health, because over one billion people rely on fish as the key source of their protein.

Despite widespread appreciation of these facts, the Members could not agree on a common strategy to deal with the crisis. Their disagreement persisted, as the April 2011 Rules Document indicated essentially no progress had been made from December 2008 through mid-2011.

78. Id.
81. Amy Tsui, USTR Hopes to Use Doha WTO Talks, TPP to Eliminate Fishing Subsidies, Support Oceans, 27 Int’l Trade Rep. (BNA) 1103 (July 22, 2010).
82. Id.
The Members were split three ways:

1) First, Japan, Korea, and Taiwan were skeptical of a link between subsidies and over-fishing.

2) Second, the so-called "Friends of Fish" on the other side—consisting of Argentina, Australia, Chile, Colombia, New Zealand, Norway, Iceland, Pakistan, Peru, and the U.S.—sought stringent disciplines on fisheries subsidies.\(^{87}\)

3) Third, Brazil, China, India, Indonesia, and Mexico demanded exceptions, i.e., S & D treatment that would allow flexibility to deviate from any such disciplines for poor countries.\(^{88}\)

The desire of the second group for stringent disciplines clashed head-on with the skepticism of the first group. The demands of the third group caused consternation among the second group, which feared exceptions for developing countries would undermine any new disciplines.

Accordingly, the Members disputed eight key areas:

- **Benchmarks?**
  
  What metrics should be used to gauge the existence of overcapacity or overfishing objectively and precisely?

- **Judge?**
  
  Should individual Members be permitted to self-judge overcapacity and overfishing?\(^{89}\) Or, should some other party, group, or institution make those judgments?

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87. See World Trade Organization, *Briefing Notes – Rules*, available at www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm. See also Amy Tsui, *USTR Hopes to Use Doha WTO Talks, TPP to Eliminate Fishing Subsidies, Support Oceans*, 27 Int'l Trade Rep. (BNA) 1103 (July 22, 2010) (quoting Senator Ron Wyden (Democrat – Oregon), Chairman, Senate Finance Committee Subcommittee on International Trade, Customs, and Global Competitiveness, telling Mark Linscott, Assistant USTR for Environment and Natural Resources: "Let me just give you something to take back to Geneva – no fish subsidies agreement, you will have my opposition. Congress in my view is not going to accept it and all you have to do is look at this Committee to get an idea of how powerful this issue is.").


Fisheries Management?

Should the core of a deal on fisheries subsidies be obligations about fisheries management, or a prohibition on subsidies? As the Chairman explained in April 2011:

91. From the outset of the negotiations, the issue of fisheries management has figured prominently in the debates. Some delegations argue that if proper management is in place, subsidies cannot cause either overcapacity or over-fishing. Others, however, consider that while fisheries management is important, it cannot on its own combat the pressure for overcapacity and overfishing brought to bear by subsidization. In their view, the global crisis in fish stocks is ample evidence that fisheries management by itself is inadequate to control overcapacity and overfishing. In this regard, the example of the North Atlantic cod industry has been cited.

92. These differences of view in turn are reflected in very different proposals as to the role that fisheries management should play in the disciplines. Delegations holding the former view consider that fisheries management should form the core of the new rules, and that the subsidy disciplines should play the auxiliary role of creating incentives for Members to adopt strong management systems. Their proposals thus are to shorten the list of subsidies to be prohibited, and to make these prohibitions subject to certain management-related conditions (such as subsidizing the replacement of retired vessels with vessels of smaller capacity), and/or to put greater emphasis on adverse effects provisions, in which the existence and operation of the fisheries management system would play a pivotal role in determining whether subsidization had caused overcapacity and overfishing in a particular situation.

93. Other delegations, however, maintain that the core of the disciplines must be a prohibition of certain subsidies, and that fisheries management should be a conditionality for making use of exceptions from the prohibition (whether general exceptions or exceptions under special and differential treatment). They further consider that while having fisheries management in place can be a relevant factor in assessing whether non-prohibited subsidies have
caused adverse effects to fish stocks, this by itself should not be sufficient for a successful rebuttal of a claim.\textsuperscript{90}

In brief, Members could not agree on the basic paradigm for an agreement—whether it was about resource management or subsidy prohibition. This disagreement, of course, begged an important question: what are the key features of “fisheries management” to which all Members should adhere?\textsuperscript{91}

\textbf{• Prohibition?}

How should the scope of the fishing subsidy prohibition be delineated?\textsuperscript{92} Should the subsidies ban apply to a comprehensive list, i.e., a broad and strict prohibition, with coverage including a ban on support for:

1) construction of new fishing vessels;
2) repair and modification of existing vessels;
3) operating costs of vessels and in- or near-port processing activities;
4) fuel;
5) port and other infrastructure facilities;
6) incomes of fishermen;
7) prices of fish products;
8) destructive fishing practices;
9) overfished fisheries;
10) transfer of fishing or service vessels (from one to another country);
11) illegal, unreported, and unregulated (“IUU”) vessels;
12) transfer of access rights (whereby one country that pays for fishing access rights in the waters of another country sells those rights to a third country)?\textsuperscript{93}

Or, should a conditional approach to prohibition be used, allowing for certain fishing subsidies, such as artisanal (i.e., small scale) fisheries, natural disaster relief, \textit{de minimis} support, and barring only subsidies most harmful to global fishing stocks?\textsuperscript{94}

\textsuperscript{90}\textit{Negotiations on Fisheries Subsidies, supra} note 14, ¶¶ 91-93 (emphasis added).
\textsuperscript{91} See id. ¶¶ 94-95.
\textsuperscript{92} See id. ¶¶ 17-18.
\textsuperscript{93} See id. ¶¶ 25-45.
\textsuperscript{94} See id. ¶¶ 20-24; \textit{New Draft Consolidated Chair Texts, supra} note 2, ¶ 5; see Pruizin, \textit{supra} note 88.
Related to these questions was how to draft a prohibition. Should a positive list of subsidies, akin to Article 1:1 of the SCM Agreement, be created, with the scope of prohibited subsidies on the list "modulated by general exceptions"? Or, would a negative list, identifying only particular types of subsidies as unlawful, be appropriate?

- **Exemptions and S & D Treatment?**

For the benefit of poor countries, what specific types of fishing subsidy programs might be exempt from a prohibition on fishing subsidies, above and beyond the general exceptions to which any country could have recourse? Accordingly, Members had failed to agree on the possible exemptions for developing and least developed countries from any ban on fishing subsidies, as well as on technical assistance for such countries. As the Chairman stated in April 2011:

> ... virtually all of the proposals for special and differential treatment are based on permanent exceptions from various prohibitions, in various circumstances and subject to various conditions. That said, there are fundamentally different visions as to how S&DT [special and differential treatment] should be structured, what particular exceptions should be provided in which particular circumstances, and what conditions should apply to the different exceptions.

Among the possible exemptions were subsidy programs:

1) that contribute only minimally to overcapacity or overfishing;

2) whose effects could be controlled adequately by a fisheries management scheme;

3) that focus on small operations, i.e., a "bottom tier" of activities that relate to artisanal (small-scale) or subsistence fishing, which would not contribute to overcapacity or overfishing;

4) that are important to the economic development of a poor country.

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95. *Negotiations on Fisheries Subsidies, supra* note 14, ¶ 10.
96. *See generally id. ¶¶ 46-83* (describing proposed subsidy exceptions for developing countries, including a tiered proposal structure).
97. *See id. ¶ 82* (concerning technical assistance).
98. *Id. ¶ 46.*
100. *See New Draft Consolidated Chair Texts, supra* note 2, ¶ 5.
Members contested the parameters for exemptions, as well as the exemptions themselves. For example, how should “subsistence” fishing to be measured? How does it differ from “artisanal” activities? Would income and price support, funding for port infrastructure, and subsidies for the construction of small-decked and undecked vessels qualify for an exemption, because they matter to economic development? In this respect, fuel subsidies, and support for other operating costs, were a “very divisive” topic.

Should flexibilities for poor countries to derogate from any ban on fishing subsidies extend to support for activities on the high seas, that is, beyond the Exclusive Economic Zone (“EEZ”) of those countries? This question also provoked heated debate.

Developing countries argues that equity suggested, “yes.” Poor countries “are latecomers to high seas fisheries, and should be able to use whatever means they deem necessary in order to catch up to the developed world.” International law also suggested, “yes,” because, “all countries have the right to a share of fisheries in international waters, but . . . the cost advantages of developed Members’ fishing fleets are too great for [developing countries] to overcome without subsidies.” Fairness, too, suggested, “yes.” “Developed countries are responsible for the overfishing of high seas stocks,” but now seek to “impose a standstill on high seas fishing.” That standstill would hurt the vulnerable resources, i.e., spawning and juvenile stocks, within the EEZs of developing countries. Nature, also, counseled for an affirmative answer: the distinction between EEZs and the high seas is artificial, because many stocks are highly migratory.

Developed countries offered strong rebuttals. First, the high seas are “the most biologically and politically vulnerable” fishing areas, as there is no national jurisdiction and thus no mechanism to ensure the “internationally-shared fisheries resources” are managed sustainably. Second, any fishing activity outside of an EEZ is by definition “highly industrialized,” not subsistence or artisanal, even if a poor country engages in such activity. So, all countries should be

101. See Negotiations on Fisheries Subsidies, supra note 14, paras. 68-69.
102. Id. para. 73.
103. See id. paras. 75-81.
104. Id. para. 76.
105. Id.
106. Id.
107. Id. para. 77.
108. Id. para 79; see also id. para. 81 (describing the problems of enforcing sustainable conditions for a S & D treatment exception that allows for a subsidy for fishing activities on the high seas).
109. Id. para. 80.
subject to the same subsidy disciplines on high seas fishing. Third, a poor country can protect its spawning and juvenile stocks with a sound "national fisheries management" program.\textsuperscript{110}

At the heart of the disagreement lay the fact poor countries demanded S & D treatment in connection with a problem for which they are partly to blame. The Chairman indicated as much in April 2011:

47. Among the considerations cited frequently in this context is the important role of developing countries in world marine capture production. According to FAO statistics, six of the top ten fishing nations, and 11 of the top 15, are developing countries, and developing countries collectively account for about 70 per cent of global capture production. For many Members, given these facts S&DT cannot simply be a blanket carve-out from the disciplines for all developing Members, as in their view this would render the overall discipline ineffective. A number of developing Members, while stressing that they do not seek a simple blanket carve-out, nevertheless consider the absolute figures to be misleading in that they mask the comparative efficiency and magnitude of countries' fishing activities, and thus their relative impacts on global fisheries resources. They argue instead that the use of catch per capita, or catch per fisher, as alternative measures, show that developing countries make less impact on global resources than do developed countries.

48. Some of the differences in the approaches advanced by different Members appear to relate to the different rationales advanced for S&DT in the particular context of fisheries subsidies disciplines. In this regard, objectives of S&DT that have been referred to in the discussions and proposals include: (1) poverty alleviation, i.e., assistance for vulnerable, disadvantaged populations; (2) development of the fisheries sector as a source of jobs, income and trade, both to lift people out of poverty and to create new opportunities for economic development and linkages; (3) building up domestic capacity to exploit the fisheries resources within the national jurisdiction; (4) enhanced policy flexibility for Members with a small share of global fish catch, on the grounds that they have at most a negligible impact on global overcapacity and overfishing; (5) extending domestic fishing activities beyond coastal

\textsuperscript{110} Id.
areas, both into the EEZ [Exclusive Economic Zone] and (in some cases) into the high seas, to relieve pressure on coastal fisheries resources, including spawning and juvenile populations; (6) "catching up" to the developed world in terms of vessels, technology, scale, and areas of operation; and (7) exercising rights under international law to exploit commercially valuable fish stocks in international waters, the products of which are traded internationally. All proposals and discussions emphasize the need for the subsidies to be deployed and the subsidized activities to be conducted in a sustainable manner, although like the different approaches to the S&DT exceptions, the proposed approaches to the accompanying sustainability conditionalities vary greatly.111

In other words, there was considerable debate over the guilt of poor countries, and the theory underlying any S & D differential treatment they might get. Unsurprisingly, the Members could not agree on the practical matter of how to calibrate the nature, scale, and geographic scope of their activities that should be exempt from any disciplines.112

Also unresolved, then, were the precise fisheries management obligations a poor country would have to implement before having access to an S & D treatment exception that permitted it to subsidize its fisheries in some manner. Presumably, these obligations would require the country to implement “internationally-recognized best practices, including regular science-based stock assessments.”113 And, what transition rules would apply to developing and least developed countries, so that they might have more time to phase in their obligations?114

Finally, whether S & D treatment should be tailored for different categories of poor countries was in dispute. Members generally agreed least developed countries ought to get the best of S & D treatment.115 But, they worried that some developing, and even some developed, countries might behave unscrupulously and try to take advantage of the exemptions designed for least developed countries. And, they could not agree on whether distinctions should be made among developing countries. Obviously, doing so along the lines of the draft agriculture and NAMA proposals (e.g., with differentiations for net food importing developing countries (“NFIDCs”), certain recently acceded members

111. Id. ¶¶ 47-48.
112. See id. ¶ 10.
113. Id.
114. See id. ¶ 11.
115. See id. ¶ 49.
("RAMs"), and small, vulnerable economies ("SVEs"), or along new lines (e.g., distinguishing developing countries with a small share of global wild fish capture) would risk making the fishing subsidy rules vastly more complex.116

- **Notification?**

What scheme should be used for Members to notify one another of their fisheries subsidies, particularly if they sought to invoke a general or S & D treatment exception?117 How much advance notice must a Member provide?118 To what forum should notice be given – the FAO, WTO, or some other entity?119 What information would be sufficient to demonstrate that a Member qualified for an exception?120

Related to problems of notification were questions of what to do with information in a notification? Should there be a review of the practices of the notifying country, and if so, what kind of review should it be?121 For example, if notification is to the FAO, then should it be empowered to render a judgment as to the soundness of the fisheries management system in a poor country, and the entitlement of that country to invoke an exception? Would this judgment be binding? Could it be used in a WTO adjudicatory proceeding? Should a non-notified subsidy be presumed rebuttably to be prohibited?122

- **Remedy?**

To be meaningful, any discipline on fishing subsidies would have to have associated with it a remedy for breach.123 Likewise, an unlawful subsidy would have to be attributed to the subsidizing government, not the flag of the vessel carrying subsidized fish (otherwise, it would be easy to circumvent the disciplines).124 And, the rule of origin for fisheries product, used for customs and labeling purposes, would not affect this attribution. But, what should the legal criteria for the remedy be?

Should the "traffic light" scheme of the SCM Agreement be used, whereby certain subsidies are forbidden ("red light") as long as they are specific, and are presumed irrefutably to cause adverse effects, while

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116. See id.
117. See id. ¶¶ 11, 97.
118. See id. ¶¶ 99-100.
120. Id. ¶¶ 11, 104.
121. See id. ¶¶ 11, 101-03.
122. Id. ¶¶ 11, 97.
123. See id. ¶¶ 11, 84.
124. Id. ¶¶ 11, 84, 90.
other subsidies are actionable ("yellow light") if they are both specific and cause adverse effects?\textsuperscript{125} What sort of "adverse effects" should be actionable – only those in relation to fish stocks, such as over-capacity and over-fishing, or any effect on trade?\textsuperscript{126} What test should be used to establish a causal link between adverse effects and subsidization?\textsuperscript{127} Is the mere absence of strong resource management enough to deem such a link exists, or must more be shown?

As to the remedy, should it be limited to a CVD, as per Article 7:9 of the SCM Agreement?\textsuperscript{128} Or, should a WTO panel or the Appellate Body be empowered to fashion a different sort of remedy? Should the remedy be the same for all types of fish, or should a distinction be made for highly migratory stocks?\textsuperscript{129} Should the remedy cover only fish from the "same stock," or also a "directly competitive product"?\textsuperscript{130}

- \textit{Enforcement}?

What methods should be used to monitor and survey any exempt fishing subsidy programs, to ensure the integrity of the prohibition is not undermined and thus to help prevent overcapacity and overfishing?\textsuperscript{131} For instance, should inspectors from the FAO review whether a poor country is implementing its fisheries management obligations?\textsuperscript{132}

Thus, Chairman Valles simply put to the Members in his "Road Map" a long list of questions concerning fundamental issues to address.\textsuperscript{133} They were back to square one.

These issues were under the negotiating mandate Members undertook three years before the Draft Text, in the December 2005 Hong Kong Ministerial Conference. And, following the Seventh Ministerial Conference in Geneva in November-December 2009, the Chairman readily admitted no progress had been made in the year

\textsuperscript{125} See id. para. 5.
\textsuperscript{126} Id. para. 87.
\textsuperscript{127} Id. para. 89.
\textsuperscript{128} See id.
\textsuperscript{129} Id. para. 88.
\textsuperscript{130} Id.
\textsuperscript{131} See New Draft Consolidated Chair Texts, supra note 2, ¶ 7.
\textsuperscript{132} See Negotiations on Fisheries Subsidies, supra note 14, ¶ 10.
\textsuperscript{133} See New Draft Consolidated Chair Texts, supra note 2, ¶¶ 10-11 (concerning the prohibition of fishing subsidies), ¶¶ 12-13 (concerning general exemptions from the prohibition), ¶¶ 14-15 (concerning S & D treatment), ¶ 16 (concerning general disciplines on, and actionability of, fishing subsidies), ¶¶ 17-20 (concerning fisheries management), 21-22 (concerning transparency), ¶ 23 (concerning dispute settlement), ¶¶ 24-25 (concerning implementation), ¶¶ 26-27 (concerning transition rules).
since he issued his Text (i.e., since December 2008). Chairman Valles elaborated on that depressing conclusion in April 2010. Deciding to retire from his post as Chairman after six years, and return to Uruguay, he said the bottom-up approach embodied in the December 2008 Text had been fruitless, and – worse yet – Members had made no significant progress after eight years of negotiations on bridging differences on AD or CVD rules. His successor, Ambassador Dennis Francis of Trinidad and Tobago, wrote in April 2011:

13. . . . [W]hat then is the problem? Why have these negotiations been underway for 10 years with little tangible progress in finding a solution? In my view, it seems that most (although not all) delegations, rather than seeking to build convergence by indicating acceptance of the appropriate level of disciplines (and of the policy changes that this would imply), to effectively address what is undeniably a common and rapidly worsening problem, appear to be focusing principally on maintaining their own status quo by placing on “others” the main responsibility to implement solutions, while minimizing the impact of disciplines on their own activities. Thus in spite of the nearly universal calls for disciplining subsidies in an effective way, many delegations in practice seem to elevate the exceptions above the disciplines. For some developed Members, a main reason given is that subsidies are necessary to protect traditional ways of life, vulnerable coastal communities, and jobs in the fisheries sector. For many developing Members, a main reason often cited is the need for policy space to subsidize in order to harness fisheries as a basis for development, economic growth, and employment. In the face of the sharp and continuing declines in the fisheries resources, however, it is hard to see how such strategies can either protect communities and jobs or be a source of food security and stable growth over the long-term.

14. . . . [A] unified, long-term strategic approach to cooperating to rationalize economic signals – including by giving priority to collectively reducing the level of capacity- and effort-enhancing subsidies – can actively promote and contribute to profitability of global fisheries, with the

135. See Daniel Pruzin, WTO Chair Cites Absence of Progress in Doha Antidumping, Subsidies Talks, 27 Int’l Trade Rep. (BNA) 659 (May 6, 2010).
hugely advantageous additional benefits of economic and environmental sustainability. . . . [F]isheries are often compared to the prisoner’s dilemma: non-cooperative pursuit of individual payoffs leads to overfishing, which in turn imposes economic loss (not to mention negative environmental effects) on all parties involved. In fact, it is widely-accepted that the economic benefits lost due to overfishing are significant – a World Bank Report gives an estimate of U.S. $50 billion annually, without counting the out-of-pocket additional costs of subsidies (estimated to be at least U.S. $16 billion annually). To put these figures in context, the value of the total global marine fish catch is around U.S. $90 billion. Like the prisoner’s dilemma, however, fisheries are not a zero-sum game. Successful subsidy negotiations can help bring about a situation where profitability and economic and environmental stability are mutually reinforcing, contributing to sustainable wealth creation.

15. In order for the negotiations to make significant progress, I am of the view that negotiators will have to focus more on these incontrovertible realities no matter how inconvenient, and less on protecting their short-term defensive interests. Unless this happens, I do not hold great prospects for the fisheries subsidies negotiations.136

A more honest assessment is hard to come by.

III. NOT FACILITATING TRADE

A. Progress through April 2009

By April 2009, it appeared a Doha Round agreement on trade facilitation (i.e., simplifying customs procedures, which can be a non-tariff barrier to trade, so as to reduce the transactions costs of trade and thereby increase trade flows by speeding up procedures for the clearance and release of merchandise) might be within reach. A June 2010 study by the Peterson Institute for International Economics states that reducing the costs of moving goods across international borders could boost global Gross Domestic Product (“GDP”) by over $100

Additionally, the WTO Director-General, Pascal Lamy, rightly explained in June 2011:

... implementation of the Trade Facilitation measures discussed in Geneva [i.e., in the Doha Round] could reduce total trade costs by almost 10 percent....

... For OECD countries it currently takes on average about four separate documents and clearing the goods in an average of ten days at an average cost of about $1,100 per container. By contrast, in Sub-Saharan Africa almost double the number of documents are required and goods take from 32 days (for exports) to 38 days (for imports) to clear at an average cost per container of between $2,000 (for exports) and $2,500 (for imports). The overall world champion at trade facilitation is Singapore, where four documents are required and goods are cleared in, at most, five days at an average cost of around $456 per container. At the other end of the scale are many of the low-income developing countries, in particular the landlocked developing countries, whose trade-processing costs can mushroom as a result of the effort required to move goods in transit by road or rail through their neighbours to their nearest international port. According to recent research, every extra day required to ready goods for import or export decreases trade by around 4 percent.

Handicapping the world’s least competitive producers and poorest consumers with additional transaction costs of $1,000 or more for each container of goods that they manage to export or import is clearly absurd.138

Indeed, even a one percent improvement in cutting red tape and streamlining customs procedures, as measured by an index of indicators for transparency and predictability, can increase trade in industrial goods by 0.7 percent.139


Under the April 2009 Doha Round proposed agreement, developing countries would be able to implement immediately between 30 and 50 percent of the obligations, with no technical assistance required to do so. Implementation of the deal, however, would be part of a single undertaking, meaning the deal was contingent on resolving the agriculture, NAMA, services, and rules issues. The agreement would deal with three articles of GATT that cover transit, fees and formalities (i.e., paperwork and documentation), and transparency of regulations—Articles V, VIII, and X, respectively. Most if not all WTO Members appreciated their shared interest in trade facilitation, though developing countries were keen to avoid having heavy obligations imposed on them, and insisted on technical and financial assistance from developed countries to meet the burdens of implementing any trade facilitation obligations.

B. Heavily Bracketed April 2011 Draft Trade Facilitation Text

On 14 December 2009, the Negotiating Group on Trade Facilitation published a “Draft Consolidated Negotiating Text.” Containing 16 Articles, it was the first draft accord in the Doha Round on the topic, but it was replete with bracketed text. On 21 April 2011, the Negotiating Group published a new version of the Text. Organized into two Sections, with Section I containing Articles 1-15, and Section II containing 10 paragraphs on S & D treatment, the April 2011 Draft Trade Facilitation Text looked very much like the December 2009 predecessor. It, too, was replete with bracketed text.

The key highlights of the 37-page April 2011 Draft Text are as follows:

- **Provisions Relating to GATT Article X on Transparency of Trade Measures**

These provisions covered publication and availability of information in Article 1, prior publication and consultation in Article 2, advance rulings in Article 3, appeal (i.e., review) procedures in Article 4, and other measures to enhance impartiality, non-discrimination, and transparency in Article 5.

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140. See Amy Tsui, *Trade Facilitation Agreement Bright Spot in Doha, May be Finished in Few Months*, 26 Int'l Trade Rep. (BNA) 507 (Apr. 16, 2009).


142. See *Draft Consolidated Negotiating Text*, supra note 4.

143. See *Revised Draft Consolidated Negotiating Text*, supra note 5.

144. *Id.* arts. 1-5.
Article 1, Paragraph 1, called for publication of trade measures. Article 1, Paragraph 1:1 explained such publication should be prompt, in a non-discriminatory and easily accessible manner that enables all governments, traders, and interested parties to become acquainted with the relevant trade measures. The measures at issue concern (inter alia) import, export, and transit procedures, applied duty rates, fees and charges, rules on customs classification and valuation, rules of origin, penalties, appeal procedures, and tariff-rate quotas. Article 1, Paragraphs 2 and 3 required establishment of an official website and inquiry points. Publication need only be in the vernacular of the country at issue, but if practicable, should be in at least one WTO language (English, French, or Spanish).146

Article 2 required an interval between publication and entry into force and opportunities for interested parties to comment on trade measures. That interval must be "reasonable," as must be the comment period, but the precise amount of time is undefined. Also unspecified is what constitutes an "opportunity" to comment. Indeed, whether the chance to comment would be mandatory, or provided by a Member "to the extent practicable," was unresolved.146

Article 3 mandated issuance by governmental authorities of advance rulings, possibly in a maximum period of 150 days (a drop from 180 days in the December 2009 Text), with clear procedures as to how an applicant may obtain one.147 An applicant could seek an advance ruling on matters of tariff classification (and, therefore, the applied duty rate to be imposed), customs valuation, duty drawback, tariff rate quotas, rules of origin, and fees and charges.148 Any such ruling must be valid for a "reasonable" (albeit unspecified) period of time.149 However, no advance ruling would be required if an adjudicatory decision on the issue were rendered, or the matter was pending before an adjudicatory or administrative body.150 Advance rulings would not be precedential, but binding only on the applicant who sought the ruling and the relevant customs agency.151

Article 4 obligated each WTO Member to ensure it allows for administrative and judicial appeals of customs decisions.152 Appeal procedures would have to be non-discriminatory, and decisions set out supporting reasoning.153 But, to what body could an appeal be lodged,

145. See id. art. 1, paras. 1.2, 2.2.
146. Id. art. 2, para. 2.1.
147. Id. art. 3, paras. 1.1, 4.6.
148. See id. art. 3, para. 1.7.
149. See April 2011 Draft Trade Facilitation Text, art. 3, para. 13.
150. See id. art. 3, para. 1.2.
151. Id. art. 3, para. 1.3 ter.
152. Id. art. 4, para. 1.1.
153. Id. art. 4, paras. 1.3-1.5.
and would that body have to be independent of the customs official or agency rendering the controversial decision? These crucial questions were unresolved.154

Article 5 prescribed disciplines on the issuance of import alerts (or rapid alerts) concerning food safety, possible risks to animal or plant health, and the monitoring of the quality of imported foods. Such alerts would have to be based on positive evidence that food failed to meet uniform, objective standards, possibly based on international references. With multiple alternatives in bracketed text, there was no consensus among Members as to the precise criteria to trigger issuance of an alert.155 Article 5 also discussed detention and test procedures with respect to problematic imported goods.156

- Provisions Relating to GATT Article VIII on Fees and Formalities Connected with Importation and Exportation

These provisions concerned disciplines on fees and charges imposed on imports and exports in Article 6, and requirements for the release and clearance of goods, in Article 7. Article 6 required fees and charges be imposed only for services rendered in connection with importation or exportation, be limited to the amount of the services rendered, and not be calculated on an *ad valorem* basis.157 Article 6 also required a WTO Member to publish its fee schedule and not enforce it until an adequate time period after publication.158 And, it set out limitations on the imposition of penalties, including that they be proportionate to the infraction, there be no conflicts of interests associated with their assessment and collection, that a written decision accompany any imposition of a penalty, and that the possibility of waiver of the penalty exist if the infraction is disclosed voluntarily by the breaching party.159

Article 7 obligated Members to maintain procedures on pre-arrival processing, i.e., administrative procedures of a customs authority to examine import documentation submitted by traders prior to the arrival of goods so as to expedite the clearance and release of goods upon their arrival, and allow for immediate release. But, Members could not agree on whether such processing would be an entitlement for all traders or a privilege only for traders with good compliance records.160 Article 7 also authorized Members to separate release from final determination and payment of customs duties and fees, i.e., to allow an importer to obtain

154. See *id.* art. 4, para. 1.1.
155. See *id.* art. 5, paras. 1.1-1.5.
156. *Id.* art. 5, paras. 2.1-3.4.
157. *Id.* art. 6, paras. 1.1-1.3.
158. *Id.* art. 6, paras. 1.4-1.5.
159. *Id.* art. 6, paras. 2.2-2.5.
160. *Id.* art. 7, para. 1.1.
its goods before final decisions about the tariff liability have been made and before importer has paid the tariff.\footnote{161}

Article 7 discussed risk assessment and analysis in respect of the potential for non-compliance with customs laws and the need to use risk management techniques in a way that reduced the number of physical inspections of goods.\footnote{162} Article 7 also discussed post-clearance audits ("PCA"), the establishment and publication of average release and clearance times, and criteria for obtaining the status of an authorized trader.\footnote{163} Finally, Article 7 covered expedited shipments, requiring (or, possibly, simply encouraging) Members to allow for the expedited release of goods, at least for merchandise entered through air cargo facilities.\footnote{164} Members could not agree on what "expedited" means—release within 3, 6, 24, or 48 hours, or a "reasonable period of time"?\footnote{165}

Ominously, the Article 7 obligations concerning risk management potentially conflict with post 9/11 U.S. customs reforms. Article 7 proposed that risk management, in the form of border controls, should concentrate on high-risk shipments. But, U.S. law requires that by 2012, 100 percent of all maritime containers bound for America be scanned overseas.\footnote{166}

- **Additional Provisions Relating to GATT Article VIII**

Articles 8-10 also dealt with formalities relating to importation and exportation. Article 8 forbids a WTO Member from requiring a consular transaction, i.e., requiring from a consul of the importing Member in the territory of the exporting Member a consular invoice or consular visas for a commercial invoice, certificate of origin, or other shopping document in connection with importation of a good.\footnote{167}

Article 9 called for border agency cooperation, that is, coordination of activities and requirements among customs authorities.\footnote{168} Article 9, paragraph 9.1 bis, which Members set in brackets, required Members to allow goods in transit (i.e., transshipped goods) to be declared as such.

Article 10 called for periodic review of formalities, and obligates Members to minimize them and the attendant documentation requirements so they are not "an unnecessary obstacle to trade."\footnote{169}

\footnotesize

161. *Id.* art. 7, para. 2.1.
162. *Id.* art. 7, paras. 3.1-3.6.
163. *Id.* art. 7, paras. 4.1-6.6.
164. *Id.* art. 7, para. 7.1.
165. *Id.* art. 7, para. 7.2(c).
168. *Id.* art. 9, paras. 1-3.
169. *Id.* art. 10, paras. 1.1-2.4.
Article 10 also called on Members to accept commercially available information and copies, but whether they must or ought to do so was not agreed.\textsuperscript{170} Likewise, Members could not agree on whether they must consider whether there are “reasonably available” alternative requirements that fulfill their “legitimate objectives” that are “significantly less trade restrictive” than their existing rules.\textsuperscript{171} They also could not agree on whether Members would have to rely on, or merely ought to rely on, best practices and international standards (e.g., as set by the World Customs Organization (“WCO”)).\textsuperscript{172} Article 10 also calls on Members to establish a single window for the one-time submission of customs documentation.\textsuperscript{173} Article 10 forbids Members, to the extent possible, from mandating the use of pre-shipment inspection (PSI) and from requiring the use of a customs broker.\textsuperscript{174}

Logically, Article 10 required Members in a customs union (CU) to use the same border procedures throughout their CU.\textsuperscript{175} Finally, Article 10 obligated Members to allow for temporary admission of goods, inward processing (i.e., importing merchandise temporarily into a customs territory without payment of duty, for manufacturing, processing, or repair, and then subsequent exportation of finished merchandise under a different customs regime), and outward processing (i.e., exporting merchandise temporarily from a customs territory for manufacturing, processing, or repair abroad and then re-importing finished merchandise with a full or partial exemption from duties).\textsuperscript{176}

- **Provisions Relating to GATT Article V on Freedom of Transit**

Article 11 provisions covered freedom of transit. This Article provided a definition of “traffic in transit,” sets out a basic freedom of transit rule.\textsuperscript{177} It obligated WTO Members to provide non-discriminatory treatment (that is, both national and MFN treatment) to traffic in transit and ensured they do not apply restrictions on freedom of transit that would be “a disguised restriction on trade.”\textsuperscript{178}

Article 11 also clarified that GATT Article V does not obligate a Member to build infrastructure to facilitate the transit of goods, or to

\textsuperscript{170} Id. art. 10, para. 2.4. \\
\textsuperscript{171} Id. art. 10, para. 2.1. \\
\textsuperscript{172} Id. art. 10, para. 3.1. \\
\textsuperscript{173} Id. art. 10, para. 4.1. \\
\textsuperscript{174} Id. art. 10, paras. 5.1, 6.1. \\
\textsuperscript{175} Id. art. 10, para. 7.1. \\
\textsuperscript{176} Id. art. 10, para. 10. \\
\textsuperscript{177} Id. art. 11. \\
\textsuperscript{178} Id. art. 11, para. 4.
provide access to such infrastructure that it does have unless it opens those facilities for general use by third parties.\textsuperscript{179}

Pursuant to GATT Article V, any regulations, formalities, or charges affecting traffic in transit must not be "more restrictive . . . than necessary," with the possible additional caveat that they must "fulfill a legitimate objective."\textsuperscript{180} Further, consideration must be given to "less restrictive" alternative measures, and existing measures must not be "a disguised restriction on transit traffic."\textsuperscript{181} Article 11 also imposed disciplines on fees, formalities, and documentation requirements imposed in respect of traffic in transit, including exemptions from customs duties imposed on imported merchandise as well as exemptions from compliance with technical standards.\textsuperscript{182} Advance filing and processing of transit documentation, prior to arrival and trans-shipment, would be mandatory.\textsuperscript{183}

Finally, Article 11 also ensured that once transited goods have undergone the relevant procedures, they must be allowed to exit the relevant customs territory without delay.\textsuperscript{184} There was a bar on the use of customs convoys except for high-risk goods.\textsuperscript{185} There were disciplines on bonded transport regimes and guarantees, to avoid inland diversion of goods in transit.\textsuperscript{186}

- \textit{Final Provisions}

Article 12 concerned customs cooperation among WTO Members.\textsuperscript{187} It called for, \textit{inter alia}, the exchange of information and assistance on imported and exported merchandise, on traffic in transit, and on verification of declarations made by traders. But, Members did not reach consensus on the extent to which some of the proposed rules would be mandatory versus exhortative.\textsuperscript{188}

Article 13 discussed institutional arrangements, including the establishment of a WTO Committee on Trade Facilitation.\textsuperscript{189} Article 14 required Members to establish a national Committee on Trade

\begin{flushleft}
\textsuperscript{179} Id. art. 11, para. 1 bis.  \\
\textsuperscript{180} Id. art. 11, paras. 3, 9.  \\
\textsuperscript{181} Id. art. 11, paras. 3(b)-(c).  \\
\textsuperscript{182} Id. art. 11, paras. 7, 10.  \\
\textsuperscript{183} Id. art. 11, para. 11.  \\
\textsuperscript{184} Id. art. 11, paras. 12-15.  \\
\textsuperscript{185} Id. art. 11, para. 17.  \\
\textsuperscript{186} Id. art. 11, paras. 15-16.  \\
\textsuperscript{187} Id. art. 12, para. 1.  \\
\textsuperscript{188} See id. art. 12, paras. 1, 4.  \\
\textsuperscript{189} See id. art. 13, para. 1.1.
\end{flushleft}
Facilitation. Its goal is to “facilitate the process of domestic coordination of trade facilitation matters.”

Article 15 contained special provisions for small, vulnerable economies ("SVEs") that are members of a CU or FTA. They may adopt regional approaches to implementing their trade facilitation obligations. Also, all of the obligations in the Draft Text would be subject to the exceptions in GATT Articles XX and XXI.

- **S & D Treatment**

Part II of the Draft Text contained transitional provisions for developing and least developed countries. Paragraph 1 explicitly acknowledged the differences among these countries, and it stated that S & D treatment “should extend beyond the granting of traditional transition periods for implementing commitments” and relate the “extent and the timing of entering commitments” to “the implementation capacities of developing and least developed country Members.” None of them would be compelled to make infrastructure investments beyond their means, and least developed countries would have only to undertake commitments commensurate with their specific development, financial, and trade needs, “or their administrative and institutional capabilities.” Conversely, developed countries “shall ensure to provide support and assistance” to poor countries so they could implement their obligations. Absent such funding, or absent the requisite capacity, poor countries would not have to fulfill their duties. But, commitment of support and assistance from rich countries would be “not open ended.”

Overall, Paragraph 1 contained bracketed language that is politically correct, designed not to offend any Member. On the one hand, it set out general principles that favor poor countries. On the other hand, it did not guarantee them any specific funding from rich countries. This equivocation was troubling, because trade facilitation is rightly touted as a way to help poor countries, whether Islamic or not: they can participate more effectively in the global trading system through more efficient customs clearance processes. Market access gains from tariff and subsidy cuts are not realizable if trade cannot flow because of cumbersome or corrupt procedures for classification.

190. See id. art, 14, para. 1.1.
191. Id. art. 15, para. 1.1.
192. Id. art. 15, para. 1.3.
193. Id. § II, para. 1.2.
194. Id. § II, paras. 1.2-1.3.
195. Id. § II, para. 1.4.
196. Id. § II, para. 1.4.
197. Id. § II, para. 1.5.
valuation, and inspection. They also are unrealizable if port and related infrastructure is parlous. Yet, on providing financial assistance to poor countries to help them implement trade facilitation commitments, the Members (in the words of a trade diplomat) had “very significant and fundamental” differences.198

Equally troubling was another fact: having stated implementation periods are not the only type of S & D treatment for poor countries, the Members, in the rest of Section II, focus on only this type. This hypocrisy was evident in Paragraphs 2 through 8 of the Draft Text. They group commitments for developing and least developed countries on trade facilitation into three categories – A, B, and C – with different implementation periods for the duties in each category:199

1) Category A commitments would be legally binding upon the entry into force of the Trade Facilitation Agreement.200

2) Category B commitments would allow for a transitional period, but that period is undefined, which do not require any technical assistance or capacity building.201

3) Category C commitments would require technical assistance or capacity building, and, therefore, additional time for implementation, though again the period is undefined.202

Developing and least developed countries would have the right to notify to the WTO the commitments they are putting in each Category, i.e., categorization is self-determined.203 Similarly, under Categories B and C, developing and least developed countries could define for themselves the implementation period for each self-imposed obligation, or accept a default time of one year.204 To be sure, Members did not agree on that default time or on how much time after entry into force of a Trade Facilitation Agreement a poor country would have to notify the WTO of its obligations.205

Flexibilities existed for a developing or least developed country that faced difficulties implementing obligations in a timely fashion. Upon

198. Quoted in Daniel Pruzin, WTO Chief Warns Members Not to Get Stuck on 'Deliverables' Package, Says LDCs Priority, 28 Int'l Trade Rep. (BNA) 886 (June 2, 2011).
199. See Draft Consolidated Negotiating Text, supra note 4, § II, paras. 2.1-2.3.
200. Id. § II, para. 2.1.
201. Id. § II, para. 2.2.
202. Id. § II, paras. 2.3, 5.3.
203. Id. § II, para. 2.4.
204. Id. § II, para. 4.2(a) (explaining that commitments would take effect at the end of the expiry of the time period for notifying the WTO about the commitment and its implementation); see id. art. 8.
205. See id. § II, paras. 3.1, 3.2, 4.1, 5.1, 5.2, 5.1 bis.
notification to the WTO of such difficulties (a so-called “Early Warning Mechanism”), developed country Members would cooperate to help the country overcome the difficulties, including via an extension of the deadline.\textsuperscript{206} Possibly, an extension of up to a year would be provided automatically upon notice.\textsuperscript{207} Developing and least developed countries also would have the option to shift an obligation from one Category to another, most likely from B to C.\textsuperscript{208}

Further, there were three “Peace Clauses.” The first one ensured WTO Members do not bring legal claims under GATT Article XXIII or WTO dispute settlement procedures against developing or least developed countries for a grace period of two years following the entry into force of a Trade Facilitation Agreement.\textsuperscript{209} The second one immunized developing and least developing countries from suit in respect of a Category B or C commitment for two years following implementation of that commitment.\textsuperscript{210} However, Members did not agree on the two year period (after all, it was in bracketed text), nor had they decided whether a different period should apply in the second Peace Clause to least developed countries.\textsuperscript{211} The third clause, for the benefit of least developed but not developing countries, barred suit against such countries for an unspecified number of years as regards their Category A commitments.\textsuperscript{212} In all instances, developed countries would be obligated to “exercise due restraint” in bringing up a matter for consultations, or adjudication, with a developing or least developed country.\textsuperscript{213}

Finally, and to be fair to the Draft Text, there was a new dimension to S & D treatment, one going beyond deferral of implementation periods. Article 9 said:

\begin{quote}
[9.1 The provision of technical assistance and capacity building by developed country Members and relevant international organizations and other agencies of cooperation, including the IMF [International Monetary Fund], OECD, UNCTAD [United Nations Commission on Trade and Development], WCO and the World Bank, is a precondition for the acquisition of implementation capacity
\end{quote}

\begin{flushleft}
\textsuperscript{206} Id. § II, paras. 4.2(c), 6.1-6.4, 6.1 bis-6.3 bis.
\textsuperscript{207} Id. § II, para. 6.2.
\textsuperscript{208} Id. § II, paras. 4.3, 6.1 bis-6.3 bis.
\textsuperscript{209} Id. § II, para. 7.1.
\textsuperscript{210} Id. § II, para. 7.2.
\textsuperscript{211} See id. § II, paras. 7.1-7.2, 7.7.
\textsuperscript{212} Id. § II, para. 7.6.
\textsuperscript{213} Id. § II, para. 7.8.
\end{flushleft}
by developing country and least-developed country Members in respect of provisions requiring assistance.]

[9.2 In cases where technical assistance and capacity building is not provided or lacks the requisite effectiveness, developing country and least-developed country Members are not bound to implement the provisions notified under Category C.]²¹⁴

In other words, unlike any other provision in the GATT–WTO regime, legal obligations of poor countries are explicitly contingent on rich countries helping them with the means to fulfill those obligations. Why flog a poor country for failure to meet its duties when it could not possibly do so without assistance? Additionally, Article 10 of the Draft Text obligates developed countries to report to the WTO on the technical and financial assistance, and capacity building measures, they provide to poor countries.²¹⁵

Unfortunately, the relevant text (quoted above) is bracketed. Moreover, how exactly a legal claim might be brought under Article 9.19.-2 is unclear. Suppose a developed country accuses a developing or least developed country of failure to implement a Category C commitment. The developing or least developed country respondent counters that the developed country complainant failed to provide the requisite technical assistance for capacity building, or did not do so effectively. What evidence must the respondent adduce for this defense to be successful? An abject failure to provide any help might be sufficient. But, could the developed country rebut that evidence by arguing no assistance was needed to implement the particular obligation at issue, or by contending it provided help but it was wasted owing to corruption in the government of the respondent? Perhaps the developed country could argue there is no “hard law” obligation for it to provide assistance, citing Article 9.3, which states:

9.3 [Developed country Members and developing country Members in a position to do so] [Members] agree to facilitate the provision of technical assistance[, financial assistance] and capacity building to developing country and least-developed country Members, on mutually agreed terms and either bilaterally or through the appropriate international organizations. The objective of such assistance is to assist developing country and least-

²¹⁴. Id. § II, paras. 9.1-9.2 (emphasis added) (footnote omitted).
²¹⁵. Id. § II, para. 10.1.
developed country Members to comply with the Agreement's commitments.\textsuperscript{216}

To "agree to facilitate" is not the same as a mandate to commit funds and expertise, and in any event, such agreement is contingent on the "mutual agreement" of the developing or least developed country. Moreover, perhaps providing normal budgetary contributions to the appropriate international organization, such as the World Bank, fulfills Article 9.3. Certainly, Article 9.4 lays out principles for providing technical assistance and capacity building, exhorting developed countries to take account, \textit{inter alia}, of the development framework of the recipient, regional integration, and private sector activities.\textsuperscript{217} But, the listed principles are generic, and might easily expand rather than narrow the grounds for dispute between rich and poor countries.

C. What Should Have Happened

Without doubt, the April 2011 Draft Text on Trade Facilitation provided considerable detail on the basic GATT Article V, VII, and X obligations and helps resolve contemporary customs problems. But, WTO Members failed to reach agreement on a vast array of critical issues. The Text contained 850 brackets. That is, there were 850 trade facilitation areas in which the Members, after a decade of negotiations, had not reached consensus.\textsuperscript{218} Complicating matters further was the fact many brackets were set within other brackets, i.e., the document had bracketed text within bracketed text.

To some degree, the range and depth of disagreement was puzzling. Trade facilitation ought to be an area in which free traders and development champions can reach agreement. Both groups seek increased trade, and cutting red tape achieves that result. Thus, assuming agreement could be reached on the bracketed language, the Draft Text promised to have a significant, positive effect on trade facilitation. The problem was an agreement was not at hand.

At the same time, helpful as streamlining customs clearance procedures could be to generating trade, boosting economic growth, and alleviating poverty in poor countries, and in turn, to rendering poor people in those countries less susceptible to Islamist or other extremist ideologies, a caveat should be noted. The poor should not be blamed for their poverty, if for no other reason than to do so is uncharitable (and very much un-Christian). That is, some developed country officials

\begin{itemize}
\item \textsuperscript{216} Id. § II, para. 9.3 (emphasis added).
\item \textsuperscript{217} See id. § II, para. 9.4(a)-(c).
\item \textsuperscript{218} See Pruizin, \textit{U.S. Criticizes WTO Chief Lamy's Assessment of Doha Impasse, Says NAMA Not Only Issue}, supra note 86.
\end{itemize}
have the view that if a trade facilitation deal is agreed, then most of the
development-oriented work of the Doha Round is complete, and the
focus of the rest of the Round can be on market access. Rich countries
should not so easily absolve themselves of their responsibilities to poor
countries. Charity aside, they would do well to bear in mind they share
a long-term national security interest in addressing poverty and the
sense of marginalization or oppression felt among some Muslim
communities.

IV. THE MISSING MIDDLE "D" IN THE DDA

A. Why Not . . .?

If the Doha Round is not about true free trade, or aggressive trade
liberalization, then is it about the middle "D" in the acronym DDA?
That is, is the Round about development, specifically about fighting
poverty in the Third World? The question became all the more acute
during the Round. As trade negotiators fiddled with and quibbled over
mind-numbing details, the number of chronically hungry people in the
world rose from 848 million in 2003-2005 to nearly one billion
(specifically, 963 million) in 2008.219 The United Nations Millennium
Development Goal (MDG) of halving world hunger between 1990 and
2015 was further off than ever before.220

"No" is the response to the above question. Why not, as the U.S.
urges in the first and second trade agenda report of the Obama
Administration (the 2009 Trade Policy Agenda and 2008 Annual
Report, and 2010 Trade Policy Agenda and 2009 Annual Report),221 and
at every other opportunity, demand a correction of the "imbalance" in
the Doha Round negotiations between:

1) a known, calculable value of America's concessions
   (including cuts to farm subsidies); and

2) a value of new market access opportunities from other
countries for America's farmers, ranchers, manufacturers,
and service providers, which is unclear because of special
flexibilities, not the least of which is the special safeguard
mechanism ("SSM") for agricultural products?222

220. See DICTIONARY OF INTERNATIONAL TRADE LAW, supra note 20, 296-97 (presenting
an overview of the MDGs).
221. OFF. OF U.S TRADE REP., EXEC. OFF. OF THE PRESIDENT, THE 2009 TRADE POL'Y
PROGRAM pt. 1, at 3, pt. 2, at 3 (2009); OFF. OF U.S TRADE REP., EXEC. OFF. OF THE
222. See also Daniel Pruzin, WTO Members Endorse Work Plan to Secure Doha
Why not, as the USTR professes, focus on winning for the American people market-opening concessions from foreign governments, make it clear that “no deal is better than a bad deal,” and declare that America
will not be “shamed” into accepting a Doha Round package that generates insufficient export opportunities.\textsuperscript{223} 

After all, 95 percent of the world’s consumers reside outside the U.S., so it is keenly in America’s economic interest to have free-trade access to them. Yet, endless flexibilities for developing countries in the draft Doha Round texts would allow those countries to wall off their consumers from American products. Looking at the December 2008 Draft NAMA Text, the former USTR, Ambassador Susan Schwab, complained:

What are the relative roles and responsibilities of advanced (or developed), emerging, and developing countries? 

\ldots

For manufactured goods, these proposals would, by the end of the Doha Round implementation period, allow the tariffs of most emerging economies, other than China and South Africa, to remain largely unchanged from those in place when the Doha Round began. Based on 2008 calculations, this would result in the developed economies’ delivering over three-quarters of the Doha Round’s market-opening results, well beyond their current 53 percent (and shrinking) share of global GDP.\textsuperscript{224}

Likewise, said Deputy USTR and Ambassador to the WTO, Michael Punke, in June 2010:

It [the flexibility for developing countries to exclude tariff lines from agreed-upon formulaic cuts, along with extended implementation periods, for them] means that China could shelter its entire automobile sector from any market opening. It means China could shield broad parts of its chemical sector from market opening. It means Brazil could leave in place over a thousand tariff peaks. 

It means India \ldots could avoid making cuts in applied tariffs on 97 percent of its industrial tariffs. \ldots When you


\textsuperscript{224} Schwab, \textit{supra} note 137, at 104, 109-10 (emphasis added).
think about examples like that, I think it's not surprising that we don't believe what's currently on the table is sufficiently ambitious or balanced, particularly when you contrast that with what's being asked of the U.S. We're being asked to make cuts to 100 percent of our applied tariffs. If what's on the table were implemented, the average U.S. tariff rate would be cut from 3.9 percent to 1.9 percent. If you look at the trade-weighted tariff, the U.S. would end up with an average tariff of 0.7 percent.225

Never mind the fact a 3.9 percent duty rate is a nuisance tariff, so a cut to 1.9 percent makes little economic difference in terms of protective effect. Never mind also the fact that America accounts for 12 percent of global trade, down from over one-quarter in the 1980s.226 It is not that America has become weaker or failed to export more. Rather, from the perspective of the USTR, it is that the proverbial global economic “pie” is getting bigger, and – amidst new power relationships in an arguably multi-polar world economic system – America wants a larger slice.

As Ambassador Punke put it in November 2010:

The central question that remains is whether or not the emerging economies are ready to step up to a level of responsibility that's commensurate with their role in the global economy.227

This refrain was repeated nearly verbatim, and ad nauseum, evincing just how hardened positions had become. In January 2011, Ambassador Punke stated:

The central question of the [Doha] Round . . . remains the question of whether emerging economies are prepared to accept the responsibility that comes along with their position in the global economy. If they're prepared to accept that responsibility, we'll have a successful outcome.228

225. Daniel Pruzin, Punke Says U.S. Frustrated by Talks with Brazil, China, India on Doha Tariffs, 27 Int'l Trade Rep. (BNA) 973 (July 1, 2010).
In July 2011, he intoned:

[F]rankly, if [the] Doha [Round] could be completed by virtue of throwing a pile of concessions on the table, we would have had a deal many years ago. [The goal of the Obama Administration is] not just any deal — but a good deal [indicative of new global economic realities]. . . . Wishing this complexity away with empty exhortations — or calls for unilateral concessions — will not result in success.229

The position clearly was one of maximizing America’s slice in a pie that was growing because of Brazil, China, India, and other enlarging markets, not one of ensuring that poor countries with marginalized Muslim youths got a bigger or fairer slice.

Consistent with this position, Ambassador Punke characterized his December 2010 meeting with Chinese Commerce Minister Chen Deming as “somewhat disappointing,” as China failed to spell out detailed tariff cuts it was willing to make, and stuck to its position that participation in NAMA sectoral negotiations must be voluntary.230 Likewise, the American Ambassador lambasted the new Brazilian government for raising import duties, indeed, the Common External Tariff (“CET”) of MERCOSUR, from 20 to 35 percent on toys to protect Brazilian, Argentine, Paraguayan, and Uruguayan toy companies from Chinese producer-exporters. It was a “stick in the eye to Brazil’s trading partners, and it creates a more difficult environment for the Doha negotiations,” said the Ambassador.231 The new government picked up where its predecessor left off, as Brazil had raised tariffs in 2009 and 2010 on autos, auto parts, chemicals, electronics, plastics, and textile and apparel (“T & A”) items. The U.S. castigated Brazil for the large gap between its bound and applied average duty rates — the “water” in its tariff schedule: 31.4 versus 11.6 percent.232

Following, or better yet composing the same refrain, issuance of the April 2011 Documents, eight major American business groups — the

230. Pruizin, Punke Cites Disappointment with Initial U.S. – China Talks on Advancing Doha Round, supra note 228.
231. Id.

A trade round is about opening markets and setting the rules for world trade for decades so it must address the reality that all major developed and advanced developing WTO members that have benefitted from past rounds enormously have a responsibility to the world trading system to undertake significant market opening measures. . . It is clear that this is not happening.233

In July 2011, the NAM Vice President for International Economic Affairs, Frank Vargo, intoned that:

[a]bout 70 percent of all the duties on American manufacturers’ exports are assessed by a relatively small handful of the advanced developing countries. . . And about 70 percent of the duties that the least developed countries pay are paid to the same countries.234

The first point relied on a distinction favored among American protectionists, between better- and worse-off developing countries. The distinction is dubious because the ostensibly better-off ones, like Brazil and India, are home to hideously high numbers of desperately poor people.235 The second point correctly recounted a long-standing concern about barriers to trade among poor countries (South – South trade).236 But, it presumed that least developed countries have much in the way of industrial products to export, and ignored the infant industry concerns of many poor country manufacturers.

Manifestly from such comments, the Doha Round was far adrift from the vision on which it was founded: development, through trade liberalization, as a counter-terrorism strategy. A decade on, the Round

236. Bracken, supra note 234.
was about re-balancing rights and obligations in the world trading system, namely, fewer rights and more obligations for big developing countries. American policy no longer linked gains from free trade with defeating Al Qaeda and the Taliban. Rather, the policy was to compel Brazil, China, and India to realize they could not have it both ways: (1) being classified as developing countries and continuing their anti-American trade policies, and (2) demanding the respect and status of major powers without shouldering the attendant obligations and burdens.237 “Grow up” was the American response.

To be fair, from a commercial perspective, the American response was justifiable. It was backed by a bevy of data on agriculture. For example, India has among the highest average bound tariff rates on agricultural goods in the world (as of December 2009) – 114 percent.238 Some of India’s bound farm tariffs are at 300 percent.239 Since 1991, when India introduced economic liberalization reforms, it dropped its average applied agricultural tariffs notably, from 113 percent in that year to 34 percent in 2007.240 But, 34 percent still is among the highest average applied rates on farm goods in the world, and India slapped especially high tariffs on apples, chocolate, cookies, coffee, grapes, potatoes, and poultry.241 Small wonder that (as of 2008) American agricultural exports amount to just six percent of the Indian import market, and overall, farm imports supply only three percent of Indian demand. Small wonder, then, why former USTR, Ambassador Susan Schwab criticized the December 2008 Draft Agriculture text: it “would allow India to shield close to 90 percent of its current agricultural trade from tariff cuts . . .”242

Likewise, data on industrial product trade exist to support the American perspective. For instance, the U.S. grants duty-free treatment on agricultural and construction machinery, whereas China does not. Since 2000 (and up through 2009), Chinese exports of this equipment grew by 45 percent.243 The U.S. also grants duty-free treatment to

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239. Brightbill, supra note 232.
242. Schwab, supra note 137, at 104, 110 (criticizing the draft because it would also “permit China to exclude from the cuts commodities of keen interest to both developing and developed countries, including corn, cotton, sugar, rice, and wheat.”).
medical equipment imports, but China does not. Since 2005 (up through 2009), Chinese exports of these products doubled.\textsuperscript{244} Plainly, the U.S. said, China was internationally competitive in these markets. Hence, it should drop its tariff barriers to zero on them. As for India, since the Doha Round negotiations began in November 2001, it had reduced its peak industrial tariffs from 35 to 10 percent.\textsuperscript{245} Yet, 10 percent was higher than necessary to protect increasingly world-class Indian exports, and it still maintained high tariffs on autos, motorcycles, and textiles.\textsuperscript{246} America saw a lot of “water” in India’s tariff schedule: an average bound rate of 48.6 percent contrasted with an average applied rate of 12.9 percent.\textsuperscript{247}

Further rhetorical questions were the American response to the question about the middle “D” in “DDA.” Why not, as some in Congress demand, amend American law to require the USTR to stick strictly to reciprocity, forbidding it to agree to a tariff concession unless it secured the elimination of foreign tariff and non-tariff barriers?\textsuperscript{248} Why not, as the American business lobby insists, demand a balance among agriculture, NAMA, and services opportunities, and greater ambition in all three areas, plus strong trade remedy rules, rather than allow other WTO Members to focus on the farm sector?\textsuperscript{249} Why not, as American agricultural interests intone, obtain commercially meaningful market access for U.S. farm products, especially in light of the severe concessions the U.S. is being asked to make in respect of domestic support and export competition?\textsuperscript{250} Why not, then, reject any attempt to reap an “early harvest” of separate agreements on particular issues, rather than await a comprehensive single undertaking?\textsuperscript{251}

\textsuperscript{244.} Id.
\textsuperscript{246.} Brightbill, \textit{supra} note 232.
\textsuperscript{247.} Id.
\textsuperscript{248.} See Amy Tsui, \textit{Brown-Slaughter Bill Would Require USTR to Eliminate Barriers before Cutting Tariffs}, 26 Int’l Trade Rep. (BNA) 1386 (Oct. 15, 2009) (reporting that a legislative proposal – the \textit{Reciprocal Market Access Act} – was introduced to Congress in October 2009 that would establish authority to enforce a reciprocal bargain by raising American tariffs if a foreign government reneged on its promise to cut its tariff or non-tariff barriers).
B. Because . . .

Indubitably, each of these questions is reasonable on the assumption the paradigm for the Doha Round is reciprocity, not generosity. From the American perspective, reciprocity is, and should be, the paradigm. In his first State of the Union Address, in January 2010, President Barack H. Obama made that clear:

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\text{[W]e need to export more of our goods. (Applause.) Because the more products we make and sell to other countries, the more jobs we support right here in America. (Applause.) So tonight, we set a new goal: We will double our exports over the next five years, an increase that will support two million jobs in America. (Applause.) To help meet this goal, we're launching a National Export Initiative that will help farmers and small businesses increase their exports, and reform export controls consistent with national security. (Applause.)}
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\text{We have to seek new markets aggressively, just as our competitors are. If America sits on the sidelines while other nations sign trade deals, we will lose the chance to create jobs on our shores. (Applause.) But realizing those benefits also means enforcing those agreements so our trading partners play by the rules. (Applause.) And that's why we'll continue to shape a Doha trade agreement that opens global markets.}^{252}
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Critically, the National Export Initiative ("NEI") calls for doubling American exports within 5 years.\(^{253}\) There is no reference in the President's address to poverty alleviation and its follow-on link to combating the breeding grounds for Islamist extremism. The Doha Round was about, or had turned into an exercise about, American exports and jobs, period. Moreover, the U.S. assertion that it is willing to offer additional concessions if only developing countries will improve their market access offers in agricultural, industrial, and services trade – an assertion made by President Obama at the November 2010 Seoul G-20 Summit – is dubious.\(^{254}\) Could the NEI goal of doubling exports be achieved if America was not mercantilist in its position?

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253. Id.
254. Daniel Pruzin, G-20 Leaders Say Time to Conclude Doha; Obama Prepared to Take Risks for Approval, 27 Int'l Trade Rep (BNA) 1755 (Nov. 18, 2010).
The American argument boils down to an assertion that difficulties in the Doha Round are due to a standoff. On the one side is the U.S., which rightly demands greater market access in developing countries for its agricultural and industrial products, and its financial services, and seeks legitimization of its trade remedy methodologies, particularly zeroing. To some degree, the U.S. is backed by other developed countries, namely, Australia, which champions better market access for agricultural and industrial products, and services. Notably, the U.S. is not joined by the EU, which declared around 2009, and reiterated in May 2010, that they had reached the limit of what they can offer and will make no new concessions. In that respect, the EU has succeeded in painting the U.S. as the "bad guy" in the Round, with nearly insatiable demands – at least in the minds of some participants and observers.

