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INTRODUCTION

When the delegates met in San Francisco in 1945 to form the United Nations, one of their primary objectives in creating the Security Council (SC), as an organ of the United Nations (U.N.), was to ensure that the SC was "placed in a position to act *quickly* and *effectively*."[1] However, the record of the SC has been a far cry from that aspiration. Instead, it has a long history of logjam, attributed primarily to rivalry among the permanent, veto-wielding and national-interest-oriented SC members, and the lack of judicial or General Assembly constraints. Despite these failures, SC's collective goal of maintaining international peace and security[2] remains noble and necessary.[3] Moreover, more than seventy years since its formation, entire parts of the world such as Africa and most of Asia remain excluded from SC permanent membership. This is why scholarship that continues to urge reform of the SC remains relevant. For a more effective and inclusive SC, this article proposes that the international communities should seize the opportunities presented by changed

* Associate Professor of Law, Concordia University School of Law (First Class, Hons.) (Makerere University, Uganda), LL.M (*Summa cum Laude*) (University of Notre Dame, USA), J.S.D. (*Summa Cum Laude*) (University of Notre Dame). Thanks are owed to my research assistants Christina Fout, Benjamin Monaghan, and Chong Moua.

1. Commission III Security Council, Verbatim Minutes of the First Meeting of Commission III, Doc. 943 III/5 (June 13, 1945), *reprinted in* 11 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO 13 (1945) [hereinafter U.N. Conference Commission III] (quoting the address by Mr. Morgenstierne (Norway)). *See also* Jean Krasno, *Legitimacy, Representation, and Accountability: A Proposal for UN Security Council Reform*, 1 YALE J. INT'L AFF. 93, 94 (2006) (stating that "[t]he Security Council was designed to be small enough to meet quickly in an emergency and decide on issues in a timely manner." (emphasis added)).

2. U.N. Charter art. 24 ¶ 1 [hereinafter "Charter"].

3. There are indications that the Cold War may be making a resurgence. Several Commentators have described that there is a new cold war already going on. *See* Carolyn Y. Forrest, *Russia's Disinformation Campaign: The New Cold War*, 33 COMM. LAW. 2, 2-4 (2018); Eric Engle, *A New Cold War - Cold Peace Russia, Ukraine, and NATO*, 59 ST. LOUIS U. L.J. 97, 99 (2014) (arguing that "Russia and NATO are on the edge of a new cold war because of the illegal annexation of Crimea and more than a half dozen other issues, such as Syria, gay rights, Magnitsky list, et cetera."). If a new cold war is already going on, the cold war dynamic in the SC may very well be going on as well, with China and Russia being more willing to veto resolutions on several S.C. resolutions. This would make the case for reforming the S.C. even more compelling.

geopolitical, economic and military circumstances to reform[4] the SC through amendment of the Charter of the United Nations. This can be through an enlarged SC that includes more permanent members on the SC, as well as making changes to the veto powers and reconfiguration of the relationships between the SC, General Assembly, and International Court of Justice. At first sight, this proposition may sound preposterous or too ambitious. This is because the inevitable result is that any meaningful, substantive and bold reforms are doomed to fail[5] due to the guaranteed resistance of current permanent members of the SC, whose right to use the veto[6] remains rock-solid and entrenched.[7] However, if economic strength correlates to military strength,[8] there is strong support for changing the permanent membership of the SC to reflect the economic realities of the post-World War II order. Even with another Cold War on the horizon, geopolitical landscape has drastically changed to enable non-SC economically advanced countries to play a major role in the resolution of challenges to international peace and security from Ukraine to Syria, and from North Korea to the South China Sea. In other words, the question is should the U.N. begin to recognize this reality by expanding the veto-wielding countries to include emerging geopolitically and economically significant countries such as Germany, Japan, Brazil, South Africa, Nigeria and India?[9]

The alternative of limiting the scope of veto power of current permanent member of the SC does not seem viable.[10] Frustrated by deadlock of the SC, the tendency

4. There is a diversity of opinion on whether reform is even worth talking about. *See, e.g.*, Princeton N. Lyman, *Saving the UN Security Council - A Challenge for the United States*, 4 MAX PLANK Y.B. U.N. L. 127, 146 (2000) (arguing that "[t]he [reform] framework should be realistic. There will be no change in the formal authority of the veto; no P-5 member will ratify such an amendment. New permanent members will not get the veto.").

5. Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 506 (1995) (observing that "Article 109 was amended in 1968 to increase from seven to nine the number of votes in the Security Council needed to complement a two-thirds vote in the General Assembly for the convening of a Charter review conference.").

6. Article 27 of the U.N. Charter provides that "[d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." Charter, *supra* note 2, at art. 27 ¶¶ 2-3.

7. *See, e.g.*, Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 341 (2000) (suggesting that all "recommendations are out of the question because the current five permanent members insist on preserving their unhindered right of veto.").

8. While it is true that economic resource is not the necessary and sufficient factor to consider, studies indicate that "conventional military dominance of Western democracies stems from superior economic development." *See* Michael Beckley, *Economic Development and Military Effectiveness*, 33 J. OF STRATEGIC STUD., 43, 74 (2010).

9. *See* Alanna Petroff, *Britain Crashes out of World's Top 5 Economies*, CNN (Nov. 22, 2017) http://money.cnn.com/2017/11/22/news/economy/uk-france-biggest-economies-in-the-world/index.html. (listing the world's top seven economies in 2017 as being: The U.S., China, Japan, Germany, France, United Kingdom and India).

10. Tom Miles & Stephanie Nebehay, *U.N.'s Rights Boss Warns Russia Over Syria Air Strikes*, REUTERS (Oct. 5, 2018), http://www.reuters.com/article/us-mideast-crisis-syria-zeid-idUSKCN1240RU. (reporting that "High Commissioner Zeid Ra'ad al Hussein said initiatives to resolve the situation in

of some permanent members has been to resort to either unilateral use of force or coalitions of allied countries to resolve challenges to international peace and security. However, unilateral actions by permanent SC members, even by the most militarily powerful states such as the United States, can have only limited success, at least in the long term.[11] This happened with regard to Iraq and Afghanistan.[12] Meanwhile, permanent members of the SC have been willing to make decisions that appear to recognize the geopolitical role of non-SC economically advanced countries. This cannot be explained except for the fact that the latter have the ability to impose costs on SC permanent members through economic sanctions.[13] Multilateralism remains the most effective approach to the resolution of international security issues, and the expansion of SC to include countries that have already demonstrated that they must be reckoned with in the resolution of international security issues seems to be consistent with the multilateralism paradigm. Reform efforts have been attempted several times[14] over the course of the U.N.'s existence, but with no

besieged, rebel-held eastern Aleppo should include proposals to limit the use of the veto by the permanent members of the U.N. Security Council.").

11. *See* Lyman, *supra* note 4, at 130 (arguing that "[o]ver the longer term of any military engagement, the legitimacy of UN authorization often becomes even more important to Americans.").

12. *See* Mary Ellen O'Connell, *The Counter-Reformation of the Security Council*, 2 J. INT'L L & INT'L REL. 107, 109 (2005) (observing that the "The Secretary-General revived the idea of Security Council reform in 2003. He did so apparently out of fear of losing any more U.S. commitment to the UN following two failures by the Security Council to authorize U.S. uses of force."). Professor O'Connell argues that the Secretary General acted as if it was the SC which had acted illegally, when in fact it was the U.S. that had acted illegally in using force against Iraq without prior SC authorization which use of force the SC considered unnecessary since no weapons of mass destruction had been found. *See id.* at 110. This is true. Even then, at least with regard to Bosnia, the SC had been gridlocked in a situation that needed intervention to stop the bloodshed. Subsequent retroactive S.C. validation of the use of force in Bosnia would not negate the fact that the S.C. had been ineffective on the grounds of self-interest.