On the other side are big emerging countries, particularly Brazil, China, and India. They wrongly resist these demands, says the U.S., and thereby fail to shoulder greater responsibilities in the world trading system, despite their professed desire to be major players in this system. Thus, when in November 2009 former Deputy USTR Peter Allgeier suggested a three-pronged compromise to break the impasse:

1) Brazil, China, and India forgo any exceptions to agreed upon NAMA tariff cuts and any right to make no cuts on Special Products;
2) the U.S. abandon its zeroing methodology in calculating dumping margins; and
3) the EU drop its proposal to extend the higher degree of protection afforded in TRIPs Article 23 to wine and spirits to a broad range of other geographically indicated items.

The idea was reasonable. But, it was firmly rooted in a paradigm of reciprocity between rich and poor countries, not generosity of the rich toward the poor. Unsurprisingly, it went largely unnoticed. The likes of Brazil, China, and India stuck to the position that the U.S. must back down from its manifestly excessive demands as well as its failure to indicate what it would offer if they actually did cough up a few more concessions.

255. Yerkey, U.S. Expected to Come Under Pressure at WTO Ministerial Over Doha Trade Talks, supra note 222.
256. Daniel Pruzin, U.S. Told to Tone Down Demands If Doha Round Deal to be Concluded, 27 Int'l Trade Rep. (BNA) 775 (May 27, 2010).
257. Yerkey, U.S. Expected to Come Under Pressure at WTO Ministerial Over Doha Trade Talks, supra note 222.
C. Trade Deficits and China

China's position hardened because of Federal Reserve monetary policy.\textsuperscript{258} The U.S. was flooding the world with dollars, as evidenced by the November 2010 Federal Reserve decision to commence a second round of quantitative easing by buying $600 billion of Treasury securities. In foreign exchange markets, dollar depreciation was the consequence of such easing, which in turn meant countries with trade surpluses were at risk of becoming countries with trade deficits.

For example, the dollar depreciated against the Brazilian \textit{real}, and Brazil experienced a $50 billion reversal in its merchandise trade balance between 2007 and 2010.\textsuperscript{259} Predictably, Brazil announced in December 2010 it was unlikely it could make further substantive Doha Round trade concessions in view of its worsening trade balance.\textsuperscript{260} The 15-percentage point increase in the \textit{MERCOSUR} CET on toy tariffs (mentioned above) was “due to their [American] own policy of devaluing [sic] the dollar . . . [and besides,] U.S. products benefit more from the declining dollar than Brazilian products benefit from the increase in tariffs,” argued Brazil’s Ambassador to the WTO, Roberto Azevedo.\textsuperscript{261}

Exacerbating the problem, from the perspective of Brazil, was that China was the largest source of cheap imports into Brazil – in part because of the appreciation of the \textit{real} relative to the Chinese \textit{yuan}.\textsuperscript{262} In July 2011, Brazil (specifically, its Minister of Finance, Guido Mantega) not only spoke of “struggles between countries” over foreign exchange valuations, but also said the global currency was “absolutely not over.”\textsuperscript{263} True enough, low interest rates in developed countries


\textsuperscript{259} Pruzin, \textit{Brazilian Official Says U.S. Payment Expected for Further Concessions in Doha}, supra note 258.

\textsuperscript{260} Id. See also Daniel Pruzin, \textit{Trade Ministers Vow to Overcome Differences, Achieve Doha Breakthrough}, 28 Intl’l Trade Rep. (BNA) 178 (Feb. 3, 2011) (reporting the new Brazilian Foreign Minister, Antonio Patriota, stated Brazil had limited room to make concessions because of the appreciation of the real relative to the dollar).

\textsuperscript{261} Pruzin, \textit{Punke Cites Disappointment with Initial U.S. – China Talks on Advancing Doha Round}, supra note 228.


\textsuperscript{263} Chris Giles & John Paul Rathbone, \textit{Currency Wars “Not Over.”} FIN. TIMES (London), July 6, 2011, at 1 (reporting that Brazilian interest rates were high because of tight monetary policy, which it needed to prevent the Brazilian economy from unsustainably high growth levels and to combat inflation). \textit{See also Brazil’s Currency War Wounds}, FIN. TIMES (London), July 8, 2011, at 8 (reporting on the effect of currency appreciation on the Brazilian economy).
were partly to blame. With Brazil’s main policy rate at 12.25 percent that month, small wonder why financial investors sought to purchase the *real* and thereby acquire Brazilian interest-bearing assets.\(^{264}\)

Yet, as a general matter, much reluctance by Brazil, India, and other emerging markets and developing countries to reducing their trade barriers through the Doha Round stemmed not from fear of competition from the U.S., but from China.\(^{265}\) Former USTR, Ambassador Susan Schwab, explained that “fear of increased imports from China may be the most unacknowledged reason behind Doha’s continued failures.”\(^ {266}\)

The Vice-President of the Council of the Americas/Americas Society put it well in a speech in March 2011:

> It’s not just production in Brazil that might be impinged on by Chinese low-cost production sales, but also Brazilian markets in Africa.

> Now the United States isn’t the only country or the loudest country saying to the Chinese, “you’ve got to change the value of your currency.”

> I can tell you the Chinese don’t care about allegations of human rights abuses. They don’t care about labor in the context of unionization.\(^ {267}\)

Likewise, *The Economist* observed: [C]ountries like India and Brazil are now more worried about cheap imports from China than about imports from the rich world. In essence, they might be more willing to open their markets to rich countries *if doing so did not simultaneously let in more Chinese goods*.\(^ {268}\)

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265. Schwab, *supra* note 137, at 108. For example, at the April 2011 BRICS meeting in Sanya, China, four of the BRICS countries (Brazil, Russia, India, and South Africa) urged the fifth one (China) to import more products from them, and insisted that their bilateral imbalances (with China) must be reduced. China retorted that its exchange rate policy was *not* negotiable. Kathleen E. McLaughlin, *Developing Countries’ Leaders Push China to Agree to Import More Products*, 28 Int’l Trade Rep. (BNA) 647 (Apr. 21, 2011).
266. Schwab, *supra* note 137, at 108.
Of course, because of the MFN rule in GATT Article I:1 and Article II:1 of the General Agreement on Trade in Services (GATS), doing so does mean entry of more Chinese goods. And, the Deputy USTR and Ambassador to the WTO, Michael Punke, summarized perfectly in June 2011:

I've been in many discussions with many different Members of the WTO, and in our [U.S.'s] urging those other Members to open their markets in the Doha context, one thing I frequently hear is those Members telling me there's no way we're going to open up on an MFN basis because we're afraid of China . . . . China is an omnipresence in these negotiations, in whatever room we're in, even if China doesn't happen to be in the room.269

In brief, it is not just that some WTO Members fear China. It is that most of them greatly fear China.

Compounding the dilemma for the likes of Brazil and India are three facts: the Chinese (1) are willing to invest in the infrastructure (e.g., ports, roads, and railways) of the countries in which they gain market access to facilitate their interests in those countries (e.g., using them as an export platform); (2) typically import their own laborers, who toil under sub-par labor and environmental standards; and (3) do not operate under stringent anti-corruption standards.270 Their model of investment, then, is quite different from that of western multinational corporations. That is, argues Farnsworth, the “Chinese model of investment in the Western Hemisphere is for the mercantilist purpose of spurring the Chinese economy and supporting the Chinese communist government.”271 In brief, what help to Brazil or India would a NAMA accord be if it helped Chinese more than their own exporters?272 The result would be de-industrialization in Brazil and other Latin American countries, if not India, too.


270. Tsui, supra note 267.

271. Id.

272. See Len Bracken, Harbinson Sees Three Positive Indicators for Doha Conclusion; Says U.S., China Key, 28 Int'l Trade Rep. (BNA) 299 (Feb. 24, 2011) (referencing a statement by Bill Reinsch, President of the National Foreign Trade Council ("NFTC"), that China might emerge as a big Doha Round winner on NAMA vis-à-vis Brazil and India).
D. Reciprocity and the Two-Track Approach

In May 2009, the above-posed questions prompted the newly appointed USTR, Ambassador Ron Kirk, to advocate in favor of a suggestion originating from Canada: negotiate direct, bilateral tariff concessions on an individual, line-by-line basis first, using the December 2008 Draft Modalities Texts as reference points for minimum commitments, and thereafter conclude negotiations on the language of the Texts themselves. The idea ran counter to how multilateral trade negotiations, including during those of the Uruguay Round, typically are conducted: first secure a deal among all countries on modalities; then enter into bilateral or small-group negotiations on specific tariff cuts to individual tariff lines. Thus, Nestor Stancanelli, Ambassador to the WTO from Argentina, remarked: "[p]ushing for bilaterals without the modalities is crazy [and] it just makes the process more complex and difficult." The proposed alternative, top-up approach would allow the U.S. to deal directly with major developing countries like Brazil, China, and India to ensure America had a clear indication of what its agricultural and industrial product exporters could expect in terms of new market access opportunities – before giving its final judgment on a Doha Round deal.

That way, America could find out precisely how developing countries intended to use the special rules – the flexibilities – drafted for them, and thus ascertain what it would get in relation to what it gave. In turn, the Congress, deeply skeptical of the effects on the American economy of the Texts, might be more inclined to pass any subsequent Doha Round deal. For instance, the U.S. could find out from India exactly what farm products India intended to designate as “special.” Additionally, the U.S. could discern which countries would participate in sectoral agreements (and the agreements they would join). After all, said the USTR, an agreement on modalities was supposed to be not an end in itself, but rather a means to an end, namely, authentic trade liberalization. Moreover, the skepticism from Congress was set in the wide context of a global economic recession, and the President simply did not have fast-track trade negotiating authority (which had expired on 30 June 2007).

Thus, the USTR had no choice but to propose that during the remainder of 2009, WTO Members would prepare and circulate draft schedules of tariff concessions, and in 2010 commence negotiations on...
tariff lines of keen interest. Those talks could wrap up in 2010, and a final consensus on the Texts would follow shortly thereafter. For the USTR, the Texts were too vague to accept, hence waiting for post-modalities tariff schedules made no sense. To buttress this proposal, the Obama Administration widened the context and “upped the ante.” What was at stake was nothing short of a new world economic order in which imbalances in the global economy – not merely those in the Doha Round texts – needed correcting. President Barack H. Obama bluntly stated in September 2009, on the eve of the G-20 Summit in Pittsburgh: “We can’t go back to the era where the Chinese or Germans or other countries just are selling everything to us, we’re taking out a bunch of credit card debt or home equity loans, but we’re not selling anything to them.”

The statement itself is economically correct. Serious deficits run by some countries, surpluses by others, and financing from the latter to the former, is neither healthy nor sustainable in the long run. But, the statement is irrelevant to the original aim of the Doha Round – namely, that the Round be a key tool for development to wean countries and peoples away from radicalism, and integrate them into the global economy. The statement forgets this aim and establishes post hoc a new goal for the Round, namely, structural adjustment. From an American perspective, U.S. insistence on knowing the full value of concessions developing countries will make, and how they will use their flexibilities, before signing off on Doha Round texts, is sensible, because the new American-established goal is to reduce its chronic trade deficit, and concomitantly reduce the chronic trade surpluses of the likes of China. But, this insistence translates into an unchanged trade policy: the strategy of the Obama Administration for the Doha Round, like that of the preceding Administration, is “no deal without tangible market access gains in advanced developing countries.”

As intimated, the obvious answer to this line of argument – understandable as it may be from an American perspective – is that the Doha Round never was supposed to produce a perfectly balanced outcome. The middle “D” meant there would be a preferential option for the poor. That is why, for instance, India insisted on the right to self-select farm goods as “special” after modalities were agreed, at the time each country prepared its Doha Round tariff schedule. That also is


why China insisted that self-designation implies a developing country does not have to publicize the list of goods it plans to shield from agreed-upon cuts until after consensus has been reached on the overall modalities texts. And, that is why South Africa argued it cannot do more in terms of opening up its market to foreign competition, given that it made concessions during the Uruguay Round that went far beyond commitments made of less developed countries, and why it found the December 2008 Draft Texts on Agriculture and NAMA unacceptable - namely, they failed to address the "developmental imbalance" between rich and poor countries.

Unfortunately, as the Third World began to take the middle "D" seriously, claims came from the First World that it was a mistake to use that middle "D." Doing so was a teaser, falsely raising expectations among poor countries. "Why give hope to the poor?" was the cold, sarcastic rhetorical question that hardheaded trade realists whispered to each other. Thus, Argentina remarked (in respect of the December 2008 NAMA Text), "[i]t's a developed country agenda," because the focus is on market access issues in which rich countries are interested. Argentina also criticized the U.S. of flip-flopping: early on in the Round, the U.S. agreed to modalities with flexibilities for developing countries.

That was not the only answer to the American effort to flip the order of events and put bilateral tariff schedules before the modalities texts. First, Switzerland explained that the August 2004 Framework Agreement contemplated bilateral negotiations on specific tariff concessions, but only after modalities agreements were finalized. Second, not all developed countries agreed with the U.S. Notably, the EU opposed the approach suggested by the USTR. Commencing bilateral negotiations before modalities were agreed could mean a re-writing, even unraveling, of the December 2008 Texts, i.e., a loss of years of hard work. Third, and perhaps most importantly, developing countries - including the entire G-20, led by Brazil, China, Egypt (speaking for many African countries), and India - were steadfastly against it. They suspected the U.S. wanted to engage them in bilateral

282. See id.
talks because the U.S. would have greater leverage dealing with them individually and even could exercise a divide-and-rule strategy.\footnote{Id.}

Thus, the USTR had little choice but to beat a hasty retreat, with one modest consolation. The Director-General, Pascal Lamy, said that perhaps WTO Members could consider a two-track approach. Under it, the Members could continue discussions on modalities, while contemporaneously engaging in bilateral negotiations on cutting farm tariffs and subsidies, reducing trade barriers to industrial products, and clarifying the scope of flexibilities for poor countries. That is, the Members could develop so-called “templates” whereby they would get data from each other with a view to scheduling draft commitments based on modalities formulas, and they could work on those modalities formulas. There was irony in this consolation. Eight years into the Doha Round, there was no clear consensus, much less unanimity, on whether to proceed solely with modalities, commence bilaterals and scheduling, or do both at once. The end-result, which was clear by September 2009, was to do both at the same time.\footnote{See Chair Consults on ‘Energizing’ Farm Talks for Coming Months, WTO (Sept. 16, 2009), http://www.wto.org/English/news_e/agng_16sep09_e.htm. The progress made by WTO Members on developing templates is recounted in the April 2011 Agriculture Document Part II, and on concomitant data-related activities in Part III. That Document is discussed in Part One of the Trilogy.}

This two-track approach is exactly the path some WTO Members began to tread with the U.S. To be sure, the compromise language at the July 2009 summit of G-8 leaders (i.e., from Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the U.S.) in L’Aquila, Italy, which also was agreed to by Australia, Brazil, China, India, Indonesia, Korea, Mexico, and South Africa, was a fudge: “[W]e regard enhancing the transparency and understanding of the [Doha Round] negotiating results to date as a necessary means to facilitate the conclusion of an agreement.”\footnote{Daniel Pruzin, G-8-Plus Declaration Sets Stage for Battle Over Developing Country Flexibilities in Doha, 26 Int’l Trade Rep. (BNA) 950 (July 16, 2009) (quoting a July 9, 2009 declaration by the G-8 and leaders of other major emerging economies).}

This language meant the U.S. was entitled to see how poor countries intended to use their flexibilities under Doha Round texts, and whether they would join a sectoral agreement, before agreeing to those texts. Yet, poor countries insisted they would not bargain over the precise products for which they sought special or sensitive designation. Self-designation of those products might allow them to tell the U.S. what they were going to do, as a matter of information, but gave the U.S. no right of consultation, or negotiation, over what the products would be, or whether they would join a sectoral agreement.
Not surprisingly, given the fuzzy compromise language and increasingly entrenched positions, the two-track approach met with mixed results.\(^{286}\) On the margins of the Seventh WTO Ministerial Conference in November – December 2009 in Geneva, the U.S. declared it had “good” bilateral consultations with India. But, China was unwilling to engage in bilateral talks with the U.S., particularly on lowering its industrial tariffs on chemicals, electronic goods, and machinery. China accused the U.S. of behaving in a protectionist manner and unfairly subsidizing its farmers to the detriment of the market access interests of Chinese farmers. The Chinese Vice Agriculture Minister, Niu Dan, said he had no interest in talking with the U.S. at the Conference, and added rather rudely “I don’t have time.”\(^{287}\) Brazil revealed the U.S. presented it with a list in early October of 3,000 industrial tariff lines covering \((\textit{inter alia})\) agricultural and industrial machinery, chemicals, forestry products, medical devices, and pharmaceuticals, for which the U.S. demanded tariff cuts beyond the general NAMA formula reductions.\(^{288}\)

The U.S. argued Brazil, as well as China and India, is globally competitive in these sectors, and thus ought to be willing to make concessions. Yet, the U.S. neither identified for Brazil precisely how many lines on which it ought to impose extra cuts, nor indicated the priority lines. Brazil balked at the demand, complained that the U.S. failed to state what concessions it would offer in return, and accused the U.S. of making it as a tactic to delay completion of the Doha Round. Brazil also reminded the U.S. that it and other developing countries already had made significant market access concessions, thus the U.S. had no basis for asking for yet more.\(^{289}\) The U.S. retorted that it should not have to pre-pay for concessions from developing countries, as it already had given up so much to arrive at the December 2008 Draft Agriculture and NAMA texts. This dialectic continued throughout 2010, and into 2011.\(^{290}\)

Not surprisingly, by late February 2010, there was widespread pessimism the Doha Round could conclude in 2010.\(^{291}\) Positions had


\(^{287}\) Id. (quoting Niu Dan on Nov. 29, 2009, on the eve of the WTO Ministerial Conference).

\(^{288}\) Id; Daniel Pruzin, \textit{U.S. Trades Charges with China, Others Over Responsibility for Doha Impasse}, 27 \textit{Int'l Trade Rep.} (BNA) 1507 (Oct. 7, 2010).

\(^{289}\) Pruzin & Yerkey, \textit{Bilateral Talks on Possible WTO Deal Will Continue for Months, USTR Says}, supra note 286.

\(^{290}\) Pruzin, \textit{U.S. Trades Charges with China, Others Over Responsibility for Doha Impasse}, supra note 288.

hardened further, and on some topics, they even appeared to have widened. Some WTO Members, and the Director-General, Pascal Lamy, admitted they did not even know how big some of the key gaps were. The best choice seemed to be to press ahead with contemporaneous bilateral and multilateral negotiations, and when appropriate, pluri-lateral ones. After all, the alternatives were to declare the Round dead, which no Member wanted openly to do, or to suspend it indefinitely until the Members had the political will to finish it. The conventional wisdom was that either alternative would deeply injure the long-term credibility and even legitimacy of the WTO. In truth, the world trading community might have appreciated the honesty and integrity behind the alternatives. By the fall of 2010, it was manifest that the Round would not finish by the end of 2010, and probably not by the end of 2011. At the WTO, the U.S. on one side, and Brazil, China, and India on the other, did little else than trade barbs as to which side was to blame for the impasse.

E. Embarrassingly Protecting Self-Interest

As for the USTR retreat into accepting a two-track approach, it did not mean the U.S., or developed countries generally, had a newfound appreciation for the middle “D” in the DDA. The fact is that once bargaining began in the Doha Round, especially in earnest after the October 2005 Portman Proposal from the U.S., the major powers settled into a familiar theme: protecting their interests. They never did shift away from that theme. Put differently, no satisfactory response has emerged to the perspective long-held by Kamal Nath, India’s Minister of Commerce and Industry, namely, for India (and other poor countries), lives are at stake, whereas for America (and other rich countries), the only issue is commerce. Thus, for example, in the

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294. See INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, supra note 15, at 77-141 (analyzing this proposal and other proposals at the time in response to it).

295. Chris Giles, Acrimony Dashes Doha Hopes, FIN. TIMES (Feb. 1, 2009), http://www.ft.com/cms/s/0/0059f106-0f84-11dd-972c-0000779fd2ac.html (paraphrasing Minister Nath). Following the sweeping victory of the Congress Party in India’s general election in May 2009, and the postelection cabinet reshuffle, Mr. Nath was reassigned as Minister of Road Transport and Highways. His replacement as Minister of Commerce and Industry was Anand Sharma. Speculation in the Indian media about the shift was that Mr. Sharma might prove more diplomatic in trade negotiations than Mr. Nath, given that Mr. Sharma had experience at the Ministry of External Affairs. Kamal Nath’s New Portfolio Takes Industry by Surprise, INDO ASIAN NEWS SERVICE (May 28, 2009, 11:52
December 2008 Draft Agriculture Text, the U.S. received much of what it had sought all along in the Doha Round, including:

- Base periods, which would apply only to the U.S., to calculate Product-Specific Support in the Amber and Blue Boxes.
- Relatively deeper cuts that would apply to EU and Japanese overall trade-distorting domestic support ("OTDS"), and significant reduction commitments that would apply to Total aggregate measure of support ("AMS") domestic support in the EU and Japan.
- A broader definition of the "Blue Box" to include countercyclical payments.
- Incorporation by reference into Product-Specific Blue Box caps of spending limits in the 2002 Farm Bill.²⁹⁶

To be sure, this Text was more than a mere transcription of the American negotiating position. The Text did not bestow upon the U.S. all it had sought. The U.S. had opposed, for example, any Product-Specific limits in the Blue Box. Nonetheless, poor countries hardly could be pleased.

In light of that middle “D,” provisions written explicitly for the U.S. ought to have proved embarrassing. They were not justified for all rich countries, which somehow might have made them thinly defensible. They were just for the richest one. They raised the question why American farmers ought to get better treatment than their counterparts in Australia, Canada, the EU, or New Zealand, to which the U.S. provided no answer other than it had to get what it wanted or there would be no Doha Round deal.²⁹⁷

²⁹⁶. See Committee on Agriculture, Revised Draft Modalities for Agriculture, TN/AG/W/4/Rev.4 (Dec. 6, 2008), available at http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf. ²⁹⁷. Following the failure to call a Ministerial meeting at year-end 2008, the Financial Times commented:

The reasons for the stalemate in the Doha talks were much the same as they have been for years. The U.S. is demanding more access for its farmers and manufacturers than the big emerging markets are willing to give – and displaying its own lack of will in confronting domestic constituencies by reducing those farmers’ subsidies in return.

Even more embarrassing ought to have been the intransigent American position on cotton. Since at least May 2006, when the World Bank published a study, the effects of cotton subsidies (and their possible removal) on poor countries were well known:298

[The] World Bank study noted that nearly half the global cotton production occurred in the United States and China. In 2002, the African and Central Asian countries that relied heavily on cotton exports had an average per capita income of less than 80 U.S. cents per day. Meanwhile, exports from these countries competed with heavily subsidized U.S. exports in the international market.

The study found that if cotton subsidies and import tariffs are eliminated, global prices would rise by an average 12.9 percent. In addition, production would decrease by one quarter in the U.S. and by one half in the EU. As a result, the global share of exports from developing countries would increase from 52 percent to 72 percent. As to farmers’ incomes, removal of cotton market distortions would lead to a one sixth decline in US farmers’ income and by more than one half in the EU. For sub-Saharan African farmers, incomes would increase by 30 percent.299

For the U.S. to link its position to moves by China, knowing full well China’s own limited room to maneuver given its concerns about the Uyghurs in Xinjiang, could lead to only one result: selling short the needs of the neediest in Sub-Saharan Africa.

Alongside cotton, the SSM was possibly the most critical Doha Round issue, at least in the agricultural negotiations, for poor countries. Fights over this issue were the proximate cause of the collapse of the July 2008 Ministerial meeting. The first five days of talks (Monday, 21 July through Friday, 25 July) during that meeting – a meeting


originally planned to end on the sixth day (Saturday, 26 July) – summed to nothing. The U.S. and EU singled India out for blame for insisting rich countries make real cuts to their farm subsidies, yet tolerate protection by poor countries of their infant industries. One trade official said of then-Indian Minister of Commerce and Industry, Kamal Nath: “He just sat there and said ‘No’ for 12 straight hours” [ending at 3:30 a.m. on Thursday, 24 July].\(^{300}\)

From the perspective of Minister Nath, there was good reason to say “No.”

Since 1980, the 62-year old celebrity Indian politician had represented, almost without interruption, in the Lok Sabha (India’s Lower House of Parliament), Chhindwara.\(^{301}\) That is a poor, rural district of 1.8 million in the state of Madhya Pradesh, with 60 million people. The farmers in his district are lucky to have a plot of one-half a hectare, hence commercial farming on a developed country scale is not easy to imagine. Soybean planters in Chhindwara are directly harmed by subsidized American soybeans.\(^{302}\) Like it or not, Minister Nath knew subsistence farming in a way few developed country trade negotiators can appreciate.

In this context, however understandable the American concern was that poor countries would abuse an SSM if its volume triggers were too low and thwart access to their markets of American farm products through higher-than-pre-Doha Round tariffs, the concern of poor countries was still more important. What the Americans see as a trade issue the likes of China and India see as a food security issue. No less an authority than the United Nations Special Rapporteur on the Right to Food, Olivier De Schutter, argues that WTO agricultural accords wrongly treat food like any other commodity, instead of respecting the human right to food. International trade has failed to feed the hungry, and to help poor countries feed themselves.\(^{303}\)

Of the nearly one billion people who are hungry in the world, half of them are small-scale farmers in these countries.\(^{304}\) Of this half – nearly 500 million people – 80 percent are directly engaged in food production. The other 20 percent are landless laborers or fishermen. The SSM remedy is essential, argues the Special Rapporteur, “to


\(^{302}\) Id.


\(^{304}\) Id.
insulate fragile domestic farm markets [in poor countries] from volatile
global prices and import surges.” To be sure, food that is traded
internationally accounts for an average of just 15 percent of total world
food output. That statistic might suggest developing and least
developed countries need more trade, not less, in food. But, from their
perspective of food security, they need enhanced capacity to produce
food, and not suffer the vicissitudes of the global marketplace — namely,
price volatility, import surges, and susceptibility to food that is
subsidized and dumped by rich nations.

The long and bloody history of revolutions, both in Asia and the
western world, provides the capstone argument for China, India, and
other developing countries. Rural poverty has catalyzed social and
political upheaval, even whole revolutions. Cases in point are China in
the 19th and early 20th centuries, and France in the late 18th
century. Compounding fears of history repeating itself are
dislocations in the export-oriented manufacturing sectors of China and
India. Even before the onset of severe recessionary conditions in late
2008, China alone had 87,000 public order disturbances — in 2005, when
its GDP grew at an annual rate of over 10 percent. In brief, the
position held by most poor countries on the SSM is more than a devilish
technical detail. Fitting squarely within the middle “D” of the DDA, the
SSM implicates a truly grand theme.

As a final point about the middle “D,” it is important for developing
countries — especially major ones — to assume responsibility for
fostering a coherent world trade regime in which the poverty-alleviating
effects of trade may be felt. The U.S. points out, rightly, that South–
South trade must increase, i.e., poor countries must lift themselves out
of poverty in part by trading more with each other than they do. Likewise, the Financial Times declares that successful conclusion of the
Doha Round requires: development activists giving up the founding
myth of Doha — that western farm subsidies and tariffs, outrageous as
they are, the main obstacle to poor nations’ integrating with the global
economy.

305. Id.

306. See CHRONIC POVERTY RESEARCH CENTER, Understanding Poverty in China, in
org/uploads/publication_files/CPR1_chap10.pdf; The French Revolution, NEW WORLD
ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/French_Revolution (last
visited Nov. 11, 2011).

39a06e68-cdbb-11dd-ba02-000077bb0768.html.

308. See Amy Tsui, USTR Seeks Coherent World trade Regime in WTO, Trade Among

cms/s/0/759d08a-69ee-11e0-89db-00144feab49a.html.
To be sure, calling that proposition “the founding myth” may be an overstatement. Moreover, the U.S. has its own interests at stake: many American businesses operate in multiple developing countries, and would benefit from reduced tariff and non-tariff barriers that inhibit these businesses from supplying goods (either for captive consumption or the merchant market) developing country boundaries. That said, developing countries like Brazil, China, and India shoulder a responsibility that goes beyond the matter of access of American exports to their markets. As long as they inhibit real trade flows amongst themselves and other developing countries, they block the evolution of a coherent trade regime in which countries at the same and different levels of development participate.310

F. The Mexican Plan Spurned

To its credit, on 29 January 2011, Mexico floated a proposal to heal the schisms in the Doha Round and re-focus efforts on the middle “D.” It was a horizontal plan, as it cut across four sectors:311

(1) Agriculture

Developed countries would be obligated to make further reductions in farm subsidies, bringing their cuts closer to what they currently spend, and would be prohibited from shielding their most profitable farm products from major tariff cuts. That is, they would have to reduce OTDS to a level between what the December 2008 draft modalities text required, on the one hand, and their current actual spending, on the other hand. Moreover, developed countries would be required to bind an applied agricultural tariff rate if that rate was below the level that would result from the tiered-reduction formula cut required by the draft text. Finally, developed countries could not designate more than 6 percent of their farm tariff lines as “Sensitive” (a ceiling Canada and Japan had long-since rejected).312

(2) NAMA

All developing countries would be obliged to participate in at least two of the fourteen sectoral initiatives. A developed country would have

310. Similarly, the large amount of tariff revenues collected by one developing country on imports from another developing country bespeaks the reliance of these countries on customs duties for government revenue. Thus, openness to South – South trade is linked to reform of domestic tax regimes in poor countries, with a view to enhancing income and sales tax collection systems. Such reform, in turn, often depends on a serious anti-corruption campaign, as well as enhanced administrative systems for recording and keeping track of assets.
312. Id.
to participate in any sectoral initiative that it sponsored. Both developing and developed countries could take advantage of a basket approach, whereby they could make different tariff commitments in different product sectors. In the first basket, on a certain percentage of tariff lines (which the Mexican proposal did not spell out), they would cut tariffs to zero. In the second basket, they would cut tariffs by a percentage (again, not spelled out) beyond what the Swiss Formula required. In this basket, developed countries would have to cut tariffs to a greater extent than developing ones. The third basket would be available only to developing countries. In it, these countries could put tariff lines and thereby exempt them from any cuts beyond what the Swiss Formula required. Every WTO Member could choose what tariff lines it put in what basket. Developed countries would have 5 years to make the cuts to tariff rates in each basket, and developing countries would have 10 years. For both groups of countries, the cuts would be in equal annual amounts.\(^3\)

(3) Services

Both developing and developed countries would be obligated to convert existing services market liberalization into bound GATS commitments. They could exempt a set number of services sectors from this requirement, but they could do so only if they had participated in the July 2008 signaling conference. Developing countries would be able to exempt a larger number of sectors than developed ones.\(^4\)

(4) Environmental Goods

Both developed and developing countries would have to reduce tariffs on environmental groups substantially, that is, to a greater degree than required under the Swiss Formula. Developed countries would have to cut those tariffs to zero. Developing countries would have to slash them to a level below what the Swiss Formula would mandate. The Doha Round negotiating group on trade and environment would establish a list of "environmental goods," and developed and developing countries would select goods from that list. But, developed countries would have to pick more environmental goods on which to cut tariffs than developing ones.

Within days, on 4 February, the U.S. rejected the plan.\(^5\) It returned to its refrain that the major emerging markets of Brazil, China, and India must open themselves further to agricultural and manufactured goods, and services, beyond what they set out in the December 2008 texts. The Mexican proposal failed to obligate Brazil,
China, or India to participate in the key chemicals and industrial machinery initiatives. Moreover, said the U.S., the plan was incomplete. It failed to address the agriculture SSM, industrial non-tariff barriers ("NTBs"), and AD-CVD disciplines. Bluntly, intoned the U.S., the American business community and Congress would not approve the Mexican proposal.\textsuperscript{316}

V. SPECIAL TRADE DISPENSATIONS TO WIN MUSLIM HEARTS AND MINDS

A. Developing Stakeholders

Poverty anywhere is a threat to prosperity everywhere. That common sense point is even truer when the poverty is in Muslim countries (e.g., Saudi Arabia), or among Muslim communities in non-Muslim countries (e.g., India). The fact is that in the post-9/11 era, many extremist ideologies are in the name of Islam, although in truth they are anything but "Islamic"; rather, they are un-Islamic.\textsuperscript{317} In brief, the connection between economic growth, poverty alleviation, and reduced vulnerability to Islamist extremism is or should be readily apparent. That is not to say trade, in spurring growth and reducing poverty, is a panacea for terrorism. Rather, to be a successful counter-terrorist strategy, trade requires complimentary and salubrious structures and policies at the domestic level. Reducing corruption and sound fiscal and monetary policies are examples.

Still, the link between trade and national security is clear enough: developed countries can help themselves in the long run by helping Islamic countries and communities integrate broadly and deeply into the world trading system. Doing so helps provide Muslims with a well-grounded sense of stake holding in this system. Yet, one of the most extraordinary features of the December 2008 Draft Modalities Texts is they say nothing explicitly about the Islamic world.\textsuperscript{318} For all the categories these texts create among WTO Members, one cohort they do not treat as such is the one made up of Muslim countries. Indeed, that is true of all the major Doha Round documents.

Consider cotton. From the Uyghur people to many residents of the Cotton Four countries, the farmers are Muslim. The adjustment costs to the U.S. and other non-Muslim developed countries of cotton market access and subsidy concessions might be more than offset by the economic, political, and national security gains from healthier, wealthier cotton farmers in western China and Sub-Saharan Africa.\textsuperscript{319}

\textsuperscript{316} Id.
\textsuperscript{317} See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) 1359-81 (2011).
\textsuperscript{318} See Revised Draft Modalities for Agriculture, supra note 296.
\textsuperscript{319} See Nioroge, supra note 299, at 10.
Similar arguments can be made in other agricultural and industrial sectors. The Doha Round was launched in the aftermath of the terrorist attacks of 11 September 2001. A key reason for meeting in Doha, and pushing through the DDA, was to show that evil extremists not only are un-Islamic, but also are hideously lousy economists. The world – aside from the extremists – has a shared interest in cross-border commercial intercourse and therefore in the concomitant necessary conditions of peace and security. War impedes trade, and as trade declines, so does job and income growth. These points hold as true for Muslims as for Catholics, Protestants, Jews, Buddhists, Sikhs, and so on.

To be sure, aside from particular issues arising under the Shari'a (Islamic Law), such as forbidden products (alcohol, pork, and pornography), forbidden banking transactions (those that involve riba, which loosely translated is interest), and forbidden insurance policies (those that involve gharar, which means uncertainty), there is no such thing as “Muslim trade law.” That is similarly true of other faiths – there is no Catholic trade law, for instance, though Catholic countries may have distinct concerns about certain trade policies and their implications.

B. Grim Statistics

Nevertheless, Muslim countries are in need of better integration into the GATT–WTO order. Consider a few stark realities about just the Arab Muslim world:320

- The GDP of Arab countries combined is (as of 1999) $531.2, which is less than that of Spain.
- The total value of non-oil exports from Arab countries is less than that of Finland. There are 300 million people in the Arab world and five million people in Finland.
- During the 1990s, the growth rate of exports from Arab countries was 1.5 percent per year. The average global growth rate was six percent.
- The export base of Arab countries is not diversified. Oil and oil-related products account for 70 percent of their exports.
- Regarding intellectual development, Arab countries lag behind the rest of the world. The number of books translated each year into Arabic in the entire Arab Muslim world is just 20 percent of the number translated into Greek in Greece. The number of books published per million people in the Arab Muslim world (whether written

DEBACLE OF DOHA ROUND COUNTER-TERRORISM

in Arabic, or translated into Arabic) is lower than every other region of the world, except Sub-Saharan Africa.

- On intellectual property (IP) generation, the Arab countries also lag behind the rest of the world. Between 1980 and 2000, Israel registered 7,652 patents in the U.S. Korea registered 16,328 patents in the U.S. In that same 20-year period, Saudi Arabia led the Arab Muslim world in registering patents in the U.S. – with a pathetic 171. Egypt had 77, Kuwait 52, the United Arab Emirates 32, Syria 20, and Jordan 15. Further, Arab countries have one of the lowest numbers of research scientists who publish frequently cited articles.

- Concerning education, the Arab countries again lag behind the rest of the world. In 2003, China began publishing a list of the 500 best universities in the world. None of the over 200 Arab universities were on that list, nor do any of them appear in the subsequent annual rankings. Even when the in list is narrowed to the Asia–Pacific region (covering the Middle East), no Arab university is listed.

- In political development, the countries of the Middle East and North Africa are consistently ranked by Freedom House as having the lowest freedom rating.

- On women's rights, nowhere in the world is the situation more dreadful than in Arab countries. Women account for slightly more than half of the Arab population, but they are largely absent from economic and political life, and (as is widely known) from the driver's seat in cars in Saudi Arabia.

- On overall average standard of living, only Sub-Saharan Africa has a lower figure than Arab countries.

Depending on the outcome of the Arab Spring, many of these statistics might improve. In the meantime, contrary to assertions by Islamic extremists, neither supposedly wicked foreign powers, nor the legacy of the Crusades or colonialism, are to blame. Arabs are responsible for themselves and their children.

To be sure, all or some of these statistics may improve after the Arab Spring, assuming countries newly liberated from their monstrosely corrupt and economically unhelpful autocrats adopt prudent economic policies. Yet, for now, candidly, these realities are scary. Left unchanged, they play into the evil hands of extremists. That is because Arab masses – the street, as it were – are at risk of developing a sense of exclusion. All faith that domestic politicians and the global economic regime can help change reality for the better is lost. The poison of extremism may appear an antidote.
C. New Ideas Faithful to the Original Purpose

The obvious inference from the above-listed points is the Doha Round should have focused in part on boosting trade with and among Muslim countries. Because it has failed to do so, the perception among Arab countries, and throughout the Islamic world, that the Round has failed to address the above-listed challenges is not irrational.

If susceptibility to fanatical ideologies and recruitment by VEOs, on the one hand, and oppressive economic circumstances (or the perception thereof), on the other hand, are linked (and they are, as Part One of the Trilogy argues), then the Doha Round was a strategic opportunity to forge trade-generating, poverty-alleviating rules. Perhaps it is not too late to resurrect the Round, restoring it to its original, counter-terrorist purpose via a package of proposals faithful to that purpose. They might include the following:

- An accelerated accession of Algeria, Iran, Iraq, Lebanon, and Syria into the WTO;
- Duty-free treatment for all non-oil exports, without exceptions for T & A and footwear, and for otherwise sensitive farm products, from all Muslim countries;
- A list of farm and industrial products of potential future keen export interest to Muslim countries, and demand free trade on those products;
- A “Muslim Sectoral Agreement,” to be followed by all WTO Members, without exception; or
- Support for fisherman in Muslim countries to enhance their livelihoods in an environmentally sustainable way;
- A “Muslim Technical Facility,” to boost as rapidly as possible the legal capacity in trade ministries from Morocco to Malaysia, particularly on trade facilitation issues.

Indubitably, there are other terms of a package oriented to reform in the Muslim world.

To be sure, elements of a Doha Round deal faithful to the original purpose of the Round would not change all the grim realities in Islamic World in the short term. They would not deliver an immediate, crushing blow against VEOs. But, they would be practically insignificant, yet symbolically important, steps.

D. The “Islamic” Delineation

To take such steps, important considerations about inclusion would need to be resolved. Should such a package cover all Islamic countries, namely, all 57 countries in the Organization of the Islamic Conference (“OIC”)? Should it cover only OIC countries that are WTO Members?
Should it exclude OIC countries with high per capita incomes, like the Gulf Cooperation Council ("GCC") states? Should emphasis be on the Arab Muslim countries? How should Muslim communities in non-OIC countries, like India or Singapore, be treated? In resolving these matters, every effort should be toward inclusiveness. After all, the goal ought to be to win minds and hearts of Muslims – the entire community (ummah) – regardless of international boundaries. To put the point more pragmatically, VEOs recruit from that ummah in disregard of those boundaries, hence a positive, pro-active trade reform agenda should contest on those same recruitment grounds.

However these questions are resolved, one matter should be obvious. There is nothing wrong with singling out OIC countries, or a subset of them. As this Trilogy shows, to a nearly ludicrous extent the Doha Round draft modalities texts create hair-splitting delineations among WTO Members, both as sub-groups and individuals. Examples include net food importing developing countries ("NFIDCs"), RAMs, SVEs, countries in the Southern African Customs Union ("SACU"), and Bolivia, as well as – shamefully – rich countries like Canada, Japan, Norway, and the U.S. To establish these delineations for flexibilities or S & D treatment but eschew an “Islamic” category is unjustifiable. Worse yet, it is irresponsible in the post-9/11 climate, given the persistence (even exacerbation) of global poverty, and continued threats posed by VEOs acting in the name of “Islam.”

There are three possible explanations for the willingness of Members to countenance the metastasizing of S & D treatment rules to all such sub-groups and individuals – except Muslim countries. One is cynical: the Members never intended to help those countries in the first place. Doing so was just part of the rhetoric surrounding the launch of the Round, rhetoric necessary to agree on the DDA in the first place. This explanation is difficult to prove, and smacks of being a “cop out.”

The second explanation is atmospheric: WTO Members are too politically correct to agree on a distinction based on religion, and fear offending Islamic countries by intimating a link between a particular religion and terrorism. Why not, then, help Members in all the other categories (e.g., NFIDCs, RAMs, and SVEs), which then will help Muslim countries? After all, those countries are scattered among the non-religiously based categories. This explanation, if true, suggests the Members are willing to entertain a remarkably roundabout, inefficient way of helping the ummah. Surely the better approach is to target the problem, as it were, directly.

The third explanation is realistic: sincere as they were in their original purpose for the Doha Round, the Members are politically and economically unable to resist their domestic business constituencies, which put short-term selfish interest above the long-term common good. This explanation best fits the facts. Commercial self-interest is
empirically verifiable lurking throughout the rules championed by various Members in the negotiating texts.

Unfortunately, led by a French Director-General, Pascal Lamy, for much of the Doha Round, one who works in a secular international organization in a Europe that sometimes prides itself as post-religious, questions about identifying poor, Islamic countries in need of special trade rules to fight poverty and thereby extremism never were asked. Mr. Lamy himself has grasped at any reason to justify the Round, except the most obvious one confronted every day, in dozens of countries, by brave men and women who serve, for example, in charitable, non-governmental organizations or in Special Operations Forces ("SOF") of the military. Preach the virtues of free trade, yes, but preach the link between free trade, religion, and a better future; Mr. Lamy would have none of it.

Rather, anointing major developing countries – Brazil, China, and India – into the elite group of WTO Members that could make or break a deal in the confines of the Green Room of the WTO Secretariat is as much of a revolution as the Director-General and Secretariat could orchestrate, tolerate, or imagine. Islam calls roughly 1.3 billion people, second only to Christianity, with about 2.2 billion followers. Who in that Green Room represents the Muslim world? Those three newcomers? The U.S. and EU, which hold fast to their traditional Green Room places and remain the final arbiters of any Doha Round deal?

The anointing of Brazil, China, and India also is part of the unwinding of the relatively straightforward, Uruguay Round era distinction among developed, developing, and least developed countries. It is redolent of the metastasizing of categories among WTO Members. Yet, if there is to be a new category, then surely that of "Islam" is as, or more compelling and as, or more consistent with the DDA, than any other category.
WORLD TRADE LAW AFTER DOHA: MULTILATERAL, REGIONAL, AND NATIONAL APPROACHES

DAVID A. GANTZ*

I. INTRODUCTION

After ten years, the Doha Development Round is effectively dead, at least in its present form, even if no one seems willing to affirm its passing in so many words for fear of being blamed for its demise.1 At best, “the Doha Rounds seems likely to lapse into an indefinite period of hibernation — with little idea of when or how the talks could be wakened.”2 Doha will not likely again be a comprehensive single undertaking, and it is unlikely that a broadly comprehensive round of trade negotiations reminiscent of Doha or the Uruguay Round will be attempted in the foreseeable future. Although some have suggested a “time out,” with resumption only after political leadership changes in the United States and China, in 2013,3 there is little reason at this writing, with the inability of the Ministers at the WTO’s 8th Ministerial Meeting in December 2011 to resurrect the Doha Round,4 to believe that a few years’ delay would make a major breakthrough in the negotiations possible. While some have suggested that Doha’s demise

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1. Alan Beattie, WTO: World waits to move on after Doha, FIN. TIMES, Sept. 22, 2011, http://www.ft.com/intl/cms/s/0/al8aeb76-ded3-1leO-a228-00144feabdc0.html#axzz1k EYD2juG.


threatens the continued existence of the GATT/WTO system, many more see continued strength in the system as developed over the past nearly sixty-five years, with its extensive body of rules and a mandatory dispute settlement system that, despite its flaws, works reasonably well, and consider it unlikely that the binding rules that have been negotiated in prior GATT rounds will atrophy. Even with some risks of backsliding and increasing protectionism many nations, the United States, the European Union (EU), Japan, Brazil, China, and India, among others, have far too much to lose to make abandoning the WTO rules or even departing substantially from them a rational option. Thus, the WTO system, with its inefficiencies and deficiencies (of which there are many), is here to stay.

Over the past twenty-five years, international trade expanded in a robust manner, outpacing world population by about 5 percent, compared to 1 percent from 1870 to 1950. Between 1994 and 2006, world merchandise trade increased each year except for 2001, in amounts ranging from approximately 10 percent in 1997, 2000, and 2004, to only 3.5 percent in 2002. While world trade rules undoubtedly facilitated this growth, other factors, including trade in components as a result of just-in-time manufacturing processes and the revolution in shipping brought about by the containerization phenomenon, as well as some of the more successful regional trade agreements (RTOs) such as the EU and NAFTA, also contributed. Perhaps Doha has been a victim of the success of prior GATT negotiating rounds, because of the

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7. Various members have complained, *inter alia*, about alleged US abuse of the antidumping laws; unfairness of the dispute settlement mechanism for small developing countries; US and EU agricultural subsidies; major developing country markets (particularly China, India and Brazil) to imports of both agricultural and manufactured products from other Members); extraordinarily high tariffs imposed by many countries on a variety of agricultural and non-agricultural products); insufficiently “special and differential treatment” of imports from developing countries, particularly the least-developed countries; and continued tariff and non-tariff restrictions to textile, apparel and footwear imports from developing country members.


extent of liberalization except with regard to agricultural subsidies, sensitive agricultural goods, and certain manufactured products.11

The last several decades have also been a time of fundamental change to the global trading system. The “Quad” countries (the United States, EU, Japan, and Canada) no longer dominate the negotiations. China (since November 2001), Brazil, India, Indonesia, and South Africa in particular are major players without whose concurrence little can be accomplished in Geneva.12 This trend will likely continue, as it is estimated that in twenty years or so, ten of the largest economies will be what we currently regard as developing countries, and China will likely be almost every WTO Member’s largest trading partner.13 Peter Sutherland, the last secretary general of GATT, states bluntly that because China is the “world’s most successful trading nation and will remain so for a long while . . . China [is] the key player in the World Trade Organization.”14 Less significant change is likely for most other developing countries, which despite increasing their share of world trade are likely to remain poor.15

The Doha process has also been plagued by a confluence of negative political factors in the United States, the EU, India, and elsewhere. The expiry of Trade Promotion Authority (TPA) in the United States in mid-2007 and divided government since 2010 have made continued negotiations more difficult, given that most nations are reluctant to conclude trade agreements with the United States unless they are assured (as TPA provides) that Congress cannot unilaterally change the agreement.16 Elections in India in 2009 likely contributed to the failure of progress in the negotiations in 2008, as did Brazil’s more recent defensive approach toward rapidly increasing imports from China and currency appreciation at home.17 A similar problem has been the inward focus of those and other developing nations, for which reducing poverty remains a major focus of government policy and actions.18 If one adds Japan’s on-going political paralysis, the EU’s focus on internal debate about the Eurozone and a stagnant regional economy and implementation of the Lisbon Treaty, and China’s reluctance to accept

11. SCHOTT I, supra note 2, at 2.
13. See Dadush, supra note 8.
15. Id. at 7.
17. Susan Schwab. After Doha: Why the Negotiations are Doomed and What we Should do About It, 90 FOREIGN AFFAIRS 104, 111 (2011) [hereinafter Schwab].
18. See Dadush, supra note 8 (arguing that reducing income gaps are much more important than a free trade offensive).
the full responsibilities of WTO membership and world economic power status (likely in part as a result of a coming leadership transition), there has arguably been a perfect storm of extreme political caution among the major players in the negotiations.

If there is reason for cautious optimism post-Doha it is because there are alternatives to a broad package of new or amended WTO agreements. These alternatives while less than ideal may nevertheless provide an impetus for continuing trade liberalization both among specific countries and in some instances worldwide. Such possibilities include existing and future "plurilateral" trade agreements (specialized agreements among willing Members but not the entire membership, such as the WTO's Government Procurement Agreement and the Information Technology Agreement), hundreds of regional trade agreements (RTAs), and various national laws and regulations in the soon to be 156 member nations of the WTO.

I begin in Part II by reviewing briefly the evolution of the world trading system since 1947, along with the major reasons for Doha's failure and for the widespread belief that a broad agenda of "single undertaking" negotiations cannot be recreated in the foreseeable future. Part III discusses the specific areas in which relatively widespread international agreement may be reached, including information technology, trade facilitation, government procurement, services, fisheries subsidies, and treatment of state owned enterprises (SOEs). Part IV discusses the historical development, current state and likely future expansion of RTAs, while Part V addresses the importance of national, largely unilateral trade liberalization through tariff and non-tariff barrier reduction such as that which has recently taken place in Chile and Mexico, and may well be more common, even in the United States and the EU and even in the agricultural sector.

When trying to assess the future, I have focused on the relatively near term, primarily the coming five to ten years. Predictions beyond that period are fraught with peril in the international trade area as in most others. I doubt that anyone, and certainly not I, has a crystal ball that would give an accurate reading forty or even twenty years hence. Among other constraints are the impossibility of assessing the impact of unexpected events ranging from a nuclear bomb or other catastrophic

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19. Schwab, supra note 17, at 108.
attack in a developed country by a terrorist group to economic and social dislocation resulting from much more rapid climate change than experts currently anticipate, to a decline in Chinese economic growth on the one hand or a reversal of the economic decline of Europe and the United States on the other.  

As others have pointed out, "the WTO is an integral part of the world trading system, but it is only one part ....." There is insufficient political will to conclude the Doha Round. It remains to be seen whether, among the willing trading nations, there exists the necessary political foresight to assure that the process of expanding world trade through the reduction of trade and non-trade barriers will continue well into the 21st Century. If such will exists there are tools other than a major WTO negotiating round to achieve such goals.

II. WORLD TRADE AS OF THE END OF 2011

The GATT 1947, as modified and expanded in eight major multilateral rounds culminating with the Uruguay Round’s Marrakesh Agreement in April 1994, resulted by 2000 (when the Uruguay Round tariff concessions were fully implemented) in an aggregate reduction of tariffs imposed by developed countries of approximately 40 percent and for developing countries of 20 percent compared to pre-Uruguay Round levels. Beginning with the completion of the Tokyo Round in 1978, rules relating to a number of non-tariff areas, such as dumping, subsidies, government procurement, and customs valuation were added as "codes," albeit on a plurilateral basis.

The watershed event for the world trading system was the completion of seven and a half years of negotiations that resulted in the Uruguay Round agreements, which became effective for most then-existing GATT Contracting Parties in 1995. The Uruguay Round constituted a massive expansion of the international system, by adding to the GATT trade in goods disciplines; trade in services; trade-related intellectual property; limited coverage of trade-related investment; coverage of agriculture, textiles, sanitary and phytosanitary measures

23. Dadush, supra note 8.
and standards; and a mandatory dispute settlement system.\textsuperscript{28} Moreover, disciplines which under the Tokyo Round were optional, such as those relating to dumping, subsidies, and customs valuation, were no longer so after the Uruguay Round. Also, discretionary plurilateral agreements applicable to government procurement, civil aviation, dairy products, and bovine meat were included in the Uruguay Round package.\textsuperscript{29}

While this expansion has proven relatively easy to understand and implement for developed countries, the additional obligations, particularly in the areas of intellectual property and services, imposed enormous burdens on developing nation administrative agencies and the courts, among others. Even with long grace periods — India and other least developed WTO members were not required to fully implement the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) for ten years after January 1, 1995 (recently extended to 2013 and likely to be extended further)\textsuperscript{30} — the burdens of full compliance were and are substantial, factors which have clearly influenced the reluctance of some developing countries to move forward again under Doha.

The United States and the EU, very unwisely in retrospect, sought at a WTO Ministerial Meeting in Seattle in 1999 to obtain agreement to kick off yet another negotiating round.\textsuperscript{31} The effort was a miserable failure going well beyond street demonstrations, in part because the majority of the Members were still experiencing grave difficulties in implementing the obligations they had accepted in the Marrakech Agreement, and neither the United States nor the EU had in the preliminary sessions shown much willingness to include on the agenda issues of importance to developing country members, such as alleged United States abuses of the Anti-dumping Agreement.\textsuperscript{32} Perhaps the most significant result of the Seattle meeting was confirmation that world trade negotiations would no longer be dominated by the United


States, EU, Japan, and Canada but that major developing nations, particularly Brazil, India, and South Africa, would play a major role.\(^{33}\)

The time of initiation of the Doha Round, in November 2011, was no coincidence. Built-in incentives to initiate the Round came in part from several of the Uruguay Round Agreements, including the General Agreement on Trade in Services and the Agreement on Agriculture, because both incorporated in their texts' obligations (beginning in 2000) to continue expanding the disciplines in those fields.\(^{34}\) A spirit of unity briefly following 9/11, the negotiating skills of United States Trade Representative Robert Zoellick and WTO Secretary General Mike Moore, and labeling the round the “Doha Development Round” probably helped bring about the accord, given that many of the developing country members, after seven years operating under the WTO agreements, felt that they had not received the benefits they expected from the package.\(^{35}\) The labeling also reflected reality; developing members were and are a substantial majority of the WTO Members and thus could determine in 2001 whether new trade rules would be attempted.\(^{36}\) In retrospect, the declaration, with fifty-two paragraphs covering a broad variety of procedural and substantive areas, was overly optimistic and perhaps naive.\(^{37}\)

From the outset there were signs that the negotiations would be difficult. The developing world was skeptical about the willingness of the major developed countries to offer major concessions in such areas as agricultural subsidies without asking for painful concessions in return. The “Singapore Issues” of investment, anti-competition rules, trade facilitation, and transparency in government procurement (the latter shorthand for corruption) were included in the Doha Declaration but never accepted by a majority of the members, and dropped completely from the negotiations a few years later.\(^{38}\)

After six or so years of negotiations it became apparent that disagreements between key developed nations such as the United States and the EU on the one hand, and the largest developing


\(^{36}\) POLASKI, supra note 6, at 2-3.


countries, including Brazil, China, and India, had become impossible to bridge. Nor, by 2007, was there agreement between the United States and the EU on reduction of agricultural subsidies, while Brazil, on behalf of the “G20” developing country Members, insisted on substantial reductions. India, on behalf of the “G33” countries whose agricultural sectors were dominated by small farmers, sought to shield 20 percent of its agricultural tariffs on “special products.”

Manufactured goods tariffs have been similarly controversial, with the United States and the EU seeking such tariffs (non-agricultural market access or “NAMA”) of no more than 10 percent for developed countries and no more than 15 percent for developing countries. Developed members believed that better market access for both agricultural and manufactured exports, and for key services such as those in the financial and telecommunications areas, were the only means to securing domestic support for further concessions on agricultural subsidies and additional tariff reductions. Argentina, Brazil, China, India, South Africa, and other developing nations adamantly refused.

The negotiations were also complicated by the fact that despite common positions in public the developing country members’ interests were hardly monolithic. Not only the United States and the EU would have benefitted from greater market access for both agricultural and manufactured goods to these major developing country markets; smaller and poorer developing countries will suffer economically (probably much more than the United States and the EU) from China, Brazil and India’s intransigence. It was only late in the process that a few middle-income developing countries such as Chile, Colombia, Costa Rica, Hong Kong, Malaysia, Pakistan, and Singapore advocated more market-opening measures by the dominant developing countries, with harsh criticism from them the result.

Also, although the criticism has seldom been articulated by member governments in public, concerns in such countries as Argentina, Brazil, and generally MERCOSUR over rapidly increasing imports from China alone may well have contributed to their own and other developing members’ reluctance to reduce tariffs on a most-

40. POLASKI, supra note 6, at 5.
42. Id. at 10.
43. Schwab, supra note 17, at 107-08.
44. Id. at 108.
favored-nation (MFN) basis, as is reflected in a recent series of highly protectionist, if understandable, actions by those two countries designed to reduce Chinese imports.

Ultimately, the divergent interests of developed countries, major developing countries and the least developed countries could not be adequately bridged. It seems unlikely that this central impasse can be resolved in the foreseeable future, or perhaps even in a decade. Add to this the leadership vacuum among developed nations; the multi-polar system divide noted above; the developed country view of the new economic powerhouses as more economic rivals than export destinations; and the sheer complexities of addressing issues as services, investment and agricultural subsidies, the probabilities for future success under the current single-undertaking and consensus-based WTO system seem slight indeed. While the WTO will continue to play an important role, both in enforcing current international trading rules and in selected areas where consensus or broad, if not universal, agreement is possible (Part III, below), the WTO’s status as the focal point for trade liberalization is likely to further erode as it has for much of the past decade.

III. FUTURE TRADE LIBERALIZATION IN GENEVA

The post-Doha opportunities in Geneva likely include those where a consensus may be possible, and those where “plurilateral” agreements among only the willing are legally and politically achievable. Other broadly-based international measures relating to trade, such as those implemented regionally and through adoption of model laws, are discussed in Parts IV and V, below.

A. Areas of Possible Consensus

There appear to be very few areas where broad consensus among the WTO membership will be achievable in the foreseeable future, beyond largely tariff-free and quota-free developed market access for least developed member (LDC) exports, subsidies to industrial fishing fleets, trade facilitation measures and, somewhat less likely, elimination of tariffs and tariff barriers for “green” technologies. Under the WTO Agreement, adoption of new agreements and amendments is

47. Dadush, supra note 8 (suggesting that this could take 25 years or more).
48. Id.
possible in most cases with a vote of two-thirds of the membership.\footnote{49} However, in practice the more customary consensus rule has usually been followed. Consensus does not mean that all members must support a measure or agreement, but if even one objects strenuously, as Georgia did earlier with regard to Russia’s desired WTO accession (later resolved with approval of Russia’s accession in December 2011),\footnote{50} all progress is blocked. At the same time, for arrangements that do not result in tariff reductions, the plurilateral route may be an option (part B of this section).

1. **Trade Barriers for LDCs**

Tariff-free, quota-free access could be provided to developed member markets for most or all manufactured goods from the LDC members — generally all members with annual per-capita GDPs of under $1000, with a few possible exceptions such as Vietnam. These proposals have been under discussion at least since the 2005 Hong Kong WTO Ministerial meeting,\footnote{51} when “developed-country Members, and developing-country Members declaring themselves in a position to do so, agreed to implement duty-free and quota-free market access for manufactured products originating from LDCs,” but have not yet been implemented (except unilaterally to some extent by the EU).\footnote{52} Support for the plan is not universal, since discrimination would effectively occur against lower middle income countries that do not qualify as LDCs but compete for access in developed country markets with LDCs, and the practical lines between so-called middle income and lower middle income developing countries and LDCs may be blurred. This is a serious problem if the implementation of the plan were to be followed by a reduction of the availability of benefits now available to all developing countries under the Generalized System of Preferences and similar regional programs.\footnote{53} Whether members such as the United States and the EU would allow expanded access, even for LDCs, for sensitive

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49. WTO Agreement, supra note 24, Annex 1(a), art. X, available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf (The actual vote under the WTO Agreement, art. X. Article X(3) also provides in pertinent part that an amendment “shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it”).


52. Id.

products such as textiles and apparel is also problematic, particularly when the program would be seen by domestic politicians as unilateral, without any corresponding benefits accruing to developed country exporters. Should exceptions be incorporated for apparel and footwear tariff lines, for example, the economic benefits of the plan for LDCs would be substantially eroded.

2. Industrial Fishing Subsidies

Broad but not unanimous support also exists for ending subsidies to industrial fishing fleets, primarily on environmental/protection of species grounds, but also to protect smaller coastal fishing industries. As outlined by the WTO Secretariat,

The proposed new disciplines on fisheries subsidies as reflected in the Chairman's first draft text would include a prohibited category covering, inter alia, subsidies for construction of new fishing vessels and subsidies for operating costs of fishing. LDCs would be exempted from the new disciplines, and other developing Members would have substantial flexibilities, especially for subsidies to subsistence-type fishing in their territorial waters. All exceptions to the proposed prohibition would be conditioned on compliance with certain provisions related to fisheries management.

Discussions have been underway in Geneva since early 2002, with the major players, apparently relatively near agreement, under pressure not only from developing country coastal fishing industries but by environmentally minded NGOs and civil society groups in the United States, the EU, and other developed nations. However, there appears to be little reported progress since the end of 2009.

3. Trade Facilitation

Few members openly oppose so-called “trade facilitation” measures, reducing the costs of physically moving goods across national borders, which some experts estimate could increase global GDP by over $100 billion annually. This increased level of interest reflects in large part the success of the GATT/WTO system in reducing tariff levels and non-tariff-barriers since 1947; in many markets trade is likely more

54. See SCHOTT I, supra note 2, at 8 (noting that legislation would be required to avoid blocking access by such barriers as restrictive rules of origin).
56. Id.
57. Schwab, supra note 17, at 115 (quoting the Peterson Institute).
restricted by border delays and infrastructure limitations and excessive regulation than by tariffs. Exports as well as imports would be facilitated, a factor that for the most part reduces opposition by national business groups. Since any agreement is likely to be coupled with strong commitments of financial and technical assistance toward such “capacity building” in achieving the objectives of the agreement (as has been the case with some regional trade agreements), it is likely to receive broad support from the developing members who would receive the assistance.

4. “Green” Technology

As part of the Doha Round the WTO members have been engaged in negotiations which if successful would eliminate tariff and non-tariff barriers for trade in “green” technology products and services. There has been no agreement to date; the United States, as the major proponent, has asked WTO members to freeze current tariffs first on green goods; as a compromise, on 25 “green” tariff lines, but to date Brazil and India have refused. Of course, under the MFN principle, if the United States and other proponents were to eliminate tariffs on “green” goods all other WTO members, including China, would benefit. Similarly, MFN obligations reduce the option of discriminatory application of reductions in services market access.

Despite disagreements and game-playing with the lists of products to be covered, some have argued that an accord on green technologies might be possible separately from the Doha package.

However, it is difficult not to be skeptical, given that China, as of early 2010, became the world’s largest producer of both wind turbines and solar panels allegedly through currency manipulation and WTO illegal subsidies. It seems unlikely under these circumstances that the United States president (whoever he or she may be as of January

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62. Schwab, supra note 17, at 115.

2012) and Congress would continue an initiative to facilitate entry of Chinese green technology goods into the United States without China making major concessions as well. Even should China agree to open its markets to foreign products, which it has refused to date, unless the tariff reductions were accompanied by changes in mandatory transfer of technology rules in China and agreement not to subsidize production of such goods, China’s acceptance into such an accord seems a total non-starter. A decision in November 2011 by the United States Department of Commerce to initiate a countervailing duty investigation of Chinese solar subsidies makes such an agreement even less likely in the foreseeable future.

B. Agreements among the Willing

With the exceptions noted above, broadly based (but not universally applicable) progress is more likely to be achieved through plurilateral agreements comprised only of the members who are willing to accept the obligations in order to reap the benefits, whether undertaken within the WTO or separately. As one scholar has observed, “many complex issues, including services, investment, agricultural subsidies, and the import of manufactures in developing countries, remain de facto outside the WTO’s reach.” Some of these may be effectively beyond any broad international accord even on a plurilateral basis, and thus destined only for treatment in RTAs (since only the latter permits departure from MFN principles absent a WTO waiver), but others seem more promising.

The practical ability of nations who are WTO members to reduce tariffs further for a group smaller than the full membership is limited, in contrast to doing so via a negotiating round in Geneva, because any such tariff reductions must be offered on a MFN basis, whether or not the beneficiaries of the reductions are part of the bargain, absent a waiver from the membership. This “free rider” problem makes such reductions problematic. Fortunately, if there is adequate political will there are other possibilities, the most promising of which include further refinements in the existing GPA and the Information Technology Agreement (ITA), where negotiations have been taking place in Geneva for some time. Other possibilities include further efforts at anti-competition and investment rules — although those are

65. Id.
66. Dadush, supra note 8 (emphasis added).
68. Id.
likely long term rather than medium term aspirations — and protection of intellectual property that goes beyond the current TRIPS.\textsuperscript{69}

1. Expended Government Procurement Agreement (GPA)

After initial discussions at the OECD, government procurement was included in the Tokyo Round GATT negotiations, resulting in the conclusion of a Government Procurement Code (GPC). The GPC entered into force in 1981 and was amended in 1988; at that time it covered only central government procurement and only goods, not services.\textsuperscript{70} Like the other Uruguay Round Codes it was not mandatory for GATT Contracting Parties.\textsuperscript{71} The plurilateral Uruguay Round, GPA became effective January 1, 1996.\textsuperscript{72} The GPA’s membership as of October 2011 included forty-one nations, including the twenty-seven members of the European Union.\textsuperscript{73} New applications for membership include China, Jordan, the Ukraine, and six others.\textsuperscript{74}

As explained by the WTO, “[t]he GPA is based on the principles of openness, transparency and non-discrimination, which apply to Parties’ procurement covered by the Agreement, to the benefit of Parties and their suppliers, goods and services.”\textsuperscript{75} Government procurement of goods and services is an important sector in most economies, accounting for 15-20 percent of GDP.\textsuperscript{76} The dream of a GPA that would include Brazil, China, India, Russia, and South Africa (BRICS) is likely some

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\textsuperscript{71.} Overview of the Agreement on Government Procurement, supra note 70.


\textsuperscript{73.} The others include Armenia, Hong Kong, Iceland, Israel, Japan, South Korea, Lichtenstein, Aruba (Netherlands), Norway, Singapore, Switzerland, Chinese, Taipei and the United States. Parties and Observers to the GPA, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (last visited Jan. 18, 2012).

\textsuperscript{74.} Int’l Centre for Trade and Sustainable Dev. (ICTSD), Finish Line “Clearly in Sight” for WTO Govt Procurement Deal: Chair, 15 BRIDGES WKLY. TRADE NEWS DIG. no. 35, at 3 (2011) [hereinafter ICTSD — GPA], available at http://ictsd.org/i/news/bridges_weekly/116637/.


\textsuperscript{76.} ICTSD — GPA, supra note 74, at 2. The WTO secretariat suggests that the value of an expanded GPA with additional coverage and members would be worth $380—$970 billion worth of trade annually. Id. (referencing a WTO working paper).
years away, since China is the only one of the five now seeking membership, and Russia will likely complete the WTO accession process only in mid-2012.\(^7\)

The GPA contains requirements for further negotiations after the first three years in force and "periodically thereafter"\(^7\) and such negotiations were incorporated into the Doha Round.\(^7\) While provisional agreement on a revised GPA was reached in September 2006 as part of the Doha Round, the negotiations have continued into December 2011, where agreement was finally reached.\(^8\) The negotiators sought to add more than 200 listed government ministries and agencies, as well as sub-central entities, to members' annexes that would be newly subject to the GPA, as well as full coverage of construction services;\(^8\) over 150 were ultimately agreed upon.\(^8\) Among the most difficult outstanding issues was EU dissatisfaction with Japanese and United States proposals on future commitments for liberalized public procurement and the future GPA work program.\(^8\) The EU has also been pressuring the United States to add more central government entities to those covered (with twelve added in the new accord), and to expand United States coverage beyond the current thirty-seven.\(^8\) This suggests that the GPA discussions will continue well into the future with expansion of both commitments and membership. Other changes including updating that would take into account the increasing use of on-line advertising for tenders and electronic procurement. In an effort to attract more developing country members, longer implementation provisions and more individually tailored accession protocols would be offered.\(^8\) The negotiators also rejected efforts by some members to withdraw concessions granted in

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78. GPA, supra note 72, art. XXIV(7).

79. Id.

80. The Plurilateral Agreement on Government Procurement, supra note 75; Daniel Pruzin, Negotiators Clinch WTO Procurement Deal; Expanded Access Valued at $80-100 Billion, 28 INT’L TRADE REP. (BNA) 2043 (Dec. 22, 2011) [hereinafter Pruzin — Procurement Deal].


82. Pruzin — Procurement Deal, supra note 80.

83. Id.

84. Daniel Pruzin, GPA Talks Chair Cites Growing Confidence in WTO Procurement Deal in December, 28 INT’L TRADE REP. (BNA) 1689 (Oct. 20, 2011) [hereinafter Pruzin — GPA]. The U.S. states that have not permitted any of their procurement to be covered are Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia and West Virginia.

85. Id.
the Uruguay Round, and the United States successfully insisted that the revised GPA be concluded by December 2011, rejecting in October the idea of no more than an agreement in principle by that date.

2. Revisions to the Information Technology Agreement

The original ITA was not a part of the Uruguay Round package. Rather, it was concluded as a plurilateral agreement at the WTO's Singapore Ministerial Conference in December 1996. The original number of participants (twenty-nine) has grown to seventy, representing some 97 percent of world trade in IT products. (Brazil appears to be the only major member that has not become a party.) The ITA provides for complete elimination of tariffs on IT products, with some developed country members afforded extended grace periods for certain products. Since 2010, the WTO's ITA Committee had been discussing a proposal by the EU for a broad review of the ITA, which would include negotiations on non-tariff barriers and expand both product coverage and membership. (The tariff reductions apply under the MFN principle to all WTO members, whether or not they are party to the ITA). Because of GATT's MFN clause the tariff reductions under the ITA apply to all WTO Members.

3. Other Plurilateral Agreements Applicable to Trade in Goods

Former United States Trade Representative Schwab has suggested that the ITA approach might also be applied in a plurilateral agreement that would cover pharmaceuticals, medical equipment, and/or health care services, with the objective to reduce the costs associated with delivering health care. In some areas, such as pharmaceuticals, the major producers include both developed nations, such as the United States and the EU, and developed Members, such as India, Brazil, and

90. Information Technology Agreement, supra note 88.
92. Information Technology Agreement, supra note 88.
93. Schwab, supra note 17, at 116.
Thailand. \(^{94}\) Whether those interested would be willing to conclude such agreement or agreements knowing that most of the benefits would accrue to free riders remains to be seen.

4. **Electronic Commerce**


As part of the Work Programme, the General Council has engaged in substantive discussions based on the reports submitted to it by the subsidiary Councils and Committees as well as on other relevant considerations. Given the rapid evolution of electronic commerce, many Members attach importance to further focused deliberations on a number of the issues raised. \(^{95}\)

This is an area in which the WTO has already had considerable success in reaching a "standstill" understanding not to impose customs duties on electronic commerce; the longstanding policy has been rolled over at least until October 2012, \(^{96}\) with further extensions likely.

The issues were addressed more fully in some regional trade agreements, including many of those concluded by the United States in recent years. For example, the United States-Korea Free Trade Agreement provides *inter alia* that the parties will not "impose customs duties, fees, or other charges on or in connection with the importation or exportation of . . . a digital product fixed on a carrier medium; or a digital product transmitted electronically." \(^{97}\) Other members would likely consider similar commitments on a reciprocal basis.

5. **Investment and Anti-Competition Law**

Both investment and competition law as they relate to trade were included in the Doha Declaration, \(^{98}\) but strong support for negotiations

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98. Doha Ministerial Declaration, supra note 37, paras. 20-22 (investment), 23-25 (competition).
on these two issues has been limited to the EU and Japan. The topics were dropped from the Doha negotiating agenda in 2004.99

Efforts over more than fifty years, beginning with the Havana Charter, to conclude broadly based international agreements on investment and competition law have been notoriously unsuccessful even among developed nations despite the proliferation of bilateral investment treaties (BITs),100 and new efforts are no more promising except perhaps in the long term. The most recent “multilateral agreement on investment” (MAI), undertaken by the then twenty-five members of the Organization for Cooperation and Development (OECD) and the European Commission, would have been open to all interested nations.101 That effort collapsed in 1998 due to concerns in several developed nations, particularly France, that the accord would give foreign investors excessive power to challenge as indirect expropriation governmental actions protecting the environment and human health, and undermine state authority for these and other exercises of police power without incurring liability.102

Efforts to conclude broad multilateral accords on standards for anti-competition law have been even less successful. Plans to improve international cooperation on anti-competition issues began with the Havana Charter, but the Charter was rejected by the Congress in part because of the anti-trust provisions.103 Subsequently, no international agreement has been concluded that “requires cooperation by states in the identification or prosecution of conduct that violates competition

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laws.” United States bilateral competition agreements with the EU and several of the individual members — Australia, Canada, Brazil, Israel, Japan, and Mexico — are mostly limited to notification and information sharing. Occasional, more extensive anti-competition provisions appear to be limited to certain RTAs, such as the United States-Singapore FTA competition chapter.

Perhaps a notification and information-sharing agreement along the lines of those noted above could be concluded with a larger group of countries, but whether it would improve antitrust enforcement significantly world-wide is less clear. Longstanding differences in approach, including the private treble damage actions and injunctions that are features of United States law and the efforts the United States makes to apply its anti-trust laws on an extraterritorial basis, along with differing approaches to mergers and acquisitions between the United States Department of Justice and the European Commission suggest that any meaningful accord is likely a long way away.

6. Services

While it is at least conceivable that some sort of services disciplines could be available to a significant group as a plurilateral agreement, MFN considerations among others make this difficult. While waivers of MFN requirements are at least theoretically possible under GATS, the likelihood of a waiver for the multiple parties to a plurilateral agreement is remote.

104. Id. at 425.
105. Id.
108. See, e.g., AARON XAVIER FELLMUTH, THE LAW OF INTERNATIONAL BUSINESS TRANSACTIONS 530-34 (West 2009) (discussing the jurisdictional reach of the U.S. antitrust laws); Guzmann & Sykes, supra note 100, at 419-22.
109. Guzman & Sykes, supra note 100, at 423.
110. At the eighth Ministerial Meeting in Geneva in December 2011, the Ministers agreed to a waiver of non-discriminatory treatment so that preferential treatment in services could be offered by developed and developing countries to least developed countries. WTO ministers adopt waiver to permit preferential treatment of LDC service suppliers, WORLD TRADE ORG. (Dec. 17, 2011), http://www.wto.org/english/news_e/news11_e/serv17dec11_e.htm.
111. Waivers for individual members are contemplated under GATS Article II.2 and Annex on Article II Exemptions, but they apply primarily upon accession to GATS. See General Agreement on Trade in Services art. II.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, 1869 U.N.T.S 183 [hereinafter GATS].
services agreement that does not meet the requirements of GATS Article V "economic integration agreements" seems slight. Rather, it would seem much more practical to focus on expanding services disciplines through a regional trade agreement or "economic integration agreement" (EIA) as authorized under GATS, as discussed in Part IV, below.

IV. CONTINUED PROLIFERATION OF RTAs

The authority of GATT/WTO members to enter into customs unions and free trade agreements dates from the original GATT 1947, Article XXIV.112 The compromise between the MFN principle and the perceived need for an exception for regional trade agreements was designed to deal primarily with the then-existing relationships between the United Kingdom and the members of the commonwealth (former colonies).113 The United States was concerned that without some limitations they would adversely affect United States interests.114 As a result, Article XXIV was crafted to limit, at least in theory, customs unions and FTAs to situations in which the agreement covered "substantially all [ ] trade," achieved their objectives of eliminating tariffs and most tariff barriers "within a reasonable length of time" (usually ten years), and did not result in increasing tariffs on imports from non-members of the customs union or RTA.115 Article XXIV also incorporated explicit notification and monitoring requirements, modified on several occasions over the years.116 Unfortunately, the Committee on Regional Trade Agreements (CRTA) and its predecessors were largely ineffective in assuring that the RTAs actually complied with the requirements.117 Efforts to further improve the review system as part of the Doha Round evidenced little progress in a decade.118 In

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114. Id.

115. GATT, supra note 112, arts. XXIV(8), XXIV(6).


117. For example, despite the requirement of review of each RTA by the CRTA, "no examination report has been finalized since 1995 because of lack of consensus." Work of the Committee on Regional Trade Agreements (CRTA), WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Jan. 25, 2012).

118. Negotiating Group on Rules Chair Ambassador Dennis Francis, on 17 March 2011, "noted the limited progress so far in negotiations on regional trade agreements . . ."
fairness, the number of RTAs submitted for review has overwhelmed the review system, and the inability of the Members to agree on such critical definitions as the meaning of “substantially all trade” has made a difficult task virtually impossible.

What Professor Jagwash Bhagwati calls the “spaghetti bowl” effect of proliferation and expansion of RTAs has nevertheless been a relatively recent phenomenon, with the majority negotiated since the early 1990s. As of January 2012, more than 511 customs unions, free trade areas, and less restricted trade agreements permissible for developing countries under the 1979 “Enabling Clause” had been notified to the WTO Secretariat, with another 105 notified under Article V of the General Agreement on Trade in Services.

This “modern” era of RTAs originated in part as a result of a major change in United States policy toward RTAs beginning in the early to mid-1980s. The Single Market Initiative adopted in the EU in 1987 had a significant demonstration effect elsewhere in the world, as with MERCOSUR and the ASEAN FTA. The United States, although a long-term supporter of European integration, grasped the importance of Europe’s enhanced access to relatively low-wage production with the accession of Ireland (1973), Greece (1979), and Spain and Portugal (1986) and the implications for Europe’s competitiveness with the Western Hemisphere and with Asia.

The United States was also frustrated from 1982-1985 in its efforts to bring about a new GATT negotiating round because of indifference from the internally preoccupied Europeans. United States Trade Representative William Brock and his colleague in the United States Government decided to respond to this rebuff by championing FTAs.


122. WTO—RTAs, supra note 120.

123. JEFFREY A. FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM 4-5 (Inst. for Int’l Econ. 1997).

124. Id.


126. See LOVETT, ET AL., supra note 125, at 83.
with Israel and then Canada. The logic then, as today with the WTO’s Doha Round, was that if the preferred global freer trade initiatives could not move forward, regional trade arrangements could provide a viable alternative.\textsuperscript{127}

An enormous volume of literature debates on the pros and cons of regional trade agreements.\textsuperscript{128} Bhagwati and some other economists have decried the expanding numbers of RTAs, terming them (with some logic) “preferential trade agreements” instead.\textsuperscript{129} The WTO Secretariat offers a more nuanced view (perhaps keeping in mind that only Mongolia among the WTO members is not party to a single RTA):

They [the WTO and RTAs] seem to be contradictory, but often regional trade agreements can actually support the WTO’s multilateral trading system. Regional agreements have allowed groups of countries to negotiate rules and commitments that go beyond what was possible at the time multilaterally. In turn, some of these rules have paved the way for agreement in the WTO. Services, intellectual property, environmental standards, investment and competition policies are all issues that were raised in regional negotiations and later developed into agreements or topics of discussion in the WTO. The groupings that are important for the WTO are those that abolish or reduce barriers on trade within the group. The WTO agreements recognize that regional arrangements and closer economic integration can benefit countries. It also recognizes that under some circumstances regional trading arrangements could hurt the trade interests of other countries . . . In particular, the arrangements should help trade flow more freely among the countries in the group without barriers being raised on trade with the outside world. In other words, regional integration should complement the multilateral trading system and not threaten it.\textsuperscript{130}

\textsuperscript{127} David A. Gantz, \textit{Regional Trade Agreements} 14-15 (Carolina Academic Press 2009) [hereinafter Gantz-RTAs].


\textsuperscript{129} Bhagwati & Panagariya—PTAs, supra note 119, at 4.

One factor noted earlier is concern among many WTO members about increasing imports from China. RTAs provide an obvious solution to this problem; a member can reduce or eliminate tariffs among members of and RTA without offering such reduced tariffs to China on an MFN basis, and likely can find many reasons other than fear of China to justify a new RTA.

What will happen with RTAs if there is an extended period when no major negotiations are taking place at the WTO? It seems likely that there will be two major types of activity, the expansion and deepening of existing RTAs and the negotiation and conclusion of new ones, the former driven by the realization that any further expansion of world trade in the short and medium term will likely be driven by RTAs. Also, given the lack of interest by many WTO members in further services marketing opening it seems likely that services RTAs — perhaps stand-alone, without accompanying market opening in trade in goods — may interest those members who wish to expand services trade.

A. Widening and Deepening of Existing RTAs

With the end of the Doha Round as we know it and no prospect of another comprehensive round in the foreseeable future the members of some RTAs will see the expansion and improvement of existing agreements to be of a higher priority that in the past, even though changes may have been considered desirable before. In this subsection, I look briefly at four RTAs — the EU, MERCOSUR, the ASEAN FTA, and NAFTA — and postulate that three of the four, which have in fact been subject to modification periodically over their existence to date, will be expanded again. Still, one cautions that with RTAs, as with the WTO, the political will to take apparently desirable, sometimes necessary steps may be lacking with or without the impetus of deadlock at the WTO, as the history of all four agreements demonstrates.

While this subsection focuses on only a handful of RTAs, many other countries are actively engaging in RTA negotiations and may be expected to continue to do so. For example, as of January 2012, eighteen WTO members have ten or more RTAs in force.

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131. Gantz—RTAs, supra note 127, at 18.
132. List of RTAs in Force by Country/Territory, WORLD TRADE ORG., http://rtais.wto.org/UI/publicPreDefRepByCountry.aspx (last visited Jan. 25, 2011). This group includes the EU (as a group), Chile, China, Iceland, India, Japan, Korea, Malaysia, Mexico, Norway, Peru, the Republic of Korea, Singapore, Switzerland, Thailand, Turkey, the Ukraine, and the United States.
1. European Union

After more than fifty-five years, and despite the Eurozone crisis, the EU remains the world's most successful customs union, having expanded from the original six members (France, Germany, Italy, Belgium, the Netherlands, and Luxemburg) to twenty-seven by 2007. Tariffs and non-tariff barriers have long been eliminated; most border controls no longer exist; EU legislation ("regulations" and "directives") dominates in such areas as international trade regulation, intellectual property, competition law, and environmental law; and with some exceptions the EU has achieved free movement of labor and capital as well as goods and services. With the approval of the Treaty of Lisbon in 2009, at least the seventh major treaty since founding, the Commission and European Parliament's authority continued to increase, encompassing, inter alia, foreign investment by the members in third countries and the equivalent of a foreign minister. A true political union nevertheless remains some years away. Much of the success of the EU is based on the ability of the members to muster, at least on some occasions, the political will to engage in a process of deepening regional integration, albeit not always on linear basis and not always with the full support of national populations. Consequently, the EU, at least until recently, was considered by other aspirants as a model for other customs unions such as ASEAN and MERCOSUR.

As of early 2012 the EU faces its most serious crisis ever with Greece unable to pay its debts and questions arising whether Italy, Portugal, and Spain can remain solvent in light of historically high


134. SHEILA PAGE, REGIONALISM AMONG DEVELOPING COUNTRIES 97 (Overseas Dev. Inst. 2000); See Gantz—RTAs, supra note 127, 319-34.


137. FRANKEL, supra note 123, at 4-5.
interest rates for the sale of government bonds.\textsuperscript{138} The Eurozone, created in 2001 with great fanfare and now encompassing seventeen of the EU members (with ten, including the United Kingdom, remaining outside), has chronically suffered from poor fiscal discipline and a European Central Bank that lacks the necessary powers to step in and serve beleaguered governments as a lender of last resort, thus providing them with the liquidity they require to recover from the crisis\textsuperscript{139} (for example, with a Eurobond backed by all members of the Eurozone, including Germany).

If the EU and the Eurozone survive in their present forms, it seems almost certain that the treaties will again be supplemented, presumably with the tougher rules to restrict government spending deficits and greater European Central Bank and/or community legal powers to monitor members' national financial policies.\textsuperscript{140} The challenges of globalization and financial stability, particularly with the dual system, may not be sustainable under such circumstances and could lead to a "downward spiral."\textsuperscript{141} It is unclear at this writing whether most of the twenty-seven members — or perhaps the seventeen Eurozone members — will be able to agree on broad reforms of the EU accords (a process that could take several years or more to complete) or will need to restructure the Union to take into account a reduced or post-Eurozone reality.

The December 2011 plan is for a treaty (technically outside the EU process) providing for tighter regional oversight of government spending to be concluded by the seventeen Eurozone members and many if most of the other ten, with only the United Kingdom demurring; however, the plan does not effectively address the high interest rates that threaten the financial viability of Greece, Italy, Spain, and perhaps other members.\textsuperscript{142} Inevitably, and regardless of the survival of the Euro, many further changes in the EU agreements are almost certain to occur in the coming years.\textsuperscript{143} These changes like many others in the history of the EU are taking place largely independently of developments in Geneva, but the longer the current

\begin{footnotesize}
\begin{enumerate}
\item[140.] See Wake up, Euro Zone, ECONOMIST, Oct. 22, 2011, at 65.
\item[141.] Europe and Its Currency: Staring into the Abyss, ECONOMIST, Nov. 12, 2011, at 3-4.
\end{enumerate}
\end{footnotesize}
crisis continues the less attention the EU nations are likely to pay to improving the global trading system.

Eventually, additional countries will likely be brought in to the EU, and perhaps ultimately even to the Eurozone. Croatia is scheduled to enter the EU in July 2012; Montenegro and perhaps Bosnia, Kosovo, Macedonia, and Serbia are likely to ultimately meet the criteria for EU admission more quickly as a result of the lack of action in Geneva and the understanding that complying with the EU entrance requirements means a level of modernization of national laws that probably cannot be achieved any other way.\textsuperscript{144} The present membership, in contrast, is sufficiently preoccupied with the Eurozone crisis and slow economic growth generally that they may resist further accessions for years. The current levels of economic and political integration may be increased again despite popular resistance, but probably not in the short or medium term.

2. MERCOSUR\textsuperscript{145}

MERCOSUR (Argentina, Brazil, Paraguay, and Uruguay) represents one of the most ambitious and important regional trade agreements ever concluded. In the aggregate, MERCOSUR nations have more than 230 million inhabitants and a gross domestic product of more than $1.25 trillion.\textsuperscript{146} MERCOSUR continues to hold promise in the longer term — whatever that is — for trade liberalization among the four Member States and within South America,\textsuperscript{147} although as of January 2012 the members are becoming more rather than less protectionist.\textsuperscript{148} The group benefits from common borders, a history of intra-regional trade, and relative lack of competition among the


\textsuperscript{145} This subsection is based on Gantz—RTAs, supra note 127, at 365-66; see also RAFAEL A. Porrata-Doria, Jr., MERCOSUR: THE COMMON MARKET OF THE SOUTHERN CONE (Carolina Academic Press, 2005); Thomas Andrew O’Keefe, Economic Integration as a Means for Promoting Regional Political Stability: Lessons from the European Union and MERCOSUR, 80 CHI.-KENT L. REV. 187 (2005); John AE Vervaele, Mercosur and Regional Integration in South America, 54 I.C.L.Q. 387 (2005).


\textsuperscript{148} Haskel, Mercosur Plans to Raise Import Duties to Counter ‘Avalanche of Predatory Export,’ supra note 46.
constituent economies. On paper, MERCOSUR seeks to include the common market characteristics of labor and capital mobility and coordination of economic policies. For Brazil, by far the most economically powerful member, MERCOSUR has political significance, offering the promise of a closely linked group of economic allies to assist a world power in offsetting the dominance of the United States in the Western Hemisphere.

Unfortunately, as is often the case with RTAs, the implementation of the MERCOSUR agreements lags well behind the formal legal and institutional framework. The early years, 1992-1999, embodied a general commitment to gradual economic integration and considerable progress in eliminating intra-regional customs duties for originating products, some reduction in non-tariff barriers, and increased coverage of the common external tariff (CET). Since then, MERCOSUR has fallen behind in timetables and expectations. Institution-building has languished. Little progress has been made in establishing the free movement of persons, services and capital. The development of a rules-based system with strong institutions and viable dispute settlement has been an aspiration rather than a reality despite improvements in the dispute settlement system in recent years, and both Argentina and Brazil are going their separate ways when dealing with increasing imports from China. It remains to be seen whether the members of MERCOSUR will make renewed efforts toward improving the functioning common market as a result of the demise of Doha, and ultimately bring about the accession of Venezuela, or if the group will continue to reflect a lack of progress and frequent backsliding, thus failing to meet its long-stated goals and objectives.

150. See Mario E. Carranza, MERCOSUR, the Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America, 27 FORDHAM INT'L L.J. 1029, 1063-64 (2004) (asserting that "the Southern Cone countries are now makers and not simply takers of international policy, having decided to take their destiny into their own hands").
152. See Arieti, supra note 149, at 764 (discussing some of the causes, including reluctance to cede political sovereignty).
153. See John AE Vervaele, Mercosur and Regional Integration in South America, 54 I.C.L.Q. 387, 408 (2005) (discussing the lack of progress in these areas as well as with recognition by the Parties of general principles of MERCOSUR law).
154. See Ed Taylor, Brazil Increases Excise Tax on Car Imports, Exempts Those With 65% Domestic Content, 28 INT'L TRADE REP. (BNA) 1546 (2011) (reporting on measures taken by Brazil alone to protect domestic manufacturers against Chinese auto imports); Protectionism in Argentina: Keep Out, ECONOMIST, Sep. 24, 2011, at 47 (reporting on the use of "non-automatic licensing" and other measures to slow imports).
3. ASEAN FTA

ASEAN as now constituted includes a population of around 500 million persons, land area of 4.5 million square kilometers, total trade of $850 billion (internal and external), and GDP of about $700 billion. The group encompasses several of the most dynamic trading nations of the world (Singapore, Malaysia, Thailand, Indonesia, and Vietnam) as well as several of the least open (Laos, Myanmar), along with Brunei, Cambodia, and Indonesia. The wide differences in levels of development and receptiveness to foreign investment and open markets among other factors have led to a “least common denominator” effect in which accords among the now ten members inevitably represent significant compromise by the bolder, more open member governments. Moreover, ASEAN Members have historically faced political and security challenges which discouraged and delayed greater economic integration, such as border clashes between Thailand and Cambodia. ASEAN also suffers from poor infrastructure, including but not limited to lengthy land travel routes that are served by poor road and railroad networks.

ASEAN and AFTA consist legally of literally dozens of agreements and declarations, often overlapping and/or in conflict, sometimes unratified after many years. The reluctance on the part of some of the member governments to make firm commitments and to adopt functioning and binding legal rules and structures includes a lack of

156. This subsection draws on Gantz—RTAs, supra note 127, at 411-12, 432-33. Major sources for information on ASEAN include ZAKIR HAFEZ, THE DIMENSIONS OF REGIONAL TRADE INTEGRATION IN SOUTHEAST ASIA (Transnational, 2004); Lay Hong Tan, Will ASEAN Economic Integration Progress Beyond a Free Trade Area?, 53 I.C.L.Q. 935 (2004); Paul. J. Davidson, The ASEAN Way and the Role of Law in ASEAN Economic Cooperation, 8 S.Y.B.I.L. 165 (2004).


160. Even in 2002, one of the key areas of China-ASEAN cooperation was acceleration of various multinational rail and highway projects, as well as development of the Mekong River basin. See Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People’s Republic of China Preamble, Nov. 5, 2002, available at http://www.aseansec.org/13197.htm [hereinafter ACFTA Framework Agreement].

161. See ASEAN Secretariat, Table of Treaties/Agreements and Ratifications, ASEAN (last updated May 2011), http://www.aseansec.org/Ratification.pdf (listing 205 instruments that not including dozens of ministerial and other declarations). This table is probably the best available source of the status of ratification of the various ASEAN and AFTA agreements.
apparent support for effective dispute resolution. “Framework” agreements are particularly popular, likely because they allow the members to announce their intention to conclude arrangements while accession to more significant and binding obligations is deferred.\textsuperscript{162} The cautious approach persisted despite China’s soaking up the lion’s share of the region’s direct foreign investment, continuing credibility problems with foreign traders and investors over vague and non-transparent rules that really are not legally binding and in any event cannot be enforced, and evidence that the market-based approach increasingly in use elsewhere works better than ASEAN’s heavy reliance on government regulation.\textsuperscript{163}

Perhaps inevitably, the policies of Singapore, Thailand, Malaysia, Indonesia, and recently Vietnam have emphasized investment in export-intensive industries and greater integration with global economies rather than restricted markets and import-substitution either individually or as part of ASEAN.\textsuperscript{164} Many ASEAN Members have greater interest and see more economic benefit in fostering expanded trade relations with nations outside Southeast Asia than with the other members of ASEAN,\textsuperscript{165} although after nearly a decade of negotiations a free trade agreement between China and the ASEAN nations went into effect January 1, 2010.\textsuperscript{166} Still, improvements in the dispute settlement system (on paper at least) and the ratification of the Bali Concord II by all ten members within a year may be reason for very cautious optimism. Will the challenges of competition from China and from members who are concluding FTAs and bilateral investment treaties with third countries, augmented by a lack of trade liberalization in Geneva, encourage the members of ASEAN to move forward with their regional integration? Or will ASEAN continue to


\textsuperscript{164} See Lay Hong Tan, Will ASEAN Economic Integration Progress Beyond a Free Trade Area?, 53 I.C.L.Q. 935, 938 (2004) (discussing early efforts at greater regional economic cooperation among ASEAN governments to encourage intra-regional trade and investment).

\textsuperscript{165} For example, in a book on the EU and ASEAN, the authors effectively suggested that EU nations might prefer to deal with individual ASEAN nations such as Malaysia and Singapore rather than as a group. See MARY T. YEUNG, NICHOLAS PERDIKIS & WILLIAM A. KERR, REGIONAL TRADING BLOCS IN THE GLOBAL ECONOMY: THE EU AND ASEAN 134-35 (Edward Elgar, 1999).

muddle along without contributing to market opening either among the members or with other nations?


The North American Free Trade Agreement (NAFTA)\textsuperscript{167} (United States, Canada, and Mexico) is the world’s largest free trade area, accounting for over $1 trillion worth of trilateral trade in goods and services in a region of over 450 million persons with $17 trillion in GDP, more than any other regional trading bloc except the European Union.\textsuperscript{168} NAFTA provides for elimination of all intra-regional tariffs and removal of essentially all non-tariff barriers except for those applicable a few agricultural products.\textsuperscript{169} It also incorporates comprehensive rules for, \textit{inter alia}, treatment of foreign investment (including investor-state dispute settlement); government procurement; trade in services, including financial and transportation services; customs procedures; technical standards; sanitary and phytosanitary standards; protection of intellectual property; trade in agriculture, energy, and basic petrochemicals; temporary immigration entry for business purposes; appeals of administrative decision; appeals in antidumping and countervailing duty trade actions; and comprehensive dispute settlement regarding disagreements among the governments concerning the application or interpretation of NAFTA provisions and administrative determinations in unfair trade (dumping, subsidies) cases.\textsuperscript{170}

NAFTA differs in two major ways from the EU, MERCOSUR, and the ASEAN FTA: a) it is an FTA rather than a customs union, with the three Parties remaining free to set their own MFN tariffs under WTO rules; and b) with minor exceptions, NAFTA is a single instrument, one that has not been amended in eighteen years.\textsuperscript{171} It is effectively a


\textsuperscript{169} NAFTA, supra note 167, art. 309, Annex 302.2.

\textsuperscript{170} Useful sources include \textit{THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS} (Judith H. Bello et al., eds.) (ABA, 1994); \textit{THE FUTURE OF NORTH AMERICAN INTEGRATION: BEYOND NAFTA} (Peter Hakim & Robert E. Litan, eds., Brookings, 2002); \textit{GARY CLYDE HUFBAUER \& JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES} (Inst. for Int’l Economics, 2005).

"confederation among independent sovereigns, each maintaining autonomous political decision-making authority within the constraints defined by agreement."172 Also, like the EU but unlike MERCOSUR and ASEAN, NAFTA's internal trade liberalization measures have been fully implemented in accordance with the schedules agreed upon during the negotiations.173 The built in mechanism for accelerating tariff reductions and making rules of origin more flexible has been utilized but not with regard to "sensitive" goods. United States law provides authorization for the United States to agree with Canada and Mexico on periodic modifications of the rules of origin to facilitate achievement of freer trade,174 and such authority is exercised on a regular basis.175

Otherwise, major changes in NAFTA have been impossible to achieve, even though after eighteen years it is obvious that revisions are desirable (if not urgent) in areas including government procurement (extending the chapter to state and local entities), rules of origin, and achieving parity for Mexico with newer United States FTAs. Mexican politicians beginning with President Vincente Fox in 2000 have periodically called for a widening and deepening of NAFTA, moving toward a common market with a common currency and free labor flows that more closely reflects European integration.176 Then as now, such expansion, requiring amendment of the agreement, is politically unacceptable in the United States (and probably in Mexico today as well) as President Obama’s decision in 2009 to effectively abandon campaign promises to amend NAFTA demonstrated.177 Still, it is possible that the United States and Canada may be more willing in the future to consider such proposals in the absence of negotiations in Geneva in the longer term, or to do a “backdoor” modernization of NAFTA through participation by all three NAFTA Parties in the Trans-Pacific Partnership.

172. Id.
173. NAFTA, supra note 167, art. 302, annex 302.2.
176. See John M. Nagel, Fox’s Calls for Expansion of NAFTA Held Unlikely to Gain U.S. Approval, 17 INT’L TRADE REP. (BNA) 1085 (2000) (suggesting that Mexico requires a 7 percent annual growth rate to create the jobs necessary to keep Mexican workers from migrating to the United States).
177. See Nacha Cattan & Rossella Brevetti, Mexico Sees Need to Dust Off, Rehabilitate Aging NAFTA with U.S., Canada, 27 INT’L TRADE REP. (BNA) 93 (2010) (discussing the lack of pressure to renegotiate NAFTA in both the U.S. and Canada and some of the changes that have been discussed).
B. Conclusion of New or Pending RTAs

1. European Union Economic Partnership Agreements (EPAs)\textsuperscript{178}

While the EU at any given time is negotiating a number of RTAs, including a potentially significant agreement with Canada in 2011\textsuperscript{179} and a proposed “WTO Plus” agreement with Russia,\textsuperscript{180} this discussion focuses on EU negotiations with former colonies — the Asian, Caribbean and Pacific (ACP) states, which are most likely to be made most urgent by the collapse of Doha. The EPAs arise out of a long-term trade and development policy that pre-dates the European Union and originates in the colonial era. France, the Netherlands, and the United Kingdom in particular have sought to maintain close relationships with their former colonies, although historical links have been replaced by economic development needs as the most significant (although not only) justification.\textsuperscript{181} It was and is a discriminatory policy in which former colonies in general were afforded more favorable access to the EU market than the rest of the developing world (including those in Latin America who obtained their independence from Spain and Portugal 150-200 years ago).\textsuperscript{182} The evolution of individual EU Member State policies was subsumed into the EU beginning in the 1950s; the EC Treaty includes among the list of EU activities “the association of overseas countries and territories in order to increase trade and promote jointly economic and social development.”\textsuperscript{183}

Initial efforts to maintain special trade relations with former colonies, the Yaoundé Conventions with new African states, were generally reciprocal in nature. Nevertheless the EC Treaty provisions (although not the Yaoundé Conventions \textit{per se}) raised consistency issues under GATT Article XXIV. According to the Working Party, duties were not to be eliminated on substantially all trade, and there were also objections to the limited (five year) term of the agreements. Questions of law were shelved in favor of an informal agreement to

\textsuperscript{178} This subsection draws on Gantz—RTAs, supra note 127, at 346-49.

\textsuperscript{179} See Peter Menyasz, \textit{Free Trade Talks Between Canada, EU Enter Ninth Round of Negotiations, Fast Says}, 28 INT’L TRADE REP. (BNA) 1700 (2011) (reporting on what Canadian authorities have called “our most significant trade initiative since the North American Free Trade Agreement”).


\textsuperscript{181} Lorand Bartels, \textit{The Trade and Development Policy of the European Union}, 18 EUR. J. INT’L L. 715, 717, 726, 756 (2007). The former Spanish and Portuguese colonies in Latin America, most of which became independent around 1820, are treated differently.

\textsuperscript{182} See id., at 715-16.

\textsuperscript{183} Treaty Establishing the European Economic Community art. 3(s), Mar. 25, 1957, 298 U.N.T.S. 3.
GATT consultations should any future problems arise. EU maintenance of association or economic partnership agreements with its former colonies, with the less advantageous GSP offered to other developing countries, continues to complicate EU trade and development policy to this day.

The Community's trade and development policies in the 1970s and 1980s were primarily non-reciprocal, both in the association agreements and in implementation of GSP. Fortunately for the EU, legal challenges under GATT did not occur for some years. In 1975, the EU concluded the first of what would be a thirty-five year series of still non-reciprocal agreements with the ACP states, the four Lomé conventions, and Cotonou Agreements. The trade cooperation provisions of the Cotonou Agreement (providing duty-free treatment for most ACP products entering the EU) were not GATT legal because they departed from MFN treatment in GATT, Article I without meeting the requirements of Article XXIV.

In 2001 the WTO Ministers authorized a waiver for the trade provisions of the Cotonou Agreement effective through 2007, which everyone understood would not be renewed. Thus, the goal for both the EU and the ACP states was a series of EPAs that are considered legal under GATT Article XXIV. The EU decided in consultation with the ECP states that the trade preference provisions of the Cotonou Agreement would have to be replaced with new arrangements that would be GATT-legal, using Cotonou as the “foundation” for such discussions. Failing agreement the ACP exports to the EU would, as of January 1, 2008, benefit only from the Generalized System of Preferences rather than from the superior preferential access under Cotonou. The impact of this change on ACP states would not have been uniform. The least developed developing states, mostly in Africa, would have had duty-free access to the EU market for “everything but arms,” and thus would not have seen enormous differences in market

184. See Bartels, supra note 181, at 722-29 (discussing the Yaoundé Conventions and the GATT Article XXIV legality questions).
185. See id. at 733, 739.
186. Id. at 733.
187. Id. at 734-36.
access compared to Cotonou. However, for “middle income” Caribbean states (all except Haiti) and many African nations, the EU GSP benefits would have been considerably less favorable than those available under Cotonou or under a new EPA.

For the EU, the focus has shifted toward a greater level of reciprocity, while continuing the emphasis on development. As EU Trade Commissioner Peter Mandelson affirmed in April 2008 (while defending the EPA negotiations against criticism), “the whole idea of the EPA is to harness trade in the cause of development, to create opportunities for trade linked to capacity building and development cooperation, which offers a much better deal than the old-style tariff preferences of Cotonou.”

The EU’s efforts to complete negotiations with all ACP nations by the end of 2007 were not successful except with respect to the Caribbean nations. In several situations the EU concluded interim EPAs (covering only trade in goods), accords which left many details to be negotiated until later, and/or did not cover services, intellectual property, or government procurement. Still, the ACP nations have continued to receive “duty free, quota free” (DFQF) access to the EU market. This approach is ending; the EU indicated in September 2011 that as of January 1, 2014, those ACP countries that had not concluded and ratified an EPA would lose their DFQF access. Possibly, the absence of negotiations in Geneva will assist at least some ACP nations in completing the EPA negotiations by 2014. It also seems likely that in the absence of another broad negotiating round in Geneva the EU and the ACP states will continue to develop the trade relationships that are the subject of the EPAs.

192. See id.
2. Trans-Pacific Partnership (TPP) and Other United States Initiatives

The two-year-old negotiations aimed at a Trans-Pacific Partnership (TPP) agreement (Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam) represent the only major Obama Administration trade initiative (beyond the enactment in October 2011 of long-stalled Bush era FTAs with Colombia, Panama, and South Korea). After nine rounds of talks despite some progress no consensus has been reached on the difficult issues, including some that have eluded negotiators in Geneva, such as increased protection of intellectual property (“TRIPS-plus”), investment, competition, and market access in sensitive goods and services sectors such as certain industrial goods, agriculture, and textiles. New language to regulate behavior of state-owned enterprises (SOEs) is being proposed by the United States for the comprehensive FTA, along with the labor and environmental provisions that are politically required in any United States FTA. Agreement even on the “broad outlines of a final pact” will not likely be reached for some time, and much hard negotiating remains.

The potential expansion of world trade likely to result from a TPP with the current nine nation negotiating group is modest, given that the United States already has free trade agreements in force with four of the TPP group (Australia, Chile, Peru, and Singapore) and Brunei, Chile, New Zealand, and Singapore are currently parties to the “P4” FTA with each other. However, many of the negotiators hope that the TPP could ultimately serve as the foundation for a much broader Free Trade Agreement of the Asia-Pacific; as the Chilean negotiator, Rodrigo Contreras observed, “[o]ur objectives are to negotiate the highest quality agreement and set the foundation for an Asia-Pacific Agreement.” For example, should Japan ultimately decide to join the TPP negotiations or sign on later—preliminary steps to that end began

in November 2011 — the economic equation would radically change, as United States Congressional leaders have cautioned. Similarly, the addition of Canada and Mexico would also greatly increase the economic significance of the TPP as well as the negotiating challenges. Trade expert Gary Horlick, a strong proponent of an expanded TPP, suggested that such a TPP might be a workable alternative for the members to the WTO. China has indicated that it might be willing eventually to take part, but China’s presence would not likely be welcomed in the United States.

One hopes that the TPP negotiations can be successfully concluded, although this is not likely to occur before 2013 at the earliest, despite President Obama’s expressed hope for a mid-2012 finalization. The pace of the negotiations has been slow; the United States presidential election and other political constraints along with the added complexities of Japanese participation make this an extremely difficult process. Still, if the agreement is concluded promptly, this, plus the absence of negotiations in Geneva, might well convince other Asia Pacific Economic Cooperation Forum (APEC) nations to participate with the United States. With Japan, Canada, and Mexico incorporated into the TPP — a further complicating and possibly delaying factor —

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206. Davies, supra note 5.


209. These include the President’s current lack of trade promotion authority, although Deputy U.S.T.R. Marantis has argued that extensive consultations between the Obama Administration and Congress on the TPP have obviated the need at the present time for TPA. Bracken, supra note 200. Another political constraint overshadowing the TPP negotiations disappeared in October 2011, when the long-stalled U.S. FTAs with Colombia, Panama and South Korea were approved. Rachel Boehm, *Bilateral Agreements: Obama Signs Robust Trade Package Implementation; TPP Next for U.S. Trade*, Int’l Trade Daily (BNA) (Oct. 24, 2011).
the agreement would rival the EU among regional trade agreements in terms of total trade.

3. An EU—United States FTA?

Should there be a political opportunity for true boldness, the concept of a United States—EU trade agreement may again surface. The logic of a comprehensive free trade agreement between the United States and the EU, perhaps parallel to the ongoing negotiations (since 2009) of such an agreement between the EU and Canada,\(^{210}\) is unassailable given the enormous volume of bilateral trade.\(^{211}\) The options range from relatively narrow coverage — perhaps of services, investment, and competition law — to an agreement that would cover manufactured goods as well, to a fully comprehensive agreement that would also address agricultural trade, investment, competition law and the like.\(^{212}\)

The obstacles are enormous as well, particularly in the GATT requirement that it apply to “substantially all trade” including agriculture and the political and economic imperative to apply to major services sectors. The fact that Canada, a nation of less than 35 million people with a GDP about 5 percent of that of the United States,\(^{213}\) may be able to successfully negotiate such an agreement doesn’t mean the same is true for the United States. Moreover, issues such as agricultural subsidies, agricultural trade, investment, and competition have proven daunting for the United States and the EU nations to address in the past.\(^{214}\) The enormous volume of WTO litigation

\(^{210}\) Peter Menyasz, Bilateral Agreements: Services, Investment Offers Exchanged in Latest Round of Canada—EU Trade Talks, 28 Int'l Trade Rep. (BNA) 1756 (Oct. 27, 2011). EU—Canada trade was C$82.5 billion in 2010.

\(^{211}\) In 2010, U.S. exports to the EU were approximately $240 million worth, while imports were worth $319 billion, for total trade in goods of $559 million. Trade in Goods with the European Union, U.S. CENSUS BUREAU, http://www.census.gov/foreign-trade/balance/c0003.html#2010 (last visited Oct. 29, 2011).


\(^{214}\) See, e.g., the failed negotiations at the OECD of a “multilateral investment agreement” in the 1990s, supra notes 101-102 and accompanying text.
between the United States and the EU is also notable.\textsuperscript{215} Perhaps the Doha failure in time will encourage the United States and the EU to consider an agreement of limited scope that nonetheless would result in significant trade expansion while still being WTO legal,\textsuperscript{216} rather than insisting on a fully comprehensive FTA. Following a November 2011 EU-United States summit, the EU and the United States committed to seeking new ways to increase bilateral trade and investment by the end of 2012,\textsuperscript{217} possibly including an FTA.\textsuperscript{218}

C. Services RTAs

The objective of the \textit{General Agreement on Trade in Services} (GATS)\textsuperscript{219} is simple: over time, to assure that the basic disciplines that have applied to international trade in non-agricultural products for more than half century — MFN treatment, national treatment, subsidies, transparency, etc. — are applied to services, with a minimum of exceptions.\textsuperscript{220} GATS provides a series of legal rules governing market access and MFN and national treatment restrictions. GATS rules apply to regional and local as well as national governments.\textsuperscript{221} Members of the WTO agree through a “positive list” approach to restrict use of market access and national treatment restrictions; obligations under GATS, except as noted below, are defined largely by Members’ individual schedules of commitments. National treatment commitments are limited by each government to the services specifically designated by that government in its individual annexes.\textsuperscript{222}

GATS also required the members, beginning in 2000, to enter into “successive rounds of negotiations . . . with a view to achieving a progressively higher level of liberalization.”\textsuperscript{223} Unfortunately, little

\textsuperscript{215} Since 1995, the EU had brought 29 WTO actions against the United States, and the United States had brought 24 actions against the EU or individual members. \textit{Chronological List of Disputes Cases}, \textsc{World Trade Org.}, http://www.wto.org/ english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 9, 2012).

\textsuperscript{216} For example, a services bilateral agreement need only meet the requirements of GATS, art. VI, discussed in subsection C, below; agreements on most investment issues and competition law would be totally outside of WTO scope.


\textsuperscript{219} GATS, \textit{supra} note 111, art. I.

\textsuperscript{220} Id. art. II, art. III.

\textsuperscript{221} Id. art. I.

\textsuperscript{222} Id. art. XX.

\textsuperscript{223} Id. art. XIX, §1.
progress has been made in the Doha services negotiations, particularly since 2008. Given that the services negotiations have been part of the Doha Round "single undertaking," the effective abandonment of the Doha Round means that services liberalization is also abandoned or indefinitely delayed in Geneva.

Because of the MFN provisions, plurilateral agreements on services are generally impractical; concessions among a few would automatically apply to other WTO members, including those who did not participate in the negotiations or make concessions of their own. However, GATS Article V contains language similar to that of GATT, Article XXIV:

1. **This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:**

(a) has substantial sectoral coverage, and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame...  

Although it is evident from Article V(2) that the Parties contemplated situations in which trade in services would typically be part of a broader RTA on goods, this is one factor to be considered rather than an absolute requirement. In other words, a freestanding services RTA or "economic integration agreement" (EIA) is permissible. Nor is there a requirement that substantially all


225. "This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply." GATS, supra note 111, art. V n.1.

226. Id. art. V, §1.

227. In the WTO's evaluation of the agreement "consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned." Id. art. V, §2.

228. It is the responsibility of the Council for Trade in Services to determine if a services RTA is consistent with GATS Article V. However, given the unlikelihood that the Council, like the CRTA, could reach a consensus on the legality or illegality of a services RTA, the risks are minimal.
services trade be covered (as with goods in GATT, Article XXIV); rather only "substantial sectoral coverage is mandated."229 This GATS Article V approach for EIAs is clearly far more flexible than a traditional "plurilateral" agreement which could not avoid the MFN questions.

GATS Article V thus provides a potentially powerful mechanism for services trade liberalization among those who are willing to liberalize services market access among a group of WTO Members even if they are reluctant to open their services markets more broadly. As one scholar suggested several years ago:

EIAs [economic integrations agreements] may not only revive negotiations among interested countries, but also offer a sensible way to account for different levels of Members' technological and infrastructural development. For example, India may find an EIA with the U.S., EU, or OCED, whether concluded cumulatively or individually, accelerating its development. The same could be said in the case of Brazil. As a method of distancing service negotiations from negotiations on agriculture and non-agriculture market access, an EIA could enable a closer cooperation between the U.S. and EU. An EIA could also induce trade among the members of the Organization for Economic Co-operation and Development.230

Services EIA negotiations already are being pursued in a preliminary fashion by the United States, the EU, and other OECD members, and the group will hopefully by some developing countries in the coming months. The focus will be on most of the same issues as at Geneva, such as market opening, domestic regulation, rules on the use of emergency safeguards, services subsidies, and possibly rules for least developed countries.231 A major objective is to expand individual country commitments to services market liberalization.232

V. NATIONAL LAW

Despite much less attention internationally than is the case with multilateral trade negotiations, a very substantial portion of the increase in world trade in recent decades has resulted not from

229. GATT, supra note 68, art. XXIV, §1; GATS, supra note 111, art. V, §1.
232. GATS, supra note 111, art. XIX ("negotiation of specific commitments").
multilateral or even regional trade agreements, but through unilateral national actions to lower tariffs, reduce non-tariff barriers, and/or make international commerce operate more smoothly. Several World Bank scholars have estimated that during the period 1983-2003, "autonomous changes in national law were responsible for the overwhelming majority (roughly 66 percent)" of trade liberalization in developing countries. In this section I consider several important examples of the power and reach of unilateral action through national legislation alone—the country-specific actions of Chile and Mexico, the individual actions of many countries under the "Washington Consensus" and the use of uniform law to implement necessary change, such multilateral efforts at the Organization of American States (OAS) and UNCITRAL to offer model laws for secured financing.

A. Chile

As the government has explained, Chile's applied MFN tariff was unilaterally phased down from 11 per cent to six per cent between 1999 and 2003. This low and uniform tariff is a distinctive feature of Chile's trade policy that makes for more efficient resource allocation by establishing the basis for non-differential treatment of the various production sectors, and has also enabled Chile to negotiate preferential agreements with various countries.

Since 2003 Chile has continued to apply the single MFN tariff rate of 6 percent, with a few exceptions. As the Chilean Government confirmed in a 2009 WTO report, Chile's trade policy maintains its objective of improving and ensuring access for its goods and services to all markets, as well as encouraging domestic and foreign investment. With a view to liberalizing the economy, all available channels have been used to give Chile's trade policy an outward orientation, including unilateral market opening and multilateral and bilateral trade negotiations.

The advantages of this tariff policy are substantial. First, it has greatly simplified the classification process for business stakeholders

233. Dadush, supra note 8, at 2 (citing a study by Will Martin and Francis Ng of the World Bank).
235. Id.
and the customs service alike, since the tariff rate is the same regardless of how the goods are classified under the tariff schedules. Secondly, it greatly reduced the likelihood of customs fraud—an endemic problem in many developing countries—because an importer receives no financial advantage by seeking the fraudulent reclassification of goods to her advantage.\textsuperscript{238}

B. Mexico Before and After NAFTA

Mexico began liberalizing its economy in 1985 in preparation for accession to GATT in 1986, and has continued the process (with more than a few ups and downs and many delays) since that time.\textsuperscript{239} Much of Mexico’s reform legislation was mandated by NAFTA, such as the 1993 Foreign Investment Law.\textsuperscript{240} However, that law, like many others, was applied from the outset by Mexico in a non-discriminatory manner to persons of other nationalities investing in Mexico, and that practice has not changed in more than eighteen years. In 2011, despite some continuing complexities in the system, Mexico is considered by the World Bank to be the easiest place in Latin America to do business and 35th in the world.\textsuperscript{241} Mexico’s future, perhaps more than most countries given the enormous comparative advantages it received with NAFTA, depends today as it did a decade ago more on its ability to bring about internal reforms than from gains it has reason to expect from new trade agreements. As the WTO Secretariat observed in 2008:

Since its previous Review in 2002, Mexico has continued with the gradual and unilateral liberalization of its trade regime. It has also concluded new free-trade agreements, now conducting 85 per cent of its trade with preferential partners . . . At the same time, some barriers to MFN trade and foreign investment limit the access of Mexican consumers and producers to certain goods and services on more competitive terms.\textsuperscript{242}


\textsuperscript{241} Making the Desert Bloom; Mexico’s Economy, ECONOMIST, Aug. 27, 2011, at 59 [hereinafter Economist—Mexico].

Despite significant improvements in recent years, Mexico continues to suffer in the areas of energy costs, education, tax inequality, legal system inefficiency, and corruption, among others.\textsuperscript{243} Still, particularly in recent years, Mexico is an example of the power of internal, unilateral, legislative reforms that could be instructive to other nations.

C. The “Washington Consensus”

The “Washington Consensus” is the term commonly given to the post-Cold War program urged on the developing world beginning around 1990.\textsuperscript{244} The essence of the Washington Consensus was deregulation, along with a package of liberal economic, legal, and political reforms that emphasized democracy through free elections. These changes were to be accompanied by balanced budgets, a smaller state sector, and privatization of the national economy.\textsuperscript{245} Critics have charged that the program was imposed without regard to individual country and citizen needs\textsuperscript{246} and others have blamed it (probably unfairly) for the Argentine financial collapse.\textsuperscript{247}

However, to the extent that the Washington Consensus stands for healthy, democratic institutions, less (but not an absence of) regulation, reduced corruption, and emphasis on internal reforms rather than outside assistance, it seems very much alive, as the experience of both Mexico and Chile confirms.\textsuperscript{248} The Peruvian economist, Hernando de Soto, postulated that poor countries could benefit from globalization only if they reform their regulatory institutions, with the objective of reducing or eliminating unnecessary barriers to entry for local entrepreneurs.\textsuperscript{249}

The George W. Bush Administration created the Millennium Challenge Corporation (MCC), which provides financial aid only to

\textsuperscript{243} See Wise, supra note 239, at 305-10 (discussing Mexico’s needs, \textit{inter alia}, for tax reform, investment in education and human capital, reform of labor markets and reform of the tax system, including dependence on oil revenues); Gantz-RTAs, supra note 127, at 156-57 (discussing the continuing need for internal reforms in Mexico).


\textsuperscript{245} Id.


\textsuperscript{247} See id. at 13 (contending that the Argentine collapse was caused by a fixed, chronically overvalued exchange rate and an excessive debt/GDP ratio).

\textsuperscript{248} Kelley, supra note 244, at 542; Marcos Aurelio Pereira Valadao, \textit{Legal and Institutional Dimensions of Reform: Washington Consensus and Latin America Integration: MERCOSUR and the Road to Regional Inconsistencies—to Where are We Going Exactly?}, 15 LAW & BUS. REV. AM. 207, 209 (2009).

lower middle income developing countries which bring about certain internal reforms that are considered vital to sustainable economic growth and development, including providing legal and financial support for small and medium-sized businesses and strengthening and improving government institutions. Before a country is eligible the candidate country’s performance on various policy indicators is examined, with those selected being based on policy performance. Those countries that are chosen must “identify their priorities for achieving sustainable economic growth and poverty reduction.” The MCC requires that individual country proposals be developed in consultation with civil society and provide consultations with the countries to help them develop and refine their programs. As Professor Thomas Kelly observed, funds are not made available by the MCC until after the country “has demonstrated progress in institution-building.”

President Obama, in his first year in office, affirmed his support for strong institutions rather than “strongmen,” in a major speech in Ghana. As of December 2011, the program continues without major changes under the Obama Administration. The selected countries include Honduras, whose secured financing legislation and registry were supported by the MCC.

It is impossible to predict in this time of unacceptable budget deficits whether the United States, the EU and other developed countries will continue to provide existing levels of foreign assistance and funding for the international development banks. However, it seems likely that such assistance will be provided only under conditions in which the donors believe it will be effective. Consequently, developing nations which take the steps that are necessary in order to create improved conditions for economic development, even if there is less knee-jerk deregulation and more institution-building, are most likely to prosper.

251. Id.
252. Id.
253. Id.
254. Kelley, supra note 244, at 547.
255. Id. at 540.
257. About MCC, supra note 250.
D. Model Laws: Secured Transactions

Another approach that falls within the gambit of national legislation is the practice of drafting models laws for adoption by the states participating in the multilateral organizations, such as the United Nations Committee on International Trade Law (UNCITRAL) and the Committee on Private International Law at the Organization of American States. By definition, such model laws are for the willing; no members of the drafting organizations are ever required to adopt the laws, although competitive pressures in neighboring countries, for the foreign investment dollar, may make such reforms less "voluntary" than would otherwise be the case.258 Versions of the 2002 OAS model secured transactions law259 have been adopted in one form or another in Mexico, Honduras and Guatemala.260 Internal deliberations among government officials, banks and potential borrowers are underway at this writing in Colombia, Malawi, and Uganda.261 The successor to the UNCITRAL working group that was responsible for the UNCITRAL Legislative Guide on Secured Transactions262 is drafting a new secured transactions law, one that is likely to have appeal well beyond Latin America and which is expected to facilitate implementation of the necessary reforms, facilitating the availability of secured credit for small and medium-sized business in the developing world.263

E. Unilateral Reduction of Agricultural Subsidies in the EU and United States?

Historically, reduction of agricultural subsidies has been one of the most difficult aspects of international trade negotiations. EU reluctance to decrease agricultural subsidies almost derailed the

263. This section is based on discussions with Boris Kozolechek and Marek Dubovec who have been working with various Latin American and African governments on secured transactions legislation and the accompanying electronic registry systems since the mid-1990s. Mr. Dubovec is a member of the UNCITRAL Working Group VI.
Uruguay Round negotiations in 1992, but the impasse was ultimately resolved through the “Blair House Accord.” As noted earlier, opposition to further reductions in agricultural subsidies contributed significantly to the demise of the Doha Round. Under such circumstances it may be considered strange to suggest that either the United States or the EU would consider reducing their agricultural subsidies on a unilateral basis. Nevertheless, particularly when one is considering the longer-term, this may be possible. The reason will likely have little to do with international trade negotiations per se. Rather, it will be a result of budgetary constraints and the increasing importance of environmentally sound farming. The EC, which devoted almost 44 percent of the EU budget to agricultural support in 2007, already has decided to freeze the budget in absolute numbers for seven years beginning in 2012 at about 36 percent of the total. The EU agricultural commissioner noted in October 2011 that “[t]he next decades will be crucial for laying the foundations of a strong agriculture sector that can cope with climate change and international competition while meeting the expectations of the citizen.” Continuing financial pressures on the EU as a result of fiscal crises in Greece, Spain, Portugal, Ireland, and elsewhere may accelerate this trend, despite the risk that reducing farm supports could further exacerbate economic problems in some of the EU’s more vulnerable economies.

The prognosis for reduced farm subsidies in the United States is much less clear. Financial constraints in the coming years have increased pressures to reduce agricultural subsidies, either as part of the ongoing super committee process or through continuing demands to reduce the budget deficit, including but not limited to actions by a re-elected or new President and Congress in 2013. However, the strength of the farm lobby within Congress, and particularly within the United States Senate, is such that substantial reductions, at least in the short

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266. EU farm budget frozen for next seven years and conditioned to ‘greening,’ MERCOPRESS (July 1, 2011), http://en.mercopress.com/2011/07/01/eu-farm-budget-frozen-for-next-seven-years-and-conditioned-to-greening.
to medium term, may be elusive. Still, the major United States subsidies and other protective measures provided to the ethanol industry, including a tariff of 54 cents per gallon, were allowed by the United States Congress to expire at the end of 2011.270

VI. CONCLUSIONS

While multilateral trade negotiations may well be the most economically sound route to the reduction of tariffs and non-tariff barriers for agricultural and manufactured goods and increased market access for services, among others, in the absence of the political will among WTO Members to move forward, other options are likely to become more popular. Most observers would agree that some trade liberalization is better than no trade liberalization, or increased protection. The vehicles for “some liberalization” include new or expanded regional trade agreements, “plurilateral” accords among a willing sub-group of the WTO memberships, and increased attention as to how members can increase their own competitiveness and trade through changes in national laws and policies.271 None of these are mutually exclusive. There are risks in all of these alternatives, but the failure of Doha has given members who seek expanded trade and the benefits accruing therefrom no other choice.


271. Kelley, supra note 244, at 541.
THE INTERNATIONAL LAW OF ANTITRUST COMPLIANCE

TED BANKS* AND JOE MURPHY**

INTRODUCTION

It was not so long ago that the concept of international criminal law was an idea with which lawyers struggled. In 1987, Ved Nanda and M. Cherif Bassiouni put together what may have been the first one-volume compendium of information on antitrust, securities, extradition, tax, and other subjects that made up the developing area of international criminal law. Today, it is well-accepted that there are certain standards of behavior that are the norm in practically all nations, and through national laws and multinational treaties, these principles are entering the realm of customary international law.

Developments in the area of competition law, or antitrust as it is known in some countries, have been particularly dramatic. Countries understand that the encouragement of competition is a key to economic development, and national laws have been enacted where they did not exist before, along with enforcement cooperation agreements among increasing numbers of countries. Enforcement of criminal antitrust laws takes place against both individuals and businesses, and while it is clear that there are situations where business entities must be held responsible for actions of their employees, there are other situations where the intent of the corporation may be contrary to the actions of the employee. Throughout the world, in competition law, as well as in other areas of law, there is a consensus that it is appropriate for companies to adopt compliance and ethics programs to utilize management techniques to foster compliance with law. So, as standards of corporate

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conduct become more universal, they reflect adherence to what is essentially an international law – the international law of competition. At the same time, more national authorities recognize that companies are expected to have compliance programs, and that a *bona fide* compliance program reflects a corporate intent not to violate the law, and therefore should be a positive factor in how authorities treat such companies, including as a mitigating factor for any penalty that might be imposed based on the *ultra vires* act by an employee.

It is well accepted that compliance and ethics programs are an expected part of corporate activity, and while no program can always guarantee human behavior, these programs do work to mitigate violations of law. Indeed, it can be said that it is now a standard for companies to have compliance programs or at least some elements of such programs such as codes of conduct. We submit that this growing recognition of the purpose of compliance and ethics programs has reached broad-based acceptance and should now be recognized in the competition law field by the United States and other governments as a standard of international law.

**The Concept of Organizational Liability**

Under many legal regimes, a corporation cannot be criminally punished for the actions of its employees, and until relatively recently (at least if you consider a century relatively recent), under the common law, a corporation was viewed as a legal fiction, which could not be held liable for the criminal conduct of its employees. In the United States, it was not until 1909, in *New York Central & Hudson River Railroad v. United States*, that the Supreme Court ruled that because the great majority of business transactions were conducted by corporations, it was time to abandon the "old and exploded doctrine" that a corporation was not indictable. The Court reasoned that, as a matter of public policy, because a corporation could be held civilly liable, criminal liability should also follow.

This concept of corporate liability has been extended to the point where the business is often held liable for acts of employees even if the

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3. "Did you ever expect a corporation to have a conscience when it has no soul to be damned and no body to be kicked?" SEC v. John Adams Trust Corp., 697 F. Supp. 573, 579 n.6 (D. Mass. 1988) (quoting Edward, First Baron Thurlow (1731-1806) in MERVYN A. KING, PUBLIC POLICY AND THE CORPORATION (1977)).
5. *Id.* at 486.
6. *Id.* at 493-94.
company was not aware of the violation,\(^7\) prohibited the conduct that led to the violation,\(^8\) or there was no actual benefit to the corporation through the acts of the employee.\(^9\) So even if none of the three justifications for corporate liability are present, i.e., knowledge, benefit, or authority, corporate liability for the acts of an employee – in addition to the liability of the employee – may still be found. A number of reasons have been given for this approach, but a consistent argument is that this type of liability will have an *in terrorem* effect on the corporation and force the entity to make certain that employees obey the law.\(^10\) As a practical matter, it also reflects the reality that employees working through a corporation, whether or not their actions are authorized, can cause harm far beyond the abilities of one person. Therefore, according to this line of reasoning, it is appropriate that the entity be punished criminally (and pay civil damages).

The usual rule in the United States and other common law countries is that a corporation is liable for acts of agents and employees acting within the scope of their employment and, in most cases, with the intent to benefit the company.\(^11\) This approach derives from the common law doctrine of *respondeat superior*, which held that a master is generally liable for the actions of servants, but may escape liability if the servant acts outside the scope of employment (i.e., takes action for

\(^7\) A company may be held liable for acts of employees when the company was under prior ownership. See, e.g., United States v. Alamo Bank of Texas, 880 F.2d 828, 830 (5th Cir. 1989).

\(^8\) See, e.g., United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989). Under the US Attorneys’ Manual the prosecution may, in its discretion, choose not to bring an action against a corporation based on evidence of due diligence to prevent wrongdoing (the case of the “rogue employee”). One older case that appears to have allowed a corporation to escape liability as a matter of law based on due diligence to prevent legal violations is Holland Furnace Co. v. United States, 158 F.2d 2, 5-6, 8 (6th Cir. 1946).

\(^9\) See, e.g., United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989). Under the US Attorneys’ Manual the prosecution may, in its discretion, choose not to bring an action against a corporation based on evidence of due diligence to prevent wrongdoing (the case of the “rogue employee”). One older case that appears to have allowed a corporation to escape liability as a matter of law based on due diligence to prevent legal violations is Holland Furnace Co. v. United States, 158 F.2d 2, 5-6, 8 (6th Cir. 1946).

\(^10\) For example, in Bazley v. Curry, [1999] 2 S.C.R. 534 (Can.), the Supreme Court of Canada found a nonprofit organization that took care of abused children liable for sexual molestation committed by an employee, even though the agency had no knowledge of the employee’s record as a pedophile when he was hired, and the employee was immediately discharged when his improper conduct became known. The court found that vicarious liability was appropriate in order to provide compensation to injured parties and to provide an incentive to employers to make sure that intentional misconduct would not occur (deterrence of future harm). Bazley v. Curry, [1999] 2 S.C.R. 534 (Can.).

which there is no actual or apparent authority).\textsuperscript{12} The concept of apparent authority, the authority that outsiders would normally assume the agent to possess judging from his or her position in the company and the circumstances surrounding previous instances of conduct, is often the foundation for a finding of corporate liability.\textsuperscript{13} Employees are assumed to be acting within the scope of their employment\textsuperscript{14} if they are doing acts on the corporation's behalf in the performance of their general line of work.\textsuperscript{15} An agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated — at least in part — by an intent to benefit the corporation."\textsuperscript{16} It is not necessary that the acts actually benefited the corporation, only that they were intended to do so.

The court decisions and statutes that led to these multiple bases for finding enterprise liability grew up in an era where there was recognition of the power of the "faceless" corporation and the need to control its activities. Courts would impute knowledge or intent to the corporation, even where there was no benefit to the enterprise by the wrongful acts of the employee and the activities did not benefit the corporation, although some courts are willing to consider whether the violation was foreseeable.\textsuperscript{17} In other situations, liability might be imputed to a corporate officer or director for failure to exert their authority to ensure that the corporation (i.e., acting through employees) did not do wrong.\textsuperscript{18}

But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do. By holding a corporation liable for virtually anything that any employee does, a situation of strict liability is created that may, in fact, be outside the scope of many laws that require an intent to violate the law.

\textsuperscript{12} See, e.g., Mylan Labs., Inc. v. Akzo, N.V., 2 F.3d 56, 63 (4th Cir. 1993).

\textsuperscript{13} United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984).

\textsuperscript{14} Activities are deemed to be within the scope of employment when they are "so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." Domar Ocean Transp., Ltd. v. Indep. Ref. Co., 783 F.2d 1185, 1190 (5th Cir. 1986) (quoting KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 502 (W. Page Keeton ed., 5th ed. 1984)).

\textsuperscript{15} United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).


\textsuperscript{17} City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1369 (9th Cir. 1992); Standard Oil Co. of Texas v. United States, 307 F.2d 120, 129 (5th Cir. 1962); United States v. Sun-Diamond Growers of California, 964 F. Supp. 486, 490-91 (D.D.C. 1997).

\textsuperscript{18} See, e.g., Hoye v. Meek, 795 F.2d 893, 897 (10th Cir. 1986).
Notwithstanding the desire to control the power of the corporation, there are limits to what it can do. The efforts of the corporation to control the actions of employees are a valid consideration in determining whether the corporation should be held liable for the actions of an employee, as was noted in the instructions to the jury after the trial of Arthur Andersen in connection with the Enron debacle:

If an agent was acting within the scope of his or her employment, the fact that the agent’s act was illegal, contrary to the partnership’s instructions, or against the partnership’s policies does not relieve the partnership of responsibility for the agent’s acts. A partnership may be held responsible for the acts its agents performed within the scope of their employment even though the agent’s conduct may be contrary to the partnership’s actual instructions or contrary to the partnership’s stated policies. You may, however, consider the existence of Andersen’s policies and instructions, and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm’s agents were acting within the scope of their employment.  

The key here is “diligence.” Was a compliance program something that existed only on paper, or were there indicia of sincerity on the part of the corporation that showed that it legitimately tried to enforce its policy of compliance? The diligence of the corporation in enforcing its policy should be a key factor in determining if it is the kind of program that should entitle the corporation to some measure of mitigation from legal penalties imposed as a result of the actions of an employee that disobeyed the policy.


20. Charles A. Bane, The Electrical Equipment Conspiracies: The Treble Damage Actions 13 (1973) (In United States v. Westinghouse Electric Corp., No. 20399 (E.D. Pa. 1960), Judge Ganey stated, “[The antitrust policy] was observed in its breach rather than in its enforcement... I am not naive enough to believe that General Electric didn’t know about [the conspiracy] and it didn’t meet with their hearty approbation.”

21. Barry J. Lipson, A Survey On the Ins and Outs of Antitrust Compliance, 51 Antitrust L.J. 517, 525-26 n.15 (jury instruction in United States v. Koppers Co., No. 79-85 (D. Conn.) (June 12, 1980) (“One of the factors, among others, that you may consider in determining the intent imputed to Koppers Company through its [managerial] agents or employees is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary imputed intent. If, however, you find that Koppers Company acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact
Competition law imposes certain standards of behavior that are accepted because of an understanding that society benefits from competition. Therefore, in most cases, cartels are prohibited, as is abuse of market power or dominance. There is a recognition in many areas of law that transparency is beneficial, and thus bribes or secret rebates are prohibited for their disruptive impact on competition, as well as their inherent corruptness.

But how do these standards become accepted? It is not sufficient only to implement national laws and multinational agreements. Enforcement authorities recognize that there must also be private action to enforce policies within corporations and to demonstrate that noncompliance with law will not be tolerated. As will be discussed below, there are benchmarks of what is an “effective” compliance and ethics program that have received broad-based acceptance. Standards of international competition law cannot have their desired impact without international standards and efforts for compliance. Companies need to be able to know that what they do to implement compliance standards does matter so that they will make a diligent effort to prevent cartel behavior from happening. If a company has taken serious action to enforce its standards, such as by discharge of employees who violate the law, this level of corporate compliance, which is expected by enforcement authorities, should be recognized when deciding how to treat corporations, including charging and penalty decisions.

So, there is a combination of factors at work here. Competition law standards are virtually universal in their acceptance. To get those standards to actually be implemented by corporations, there need to be corporate compliance and ethics programs in place. Standards of culpability recognize that factors such as intent, knowledge, and benefit are relevant to findings of corporate liability. A number of countries do specifically encourage compliance and ethics programs, including in the antitrust area. Therefore, this growing, worldwide acceptance,

\begin{itemize}
\item \textit{See United States v. Beusch, 596 F.2d 871, 877-78 (9th Cir. 1979) (holding that the jury instruction, “A corporation may be responsible for the acts of its agents done or made within the scope of its authority, even though the agent’s conduct may be contrary to the corporation’s actual instruction or contrary to the corporation’s stated policies” does not impose strict liability on the corporation, but instead means that a corporation “may be liable for acts of its employees done contrary to express instructions and policies, but that the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.”).}
\item \textit{See e.g., SCOTT H. JACOBS, OECD, REGULATORY REFORM IN MEXICO 59 (1999).}
\item \textit{See infra. Some of the enforcement agencies provide videos to show the folly of antitrust violations, and to aid in compliance training. See, e.g., NMaMovie, Leniency in Cartel Cases, YOUTUBE (June 9, 2008), http://www.youtube.com/watch?v=5diFAadwel}
\end{itemize}
combined with universal necessity, has established an international law not just for antitrust, but for antitrust compliance. The countries that do not formally recognize the value of bona fide compliance programs as relevant to corporate liability, perhaps seduced by the possibility of collecting huge fines from a corporate piggy-bank, are out-of-step with the reality of what is necessary to truly promote the principles of competition law.

Perhaps one fundamental difficulty here is that no form of organizational punishment seems to hit exactly the "right" target when dealing with large corporations. Punishment of individual employees alone does not seem fair, because the corporate entity goes unscathed. Yet punishing the corporation for individual acts that it could not control also seems unfair. Moreover, for large multinational corporations, small fines appear meaningless, yet fines large enough to have an impact cause unavoidable collateral damage to innocent parties uninvolved in the wrongful acts. For publicly-traded corporations, managers writing enormous checks for major violations seem merely to be spending other people's money—the distant shareholders who may largely constitute innocent, passive investors such as pensioners in any event. It is a frustrating exercise, meting out punishment to amorphous entities.

We believe the most effective place to focus attention is how best to prevent violations within the organization. Preventing the massive harm that a large corporation can cause is considerably more useful than figuring out who to punish after the harm is done. The vehicle for prevention in large organization is the compliance and ethics program.

A VERY BRIEF HISTORY OF CORPORATE COMPLIANCE AND ETHICS PROGRAMS

Compliance and ethics programs are management systems to prevent and detect misconduct, i.e., illegal and unethical conduct. The genesis of these programs is probably in the antitrust field, beginning with the electrical equipment conspiracies in the 1950s and 60s.\(^\text{25}\) The field grew as other risk areas developed similar needs for internal corporate efforts, including such areas as environmental compliance, workplace safety, employment discrimination, and foreign corrupt payments. However, until 1991 the focus was almost always on compliance confined to specific risk areas.

\(^\text{25. See e.g., BANE, supra note 20.}\)
In 1991, the United States Sentencing Commission issued sentencing guidelines for federal judges to use in criminal cases involving organizations.\(^{26}\) While the guidelines imposed tough terms that resulted in substantial increases in penalties imposed, they also recognized effective compliance and ethics programs as a significant mitigation factor. As part of this formula, the Guidelines set out a standard for such programs based on seven elements.\(^{27}\) These standards used an approach aptly described as "structured flexibility,"\(^{28}\) setting minimum standards but giving organizations flexibility in the details of their programs. If a company had such a program and met certain other conditions, it was to be given a substantial reduction in its fine.

In 2009, the Organization for Economic Development and Cooperation, through its Working Group on Bribery, issued the first international standard for compliance and ethics programs.\(^{29}\) In a document called the Good Practice Guidance, the Working Group enumerated twelve elements for an anti-bribery program.\(^{30}\) These elements, substantially similar to the seven elements in the Sentencing Guidelines, set out a framework that, for the most part, could be easily adapted to any type of compliance and ethics program. That the Sentencing Guidelines and the Good Practice Guidance would be very similar was a predictable result for a fundamental reason. Compliance and ethics programs are not some bureaucratic formulation or a mysterious concoction; rather, they are the application of basic management principles to accomplish a defined task: prevention and detection of misconduct. The fact that compliance programs operate within the organization and form part of the organization's fabric explain why their ability to prevent harm is so much greater than the government's. Working within the organization provides the access necessary to be effective and to interdict misconduct before it comes to complete fruition.\(^{31}\)

27. Id. § 8A1.2(k).
RECOGNITION OF THE IMPORTANCE AND VALUE OF COMPLIANCE AND ETHICS PROGRAMS

The Sentencing Guidelines model, setting a standard for an effective program and then providing incentives to companies to adopt such programs, has developed as a global model. Since 1991, government agencies in the United States and around the world have recognized the essential role of compliance and ethics programs, and government’s role in promoting these programs. In the United States, for example, the U.S. Attorney’s Manual advises federal prosecutors to take into account the existence of an effective program in deciding how and whether to proceed in prosecuting a company (with the exception only of antitrust violations).32 The Department of Justice’s Criminal Division, in settling cases such as Foreign Corrupt Practices Act prosecutions, has followed the U.S. Sentencing Guidelines (and more recently the OECD Good Practice Guidance) standards in requiring companies to implement strong programs as part of these settlements.33 Regulatory agencies, such as the Federal Energy Regulatory Commission, have held public hearings on the issue of the agency’s role vis-à-vis such programs and issued guidance to industry.34 The U.S. Supreme Court, in dealing with employment discrimination and harassment, has recognized the role of compliance programs in preventing such socially undesirable conduct; in the case of certain forms of harassment the existence of a compliance program can form part of the defense,35 and for any form of employment discrimination compliance efforts can be a defense to punitive damages.36

Globally, governments concerned with protecting privacy have followed the compliance program model, calling on companies to have a designated privacy officer or “data controller” to ensure compliance with privacy laws.37 Some legal systems have provided that compliance efforts can serve as a defense, either to corporate liability38 or to
liability for directors under a due diligence defense. Compliance programs may be specifically acknowledged as factors in reducing penalties for violations, as the Singapore Competition Commission has done.\(^{39}\)

Why has this trend developed? The recognition of the importance of compliance programs addresses a fundamental reality about organizations; no matter how fond lawyers may be of the legal fiction that a corporation is a “person,” like all fiction it should not be confused with reality. Corporations are not simply large individuals; they are complicated collections of individuals, departments, cultures, motivations, and all the other elements that constitute a society. No company, and no society in the history of mankind, has been able to control the conduct of all its members in all their actions. Simply punishing an organization because one or more of its members does something wrong makes sense only if it serves to prevent misconduct. But how does an organization act to prevent misconduct? There is only one method, and that is the use of management tools to prevent and detect misconduct, i.e., a compliance and ethics program. If a company has not made the effort to prevent violations, then punishment serves a very important and useful social function—driving management to take the necessary steps. But if a company uses true diligence to prevent misconduct, then punishment serves no deterrent function, and becomes only an amoral revenue raising exercise.

**THE “ANTITRUST DIVISION”**

Logic, experience, and public policy strongly favor development of effective organizational compliance and ethics programs. However, there has emerged in the enforcement community a sharp division in approach. In the U.S. Department of Justice, the Criminal Division, with responsibility for a broad range of offenses such as fraud and FCPA violations, is vocal about the importance of such programs, and specifically cites them as a factor in its enforcement decisions.\(^{40}\) It also exacts from violators a requirement that they reform their conduct by adopting rigorous programs. Even companies that voluntarily disclose

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violations must take this step. Similarly, the Department's Environmental and Natural Resources Division has addressed compliance and ethics programs as a key factor in prosecutorial decisions since 1991. But the Department's Antitrust Division, in its enforcement actions against cartel conduct, has created a split in approaches, taking the position that it will not consider programs. Moreover, unlike the Criminal Division, even admitted criminal violators who are accepted into the Antitrust Division's leniency program, need do absolutely nothing regarding institution of a program.

In fact, in contrast to the approach of the Sentencing Commission, the Supreme Court in the context of employment discrimination, and the Criminal and Environmental Divisions in the same Justice Department, the Antitrust Division dismisses as "failed programs" any program, no matter how diligent, if it fails to prevent or be the first in an industry to detect a violation. As one Division spokesperson has said, "We will not reward a company for a failed compliance program that neither prevented nor detected the wrongdoing." This split has been cursorily "explained" as existing because antitrust "goes to the heart of the business." Nothing further is offered to justify this, or explain why a price-fixing conspiracy in a small subsidiary in Biloxi goes more to the core of a business while a securities fraud from headquarters or a bribe paid to a another country's prime minister is somehow peripheral.

Remarkably, in the global context, this division in approaches has been exacerbated by the EU Commission, adopting in almost the same words the position of this one Justice Department Division. On the
other hand both the Antitrust Division and the EU, as well as more than 50 jurisdictions worldwide, have so-called leniency programs.\textsuperscript{47} Under these arrangements, the first company involved in a cartel to report the violation gets a complete pass from any form of punishment.\textsuperscript{48} Those entering such a leniency program need not have a program at the time of the violation, nor need they even consider one going forward. In other words, violators who have not even made a small effort to prevent violations are richly rewarded; companies that do try even with extraordinary diligence, however, are punished no matter how hard they tried. In short, while others in the global enforcement and regulatory world go to substantial efforts to promote and recognize compliance and ethics programs, those on the other side of this "antitrust division" offer companies with even the most diligent programs no credit when investigating, no credit in the decision to prosecute, and no credit regarding penalties. Those who win the race to the prosecutor to report cartel violations face no penalties and are not required to have the inconvenience of taking at least some compliance program steps despite admitting to the most destructive types of competition law violations.

This "antitrust division" exists not only between the Antitrust Division and EU on the one hand, and enforcement authorities in other areas of the law, but it also exists within the antitrust enforcement community itself. While the Antitrust Division and EU scoff at so-called "failed programs," and do nothing to recognize programs at any stage of enforcement, other competition law enforcement agencies have recognized the importance of such programs in a variety of ways. The importance of compliance programs, in some instances as part of case settlements, has been recognized in Canada,\textsuperscript{49} Norway,\textsuperscript{50} the UK,\textsuperscript{51}


\textsuperscript{48} Id.


Singapore, Australia, South Africa, France, Israel, India, and by the FTC.

**COMPLIANCE AND ETHICS PROGRAMS PROMOTE GLOBAL POLICY OBJECTIVES**

Compliance and ethics programs have been found to be key tools in promoting important public policy objectives. There is no more effective way to control the conduct of large organizations. They have been promoted as instruments to achieve important policy objectives regarding prevention of corruption, fraud, pollution, invasion of privacy, healthcare fraud, and many other forms of organizational misconduct. There is no valid policy reason why prevention of cartels should be treated as a less important policy objective. If policy makers believe that cartels are serious offenses against the public then they should be using and recognizing this essential tool to prevent and control them.

Effective compliance and ethics programs historically have not simply emerged from industry unguided by government. It has consistently been active government support and promotion that has made the difference. But those in industry are astute on this point—government actions and commitment matter and empty rhetoric is routinely ignored by those in the private sector. If competition law enforcers do nothing but give speeches and write articles, but offer no value for such programs, then those in industry are smart enough to...

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52. COMPETITION COMM’N OF SINGAPORE, supra note 39, ¶ 2.13.
53. AUSTRALIAN COMPETITION AND CONSUMER COMM’N, CORPORATE TRADE PRACTICES COMPLIANCE PROGRAMS III (Nov. 2005), available at http://www.acc. gov.au/content/item.phtml?item Id=717078&nodeId=0de4ca0a69fe9de037bf81391b2c dab&fn=Corporate%20trade%20practices%20compliance%20programs.pdf.
55. COMPETITION AUTHORITY OF FRANCE, 2008 ANNUAL REPORT 36, available at http://www.autorit6edelaconcurrence.fr/doc/synthese2008_uk.pdf. “The Autorité already encourages compliance programs thanks to commitments that can be made, in the course of a settlement package. It wishes to speed up the process by taking a more proactive approach, outside the litigation context. Beneficial to a competitive economy, this preventive compliance may be an element structuring the company’s strategy. The cost of a program should be viewed against the investment in terms of legal security, image, and ultimately, trust on the part of clients and consumers.”
focus on actions, not mere words. Corporate resources will not be directed to activities that bear no fruit.

Moreover, only the government can ensure that corporate programs are themselves marked by actions and not mere rhetoric. Effective programs call for tough levels of commitment within companies. When government makes it clear that effective programs matter and will result in favorable treatment, then and only then does the government have the leverage necessary to get industry's attention and cause companies to upgrade their efforts to be truly effective. On the other side of the antitrust division, however, both the EU and the DOJ Antitrust Division have needlessly forfeited their leverage by only paying lip service to programs.

What is it that makes a company's competition law compliance and ethics program effective? What is it that governments need to promote in companies? Full coverage of this topic is beyond the scope of this article. In fact, both authors of this paper have written entire treatises on this topic. But here in a nutshell are the types of steps needed to make a program actually work, and also the types of steps that may be missing in antitrust programs, at least in jurisdictions on the wrong side of the antitrust division:

**Audits and monitoring.** Programs need to be more than talk. There need to be efforts to actually find out what employees are doing, and whether they are violating the rules.

**An empowered, senior officer-level chief ethics and compliance officer with sufficient autonomy, empowerment, and resources.** If there is not a strong compliance and ethics officer at the top, the program may be nothing more than a corporate decoration.

**Effective communications.** All those acting for the company need to know the antitrust laws and be convinced to follow them. Boring lectures by lawyers do not work; effective adult learning techniques do. Effective communications requires targeting a message to the right employees, and putting it into a form that will be relevant to the employees. The shotgun approach is usually not very effective.

**Incentives and discipline.** Those who break the rules and ignore the compliance and ethics program need to be held accountable. Those who manage and supervise them need to be held equally accountable. The incentive system needs to promote ethical and compliance conduct.

**Other management tools.** There are many other management tools needed in a program. The Sentencing Guidelines and the Canadian Competition Bureau's Guidance bulletin show the way. Similarly, the OECD Working Group on Bribery's twelve step Good Practice Guidance

59. *COMPETITION BUREAU CANADA, supra* note 49.
provides effective guidance, allowing for only a few differences related to corruption versus treatment of cartels.

**BRIDGING THE "ANTITRUST DIVISION"**

How can we move beyond the artificial and dysfunctional division originated by this one enclave of enforcers in the Department of Justice's Antitrust Division? How can antitrust enforcement authorities around the world harness the force of compliance and ethics programs to more effectively prevent cartels? The change would not be difficult, and there are more than enough good models around the world.

Enforcement authorities that recognize the importance of compliance and ethics programs do this through several vehicles. In the U.S. Department of Justice, outside of the Antitrust Division, prosecutors take programs into account in making decisions about how to proceed against companies. Violations deemed less serious, or mitigated by an existing compliance program, may be pursued with a civil, rather than a criminal, remedy. In jurisdictions where enforcers have discretion in how to proceed, they can readily take into account the diligence of a company's compliance and ethics program.

Another useful tool is the consideration of programs in penalty decisions. Here the Competition Commission of Singapore provides a useful model. The Commission spells out key factors it considers in programs:

> 2.13 In considering how much mitigating value to be accorded to the existence of any compliance programme, the CCS will consider:
> - whether there are appropriate compliance policies and procedures in place;
> - whether the programme has been actively implemented;
> - whether it has the support of, and is observed by, senior management;
> - whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and
> - whether the programme is evaluated and reviewed at regular intervals.  

While there is no specific number provided regarding the weight given to programs, the important point is that this provision sends the message that real programs count. In the UK, the OFT has said it will give up to 10 percent reductions on penalties for effective programs.  

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60. COMPETITION COMM’N OF SINGAPORE, supra note 39.
61. OFFICE OF FAIR TRADING (U.K.), supra note 51, at 32, ¶ 7.4.
This self-imposed, artificial limit, which only serves as a counterproductive restraint on the government's own freedom, is perhaps understandable given the existence of the environment set by the EU and the U.S. Antitrust Division.

Enforcement authorities can also require that those who admit misconduct and enter into agreed-upon arrangements with authorities must institute effective programs. Unfortunately, in those cases where the Antitrust Division does this — never for leniency applicants — the programs have been formalistic measures readily dismissed by corporate employees as legalistic exercises. None of the experience developed in the past 20 years appears to have seeped into the Division's decrees. Most remarkable is that those offenders admitted into the leniency programs need do nothing at all.

The more justifiable approach, from a policy perspective, is to require all those entering into consent decrees and especially those coming into the leniency program, to adopt high-potency programs. Governments should recognize that the mere act of being first to disclose a violation does not merit praise and a complete pass from any responsible action. Companies that commit violations should be expected to take serious steps to prevent recurrence. In this respect, someone must be right and someone must be wrong in their approach. Either the Criminal Division or the Antitrust Division is using an effective approach. The policy factors behind effective compliance and ethics programs strongly support the Criminal Division's perspective, and raise unanswerable questions about the Antitrust Division's unlimited rewarding of those in the leniency program.

Finally, it is time to end the dysfunctional antitrust division and bring cartel prevention efforts into line with enforcement of other important policy objectives. The hostile tone of the Antitrust Division and the EU, which likely has served to sharply undercut preventive corporate efforts in competition law compliance, needs to be reconsidered. Government needs to speak with one voice to promote effective corporate compliance and ethics efforts. Government, industry, and the public can only benefit from enhanced corporate efforts to prevent and detect misconduct, including the scourge of cartels. If the governments of the world expect to treat competition law as a basic tenet of international law, governing, as it does, the conduct of local and multinational corporations, then they must also recognize the need to accord competition law compliance programs their proper role in determining enforcement priorities and penalties.
BEYOND THE DOHA ROUND: TOWARDS DEVELOPMENT FACILITATION IN THE WORLD TRADING SYSTEM

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I. INTRODUCTION

The Doha Round of the World Trade Organization (WTO), which aims to advance the development interests of developing countries in the world trading system,1 has not been completed for over a decade due to the critical differences among the Member States (Members). While international trade is essentially important for the economic development of developing countries and the rules for international trade have significant impacts on developing countries with respect to their ability to adopt development policies,2 the current WTO system does not adequately address the development concerns of developing countries and the rules fail to facilitate economic development. The Doha Round was launched with an objective of meeting the development interests of developing countries, but its progress has been sluggish, reflecting large gaps in positions on development issues between developed and developing countries.3

Even if the current Doha Round is concluded successfully, with its negotiation agendas and objectives4 met in the final negotiations, it would not be sufficient to fill the regulatory gap in the current WTO system for development facilitation through international trade, nor does it address the fundamental problem and imbalance in the current

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1. The Doha Round, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Dec. 3 2011). The Doha Round agendas and the main areas of negotiation include agriculture, non-agriculture market access (NAMA), services, intellectual property, trade and development, and trade facilitation.


3. Id. at 10.

4. WORLD TRADE ORG., supra note 1.
organizational structure of the WTO. The negotiation agendas and mandates of the Doha Round are not sufficient to achieve the reform that would correct the current problem in the regulatory framework and in the institutional apparatus of the WTO. The reform will have to be considered and discussed in a subsequent round.

This paper, based on the author's previous works, provides a brief account of the "development deficit" in the regulatory framework of the WTO and its organizational apparatus and of the reform proposal to meet the development needs of developing countries, as mandated by the WTO Agreement itself. The next section discusses the issues with the current regulatory framework with a proposal for a set of development-facilitation provisions, named the Agreement on Development Facilitation (ADF). Section III provides a discussion of the "development deficit" in the current WTO structure and proposes organizational reform. Section IV draws conclusions.


6. The Preamble of the Agreement Establishing the World Trade Organization ("WTO Agreement") provides in relevant part, "acknowledging further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development. . . ." Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. The agenda of the current Doha Round ("Doha Development Agenda" or "DDA") also aims to facilitate economic development of developing countries through international trade. See supra note 1.

7. The purpose of this paper is to provide a brief account of the regulatory and organizational gap in the WTO and the points of the proposed reform; thus, those who seek a more extensive discussion should refer to the author's other work, such as RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM, supra note 2.
II. REGULATORY REFORM

A. Current Regulatory Imbalance

The current rules of international trade represented by WTO disciplines apply to 195 Members of the WTO, thus constituting the global regulatory regime of international trade. Various agreements and understandings (WTO agreements) concluded in the Uruguay Round (1986-1994) were added to the rules of the General Agreement on Tariffs and Trade (GATT), which had been implemented since 1947 and still remain as the core principles of the international trade law. The subsequent WTO agreements reinforce the GATT rules, where applicable, by providing detailed procedures, provisions, and implementation mechanisms.

While most of key GATT provisions have been elaborated by more detailed WTO agreements with implementation mechanisms, none of the GATT's development-facilitation provisions, such as Article XVIII and Part IV provisions (Articles XXXVI ~ XXXVIII), has been reinforced by any WTO agreement. Some of the GATT principles, such as maximum tariff bindings in Article II, restrain the ability of developing countries to adopt trade-related development policies. The development-facilitation provisions in the GATT, such as Article XVIII, address this issue by enabling developing countries to adopt tariff measures beyond their previous commitments under Article II for development purposes.

8. Marrakesh Agreement, supra note 6, art. XIV. Compliance with the WTO legal disciplines is mandatory for all Members: Members are required to bring their own laws and practices in compliance with the rules of WTO legal disciplines.


11. GATT, supra note 10, art. XVIII, para. 2.
Nonetheless, certain requirements under the GATT's development-facilitation provisions, including those in Article XVIII and Articles XXXVI-XXXVIII, cause difficulties for developing countries to adopt those measures. Article XVIII allows developing countries, whose economies only support low standards of living and are in the early stages of development, to adopt tariff measures beyond the maximum tariff bindings to which they are committed under Article II in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people. However, developing countries are also required to engage in negotiation with the interested Members and compensation may well be required as a result of any modification. Those negotiations can be lengthy, which may not allow developing countries to adopt the necessary measures in time, or may never be concluded successfully with the interested parties. Developing countries with limited economic resources may not be able to offer compensation required by the other parties. Article XVIII allows developing countries to adopt the measure even if negotiation should not be successful, provided that they offer compensatory measure at the time of applying the measure, but it is subject to retaliatory measures by the other interested Members should the WTO consider the compensation inadequate.

Another set of major development-facilitation provisions of the GATT, Articles XXXVI-XXXVIII, lays out an impressive array of preferential treatments in favor of developing countries. Article XXXVI addresses the vital role of export earnings in economic development, the possible authorization of special measures to promote trade and development, and the need for more favorable and acceptable conditions of access to world markets for primary products (on which many developing countries depend). Article XXXVII elaborates the commitment of developed country Members' to assist developing countries with economic development. These commitments include according high priority to the reduction and elimination of import barriers to products of particular export interest to developing Members, refraining from introducing or increasing import barriers to such products, and according high priority to the reduction and elimination of policies specifically applicable to primary products wholly

12. See WORLD TRADE ORG., supra note 9, for the text of Article XVIII and Articles XXXVI-XXXVIII.
13. GATT, supra note 10, art. XVIII, para. 4(a).
14. Id. art. XVIII, para. 7(a).
15. Id.
16. Id. art. XVIII, para. 7(b).
17. Id.
18. WTO Legal Texts, supra note 9.
or mainly produced in developing countries, which hamper the growth of consumption of those products.\textsuperscript{20} Article XXXVIII calls for joint action and institutional effort by the WTO to assist developing countries.\textsuperscript{21} These provisions, however, are declaratory rather than obligatory for absence of sanction in the case of violation of those duties. Article XXXVII also allows developed countries to avoid any of those obligations by legislating against them.\textsuperscript{22}

Subsequent WTO agreements, while reinforcing other key GATT provisions,\textsuperscript{23} do not address the implementation and enforcement problems of the development-facilitation provisions in the GATT, including those of Article XVIII and Articles XXXVI-XXXVIII, leaving regulatory vacuum in this area. The mainstream neo-classical economic stance does not support state-led development policies, such as infant industry promotion policies embodied in Article XVIII,\textsuperscript{24} but the policy decision has already been made to allow developing countries this option when the Article was adopted by the GATT. Thus it would be only fair and adequate that those development-facilitation provisions are reinforced by subsequent agreements with detailed implementation provisions and enforcement mechanisms. The current WTO rules offer special and differential (S&D) treatment in favor of developing countries.\textsuperscript{25} However, it is insufficient for the S&D provisions, which are scattered throughout WTO agreements, are either temporary or limited in coverage and extent.\textsuperscript{26} The remainder of this section makes brief proposals for regulatory revisions to amend this development deficit in WTO legal disciplines.\textsuperscript{27}

B. Reform Proposal

The development deficit in the regulatory system can be cured by elaborating and reinforcing the development-facilitation provisions in the form of a separate WTO agreement, as has been done with other GATT provisions.\textsuperscript{28} This agreement can be named, “The Agreement on

\textsuperscript{20.} Id. art. XXXVII, para. 1.
\textsuperscript{21.} Id. art. XXXVIII, para. 2.
\textsuperscript{22.} Id. art. XXXVII, para. 1.
\textsuperscript{23.} See supra note 10.
\textsuperscript{24.} LEE, supra note 2, at 62.
\textsuperscript{25.} 145 S&D provisions are scattered throughout several WTO agreements, understandings, and GATT articles. Twenty-two are applied exclusively to LDCs. For a review of the special and differential treatment (S&D) provisions in the WTO, see Note by Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/77 (Oct. 25, 2000).
\textsuperscript{26.} See LEE, supra note 2, at 40-41, for a detailed account of the limits of the S&D provisions.
\textsuperscript{27.} See id. ch. 2-6, for more detailed accounts of the proposals.
\textsuperscript{28.} See supra note 10.
Development Facilitation (ADF)." The Agreement may include rules for new, permanent S&D treatment in the areas that have critical implications for development such as tariff bindings, subsidies, anti-dumping, trade-related intellectual property rights, and trade-related investment measures. The ADF can also provide a coherent regulatory standard for determination of developing countries to benefit from regulatory preferences. A separate agreement will function as exceptional rules to the other WTO agreements and its advantage is to advance development interests without potentially complex revisions to the existing agreements.

The maximum tariff binding under GATT Article II has important ramifications for development. Article II prohibits Members from raising tariff rates beyond the maximum bindings that they have agreed in the previous trade round. While the requirement provides essential stability for international trading system, it also restrains the ability of developing countries to adopt tariff measures beyond the maximum bindings to promote domestic industries for development purposes. As mentioned, the GATT has adopted the policy to allow this measure by the provisions of Article XVIII, but the negotiation and compensation requirement causes a considerable difficulty for developing countries.

Development-Facilitation Tariff (DFT) has been proposed to address this issue. The DFT scheme enables developing countries to set the maximum additional tariff rate beyond the tariff binding under Article II. It assigns a different maximum DFT rate to an individual developing country on a sliding scale, to be determined in accordance with its level of economic development measured by relevant economic indicators such as per-capita gross national income (GNI) figures.

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29. LEE, supra note 2, at 47.
30. Id. at 47–48.
31. Id. Under the current system, developing country status is self-declaratory and the absence of a definition for developing country Members seems to create regulatory ambiguity. See also Fan Cui, Who are the Developing Countries in the WTO?, 1 L. AND DEV. REV. 123 (2008).
32. GATT, supra note 10, art. II.
33. Id.
34. See discussion supra Part II.A.
35. LEE, supra note 2, at 66.
36. Id. at 68–70.
37. Id at 68-69. For instance, suppose that the maximum DFT rate is set at 100 percent over the tariff binding and the economic threshold for an eligible developing country to benefit from a DFT is 15,000 USD per capita GNI. Then any country that has a higher per-capita income than 15,000 USD will not be eligible for a DFT. Country A with the per capita GNI of 3,000 USD, which is 20 percent of the threshold income, will be allowed to apply a DFT of 80 percent (100% x (100% – 20%) = 80%). Country B with the
While negotiation and compensation requirements are not imposed on developing countries, a series of procedural requirements, such as a report setting forth rationale for the proposed increase in tariffs, public hearing, notice, and gradual liberalization and elimination of the DFT after a set period of time, should reduce the possibility of an abuse.

A similar treatment can be considered for subsidies. Government subsidies are important development tools for developing countries, and the WTO recognizes their importance for economic development. Yet, some of the key trade-related subsidies, such as export subsidies and import-substitution subsidies, are prohibited by the current WTO rules. The other kinds of subsidies that affect the trade of other Members adversely are also "actionable": i.e. subject to trade sanctions including countervailing measures. As Dani Rodrik has aptly described, the current trade rules have made "a significant dent in the ability of developing countries to employ intelligently-designed industrial policies."

Historically, subsidies have played an important role in the economic development of today's developed countries, and developing countries should be able to adopt trade-related subsidies without the fear of retaliatory measures from developed countries. The concept of the sliding scale, which is used for the DFT, can be applied to subsidies otherwise prohibited or actionable under the current WTO rule.

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38. See discussion supra Part II.A. Those requirements are present for the application of Article XVIII measures.

39. LEE, supra note 2, at 66-67. The Agreement on Safeguards also includes those procedural requirements. See Agreement on Safeguards supra note 10, arts. 3, 7, 12.

40. LEE, supra note 2, at 52-54.

41. SCM Agreement, supra note 10, art. 27, para. 1.

42. Id. art. 3.

43. Id. arts. 5-7.


45. See HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 19-51 (2002). For instance, the United Kingdom provided extensive export subsidies to textile products in the eighteenth century, id. at 21-22, the United States offered subsidies to railway companies in the nineteenth century and invested heavily in research and development of new technologies, id. at 30-31, and Germany also subsidized a number of industries, including textiles and metals, id. at 33-34. Other developed countries today, including France, the Netherlands, Sweden, Japan, and the East Asian countries (NICs) all provided subsidies to promote their industries, id. at 35-51.

46. LEE, supra note 2, at 79.

47. See supra notes 42-43.
“Development-facilitation subsidy” or “DFS” can be considered in favor of developing countries under certain income thresholds. Under this scheme, developing countries are allowed to adopt otherwise prohibited or actionable subsidies in accordance with their per-capita income status. The procedural requirements, comparable to those for the DFT, would also be important for the DFS scheme to prevent abuse.

Anti-dumping (AD) is another area in which substantial trade interests of developing countries are adversely affected. WTO rules allow Members to adopt AD measures in the form of added tariffs where they determine that imports are “dumped,” i.e., sold at prices below normal value. The “normal value” is determined by comparison to the home price or to an export price in a third country where a proper comparison cannot be made for the market situation or a low sales volume in the domestic market. The normal value can also be “constructed” based on costs and reasonable profits. This regulatory flexibility allows national authorities much latitude with anti-dumping investigations, making AD measures the most prevalently adopted trade measures of all. There is little economic rationale for imposing anti-dumping measures, and particularly cheaper imports from developing countries have been a major target for AD measures, undermining the trade and development interests of developing countries.

The determination of “normal value” is inherently arbitrary and imprecise. For example, there may not be a single home market to compare, and the complex adjusted average may have to be calculated to come up with a reference home price. Where a comparison should be made to an export price in a third country, there may not be a single export price but potentially many substantially different prices. Where a normal value needs to be constructed, the result can be vastly different, depending on a specific methodology adopted to calculate

48. LEE, supra note 2, at 79. Since the objective of the DFS is to promote economic development through export facilitation, it may not be used to support exports from developing countries whose share in the export market is above certain thresholds and that are already competitive.

49. ADP Agreement, supra note 10, art. 1.

50. Id. arts. 1-2.

51. Id. art. 2.


53. LEE, supra note 2, at 94.

54. Between July 1, 2009 and June 30, 2010, over three-quarters of the 181 new AD investigations were targeted to products from developing countries. WTO Committee on Anti-Dumping Practices, REPORT (2010) OF THE COMMITTEE ON ANTI-DUMPING PRACTICES, Annex C, G/L/935 (Oct. 28, 2010).

55. LEE, supra note 2, at 92.
costs and average prices, not to mention that the measure of "reasonable profit" can also vary. The national authorities have almost free hands to determine the existence of dumping and the dumping margin. Limited reform of the AD Agreement has been proposed, but it is unlikely to remove the inherent arbitrariness from the AD regime. As Yale economist T. N. Srinivasan has characterized, AD is indeed the equivalent of "nuclear weapon in the armoury of trade policy," and the ADF should prohibit AD measures against imports from developing countries altogether.

Certain trade-related government measures on investment (TRIMs) are also regulated by WTO rules. TRIMs are important government development policy tools, thus the rules regulating TRIMs need to be examined. Provisions of the WTO Agreement on Trade-Related Investment Measures (TRIMs Agreement) prohibit a range of investment measures that affect international trade. Those prohibited TRIMs include local content requirements (imposing the use of a certain amount of local inputs in production); import controls (requiring imports used in local production to be equivalent to a certain proportion of exports); foreign exchange balancing requirements (requiring the foreign exchange made available for imports to be a certain proportion of the value of foreign exchange brought in by the foreign investment from exports and other sources); and export controls (obligating exports to be equivalent to a certain proportion of local production).

Investment can contribute to economic development significantly by bringing needed capital, technology, and management expertise to the host nation, and some of the TRIMS are designed to maximize investment's contribution to their development agenda. While the economic utility of TRIMs has been debated and the distorting trade effect of TRIMs has been underscored, the decision to adopt TRIMs needs to be vested with developing countries. According to a recent study, all of today's developed countries also adopted investment

56. Id. at 93.
57. See WORLD TRADE ORG., supra note 1.
60. The TRIMs Agreement prohibits investment measures that are inconsistent with Articles III and XI of the GATT, which requires national treatment and the general elimination of quantitative restrictions, respectively. Id. art. 2; GATT, supra note 10, arts. III, XI.
61. TRIMs Agreement, supra note 59, annex, ¶ 1(a)-2(c).
62. LEE, supra note 2, at 114, 117.
63. Id. at 118.
measures to meet their development objectives during their own development. Reflecting this concern, twelve developing countries proposed to change the text of the TRIMs Agreement to make commitments under the agreement optional and not mandatory. It would be indeed fair that today's developing countries should be accorded the same opportunity to use TRIMs to promote economic development. The ADF may include provisions to lift the application of the TRIMs Agreement in favor of developing countries.

The current WTO rules on intellectual property rights (Agreement on Trade-Related Property Rights or TRIPS Agreement) should also be reconsidered in the context of development. Acquiring advanced technology and knowledge is important for developing countries to improve their industries and promote economic development, and this tends to create tension between developing countries whose priority is to acquire advanced technology and knowledge and developed countries with an interest to protect them. Assigning proprietary rights to technology and knowledge domestically through local IPR law and internationally through conventions is an effort to protect them. The TRIMS Agreement, the most extensive provisions in WTO legal disciplines, sets out mandatory standards for the protection of several intellectual property rights (IPRs), including patents, trademarks, copyrights, designs, and geographical indications, mandates protection of foreign IPR holders by incorporating other major IPR conventions, and requires enforcement against IPR violations.

While protection of IPRs is a legitimate interest, those extensive requirements are counterproductive to the development effort of developing countries whose legal and financial recourses may not be

64. Ha-Joon Chang & Duncan Green, The Northern WTO Agenda on Investment: Do as we Say, Not as we Did, SOUTH CENTRE, 33 (June 2003), http://www.southcentre.org/index.php?option=com_content&task=view&id=380&Itemid=67 (follow “click here to download” hyperlink).
67. LEE, supra note 2, at 123.
69. TRIPS Agreement is composed of 73 Articles in seven parts. See TRIPS Agreement, supra note 66.
70. Id. arts. 9-12.
sufficient for the extensive IPR protection. The ADF should exempt developing countries from the application of the TRIPS Agreement to the extent that it imposes legislative requirements on them. This does not mean that developed countries should give up their IPR interests in the context of international trade. A better alternative is to develop another set of rules and elaborate on the relevant provision of GATT Article XX which allows Members to take measures to protect their IPR interests, so as to specify applicable measures as well as the procedural and substantive requirements for the application of the measures as has been the case with the adoption of the WTO Agreement on Safeguards which was developed based on GATT Article XIX.

Finally, the ADF may also require quota-free, tariff-free treatment for imports from least-developed countries (LDCs). Some developed countries have offered preferential treatment to LDCs. For instance, the European Union has introduced the “Everything But Arms” (EBA) initiative, offering duty-free and quota-free treatment to products currently exported by LDCs. Other countries, such as the United States and Canada, offer similar preferential treatment to LDCs, although less comprehensive and more limited in scope than the EBA initiative. Considering the dire economic need of LDCs, an EBA-type

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71. According to a study, implementing the TRIPS obligations "would require the least developed countries to invest in buildings, equipment, training, and so forth that would cost each of them $150 million — for many of the least developed countries this represents a full year's development budget." J. Michael Finger, The WTO's Special Burden on Less Developed Countries, 19 CATO J. 425, 435 (2000).

72. GATT Article XX provides in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the protection of patents, trade marks and copyrights, and the prevention of deceptive practices . . .

GATT, supra note 10, art. XX.

73. The Agreement on Safeguards elaborate on GATT Article XIX and provides a detailed set of substantive and procedural requirements for the application of a safeguard measure. See YONG-SHIK LEE, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS (2d ed. 2007), for a detailed study of safeguard measures.


75. For instance, the United States has implemented the Africa Growth and Opportunity Act, which offers improved access to certain African, but not Asian, LDCs. Id. at 644-45.
of duty-free and quota-free treatment needs to be implemented by developed countries and participating developing countries in the WTO. A transitional period can be established for the complete removal of trade barriers to sensitive products. Members would also have to ensure that non-tariff measures do not undermine the trade benefit of these preferences for LDCs.

III. WTO GOVERNANCE

A. Case for WTO Council for Trade and Development

The present organizational structure of the WTO is not adequate to address the development interests of developing countries at the highest level. The main body in the WTO which deals with trade and development issue is the Committee on Trade and Development (CTD). The CTD reports to the General Council and has a mandate to address certain trade and development issues such as implementation of preferential provisions for developing countries, guidelines for technical cooperation, increased participation of developing countries in the trading system, and LDCs issues. The WTO provides assistance to developing countries which focuses on capacity-building.

The organizational status and mandate of the CTD is insufficient to address fundamental trade and development issues such as finance and debt relief in the context of trade, technological transfer which is key to resolve capacity-building issues, and extensive regulatory reform to fill the development deficit in the present regulatory framework. Those core issues with ramifications that affect the WTO as a whole must be addressed at the Council level, which is the highest decision making body in the WTO organization. The trade and development issues cited above require long-term attention and intense negotiation efforts at the highest organizational level. LDC issues, which are now being

76. At the adoption of the EBA initiative, trade liberalization was complete except for three products: fresh bananas, rice, and sugar, where tariffs were to be gradually reduced to zero (in 2006 for bananas and 2009 for rice and sugar). Duty-free tariff quotas for rice and sugar were to be increased annually. Id. at 625.

77. It has been observed that non-tariff measures, as well as stringent rules of origin, continue to limit exports from LDCs significantly. Stefano Inama, Market Access for LDCs: Issues to Be Addressed, 36 J. WORLD TRADE 85, 115 (2002). Applications of administered protection, such as anti-dumping measures, countervailing duties, and safeguards, can also diminish the beneficial effect of preference for LDCs.

78. LEE, supra note 2, ch. 2.3.2.

79. At present WTO assistance to developing countries focuses on capacity-building. In this area, the WTO Secretariat primarily offers assistance through its Institute for Training and Technical Cooperation. Assistance includes legal advice to some developing countries, regular training sessions on trade policy in Geneva, and the organization of approximately 400 technical cooperation activities annually, compromising both seminars and workshops in developing countries and courses in Geneva.
discussed at a subcommittee under the CTD, require attention and work at a full committee level given the complexity and urgency of the dire economic conditions of the LDC. This committee on LDCs can be constituted under the proposed Council for Trade and Development.

The proposed organizational elevation of the CTD to a full Council is well justified by comparison to the treatment of intellectual property right issues in the WTO. IPRs have been promoted by a relatively small number of developed Members within the WTO, but their importance has been emphasized and recognized by instituting a separate Council for Trade-Related Intellectual Property Rights. Trade and development issues are considered essentially important by the majority of WTO membership, which is comprised of developing countries. This majority interest should receive the comparable attention and recognition by the WTO. Setting up a separate Council for Trade and Development will be an affirmation of such recognition and will allow trade and development issues to be addressed at the highest institutional level.

B. Proposed Role of the Council for Trade and Development

The role of the proposed Council should be set out to meet its objective to advance the trade and development agenda in the WTO. Thus the role of the new Council may include promotion of development agendas and implementation of trade-related development assistance policies, monitoring development and implementation of trade-related rules and policies relevant to development interests of developing countries, and establishment and supervision of subcommittees to address specific development issues.

As to the implementation of trade-related development assistance policies, the Council may on a regular basis identify problems and gaps in the current trading system and practices in facilitating development and set a trade and development agenda accordingly. This agenda may be discussed at the Ministerial Conferences and in subsequent trade negotiations to develop a more development-supportive regulatory system and trade practices. This would include modifying relevant rules where necessary. In promoting a trade and development agenda, the Council may also cooperate with relevant international bodies such as the United Nations Committee on Trade and Development (UNCTAD) and the United Nations Industrial Development Organisation (UNIDO). Through such cooperation, the trade and development

80. Marrakesh Agreement, supra note 6, art. IV.
81. See LEE, supra note 2, ch. 2.3.2; Yong-Shik Lee, World Trade Organization and Developing Countries, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW 109, 109-11 (Yong-Shik Lee et al. eds., 2011).
agenda set by the WTO would be promoted and coordinated more effectively and consistently.

In addition, the reform may include a mandatory reporting requirement for all developed country Members and participating developing country Members to file a “Trade-Related Development Assistance Report” (TDAR) on a regular basis. This report would identify and examine trade practices and activities of an individual Member that are in compliance with the trade and development agenda set by the Council, as well as those that are inconsistent with them. The Council should examine TDARs on a regular basis and consult with relevant Members to discuss their development assistance activities. The Council could agree on specific commitments to be fulfilled by the developed country Members and participating developing country Members to promote the trade and development agenda, and the Council may further examine, within a certain time period, whether these commitments are being met.

The Trade and Development Council could also monitor compliance with WTO provisions on development assistance, including the existing S&D provisions, GATT Articles XXXVI XXXVIII, as well as the pro-development provisions proposed in the preceding section of this chapter. A portion of this monitoring could be incorporated in the TDAR. A violation of those provisions should be reported to the Council if it is detrimental to the trade interests of developing country Members. The Council may subsequently consult with the violating Member to seek a resolution.

The TDAR could also monitor the commitments of developed country Members to developing countries under GATT Article XXXVII. Compliance with these commitments may require a broader policy adjustment by the developed country Member, which may necessitate monitoring by the Council. The Council should publish an annual report on compliance with the development assistance provisions and provide monitoring of any systematic compliance failure. The Council may also include issues of compliance failure in the trade and development agenda with a prospect of rule modification where necessary.

Finally, the Council may also establish standing or ad-hoc committees to address specific issues of trade and development that require long-term attention, such as technological transfer between developed and developing country Members. There should be at least one committee specifically devoted to the problems of LDCs and another

82. See supra note 25.
83. See discussion supra Part II.B.
84. See discussion supra Part II.A.
to assist with capacity building of developing countries to participate fully in the trading system and realize its benefits.\textsuperscript{85} Greater assistance should also be provided to developing country Members involved in costly and time-consuming trade disputes. Consideration should also be given to whether it would better serve the needs of developing country Members to assign the function of the existing WTO Advisory Centre to a committee under the proposed Council for Trade and Development. In either case, the current WTO Advisory Centre needs to be expanded so that it can offer assistance to every developing country Member in need of support with respect to the panel or Appellate Body proceedings.

IV. CONCLUSION

The current regulatory framework for international trade under the WTO is marked by “development deficit.” The Uruguay Round failed to elaborate and develop any of the development-facilitation provisions in the GATT, such as Article XVIII and Articles XXXVI XXXVIII, into a more detailed, enforceable set of rules in WTO agreements, while it has done so in the other areas.\textsuperscript{86} S&D provisions in the WTO agreements are either temporary or insufficient to meet the development interests of most developing countries.\textsuperscript{87} While market access and freer trade is emphasized across the board, exceptions have been legislated in the areas it does not serve the interests of many developed countries, such as agriculture. The outcome is the clearly imbalanced rules in the WTO system, which promotes the trade interests of developed countries disproportionately, and undermines the development interests of developing countries.

Also, the organizational structure of the WTO does not adequately reflect on the interests of developing countries. While the trade interests of developed countries, such as trade in services and trade-related intellectual property rights, are regularly addressed at the highest institutional level, in the Council for Trade in Services and the Council for Trade-Related Intellectual Property Rights, the comparable institutional weight has not been accorded to the development interests of developing countries. There is no Council devoted to the trade and development issues, only a Committee (CTD) under the General Council, with an insufficient mandate to address fundamental trade and development issues, which would require negotiations and decisions at the highest level. Considering that over three-quarters of

\textsuperscript{85} The Aid for Trade done by the WTO has been helpful for developing countries in this regard. See Aid for Trade, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm (last visited Nov. 22, 2011).

\textsuperscript{86} See discussion supra Part II.A.

\textsuperscript{87} Id.
BEYOND THE DOHA ROUND

the entire WTO membership is developing countries, whose primary membership interest is economic development through international trade, the present organizational status of the CTD is not inappropriate and should be elevated to the full Council level.

Since the inception of the WTO, world trade as a whole has increased rapidly benefitting developed countries and some select developing ones.\(^{88}\) However, many developing countries, particularly least-developed countries, have not taken a fair share of economic growth through trade.\(^{89}\) The forecited regulatory imbalance and the inadequate institutional coverage of trade and development issues at the WTO have contributed to this problem. The Doha Round was launched to address the development deficit in the system, but its successful conclusion is not in clear sight. Even if the present Round is concluded, the development deficit in the WTO regulatory disciplines and trade practices will not be cured. This chapter has proposed regulatory and organizational reform to address this issue. It is hoped that developed countries will join to support the necessary reform with understanding that the successful development of developing countries will provide markets for their own exports in future, as some of the former developing countries, such as South Korea, Taiwan, Singapore, Hong Kong, and more recently, China, have shown.\(^{90}\) After all, the proposed regulatory and institutional facilitation of development would prove to be in the interest of all.

\(^{88}\) For instance, China has substantially increased its trade, particularly after joining the WTO in 2001.

\(^{89}\) The LDC's share of world trade has declined by more than 40 percent since 1980 to a mere 0.4 percent. United Nations Conference on Trade and Development, The Least Developed Countries 1999 Report, at 106, U.N. Doc. UNCTAD/LCD/1999 (Jan. 12, 1999).

\(^{90}\) LEE, supra note 2, at 6-9.
TESTING THE JURISDICTIONAL LIMITS OF THE INTERNATIONAL INVESTMENT REGIME: THE BLOCKING OF SOCIAL MEDIA AND INTERNET CENSORSHIP

MATTHEW R. DARDENNE*

It was late Saturday, June 13, 2009 when the rumbling of a stolen election began moving through the Twittersphere. On June 12th, many thought the Iranian presidential election between Mahmoud Ahmadinejad and Mir Hossein Mousavi would be close. To the contrary, Ahmadinejad won a sweeping victory that defied the polls and was quickly dismissed as a fraud. In reaction, the Iranian people took to the streets and riots lasted long into the next week.

Despite the outrage, few traditional media outlets reported the story of Iran’s growing Green Revolution. Instead, the protests were mostly reported by text, tweets, and through other social media. Tehran’s authoritarian regime responded by taking down the telephone

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5. Hodson, supra note 1.

6. Iran’s Twitter Revolution, supra note 4.
system supporting SMS text messaging and blocking other cellular networks. Iran's highly computer-literate society, including bloggers and hackers, fought back, kept channels open and spread the word about functioning proxy portals.7

The immediacy of the reports was stunning and gripping. Twitter lists constantly gave updates and provided links to photos and videos, which acutely demonstrated the developing turmoil.8 Photos and videos were posted on Twitter and Youtube. The video footage that emerged was “raw, unedited and dramatic”;9 it captured images of “young people throwing rocks, scenes of burning tires and vehicles, and riot police delivering savage beatings.”10 Others showed protestors peacefully shouting “Marg bar dictator!” (Death to the dictator!)11

Ultimately, the scene turned violent as paramilitary Basij and police rooftop snipers opened fire. Reports of deaths tweeted out, and within minutes, a gruesome picture circulated of a man lying face-up in the street, blood covering his face and pooled around his head. Other photos followed of other people bloodied or dead. Soon there were reports of nonstop shooting and opposition leaders arrested. A crackdown was under way.12

While Tehran was not able to completely choke off access to text and Twitter, its abuse of its citizens coupled with the crackdown on avenues of organization through social media and telecommunications brought the short lived Green Revolution to an end. The first digital revolution was over before it began.

A year before Iran was cracking down on access to Twitter and text messaging, U.S. Ambassador to Tunisia, Robert F. Godec, was providing embarrassing details of the opulent life styles of Zine El Abidine Ben Ali, the President of Tunisia, and his family to his superiors in the United States.13 In one of the cables, Ambassador Godec referred to the Tunisian president and his siblings as “The Family” and likened them to the mafia who ran Tunisia’s economy.14 These cables were part of the tens of thousands of pages leaked to

7. Id.
8. Id.
10. Iran’s Twitter Revolution, supra note 4.
11. Id.
12. Id.
Wikileaks that were then disclosed in November 2010 online and to various media outlets. Ultimately, the cable was read and shared via Facebook and Twitter\textsuperscript{15} throughout Tunisia’s significant online population.\textsuperscript{16}

Like the stolen election in Iran, these cables acted as digital tinder ready to be ignited by the rage of an oppressed people. A few weeks later, the spark was literally lit, igniting a revolution across the Arab world. Mohammed Bouazizi, a street vendor, was harassed by a policewoman for failing to have a license to sell vegetables from his street cart.\textsuperscript{17} When local government authorities failed to intervene, he set himself ablaze outside the governmental compound in a desperate act of self-immolation.\textsuperscript{18} His act was caught on film, streamed across the web, and shared on Facebook and Twitter. Bouazizi’s single act of protest, combined with the leaked documents, fueled an entire movement across the Arab world.\textsuperscript{19}

As the revolt blazed across Tunisia, both Egypt and Libya moved quickly to block access to the internet, social media, and telephone service. In Libya, Muammar Gaddafi’s government blocked access to several internet websites. Access to Facebook was cut as protests developed in the Libyan capital.\textsuperscript{20} Libya also cut access to Al Jazeera for its reporting on the unrest.\textsuperscript{21}

“On January 28, 2011, Egypt’s President, Hosni Mubarak, took the drastic and unprecedented step of shutting off the Internet for five days across [Egypt].”\textsuperscript{22} Mubarak took these steps to stop the coordination of protestors on Facebook and Twitter.\textsuperscript{23} Representatives from both Facebook and Twitter later confirmed access to their sites was being

\textsuperscript{15. Bachrach, supra note 13.}
\textsuperscript{16. Id. (statement of Radwan Masmoudi, president for the Center for the Study of Islam and Democracy) (“Something like two million among ten million people have their own Facebook account.”).}
\textsuperscript{18. Id.}
\textsuperscript{21. Id.}
\textsuperscript{23. Id.}
blocked. Like Iran, Egypt also disrupted text messaging and Blackberry services.

As the Arab Revolution spread, several more countries blocked access to social media sites, internet search engines, and news sites. Since the Arab Spring, Facebook has been either totally or partially blocked in Algeria, Tunisia, Libya, Egypt, Saudi Arabia, Iran, and Pakistan. Twitter was partially blocked in Algeria, Egypt, Iran and Pakistan. YouTube remains completely blocked in Turkey and is partially blocked in Iran and Pakistan. Arab states are not alone; many other nations block social media including, most notably, China, Indonesia, Vietnam, Myanmar, Uzbekistan, Cameroon, and even, to some extent, Mexico.

The power of social media during the Arab Revolution should not be overblown; “digital media didn’t oust Hosni Mubarak.” “[O]veremphasizing the role of information technology diminishes the personal risks that individual protesters took in heading out onto the streets to face tear gas and bullets.” At the same time, the role of social media and the internet at large during the Arab Spring cannot be denied. Newsweek called the protest in Egypt a “Facebook Revolt.” The images of the self-immolation of Bouazizi circulated in “cyberspace before being broadcast by Middle East media corporation al-Jazeera.”

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26. Id. See Social Media Filtering Map, OPENNET INITIATIVE, available at http://opennet.net/research/map/socialmedia (last visited Jan. 28, 2011). (The OpenNet Initiative (ONI) is a collaborative partnership of three institutions: the Citizen Lab at the Munk School of Global Affairs, University of Toronto; the Berkman Center for Internet & Society at Harvard University; and the SecDev Group. Drawing on testing conducted in 2008-2009 as well as media reports collected since 2004, ONI has compiled data from on the most frequently blocked social media sites around the world. ONI maintains an interactive map that demonstrates social media sites that have been censored at any point since their creation. ONI reports the states listed above as blocking social media sites Document2).
27. Id.
28. Id.
30. Id.
U.S. Ambassador to the United Nations, Susan Rice, captured the potential of social media when she commented "the power of social networking to channel and champion public sentiment, has been more evident in the past few weeks than ever before."33

The effects of blocking social media and other websites raise serious questions related to the "congenital tension" ever present between the recognition and enforcement of state sovereignty and the protection of human rights and fundamental freedoms.34 On the one hand, states have a sovereign prerogative to protect their territorial integrity and independence from destabilizing forces like armed intervention, whether of an external or internal nature, and mass protests that threaten the life of the nation.35 On the other hand, states also have an obligation to protect human rights such as the right to hold opinions, the freedom of expression and speech, the right to receive and transmit information, the right to hold and transmit ideas of all kinds in writing and print through any media of a person's choice, and the right to peaceful assembly.36

Today, this tension is made increasingly more complex by a web of overlapping international obligations stemming, not only from human rights law, but also from modern trade and investment regimes: many developing states blocking access to social media and the internet at large are members of the World Trade Organization ("WTO") and are often parties to treaties protecting investment as a means to improve economic conditions and to gain access to the ever expanding global

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33. Howard, supra note 29.

34. FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 3 (3d ed. 2005). See also Muna Ndulo, United Nations Peacekeeping Operations and Security and Reconstruction, 44 AKRON L. REV. 769, 773 (recognizing the tension in the U.N. Charter "between the doctrines of national sovereignty and the protection and promotion of individual rights and the promotion of peace and security generally in the context of a civil war").


36. ICCPR, arts. 19, 21.
market place. As a result, when states move to block and censure material on the internet as an exercise of their sovereign rights, they not only trample their human rights obligations, but they may also be in violation of other international obligations created by the international trade and investment regimes.

As goods, services, telecommunications, and other unrealized future business ventures move to and develop because of the internet, and as the internet becomes subject to increasing regulation and censorship,37 sophisticated e-commerce business interests will no doubt turn to the protections afforded by international law to protect their interests.38 When business interests, such as social media, overlap with and touch upon individuals' human rights, trade and investment protections may actually serve as a collateral method to enforce human rights obligations. Trends in international e-commerce are already pointing to this result.

For instance, in 2010 Google shocked the world when, in the face of China's increased censorship, it ended its nascent presence in China and began routing Chinese users to its uncensored search engine in Hong Kong.39 Essentially the dispute between China and Google arose when Google discovered a highly sophisticated cyber attack originating from China on the Gmail email accounts of Chinese human rights activists.40 In response, Google decided it would no longer censor Chinese internet searches as required by Chinese law. When negotiations broke down between China and Google over the dispute,

37. See OPENNET INITIATIVE, supra note 26 (compiled list of various countries' internet regulation and censorship activities by month in 2010).

38. See Christopher Gibson, A Look at the Compulsory License in Investment Arbitration: the Case of Indirect Expropriation, 25 AM. U. INT'L L. REV. 357, 359-60 (2010) (noting it is likely that an international investment arbitration involving intellectual property rights in e-commerce is likely "given the trajectory of the modern economy, in which foreign investments reflect an increasing concentration of intellectual capital invested in knowledge goods protected by [intellectual property rights]").


40. Id. (citing Google May Quit China over Cyber-Attacks, MSNBC (Jan. 13, 2010), available at http://www.msnbc.msn.com/id/34831106/. A report issued by iDefense, a computer security company owned by Verisign, states that thirty-three other companies were targeted in the attack spanning the Internet, media, finance, technology, and chemical sectors. Thomas Claburn, Chinese Spy Agency Behind Google Cyber Attack, Report Claims, INFO. WK. (Jan. 14, 2010, 6:00 AM), http://www.informationweek.com/news/security/attacks/222300848 (claiming Adobe, Internet Web hosting company Rackspace, Dow Chemical, and Northrop Grumman are some of the companies that were targeted in these series of coordinated cyber-attacks)).
Google stunningly announced it would leave China and reroute Chinese searches through Hong Kong.41

Similarly, “Go Daddy.com, the world’s largest domain name registration company, announced on March 24, 2010 that it would no longer sell .cn domain names, citing similar fears of hacking and an unwillingness to continue to comply with stringent government requirements.”42 In its announcement, “Go Daddy.com specifically referenced the heightened requirements for documenting and verifying the identity of domain name registrants and what it perceived to be increased threats against individual security as reasons for discontinuing the offering of new .cn domain names.”43

Cynthia Liu makes a compelling argument that a case could be brought through the auspices of the World Trade Organization’s Dispute Settlement Body (“DSB”) under the General Agreement on Tariffs and Trade (“GATT”) and the General Agreement on Trade in Services (“GATS”) to protect against such censorship.44 Indeed, the United States announced in October, 2011, that it would seek detailed information on the trade impact of Chinese policies that may block U.S. companies’ websites in China under Article III of GATS which allows member states to request information from another member state on its measures that affect the operation of GATS.45 The European Parliament has also passed a resolution calling on the European Union to treat Internet censorship as a trade barrier.46

While the DSB may provide one form of relief for such conduct, it does not provide a direct means of enforcement.47 Generally, private

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42. Liu, supra note 39, at 1201 (citing Alexei Alexis & Kathleen E. McLaughlin, Muted Reaction in China Greets Go Daddy’s Departure Announcement, 27 INT’L TRADE REP. (BNA) 503 (Apr. 8, 2010)).

43. Id.

44. Id. at 1211-33.


entities can petition their governments to bring a case through the DSB on an affected industry or corporation's behalf as a matter of diplomatic protection, but as a matter of right, the entity has no ability to bring the case directly. Also, governments have no obligation to bring the case on the affected party's behalf.

Meanwhile, the protections found in international investment law always provide for private dispute resolution, and may provide a powerful method to respond to internet censorship. Notably, the United States and China are not currently parties to an international investment arbitration agreement ("IIA"), although one is currently being negotiated. However, turning back to the censorship of the internet during the Arab Revolution, many Arab nations affected by the Arab Spring, such as Egypt, Tunisia, Turkey, Morocco, and Bahrain, have entered into IIAs with the United States such that organizations like Facebook, Twitter, YouTube, and Google could take action directly for the blocking of their digital platforms. The provisions of other IIAs with non-Arab countries blocking social media, such as Vietnam, could also be invoked.

While there are many facets of international investment arbitration, the purpose of this article is to demonstrate how jurisdiction could be established against sovereign states for the suppression of social media and censorship of the internet and to provide a brief, but not exhaustive, analysis of the claims that could be brought therefore. Part I of this article introduces the concept of social media and evaluates the property interests inherent in social media. Part II then turns to a brief introduction of IIAs. Much has been written concerning investment law over the last decade such that it is unnecessary to thoroughly reexamine what has already been done. The bulk of this article is devoted to Part III, which discusses whether social media, especially those services that originate in the capital exporting state, meet the definition of an investment under particular investment treaties. While the definition of an investment under IIAs is generally broad, modern investment arbitration tribunals have restricted its applicability. Therefore, from a jurisdictional standpoint, it is essential that social media and particular internet sites be considered as an investment; otherwise an arbitration tribunal would lack jurisdiction rationae materiae to hear the dispute. Part IV briefly illuminates the claims social media could bring for internet censorship. Ultimately,

48. Id.
49. Id.
more research is needed in this area to fully explore how such claims are likely to be evaluated. Finally, Part V concludes that social media and internet based platforms may bring claims that will withstand the jurisdictional hurdles of international investment law.

Before turning to the dynamics of international investment arbitration in the context of social media, it should be noted that it has been more than fifty years since the first modern bilateral investment agreement entered into force between Germany and Pakistan. For the first forty years of that history, instances of disputes were relatively rare. But, over the last ten-plus years, as the number of IIAs proliferated, great growth in the number of the reported cases occurred. The overwhelming majority of reported cases have been brought by investors of developed nations against developing states for treatment related to investments in infrastructure and natural resources. The size and scope of the awards have resulted in many calling into question the legitimacy of international investment arbitration under the perception that IIAs threaten state sovereignty and sustainable economic development.

While there are legitimate concerns about the impact international investment arbitration has on these issues, the future of international investment arbitration over the next forty years could be far nobler if corporations like Google, Facebook, Twitter, YouTube, and other forms of new media embrace ideas of corporate social responsibility by using tools at their disposal to prevent abuses of human rights. Certainly there are limits to speech on the internet; most countries use cybersieves to filter undesirable content. Whether it is copyrighted songs in the United States or political dissent in the Middle East, the goal is the same: “Countries differ not in their intent to limit access to

54. Id. at 446.
57. George, supra note 32, at 35; see also Anupam Chander, Googling Freedom, 99 CALIF. L. REV. 1, 7-8 (2011).
59. Id. See also Stop Online Piracy Act, H.R. 3261, 112th Cong. (SOPA allows the Attorney General to seek injunctions that would compel U.S. search engines and other sites to block domain names or search results against foreign websites that steal and sell American innovations, intellectual property, and products. The bill increases criminal penalties for individuals who traffic in counterfeit medicine and military goods, which put innocent civilians and American soldiers at risk. And it improves coordination between IP enforcement agencies in the U.S.).
material online, but in the content they ban, the precision of their blocking, and the voice they offer citizens in decision making.\textsuperscript{60} At some point though, the threshold is breached; a state's censorship and blocking of social media and the internet at large infringes on fundamental freedoms. At that point, international investment arbitration can be used as a powerful weapon not only to protect the value of the investment, but also the rights of those whose use of the medium gave value to the investment in the first place.

**AN INTRODUCTION TO SOCIAL MEDIA**

Like other forms of property, economic interests in social media and other internet platforms stem from a range of rights that likely fall within the substantive and procedural protections provided by IIA. These rights range from the value of shares in the entities that own social media, the myriad property rights now associated with domain names, the proprietary technological and intellectual property rights owned by social media, and possibly, although controversially, rights to the ultimate content of and access to users of social media.

The term "social media" refers to internet-based applications that build on the ideological and technological foundations of Web 2.0 that enable people to communicate and share resources and information.\textsuperscript{61} In essence, social media are forms of electronic communications used for networking and microblogging, through which users create online communities and content to share information, ideas, personal messages, and other material.\textsuperscript{62}

Examples of social media include a wide array of blogs, discussion forums, chat rooms, and wikis.\textsuperscript{63} Prominent social media sites include Facebook, YouTube, LinkedIn, and Twitter.\textsuperscript{64} Social media can be accessed by computer, smart and cellular phones, and mobile phone text messaging (SMS). To some degree, the entire web is one gigantic social media platform.

\textsuperscript{60} Bambauer, *supra* note 58, at 379.


\textsuperscript{63} Lindsay, *supra* note 61, at 1.

\textsuperscript{64} Id.
The use of social media is an evolving phenomenon. During the past decade, rapid changes in communication technologies have enabled people to interact and share information in ways that were non-existent or commercially unavailable as recently as fifteen years ago.

The property rights inherent in social media are also evolving. It is an extreme understatement to say that the shares in the corporations that developed successful social media platforms are valuable. Forbes lists Mark Zuckerberg’s wealth at $17.5 billion; Sergey Brin and Larry Page, the Google Guys, are worth $12 billion each. The lawsuits underscoring the movie The Social Network, and the interests involved therein are immense. Because shares in corporations are generally protected under modern IIAs, such economic interests in social media will generally be protected thereunder.

The intellectual property rights in both domain names of social media and the proprietary coding that make them function are also valuable property rights. “A domain name consists of two parts: a top level domain and a secondary level domain.” The top level domain is the domain name’s suffix like .com or .org. The secondary level domain is the remainder of the address, and today often includes the names of valuable trademarks identifying a corporation’s goods or services. Together, the complete domain name allows a user to link to a specific computer’s IP address by routing the user to the provider of the content.

Domain names are generally considered a valuable intangible property right or, in rare cases, a tangible property right, both of

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65. See Id.
66. Id.
70. FAQ: Domain Name, available at http://domainwhiz.net/faq_domainname.html.
72. Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003) (finding that domain names are intangible property); see also OBG Ltd v. Allan (2007) UKHL 21, 1 A.C. 1, 32 (separate opinion of Lord Hoffman stating “have no difficulty with the proposition that a domain name may be intangible property, like a copyright or trade mark”); see also 15 U.S.C. §1125(d) (2006) (treating domain names as property subject to in rem proceedings in the ACPA); Porsche Cars North America, Inc. v. Porsche.Net, 302 F.3d 248, 260 (4th Cir. 2002) (“Congress may treat a domain name registration as property subject to in rem
which are generally protectable under IIAs. In other instances, domain names have been considered contractual rights, but this seems to be the minority view. Rather, domain names are generally considered intangible property because registrants of domain names have the right to:

a) possess the domain name to the exclusion of others; b) use the domain name as its ‘locator’ on the Internet; c) manage the domain name by designating the registrar; d) enjoy the income from the domain name; e) dispose of the domain name by sale or transfer; and f) exclude others from using its domain name.

Regardless of how they are characterized, domain names have tremendous value. Corporations have paid millions to acquire domain names and engaged in expensive lawsuits to prevent cybersquatting and unlawful trading upon their protected marks included within domain names. Likewise, governments have responded to these actions jurisdiction if it chooses, without violating the Constitution.


74. Wornow v. Register.Com, Inc., 778 N.Y.S.2d 25, 26 (App. Div. 2004) (N.Y. statute making self-renewing contracts unenforceable do not apply to domain name registrations because a domain name that is “not trademarked or patented is not personal property, but rather a contract right that cannot exist separate and apart from the services performed by a register such as defendant.”); Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 86-87 (2000).

75. Xuan-Thao N. Nguyen & Jeffrey A. Maine, Taxing the New Intellectual Property Right, 56 HASTINGS L. J. 1, 42-43 (2004); Jeffery A. Maine, Tax Considerations: Domain Name Acquisitions and Web Site Development, SK102 ALI-ABA 205, 213 (2005) (“Domain names should not be treated for tax purposes as government licenses or contracts for services, but instead should be treated as valuable intangible property”); Xuan-Thao N. Nguyen, Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification, 10 GEO. MASON L. REV. 183, 203 (2001) (“decisions in Umbro and Dorer fail to correctly classify domain names”); see also eBay v. Bidder's Edge, 100 F. Supp. 2d 1058 (N.D.Ca. 2000); Register.com v. Verio Inc., 126 F. Supp. 2d 238, 249 (S.D.N.Y. 2000) (finding that websites should be treated as chattel and thus as property). See Kremen 337 F.3d at 1029 (stating that Network Solutions all but conceded that registrants have property rights in their domain names); Network Solutions, Inc. v. Clue Computing, Inc., 946 F. Supp. 858, 860 (D. Colo. 1996) (stating that Network Solution admits that domain names are intangible personal property).


to ensure consumers have access to their trademarks. 78 Consequently, domain names will likely be treated as a valuable property right protected under most IIAs.

In addition to the intangible property rights in domain names, domain names also contain valuable trademark rights, which are protected under IIAs. It is well established that certain domain names may be registered as trademarks. 79 Like other trademarks, under the U.S. Patent and Trademark Office guidelines for the registration of domain names as trademarks, "domain names are entitled to the protection afforded to trademarks if they are arbitrary, fanciful, suggestive, or descriptive, with acquired secondary meaning." 80 Trademarks are now almost universally protected by IIAs. As a result, trademarks included in domain names will likely be protected under IIAs as well.

Finally, social media sites routinely require terms of use contracts that possibly give them an ownership interest in user generated content ("UGC"). For instance, while Facebook’s terms of use ("TOU") assert that the user owns any content he or she creates and uploads to the site, its TOU also states in part, "[f]or content that is covered by intellectual property rights, like photos and videos (IP content)," the user grants Facebook a ‘nonexclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content’ that the user posts ‘on or in connection with Facebook.’" 81 Similarly, the TOU for LinkedIn, a social media platform for business professionals, mandates users grant “a nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sub-licensable, fully paid up and royalty free right to [LinkedIn] to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialize, in any way now known or in the future discovered, any information [the user] provide[s].” 82 These unrestricted licenses grant social media a protected right in UGC. Under international investment law that protected right is also protected and may, even if

82. Id. at 51.
controversially, extend to an interest in access to current and potential users of social media themselves.

A BRIEF INTRODUCTION TO INTERNATIONAL INVESTMENT LAW

Much has been written concerning the history, development, and theory of international investment arbitration such that much of it need not be repeated here.83

The purpose of IIAs is simple; IIAs safeguard investments made by qualifying investors in another state from government conduct which may impinge or otherwise mistreat the value of the investment.84 While many of the treaties differ in language, they are relatively uniform: most grant the qualifying investment reciprocal rights, both procedural and substantive, which may be enforced if the host government mistreats the investment in a manner prescribed by the relevant agreement. These agreements generally grant foreign investors substantive rights, including national and most-favored-nation ("MFN") treatment, fair and equitable treatment ("FET"), and protection against expropriation without compensation.85

There are many different forms of IIAs. Today there are reportedly 2,700 to 3,000 bilateral investment treaties ("BITs"), a small number of regional free trade agreements such as NAFTA86 or ASEAN,87 and treaties with limited subject matter jurisdiction such as the Energy Charter Treaty88 that allow private dispute resolution.89

Procedurally, an IIA permits private party investors whose investment has been mistreated to seek direct redress against the host state through the treaty's dispute resolution mechanism, usually through the an ad hoc tribunal organized under the auspices of the World Bank's International Centre for Settlement of Investment Disputes ("ICSID"), the ICSID Additional Facility rules, the United Nations Commission on International Trade Law ("UNCITRAL")


84. Franck, supra note 83, at 779.


Arbitration Rules, the Stockholm Chamber of Commerce ("SCC"), or some other standing arbitration body.

Ordinarily, the individual agreement will provide a specific set of definitions to determine whether a particular activity or interest will qualify for the protections of the IIA. If these jurisdictional prerequisites can be met, and the government conduct falls within the substantive protections of the IIA, the state will be held internationally responsible for its wrongful conduct to the qualifying investor.

In the context of the Arab Spring and the blocking of social media, the United States has entered into IIAs with Bahrain, Egypt, Tunisia, Turkey, and Morocco. Because most social media and internet locations blocked during the Arab Spring were owned and operated by U.S. corporations, those corporations would be able to take advantage of the protections afforded under the IIAs between the United States and those governments. For the purposes of this article, the jurisdictional prerequisites and substantive claims related to the blocking and censuring of internet access shall be predominantly analyzed under the U.S.-Egypt BIT since Egypt was at the center of the Arab Spring and undisputedly shut down internet access during the heart of the protests.

Social Media Meets the Jurisdictional Requirements to Bring an International Investment Claim

In international investment arbitration, three main jurisdictional prerequisites must be satisfied in no particular order: the tribunal must have jurisdiction over 1) the parties (ratione personae); 2) the timing of the dispute (ratione temporis); and 3) the subject matter of the dispute (ratione materiae). These issues are complicated further by jurisdictional limitations of the dispute settlement apparatus under which the dispute is brought. For instance, Article 25 of the ICSID Convention provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting

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90. See id.


92. See Impregilo S.p.A. v. Islamic Republic of Pakistan (Jurisdiction) ICSID Case No. ARB/03/3, ¶¶ 26-31 (Apr. 22, 2005). But see McLACHLAN, supra note 83, at 10 ¶ 1.23 (noting that the “treaty provisions on nationality may be said to deal with arbitral jurisdiction over persons (ratione personae); the treaty provisions on investment prescribe the extent of arbitral jurisdiction over subject-matter (ratione materiae). But, the treaties themselves proceed simply on the basis of nationality and investment, and the dividing line between persons and things is not exact.”).
State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.93

Consequently, Article 25 provides an additional layer of jurisdictional hurdles that must be overcome.

In bringing claims against states blocking social media and internet access, the first two jurisdictional prerequisites are easily met. First, similar to the law of diplomatic protection, to establish nationality under the relevant IIA, a U.S. corporation need only establish it is a corporation under the laws of the state under which it is incorporated and in whose territory it has its registered office.94 While there exist many methods to challenge nationality, in the case of social media and internet platforms such as Facebook, Twitter, Google, or YouTube, U.S. nationality would easily be established because all of these enterprises held continuous U.S. nationality prior to the Arab Spring.95

Likewise, such entities could also establish jurisdiction over the timing of the dispute. In considering the timing of a dispute and whether a particular IIA applies, reference must always be had to the particular IIA96 and whether the IIA was in force or can apply retroactively to the conduct complained. Generally speaking, if a relevant IIA is in force at the time the violating conduct took place, the arbitration panel will have jurisdiction over the timing of the dispute. The relevant U.S. IIAs involved during the Arab Spring, including the US-Egypt BIT, were all in force long before the events that occurred during the Arab Spring came to pass. Consequently, social media and


95. According to the California Secretary of State website, Facebook Inc., Google, YouTube and Twitter are all Delaware corporations headquartered and registered to do business in California. See Business Search, CALIFORNIA SECRETARY OF STATE, available at http://kepler.sos.ca.gov/cbs.aspx.

internet platforms would easily be able to establish jurisdiction over the timing of the dispute.

Establishing the final jurisdictional requirement, jurisdiction *ratione materiae*, however, is much more problematic and will be complicated by the choices of the parties to any potential arbitration.

*Is the Economic Interest in Social Media an Investment?*

In international investment arbitration, the only true jurisdictional limitation, *ratione materiae*, is whether the economic activity or business interest amounts to an “investment” as that term is understood in international investment law. Thus, to prevail in any arbitration challenging the blocking of social media during the Arab Spring, social media and internet platforms must prove that their economic interest in those platforms amounts to an “investment.”

There are many considerations that impact whether an “investment” has been made including the language of the applicable IIA, the scope of economic interests the term covers, limitations possibly imposed by Article 25 of the ICSID Convention, and territorial limitations of where the investment can be made. If the economic interest, here the interest in social media, meets these criteria, then it will satisfy the jurisdictional requirements *ratione materiae* to maintain a claim against the host state.

**Economic Interests in Social Media and Internet Platforms meet the Definition of Investment as Generally Defined in IIAs.**

Simply put, social media and internet platforms must meet the definition of an investment “because only the assets or interests of investors that fall within its scope are entitled to the protections of the treaty.” If, and only if, social media meets this threshold requirement can social media platforms move forward to their substantive claims.

Almost all IIAs define investment similarly. Under most IIAs, the term is first defined broadly to include “every kind of asset” and

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97. ICSID Convention, *supra* note 93, Art. 25(1); *see also* Fedax N.V. v. Republic of Venezuela, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/96/3 (July 11, 1997); Mihaly Int'l Corp. v. Democratic Republic of Sri Lanka, Award ICSID Case No. ARB/00/2 (Mar. 15, 2002).


then a non-exhaustive list of rights or interests in property follows.101 Most U.S. treaties protecting investments are broadly defined in this manner.102

The tendency of modern investment agreements, especially the model agreements of capital exporting states, has been to broaden the scope of the definition of investment to include many economic interests and activities that were not originally protected under early treaties and customary international law.103

Originally, the term investment was confined to foreign direct investment, meaning capital that flowed from the enterprise of a person located in one state, to the enterprise of an entity controlled by the laws of another state.104 However, the meaning of the term foreign direct investment, as it was originally understood, gradually grew more inclusive.105 For instance, the protections offered to foreign investors were expanded in 1938, when Mexico nationalized American oil companies.106 In response, the United States insisted that the rules

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101. McLachlan, supra note 83, at 163, ¶ 6.01. While most IIAs are similar, it should be noted the various activities or interests covered in most IIAs are not always consistent with one another given the various types of IIAs that exist. See Noah Rubins, The Notion of 'Investment' in International Investment Arbitration in Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects 284 (Norbert Horn & Stefan M. Kröll eds., 2004). Be aware that some IIAs, such as the North American Free Trade Agreement, do not follow this method. Instead, NAFTA sets a forth a broad, but exhaustive list of covered economic activities that is contrasted by examples of commercial transactions which do not amount to investments. Id.


104. Id. According to the United Nations Conference on Trade and Development (UNCTAD), foreign direct investment is defined specifically as an "investment involving a long-term relationship and reflecting a lasting interest of a resident entity in one economy (direct investor) in an entity resident in an economy other than of the investor. The direct investor’s purpose is to exert a significant degree of influence on the management of the enterprise resident in the other economy. FDI involves both the initial transaction between the two entities and all subsequent transactions between them and among affiliated enterprises, both incorporated and unincorporated. FDI may be undertaken by individuals, as well as business entities." See also Organization for Economic Co-Operation and Development (OECD), Benchmark Definition of Foreign Direct Investment (3d ed. 1996), available at http://www.oecd.org/dataoecd/10/16/2090148.pdf ("Foreign direct investment reflects the objective of obtaining a lasting interest by a resident entity in one economy (‘direct investor’) in an entity resident in an economy other than that of the investor (‘direct investment enterprise’). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Direct investment involves both the initial transaction between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated.").

105. Malik, supra note 98, at 2.

106. Andreas F. Lowenfeld, International Economic Law 397-402 (John H. Jackson ed., 2002). As is well known, in 1938, in response to Mexico’s nationalization of
related to expropriation and nationalizing upon prompt, adequate, and effective compensation also be applied to alien's physical property located in the host state's jurisdiction.107

Later, in response to the International Court of Justice's decision in the Barcelona Traction Case,108 modern investment agreements expanded the term investment to include many forms of intangible property including leases, mortgages, liens, some classes of loans, and shares of stock in corporations.109 After Barcelona Traction, capital exporting states immediately addressed shareholder protection and other forms of intangible property in a new wave of international investment agreements.110

In addition to these forms of intangible property, capital exporting states next began to include protection for intellectual property111 and some forms of government contracts.112 For example, many BITs now "provide a detailed listing of the types of intellectual property that may be considered as a form of investment asset, for example, copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, known-how, and goodwill."113

To date no decision concerning an intellectual property rights-centered arbitration has been publicly reported.114 However, arbitration

American oil companies, U.S. Secretary of State Hull argued that compensation for expropriation should be "prompt, adequate, and effective." Mexico argued that the American investors should simply receive expropriation compensation on par with domestic investors according to the laws of the host government (the Calvo doctrine). Since the 1930s, the United States and other capital exporting countries have incorporated the language of Hull's formula into hundreds of Friendship, Commerce, and Navigation treaties and more modern BITs. Since then, Hull's formula has become the standard for modern IIAs. Foreign Direct Investment (FDI), UNCTAD, available at http://www.unctad.org/templates/Page.asp?intItemID=3164&lang=1. See also OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT (3d ed. 1996), OECD, available at http://www.oecd.org/dataoecd/10/16/2090148.pdf.

107. LOWENFELD, supra note 106, at 397-402.
109. See SORNARAJAH, supra note 103, at 10-11.
110. See Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 15 (July 20). Although the treaty at issue in ELSI was negotiated and concluded long before the International Court of Justice reached its judgment in Barcelona Traction, it was not until after that case that many capital exporting states began to renegotiate its previous treaties protecting foreign investment through more modern bilateral trade and investment agreements.

111. SORNARAJAH, supra note 103, at 11.
112. Id. at 13.
114. Id. at 359.
panels have found that the following intangible property rights amount
to investments: (1) an office construction project consisting mainly of
plans and various regulatory approvals; (2) a performance contract to
perform liaison customs duties; (3) a hotel construction and operation
contract; (4) a concession agreement to develop and operate a local
port terminal; (5) an investment in local securities; and (6) debt
instruments issued by a sovereign state as broadly defined under
various investment agreements. Likewise, claims over rights in
broadcast media and rights in telecommunication properties have been held to be an investment.

The trend in these cases is to prefer a broad view of the term
investment, at least as that term is defined by the IIA. While a few
tribunals have been reluctant to base decisions on jurisdiction solely on
the language that investment means “every kind of investment,” others have relied on similar language. Other tribunals have simply
preferred not to read any limiting phrases into the definition of
investment unless the treaty provides one itself.

More importantly, these cases exercise an explicit deference to the
host state’s conscious decision to protect investments covered by the
relevant investment agreement. Under this analysis, tribunals simply look to the relevant IIA’s definition of investment, and assess
under the customary rules of treaty interpretation as codified in the

119. Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Objections to Jurisdiction, ¶¶ 1, 16 (July 11, 1997).
121. Rumeli Telekom A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 322 (July 29, 2008).
123. See, e.g., Saipem S.p.A. v. People’s Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶¶ 118, 121 (Mar. 21, 2007) (relying on the language “any kind of property”).
124. Tokios Tokeles v. Ukraine, supra note 94, at 52.
Vienna Convention of the Law of Treaties ("VCLT")\textsuperscript{126} whether the definition of investment in the IIA is broad enough to cover the asset or enterprise in question. If the economic activity or interest falls within the class of activities and interests protected as an investment, jurisdiction under the relevant IIA is appropriate.

Based on this broadening trend, social media and internet platforms such as Facebook, Google, Twitter, or YouTube would likely be able to prove that their economic interests in such platforms amount to an investment under today's modern IIA structure.

Specifically applying U.S. based social media's interests under the US-Egypt BIT,\textsuperscript{127} investment under that agreement "means every kind of asset owned or controlled" including but not limited to tangible and intangible property rights, shares, stock, valid intellectual and industrial rights such as trademarks, permits, and licenses, etc.\textsuperscript{128}

According to the customary tools of treaty interpretation found in Articles 31 and 32 of the VCLT, terms such as "every kind of asset," "every kind of investment," "intangible property rights," and "intellectual property rights" are broad enough to include the property rights included in domain names discussed above.\textsuperscript{129}

Giving due regard to Article 31, with its emphasis that the terms of the treaty shall be interpreted (1) in good faith (2) in accordance with the ordinary meaning to be given to the terms of the treaty (3) in their context and (4) in the light of the treaty's object and purpose, it is highly likely that the terms "every kind of asset" including intangible property such as intellectual and industrial rights includes interests in the shares of social media corporations, the value of trademarks inherent in the domain names of social media, and may even apply to the UGC that would have been posted on the social media's platforms had internet service not been interrupted and access to social media disabled during the protests in Egypt and other Arab nations.

Furthermore, neither treaty excludes interests in domain names or internet platforms specifically or any other similar enterprise that could be analogized to such platforms predating the internet. Moreover, the treaty, as well as those with Turkey and Tunisia, fails to provide any type of explanatory phrase within the treaty itself, such as the footnotes now included in the current US Model BIT which limits the types of interests that may be considered an investment.

Consequently, based on the broad language in the US-Egypt BIT, as well as other similar IIAs, it is highly likely that the interests in

\textsuperscript{127} U.S.-Egypt BIT, supra note 91, art. I(c).
\textsuperscript{128} Id. art. I(c)(i)-(vii).
\textsuperscript{129} VCLT, supra note 126, arts. 31-32.
social media will amount to an investment as that term is defined in the US-Egypt BIT, and most likely the US BITs with other Arab nations.

Overcoming Additional Jurisdictional Requirements under ICSID

Despite the broad range of economic interests and activities protected as an “investment” under the relevant IIA, jurisdiction may still not be appropriate if it fails to meet the term investment as understood under Article 25 of the ICSID Convention.

As stated above, Article 25 of the ICSID Convention provides that: the “jurisdiction of the Centre shall extend to any legal dispute arising directly out of or in relation to an investment.”\(^{130}\) The ICSID Convention intentionally did not define the term investment. Extensive research into the *travaux préparatoires*\(^{131}\) of the ICSID Convention decidedly demonstrates “[n]o attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre.”\(^{132}\)

As noted by Julian Mortenson, the original drafters of the Convention sought to limit the types of disputes that could be brought before ICSID.\(^{133}\) However, the drafters also wanted to ensure that a wide range of economic interests and activities could be adjudicated by the Centre.\(^{134}\) To resolve this impasse, the United Kingdom’s delegation suggested that the ICSID Convention leave the term investment undefined and add a new subsection to Article 25 which defined the Centre’s jurisdiction. This mechanism established “a procedure for states to notify other signatories of the categories of dispute that they would not consider submitting to arbitration.”\(^{135}\)

This approach provided a broad and open-ended definition of the term investment that could be limited or expanded by the individual state members through arbitration agreements, notifications to the Centre under Article 25(4), and reservations from the Convention.\(^{136}\)

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133. Mortenson, *supra* note 125, at 280-86.
134. *Id.*
135. *Id.* at 290 (citing Summary Proceedings of the Legal Committee Meeting (Dec. 8, 1964), in 2 *HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES* 59, 821-22 (1968)).
136. *Id.* at 293.
Based on this broad approach, many arbitration decisions have held that jurisdiction is nearly a nonjusticiable issue that merges with the question of party consent. Tribunals following this approach have approved an extraordinarily wide array of investments including many of those listed above.

Other ICSID tribunals, however, have taken a far more restrictive approach based on Christoph Schreuer’s seminal treatise on the ICSID Convention in which he listed several factors considered “typical” of economic interests found to be an investment under previous ICSID proceedings including:

- “a certain duration” of the enterprise,
- “a certain regularity of profit and return,”
- an “assumption of risk,”
- a “substantial” commitment by the investor, and
- some “significance for the host State’s development.”

Since Schreuer’s original commentary, tribunals have turned these factors into a prescriptive set of requirements. For instance, in Salini Costruttori v. Morocco, a case involving a highway construction contract, the tribunal turned Schreuer’s factors into a rigid test now known as the Salini Test. In its decision, the tribunal determined the claimant’s contractual rights were not investments under Article 25 of the ICSID Convention, but were instead mere unenforceable promises. Since Salini, other tribunals have gone on to reject a totality-of-the-circumstances balancing of the factors, preferring an objective fulfillment of each element.
Schreuer later commented it was “unfortunate” that such practice had occurred.\textsuperscript{143} As Schreuer explained in his second edition to his commentary, these elements were not meant to establish individual elements necessary for jurisdiction, but were merely typical of the types of economic interests brought forth under the ICSID Convention.\textsuperscript{144} Nevertheless, as noted by Mortenson, since 2006, seven decisions have adopted the \textit{Salini} approach, while two – Biwater Gauff v. Tanzania and the Malaysian Historical Salvors annulment – rejected it.\textsuperscript{145} Other cases not noted by Mortenson also rejected the \textit{Salini} test as a set of prescriptive requirements.\textsuperscript{146}

As Mortenson notes, certain types of enterprise will likely be unaffected by the incorporation of Schreuer’s factors as a prescriptive test;\textsuperscript{147} indeed, Schreuer pulled the factors from those industries that were often brought before an ICSID body in the first place. But such rigid jurisdictional requirements will likely continue to affect pure services contracts, financial interests, and other forms of intangible property rights such as intellectual property and interests in internet based platforms.

Nevertheless, interests in social media and other internet platforms can make a compelling case that they fall within the scope of the so-called \textit{Salini} test. But, even if such interests do not meet these rigid requirements, it is possible to bring the claim outside of ICSID or to have a hand in the selection of the tribunal itself, such that the members of the tribunal do not follow the \textit{Salini} test. Consequently, it is still possible that interests in social media and other internet platforms will fall within the jurisdictional prerequisites to bring a claim for state suppression of internet service and the blocking of social media.

\textit{Remaining Limits on Jurisdiction Ratione Materiae: Territorial Requirements}

A further limitation on jurisdiction \textit{ratione materiae} may exist if the IIA limits the subject matter jurisdiction of a tribunal to those cases

\textsuperscript{143} CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, & ANTHONY SINCLAIR, \textit{THE ICSID CONVENTION: A COMMENTARY} 133, ¶ 171 (2d ed. 2009).
\textsuperscript{144} Id. ¶ 172.
\textsuperscript{145} Mortenson, \textit{supra} note 125, at 277.
\textsuperscript{146} See, e.g., Toto Costruzioni Generali S.P.A. v Republic of Leb. ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 82-84 (Sept. 11, 2009); L.E.S.I. S.p.A. et Astaldi S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 72(iv) (Jul. 12, 2006).
\textsuperscript{147} Mortenson, \textit{supra} note 125, at 315.
over an investment that is made within the territory of the host state.148 Few cases have turned on this requirement, focusing instead on whether an investment has been made as a whole. However, if such a requirement is necessary or read into the relevant IIA, then it surely will be raised as an objection to jurisdiction in a case involving social media because of the internet's nature to be "created" outside of the host state.

It should be noted at the outset that no such requirement in the definition of investment exists in the US-Egypt BIT or the U.S.-Turkey BIT, although each require territoriality in the application of its MFN and national treatment standards. By contrast, the US-Tunisia BIT mandates territoriality in the definition of investment. Consequently, according to the customary rules of treaty interpretation, in any potential arbitration between a U.S. based social media platform and Egypt, territoriality is not a necessary requirement.

However, assuming arguendo that territoriality is explicitly or implicitly required by the relevant IIA, territoriality will not necessarily deprive a tribunal of jurisdiction merely because the social media platform is owned, controlled, or originated by U.S. corporations situated in U.S. territory. Rather, the trend in international investment arbitration, especially with respect to intangible property, looks not to the physical location of the property making up the investment, but rather to where the benefits of the investment flow.149 If the benefits of the investment touch and concern the state with which a dispute exists, jurisdiction will likely be upheld.

For example, in Fedax N.V. v. Republic of Venezuela,150 the tribunal recognized the existence of an investment in debt instruments acquired on the secondary market even though those instruments were not held in the territory of Venezuela. There the tribunal held that it is a standard feature of financial transactions that the funds involved are "not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere."151 Nevertheless, because the benefits of such instruments – credit available to Venezuela – were used by Venezuela

150. Fedax, ¶ 41.
151. Id.
for its various needs, the interest in the promissory notes and other debt instruments were considered an investment in the territory of Venezuela.152

Similarly, in both SGS v. Pakistan,153 and SGS v. Philippines,154 the tribunals noted that the pre-shipment customs inspection service contracts, carried out predominately outside the host country, amounted to an investment in the territory of Pakistan and the Philippines because the benefits of those services occurred in the territory of the host governments. In SGS v. Pakistan, the tribunal noted that the contract may not meet the "'traditional' notion of an investment, [but] nevertheless [the contracts] fall within the category of new investments covered by [the] BIT."155 Also, the contracts caused an "injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the [service contracts]."156 These attributes of the economic interests involved amounted to an investment in the territory of Pakistan.

In SGS v. Philippines, the tribunal went further by explaining the contract was designed "to provide services, within and outside the Philippines, with a view to improving and integrating the import services and associated customs revenue gathering of the Philippines."157 Because those services were rendered for the benefit of the Philippines, and the customs reports and licenses were issued directly to the Philippines and not to any outside non-territorial agency, the tribunal considered that a "substantial and non-severable aspect of the overall service was provided in the Philippines."158 Together, these facts qualified the service as one provided in the Philippines.

Likewise, in CSOB v. the Slovak Republic, the tribunal found that the "'entire process' of economic activity, even though particular aspects of it were not locally performed"159 amounted to an investment in the territory of the Slovak Republic.

Finally, in Alpha Projektholding GmbH v. Ukraine, the tribunal dismissed the Ukraine's arguments that funds transferred outside the Ukraine for the benefit of a hotel construction project in the Ukraine

152. Id. ¶ 42.
155. SGS v. Pak., ¶ 126.
156. Id. ¶ 136.
158. Id. ¶ 102.
159. Id. ¶ 110 (citing CSOB v. Slovak Republic, supra note 149, ¶ 88).
did not meet the territority requirement of the relevant IIA.\textsuperscript{160} Rather, because those funds were utilized for the benefit of the Ukraine, territority was met.

Based on this trend, interests in social media may also meet the territority requirements explicitly required or implicitly read into Arab BITs with the U.S. because the benefit of the investment in social media is located everywhere, including inside the host government.

Like sophisticated financial transactions, the use and structure of social media and the internet pay little attention to state boundaries. Rather, social media and the internet center on the user of the platform and the manner in which those users facilitate and further online relationships and share information. With respect to social media specifically, users create all of the content and provide the value of the platform from where ever they are, not where the platform exists. This phenomenon has resulted in a sea change in how we communicate and see the world such that news, events, business, and all other aspects of life are no longer solely broadcasted to others but broadcasted by others,\textsuperscript{161} resulting in an immense value to the state in which social media exists.

Consequently, the location of the social media platform is largely irrelevant, because the benefits of its effects are everywhere, all at once, both inside and outside the host government. By extending the analysis of previous cases involving intangible property where territority was met when the state was benefited by the investment, tribunals will be able to uphold jurisdiction on any potential case involving social media.

No doubt, upholding jurisdiction in this manner will be controversial. Critics will likely argue that permitting a case to be brought where an investment was not actually made in the host state betrays the original purpose of agreements protecting foreign direct investment. But such criticism fails to realize the nature of and movement to e-commerce. The investment is not made in any one national jurisdiction. Like space above, the internet is everywhere, all around us, and omnipresent. The fact that the internet knows no national boundaries is what creates its true value. It allows information to be shared instantly, all at once, everywhere. When states block the internet they deprive the internet of its value and the value of the investment made therein.

Another criticism lies in the traditional notion of positivism. Historically, states, as a function of sovereignty, placed conditions on

\textsuperscript{160} Alpha Projektholding GmbH v. Ukr., ICSID Case No. ARB/07/16, Award, ¶¶ 277-79 (Nov. 8, 2010).

\textsuperscript{161} See Scott Monty, Foreword to Erik Qualman, Socialnomics: How Social Media Transforms the Way We Live and Do Business, xiv (2011).
the entry of aliens and their property within its borders.\textsuperscript{162} To stoke investment and improve economic conditions within their borders, states have given up attributes of their sovereignty by entering IIAs. Historically, then, to be included within the subject matter jurisdiction of the IIA, the investment must have been located physically within the state's borders or targeted to specifically affect interests therein. Despite the modern trend articulated above, allowing economic interests in e-commerce to gain access to the state's market simply because the investment exists online and has collateral benefits for the state will strip the state of far more sovereignty than it originally intended. Even in those cases where intangibles were held outside the state, the overall investment was specifically targeted to the respondent state. In a general sense, interests in social media are not.

However, with the ever increasing scope of investments protected within today's modern investment law regime, protections have been extended far beyond those originally contemplated, and will often be located outside the host government. Had the state intended to restrict the scope of investments that may have been protected, the host states should have included exceptions or restrictions in the relevant IIA. Moreover, social media platforms often do make actual investments in the host states to further the reach of their platforms. For instance, Facebook often hires programmers and staff members overseas to extend its platforms in new markets.\textsuperscript{163}

Like in \textit{SGS v. Pakistan} and \textit{SGS v. Philippines}, where the tribunals considered that having local offices in the host governments constituted part of the overall investment,\textsuperscript{164} these activities may overcome general objections to any arguments based on positivism.

Despite the tension between the scope of investments under IIAs and between limitations on jurisdiction found in both IIAs and Article 25 of the ICSID Convention, international investment law has proven highly adept at allowing new forms of commerce to be protected under investment protection. While there are legitimate arguments for not recognizing new media as an investment in the territory of a host state, it is highly unlikely such a result will occur given the size, scope, and growth of e-commerce. Consequently, given the internet's effects on all states, and modern trends in international investment arbitration, it is far more likely that investment in social media will meet the jurisdictional requirements embedded in international investment law.

\textsuperscript{162} IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (7th ed. 2008).


\textsuperscript{164} See SGS v. Phil., ¶ 104 -08.
The Substantive Protections in International Investment Agreements Prevent States from Blocking Websites

Once interests in social media meet these jurisdictional thresholds, potential claimants must still prove that their interests have been mistreated under the relevant IIA. IIAs contain a myriad protections for covered investors. By and large though, most contain three core protections: (1) the prohibition on expropriation without adequate, prompt, and effective, compensation; (2) the obligation to afford fair and equitable treatment; and (3) the obligation to afford similar treatment as other aliens and nationals.

No attempt is made here to thoroughly exhaust and analyze whether censorship during the Arab Spring, or by other states such as China, violated these substantive protections. Such an effort goes beyond the scope of this article, and would require a significant discussion of the substantive protections, a detailed analysis of international responsibility including conditions precluding wrongfulness during national emergencies, and a comprehensive examination of the factual situation in each state that blocks social media.

However, on a cursory review of at least the standards on expropriation and the obligation to afford fair and equitable treatment, it is likely that such states have breached the protections afforded in relevant investment agreements.

Blocking Access to Social Media and the Internet May Amount to Expropriation

International law has long prohibited nationalizations and expropriations without adequate, prompt, and effective compensation (the Hull formula). This standard has long been included in modern IIAs.165

The US-Egypt IIA is typical of most expropriation provisions. It provides:

No investment or any part of an investment of a national or company of either Party shall be expropriated or nationalized by the other Party or by a subdivision thereof or subjected to any other measure, direct or indirect, if the effect of such other measure, or a series of such other measures, would be tantamount to expropriation or nationalization . . . .

Most IIAs, including the US-Egypt BIT, do not provide a definition of expropriation. However, expropriatory conduct is generally held to include not only open, deliberate[,] and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.166

An expropriation can take many forms and be both direct and indirect.167 As can be expected, many tribunals have taken a broad view of what amounts to an expropriation.168 Under this view a government measure that interferes with the use of foreign investors’ property such that they cannot use the property or reap expected benefits there from amounts to an expropriation.169 Other tribunals have taken a much more narrow view.170 In these cases, conduct considered expropriatory occurs when the regulatory action deprives the claimant of control of his company, interferes directly in the internal operations, or displaces the claimant as the controlling shareholder.171

In analyzing the Arab Spring, these competing methods would likely be pitted against each other in any case involving the crackdown on social media. Balancing the police powers of the state, the proportionality of the means involved, and other factors will also weigh heavily on any potential tribunal.

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167. McLachlan, supra note 83 at 290-97, ¶¶ 8.68 – 8.89.
170. S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, ¶¶ 281-82 (NAFTA/UNCITRAL 2000); Pope & Talbot Inc. v. Canada, 40 I.L.M. 258, ¶¶ 96, 100-02 (NAFTA 2000); Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, ¶ 100 (2002); Methanex Corp. v. United States, 44 I.L.M. 1345, ¶ 23 (NAFTA/UNCITRAL, 2005).
Nevertheless, a strong case can be made that under either view, the economic interest in social media is expropriated when states shut down internet access and block social media. Under the broad view, the government measures taken certainly interfered with social media and internet services’ expected property rights and prevented those interests from receiving the expected benefits inherent therein. Under the narrow view though, the actions taken by Egypt and other Arab States did not divest shareholders of their shares, wrest control of any corporation away from its officers, or even interfere with the corporation’s internal affairs. Then again, even under the narrow view, blocking access to the domain name may be akin to preventing someone access to their physical property such that a digital taking has occurred even under the narrow view.

Whether an expropriation has occurred will also depend heavily on the facts of the situation. Given the political turmoil in Egypt, Tunisia, Libya, and other Arab States since 2011, states will certainly argue their actions were taken in a time of national emergency and invoke necessity, both as a non-precluded measure, if available under the relevant IIA, and as a condition precluding the wrongfulness of their conduct under customary international law. Necessity is available as a non-precluded measure if the relevant IIA provides necessity as a basis for not providing the requisite standards of treatment. Indeed the US-Egypt BIT contains such a clause in Article X allowing “all measures necessary for the maintenance of public order...”

Under customary international law as reflected under Article 25 of the Articles of State Responsibility, necessity “may not be invoked by a State as a ground for precluding the wrongfulness of an act... unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”

Article 25 also states that “necessity may not be invoked by a State as a ground for precluding wrongfulness if... the State has contributed to the situation of necessity.”

172. See LG&E Energy Corp. v. Argentine Republic (Award) ICSID Case No. ARB/02/1, ¶¶ 226-61 (recognizing that the “state of necessity” exist in international law, particularly in ¶ 245) (2006); CMS Gas Transmission Co. v. Argentine Republic (Award) ICSID Case No ARB/01/8, ¶¶ 101-09, 121-36 (2005); Sempra Energy Int’l v. Argentine Republic (Annulment Proceeding) ICSID Case No. ARB/02/16, ¶¶ 159-200 (2010).
173. U.S.-Egypt BIT, supra note 91, art. X.
176. Id. art. 25(2).
Whether either condition removes potential liability for the blocking of internet access during the Arab Spring will depend heavily on the facts of each state's conduct, and the manner in which such conditions are interpreted under traditional methods of interpretation.\textsuperscript{177} Nevertheless, depending on the specific tribunal's view, it is highly possible that certain forms of internet censorship during the Arab Spring and in other states amount to an expropriation of the investment in social media and other internet platforms.

\textit{Denying Access to Social Media and the Internet Likely Violates the Fair and Equitable Treatment Standard}

Most IIAs require the host government treat an investment in accordance with the fair and equitable treatment ("FET") standard. FET is a fixed standard that applies a level of treatment owed to foreign investors regardless of how a host state treats its own nationals.\textsuperscript{178}

While most IIAs outright require FET, the US-Egypt BIT merely requires that the "treatment, protection and security of investments shall never be less than that required by international law and national legislation." Such language likely means that Egypt only applies the minimum standard of treatment ("MST") found in customary international law. Typically, the MST requires foreign nations to treat aliens and their property in a manner that would avoid "an outrage, [ ] bad faith, [some] willful neglect of duty, or [ ] an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."\textsuperscript{179}

Since the decision in \textit{Glamis Gold, Ltd v. United States of America},\textsuperscript{180} it has been discussed whether the MST has evolved beyond the Neer standard to include some of the substantive protections afforded by the FET standard.\textsuperscript{181} Based on \textit{Glamis}, it is likely that the MST is still a floor, below FET; whether the reaches of that floor have shifted higher is another issue.

However, if a claim is brought under some other IIA protecting the fair and equitable treatment of investments, then the state suppression of internet access and the blocking of social media may violate the FET standard dependent on the facts of the suppression.

\textsuperscript{177} See generally Javier Garcia Olmedo, \textit{The Balance between NPM Clauses and Investors Protection under Bits: The Enron Annulment Decision}, 16 No. 1 INT. B. ASS'N ARB. NEWS 178 (2011).

\textsuperscript{178} Margaret Clare Ryan, \textit{Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard}, 56 MCGILL L.J. 919, 927 (2011).

\textsuperscript{179} Neer v. United Mexican States, 4 R.I.A.A. 60, 61-62 (1926).

\textsuperscript{180} Glamis Gold, Ltd v. United States of America, Award, 48 ILM 1039 (June 8 2009).

\textsuperscript{181} See Ryan, \textit{supra} note 178, at 928; see also Merrill & Ring Forestry LP v. Canada 48 ILM 1038 (2010).
Cases involving the FET standard fall into two broad categories: (1) the treatment of investors in the courts of the host government; and (2) administrative or executive decision making. In the case of the Arab Spring, the actions to shut down internet activity and block social media fall within the second category.

The majority of cases involving FET in the context of administrative decision-making have been concerned with the licensure of investments, or a fundamental change in the law affecting the investment climate. In determining whether the FET standard has been breached, tribunals often evaluate these issues according to the legitimate expectations of the investor and whether the investor’s property rights have been afforded due process.

In Tecmed, the tribunal considered that the FET standard, in light of the good faith principle established by international law, required host governments to provide investments “treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment[;]” including the host State (1) “to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations[;]” (2) to act consistently, without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities; (3) to “use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments[;]” and (4) “not to deprive the investor of its investment without the required compensation.”

The tribunal continued:

[Failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor’s ability to measure the treatment and

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183. Id.; See also Occidental Exploration and Production Co v. Republic of Ecuador (Award) UNCITRAL (2004); Técnicas Medioambientales Teemed S.A. v. United Mexican States ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 43 I.L.M 133, ¶173 (2004).
185. Id.
186. Id.
187. Id.
188. Id.
protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle.\textsuperscript{189}

The FET standard also requires the host government to provide due-process in its decision making. Where states engage in a process of discrimination, lack of transparency, use of powers for improper purposes, inconsistently, for purposes of coercion and harassment, or in bad faith, due process is denied to the investor.\textsuperscript{190}

Each of these considerations applies in some manner to the Arab Spring, and how access to the internet and to social media was blocked during the protests. While these actions must again be taken in context with the state’s need to respond to the emergency presented by the protests and demonstrations, there is a strong case that the states violated the substantive rights to FET held by digital platforms.

CONCLUSIONS

Social media’s power to organize and speak is undeniable. During the protests in Cairo, one activist powerfully tweeted: “We use Facebook to schedule the protests, Twitter to coordinate, and YouTube to tell the world[.]”\textsuperscript{191} When we look back at the Arab Spring and its consequences, perhaps we will be able to add that Facebook, Google, Twitter, and YouTube used the power of investment law to defend the right to protest, coordinate, and tell the world.

Bringing claims on behalf of social media and other internet platforms will be filled with procedural and substantive pitfalls. But, based on current trends in international investment arbitration, it is highly likely that such platforms will meet the jurisdictional challenges that will ultimately be raised by those states blocking access to social media and the internet at large.

If social media and internet platforms can successfully hurdle those jurisdictional bars, and ultimately prove their substantive claims, international investment law can be used as a powerful tool, by powerful corporations, to uphold and enhance the human rights of oppressed peoples.

Between November 1989, as the Berlin Wall began to tumble, and December 1991, the fall of the Soviet Union, the world watched in amazement how economic and political liberalization lifted the Iron Curtain.\textsuperscript{192} At the fall of the Soviet Union, three persons, the President,

\begin{itemize}
  \item \textsuperscript{189} Id.
  \item \textsuperscript{190} McLACHLAN, supra note 83, at 239 ¶ 7.115.
  \item \textsuperscript{191} Howard, supra note 29.
  \item \textsuperscript{192} See Moran R. Davis, \textit{How Central Asia was Won: A Revival of the "the Great Game"} 36 N.C. J. INT’L L. & COM. REG. 417, 418 (2011) citing JOHN LEWIS GADDIS, THE
the Pope, and the Prime Minister – Ronald Reagan, John Paul II, and Margaret Thatcher – were praised for their roles above all others in lifting the Iron Curtain. Today, there exists a digital curtain shrouding totalitarian and oppressive regimes preventing peoples' basic human liberties: freedom of speech, assembly, thought, expression, and assembly. Private actors have tools that did not truly exist at the collapse of the Soviet Union to affect such sweeping change. Today they do. Facebook, Google, and Twitter have the power, and the means, to challenge those who would oppress and prevent the establishment of self-government.

Such would be a welcome development. Recent scholarship on the intersection of human rights and international investment law tends to bemoan international investment law's impact on human rights. However, the issue of internet censorship and the blocking of social media presents a new opportunity to demonstrate how international investment law can be used to defend and increase access to human rights, albeit in a nontraditional method.


THE IMPACT OF CORRUPTION ON INTERNATIONAL TRADE

MOIZ A. SHIRAZI*

I. INTRODUCTION

The issue of corruption is a continuing one in legal literature and is the premise of many laws, regulations, and international norms, such as the Foreign Corrupt Practices Act ("FCPA"), the Organisation of Economic Cooperation and Development ("OECD") Anti-Bribery Convention, the UK Bribery Act, the United Nations anti-corruption rules, as well as local anti-corruption laws and regulations. All of these measures aim to deter corrupt practices and encourage, and often require, multinational corporations to implement policies and procedures to not only monitor the behavior of employees, but also the actions of third parties, including, but not limited to, business partners, suppliers, and potential acquisition targets. These laws and regulations are often backed by strong enforcement mechanisms that can lead to severe fines and punishment for multinational corporations and individuals engaging in, or failing to identify and prevent corrupt practices.

While most, if not all, developed countries have adopted these international norms and have well established cultures of enforcement, the countries designated as emerging and frontier markets have only recently started to tackle the issue of corruption. For these markets, it is vitally important to get ahead of the corruption issue as not tackling corruption can come at a high economic price. As these countries compete for international trade opportunities, they should assign a high priority to combating corruption, as a high perception of corruption is strongly correlated with low levels of international trade. As shown in this article, a significant reduction in the perception of corruption for certain countries can have as much, if not more, of an impact on international trade as favorable labor laws, tax rates, and capital (currency) control measures.

In this article, we affirm the link between perceptions of corruption and perceptions regarding ease of doing business. Having established this link, we conduct a comparative analysis of the countries considered to be emerging or frontier markets based on perceptions of corruption and ease of trading across borders, as well as an analysis of actual levels of international trade per capita for each market. Based on the takeaways from this comparison, we identify the

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countries that could have the most to gain from combating corruption and quantify the possible impact on international trade levels from improvements in the perception of corruption.

II. CORRELATION BETWEEN CORRUPTION AND EASE OF TRADE

In general, corruption, or the perception of corruption, is highly correlated with perceptions regarding difficulty of trade. Figure 1 below illustrates this point by comparing the ranking of 178 countries based on Transparency International’s (“TI”) Corruption Perception Index (“CPI”) for 2010 to the ranking of the same countries based on the ease of Trading Across Borders as reported in the Ease of Doing Business Index for 2010 as published by the World Bank. A higher number on TI’s CPI equates to a lower perception of corruption. Singapore has the highest value of 9.3 (perceived as least corrupt) and Afghanistan has the lowest value of 1.4 (perceived as the most corrupt). A higher number on the Trading Across Borders category of the Ease of Doing Business Index translates to a worse perception in regards to the ease of conducting international trade, meaning that countries with the highest value are considered to be the least business friendly jurisdictions for international trade. Based on 2010 data, Singapore has the lowest value and is considered to be the most business friendly and Afghanistan has the highest value and is considered the most difficult place to conduct international trade.

Figure 1. Trade Difficulty vs. CPI

1. Transparency International’s Corruption Perceptions Index ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. It is a composite index, a poll of polls, drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions. The CPI reflects views from around the world, including those of experts who are living in the countries evaluated. The greater the CPI number, the lower the perception of corruption. This is not an absolute ranking: that is, multiple countries may have the same CPI ranking assigned to them. Corruption Perceptions Index 2010, TRANSPARENCY INTERNATIONAL 2-3 2010, http://www.transparency.org/content/download/55725/890310.

2. The Ease of Doing Business Index ranks economies from 1 to 183 based on 9 factors: starting a business, dealing with construction permits, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and closing a business. The lower the number, the greater the ease of doing business. This is a ranking; each country is assigned a unique integer value. Doing Business 2011, DOING BUSINESS (Nov. 4, 2010), http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB11-FullReport.pdf.
As TI’s CPI is one of many indices that aim to provide cross-country indicators of levels of corruption, we also present a comparison of the World Bank’s Worldwide Governance Indicators ("WGI") to the Trading Across Borders data in figure 2. Both comparisons show a strong correlation between perception of corruption and ease of conducting international trade, a correlation of 0.70 based on TI’s CPI and 0.73 for WGI, respectively. This is not surprising as the barriers to international trade, principally, administrative red tape and heavy bureaucratic organizations, frequently go hand in hand with corruption.

Figure 2. Trade Difficulty vs. WGI Corruption Index

III. ECONOMIC COST OF CORRUPTION – EMERGING MARKETS

Having established that perceptions of corruption and perceptions around ease of conducting international trade generally move in a parallel manner based on the correlation coefficients of -0.70 and -0.73 from figures 1 and 2, we now turn to evaluating the specific impact of corruption on international trade. In order to isolate the impact of corruption on international trade, we need to identify markets where there has been or is expected to be movement both in terms of perceptions of corruption and levels of international trade. The developed markets are generally not useful in this regard as their perception of corruption is relatively low and their ranking on TI’s CPI is generally stable from year to year.4 Fluctuations

3. WGI is similar to TI’s CPI in that it attempts to aggregate data across multiples sources. The key difference is that WGI attempts to consider corruption in both the public and private sectors while TI’s CPI deals specifically with corruption in the public sector. Similar to TI’s CPI, the higher the WGI number, the greater the perception of corruption. Doing Business 2011, supra note 2; Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, Worldwide Governance Indicators, THE WORLD BANK, http://info.worldbank.org/govemance/wgi/index.asp (last visited Nov. 4, 2011) (Follow the “click here” link for the full data set in Excel).

4. This is not meant to be an absolute statement as there are certain developed countries like Italy and Greece that could be perceived as having a higher perception of corruption than most other developed countries. For purposes of this analysis, we focused on the emerging and frontier markets specifically. See Corruption Perceptions Index 2010, supra note 1. See generally Press Release, Transparency International, Persistently high corruption in low-income countries amounts to an “ongoing humanitarian disaster” (Sept. 22, 2008), http://www.transparency.org/news_room/latest_news/press_releases/2008/2008_09_23_cpi_2008_en.
in levels of international trade for developed markets are likely more the result of economic policy changes, tax regimes, and changes in the perceived corruption levels of current or future trading partners. The emerging and frontier markets, on the other hand, have higher perceptions of corruption and are competing against each other for international trade opportunities. These markets provide the best opportunity to identify and isolate the impact of corruption on international trade.

Brazil, Russia, India, and China, otherwise known as "BRIC", have long been considered as emerging markets, but there are other countries such as South Africa, Turkey, Republic of Korea, Mexico, and Poland, among others, that are also experiencing rapid economic growth. There are also a number of countries that are considered to be the next wave of emerging markets, commonly referred to as frontier markets. As there is no single definition of emerging or frontier market, we considered the list of emerging and frontier markets as listed by various sources, including The Economist, the World Bank, Morgan Stanley Capital International, and Goldman Sachs' list of next 11 frontier markets. Based on this review, we identified a total of 30 countries for this analysis as shown in figure 3 below. This is an appropriate sample as it includes countries that cover all geographic regions and are at different stages of development.

!["Trade Difficulty vs CPI"](image)

Figure 3. Emerging and Frontier Markets – Trade Difficulty vs. CPI

---


The top left hand corner of figure 3 shows the countries that potentially could benefit the most from improvements in their perception of corruption, including Russia, Ukraine, Kazakhstan, Nigeria, and Kenya. These countries are among the worst with respect to perception of corruption among the thirty emerging and frontier markets and also among the worst with respect to perception of ease of conducting international trade. There are also a number of countries, including Indonesia, Egypt, and Thailand that rank relatively high in terms of ease of conducting international trade, despite having a high perception of corruption. Then there are countries that could have been expected to rank higher in ease of conducting international trade given their relative CPI score, including South Africa and Brazil, among others. The takeaway from all this is that corruption is not the only factor impacting international trade. This conclusion is further substantiated by the relatively low correlation coefficient of 0.44 between trade difficulty and CPI for the thirty countries shown in figure 3. Governmental policies regarding tariffs, corporate tax rates, and capital control, as well as geographic location, labor costs, and transportation infrastructure, all play major roles as well. Before trying to identify and isolate the specific impact of corruption on international trade, we need to acknowledge these other factors and identify the markets where improvements in the perception of corruption is likely to have the greatest economic impact.

For example, a close examination of the Ease of Doing Business Index data for Brazil for 2010 as reported by the World Bank reveals that while Brazil is ranked 114 as far as ease of trading across borders, it is ranked 152 on the paying taxes category. This suggests that perhaps the single item that would have the greatest impact on Brazil's Ease of Doing Business Index ranking would be reforms to Brazil's overly complex tax system. A similar analysis of this data for South Africa shows that while South Africa is ranked 34 as far as Ease of Doing Business, it is ranked 149 in terms of trading across borders. South Africa's CPI rating of 4.5 suggests that corruption may not be driving this relatively poor ranking. According to the World Bank's description of the factors considered for the trading across borders category, better training of customs staff and investment in transportation and logistics infrastructure could have a positive impact on South Africa's ranking in the ease of trading across borders category. In summary, while both Brazil and South Africa have issues to consider in order to improve their rankings for the Ease of Doing Business Index and the trading across borders category, corruption may not be the primary issue for these countries.

There is also a group of countries at the bottom left hand corner for figure 3, including Bangladesh, Pakistan, among others, where corruption is clearly just one of many issues that need to be dealt with in order to attract international trade opportunities, including changes to the legal system to implement and enforce intellectual property laws, investment in infrastructure, business friendly tax regimes, and enforcement of business contracts. Some researchers have even suggested that corruption in certain markets serves as a lubricant for international trade as it makes up for the low quality of government agencies and poorly trained
This is not to say that such countries could not benefit from implementing anti-corruption measures and improving the quality of their government organizations and officials. They simply need to focus on other areas first.

The aforementioned observations indicating that corruption is not the only factor impacting international trade are valuable as we compare the 2010 international trade per capita, defined as the sum of imports and exports divided by the 2010 population, to the TI CPI values for each of the thirty countries as shown in figure 4. We note that oil and gas imports and exports were excluded from this analysis as we tried to isolate the discretionary forms of international trade.

![Figure 4. 2010 International Trade per Capita vs. CPI](image)

At first glance, the data in figure 4 does not seem particularly enlightening as there are many outliers that would be expected to have either much lower or much higher levels of international trade per capita based only on their TI CPI value. On closer examination of the data, taking into account the other factors impacting international trade, such as geographic location, tax regimes, and relative labor costs, we can start to see relevant clusters of data. In figure 4 we highlight some of the relevant clusters. Of these clusters, the two that are the most useful are the Eastern European cluster (in blue) and the Middle East cluster (in green). In looking at the two groups of Eastern European countries with Russia, Ukraine, and Kazakhstan in one group (Group A) and Hungary, Croatia, Bulgaria, and Poland in another (Group B), we see a significant difference in the level of international trade per capita and TI CPI values between the two groups. The correlation coefficient


between international trade per capita and CPI is 0.90 for the seven countries in Group A and B. The countries in Group A and Group B were all part of the former Soviet Union, have similar corporate tax rates, labor costs, and are generally similar in terms of transportation infrastructure. While there are certainly some differences amongst the group of countries, the perceived level of corruption is a key difference between the two groups.

The comparison of the Group A countries to the Group B countries is particularly insightful as it allows us to potentially quantify the economic cost of corruption for the Group A countries with reference to the results of the Group B countries. Table 1 displays the predicted level of international trade per capita for the Group A countries based on a TI CPI value of 5.3, equal to that of Poland. Poland was selected as the appropriate benchmark as it has the highest population of the Group B countries and is also the largest in terms of land mass, making it the most comparable to the relatively more populated and geographically large Group A countries.

Table 1. Estimated Economic Cost of Corruption – Eastern Europe

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>108</td>
<td>3.6</td>
<td>45,969</td>
<td>7,543,325</td>
<td>6,094</td>
<td>91,662</td>
</tr>
<tr>
<td>Croatia</td>
<td>98</td>
<td>4.1</td>
<td>31,856</td>
<td>4,424,161</td>
<td>7,200</td>
<td>857,792</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>181</td>
<td>2.9</td>
<td>49,141</td>
<td>16,316,050</td>
<td>3,012</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>49</td>
<td>5.3</td>
<td>329,548</td>
<td>38,187,488</td>
<td>8,630</td>
<td></td>
</tr>
<tr>
<td>Russian Federation</td>
<td>162</td>
<td>2.1</td>
<td>365,473</td>
<td>141,750,000</td>
<td>2,578</td>
<td>283,681</td>
</tr>
<tr>
<td>Ukraine</td>
<td>139</td>
<td>2.4</td>
<td>112,171</td>
<td>45,870,700</td>
<td>2,445</td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>21</td>
<td>3.1</td>
<td>182,371</td>
<td>81,121,077</td>
<td>18,221</td>
<td></td>
</tr>
</tbody>
</table>

The findings of the analysis suggest that Russia’s level of international trade could be nearly $860 billion higher, more than two times current 2010 levels, if there was a dramatic change in Russia’s perception of corruption equal to that of Poland (a movement from 2.1 to 5.3 on TI’s CPI). This potential impact for Ukraine could be over $280 billion and Kazakhstan over $90 billion.

As Russia is often compared to other members of BRIC, namely Brazil, India, and China, we compare Russia’s level of international trade for 2010 to these countries (see table 2). We also show this comparison based on a corruption-adjusted international trade figure from table 1. Based on 2010 data, Russia had a total level of non-oil and gas related international trade of $365 billion, the lowest level of international trade among BRIC. With the corruption adjusted value of over $1.2 trillion, Russia could be well ahead of Brazil and about half of India’s $2.5 trillion in international trade for 2010.


13. See infra Table 2.
Table 2. Estimated Economic Cost of Corruption for Russia

<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>114</td>
<td>3.7</td>
<td>399,379</td>
<td>194,949,470</td>
<td></td>
</tr>
<tr>
<td>China</td>
<td>50</td>
<td>3.5</td>
<td>2,972,960</td>
<td>1,338,299,512</td>
<td></td>
</tr>
<tr>
<td>India</td>
<td>100</td>
<td>3.3</td>
<td>2,490,489</td>
<td>1,170,938,000</td>
<td></td>
</tr>
<tr>
<td>Russia Federation</td>
<td>162</td>
<td>2.1</td>
<td>365,473</td>
<td>141,750,000</td>
<td>1,223,265</td>
</tr>
</tbody>
</table>

Similar results can be obtained by examining the cluster of Middle Eastern countries (in green) in figure 4. Egypt, although similar to Jordan and Turkey in many regards, has a significantly lower level of international trade per capita. As shown in table 3, Egypt’s level of international trade could be over $200 billion higher than actual 2010 levels if Egypt’s perception of corruption improved to levels consistent with Jordan and Turkey (from TI’s CPI of 3.1 to 4.4).

Table 3. Estimated Economic Cost of Corruption for Egypt

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Egypt, Arab Rep.</td>
<td>21</td>
<td>3.1</td>
<td>79,361</td>
<td>81,121,077</td>
<td>217,220</td>
</tr>
<tr>
<td>Jordan</td>
<td>77</td>
<td>4.7</td>
<td>22,108</td>
<td>6,047,000</td>
<td></td>
</tr>
<tr>
<td>Turkey</td>
<td>76</td>
<td>4.4</td>
<td>299,520</td>
<td>72,752,325</td>
<td></td>
</tr>
</tbody>
</table>

We note that the figures noted for Russia and Egypt may not be entirely explained by differences in perception of corruption as there may be other factors/limitations that lead to differences in the level of international trade for the various markets. The analysis here attempts to identify comparisons where corruption is one of the most important factors influencing the differences in international trade levels per capita. The numbers shown in tables 2 and 3 should be best viewed as hypothetical outcomes that each market can achieve if it includes combating corruption among its top priorities, along with other policies that work to attract international trade opportunities.

IV. OTHER METHODS TO ESTIMATE THE ECONOMIC COST OF CORRUPTION

The findings of this analysis are based primarily on a qualitative comparison and analysis of the thirty countries considered to be emerging or frontier markets. We have not performed a statistical analysis by means of regression or other methods to quantify the impact of corruption on international trade. There are other researchers, including research conducted by Global Financial Integrity (GFI), a Washington, DC-based think tank, that have attempted to perform such analyses and have found similarly dramatic results as shown in this article.14

In examining the economic cost of corruption, some researchers have drawn the analogy between payment of a bribe to payment of a tax.\textsuperscript{15} The premise being, as an investor, if one knows that they have to pay a tariff on imports of 10 percent and also knows that they will have to pay bribes to customs officials of 10 percent to get products through possible lengthy and costly delays at the port, the investor would not distinguish between these two payments of the tariff and bribe and a single payment of the 20 percent tariff. If the amount of the bribe is known, and assuming all other factors are the same, a risk neutral investor would be indifferent between investing in a country with a 20 percent tariff and a country that had a 10 percent tariff and 10 percent bribe requirement. In reality, the amount and timing of the bribe is rarely known and this uncertainty would require a much lower tariff rate than 10 percent to convince the investor to invest.\textsuperscript{16} This analogy between corruption as a form of taxation is useful, however, as it can help to quantify the economic impact of corruption, something that has rarely been quantified, based on the economic impact of taxation, something which has been studied and evaluated on a much greater scale.

Research by Shang-Jin Wei based on a statistical analysis of TI’s CPI index, country tax rates, capital control policies, foreign direct investment levels, and accounting for other variables such as GDP levels and other government policies, concluded that a drop of 1.0 points on the TI CPI index would have an equivalent impact on foreign direct investment as a 4.69 percent increase in the corporate tax rate.\textsuperscript{17} While the research focused on foreign direct investment, international trade would be expected to be similarly impacted. Based on the TI CPI index figures for 2010, the findings of this research would suggest than an increase in the corruption level from that of Singapore to Russia would have an equivalent impact on foreign direct investment as a 33.8 percent increase in the corporate tax rate. Given Russia’s 2011 average corporate tax rate of 20.0 percent,\textsuperscript{18} the implied tax rate given Russia’s perceived level of corruption would be a whopping 53.8 percent, compared to Singapore’s tax rate of 17.0 percent. These findings may be helpful in explaining why Russia, with a relatively low corporate tax rate, has a much lower level of international trade as compared to other BRIC countries, namely China, India, and Brazil. Similarly, an increase in the corruption level from that of Singapore to Egypt would have an equivalent impact on foreign direct investment as a 29.1 percent increase in the corporate tax rate. Given Egypt’s 2011 average corporate tax rate of 20.0 percent,\textsuperscript{19} the implied tax rate given Egypt’s perceived level of corruption would be 49.1 percent. These findings are also consistent with


\textsuperscript{16} Wei, supra note 15, at 74-76, 78.


the analysis presented in tables 2 and 3 as perceived tax rates that are 33.8 percent and 29.1 percent higher than actual tax rates are likely to lead to significantly lower international trade levels than would otherwise be expected.

V. WHAT STEPS CAN RUSSIA TAKE?

Our research and the research performed by others indicate that the perception of Russia as one of the most corrupt countries in the world comes at a potentially steep economic price.\(^\text{20}\) The good news is that this perception can be reversed. Singapore is perhaps the most dramatic example of this as it was considered one of the most corrupt countries in the world early in the twentieth century and is now considered the least corrupt country in the world according to both TI's CPI and the World Bank's WGI. Russia does not have to go so far back in history as Singapore to find a role model, it has only to look at a fellow member of BRIC, China.

Although neither Russia nor China has a low perception of corruption based on TI's CPI, there is a large difference between the two countries according to the Trading Across Borders rankings as shown in figures 1 and 2. Russia is close to the predicted level for ease of international trade, as shown by the trend lines in the figures, while China's ranking as a trading partner is significantly better than what the data would predict. Based on China's TI's CPI value of 3.5, China could be number 115 in the Trading Across Borders ranking.\(^\text{21}\) Instead, China is ranked number 50, 65 notches higher than predicted.\(^\text{22}\) Russia, on the other hand, is 2.1 on TI's CPI and 162nd on the Trading Across Borders ranking.\(^\text{23}\) Russia could be number 145th based on the predicted results.\(^\text{24}\) Why does China do so much better than Russia on its perception as a trading partner than Russia? What can Russia learn from China in greatly improving its image as a reliable trading partner?

To answer these questions, we examine the nine factors that go into the Ease of Doing Business Index. The following government services are particularly relevant from a corruption perception standpoint: obtaining of business and construction permits, registering property, getting credit, protecting investors, paying taxes, trading across borders (customs), enforcing contracts, and closing a business. Put differently, corruption in these areas is likely to have the greatest impact on the Ease of Doing Business Index ranking. Table 4 provides a comparison of China and Russia across these nine factors.

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\(^{21}\text{Corruption Perceptions Index 2010, supra note 1, at 3; Doing Business 2011, supra note 2, at 156.}\)

\(^{22}\text{Doing Business 2011, supra note 2, at 156.}\)

\(^{23}\text{Id. at 189.}\)

\(^{24}\text{Id.}\)
Table 4. Ease of Doing Business: Russia-China Comparison

<table>
<thead>
<tr>
<th>(2010 Data from the World Bank)²⁵</th>
<th>China</th>
<th>Russia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ease of Doing Business Rank (Composite Ranking)</td>
<td>79</td>
<td>123</td>
</tr>
<tr>
<td>Starting a Business</td>
<td>151</td>
<td>108</td>
</tr>
<tr>
<td>Dealing with Construction Permits</td>
<td>181</td>
<td>182</td>
</tr>
<tr>
<td>Registering Property</td>
<td>38</td>
<td>51</td>
</tr>
<tr>
<td>Getting Credit</td>
<td>65</td>
<td>89</td>
</tr>
<tr>
<td>Protecting Investors</td>
<td>93</td>
<td>93</td>
</tr>
<tr>
<td>Paying Taxes</td>
<td>114</td>
<td>105</td>
</tr>
<tr>
<td>Trading Across Borders</td>
<td>50</td>
<td>162</td>
</tr>
<tr>
<td>Enforcing Contracts</td>
<td>15</td>
<td>18</td>
</tr>
<tr>
<td>Closing a Business</td>
<td>68</td>
<td>103</td>
</tr>
</tbody>
</table>

Table 4 shows that, while the two countries are generally similar across most categories, one significant difference relates to the Trading Across Borders category. As noted, China ranks at number 50 while Russia is at number 162. This category relates specifically to government agencies and policies dealing with international trade, including import tariff regimes, customs organizations, port authorities, and transportation companies. An explanation of the discrepancy in the levels of international trade for these markets may be explained through further analysis of the rules and organizations for each country as they relate to these agencies.

The average tariff for China was 9.8 percent in 2010, but this figure has come down gradually from close to 15 percent in 2000.²⁶ Furthermore, China implemented specific measures to improve and modernize its customs agencies and to combat corruption in its customs agencies leading up to and after its entry into the World Trade Organization in 2001. Over the last ten years, China has tried to build a culture of enforcement and has prosecuted a number of high-level cases involving senior customs officials. These measures may have contributed to a significant improvement in the perception of China as a reliable trading partner from number 100 in 2004 to number 50 in 2011.

In order to specifically target the relatively low levels of international trade, Russia can learn from China’s experience and implement a long-term policy with respect to tariffs so as to reduce the uncertainty associated with the Russian tariff regime. Specifically, Russia can invest in improving the quality of its customs

²⁵ Id. at 156, 189.
officials and of the customs organization overall. The customs officials need to be evaluated on a series of metrics that are aligned with Russia's objectives for international trade. Of these metrics, reductions in waiting time at the border needs to be a high priority as the combination of bad institutions, low quality of customs officials, and unpredictable waiting times at the border all work to stifle international trade. Significant improvements in these areas may lead to an improved perception of corruption for Russia and could reduce the impact of the perception of corruption on international trade.

VI. SUMMARY AND CONCLUSION

Based on the analysis of emerging and frontier markets presented here, there is clearly a correlation between the perception of corruption and levels of international trade. Countries that are ranked high in perception of corruption are generally also perceived as the most difficult countries in terms of ease of international trade. While perception of corruption is not the only relevant factor impacting international trade, for certain countries like Russia, Ukraine, and Egypt, a significant reduction in the perception of corruption may have as much, if not more, of an impact on international trade as favorable labor laws, tax rates, and capital (currency) control measures.
I. INTRODUCTION

The international community has developed several different types of legal regimes to govern natural resources. In general terms, these include:

- according states exclusive permanent sovereignty over natural resources, a system associated with territoriality;
- sharing resources, as in the cases of international rivers and migratory species;
- recognizing common property rights, as in the case of the high seas, where no one user has exclusive rights to resources and no one can exclude others from exploiting them, but capturing resources results in exclusive property rights; and
- recognizing property as the common heritage of mankind – or, to use a more contemporary phrase, the common heritage of humankind (CH) – whereby all manage resources and share in the rewards of exploiting them, even if they are not able to participate in that exploitation.

In this essay I reflect on what has happened to the CH principle, which underlies the last of these regimes. Several exemplary studies have examined the evolution and content of the CH principle.1

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Although I comment on the evolution of the principle, I also focus on recent developments affecting its implementation and its possible future.

Part II of this essay discusses what the CH principle means in international law. This discussion involves three questions: To what situations does the principle apply? What are its components or elements? And what is its legal status? Parts III and IV suggest that "context" is essential to understanding the CH principle, or indeed any principle of international law. Part III places the CH principle, which was promoted especially in the late 1960s and the 1970s, in historical context. Part IV notes that the CH principle has been incorporated in some treaties. The most notable of these is Part XI of the 1982 United Nations Convention on the Law of the Sea ("LOS Convention"), as revised by its associated 1994 Implementation Agreement, concerning seabed mining beyond the limits of national jurisdiction. An additional development has accompanied the translation from principle to detailed rule in the law of the sea: the practice of states and international legal institutions has reinforced aspects of the CH seabed mining regime. Finally, Part V of this essay evaluates the current status and significance of the CH principle or concept. What, if anything, remains of it?


II. THE COMMON HERITAGE PRINCIPLE

We can explore the meaning of any principle by considering three questions. First, to what events or situations does it apply? That is, with respect to the CH principle, what sorts of property or resources fall within the scope of the principle? Second, what are the elements or components of the principle, the features that give it content? And third, what is its legal status? When we ask these questions about the CH principle we discover that its meaning is less than clear, despite several decades of use of the principle in international law.

The first question is perhaps the easiest to answer. States and commentators have promoted the CH principle as applying particularly to areas beyond the limits of national jurisdiction and to natural resources found there. One early influential document was the Declaration of Principles, adopted by the U.N. General Assembly in 1970. Paragraph 1 of this Declaration provides that “[t]he sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.” Article 136 of the widely adopted 1982 LOS Convention explicitly provides that “[t]he Area and its resources are the common heritage of mankind”; the Convention defines the “Area” as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction,” and “resources” are limited to “solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules.” Article 11 of the 1979 Moon Treaty, now in force for thirteen states (albeit none of the space powers), explicitly incorporates the CH principle. The principle has also been discussed in connection with Antarctica, and some commentators have advocated applying the

5. Id. ¶ 1.
6. LOS Convention, supra note 2, art. 136.
7. Id. art. 1(1)(1).
8. Id. art. 133(a).
principle to other common space resources, including geostationary orbit and high seas fisheries. In 1995 Malta invoked the CH principle in proposing that the U.N. Trusteeship Council be transformed "from a guardian of dependent territories to a body that acts as guardian and trustee of the global commons and the common concerns in the interest of present and future generations," a proposal directed at conserving the international environment.

Commentators and international organizations have also proposed that a range of other, non-common space resources that are essential to humans and of widely shared interest should be governed under a CH regime. Such resources include, for example, rain forests, genetic resources (even when found within national boundaries), cultural heritage, and food. However, the idea of applying the CH principle to resources within the territorial jurisdiction of states has proved controversial, and the principle has gained traction only with respect to some common space resources, particularly deep seabed minerals in the Area.

Second, what are the elements of the CH principle? Features often associated with it include:

- a prohibition of acquisition of, or exercise of sovereignty over, the area or resources in question;
- the vesting of rights to the resources in question in humankind as a whole;
- reservation of the area in question for peaceful purposes;
- protection of the natural environment;
- an equitable sharing of benefits associated with the exploitation of the resources in question, paying particular

11. See, e.g., Kiss, supra note 1, at 145-64.
13. See, e.g., PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 552 (2d ed. 2003) (discussing FAO Conf. Res. 5189 (1989), an Agreed Interpretation of the International Undertaking, recognizing plant genetic resources as "a common heritage of mankind to be preserved, and to be freely available for use, for the benefit of present and future generations"); Borgese, supra note 1, at 1313-34; Kiss, supra note 1, at 164-96.
attention to the interests and needs of developing states; and
• governance via a common management regime.

The first two of these features relate to the juridical status of the area in question. The first – prohibition on sovereignty – is not unique to a CH regime: for example, it has long been accepted that no state may exercise sovereignty over the high seas. The notion that rights vest in humankind as a whole does, however, radically diverge from the concept of high seas freedoms, which permits individual acquisition of fish or other resources.

The next three features concern the utilization of the area and resources in question. Some formulations of the CH principle explicitly provide that protection of the environment entails a sharing of burdens as well as benefits,\textsuperscript{15} and note that such protection involves an obligation to take into account the interests of future generations.\textsuperscript{16} Because non-peaceful uses of an area could destroy its resources, the peaceful purposes prong may also encompass concern with future generations. The equitable sharing of benefits, implying distributive justice, is the most novel and most controversial feature of the CH principle. This element may imply a sharing or broadening of the base of knowledge about resources. It also encompasses sharing the material benefits or proceeds derived from exploiting resources. Opposition to this benefit-sharing feature, as well as to the prohibition on sovereignty, help explain why the CH principle has not been applied to rain forests or other resources located within national territory.\textsuperscript{17}

The last feature, governance through a common management system, reflects the view that "humankind" as a whole is responsible for managing the area or resource in question. The CH principle anticipates the creation of appropriate institutional machinery or other cooperative arrangements to implement such governance.

Although I assert that these features are "often associated" with the CH principle, each of them has been subject to much debate. States and commentators disagree about several components of the CH principle. A few examples provide a sense of the discourse:

\textit{Juridical Status.} The United States has historically argued that the CH principle is simply another verbal formulation of a freedoms regime, under which no country has sovereignty over a common space but may acquire exclusive property rights in its resources.\textsuperscript{18} Professor

\begin{itemize}
  \item \textsuperscript{15} BASLAR, supra note 1, at 99-103.
  \item \textsuperscript{16} Id. at 103-05, 174; Joyner, supra note 1, at 195.
  \item \textsuperscript{17} NANDA \& PRING, supra note 1, § 2.1.10, at 35.
  \item \textsuperscript{18} See Goldie, supra note 1, at 80-81.
\end{itemize}
Christopher Joyner argues that "vesting of rights in all of humankind" is an element only of a radical form of the CH principle. Many commentators, however, regard humankind's rights to the resources as an essential characteristic of the CH principle.

**Utilization: Peaceful Purposes.** The International Law Association, in its 1986 Seoul Declaration concerning the CH principle, does not list "peaceful purposes" among the utilization features of a common heritage regime. Commentators have noted that "peaceful purposes" could stand apart from the CH concept as a separate principle.

**Utilization: Environmental Protection.** The existence and formulation of an environmental protection element of the CH principle have been disputed. Professor R. St. J. McDonald does not consider environmental protection an element. He finds that environmental preservation is linked to "an obligation to leave a particular area in as good a condition as the present generation received it," and believes that "obligations on intergenerational rights and on environmental and natural preservation" must await "a more mature" formulation of the CH principle. By contrast, Judge Rüdiger Wolfrum finds that "the interests of future generations have to be respected in making use of the international commons," approaches environmental protection through the lens of sustainable development, and considers "the concept of sustainable development [to be] one of the important elements of the common heritage principle." However, Professor Duncan French questions whether the concept of sustainable development applies to common spaces, noting that "the generic idea of 'development' . . . has generally been conceptually restricted to areas within a State's territory, or at least its jurisdiction" and that Agenda 21 did not mention the deep seabed when discussing sustainable development.

**Utilization: Benefit Sharing.** Commentators dispute whether the equitable sharing of benefits under the CH principle requires

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preferential treatment for developing states. According to Wolfrum, de facto equal participation "derives from the common heritage concept, placing all States . . . on the same footing and accordingly benefitting all States," but preferential treatment "favours only developing countries and has its roots in the development aid philosophy." Joyner, arguing that the CH principle includes the idea that "any economic benefits derived from" efforts in a common space "would be shared internationally," also finds that giving a preference to developing countries is an ideological gloss accepted only in some formulations of the principle.

Common Management. If a common management or other cooperative decision-making arrangement has not actually been established, the question arises how a country should act in accordance with the CH principle. Wolfrum concludes that each state must then "decide how to ensure that activities subject to the principle are carried out for the benefit of all mankind." To this end, each state retains discretion "whether to attempt to achieve this objective by refraining from unilateral, in favour of joint, activities, by seeking cooperation on a bilateral or multilateral basis, or by distributing revenues or information." However, the possibility that a state could comply with the CH principle by unilaterally "distributing revenues or information" raises questions about whether common management is an essential element of the CH concept. For some, a procedural element of the CH principle, requiring that exploration and exploitation of resources must be managed under treaty-based mechanisms, may be more controversial than a substantive requirement of some sort of sharing of benefits.

Other Possible Elements. Joyner stresses that scientific research "would be freely and openly permissible" under a CH regime, with research results made available to those interested in them. This assertion is consistent with the notion that the CH principle requires

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27. See id. at 192-93.
28. Wolfrum, The Common Heritage of Mankind, supra note 1, ¶ 25 (emphasis added). See Tullio Scovazzi, Is the UN Convention on the Law of the Sea the Legal Framework for All Activities in the Sea? The Case of Bioprospecting, in LAW, TECHNOLOGY AND SCIENCE FOR OCEANS IN GLOBALISATION 309, 313 (Davor Vidas ed., 2010) (suggesting that each state operating under a CH principle has the obligation, even absent institutional direction, to ensure that knowledge resulting from marine scientific research be disseminated). For discussion of the possible roles of states and international institutions in managing different CH regimes, see Kiss, supra note 1, at 240-42.
29. Joyner, supra note 1, at 192.
sharing benefits, but most commentators do not specifically include scientific research as one of the features characterizing how a CH resource or area must be utilized. Professor Kemal Baslar would add the explicit requirement that "only those natural and cultural resources which globally affect the survival and welfare of mankind can be exploited, conserved or protected under the common heritage regime." Others suggest that the "common concern" concept, important in international environmental law, is distinct from and weaker than the CH principle, not incorporating other elements of the CH principle.

In sum, one source of indeterminacy in articulating the CH principle is disagreement about which elements comprise the CH principle and how each should be formulated.

In addition, some words commonly associated with the CH principle are themselves unclear. For example, what is meant by "[hu]mankind"? Does this word encompass future generations? Does it suggest that the CH principle embodies a type of human right? Or does it include, along with states, only peoples and territories that are not yet capable of self-governance? How broad is the definition of "benefits"? Do the words "peaceful purposes" connote complete demilitarization or simply limit uses of force to those that have been recognized as legal in other contexts? The law is to some degree inevitably indeterminate, but typical formulations of the CH principle on their face leave significant questions about its meaning.

The reason why the features I set out above are often associated with the CH principle becomes clearer when we consider the context in which the principle developed (outlined in Part III). These features also may be found (albeit some of them in qualified form) in one part of the treaty that implements the CH principle in the most detail, namely Part XI of the LOS Convention as modified by the 1994 Implementation Agreement. The terms of the LOS Convention and the Implementation Agreement limit the indeterminacy of the CH principle as developed in that treaty regime.

Finally, consider the third question: What is the legal status of the CH principle? Where the CH principle has been included in a treaty that has entered into force, states parties are of course bound by the principle in the form incorporated in the treaty. Assertions about a more universal legal status for the CH principle have varied widely.

30. See BASLAR, supra note 1, at 98.
31. Id. at 110.
32. Id. at 287-96; NANDA & PRING, supra note 1, § 2.1.10, at 35.
Some have argued that it sets out a fundamental and non-derogable norm, constituting a *jus cogens* obligation. This assertion historically seems linked to political efforts to promote the CH principle in the LOS Convention, but today must raise eyebrows, especially outside that context. Some have concluded that the principle has attained the status of customary international law. The International Law Association’s 1986 Seoul Declaration, for example, provides that “[t]he concept of the common heritage of mankind as a general legal principle has entered into the corpus of public international law.” Writing in 2009, Wolfrum also finds that “[t]he common heritage principle, as far as the use of common spaces is concerned, is a part of customary international law,” constituting “a distinct basic principle providing general . . . legal obligations with respect to the utilization of areas beyond national jurisdiction.” Others have found too bold the assertion that the CH principle is established in customary international law. For example, Joyner (although writing before the 1994 Implementation Agreement and the ensuing widespread acceptance of the LOS Convention) concludes that the CH principle is too indeterminate and too lacking in accompanying state practice and *opinio juris* to have gained acceptance in customary international law.

Even if one were to conclude that the principle today rises to the level of customary international law, one would have to be open to the possibility that some states may have persistently objected to applying the principle in particular settings.

If not a principle of international law, the CH principle is left to the realm of political or moral concept or non-binding soft law. Professors Ved Nanda and George Pring accurately but cautiously report that the CH concept “has received very favorable support from many expert

34. See, e.g., 14 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 16 (¶¶ 52, 58), 37 (¶ 93), 42 (¶ 6), 71 (¶ 145), 75 (¶ 6), U.N. Sales No. E.82.V.2 (1980) (statements of representatives of India, Trinidad and Tobago, Argentina, Iran, Jamaica, and Niger); see also BASLAR, supra note 1, at 365-67; Degan, supra note 1, at 1373-74. For purposes of the LOS Convention, the CH principle is accorded special prominence. The Convention provides that “States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.” LOS Convention, supra note 2, art. 311(6).

35. ILA Seoul Declaration, supra note 20, ¶ 7.1; ILA New Delhi Declaration, supra note 14, pmbl., at 24 (reaffirming the Seoul Declaration in 2002).


commentators" and refrain from giving an opinion on its exact legal status. 38

With respect to one arena—the mineral resources of the seabed beyond the limits of national jurisdiction—a decision maker could well find that the CH principle represents customary international law. The near-universal acceptance of the LOS Convention and the 1994 Implementation Agreement, 39 along with the practice of states and international organizations concerning deep seabed minerals, 40 provide evidence supporting customary international law status. However, the exact content of such a norm is debatable: does it track the particulars of the widely accepted 1994 Implementation Agreement 41 or instead reflect more general standards? 42

In sum, we are left with significant questions about the scope of application of the CH principle, and especially about its elements and legal status. Any decision maker faced with applying the CH principle to a legal dispute would have considerable discretion in interpreting its meaning and status. As discussed in Part IV, the LOS Convention added some determinacy to the meaning of the CH principle for purposes of that treaty. We may also obtain some clues about the meaning and lasting influence of the CH principle— or any principle—by paying attention to the context in which it developed. Part III explores some of the important context related to the CH principle.

III. HISTORICAL AND ETHICAL CONTEXTS

The standard story of the CH principle begins with the undoubtedly influential August 1967 speech of Ambassador Arvid Pardo of Malta to the U.N. General Assembly. In that speech, Pardo asserted that "[t]he seabed and the ocean floor are a common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole." 43 More generally, Pardo also espoused

38. NANDA & PRING, supra note 1, § 2.1.10, at 35.
40. See infra notes 81-93 and accompanying text.
42. See Wolfrum, The Principle of the Common Heritage of Mankind, supra note 1, at 333-37.
an international oceans management regime responsible for a wide range of oceans activities. Others articulated the CH principle in the late 1960s as well. The World Peace Through Law Conference adopted a resolution in July 1967 directed primarily at deep seabed resources, but referring to "the high seas" as "the common heritage of all mankind." In a June 1967 speech, Ambassador Aldo A. Cocca of Argentina, during deliberations of the U.N. Outer Space Committee, argued that "the international community has endowed [a] new subject of international law – mankind – with the vast […] common property" of outer space. Invocation of the CH principle in legal and political forums coincided with proposals to exploit common space resources. The perception that technology allowed, or might soon allow, the exploitation of previously unobtainable common space resources, in short, gave rise to proposals for new legal regimes to manage them. The proposed CH regimes differed from regimes treating common spaces as res communis, open to all, or res nullius, subject to occupation and sovereignty.

Although these expressions of the CH principle were undoubtedly important in pushing it onto the world political and legal stage, they provide an overly narrow view of how and why the principle developed. With any principle, it is important to try to identify its core underlying values. When political formulations of a principle are linked to longstanding values and traditions, the principle is more likely to resonate with people and gain acceptance. A thorough investigation of the values associated with the CH principle could fill at least a book, but I note here a few pertinent points. The CH principle's antecedents include the legal public trust doctrine and precepts of Roman law applicable to common space resources. A complete story of the origins of the principle would also note its religious and natural law in the League of Nations concerning living resources of the oceans had included similar references. The League’s Assembly appointed a Committee of Experts for the Progressive Codification of International Law, which considered, inter alia, "[w]hether it is possible to establish by way of international agreement rules regarding the exploitation of the products of the sea." League of Nations Comm. of Experts for the Progressive Codification of Int'l Law, Questionnaire No. 7 adopted by the Committee at its Second Session, held in January 1926: Exploitation of the Products of the Sea, 20 AM. J. INT'L L. SPECIAL SUPP. 230, 230 (1926). The Rapporteur, José León Suárez of Argentina, examined living resources, finding that "[t]he riches of the sea, and especially the immense wealth of the Antarctic region, are the patrimony of the whole human race," José León Suárez, Report on the Exploitation of the Products of the Sea, in id. Annex 231, 236. See 1 PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING 109-13 (1985). 44. See Louis B. Sohn, Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea, 36 COLUM. J. TRANSNAT'L L. 285, 289-91 (1997). 45. Wolfrum, The Principle of the Common Heritage of Mankind, supra note 1, at 315. 46. U.N. Legal Subcomm. of the U.N. Comm. on the Peaceful Uses of Outerspace, 75th mtg. at 7-8, U.N. Doc. A/AC.105/C.2/SR.75 (Nov. 13, 1967). 47. See BASLAR, supra note 1, at 65-68.
underpinnings. For example, all religious traditions emphasize the promotion of peace and the resolution of disputes without recourse to violence. All religious traditions emphasize the importance of generosity, of sharing wealth with the poor and unfortunate, even if they have not "earned" that wealth. Furthermore, Judeo-Christian, Islamic, and Buddhist traditions support the notion of human stewardship of the earth, with responsibilities for future generations. It is, admittedly, a large step from the view that individuals have certain moral responsibilities to the view that nation-states should embrace them with respect to non-citizens. Nonetheless, the ideals of peaceful resolution of disputes, sharing with the poor, and stewardship of the earth for future generations persuaded religious leaders to endorse the CH principle.

A consideration of context reveals, then, two important underpinnings of the CH principle. In general, aspects of the principle coincide with long-held values. Second, political leaders articulated the principle at a time in history when it was important to develop legal guidance concerning common space resources.

The context in which the CH principle developed also helps explain why its scope of application, content, and legal status have remained so disputed. No one global forum arrived at consensus on the meaning of

49. The Old Testament of the Bible calls on property owners to leave a portion of their lands' production to "the alien, the orphan, and the widow." Deuteronomy 24: 19-21; id. 15:7-8; Leviticus 19:10; Proverbs 25:21. In the New Testament, Jesus called on people to share material wealth with the less fortunate (and to cultivate a rightness of spirit). Matthew 5:42; Luke 18:22. The Koran describes "true piety" or "righteousness" as encompassing the giving "of one's substance, however cherished, to kinsmen, and orphans, the needy, the traveler, beggars." Koran 2:177. The Bhagavad Gita, Buddhist scriptures, Confucius's Analects, and Baha'i readings also extol the virtues of generosity and help for the needy. See LEPARD, supra note 48, at 45-49, 86-87.
50. See BASLAR, supra note 1, at 13-20.
51. See id. at 14-20; Borgese, supra note 1, at 1321-26.
52. See BASLAR, supra note 1, at 318-34; see also Ved P. Nanda, The Right to Development: An Appraisal, in WORLD DEBT AND THE HUMAN CONDITION 41 (Ved P. Nanda et al. eds., 1993) (reviewing individual human rights and collective aspects of the right to development).
53. The U.N. General Assembly's 1970 Declaration of Principles, supra note 4, focused only on deep seabed mineral resources, and its compromise language has been the subject of much interpretive debate. See, e.g., Goldie, supra note 1, at 69-105. The International Law Association, the world's foremost international non-governmental organization devoted to the study and development of international law, adopted its Seoul Declaration, supra note 20, two decades after the CH principle was articulated in various forums on the law of the sea, outer space, and Antarctica; did so in an effort to promote the "progressive development" of international law; and arrived at conclusions that were immediately questioned. See ILA NIEO Report, supra note 37, at 411, 414-16, 469.
this general concept early in its development. Much of the development of the CH principle has been left to commentators who, as we saw in Part II, often disagree about the principle's legal status and elements.

The indeterminacy surrounding the CH principle relates to the political context of 1960s and 1970s. Debates over the CH principle reflected deep-seated political tensions between Western developed states and the Third World. In particular, developed and developing states disagreed about whether rights to common space resources should vest in all of humankind (rather than in whoever captured the resource) and about whether benefits should be equitably distributed, taking particular account of the needs developing states.\(^5\)

Formulations of the CH principle that strongly emphasized the vesting of rights in all of humankind and the distribution of benefits to developing states were linked to the New International Economic Order ("NIEO") movement. In line with that movement, many developing states criticized what they saw as Western economic exploitation. For those states, the traditional law of the sea, based on high seas freedoms, embodied such exploitation. Only developed states had the economic wherewithal to send factory ships to fish freely off the coasts of developing states, depleting coastal fisheries. Only maritime powers had navies that could sail near the shores of developing states or through their straits, posing security and environmental risks. The CH principle as applied to deep seabed minerals – a principle incorporating shared access to those common space resources, common management responsibilities, and equitable distribution of benefits – was an antidote to developed state privileges under the traditional law of the sea. In Pardo's words:

We wanted dignity for poor countries and an end to humiliating financial hand-outs, by giving even the poorest

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54. In the mid-1960s and early 1970s, some Western leaders did in general terms assert the need to respect the interests of all humanity in common spaces. For example, in 1966 U.S. President Lyndon Johnson declared, "[w]e must insure that the deep seas and the ocean bottom are, and remain, the legacy of all human beings." President Lyndon Johnson, Remarks at the Commissioning of the New Research Ship, The "Oceanographer," in 2 WEEKLY COMP. PRES. DOCS. 930, 931 (1966); see EDWARD WENK, JR., THE POLITICS OF THE OCEAN 212-13, 258 (1972). Four years later, President Richard Nixon issued a statement referring to deep seabed mineral resources as "the common heritage of mankind," proposing "the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries," and calling for "international machinery" to "authorize and regulate exploration and use of seabed resources beyond the continental margins." President Richard Nixon, Statement About United States Oceans Policy (May 23, 1970), reprinted in 2 NEW DIRECTIONS IN THE LAW OF THE SEA: DOCUMENTS 751-52 (S. Houston Lay et al. eds., 1973). These U.S. statements did not, however, fully embrace all aspects of the CH principle.

55. See Larschan & Brennan, supra note 1, at 306-12.
members of the international community the opportunity to obtain access to marine technology at a tolerable cost and to participate on a basis of equality in the management and development of very significant resources.

Finally, we wanted radically to change the traditional law of the sea which, we believed, reflected the interests of only a few members of the international community. It certainly was not in harmony with the ever more urgent need of cooperation in addressing world problems, and for environmental sensitivity and sustainable cooperative development of world resources. In short, we wanted the common heritage principle to replace freedom of the seas as the foundation of international law of the sea.56

If it proved impossible to extend the CH principle to all ocean spaces, its application to deep seabed mineral resources could, in Pardo's view, partially counterbalance navigational and other privileges accorded maritime powers. The political tension between NIEO proponents and Western leaders who resisted restrictions on free enterprise and were skeptical of international bureaucracy shaped how the CH concept was implemented in Part XI of the LOS Convention.

IV. IMPLEMENTING THE COMMON HERITAGE PRINCIPLE IN TREATY LAW

Legal principles have value even if left in general terms. Indeed, it is not always desirable to convert broad principles into more concrete or determinate rules. Principles of international law57 may fill gaps in rules and provide decision makers with a guiding mindset – a reminder of basic objectives of the law – when they interpret or apply rules. Principles, when applied in good faith, also allow for, in David Caron's words, "diversity within convergence."58 That is, they may accord different states discretion to pursue a common objective in different ways, in line with particular domestic political and legal arrangements.

56. Arvid Pardo, The Origins of the 1967 Malta Initiative, 9 INT'L INSIGHTS 66, 69 (1993). Pardo also acknowledged that Malta had certain selfish concerns at stake: Government officials hoped that the initiative would bolster Malta's political standing with other states, especially in the Mediterranean, and that Malta might become the headquarters of a significant international institution. Id.

57. I refer to broad principles embodied in treaties and customary international law, as well as to "general principles of law" derived from analogies to municipal law principles.

A legal principle need not be incorporated in treaty law in order to have significance. Indeed, even as soft law, political concept, or "emerging customary international law," a principle may be used to influence debates and shape legal developments.

However, the CH principle itself points towards its eventual incorporation and elaboration in treaty rules. If there is to be "common management" or at least some cooperative decision-making structure concerning common space resources — one commonly listed element of the CH principle — the managers must know the governing procedures. If natural resources or other benefits are to be shared equitably, it will be helpful to learn exactly what is to be shared and how distribution is to take place. The uncertainty about elements of the CH principle, noted in Part II, may suggest the desirability of more determinate language to guide states and other actors operating under the principle. To this end, the U.N. General Assembly's 1970 Declaration of Principles concerning deep seabed mineral resources provided that "an international régime . . . including appropriate international machinery to give effect to [the Declaration's] provisions shall be established by an international treaty of a universal character, generally agreed upon."59

The International Law Association's 1986 Seoul Declaration indicated that the CH principle was "to be specified by internationally agreed regimes."60

Indeed, a few treaties have incorporated the CH principle. The Moon Treaty explicitly does so,61 and also sets out in general terms several elements commonly associated with the principle. Along with these elements — no acquisition of sovereignty over the moon or its resources, equal access for parties to the use and exploration of the moon, a peaceful purposes provision, and the requirement to carry out exploration of the moon "for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development"62 — the Moon Treaty commits its parties "to undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible."63 However, Part XI of the LOS Convention, which provides that "[t]he Area and its resources are the common heritage of mankind,"64 along with the 1994 Implementation Agreement, which reaffirms the CH character of the Area and its resources,65 are the only international agreements that

60. ILA Seoul Declaration, supra note 20, ¶ 7.1.
61. Moon Treaty, supra note 9, art. 11(1).
62. Id. arts. 2, 4, 11.
63. Id. art. 11(9).
64. LOS Convention, supra note 2, art. 136.
65. Part XI Implementation Agreement, supra note 3, pmbl.
have as yet developed detailed rules and procedures to implement the CH principle.66

The LOS Convention/1994 Implementation Agreement regime for deep seabed mining has been analyzed in depth elsewhere.67 For present purposes, two general points deserve emphasis. First, negotiating compromises resulted in a regime that, broadly, leaves states operating through the International Seabed Authority ("ISA" or "Authority") to represent humankind, but, in its details, does not fully reflect several elements commonly associated with the CH principle. Second, the practice of states and international institutions has reinforced at least some CH features of the LOS Convention/1994 Implementation Agreement deep seabed mining regime.

The 1982 Convention itself reflected compromises related to the CH principle. In negotiating the Convention, the political tensions noted in Part III of this essay were evident. First, the deep seabed mining regime in Part XI of the LOS Convention formed part of a "package deal." Many developed states did not truly embrace the CH principle, but were willing to accept its application to the Area and its minerals as part of a package, the price for assurances in the LOS Convention of expanded navigational rights and limits on coastal state jurisdiction. Second, Part XI in its original form did not fully incorporate the version of the CH principle advocated by Pardo and many developing states. For example, Part XI established a so-called parallel system, whereby national or private companies could exploit seabed resources in one of a pair of mining sites; the Enterprise, which is the mining arm of the ISA, or a developing state could mine only the second site.68 This parallel

66. The CH principle has been discussed in conjunction with other treaties, but it is debatable whether they implement the principle. Some features of the Antarctic Treaty system, e.g., reserving the continent for peaceful purposes, protecting the environment, and sharing the results of scientific research, reflect elements of the CH principle. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 72. However, other features appear incompatible with the CH principle, notably claims to sovereignty, a ban on mineral exploitation (rather than exploitation with equitable distribution), and management by only some parties to the Antarctic Treaty (rather than global common management). See BASLAR, supra note 1, at 243-76; Guntrip, supra note 1, at 404-05. A few other treaties also contain language that broadly echoes the CH principle. See Convention for the Protection of the World Cultural and Natural Heritage pmbl., Nov. 16, 1972, 1037 U.N.T.S. 240 (referring to cultural and natural heritage sites as "the heritage of all the nations of the world"); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies pmbl., Jan. 27, 1967, 610 U.N.T.S. 205 (referring to outer space as the "province of all mankind"). These treaties do not elaborate a detailed regime for common management or for equitable distribution of benefits.

67. For an introduction to the deep seabed mining regime, see LOUIS B. SOHN, KRISTEN GUSTAFSON JURAS, JOHN E. NOYES & ERIK FRANCKX, LAW OF THE SEA IN A NUTSHELL 339-45, 351-60 (2010).

68. See LOS Convention, supra note 2, Annex III, arts. 3, 8-9.
system undercut the equitable distribution or resource-sharing aim of the CH principle with respect to a significant portion of seabed resources.\textsuperscript{69} Overall, the meaning of the CH principle, which is not defined in Article 136 of the LOS Convention, was linked to particular treaty provisions. According to the influential \textit{Virginia Commentary}, the meaning of "common heritage of mankind . . . for the purposes of the Convention" can be derived from other provisions of Part XI.\textsuperscript{70}

The 1994 Implementation Agreement reflected a changing global political situation. Developed states refused to accept the LOS Convention because they opposed its deep seabed mining provisions; the United States under the Reagan administration was the most vocal opponent of those provisions. Developing states agreed to changes that benefited developed states and incorporated market-oriented features into Part XI. Many developing states were, by the end of the twentieth century, less enamored of NIEO precepts than they had been a few decades earlier, and the Preamble to the 1994 Part XI Implementation Agreement explicitly "note[s] the political and economic changes, including market-oriented approaches, affecting the implementation of Part XI."\textsuperscript{71} States agreed on changes necessary to persuade developed states to accept the LOS Convention just months before it was due to enter into force in November 1994. These changes are set out in the Implementation Agreement and its Annex, which are "interpreted and

\textsuperscript{69} However, other LOS Convention provisions – e.g., requiring the transfer of technology to developing states, obligating mining companies to pay significant fees to assist with the Authority's expenses, and requiring parties to the Convention to fund the mining activities of the Enterprise or provide it with technology – could have a redistributional effect. See \textit{id.} Annex III, arts. 5(1), 13, Annex IV, art. 11(3).

\textsuperscript{70} 6 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶ 136.8(a) (Satya N. Nandan ed., 2002) (emphasis added). The \textit{Commentary} then summarizes some of the relevant provisions of Part XI, section 2 of the LOS Convention: [No] state may claim or exercise sovereignty or sovereign rights over the Area (article 137(1)); rights to the resources of the Area are vested in humankind as a whole and may not be alienated (article 137(2)); activities in the Area are to be carried out for the benefit of humankind as a whole, "irrespective of the geographical location of States, whether coastal or landlocked" (article 140(1)); financial and other economic benefits derived from activities in the Area are to be shared equitably (article 140(2)); the Area is to be used exclusively for peaceful purposes and can be used by all States without discrimination (article 141); and States have a responsibility to protect the marine environment from harmful effects that may be caused by activities in the Area (article 145). In addition, the principle of the common heritage of mankind requires that the interests and needs of developing States, and especially the landlocked and geographically disadvantaged among them, be taken into particular consideration in the conduct of all activities undertaken in the Area (e.g., articles 140(1), 143(3)(b), 144 and 148).

\textit{Id.}

\textsuperscript{71} Part XI Implementation Agreement, \textit{supra} note 3, pmbl.
applied together" with Part XI of the LOS Convention "as a single instrument."72

The Implementation Agreement differed significantly from Pardo’s original vision of a CH regime. Some provisions, for example, affect the goal of equitable distribution of benefits: provisions for the mandatory transfer of technology to developing states “shall not apply”;73 the Enterprise is to operate through joint ventures in accordance with “sound commercial principles,” and the requirement that States Parties fund the Enterprise “shall not apply”;74 any state on the Authority’s Finance Committee, which would include the United States should it become a party to the LOS Convention, could block financial distributions.75 Other changes call into question whether the Authority is to be operated under a true common management system: any one of four chambers of states, each composed of states with similar characteristics (including a chamber of developed states), may block actions of the Authority’s Council;76 LOS Convention provisions for a Review Conference that might have resulted in amendments to Part XI binding on parties even without their consent “shall not apply.”77 One commentator has concluded that the 1994 Implementation Agreement pays “mere lip-service to [the CH] principle” and that the Agreement and its Annex “have destroyed [the principle’s] substance as defined in the 1970 Declaration [of Principles].”78 The U.S. view was that “the common heritage principle fully comports with private economic activity in accordance with market principles.”79

Despite these assessments, however, traditional elements of the CH principle remain in place. As a formal matter, the 1994 Implementation Agreement did not change basic features of the CH concept set out in the LOS Convention’s Part XI, section 2 – e.g., the prohibition on sovereign claims, the basic provision concerning the

72. Id. art. 2(1). Provisions of the Implementation Agreement prevail “[i]n the event of any inconsistency” between the Agreement and Part XI of the LOS Convention. Id.
73. Id. Annex § 5.
74. Id. Annex § 2.
75. See id. Annex § 9(3), (7)-(8).
76. Id. Annex § 3(9)(a), (15)-(16).
77. Id. Annex § 4.
78. Degan, supra note 1, at 1374; accord Anand, supra note 1, at 16-18.
equitable sharing of benefits, the peaceful purposes provision, and the requirement to protect the marine environment. Furthermore, states and the ISA have reinforced aspects of the CH principle. By operating continuously under the LOS Convention/1994 Implementation Agreement, states and the ISA have, for example, emphasized that the Area is not subject to claims of sovereignty. The Authority’s mining codes and contracts with miners mandate protections for the marine environment, one component of a CH regime. The CH notion of sharing benefits is reflected in Authority-sponsored marine scientific research concerning the Area, the results of which are widely distributed.

In practice, no state is actively pursuing any alternative deep seabed mining regime. Although the U.S. Code still provides for a registration mechanism for U.S. nationals involved with deep seabed mining initiatives, U.S. companies have essentially abandoned any such initiatives. Activity is taking place only under the LOS Convention/1994 Implementation Agreement regime. Parties to the LOS Convention apply to the ISA, on their own behalf or by sponsoring their nationals, in order to undertake mineral exploration, prospecting, and eventually exploitation, and miners enter into contracts with the Authority for those purposes. The possibility of a competing deep seabed regime appears extremely remote, and any such regime would surely be condemned as inconsistent with international law. The LOS Convention/Part XI Implementation Agreement regime has become the “only game in town.”

80. See Part XI Implementation Agreement, supra note 3, pmbl.; LOS Convention, supra note 2, arts. 136-49; supra note 70.
81. In applying the core elements of the CH principle as set out in the LOS Convention, the Authority is called on to take into account not only the interests of States Parties but of all states. LOS Convention, supra note 2, pmbl.
82. See Int’l Seabed Auth., Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISBA 16/A/12 (May 7, 2010); Int’l Seabed Auth., Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6/A/18 (Oct. 4, 2000).
85. See SOHN ET AL., supra note 67, at 360.
Another institutional actor has also significantly reinforced the CH underpinnings of the Part XI/Implementation Agreement regime. In May 2010, in response to a request by Nauru, the ISA's Assembly asked the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea ("SBC" or "Chamber") to issue an advisory opinion on three questions concerning, to quote the name of the case, "Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area." In the resulting unanimous opinion, which the Authority's Council and Assembly in turn noted with appreciation, the SBC discussed several emerging aspects of the principle of sustainable development, including them within the parameters of sponsoring states' obligation of due diligence; these aspects have a bearing on how duties of environmental protection concerning the Area are to be carried out. The Chamber also explicitly highlighted aspects of the CH principle as set forth in the deep seabed treaty regime. The Chamber reiterated that the LOS Convention sought to "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked," concluding that various Convention articles "require effective implementation with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States." The "role of the sponsoring State," the SBC found, "is to contribute to the common interest of all States in the proper implementation of the principle of the common

88. According to Article 191 of the LOS Convention, the SBC "shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities." LOS Convention, supra note 2, art. 191. More particularly, the three questions concerned: 1) the content of the obligations and responsibilities of sponsoring states under the Part XI LOS Convention/1994 Implementation Agreement regime; 2) the extent of liability of sponsoring states should a sponsored entity fail to comply with its undertakings; and 3) the measures a sponsoring state must take to fulfill its responsibilities under the LOS Convention. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 50 I.L.M. 455, ¶ 1 (2011) (Seabed Disputes Chamber of the Int'l Tribunal of the Law of the Sea, 2011).


90. According to some commentators, the concept of sustainable development underpins the environmental protection aspects of the CH principle. See Responsibilities and Obligations ¶¶ 117-20, 136-37; see also French, supra note 24, at 538-44.

91. Responsibilities and Obligations ¶ 163 (quoting LOS Convention, supra note 2, pmbl).
The Chamber also determined that "obligations relating to preservation of the environment . . . in the Area" have an "erga omnes character," suggesting that the obligations are applicable to all humankind.93

The advisory opinion also highlighted compliance mechanisms that could help specify rights under this erga omnes notion. The SBC suggested that the Authority itself – by virtue of its implied powers under Article 157(2), for the LOS Convention itself is silent on the point – may make a claim for compensation for "damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment."94 Furthermore, "[e]ach State Party may also be entitled to claim compensation" for breach of these erga omnes obligations.95 Other actors that could make claims include "entities engaged in deep seabed mining, other users of the sea, and coastal States."96 These claims need not be relegated to diplomatic protests. Article 187 of the LOS Convention, concerning the jurisdiction of the SBC in contentious cases, provides one avenue of recourse for States Parties, the Authority, or contractors with respect to breaches by sponsoring states. The SBC’s opinion reinforces the notion that the Area and its resources are part of the common heritage of humankind.97

Although the ISA may challenge actions of sponsoring states that violate CH requirements in the Area, it lacks the authority to challenge coastal states’ maritime boundaries that affect the size of the Area. The Area is bounded by coastal states’ continental shelves, and in many regions the outer limits of the shelf extend beyond 200 nautical miles from baselines. Coastal states themselves set the outer limits of their continental shelves, the general criteria for which are specified in Article 76 of the LOS Convention. Coastal states with outer limits beyond 200 miles from baselines also must submit data to the Commission on the Limits of the Continental Shelf ("CLCS"), a technical body established by the Convention, and limits established "on the basis of" CLCS recommendations "shall be final and binding."98 Although outer limits lines affect the extent of the Area and hence where the CH principle applies, Article 187 limits the jurisdiction of the SBC in contentious cases to disputes involving "activities in the Area"; this limitation precludes the Authority from challenging the legality of

92. Id. ¶ 226.
93. Id. ¶ 180.
94. Id. ¶¶ 179-80.
95. Id. ¶ 180.
96. Id. ¶ 179.
97. For discussions of the SBC’s advisory opinion, see David Freestone, International Decision, 105 AM. J. INT’L L. 755 (2011); French, supra note 24, at 544-46.
98. LOS Convention, supra note 2, art. 76(8). For a brief overview of Article 76 and the CLCS process, see SOHN ET AL., supra note 67, at 306-17.
continental shelf outer limits set by a coastal state.\textsuperscript{99} In addition, the ISA’s Council or Assembly probably could not request an advisory opinion from the SBC on the legality of the location of an outer limits line.\textsuperscript{100} The potential thus exists for coastal states to assert “creeping jurisdiction” against the Area,\textsuperscript{101} and the international community has not provided effective legal mechanisms to challenge such encroachment. Despite this limitation, however, the international institutional mechanisms governing deep seabed mining can, as noted above, help to reinforce precepts of the CH principle established in the LOS Convention/1994 Implementation Agreement regime.

V. THE FUTURE OF THE COMMON HERITAGE PRINCIPLE

What lies ahead for the CH principle? It is useful to break this inquiry into more specific questions. First, what of the principle’s application in the treaty regime governing deep seabed mining? Treaty provisions, such as those in the LOS Convention/1994 Implementation Agreement, may cure much of the indeterminacy associated with the principle and create specific CH regimes. Widespread acceptance of a treaty may also bolster support for the CH principle as a norm of customary international law. As discussed in Part IV of this essay, the LOS Convention/Implementation Agreement regime – our only example of a widely accepted treaty regime specifically incorporating the CH principle – appears stable, despite the United States not being a party. Indeed, the practice of states and international institutions operating under this regime reinforces the CH principle as applied to deep seabed mining.

Second, does the CH principle, as set out in Article 136 of the LOS Convention, apply to non-mineral activities on the seabed beyond the limits of national jurisdiction? Article 136, after all, applies to “the Area” as well as to its mineral “resources.” Some have argued that such features of the Area as deep-sea hydrothermal vents (and perhaps their living resources, prized for biotechnology) are subject to the CH principle.\textsuperscript{102} Others contend that such resources are instead governed

\textsuperscript{99} See John E. Noyes, Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf, 42 VAND. J. TRANSNAT’L L. 1211, 1239-40 (2009). The LOS Convention defines “activities in the Area” as “all activities of exploration for, and exploitation of, the resources of the Area,” and “resources” in the Area are in turn defined in terms of mineral resources. LOS Convention, supra note 2, arts. 1(1)(3), 133(a).

\textsuperscript{100} See Noyes, supra note 99, at 1256-58.

\textsuperscript{101} Franckx, supra note 1, at 566-67.

under other legal regimes, including the high seas freedom of fishing.\textsuperscript{103} The ISA is not authorized directly to regulate deep-sea vents, for its mandate is limited to particular functions concerning mineral "resources" and mining-related "activities in the Area."\textsuperscript{104} It seems quite possible that in trying to fashion a legal regime applicable to living resources at deep-sea vents, political tensions similar to those attending the negotiation of the deep seabed mining regime may surface. Any generally accepted regime for managing issues arising in the Area other than seabed mining must await an agreement, the details of which appear unlikely to reflect the CH principle in any "pure," Pardo-esque form, if at all.\textsuperscript{105}

Third, what of the CH principle’s future with respect to areas other than the deep seabed? What can it contribute to other common space regimes? Here again, political opposition to the redistribution and common management prongs of the CH principle persists. It may well be difficult to incorporate the redistribution element of the principle, which links to NIEO goals, into any generally accepted global legal mechanisms. Although the Moon Treaty explicitly references the CH principle, widespread acceptance of a more detailed international legal regime governing the moon and its resources could depend on jettisoning or redefining the CH principle.

None of this is to say that all the values underlying the CH principle have become unimportant. Its core values surface in other declarations and legal principles. Some elements of the CH principle – for example, reserving the area in question for peaceful purposes – restate values found in the U.N. Charter, other basic international law documents, and moral and religious traditions. The environmental protection component of the CH principle is now reflected in many principles of international environmental law, often under the rubric of sustainable development. The work and structures of regional fisheries management organizations suggest international policy makers recognize that common management mechanisms, or at least some type of cooperative arrangements, are necessary to conserve and manage common space living resources. In short, many values associated with the CH principle continue to find expression, sometimes in modified form, in other international law principles and arrangements.

The controversial equitable redistribution or benefit-sharing element of the CH principle may, however, be too closely linked to the


\textsuperscript{104} See Oxman, supra note 79, at 688-89.

\textsuperscript{105} For discussion of one possible regulatory model, see Scovazzi, supra note 28, at 314-15.
NIEO movement to gain acceptance in new treaties or general international law. This element of the CH principle is in large measure a product of the political climate of the 1960s and 1970s. However, benefit sharing reflects, broadly, a concern with development and the needs of developing states that continues to be recognized in many international law and soft law instruments. For example, the concept of common but differentiated responsibilities has been incorporated in some treaties, reflecting the concern that many developing states require additional time or resources in order to contribute on the same basis as developed states to ameliorating international environmental or common space problems. Similar sentiments underlie the numerous international efforts at capacity building. Although capacity building and common but differentiated responsibilities concern developed states’ obligations, they also reflect the needs of developing states. Many policy makers may argue that redistributing the proceeds of resource exploitation is not the best way to further development in Third World states. But many also recognize that it is difficult to achieve a stable and just world without such development, and they search for alternative modalities toward that end. Ved Nanda has written wisely that the underpinnings of an asserted right to development include “enhanc[ing] the human condition, recogniz[ing] basic needs, and foster[ing] participatory and sustainable development.” Even if the world is unwilling to embrace direct wealth redistribution, as Pardo envisioned in his formulation of the CH principle, the goal of development remains to be addressed through other mechanisms.

In sum, the CH principle incorporates several norms that have been recognized elsewhere, including reserving an area for peaceful purposes, environmental protection or sustainable development, and cooperation in the management of common space resources. The most controversial aspect of the CH principle, involving the equitable sharing of benefits, may not survive in new contexts. But other principles, international instruments, and international arrangements have recognized the development needs of people in developing states.

International lawyers and policy makers are of course concerned about much more than the abstract meaning of principles and the identification of their underlying values. They also engage with process – who decides, in what forum, about interpreting and applying principles and rules – and with compliance mechanisms. The fully

106. See Franckx, supra note 1, at 566 n.139.
operational deep seabed mining regime of the LOS Convention/1994 Implementation Agreement provides one example of international dispute settlement processes and compliance-enhancing mechanisms addressing common space and international environmental issues. Observers may well evaluate this regime in terms of its real-world contributions to sensible environmental protections, the fostering of marine scientific research, and the avoidance of conflicts in exploring for and exploiting deep seabed minerals. The fact that the deep seabed mining regime formally embodies the CH principle may prove less significant than the regime's concrete achievements concerning various specific goals that the world recognizes as essential.
Remarks in Honor of Professor Ved P. Nanda

It is a great honor and privilege to be able to make these remarks about our dear friend and colleague, Professor Ved P. Nanda, an outstanding, prolific and renowned international law scholar, teacher, and mentor. Professor Nanda is a passionate supporter of human rights, advocate of international environmental law, proponent of sustainable development, and major contributor to the development of modern international law. Professor Nanda has espoused the application of the rule of law to international armed conflicts and consistently promoted global peace. He has international respect as an author of leading treatises, books and articles on international law and as an exceptional teacher and mentor. He has won many honors and awards.

Ved and his wife Katharine are wonderful friends and colleagues and we have known them and collaborated with them for decades. We have adored their daughter Anjali Nanda since she was a child. Anjali recently worked for Sherry at the law office and lived with us in Hawaii. She was very devoted to Sherry’s human rights cases. Another project was on black carbon and international environmental law. Anjali later developed her own hypothesis on black carbon and produced an excellent article further analyzing this type of air pollution focusing on India, which was published by the Denver Journal of International
PARTICULARLY SENSITIVE SEA AREAS

Law and Policy. We are very pleased to see that she is now Editor in Chief of this publication.

In Hawaii we call our very closest friends "calabash family" which means they are family. Ved, Katharine and Anjali are our calabash family. We think of the many special times together: sitting at a café in Shimla drinking tea, walking on the Champs-Elysees and in the 6th Arrondissement, teaching together and collaborating on international environmental law issues and human rights, enjoying the warmth and beauty of Hawaii, attending a Ved Nanda Center for International and Comparative Law Conference in Denver, and many other things. Together Ved, Katharine and Anjali have a rare generosity of spirit and ethical approach to all matters in life and an unwavering commitment to social justice issues and making the world a better place. They have our profound respect, admiration, and affection.

In honor of Ved’s contributions to international environmental law and human rights, we have examined the establishment of designated areas in the ocean that restrict global shipping, and especially Particularly Sensitive Sea Areas (PSSAs), recognized by the International Maritime Organization (IMO). Guidelines for identification and establishment of PSSAs have been developing in the last 25 years. PSSAs provide one way to correct the imbalance favoring freedom of navigation over the interests of the coastal state to provide some protection to an area of its marine environment. Designation of a PSSA by the IMO at the request of a coastal state can be a powerful tool for protecting environmentally sensitive areas in the territorial seas and Exclusive Economic Zones (EEZs), for placing some limits on the freedom of navigation and imposing higher standards for the protection of the environment than is allowed under existing treaties and conventions.

PARTICULARLY SENSITIVE SEA AREAS—PROTECTING THE MARINE ENVIRONMENT IN THE TERRITORIAL SEAS AND EXCLUSIVE ECONOMIC ZONES

The oceans cover approximately 71 percent of the Earth’s surface and hold approximately 90 percent of the planet’s living biomass. Ocean ecosystems support all life on the planet. They provide oxygen and food, manage vast amounts of human pollutants, buffer the weather and regulate global temperature. The oceans are divided into several principal oceans and smaller seas. Because it is the principal component of Earth’s hydrosphere, the world ocean is integral to all known life, forms part of the carbon cycle, and influences climate and weather patterns.

Large ships have negative impacts on marine environment, wildlife and habitats through accidental spills of oil or the deliberate, operational discharge of wastes, chemical residues and ballast water as well as the use of anti-fouling paints, and noise. It has been long recognized that large vessels do threaten the marine environment by acci-
dents, physical damage and standard operational practices. There can be severe physical damage to coral reefs. The bunker fuel, a heavy fuel oil the shipping industry utilizes to run its engines, poses the greatest threat to the marine environment. Shipping companies favor such low-grade fuel because it is cheap. But it is extremely viscous, almost like sludge, and needs to be heated before injected into engines. The texture and viscosity of the bunker fuel makes it more ecologically dangerous and more difficult to clean up.

In creating the EEZ, United Nations Convention on the Law of the Sea (UNCLOS) gave coastal states significantly greater control than they had previously enjoyed over the waters adjacent to their territorial seas. UNCLOS also made coastal states responsible for protecting marine resources in their EEZs through national legislation and regulation. Despite giving coastal states increased control and responsibility over their EEZs, the EEZ compromise continues to favor the freedom of navigation over coastal state jurisdiction. UNCLOS's requirement that coastal states have "due regard" for the freedom of navigation sharply constrains their ability to impose and enforce environmental efforts.

Since the ratification of UNCLOS, international shipping has increased dramatically while the global marine environment has degraded rapidly. With the expansion of maritime trade and the growth in the size of fleets, risks for the marine environment have increased. The balance UNCLOS struck in favor of the freedom of navigation is no longer equitable. Coastal states have difficulty in protecting their marine environment from the dangers and hazards presented by global shipping. UNCLOS protects navigational freedom by placing heavy constraints on coastal states' jurisdiction in their EEZs. In so doing, the Convention curtails the ability of coastal states to implement and enforce measures protecting marine resources.

1. The Law of the Sea Convention identifies categories of areas that may require greater environmental protection, due to rare or fragile ecosystems. Article 211(6)(a) provides:

Where the [general] international rules and standards . . are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal States, after appropriate consultations through the competent international organization with any other States concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities.

UNCLOS limits coastal state environmental efforts in order to protect the freedom of navigation by providing coastal states with few options for imposing protective measures even in navigationally challenging or ecologically sensitive areas. Article 211(6)(a) provides that where an area in an EEZ is particularly navigationally challenging or ecologically sensitive, a coastal state may "direct a communication" to "a competent international organization" (which has been generally interpreted to refer to the IMO) to permit the adoption of coastal state regulations in that area that are more stringent than international ones. This article provides coastal states with few effective options, however, because subsection (6)(c) mandates that requested restrictions cannot include "design, construction, manning or equipment standards other than generally accepted international rules and standards."

The IMO is the primary international organization that sets maritime rules and standards. A coastal state's jurisdiction over vessels in transit through its exclusive economic zone is overall limited to enforcing generally accepted international rules and standards designed for the protection or preservation of the marine environment. The IMO has developed rules to authorize coastal states to impose protective measures that restrict the freedom of navigation in ecologically sensitive marine areas. If a coastal state believes international standards are inadequate to protect a clearly defined area of particular ecological sensitivity within its EEZ, it may apply to the IMO for authorization to adopt special mandatory measures for prevention of vessel pollution within the area. Those measures, if approved by the IMO, may exceed international standards.

The IMO through its Marine Environment and Protection Committee (MEPC) began its study of the issue of PSSAs in response to resolution 9 of the 1978 International Conference on Tanker Safety and Pollution Prevention concerning the protection of such sea areas. Resolution 9 recognized IMO authority to adopt regulations to protect the marine environment, to prevent marine pollution and waste from ships by iden-
tifying special areas of protection. This authority enhanced the already existing designation of special areas in the 1973 MARPOL Convention.\(^3\)

In 1987, the IMO adopted Resolution 619(15), which recommended the use of pilots for several high-risk ship transports seeking passage through the Torres Strait, the Great North East Channel, inner route of GBR, and Hydrographers' Passage.\(^4\)

In 1990, the Great Barrier Reef (GBR), which had long been considered an area of ecological, social, cultural, economic, and scientific importance, was recognized as the first PSSA. The IMO approved compulsory pilotage, backed by criminal penalties, which are not permitted under other international conventions. Australia was eager to protect a particularly vulnerable part of the GBR, between Mackay (Island) and the Tropic of Capricorn. The area of the Reef covered by the PSSA “extends 2,300 kilometres along the east coast of Queensland and covers an area of 346,000 square kilometres,” passing through both Australia’s territorial sea and its EEZ.\(^5\) The Torres Strait was not part of the Great Barrier Reef Region PSSA initially, but the IMO extended the Reef PSSA to the Torres Strait in 2005. The area is also a Marine Protected Area under Australian domestic law and a Special Area under the International Convention for the Prevention of Pollution from Ships.\(^6\)

In 1991, the IMO passed IMO Assembly Resolution 720(17), establishing “guidelines for designating and identifying Particularly Sensitive Sea Areas (PSSAs).”\(^7\) PSSAs are “areas with ‘ecological, socio-economic, or scientific’ importance.” The IMO established that it can designate areas as PSSAs not only in states’ territorial seas but also in their EEZs. However, these initial criteria and standards were too strict and the procedures too arduous and complex. In 1997, the archipelago of Sabana-Camagüey was recognized as a PSSA as requested by Cuba and it was the only PSSA recognized on the basis of the original Resolution 720(17) criteria.\(^8\)


\(^4\) IMO, Assembly, Use of Pilotage Services in the Torres Strait and Great Barrier Reef Area, Resolution A.619(15) (Nov. 19, 1987).


\(^7\) IMO, Assembly, Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Areas, Resolution A. 720 (17) (Nov. 6, 1991).

\(^8\) IMO, MEPC, Identification of the Archipelago of Sabana-Camagüey as a Particularly Sensitive Sea Area, Resolution MEPC.74(40) (Sept. 25, 1997).
coastal ecosystems of this archipelago have been described as "almost pristine."\(^9\)

There were IMO amendments to the procedures in Resolution 720(17) to make the process more workable. In 1999 Resolution 885(21)\(^{10}\) was adopted and in 2001 Resolution 927(22) was adopted making further clarifying changes.\(^{11}\) In 2005, additional revisions to the guidelines for identification and designation of PSSAs were approved.\(^{12}\)

A PSSA is defined as "an area that needs special protection through action by IMO because of significance for recognized ecological, socio-economic or scientific reasons and because it may be vulnerable to be damaged by international shipping activities." However, a PSSA does not include any explicit prescribed protective mechanisms, but an application to the IMO for PSSA designation needs to be accompanied by specific proposed Associated Protective Measures (APM).\(^{13}\)

Section 6 of the Guidelines refers to the spectrum of Associated Protective Measures approved or adopted by IMO to prevent, reduce, or eliminate the threat or identified vulnerability. There can be special discharge standards within PSSAs (other than by means of designation as a "special area" under MARPOL 73/78\(^{14}\)) and "other measures aimed at protecting specific sea areas against environmental damage from ships, provided that they have an identified legal basis." When an area is designated as a PSSA, a coastal state can ask the IMO for permission to issue requirements for vessels and these requirements can and do impose restrictions on the freedom of the seas and passage in the PSSA. Applications for designation of a PSSA normally include a proposal for at least one measure to protect the area from shipping.

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10. IMO, Assembly, Procedures for the Identification of Particularly Sensitive Sea Areas and the Adoption of Associated Protective measures and Amendments to the Guidelines Contained in Resolution A.720(17), Resolution A. 885(21) (Nov. 25, 1999).
11. IMO, Assembly, Guidelines for the Designation of Special Areas Under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, Resolution A.927 (22) (Nov. 19, 2002) (Assembly Adoption of both Guidelines for the Designation of Special Areas under MARPOL and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas).
12. IMO, Assembly, Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, Resolution A. 982 (Dec. 1, 2005).
13. Id.
14. The MARPOL Convention also includes express provisions for designating certain waters as "special areas," which may be subject to more stringent discharge requirements, including, where appropriate, a complete ban on discharges that would otherwise be permitted under the convention's annexes. The IMO Marine Environment Protection Committee is the approval body for "special area" designations. Approval is conditioned on the availability of adequate reception facilities for the wastes. See, e.g., MARPOL, Annex I, regs. 1(10) (definition of "special area"), 15.B, 34.
Associated protective measures can include a wide range of actions, but they are limited to actions within the purview of IMO, and must relate to international shipping activities. Specific associated protective measures can be used to control the maritime activities in that area, such as compulsory pilotage programs, separated shipping, traffic lanes, areas to be avoided, reporting requirements, no anchor zones, strict application of discharge and equipment requirements for ships, and installation of vessel traffic services (VTS). The PSSA Guidelines explicitly state that associated protective measures may include:

1. any measure that is already available under an existing IMO instrument; or is to be adopted by the IMO; and
2. any measure that does not yet exist which is described as the “development and adoption of other measures aimed at protecting specific sea areas against environmental damage from ships, provided that they have an identified legal basis.”

Allowing for these “other measures” permits the petitioning coastal states to seek measures beyond those already identified or approved.

To be identified as a PSSA, a proposed area must meet at least one of the ecological, socio-economic or scientific criteria listed in section 4 of the Guidelines, Annex I. The 2005 Guidelines have amended some of the criteria and added others to incorporate developing principles contained in recent international instruments such as the Biodiversity Convention. The earlier guidelines’ original ecological criteria concentrated on the significance of the sea area for its uniqueness, dependency, representativeness, diversity, productivity, naturalness, integrity or vulnerability. In the 2005 Guidelines, the uniqueness criteria have been expanded to include the concept of rare ecosystems or habitats. The diversity criteria incorporate genetic diversity as well as the earlier standards of species diversity and highly varied ecosystems, habitats, or communities. Three new criteria have been added: critical habitat; spawning and breeding grounds, and biogeographic importance.

The required link to risk from international shipping activities is now emphasized through a section detailing data required to be submitted. This includes: vessel traffic characteristics in the area (operational factors, vessel types, traffic characteristics and harmful substances carried); and natural factors (hydrographic, meteorological and oceanographic). The guidelines also suggest providing information on evidence of damage from international shipping activities, history of groundings, collisions or spills in the area and their consequences, foreseeable circumstances under which significant damage might occur, stresses from other environmental sources, and measures already in effect and their actual or anticipated beneficial impact.

15. IMO, supra note 13.
These data requirements could present problems for countries with limited technical capacities or financial capabilities and the IMO recognizes that. Thus the guidelines provide: “IMO should, in assessing applications for designation of PSSAs and their associated protective measures, take into account the technical and financial resources available to developing Member Governments and those with economies in transition.”

The IMO language reflects the language of Article 211(6)(a) of UNCLOS, but the PSSA designation goes one step further: it allows the IMO to impose measures to be taken in all maritime zones of a coastal state, including measures that affect design, construction, manning, or equipment standards. The creation of the PSSA mechanism was an important and significant step forward in expanding coastal states’ ability to protect marine resources, as it allows the imposition of new restrictive measures in sensitive areas of EEZs.

All IMO member governments are obligated to ensure ships flying their flag comply with the APMs for that area. To give an area the status of a PSSA, is potentially a very important designation for the protection of that area. It gives coastal states the right to enact national legislation to implement the Associated Protective Measures.

Some States may prefer to adopt an international convention or include a new protocol to an existing Convention. The reason is that the guidelines do not have a binding force . . . . Guidelines which are widely accepted and voluntarily put into force may lead to more positive and significant results than a treaty which is not ratified and applied or is ratified and applied by only a few States.

In 2002, Prestige, a single-hulled container ship carrying 77,000 metric tons of two different grades of heavy fuel, split in half and sank, releasing over 20 million US gallons (76,000 m) of oil into the sea. The Prestige catastrophe seriously threatened coastal areas of Portugal, Spain, France and Belgium. In spring 2003, the European Union (EU) banned large, single-hulled tankers carrying heavy grade oil from coming into any European ports and the French National Assembly unanimously enacted a law asserting the right to intercept ships that release polluting ballast waters as far as ninety miles from its Mediterranean coast, and also imposed stricter controls on transient oil tankers. The EU, through those member states together with the UK and Ireland, submitted a proposal to the MEPC asking for the designation of West-
ern European Waters as a PSSA and making those waters completely off-limits for single-hulled oil tankers and other cargo vessels transporting dangerous cargoes. The proposal covered a vast area from the Shetland Islands north of Scotland to the southern Portuguese-Spanish border in the respective states' EEZ and territorial seas. The original text contained a ban of single hull tankers over 600 dead weight tonnage carrying heavy grades of oil, feature which was withdrawn by the proponents of the proposal during the deliberations at the 49th session of the MEPC.19

The Western European Waters proposal created concerns about its potential for interfering with freedom of navigation especially since it was such a large sea area and traditionally a very busy shipping traffic area. The Western European Waters does not comprise a single coherent ecosystem and its environment was not known to be notably vulnerable. However, despite these concerns and objections, the Western European Waters PSSA was designated by the IMO on 15 October 2004.20 “This sequence of events, initiated by five maritime countries to protect their own coastal resources, is a significant example of the ‘state practice’ of restricting navigational freedom in order to protect the resources of the EEZ.”21 The earlier IMO guidelines for application to designate a PSSA were complicated and difficult to satisfy. Between 1991 and 2002, only two PSSAs were recognized. But with the new guidelines adopted in 2005, there was increased activity by coastal nations to protect their marine environments from international shipping.

By 2012, fourteen PSSAs had been approved by the IMO. They include the Great Barrier Reef, Australia (1990); Sabana-Camagüey Archipelago, Cuba (1997); sea area around Malpelo Island, Colombia (2002); marine area around the Florida Keys, United States (2002); Wadden Sea, Denmark, Germany, and the Netherlands (2002); Paracas National Reserve, Peru (2003); Western European Waters, Belgium, France, Ireland, Portugal, Spain, and the United Kingdom (2004); Torres Strait as an extension to Great Barrier Reef, Australia and Papua New Guinea (2005), Canary Islands, Spain (2005); Galapagos Archipelago, Ecuador (2005); the Baltic Sea area, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden (2005); North-West Hawaiian Islands, Papahānaumokuākea Marine National Monument, United States (2008); Strait of Bonifacio, France and Italy (2011), Saba Bank (Caribbean Island of Saba) (2011), and The Netherlands

20. IMO, MEPC, Designation of the Western European Waters as a Particularly Sensitive Sea Area, Resolution MEPC, 121 (52) (Oct. 15, 2004).
21. Jon M. Van Dyke, Canada’s Authority To Prohibit LNG Vessels From Passing Through Head Harbor Passage To U.S. Ports, 14 OCEAN & COASTAL L.J. 45, 64 (2008).
(approved in principle in July 2011 and to be formally designated by MEPC 64 in Oct 2012).

The definition and coverage of PSSAs has been expanded to better protect the marine environment and to readjust the imbalance between the freedom of navigation and the interests of the coastal state. This is consistent with the precautionary approach and the polluter pays principle. The number of PSSAs is growing. The expanse of ocean space that can be included in a PSSA is large. Important new protective measures have been adopted and can be instituted at any time. There are methods for enforcement. IMO member states are obliged to ensure that the ships flying their flag conform to the PSSA authorized associate protective measures. Coastal states may adopt national legislation and regulations to implement the PSSA APMs. PSSAs constitute a recognition and acceptance of local priorities by international interests. With the recent designation of the Bonifacio Strait, the potential jurisdiction of PSSAs has been extended and straits are now part of the regime of PSSAs. PSSAs have international legitimacy and respect and the PSSA regime has now evolved to the point of being international customary law. The next step is to apply the PSSA regime to include “areas with ‘ecological, socio-economic, or scientific’ importance” in the High Seas beyond national jurisdiction.
THE FUTURE OF ENVIRONMENTAL DISPUTE RESOLUTION

GEORGE (ROCK) PRING* AND CATHERINE (KITTY) PRING**

A new form of environmental governance — the specialized environmental court or tribunal (ECT) — is emerging as a dynamic alternative to the general courts for providing better access to environmental justice in the 21st century. The University of Denver Sturm College of Law’s Environmental Courts and Tribunals Study is conducting the first global comparative analysis of this new phenomenon.¹ Hundreds of ECTs have been established around the world in just the last decade, and, based on the DU study, we predict that ECTs will be the dominant dispute resolution models for environmental risks and crises in the decades to come.

The people and nations of the world are increasingly facing three interconnected environmental risks in the 21st century, with consequent multiple threats to the health of humans and the planet. Those risks are continued degradation of fresh and salt water, air, and soil and the ecosystems dependent on them; the impacts of current and impending climate change; and widespread economic collapse. These risks and how they are managed directly impact the ability of people and nations individually and collectively to achieve sustainable development and a viable future for life on earth. The challenges are no longer confined to countries, regions, or locales in one part of the world,
but are truly global in scope and impact the populations of every
continent. Events perceived to be in one arena generate ripple effects
which result in reduction or increase in the severity of impacts in the
other two areas.

Efforts to manage these related risks are being made now at every
level of government through the development of principles, policy,
legislation, regulations, treaties, agreements, and new governance
institutions. Since the 1970s, environmental laws have been adopted at
the city, state, national, and international levels. As many as 80
nations’ constitutions now include a right to a healthy environment as a
human right, and hundreds of new international environmental legal
authorities have been adopted.\textsuperscript{2} New precepts have emerged — such as
sustainable development, no-transboundary-harm, precautionary,
polluter-pays, environmental justice, equitable utilization of resources,
and other principles.\textsuperscript{3} These and other precepts like climate change
mitigation and adaptation are slowly being incorporated into a new
generation of international, national, and local laws.

Today, the major difficulty is not filling the books with more
environmental laws. Instead, the challenge is ensuring effective
enforcement and compliance with the laws already adopted — and this
can only be done through improved environmental governance and
access to justice. The rapid growth of serious environmental problems,
coupled with increasing public awareness and reaction, has generated
global demands for new forms of governance to adjudicate and enforce
solutions to environmental problems, from the smallest local issues to
the largest global ones. The result has been an explosion of specialized
ECTs and a parallel explosion in environmental litigation.

For the DU Study, we define ECTs as “judicial or administrative
bodies of government empowered to specialize in resolving
environmental, natural resources, land use development, and related
disputes.”\textsuperscript{4} Environmental courts (ECs) refer to bodies within the
judicial branch of government, and environmental tribunals (ETs) are
those within the executive or administrative branch. They include free-
standing ECs and ETs, formal and informal panels of judges within a
court of general jurisdiction (“green benches” or “green lists”),
individual judges within generalist courts who have training and
expertise in environmental law and to whom environmental cases are
assigned formally or informally, and ETs housed within another
government body such as the environmental agency.

\textsuperscript{2} See GREENING JUSTICE, supra note 1, at 10.
\textsuperscript{3} See VED P. NANDA & GEORGE (ROCK) PRING, INTERNATIONAL ENVIRONMENTAL
LAW FOR THE 21ST CENTURY 17-62 (2003), also see the updated Ch. 2 in the new 2d edition
(forthcoming 2012).
\textsuperscript{4} GREENING JUSTICE, supra note 1, at 3.
At the start of 2012, some 465 ECTs are known to exist or to be authorized in 46 countries, over 70 percent of which were created since 2005. Some of the newest examples include eleven administrative courts in Thailand, five four additional ECs in Brazil, and nearly 100 ECs in 15 provinces in China. Kenya adopted a new Constitution in 2010 that requires Parliament to “establish courts with the status of the High Court to hear and determine disputes relating to . . . the environment and the use and occupation of, and title to, land.” Also in 2010, England created its first ET, and India’s Parliament passed a “National Green Tribunal” bill in part to counteract the activist “Green Benches” of its Supreme Court. In 2011, Pakistan added three new environmental tribunals, and South Africa announced it would re-establish an environmental court in Port Elizabeth, Eastern Cape. Other countries, including Ecuador, Bolivia, Vanuatu, Dubai, Abu Dhabi, Lebanon, Jordan, and Kuwait considered establishing an ECT in 2011.

ECTs can be found on every inhabited continent; in civil law, common law, and other legal systems; in jurisdictions from the largest (China, India, Canada, Brazil) to the smallest (Trinidad and Tobago, the City of Memphis, Tennessee); and in both wealthy developed and impoverished developing nations. Interestingly, the nations which have most aggressively embraced ECTs as a mechanism for improving environmental governance are China, Brazil, and developing nations, not the highly developed USA or countries of the EU. Historically, Australia and New Zealand have been leaders in ECT creation, but today ECTs are spreading in Asia (examples include China, India, Japan, the Philippines, South Korea, Thailand), Africa (South Africa, Kenya, Sudan), Europe (Belgium, England, Finland, Hungary, Sweden), South America (Brazil, Bolivia, Guyana), Central America (Costa Rica), and the Americas.


6. Interview with Vladimir Passos de Frietas, former Chief Judge of Federal Court of Appeal, 4th District, Brazil, and Professor of Environmental Law.


and North America (Vermont USA, Ontario, British Columbia).\textsuperscript{11} The United States is not a leader in the ECT field; it has one impressive state EC (Vermont), a number of local (city, county) ECs, and several in-house ETs at the national level, such as the US Environmental Protection Agency’s Environmental Review Board and the US Department of the Interior’s Board of Land Appeals.\textsuperscript{12}

The pressure for creation of ECTs as a new form of environmental governance comes from both environmental advocates and business/development interests, the DU Study found, and it comes in response to any of eight major problems with courts of general jurisdiction:

1. Delayed Justice:

The first problem, not surprisingly, is the long delays that can occur in general courts. General court dockets in many countries are overloaded, and it may take years for a filed case to be heard. In 2011, when Thailand established new environmental divisions in all 11 administrative courts across the country, more than 1,300 “green cases” were already on file.\textsuperscript{13} For citizens, public interest groups, and advocates, delays can mean health or environmental damage that is irreversible. For developers, time is money, and delays are costly. All sides share an interest in speedy resolution of complex environmental issues. An ECT can set cases for a speedy hearing because the court or tribunal has a single legal jurisdiction, defined by law. The ECT jurisdiction usually includes many different specific laws, such as those affecting air, water, land, human health, biodiversity, public land protection.\textsuperscript{14} However, all can be integrated under the environmental and/or land use umbrella for purposes of non-fragmented problem solving and decision-making.

2. Access to Justice:

A second problem with general courts is that they frequently present more than a temporal delay. People’s access to justice can be thwarted by complicated filing procedures, lack of knowledge about courts, limited understanding about the issue and how to challenge it, substantial physical distance between the location of the controversy and the location of the court, minimal to no institutionalized procedures for public participation, narrow court standing requirements, and other

\textsuperscript{11} See GREENING JUSTICE, supra note 1, at 106-09.
\textsuperscript{12} See id. at 108-09.
\textsuperscript{14} GREENING JUSTICE, supra note 1, at 26-28.
ECTs around the world are charged with overcoming these barriers, opening the courthouse doors to a wider public, and assisting rather than blocking those with complaints.

3. Technical expertise:

Lack of scientific and technical expertise limits the competence of the general jurisdiction court, which generally must rely on the testimony of the parties' expert witnesses for information (the so-called "battle of the experts"). Most general court judges (and juries) do not have the expertise to evaluate expert testimony or to predict probable outcomes, a crucial gap given the complex issues that can arise in environmental cases. Lack of technical competence or interest may even result in a judge's unwillingness to set a complicated case for hearing. Interviewees in the Philippines informed us that some judges there pushed environmental cases to the bottom of their dockets repeatedly, prior to the establishment of local ECTs and intensive judicial training in 2009.

4. Legal Expertise:

Not only do courts of general jurisdiction lack ready access to reliable scientific and technical expertise on the bench, but many judges have never studied environmental law or had any specific training in it. As national environmental laws have become increasingly complex and interrelated, generalist judges are handicapped by lack of specific knowledge of and experience with environmental law.

5. Expense:

Financial costs in general courts — including filing fees, attorney fees, expert witness fees, lost employment, potential adverse costs awards, retaliatory lawsuits, and other financial barriers — are crippling for citizens and environmental advocacy organizations, as well as for defendants. In addition, the so-called British Rule of "costs follow the event" (that is, "loser pays winner's costs") remains the rule in many countries. This rule, where even a litigant with a real grievance can be forced to pay huge sums, clearly discourages the filing of legitimate cases since the ultimate outcome and costs are unknowable at filing. Environmental organizations are forced to pick and choose clients and issues with great risk-aversion, leaving many legitimate complaints unfilled and unresolved. There are instances in Australia where non-profits have actually been forced to file for bankruptcy

15. See id. at 14-16.
16. Id. at 55-60.
17. Id. at 51-52.
following a costly legal environmental battle in which they had a legitimate case that was however dismissed on a technicality.

6. ADR:

Alternative dispute resolution (ADR) is not an integral part of most general jurisdiction courts.¹⁸ (One exception is family courts dealing with divorce and child custody issues.) Often the use of ADR, managed by a trained neutral third-party, can help litigants arrive at a successful resolution to a conflict which was not envisioned by the judge or prescribed by law. The use of court-integrated ADR methods can also help reduce costs, speed decisions, and achieve true “win-win” results – for the parties, the court, the environment, and the economy.

7. Case-management:

Streamlined case-management and special rules of procedure for environmental cases are not possible in a general court, which typically cannot employ different rules for different types of cases. ECTs around the world have maximized the use of a number of special case management tools and procedures, resulting in a more efficient and effective decision-making process. Many ECTs actually employ a case-manager to assist parties and to carefully track public notice, time limits, hearing dates, and even to conduct court-annexed ADR. ¹⁹

8. Enforcement / Remedies:

General court enforcement tools and remedies are typically limited to those formalized in law or court rules. Preliminary injunctions, creative sentencing, community service and fines directed to environmental projects rather than the general fund, restorative justice, and other less traditional enforcement tools may be more effective at resolving environmental issues than traditional civil or criminal outcomes. Creative sentencing is a hallmark of effective ECTs.

At the international level as well, these problems have led to calls for the creation of a specialized international ECT. Such a body could provide a forum to adjudicate global issues, such as transboundary pollution and climate change, which now transcend national court jurisdictions, much as the International Criminal Court now does. Several international environmental forums currently exist, but are hampered by limited jurisdiction, unwillingness of states to bring issues to an international arbiter, lack of binding international environmental law, and limited enforcement powers. Existing multinational forums which could develop ECT divisions could include the International Court of Justice, the Permanent Court of Arbitration, the European

¹⁸. Id. at 61.
¹⁹. Id. at 76-79.
Court of Justice, the World Trade Organization, the NAFTA Commission for Environmental Cooperation, international financial institutions like the World Bank, international river basin commissions, and the International Tribunal for the Law of the Sea. The latter is the closest to an international ECT, but has resolved only 20 cases in its 15 years of existence.

Based on nearly five years of in-depth research on specialized ECTs around the world with the DU ECT Study, the authors predict that the ECT explosion will continue into the 21st century at all levels of government, including the international. The increase in the number of ECTs is predicated on findings that well-designed specialized adjudication bodies have the capacity to resolve environmental and climate change litigation independently, holistically, more cheaply, competently, rapidly, consistently, and justly, incorporating the key principles of sustainable development. They also have the potential to effectively mitigate all eight barriers to effective environmental governance and access to justice found in general courts.

The key characteristics of ECTs that allow effective and efficient adjudication of environmental and climate change suits include:

- Fast-tracking of environmental litigation
- Integrated jurisdiction over relevant laws
- Expertise of decision makers
- Ability to manage scientific and technical expert evidence
- Expanded standing for plaintiffs
- Adoption of flexible rules of procedure
- Consistency in decisions
- Ability to employ a problem-solving approach to adjudication, including extensive use of various ADR methods

Each of these characteristics, when incorporated in a specialized ECT, can facilitate access to environmental justice and can incrementally contribute to environmental protection, climate change mitigation and adaptation, and sustainable development.

The progress of ECT development follows a reasonably consistent six-step pattern regardless of country. (1) First, the environmental impacts of non-sustainable development and population growth begin impacting the environment in major ways. (2) Second, civil society and advocacy groups become aware of these environmental impacts and demand laws and institutions to prevent and/or mitigate the environmental damage. (3) Third, laws are passed, which may or may not be adequate, but are not rigorously enforced. (4) Fourth, public dissatisfaction with the laws or their enforcement prompts litigation in the general courts. (5) Fifth, the general courts then disappoint these advocates by not having the expertise, patience, will, or incorruptibility
to adjudicate environmental cases in a way that is — to quote the memorably succinct mandate of one Australian state’s court procedure law — “just, quick, and cheap.” Cases may take decades to hear, cost the parties immense sums, expose complainants to monetary liability or intimidation or worse, result in dismissal on technical grounds, and/or produce inconsistent decisions. Sixth, this dissatisfaction with the general courts, from both plaintiffs and defendants, leads to a public debate over new options and the emergence of visionary leaders who believe that a well-designed ECT can address the issues.

The visionary leadership to create or improve an ECT can come from within the judicial branch, from the executive or legislature, or from civil society advocates. Often the leadership comes from an individual who has “switched hats” from one sector to another and by doing so has gained power to change the system. One such example is Justice Brian Preston, Chief Judge of the State of New South Wales, Australia, Land and Environment Court, who was a lawyer for the Environmental Defenders’ Office (EDO), a leading environmental NGO in Australia, before being appointed to the bench and who has spearheaded many cutting-edge innovations in that EC.

The pressure to create an international environmental court is following a similar six-step path. It is being driven by the need for effective global adjudication of environmental conflicts to foster sustainable development, control climate change, and respond to transnational environmental impacts. These issues are multinational in scope and need a multinational adjudication forum.

Much of the public debate about ECTs takes place in international forums designed to share experience and expertise and build judicial capacity. Conferences were convened by various international organizations during 2010, 2011, and 2012 to bring members of the judiciary, executive, and legislative branches, non-governmental organizations, and academics together to develop options for international environmental problem-solving. These included symposia sponsored by the UN Environment Programme, the Asian Development Bank, the Association of Southeast Asian Nations, the European Union Forum of Judges for the Environment, and the Association of European Administrative Judges for the Environment. In 2010, a new International Judicial Institute for Environmental Adjudication was created with the support of Pace Law School in White Plains, New York, which subsequently held a major international conference of judges, government officials, and academics, and published an issue of

20. Civil Procedure Act 2005 (NSW) s 56(1) (Austl.).
the Journal of Court Innovation dedicated to "the Role of the Environmental Judiciary."  

The agenda for the 2012 United Nations Conference on Sustainable Development (Rio+20) includes a call for the creation of a World Environment Organization similar to the World Trade Organization. On the eve of Rio+20, UNEP will sponsor a World Congress on Justice, Governance and Law for Environmental Sustainability for judges, attorneys-general, prosecutors, and other justice officials. It is expected to outline future rule of law and governance actions required to enhance sustainable development in the 21st century. Bolivia's proposal to Rio+20 specifically states "an International Tribunal of Environmental and Climate Justice must be established to judge and sanction crimes against nature that transcend national borders, violating the rights of nature and affecting Humanity." Whether or not there will be sufficient will amongst the delegates to agree on an international adjudication forum remains to be seen.

In conclusion, based on the authors' research and evaluation, specialized ECTs can be a better forum for the adjudication of environmental, land use, and climate change issues than courts or tribunals of general jurisdiction. Calls for the establishment of ECTs are occurring today at local, national, and international levels, based on their demonstrated ability to deal more efficiently and effectively with the very complex, multiscalar geographic, political, and temporal nature of the environmental harm caused by non-sustainable development and anthropogenic climate change.

Although the creation of an ECT or any new governance institution does not necessarily guarantee a better outcome in terms of sustainable development or climate change, the improvements in efficiency, competence, and transparency afforded by an ECT can result in greater access to environmental justice. Even if ECTs are not a magic bullet for the world's environmental problems, they can have positive effects on governmental regulatory decision-making, corporate behavior, and public appreciation of the problems by fostering interaction across levels of government and engaging disagreement about the ways in which various actors should be taking action.


25. See generally Hari M. Osofsky, The Continuing Importance of Climate Change
judge Brian Preston reminds us that "the status of the judicature and its institutional habit of public, reasoned decision-making may result in its response having meaningful effects, including a catalytic effect on the legislature and executive to take their own action to mitigate or adapt to climate change." 26

To contribute positively to environmental governance, ECTs are dependent on commitment to the rule of law, principles of sustainable development, and enforceable laws at the local, state, national, and international level. The special attributes of well-designed and well-run ECTs can be marshaled to play a very important supporting role in achieving viable solutions. The indications are that the rising interest in and explosion of ECTs at all levels of governance will escalate in the coming decades, with a consequent improvement in access to justice and environmental governance nationally and internationally.


THE ROLE OF BROWNFIELDS AS SITES FOR MIXED USE DEVELOPMENT PROJECTS IN AMERICA AND BRITAIN

JAN G. LAITOS* AND TERESA HELMS ABEL**

INTRODUCTION

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INTRODUCTION

Traditional zoning is a form of land use planning that focuses on separating and segregating land according to residential, commercial, industrial, or agricultural uses. Such zoning often divides uses from each other, so that more intense uses are not located next to less intense uses.\(^1\) For example, only residential uses may be allowed in residential districts, both residential and commercial uses may be allowed in commercial districts, and residential, commercial, and industrial uses may be allowed in industrial districts.\(^2\) These exclusionary zoning practices help to avoid the kinds of problems that arise when industrial factories are located beside residential units. However, the segregation of uses created by traditional zoning has brought about ecological concerns, and a belief that those kinds of separated land use patterns are not consistent with resource sustainability and the integration with socio-economic classes.\(^3\)

Sustainable development focuses on the wise use and conservation of resources to fulfill present and future needs. Unfortunately, traditional exclusionary zoning often prevents land from being put to its most efficient use. When local patterns emphasizing a non-integrated, use-separated approach to land development dominate growth management and regional planning programs, resource and energy consumption are accelerated and infrastructure costs are increased.\(^4\) Excluded development and prohibited uses are forced to relocate further from the urban core, resulting in suburban sprawl.\(^5\) Along with sprawl comes environmental harms, increased traffic, more fuel consumption, racial ghettos, and a disconnect between work and home. Low density, automobile-dependent regional sprawl is, in the long run, unsustainable.\(^6\)

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1. JOSEPH WILLIAM SINGER, PROPERTY 654 (3rd ed. 2010).
2. Often, further distinctions are made within each type of use area. Some municipalities and local governments have enacted elaborate plans to manage growth, as well as location of development. The goals of traditional zoning include the protection of the environment, the promotion of low-density development, and the preservation of the character of the community. Id. at 654-55.
5. Id.
6. Id. at 164-67, 172; see also Jane E. Brody, Communities Learn the Good Life Can Be a Killer, N.Y. TIMES, Jan. 31, 2012, at D7 (discussing that, ironically, the "successful" development of expanded metropolitan and vehicle-dependent environments has fostered obesity, poor health, social isolation, excessive stress, depression, and become a leading cause of death and disability).
In light of a global economic downturn and a shortage of housing, many communities around the world are rethinking the future growth of metropolitan regions. Instead of creating land use regimes that bring about traditional segregated uses and spatially divided development patterns, urban zoning and planning can instead be deployed to promote resource sustainability by permitting and encouraging integrated uses. There is a growing awareness of the importance of coordinated, but diversified, urban planning policy at the metropolitan level.\(^7\) "Mixite," or mixed use development, is a land use planning concept that focuses on creating urban core areas where people are not functionally separated from what they do; rather, these spaces are where the inhabitants can live, work, shop, and play, all without daily use of an automobile.

Urban planning that promotes mixed-use development is one antidote to the ills of traditional zoning. It reduces the spread of scattered development and minimizes automobile dependency.\(^8\) Higher density and functionally mixed urban spaces can be designed to reduce environmental impacts, consume fewer resources and energy, integrate social and economic classes, and provide for more economical and efficient infrastructure and public services, such as public transit. Mixite can accommodate a wide mix of housing types, social uses and amenities, and socio-economic classes.

The implementation of mixite themed planning requires urban space that is largely free of pre-existing uses. Such spaces exist in the form of brownfields, greenfields, greyfields, and redfields.\(^9\) Brownfields seem particularly suited to urban redevelopment. In the United Kingdom, "brownfield" land is generally defined as land that has the potential to be redeveloped, but that has been adversely affected by the prior uses of the land and surrounding land.\(^10\) The land may also be contaminated.\(^11\) These sites are derelict or underused, mainly located in developed urban areas, and require intervention before they can be put to beneficial use.\(^12\) In the United States, the Environmental Protection Agency defines brownfields as "abandoned, idled, or under used industrial and commercial sites where expansion or

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7. See id. at 173. See also Christopher B. Leinberger, Op-Ed., The Death of the Fringe Suburb, N.Y. TIMES, Nov. 26, 2011, at A17.
8. Id. at 182.
11. Id.
12. See id.
redevelopment is complicated by real or perceived environmental contamination that can add cost, time or uncertainty to a redevelopment project.” In both the United Kingdom and the United States, brownfield land is the result of economic factors that discourage development, create an inability to attract investment for redevelopment, and reflect market failure. However, when they are cleaned up, brownfields do supply a “space” where new mixed-use redevelopments can emerge.

Such spaces can also arise when there are greenfields, greyfields, and redfields. “Greenfields” are uncontaminated, rural, or suburban sites that are being considered for development. “Greyfields” generally include moribund shopping centers and vast, empty parking lots. “Redfields” consist of underperforming, financially underwater, and foreclosed commercial real estate, and can include brownfields and greyfields. Although greyfields and redfields supply space, these types of sites can present unique challenges in terms of being suitable locations for urban redevelopment. Greenfields, greyfields, and redfields that are not located in developed urban areas – such as failed subdivisions or vacant retail strips – may be better suited for parks and conservation areas, as opposed to dense urban cores. Mixed-use spaces seem most likely to arise in locations that previously had been considered brownfield sites.

This article will consider how, in both the United Kingdom and the United States, brownfields are increasingly being transformed into sites where much needed, and more sustainable, integrated mixed-uses can emerge. Part I addresses the barriers to and benefits of brownfield development. Part II discusses the differing ways in which the United Kingdom and the United States have responded to the need for brownfield development. Part III analyzes the varying degrees of

14. See James Murray-White, Greenfield Sites, SUSTAINABLE BUILD (Dec. 20, 2010), http://www.sustainablebuild.co.uk/GreenfieldSites.html; see also APPLEGATE ET AL., supra note 13 (discussing the proposition that, to avoid potential liability under CERCLA in the United States, developers often prefer to develop greenfields over brownfields). In the UK, the amount of land available for development is split between greenfield and brownfield sites. Murray-White, supra.
15. Lerner, supra note 9, at 16.
16. Id.
17. Id.; see also Murray-White, supra note 14 (discussing potential negative effects on greenfield sites and surrounding areas when the sites are used for building development).
18. See Lerner, supra note 9, at 16.
success each country has experienced in actually creating mixed-use spaces from brownfield sites. The article concludes with three case studies of mixed-use development sites in the United States, where each has experienced differing degrees of success in implementing mixite.

I. BARRIERS TO AND BENEFITS OF BROWNFIELD DEVELOPMENT

Brownfield development can be economically practical only if the financial benefits of reclamation outweigh the physical and financial costs of preparing the land for reuse. The economic rationale behind the financial feasibility of such development depends on several factors, including governmental regulations imposed on development, which either inhibit or encourage mixite, the overall marketability of the reclaimed site, and the physical characteristics of the land. Each of these factors must be taken into account when assessing the viability of brownfield development for mixed-use.

A. Regulatory, Financial, and Physical Barriers to Brownfield Development

Governmental regulations and policies may inadvertently impede brownfield development. Hazardous waste rules and other environmental laws often impose stringent liability and strict clean-up standards on those seeking to transform these otherwise useless sites into mixite locations. Such laws may discourage brownfield development. Planning applications for differing uses can be time consuming, and progress can be further slowed due to a lack of certainty and predictability regarding applicable waste remediation.


20. See id. at 3-4 (discussing the obstacles to development of brownfields).

21. Tracy A. Hudak, Addressing Barriers to Brownfield Redevelopment: An Analysis of CERCLA and the Voluntary Cleanup Programs of Ohio, Pennsylvania and Michigan 6 (Apr. 19, 2002) (unpublished Major Paper, Virginia Polytechnic Institute and State University) (on file with Digital Library Archives, Virginia Tech); Gray, supra note 10; see also INTERNATIONAL ECONOMIC DEVELOPMENT COUNCIL, BROWNFIELDS REDEVELOPMENT MANUAL 40 ("The potential liability attached to brownfield sites can be a significant barrier to the reuse of these properties.").

22. Hudak, supra note 21, at 6-8.

23. Id. at 6-7. For example, the EPA and some states require an initial evaluation of each contaminated site, which may force parties to begin a clean-up before they have a complete understanding of the costs associated with development. Id. at 7.
policies and regulations.\textsuperscript{24} Time requirements and associated costs for obtaining project consent from government officials can make development less desirable. Receipt of government funding can actually reduce the likelihood of success in some situations by imposing conditions that remove the flexibility of the project's scope or timescale.\textsuperscript{25} Additional impediments to development may stem from public opposition, licensing mandates, and legislative requirements.\textsuperscript{26}

Unfavorable market conditions can also affect the feasibility of brownfield development. The cost of buying land at fair market value can cause financial problems, as can a general lack of demand for mixed-use housing or commercial buildings. Preparatory costs may be high for contaminated brownfield sites because the myriad of costs are difficult to assess before development commences; the cleanup and development of these sites may be considered risky investments. In a hostile or down-market environment, the risk of subsequent liability for environmental harms can deter prospective developers. Many site owners may not thereby be able to acquire affordable financing.\textsuperscript{27}

The environmental conditions of brownfield land can significantly affect the financial practicality of development. The history of any particular brownfield may include one primary use, or many prior uses, ranging from being a major industrial site to being a location where there were many local dry cleaning businesses or gas stations.\textsuperscript{28} One of the first steps in any brownfield development project is to therefore perform an environmental assessment of the site.\textsuperscript{29} This assessment in itself can be expensive, but it is necessary to do in order to minimize the inherent risks and uncertainties associated with transforming brownfield sites into usable space.\textsuperscript{30} Other physical factors, such as size, location, and topography, must also be taken into account.\textsuperscript{31} For

\textsuperscript{24} See id. at 11-12, 51-53. For example, in 29 Flatbush Ave. Assocs., LLC v. N.Y. State Dept'f of Envtl. Conservation, No. 21827/09 2011 N.Y. Misc. LEXIS 1108, at *1 (N.Y. Sup. Ct. Mar. 22, 2011), the Supreme Court of New York found that the Department of Environmental Conservation improperly applied the “complication of development” test when it denied a contaminated site's application for inclusion in the brownfields cleanup program. The Department did not consider underutilization of the site, blight of the surrounding area, or the owner's inability to obtain financing without the program.

\textsuperscript{25} See id. at 12-14.

\textsuperscript{26} The development plan for the Gates Rubber factory, discussed in Part II of this Article, faced opposition by a group of community activists who demanded that the developers agree to invest in area neighborhoods. Mark P. Couch, \textit{Invest in Area, Group Urges Gates Redevelopers}, DENV. POST, Apr. 18, 2003, at C3.

\textsuperscript{27} BARTSCH, supra note 19, at 3.

\textsuperscript{28} APPLEGATE ET AL., supra note 13.

\textsuperscript{29} H. WADE VANLANDIGHAM, THE STORMSTOWN GROUP, & PETER B. MEYER, PUBLIC STRATEGIES FOR COST-EFFECTIVE COMMUNITY BROWNFIELD REDEVELOPMENT 12 (2002).

\textsuperscript{30} Id.

\textsuperscript{31} See Hudak, supra note 21.
example, a lack of access to local roads can impact the foreseeable costs and likely long-term benefits of development.  

Environmental contamination of the land by extremely toxic substances is a common and potentially serious impediment to brownfield development. As Charles Bartsch reports in his discussion of the problems posed by contamination of brownfield sites in the United States:

The actual number of underused or abandoned industrial complexes is difficult to tally, but the problem is significant and pervasive. Some experts have suggested that nearly 1 million sites nationwide — ranging from obsolete manufacturing complexes to abandoned corner gas stations — show evidence of at least some contamination which could trigger regulatory concerns and ultimately inhibit their owners from selling the site, securing financing, or proceeding with reuse. This situation has posed a major challenge for localities seeking to revitalize distressed neighborhoods and attract new investment to sites with prior uses.  

Contaminated brownfield land can include both surface terrain and underground resources; the degree of contamination may range from slightly affected to severely contaminated. Contamination is usually caused by one dominant use or multiple prior uses of the land. If the former, there are typically one to two environmental contaminants that must be removed; if the latter, there may be multiple different toxic pollutants that need to be remediated. Before any mixite development can begin, an environmental analysis of the soil, groundwater, and surface water should be performed by an environmental consultant to ensure that appropriate steps are taken to reduce risks and liabilities. Environmental contamination not only poses cleanup problems and costs associated with remediation and waste removal, but it can also significantly extend the amount of time required for eventual development.  

Sometimes, brownfield developers may attempt to procure payment for the clean up of the site from the parties responsible for the contamination. However, responsible parties may be insolvent, bankrupt, dissolved, or impossible to find. In the United States, the federal hazardous waste cleanup law, CERCLA, encourages parties subject to waste-removal liability to seek contribution from potentially responsible parties.

32. See id.
33. BARTSCH, supra note 19, at 2.
34. Gray, supra note 10.
35. See VANLANDIGHAM ET AL., supra note 29, at 4.
36. See APPLEGATE ET AL., supra note 13, at 616.
37. Id. at 629.
B. Challenges to Communities Where Brownfields are Left Undeveloped

When the costs associated with brownfield reclamation are difficult to estimate, development of these sites for mixed-use can pose considerable risks for investors. Uncertainties regarding contamination and liability may deter developers from investing in otherwise beneficial and profitable future brownfield development projects. The result is more than an urban eyesore. Brownfield sites that are not transformed into useful sites and that remain undeveloped can themselves pose problems for the communities in which they are located. Contamination of brownfield soil and water may pose health and environmental risks to the surrounding population. Lost jobs and a diminished tax base are often the result of the visual blight and depressed property values associated with these neglected and abandoned brownfields. Perhaps the most significant costs to communities where undeveloped brownfield sites are located come from the unrealized benefits of revitalization, and the opportunity costs of lands not yet changed into productive components of the local economy.

C. Benefits of Brownfield Redevelopment

The restoration of brownfields is a worthy goal, because the cleanup and reuse of these areas often result in numerous environmental, economic, and community benefits. When contaminated brownfields are cleaned up, the contamination no longer threatens the health of the surrounding people and environment. Additional environmental and community benefits of reclamation include the ability to reuse existing infrastructure, the lessened need to build on undeveloped land, and the reduced continued degradation and contamination of the natural environment. Old industrial and commercial buildings in urban areas can provide prime locations for offices, small businesses, and residential units. The architectural history and character of these sites can become an anchor for distinctive redevelopment efforts. In communities that lack large spaces of empty land, building on brownfields can reduce the pressure to develop and pay for greenfields.

40. A BROWNFIELDS TOOLKIT, supra note 13.
41. See REGIONAL BROWNFIELDS ASSESSMENT PILOT, supra note 39.
42. A BROWNFIELDS TOOLKIT, supra note 13.
43. Id.
45. BARTSCH, supra note 19, at 2.
When there are economic downturns, communities experience a surplus of vacant urban property. Although cities may ultimately benefit from developing these vacant lots, efforts to rebuild are often forestalled by reduced demands and limited funds. Although immediate development may not be a feasible option, community organizations have expressed a growing desire to see these derelict lots be put to beneficial use in other ways.46

Urban agriculture is one common theme that has emerged. Urban agriculture combats the detrimental impact that abandoned land can have on a community. For example, there are more than 400 community gardens and farms operating throughout the city of Detroit, Michigan. Although Detroit's zoning ordinance does not recognize agriculture as a permitted use, for now, the city has chosen not to enforce its existing zoning laws because it recognizes urban agriculture as a beneficial use of vacant land that may otherwise result in blighted blocks and high maintenance costs.47 Urban agriculture offers a myriad of benefits to urban residents, including bringing fresh produce to inner-city neighborhoods, building a sense of community, and creating environmental benefits, such as saving fuel and reducing air pollution.48

United States cities such as Cleveland, Detroit, Youngstown, and others that have experienced extensive population decline are focusing on economic development in key areas and the transformation of blighted areas or brownfields to innovative green uses.49 Cleveland, Ohio envisions "a city with densely-built mixed-use walkable neighborhoods connected by greenways and contemplated by urban gardens and open space amenities."50 It is unlikely that all of the surplus land in Cleveland can be reused for real estate development in the foreseeable future. But Cleveland and other cities with similar problems have embraced the use of vacant land as a green resource to enhance a sense of community, grow crops for residents, mitigate urban runoff, and remediate soil contamination. Some of the challenges to making productive use of vacant land include gaining legal control over the property, addressing tax delinquency, and researching clouded title.51

47. Id. at 49.
48. Id. at 46.
51. Id.
Reclaimed brownfields also create new space — previously unavailable urban land that now can be planned for mixed-use. Not only can these areas contribute to sustainability by increasing population density in cities that reduce the atmospheric emissions of driving to work, they may also permit energy efficient residential layouts and commercial building. In addition, a mixed-use site may stimulate new forms of economic and social growth. Development of brownfield sites in desirable locations can put this prime real estate back to beneficial use, thereby increasing the local tax base and job market. These mixed-use areas can emerge with local directives in mind, such as job training, childcare provision, affordable housing, transport, education, and greenspace leisure.

II. BROWNFIELD DEVELOPMENTS: A COMPARISON BETWEEN THE UNITED KINGDOM AND THE UNITED STATES

Many of the problems associated with brownfield development can be overcome with education, resources, and public and private partnerships. In the case of brownfields, both the United Kingdom and the United States have responded to the potential of their development in similar, yet differing ways. Each provides lessons for how a community might identify and redeem brownfield sites so as to make them ready for a mixed-use redevelopment.

A. Responses of the Government and the Private Sector in the United Kingdom

The United Kingdom recognizes the development of brownfield sites as a way to benefit the economy and the environment, and to relieve pressure on the creation of greenfield sites. The Office of the

52. The EPA has reported that, as of September 2011, 72,250 jobs have been leveraged through its Brownfields Program. The Brownfields Program has found that redeveloped brownfield sites have resulted in a 32 to 57 percent reduction in vehicle miles traveled associated with these sites, as well as a reduction in air pollution emissions. An EPA study of redeveloped brownfields shows that the value of surrounding residential property increased between 2 and 3 percent upon reclamation of nearby brownfields. The studies also show that cleaning up a brownfield can increase nearby property values by $0.5 to $1.5 million. EPA, The EPA Brownfields Program Produces Widespread Environmental and Economic Benefits (Sept. 2011), http://epa.gov/brownfields/overview/Brownfields-Benefits-postcard.pdf.

53. See A BROWNFIELDS TOOLKIT, supra note 13; Grant Proposal Guide FAQ, supra note 44, at 43-44.


55. A BROWNFIELDS TOOLKIT, supra note 13.
Deputy Prime Minister (ODPM) controls brownfield policy in England, and it is advised by English Partnerships.\textsuperscript{56} Local authorities work with regional planning agencies to promote regeneration of their respective areas. The policies governing brownfield development have evolved in the past several years through a series of key policy statements and an independent task force.\textsuperscript{57} Wales and Scotland have similar arrangements.\textsuperscript{58} Government policy in the United Kingdom focuses on redeveloping brownfield sites primarily for the creation of new housing, although appropriate uses may vary with the circumstances.\textsuperscript{59} Local authorities, however, frequently encourage a more mixed-use scheme as a response that can perhaps offer the most economic and social benefits.\textsuperscript{60}

The United Kingdom supports sustainable communities as places where people want to “live and work now and in the future.”\textsuperscript{61} The inclusion of affordable housing as a part of mixite themed planning is a way to address housing shortages and to develop mixed communities that are more efficient and sustainable. Brownfield development sites that include sufficient, desegregated affordable housing ensure social sustainability by fostering interaction between different social classes, attracting higher levels of social services, and creating additional employment opportunities.\textsuperscript{62} Residential use of land within an urban infrastructure also minimizes homelessness and reduces the impact of high shelter costs.\textsuperscript{63}

In response to pressure for housing development, the ODPM has published several Public Service Agreement aims and objectives. In February of 1998, it released an Agreement setting forth a national goal to have 60 percent of all new development take place on brownfield sites


\textsuperscript{57} Id.

\textsuperscript{58} Id.


\textsuperscript{60} Id.


\textsuperscript{62} Id. at 236-37.

\textsuperscript{63} Id. at 241.
by 2008. This designation was intended to relieve pressure on greenfield sites, which were the next logical location for mixed-use development, in order to preserve the countryside. That year, England created a National Land Use Database (NLUD) that has since been working to identify previously developed land that might be suitable for redevelopment. In the United Kingdom, sites often become unexpectedly available for redevelopment when their previous use comes to an end. The Homes & Communities Agency (HCA) of England manages the NLUD database of land and buildings, and updates the list annually. The HCA has stated, “Developing brownfield land for housing, industrial, commercial, and leisure use protects greenfield areas and contributes to community well-being by tackling visual and economic issues.”

The HCA works with other organizations and groups to foster local investment planning for housing and urban regeneration. Its key partners include local authorities, central government agencies, housing associations, private sector builders, developers and contractors, lenders and investors, and voluntary and community sectors. It also works with regional development agencies and professional and industry bodies such as the Local Government Association (LGA) and the Department for Communities and Local Government. The HCA has reached an agreement with the LGA under which the central government will set national policy backed by funding

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64. Brownfield Development, POLITICS.CO.UK (June 29, 2010), http://www.politics.co.uk/briefings-guides/issue-briefs/housing-and-planning/brownfielddevelopment.htm; Policy and Regulation:- United Kingdom, supra note 56.
65. Further Description:- United Kingdom Brownfields, supra note 59.
66. Id. England had previously performed several surveys to identify “derelict land,” but the land included in this category is incongruent with the notion of brownfield land. Id.
67. Further Description:- United Kingdom Brownfields, supra note 59. Spatial planners in the United Kingdom refer to these sites as “windfall” sites. Id.
69. Brownfield Development, supra note 64. The HCA classifies brownfield land into five main subdivisions: previously developed land now vacant, vacant buildings, derelict land and buildings, previously developed land or buildings currently in use and allocated in local plan or with planning permission, and previously developed land or buildings currently in use with redevelopment potential, but no planning allocation or permission. National Land Use Database, supra note 68.
for brownfield sites, and the HCA will serve to connect these national priorities with local directives.  

Some sources of public funding for brownfield development are available through the ODPM, the Scottish Executive, and the Welsh Assembly, but most funding comes from the private sector. Despite national and local public support, regeneration projects in the United Kingdom are in large part led by the private sector, and public bodies are generally not directly involved with brownfield reclamation. As a result, private developers must be convinced that the long-term economic payoffs make it worth the cost of reclamation and the investment in a mixite site.

B. United States Response to Brownfields and Their Development

In the United States, the Environmental Protection Agency (EPA) cooperates with the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Transportation (DOT) to support urban sustainable development projects. In 2009, these entities formed a Partnership for Sustainable Communities to ensure that federal action does not subsidize sprawl. The Partnership aims to support efficient and sustainable development of brownfields. However, it is the EPA that has played a leading role in the promotion of sustainable brownfield development sites for more than two decades.

In the early 1990s, the EPA developed a Brownfields Program designed to “empower states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields.”


73. Further Description:- United Kingdom Brownfields, supra note 59.

74. Id. This focus on the private sector may be the result of several factors, including the fact that most of the brownfield sites are already privately owned, the demand for the land in the areas, and conscious political choice by the national government. Id.


76. Press Release, EPA, EPA Administrator Lisa Jackson, DOT Secretary Ray LaHood and HUD Secretary Shaun Donovan Announce Interagency Partnership for Sustainable Communities, Partnership sets forth 6 ‘livability principles’ to coordinate policy (June 16, 2009), http://yosemite.epa.gov/opa/ adipress.nsf/0/F500561FBB8525D700501350.

The Brownfields Program uses cooperative agreements to provide funding to pay for brownfield redevelopment projects. Direct funding that is made available through the EPA's Brownfields Program includes assessment grants, revolving loan fund grants, job training grants, and cleanup grants. The EPA also provides other opportunities for funding, as well as technical information regarding the financing of brownfield matters. In 1997, the United States Congress authorized a Brownfields National Partnership program that allocated $300 million in federal funds for brownfields revitalization. The Partnership brought public and private entities together to redevelop 5,000 brownfield sites. Five years later, the Small Business Liability Relief and Brownfields Revitalization Act was enacted, which again increased funding for sustainable brownfield development.

The EPA runs a Sustainability Pilot program that promotes environmentally friendly urban growth at a local level. The EPA provides funding for these pilot projects and works with communities to create sites that are consistent with environmental health and sustainable development, and that can serve as an example for other communities across the country. Funding is provided to local governments to encourage recycling, green building and infrastructure design, energy efficiency, resource conservation, development of renewable energy, and environmentally beneficial landscaping. The EPA Brownfields Program is supported by other governmental initiatives, such as the American Recovery and Reinvestment Act of 2009, which was enacted in response to a deteriorating private housing market and overall economic recession. The Recovery Act will ultimately provide the EPA's Brownfield Program with $100 million, to be awarded to eligible entities seeking to change hazardous waste sites into mixed-use urban areas that promote sustainable urban growth.

In addition to providing funding for brownfield development, federal and state laws have also been enacted in the United States to combat some of the other barriers to the revitalization of brownfields. Legislation has been passed to protect brownfield sites from hazardous materials by promoting or requiring cleanup, and then motivating

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http://www.epa.gov/region7/cleanup/brownfields/index.htm (last updated May 9, 2011) [hereinafter Introduction to Brownfields].

78. Introduction to Brownfields, supra note 77.


82. Id.

83. Brownfields Program Activities Under the Recovery Act, supra note 77.

84. See BROWNFIELDS REDEVELOPMENT MANUAL, supra note 21.
redevelopment, despite liability fears.\textsuperscript{85} As discussed in Part I of this Article, the potential for liability can significantly hinder the reclamation of brownfields. Two federal laws that have negatively impacted brownfield redevelopment by fostering a fear of liability are the Resource Conservation and Recovery Act (RCRA),\textsuperscript{86} and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\textsuperscript{87} RCRA addresses threats to public health and the environment from the active misuse of hazardous waste disposal.\textsuperscript{88} CERCLA identifies the parties responsible for creating hazardous waste sites, and imposes liability on them for the costs of cleaning up the contamination.\textsuperscript{89} While RCRA prevents, in theory, "midnight dumpers" from disposing of hazardous waste in a brownfield, CERCLA deters cleanup efforts by imposing strict liability on any operator-developer who affects a hazardous waste site, like a brownfield.

The United States has responded to such liability concerns by clarifying defenses to claims for liability, and by providing exemptions from liability for some owners and recent purchasers of brownfields.\textsuperscript{90} For example, in 1995 the EPA responded to the unintended consequences of CERCLA liability by announcing reforms that incentivize the development of brownfields by lessening the severity of CERCLA.\textsuperscript{91} The EPA now encourages the use of "comfort letters" to spur voluntary cleanup. The letters assure brownfield owners and prospective brownfield purchasers that CERCLA enforcement action will not be taken against their properties if they either initiate voluntary cleanup or agree to perform a portion of the cleanup. The Taxpayer Relief Act of 1977 enables development companies to deduct the costs of cleaning up brownfields. The United States government encourages the EPA to cooperate with states and local entities to clarify potential liabilities of prospective purchasers, lenders, and brownfield owners, and to coordinate enforcement priorities so that brownfield redevelopment can occur.\textsuperscript{92}

In the United States, environmental insurance is also available to help protect against the liabilities and risks associated with

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\textsuperscript{85} Id.
\textsuperscript{87} 42 U.S.C. §§ 9601-75 (1980).
\textsuperscript{88} Id.; APPLEGATE ET AL., supra note 13, at 316.
\textsuperscript{89} APPLEGATE ET AL., supra note 13, at 481.
\textsuperscript{90} BROWNFIELDS REDEVELOPMENT MANUAL, supra note 21, at 72.
\textsuperscript{92} APPLEGATE & LAITOS, supra note 80, at 267-68.
\end{flushleft}
development of contaminated land. Environmental insurance comes in various forms, including professional liability insurance, remediation cost overrun insurance, and pollution legal liability or environmental impairment liability insurance. These types of insurance policies help to ease lenders' fears that, in the event of foreclosure, they ultimately will be exposed to liability as the effective owners of the contaminated property.

III. VARYING SUCCESS IN TWO COUNTRIES WISHING TO CREATE MIXED-USE SPACES FROM BROWNFIELD SITES

Both the United States and the United Kingdom have experienced differing levels of success in actually creating mixed-use spaces from brownfields sites. Each country has relied on and implemented distinct techniques to convert an otherwise useless urban area into a vital, thriving, and ultimately sustainable mixture of residential-commercial-greenspace land. The United States seems to have a critical mass of such sites, and it will therefore be useful to examine several case studies from America of successful and mixed-success brownfield development projects.

A. Implementation of Brownfield Redevelopment in the United Kingdom

The United Kingdom government has promoted brownfield development since the 1970s. In the United Kingdom, the primary focus seems to be on encouraging development of brownfields for one use residential projects. However, even with public policy supporting brownfield development, greenfield development in the United Kingdom is usually more feasible from an economic perspective. Private investors often are hesitant about developing brownfield sites because of the expenses involved in clearing and cleaning the usually contaminated sites. Some brownfields are not suitable for parks, open spaces, or gardening, even though they may be suitable for city apartments and residential units. Moreover, if an investor wishes to expand the size of re-development in the future, such a prudent

93. BROWNFIELDS REDEVELOPMENT MANUAL, supra note 21, at 66. Environmental insurance encourages brownfield development by assuring the buyer and lender that they will not be accountable if additional or different contamination is found at the site, by capping costs and helping to manage budgets, and by covering legal defense costs. Id. at 67.


95. Brownfield Development, supra note 64.

96. Id.
entrepreneur may be discouraged from building on brownfield land that can only offer limited space.

The United Kingdom has exceeded its target of having at least 60 percent of new homes be built on brownfield sites. In 2008, 80 percent of new homes were built on brownfields, up from 56 percent in 1997. However, the Center for Cities, an independent research institute that studies the economic performance of United Kingdom cities, claims that this policy has actually slowed residential development and restricted growth. It argues that the 60 percent target has caused land and house prices to increase substantially, because of decreases in supply. Housing supply has decreased in general because governmental initiatives that discourage development on greenfields have not adequately addressed the underlying problems and potential liabilities associated with brownfield development. The result— that many builders choose not to build at all— has led to the diminished housing supply.

This unforeseen secondary effect of the United Kingdom's policy of promoting brownfield development by restricting greenfield development is similar to the United States' problems associated with its CERCLA and RCRA regulations. The United Kingdom uses a comprehensive system of regulations to control how brownfield development takes place. These regulations attempt to promote the development of brownfields by withholding permission to build on greenfields. At the same time, governmental policies identify brownfields and make such land available for development. However, these policies may not provide a strong enough incentive for developers to risk building on brownfields. Instead, they may discourage development in general by inhibiting the development of greenfields, but not correspondingly making development on brownfields a feasible investment. To avoid this problem, the United Kingdom should provide more comprehensive incentives for building on brownfields, in addition to the identification of land that is suitable for redevelopment.

Initially, the policies in the United States were also narrowly focused on reducing the severity and effects of brownfield contamination. These policies inadvertently discouraged sustainable development of brownfields by increasing the risks associated with investment in such development. As discussed in Part II of this Article, the United States has responded to these issues by revising the

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98. Id.
problematic areas of its laws and policies so as to make more attractive brownfield sites. These reforms seem to have had a positive effect on brownfield development in the United States. Under the current state of affairs in the United Kingdom, the choice not to build on a brownfield is often more attractive than the choice to build on a brownfield. If the United Kingdom wishes to further encourage development, it should consider expanding its policies to promote sustainable brownfield development by identifying and reducing the barriers to such development.

**B. United States**

In the United States, investment in the EPA's Brownfields Program has leveraged more than $6.5 billion in public and private funding for brownfields cleanup and redevelopment. The EPA's initiatives have created approximately 25,000 new jobs. The EPA has reported numerous brownfield redevelopment success stories. This success in promoting sustainable brownfield development is largely because the EPA has prioritized the reduction of barriers to such development. The EPA in America has promoted aggressively the idea that the implementation of mixed-use development on urban brownfields can be beneficial for every party involved. As a result of its policies, there has been considerable interest and investment in brownfields.

The following case studies are three examples of brownfield development in the United States. The first is a terrific success story. The second might be a success several decades into the future. The third could have been a success, had economic conditions been better. In each of them, the planners had a goal of mixed-use development, where the formerly contaminated site would be transformed into a multi-purpose, multi-functional location where residents could live, play, shop, and work in one place, and where automobile transportation was minimized. These sites were intended to be sustainable environmentally, and efficient with respect to energy consumption. And, they held the promise of socio-economic integration as well.

**C. Case Studies of Mixed-Use Brownfield Development**

1. **Atlantic Station in Atlanta, Georgia**

"True to its motto 'Live, Work, Play,' the Atlantic Station redevelopment includes affordable housing and a host of new jobs in its

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100. See also text accompanying supra notes 75-93.
101. *Introduction to Brownfields*, supra note 77.
comprehensive approach to community development. But this kind of development doesn’t just happen on its own. It takes vision and cooperation among many partners.”

Atlantic Station is the United States’ largest urban brownfield redevelopment project. It sits on 138 acres in Atlanta, Georgia, where a former steel mill was once located. The steel mill operated from 1901 to 1997. During this time, the land became contaminated with PCBs and sulfates. In 1997, a private developer proposed a comprehensive redevelopment plan to transform the site into a mixed-use development. The site’s central location and large size had significant development potential that could offset cleanup costs. After being decontaminated, cleaned and redeveloped, the site was opened in 2005 as Atlantic Station, where the land is currently being used for a variety of uses including residential, office, retail, and entertainment.

The idea for Atlantic Station began as a master’s thesis on city planning by a student at the Georgia Institute of Technology. The transformation of Atlantic Station from a brownfield to a mixuse, which ultimately required an investment of over $2 billion, was influenced by many factors. Two key elements to its success were the formation of numerous public-private partnerships, and the strategic implementation of the comprehensive redevelopment plan. Developers, bankers, architects, engineers, federal, state, and local governments, the local transit authority, local schools, and grassroots foundations all came together to create Atlantic Station. Funding for the project came from a combination of public and private sources. The site was issued “Tax Allocation Bonds” by the federal government. These bonds contributed up to $170 million in cleanup and infrastructure costs. The U.S. Department of Transportation also provided funding to improve the sidewalks, streets, and traffic flow. The private sector paid for the office, commercial, and residential development.

Atlantic Station has been recognized as a national model for smart growth, mixed-use urban planning, and brownfield redevelopment.

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104. Id.


107. Howell & Smith, supra note 103.

108. Press Release, EPA, *EPA Congratulates Atlanta on Smart Growth Success* (Nov. 18, 2005), http://yosemite.epa.gov/opa/admpress.nsf/9f9e145a6a71391a852572a000657b5e/0e30c482fa56b3ac852570d00057788b!OpenDocument.
Currently, over 50 percent of all blocks in Atlantic station contain a variety of different functions. More than 3,000 residents and 3,500 employees live and work in Atlantic Station. The community offers 11 acres of parks and greenspaces, bike trails, wide sidewalks, and numerous public transportation options.\textsuperscript{109} Atlantic Station has helped reduce vehicle miles traveled in Atlanta, conserved fuel, and lessened air pollution. The Rollins School of Public Health is currently conducting a study of Atlantic Station to determine the social and physical characteristics of similar mixed-use communities. The three-year study is expected to quantify the quality of life benefits that were envisioned by the developers of the site. Developers are supporting the study with a grant, and are also providing access for nearly 200 participants to move to Atlantic Station for a year.\textsuperscript{110}

2. Gowanus Canal in Brooklyn, New York

The Gowanus Canal empties into the New York Harbor, and was once a major transportation route for Brooklyn and New York City. Many facilities operated along the canal, including gas plants, mills, tanneries, and chemical plants. These facilities emptied toxic waste and raw sewage into the canal for over a century. The canal is now one of the most extensively polluted bodies of water in the United States.\textsuperscript{111} The contamination threatens the health of nearby residents, who use the canal for fishing and recreation.

The case of the Gowanus Canal is an example of how government regulations can slow progress at brownfields. Due to the health hazards posed by extensive pollution, the Gowanus Canal has been designated by the EPA as a site that is eligible for Superfund money.\textsuperscript{112} It has been added to the EPA’s list of the most severely contaminated sites in the nation, and the EPA will be either funding the cleanup or designating responsible parties to pay for it.

The Mayor of Brooklyn was disappointed with the designation of the Gowanus Canal as a superfund site. He and other city officials feared that the designation would prolong cleanup of the site, and would discourage developers from investing in the site due to the stigma associated with the superfund label. Originally, private developers who were interested in building mixite sites along the Canal were willing to pay for cleanup in their respective areas. Now that the

\textsuperscript{109} Morse, supra note 106.
\textsuperscript{110} Id.
\textsuperscript{112} The “Superfund” is a CERCLA trust fund that finances cleanup of the worst hazardous waste sites in the country. SeeAPPLEGATE & LAITOS, supra note 80, at 133-36. The EPA maintains a National Priorities List of the sites that it determines are worthy of Superfund dollars. Id.
EPA is in charge of funding the cleanup, the developers will have to wait for the responsible parties to be located and for liability to be assigned for cleanup. This could take years, and will likely precipitate legal battles among polluters responsible for cleanup. Local groups believe the Superfund site designation will ensure the most efficient and comprehensive cleanup. The city has agreed to cooperate with the EPA, which estimates that operations to remove pollution will continue until 2025, and will cost up to $500 million.\footnote{113. Mireya Navarro, \textit{Gowanus Canal Gets Superfund Status}, \textit{N.Y. TIMES}, Mar. 3, 2010, at A1.}

Assessment and cleanup of the site have already begun, and a full plan for the cleanup process, which could last over five years, is expected by 2014. The EPA has already identified several responsible parties, including the City of Brooklyn, the United States Navy, and seven other private companies. At least 20 additional potentially responsible companies are under investigation.\footnote{114. Id.} Although preparation of the site for development may be prolonged for decades by the EPA’s involvement and oversight, the parties interested in developing the Canal as a mixed-use location should ultimately benefit from the reforms to United States brownfield law and policy that encourage turning brownfields into mixite after cleanup is concluded.\footnote{115. Brooklyn has already approved zoning changes that will allow Whole Foods to build a 52,000 square foot store on the cleaned up banks of the Gowanus canal. Erin Durkin, \textit{Whole Foods Gets City Nod to Build First Brooklyn Store on the Banks of the Gowanus Canal}, \textit{N.Y. DAILY NEWS} (Feb. 29, 2012), http://www.nydailynews.com/new-york/foods-city-nod-build-brooklyn-store-banks-gowanus-canal-article-1.1030115. The store’s plans include a rooftop greenhouse that will be used to grow organic produce. \textit{Id.}}

\section*{3. Gates Redevelopment in Denver, Colorado}

The old Gates Rubber factory is conveniently located on a light-rail transit line near a major intersection in the center of Denver, Colorado. The Gates Rubber Company was founded in 1911, and eventually grew to become one of the largest employers in Denver. The 50-acre site was closed in 1995 after the Gates Company moved its plants overseas. Cherokee Denver, LLC, a private company in Denver, purchased the site in 2001.\footnote{116. Tory Read, \textit{The Gates Cherokee Redevelopment Project: A Huge Step Forward for Low-Income People in Denver}, ANNIE E. CASEY FOUND., 12, http://www.aecf.org/upload/publicationfiles/cc3622h1195.pdf.}

In 2004, a major trichloroethylene dump was discovered at the site. Trichloroethylene is a toxic solvent that is listed by the EPA as a possible carcinogen. The site was not designated as a Superfund site, but the EPA did participate in assessing the nature and degree of contamination at the site. After learning of the contamination,
Cherokee became involved with the city and the local community in making efforts to fund and clean up the contamination. Local unions and community groups formed a coalition that pushed for responsible development. The coalition, which eventually included over 50 groups, convinced Cherokee to commit to providing quality jobs and affordable housing.

Development at the Gates Rubber site was seen as an opportunity to bring numerous benefits to the investors and to the community surrounding the site.

In exchange for public subsidies and tax increment financing to aid in cleanup and development, Cherokee agreed to comply with a long list of conditions stipulated by the local government and surrounding community. The development project was seen as a huge economic generator for Denver. It was set to provide 350 affordable housing units and up to 10,000 temporary and permanent jobs, with preference for residents of surrounding neighborhoods. The plan was to redevelop the Gates Rubber factory into a transit oriented, mixed-use, varied-income community that included residential, retail, office, and greenspace uses.\(^1\)

The redevelopment plan for the Gates Rubber factory was never fully realized due to the collapse of the real estate market in 2008. The site remains both an eyesore and a glaring example of an opportunity cost – the loss of jobs in transforming the site, and the lack of benefits that would have followed, economically and environmentally, had the site been changed to the mixed-use plan. The Gates site is a reflection of what “could have happened” to a brownfield, had (1) adequate funding been available and (2) economic conditions been better.

CONCLUSION

The successful mixed-use development projects that have been planned and completed in the United States can serve as an example for future brownfield developments in the United States and the United Kingdom. Atlantic Station is one of the most successful brownfield redevelopments in the United States. The strategy used for development in Atlanta can be implemented in other brownfield projects as well. The Gowanus Canal development project, which is still in the early stages, should be examined when considering the potentially hindering effects of government involvement. Government cleanup requirements have caused redevelopment to be delayed by over a decade.

The Gates Rubber brownfield project is an outstanding example of the benefits that private-public partnerships can bring to mixed-use

\(^1\) Id. at 6.
brownfield development. The local coalitions, the private developer, and the city worked together to negotiate a development plan that was beneficial for every party involved, as well as the surrounding community. Many lessons can be learned by understanding the financial obstacles that eventually put this otherwise model redevelopment goal on hold.

Much of the United States' partial success in encouraging sustainable brownfield development can be attributed to its commitment to providing incentives for private investors to engage in the mixed-use development of brownfields. Another key factor is the effort the EPA has made to remove the unique legal obstacles to development that are inherent in contaminate properties. The United Kingdom is currently facing problems similar to those faced by the United States, such as the negative secondary effects of laws and policies regulating brownfield development. To remedy these problems, the United Kingdom should consider reforming its policies to provide incentives that convince investors of the unique social and economic benefits of sustainable brownfield development. This goal can be achieved by limiting liability, and promoting voluntary cleanup in order to reduce investment risks. In addition to promoting development objectives through written agreements, the United Kingdom government may benefit by playing a more active role in mixed-use development; it can provide job training and education, become more involved with encouraging local communities to embrace mixite, and reduce regulatory obstacles that inhibit the allocation of funding for cleanup and new infrastructure at brownfield sites.
Buildings are constructed by first erecting an interior frame or architecture and then, upon that architecture, the exterior is layered on giving the building its appearance. In a similar fashion law is often layered on underlying social and geopolitical structures forming a structure which then affects how we interpret the underlying social structure.\(^1\) Law, to the extent that it is reactionary in this manner, can only be fully understood when the underlying architecture that it has been mapped onto is exposed. Often though, like in older buildings, we find that the underlying architecture has changed. In buildings termites and settling affect the structure without changing the exterior characteristics. Law is similar to the extent that the values it embodies can remain in place well past the demise of the social structures that it was built to regulate. Due to the dynamic nature of the social sphere, law can encounter application and interpretation problems later in its life. Rigid interpretations may be a bad fit for newer developments, whereas adaptive interpretations can become controversial. Striking a balance in this spectrum can be difficult.

Understanding the architecture that laws are built on is important in understanding if and how older regulations can be applied to modern times. This is especially important in laws dealing with technological areas which are prone to rapid change but that nonetheless need regulation. In this article, the term “architecture” is used to describe the underlying social, cultural, and political environment that inevitably influenced the development of law. The interests involved in these areas build a framework upon which the law is then mapped so as to best serve the goals sought. Obviously though, society and politics are not static, and when they change the law is often left as a rigid exo-structure that no longer suits the architecture underneath. It becomes a

\(^*\) National Center for Remote Sensing, Air, and Space Law.

1. It should be acknowledged that this is not a perfect analogy, and indeed is one that can be flipped on its head by arguing that law forms the architecture and society maps itself around law. In fact most likely both phenomena are happening. It is submitted though, that at the international level and especially in the area of regulation of technologies, the competing interests of States create an environment wherein law is more likely to be mapped onto geopolitical structures than vice versa.
historic building in need of restoration, and the law can often, in a sense, be renovated by evaluating the new architecture and remapping to suit that framework.

International space law (and indeed much of international law) is currently at a place wherein its underlying architecture has dramatically changed. This paper will discuss the future challenges for international space law as it is applied to new geopolitical situations and the trends that are developing as this process takes place. Part I will describe the architecture upon which international space law was built, Part II will discuss how that architecture has changed, and Part III will analyze the trends that are changing the structure of space law and shaping its future.

I. BUILDING A COLD WAR BUILDING

It is no secret that international space law is a product of the Cold War. There is a great deal of literature on its development and the roles that the United States and the Soviet Union played in negotiating the original founding principles. This article will, as much as possible, avoid revisiting this well documented past. However, it will seek to give an understanding of the regulatory goals that the architects were building for in this geopolitical climate.

The primary goal of the architects when first negotiating space law principles was security. The popular narrative that accompanies the Space Race at the beginning of the “space age,” involves two superpowers vying for technological superiority over the other. The launch of Sputnik is often portrayed as a black eye to the United States in its quest for space superiority, from a country that should have been its technological inferior. The oft forgotten part of that narrative is that the Soviet launch raised a serious strategic threat to the United


3. One of the prominent themes in Space Law is the concept of “peaceful purposes,” this is because of the close relationship of space technology to that of weapons delivery systems. The lawmaking process held international peace and security at its heart, and the value is explicitly stated in Article III of the Outer Space Treaty: “States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.” Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

States, in that it showed that the Soviet Union was much closer to the technology that would allow for the intercontinental delivery system for a nuclear warhead (an Intercontinental Ballistic Missile – ICBM). Tensions rose between the two states as they both got closer to developing not only the delivery capability for nuclear weapons but also the nuclear weapons themselves. The international community and specifically the two superpowers saw that there was great strategic risk, and that it warranted negotiating principles to reduce these tensions. This resulted in a UN General Assembly Declaration of Legal Principles followed by the Outer Space Treaty. The legal principles found in these documents were specifically designed to ease tension in outer space activities. Some of these principles are outright prescriptions, such as the ban on the “national appropriation” of space. Others are softer obligations that serve to build confidence by placing strong emphasis on principles such as transparency and international cooperation. The principles as a whole though served to lay the foundation of a legal regime that promoted the peaceful exploration of space by reducing the opportunity for tensions in the new arena.

These principles were later integrated into the Outer Space Treaty, which has been referred to as a “constitution for space.” This treaty, though, was designed to suit underlying societal and political realities that shaped the drafters goals. Primary amongst these realities is that the treaty was built around a binary world; one dominated by two symmetric yet opposed powers. As a result the law had to be seen by

6. Id. princ. 3.
7. Id. princ. 6.
9. It should be noted that this is not a critique of the drafters. They were writing law for the world they knew, and could not be expected to envision the changes in the geopolitical climate nor in the nature of space activities. While predictions of future technology are ubiquitous, they are often incorrect. See generally The Paleofuture, http://www.paleofuture.com/ (last visited Aug. 24, 2011).
10. The use of symmetric here refers to goals and strategies. See P.J. Blount, The Development of International Norms to Enhance Space Security Law in An Asymmetric World, in PROCEEDINGS OF THE 52ND COLLOQUIUM ON THE LAW OF OUTER SPACE (2010). While technological and military might was not always in symmetry, the two states pursued very similar strategies in coping with the others power. The arms race the primary example of this relationship. Both sought sheer numerical superiority, as opposed to others sorts of advantages. This can be compared today wherein both States and other actors seek to gain strategic advantage via asymmetrical means. For example, a prominent thought in Chinese theory on warfare is the idea of defeating the superior with the inferior. See Zhao Nanqi. Deng Xiaoping’s Theory of Defense Modernization, in CHINESE VIEWS OF FUTURE WARFARE 11, 18 (Michael Pillsbury ed., 1998).
both of these nations as serving its own self interests, otherwise it would fail for lack of support from one or the other. This, predictably, had a dramatic effect on the final product, in that law reduced tensions, but at the same time left lacunae in which states could pursue their own security interests.

A second underlying assumption that is critical to understanding the regulatory system adopted is that space activities were to be purely state undertakings. While future commercial activities were to a small extent envisioned, international space law was built on the principle that space activities are uniquely state controlled activities. To this end the negotiators sought to control state actions as opposed to those of private actors. The idea of private actors was not completely ignored though, and Article VI of the Outer Space Treaty was drafted to deal with such situations. This article is quite exceptional in international law and makes states “internationally responsible for national activities in outer space” carried on by non-governmental actors. At the end of the day though, the law was crafted around an architecture that did not include a full panoply of non-governmental actors, and has left numerous question about the obligations that states have to regulate these entities.

This geopolitical situation formed the underlying architecture that international space law was mapped onto. The space treaties were built to serve regulatory goals that served the vision of the world held by the drafters at the time. In fact mapping the law onto this structure was critical in achieving the primary regulatory goal of increasing international peace and security. If the law had not been constructed in such a way as to conform with the geopolitical architecture it is arguable that the system could have collapsed like a house of cards.

II. THE NEED FOR RENOVATION

In the past 20 years, the geopolitical climate in which space activities take place has changed dramatically. Most notably, the Cold


12. Outer Space Treaty, supra note 3, Art. VI. Compare this to the Draft Articles on State Responsibility which states that States only bear international responsibility when those actions are attributable to the State. Draft Articles on State Responsibility, Art. 8. It should be noted that Article 11 of the Draft Articles allow States to accept greater obligations in relation to making actions by non-governmental actors attributable to it, which is what the Outer Space Treaty does in Article VI. Id. Art. 11.
War ended and commercial actors have begun to edge their way into the market. These events have changed underlying architecture that space law was built around.

*The End of a Binary Existence*

The end of the Cold War, predictably, has had a dramatic effect on geopolitics in the world. No longer did two diametrically opposed symmetric superpowers exist. Instead there remained a dominant superpower, and “[s]pace went from being a two-player game with both players starting from the same point and nearly equally matched, to a multiplayer game with one leading player and many other various points of a spectrum of capabilities.” Specifically, Asian states have begun to get very involved in space activities. China, Japan, and Korea have all started their own space programs with varying levels of success. Korea is developing its indigenous launch capability, Japan has become an important partner in the ISS, and China has become the third nation to embark on a human exploration program. In fact, some commentators have referred to this trend as a “new space race” that pits Asian nations against each other, but also in another iteration - pits the United States against China.

Additionally, developing nations have begun to gain an increasing interest in access to the benefits of space technology. These states’ interests come in a wide variety. Some partner to gain access to data, some contract to have satellites launched on their behalf, and others seek out indigenous technologies. Developing nations have embraced space technology as way to participate in the global community via access to better telecommunications technologies as well as access to the benefits of remote sensing technologies, and this has led to the

adoption of a UN General Assembly resolution on space and developing countries.\textsuperscript{18} States have traditionally seen space as a way improve the lives of their citizens, achieve security goals, and increase their international stature.\textsuperscript{19} Space activities though have not been divorced from their early roots. Indicative of this is that some states have pursued space to achieve strategic goals by developing launch delivery systems. States such as Iran\textsuperscript{20} and North Korea\textsuperscript{21} have pursued indigenous launch capability in order to develop completely domestic space programs and possible ICBM capabilities. These states have used the terms of the Outer Space Treaty to justify their exploration of technology that can lead to the development of delivery systems for weapons of mass destruction.\textsuperscript{22}

International space law was built around the tenets of international peace and security. To this end the Outer Space Treaty and its progeny can and should be read as security treaties. As already stated, they are security treaties built around a bipolar world. The goals and aspirations of these treaties still remain valid, but the activities they were meant to support and regulate have changed dramatically. First, maintaining security in a world with a wider and more disparately situated set of actors has become increasingly challenging. During the Cold War "the modus operandi that arose between the Soviet Union and the United States during the Cold War that each side appeared to value its own assets more than it valued the ability to destroy the assets of its adversaries."\textsuperscript{23} This strategic balance is shifting with the proliferation of space actors. The idea that there are spoilers who might value the destruction of an adversary's space asset over preservation of their own is emerging.\textsuperscript{24} The most accessible example of this is the entry of Iran and the attempted entry of North Korea into space activities. These outliers have both sought to become

\begin{itemize}
    \item \textsuperscript{18} Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, U.N.G.A. Res. 51/122 (Dec. 13, 1996).
    \item \textsuperscript{19} For example, the Japanese Space Policy includes sections on economic growth, strategic growth, and space diplomacy. Setsuko Aoki, Japanese Law and Regulations Concerning Remote Sensing Activities, 36 J. Space L. 335, 350-64 (2010).
    \item \textsuperscript{21} See THE NORTH KOREAN EXPENDABLE CARRIER ROCKET, UNHA-2: SELECTED LEGAL DOCUMENTS (P.J. Blount & Joanne Irene Gabrynowicz eds., 2010).
    \item \textsuperscript{22} See P.J. Blount, Development in Space Security Law and Their Legal Implications, 44/2 LAW/TECHNOLOGY 19, 35-39 (2011).
    \item \textsuperscript{23} ROGER G. HARRISON, SPACE AND VERIFICATION VOLUME I: POLICY IMPLICATIONS 9 (Eisenhower Center 2011).
\end{itemize}
space actors, conspicuously though they are also both pursuing the development of nuclear weapons, and space launch vehicles are a very similar technology to ICBMs. Both countries though have used the concept of "peaceful purposes" and have capitalized on the Outer Space Treaty guarantee of "free access" as a shield to their activities. This is troubling because it allows the very laws that are supposed to ensure peace and security in space to be invoked to protect the development of technologies that can threaten peace and security terrestrially.

Another example of the increasing complexity of space activities can be seen in the relations between the United States and China. The United States does not trust China to not exploit space technologies to increase its military might, and to this end, whether right of wrong, the United States actively marginalizes China from space cooperation activities. As a result, China has successfully developed these technologies without the assistance of the world's leading space power. However, China also often behaves in a non-cooperative manner that threatens the security and safety of the space environment, which could probably be avoided if a more open dialogue was had among the space faring states. While the drafters of the Outer Space Treaty sought facilitate such discourse, the gaps left by the geopolitical architecture leave seams that both the United States and China can exploit.

_The Ticket Office is Now Open_

The second major development is the rise of commercial actors in space. Currently, there are several entrepreneurial companies around the world seeking to gain private access to space for a variety of reasons. Interestingly, these "newspace" companies are seeking to step outside the status quo of governmental contracting which has been the norm for commercial space actors to date. These entities are seeking to jumpstart business models for space tourism and private launch providers. While the success of this strategy has yet to be seen,

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29. _MARYLAND DEPARTMENT OF BUSINESS AND ECONOMIC DEVELOPMENT, MARYLAND: THE BUSINESS OF SPACE SCIENCE_ 11 (May 2011) ("For decades it was largely driven by government markets and manned space flight. While still substantial, government spending on space no longer accounts for the majority of economic activity.").
there is hope that these companies can survive. The idea of privatizing space access does seem to be gaining ground, as well. Of particular interest is the new United States Space Policy which relies on buying services from such providers in the post Space Shuttle era. The government is looking to buy the service as opposed to the hardware. This, of course, begs the question of whether these start-up companies will rely on government contracts for their existence much as their predecessors have. Regardless, though, these companies seem to be fundamentally different, and that difference is helping to change the state motivations behind space regulation.

The shift that is being seen in space regulation is an important one, since it serves to inform what state interests and goals are. As stated above security has been a primary and historical goal of states when regulating space activities. Commercial actors in space have begun to change how states view regulatory goals. Specifically, the goal of fostering commercial space activities to enhance the economic life of the country and to enhance the everyday life of citizens has been introduced. This goal is different in form and often conflicts with ideas of security. A prime example of this is the ongoing debate over property rights on celestial bodies. Property rights for private entities would be more economically favorable to commercial space exploration as it would help to ensure investments of companies seeking to exploit resources on celestial bodies. However, if as the majority of scholars argue, these rights are precluded by the Outer Space Treaty, then private entities will lack incentive to invest in the exploitation of those resources due to the lack of predictability on whether the investment will be protected. The non-appropriation clause in the Outer Space Treaty does indeed serve a security interest by disincentivizing states from reenacting terrestrial “land rushes” and taking boundary disputes – a traditional reason for armed conflict – into space. The conflict

30. NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 5 (June 28, 2010).


33. JOHNSON-FREESE, supra note 13, at 34 (“... both the Soviet Union and the United States instead endorsed the principle that sovereignty cannot be extended to space. Both countries took the approach that it was in their interests to use space to stabilize deterrence, the guiding strategic doctrine of the day, and to support arms control toward that goal. That meant that in order to protect their own interests, both had to accept the use of space by each other, and eventually other countries. This acceptance
between these goals increases risk for commercial actors in an already risky environment.

States are now beginning to adopt as a goal the development of the commercial space industry. This differs from a great deal of national legislation which is intended to protect national security interests as well as ensure compliance with international treaties. A robust commercial space industry can be a competing goal with national security, and poses specific problems for compliance with international agreements. While there is now a trend among nations to write such encouragement into national legislation, these laws must comport with the requirements of the Outer Space Treaty. But as explored below these laws can inform, via a feedback loop, us as to the content of the norms contained in the Outer Space Treaty, especially in light of its more ambiguous terms.

III. THE FUTURE OF SPACE LAW

Tearing Down the House?

Drawing from the architecture analogy, the immediate question when approaching an old structure is whether it should be razed and a new structure built, or whether it can be salvaged and whether it is worth being salvaged. Are its boards to rotten to support new users, and can it be adapted to fit the new uses? The first question to be addressed when investigating the future of space law is whether the international regime flowing from the Outer Space Treaty can still be effective in a dramatically changed world.

The arguments for scrapping the system include a lack of clarity in the Outer Space Treaty, the inhibiting nature of its rules due to drafting for a different geopolitical climate, and its lack of attention to commercial entities. These arguments point to lacunae and ambiguous terms found in the regime, which create questions of meaning and the possibility for low or unfavorable regulability of some activities. For instance, the Chinese ASAT of 2007 was unarguably a destabilizing moment for space and led to decreased security and safety in space. However, legal scholars, though mostly in agreement that the act was not within the spirit of the law, were hard pressed to find a

reflected a largely tacit acknowledgement that the physical environment of space was so different, and limiting, that there was little choice but to treat it differently in terms of expectations of sovereign rights.

specific clause that outlawed such behavior.\textsuperscript{35} Most argued that China violated Article IX by not seeking consultations.\textsuperscript{36} States on the other hand, made diplomatic protests, but did not direct legal claims at China.\textsuperscript{37} This is because the Outer Space Treaty left the use of conventional weapons an open question, by simply not addressing them in relation to space.\textsuperscript{38} Some would argue that this justifies the negotiation of a new treaty that better protects the space environment.

While these arguments can be compelling, they fall short of being realistic, primarily due to state reluctance to adopt new space law.\textsuperscript{39} The last space treaty, the Moon Agreement, was adopted in 1979 and has only 13 States Parties.\textsuperscript{40} States seem to be uninterested in negotiating new law, and the idea of renegotiating the principle document is outside the realm of current possibility. More substantively, renegotiating the Outer Space Treaty would most likely only result in a different treaty that has many of the same flaws. No treaty completely covers all possible scenarios, thus no treaty is ever complete. To this end the Outer Space Treaty actually has great advantages. It holds very few hard prescriptive articles, and instead regulates with open language that requires states to communicate in order to avoid conflicts. This tactic also allows that treaty to develop via state practice, which adds to its adaptability.

The Outer Space Treaty sets out core values and aspirations that are still at the heart of international space law, many of which may have solidified into custom. These core concepts though must be able to adapt to the actual experience of space actors. As a result, the treaty must be remapped onto the new architecture. This remapping is happening through a variety of mechanisms that are helping to protect state interests as well as increase the regulability of space.


\textsuperscript{36} Marder, supra note 35; Mineiro, supra note 35.

\textsuperscript{37} Marder, supra note 35, at 1-2, 11.

\textsuperscript{38} Arguably, this is by design since Article IV of the Treaty specifically bans weapons of mass destruction from space and celestial bodies and specifically bans conventional weapons from celestial bodies, but fails to mention conventional weapons in relation to space. Outer Space Treaty, supra note 3, Art. IV.

\textsuperscript{39} For a history of International space law regulation see Sergio Marchisio, The Evolutionary Stages of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), 31 J. SPACE L. 219 (2005).

\textsuperscript{40} Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature Dec. 18, 1979, 1363 U.N.T.S. 21 [hereinafter Moon Agreement].
**Soft Law**

Soft Law mechanisms are becoming a more prevalent aspect of international law. States seek legal order in order to create orderly relations among themselves, but hard law obligations "[entail] significant costs: hard law restricts actors' behavior and even their sovereignty."41 Soft law comes in many forms and is difficult to define. Abbot and Snidal argue that "[t]he realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation" with the "softening . . . occur[ing] in varying degrees along each dimension and in different combinations across dimensions."42 Essentially, soft law occurs on a spectrum, and "the choice between hard law and soft law is not a binary one."43 Due to their nonbinding nature these mechanisms can help states to maximize the goals being sought while minimizing the risk taken.44 As a result soft law agreements are "often easier to achieve than hard legalization."45 This allows states to creatively tackle international problems for which they are unwilling to make sacrifices of their own sovereignty.

Space law is no stranger to the concept. In fact it can be argued that much of space law is built on soft law ideas. This is because a great deal of the Outer Space Treaty uses ambiguous language and creates obligations that lack in precision or obligation and are open to interpretation by states. For instance, Article IX of the Outer Space Treaty states that:

> In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and,

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42. *Id.* They use the term "soft law" to "distinguish this broad class of deviations from hard law — and, at the other extreme, from purely political arrangements in which legalization is largely absent." *Id.*
43. *Id.*
44. *Id.* at 423 ("Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own.").
45. *Id.*
where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.46

The obligations contained in this section are generally “soft” in nature. The “hardest” obligation is the requirement that states seek consultations if they think they may cause “harmful interference,” which does not actually include harmful interference. The other obligations are extremely soft in nature are place few limits on the actions of states. States have rarely (if ever) sought such consultations, and indeed the idea of a consultation in no way precludes a state from taking a specific action. Instead it only gives other states the ability to weigh in to the activity. An example can be seen in the aforementioned Chinese ASAT test. China did not seek a consultation, and more importantly, no state, save Japan,47 invoked Article IX, despite the fact that there was evidence that the United States knew about the test beforehand.48 Additionally, the United States decided that it fell outside Article IX when it conducted an ASAT intercept the following year.49 This is because both states were free to interpret Article IX as they saw fit due to the lack of precision in the Article. Article IX creates obligations, but they are soft obligations with a low level of precision and a low level of enforceability.50 These types of provisions are

46. Outer Space Treaty, supra note 3, Art. IX.
47. Marder, supra note 35, at 11.
48. JOHNSON-FRESE, supra note 13, at 12.
49. DoD News Briefing with Deputy National Security Advisor Jeffrey, Gen. Cartwright and NASA Administrator Griffin, in USA-193: SELECTED DOCUMENTS 51, 52 (P.J. Blount & Joanne Irene Gabrynowicz eds., 2009) ("While we do not believe that we meet the standard of Article IX of that treaty that says we would have to consult in the case of generating potentially harmful interference with other activities in space, we do believe that it is important to keep other countries informed of what is happening.").
50. See HARRISON, supra note 23, at 8-9. "Even in areas of Treaty-imposed constraint that were remained [sic] pertinent," particularly the prohibitions against "interfering with
common in space law, because they serve state interests. As a result, while there is a core of hard provision, space law was developed as a flexible regime that can be re-envisioned with changes in its underlying architecture. The values that it supports still serve as important end goals, but the application of the law can change to best achieve these goals in any given set of circumstances.

Adapting the Hard Law

If, as argued, the Outer Space Treaty is the proper mechanism to be regulating space activities in space, and this Treaty consists to a large extent of soft obligations, then through what mechanisms is this law to be adapted to new circumstances? This is essentially the same question that is faced when approaching domestic issues and constitutional interpretation in light of situations not envisioned by the framers, especially in light of technological advances. When such questions arise domestically, competing interpretations vie for prominence, until an official ruling by an ultimate court gives a (hopefully) definitive answer to the question. In much the same way, the Outer Space Treaty, the “constitution” for space, has similar problems. The drafters, taking into account the geopolitical architecture of the time, were often ambiguous as to meaning. In order to serve state interests, and as technology and the geopolitical architecture have changed, the meaning of the Outer Space Treaty's clauses has gradually become more contested. Unfortunately, there is no “Space Supreme Court” to give definitive interpretations of what passages require in light of new developments. International law does present a tool to help elucidate these meanings.

The Vienna Convention on the Law of Treaties gives a rubric for treaty interpretation. It starts with the idea that the ordinary meaning of words within the purpose and scope of a treaty should be used to interpret the treaty text.\textsuperscript{51} It also allows, as a tenet of treaty interpretation, interpreters to take into account state practice in relation to a treaty to determine the meaning of the text.\textsuperscript{52} This can be a powerful tool when looking at soft terms in a treaty.

Returning to the ASAT example and Article IX, we can see how such interpretation works. In the case of the Chinese ASAT test and


\textsuperscript{52} Id. art. 31(3b).
the U.S. intercept of USA-193, the author has previously argued that state practice points to a *de minimis* standard of information sharing to fulfill Article IX requirements. Both states engaged in similar activity, however, the United States did so with a great deal of transparency and explicitly acknowledged its Article IX obligations. China on the other hand acted without transparency. China's test was condemned diplomatically by the international community and the United States' was not. From these incidents the contours of the content of Article IX can begin to be derived. Interestingly, the adoption of soft law agreements (discussed below) to facilitate more robust standards could lead in the future to a shift in the meaning of Article IX to require more than the most basic of information. Widespread adoption of soft law mechanisms can feasibly transform via wide state practice to treaty practice.

*Extending the Law*

It is clear that states are reluctant to adopt new treaties relating to space activities. One of the major factors for this is that states, particularly the United States, prioritize national security and are reluctant to undertake any obligation that would limit activities in pursuit of such goals. This is best highlighted by the former United States space policy, which stated that “[t]he United States will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to or use of space.” States will preserve their interests in a strategic manner, and not subsume them to new law unless there is an equally strong advantage. Another issue that stands in the way of new legal instruments is that of verification. Verification of compliance with treaties in Outer Space can be technically difficult, and as a result “[n]o major space actor is likely to accept meaningful constraints on its freedom of action in space unless it can verify independently the compliance of others.” States enter treaties when it is in their best interest, and unverifiable treaties unavoidably create risks of noncompliance. As a result, states are reluctant to bind themselves in ways which they see as strategically limiting. Without new international agreements states are left to rely on the Outer Space Treaty and its progeny to regulate space. However, these agreements have proved to have weaknesses that can be exploited. This has been illustrated by China's ASAT test as well as North Korea's attempted space launch, which looked suspiciously like an ICBM test.

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Despite the unlikelihood of a new treaty that helps to ensure the future security of space, states have sought other innovative solutions. These solutions have come in the form of soft law agreements. Instruments such as the IADC Space Debris Mitigation Guidelines\(^{56}\) as well as the European Union’s Draft Code of Conduct for Space Activities\(^{57}\) seek to address the changed geopolitical architecture with instruments to which states can accede without being bound by international law. These agreements weaken the obligation element so as to allow states to comfortably pursue goals without the risk of binding themselves. These types of agreements have advantages for states. They serve to build confidence among states and help to foster cooperation.\(^{58}\) Also, they can be used as regulation labs, by allowing states to try out certain regulatory mechanisms with reduced risk if the mechanisms are not effective.\(^{59}\) Furthermore, these types of agreements also can help to fill a void. Whereas before, there was a lack of dialogue on new agreements, now there is open debate and interaction among states on these important questions. These agreements will be analogous to the idea of \textit{lex mercatoria}, wherein business actors agree on best practices and follow these practices out of utility and efficiency. Soft law mechanisms for space activities seek to bring space actors to the table and facilitate dialogue on ways in which their own self interests can be fulfilled via more efficient mechanisms.

One of the major components going forward with such mechanisms will be the exchange of information. Space is becoming increasingly congested and a higher risk area in which to operate. States, however, use space as a crucial component of both commercial infrastructure and national security infrastructure. The ability to operate in space is critical. In order to do that effectively states must have information about the environment in which they are operating. This was highlighted recently when a telecommunications satellite collided on orbit with a defunct Russian governmental satellite.\(^{60}\) Information exchange has been entrenched in the space law regime from the very beginning, but it has never been clear how much information has been required to be shared. While data exchange will be important in the emerging soft law regimes, it is important to note that

\begin{itemize}
\item \(^{56}\) IADC Space Debris Mitigation Guidelines, IADC-02-01 (Sept. 2007).
\item \(^{57}\) Council of the European Union, Council Conclusions concerning the revised draft Code of Conduct for Outer Space Activities, Council Doc. 14455/10 (Oct. 10, 2010).
\item \(^{58}\) Abbott & Snidal, supra note 41, at 423 (“soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power.”).
\item \(^{59}\) Id. (“It offers more effective ways to deal with uncertainty, especially when it initiates processes that allow actors to learn about the impact of agreements over time.”).
\end{itemize}
nongovernmental space actors are also seeking to gain access to more information about the space environment. INTELSAT has spearheaded a movement wherein commercial actors will exchange information about the space environment in order that they may all operate more efficiently creating another layer of soft obligations. These satellite operators will engage in this effort despite the fact that they are competitors. This sort of cooperation highlights an important point about soft law mechanisms. First is that soft law need not be among states, in fact as non-state actors pursue the exploitation of space they will develop standards that become a form of "law." Soft law is about increasing efficiency and guaranteeing operability. To this end, all the players, not just states will have important input, and such mechanisms will be adopted at a variety of levels.

*Designing New Rooms in the Architecture*

Article VI of the Outer Space Treaty is an extraordinary clause in international law. It is one of the rare instances recognized in the Draft Articles on State Responsibility wherein states have opted to adopt more responsibility for the actions of their nongovernmental actors than attributed by customary international law. Article VI states that:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

While there is much debate as to the exact content of Article VI, one must appreciate the burden and risk that this places on states. By creating an affirmative obligation to authorize and supervise non-governmental actors in space in addition to making states responsible for the activities of these entities, Article VI makes it a high risk

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activity for a state to allow commercial actors to operate in the space environment. In the past legislation has been written so as to help states effectively fulfill Article VI obligations. Traditionally this has been through licensing regimes for nongovernmental actors. These regulations are the feedback loop that helps to inform the international community what constitutes the proper measures for compliance with Article VI. Again, this is an area where state action can influence the interpretation of the Treaty's clause.

As the importance of a healthy commercial space sector has grown, legislation has begun to increasingly have a different set of goals underlying it. In general these goals are meant to incentivize doing business in the space sector. The most prominent example is the oft-discussed Federal Aviation Administration's Human Spaceflight Requirements.62 These United States regulations seek to encourage private human space flight by, among other things, requiring space flight providers to give informed consent to space flight participants in order to reduce possible claims against the space transportation provider in the case of an accident.63 These innovative regulations seek to encourage the industry by reducing the risk of doing business and thereby increasing the commercial viability of such operations. Other regulatory regimes have followed suit and attempted to offer other financial incentives to space actors.64

This trend is one that will continue as the commercialization of space continues. It is important to note though, that these are domestic rules, therefore states must be cautious that they still fulfill their obligations under the Outer Space Treaty, specifically Article VI. The interplay between domestic legislation and international law will become an increasingly important theme in the development of international space law. This is especially true if the number of commercial actors proliferates as predicted. It should also be noted that as domestic law develops and defines items such as best practices for space flight providers, these developments can have influence at the international level and on the development of soft law mechanisms. For instance, the FAA regulations seek to not adopt safety guidelines and standards at a time when it may be too preliminary to know what those standards should be. This leaves the door open for the industry itself to adopt these standards for efficiency, creating soft law at the industry

64. See generally P.J. Blount, If You Legislate It They Will Come: Using Incentive Based Legislation to Attract the Commercial Space Industry, AIR & SPACE LAWYER, v. 22/3 (2009).
level. The United States can then, as the industry develops, adopt regulations that solidify these practices. This adoption can be influential at the international level as states seek to define how to engage in space activities in a responsible manner. Mechanisms, whether hard or soft, that increase safety will be beneficial to commercial actors, since the perceived safety of the industry will affect all the entities in involved. States will in turn though have to close the loop in order to ensure that adopted industry practices comport with international obligations. As this is done, those mechanisms can become the mechanisms that build consensus in the international community via nontraditional law-making routes.

CONCLUSION

Laws, like buildings, sometimes need renovations and updates, especially when the architecture beneath them has changed. International space law was mapped onto a geopolitical structure that no longer controls the dynamics of space activities. It is important that the law adapt to the changed circumstances. Luckily, international space law is not in a state of decrepitude wherein it must be torn down. Instead it can be renovated to work with the new, updated architecture.

This paper has sought to illustrate the likely path that the development of international space law will take in the future. This path will be mix of regulatory mechanisms that empower states to best maintain the domestic advantages they receive from space as well as the freedom of access and exploration by all states. Importantly, non-state actors are rising in prominence which leads to particular problems for international regulations. States will seek to foster these industries, but at the same time, must fulfill their international obligations. Though controversial, soft law obligations are the most likely route for states to take in relation to space activities. This sort of “legal” mechanism creates favorable situations for states to engage in the international discourse as well as preserve their own interests.
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