13. *See, e.g.*, Elizabeth Pond & Hans Kundnani, *Germany's Real Role in the Ukraine Crisis*, 94 FOREIGN AFF. 173, 173 (2015) (noting that Germany could have resisted the imposition of "blunt sanctions and has taken every opportunity to negotiate with Moscow … to de-escalate the fighting in Ukraine" and that Germany had begun to "assume geopolitical leadership of Europe for the first time since 1945," because Germany's Chancellor Merkel "remained in constant phone contact with [Russian President] Putin, counseling him to pull back from Ukraine while the West … warning … [that] … Russia would come under severe financial sanctions if Putin refused to comply"). A similar approach to the conflict in Syria has been attempted by the European Union, which includes Germany. *See also* Robin Emmott & Gabriela Baczynska, *EU Threatens New Sanctions Against Syria but not Russia*, REUTERS (Apr 16, 2018), https://www.reuters.com/article/us-mideast-crisis-syria-eu/eu-threatens-new-sanctions-against-syria-but-not-russia-idUSKBN1HN16P.

14. The United Nations itself has been involved in efforts aimed at reform. Prominent among these efforts is Third Report of the 1996 General Assembly Working Group which coincided with the fiftieth anniversary of the United Nations. This report proposed several proposals pertaining to reforms, especially with regard to transparency and working methods of the Security Council, its size and composition and decision-making, including the veto. Rep. of the Open-ended Working Group on the Question of Equitable Representation on and the Increasing in Membership of the Security Council, U.N. Doc. A/50/47/Rev. 1 (1998). Prior to that, in 1963, on the "initiative of a group of forty-four African and Asian States', the number of non-permanent members of the Security Council was increased from six to ten by way of an amendment based on Article 108." *See* Ingo Winkelmann, *Bringing the Security Council into a New Era - Recent Developments in the Discussion on the Reform of the Security Council,* 1 MAX

breakthrough because the national interests[15]of SC permanent members prevailed every time.[16] To some extent, it is inevitable that national interest prevails over U.N. interests because the "primary responsibility of any government is to protect the interests of its own citizenry."[17] If past efforts have fallen short, new attempts at reform must be justified by the existence of new circumstances and opportunities that increase prospects for success.[18] Thus, when the "Secretary-General Kofi Annan

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PLANCK Y.B. U.N. L. 35, 39 (1997). There have been only two "*defacto* replacements of two permanent members," that did not involve a formal amendment of the Charter, one with regard to the replacement of the Republic of China with the People's Republic of China and of the USSR with the Russian Federation. *See id.* at 42.

15. But "national interest" is the very reason that the veto exists. Wouters and Tom Ruys observe that

> The motivation, put forward by the four sponsoring States in 1945, is based on the need to guarantee peaceful relations among the world's main powers and to assure the new body of their support in order to make it sufficiently credible and vigorous. This goal, the Allied Powers argued, could only be achieved by introducing a mechanism to safeguard the vital national interests of the most important UN Member States. The reverse side was the responsibility of these privileged members to take up the responsibility to maintain international peace and security through the United Nations. The concerns underpinning the insertion of Article 27 were well-founded in light of the demise of the League of Nations. The latter organisation never managed to live up to its aspirations due to the requirement of unanimity among all members of its Council on the one hand, and the lack of support of various powerful States on the other hand (the United States never participated in the organisation, whereas Japan, Germany and Italy withdrew from it in the l930s). Eventually, the League was unable to avert the Second World War. Thus, the founding fathers of the UN somehow struck a compromise deal: the requirement of unanimity of all Security Council members was rejected as this would paralyze the exercise of its functions; the position that none should be awarded a veto was equally rejected on the ground that this would deprive the organ of the indispensable support of its core members.

Jan Wouters & Tom Ruys, *Security Council Reform: A New Veto for a New Century?*, 44 MIL. L. & L. WAR REV. 139, 157 (2005). The authors also observe that,

> Soviet Union used its veto no less than 51 times to block the applications of Kuwait, Mauritania, Vietnam, North Korea, South Korea, Japan, Spain, Laos, Cambodia, Libya, Nepal, Ceylon, Finland, Austria, Italy, Portugal, Ireland and Jordan. The United States moreover blocked the application of Vietnam six consecutive times. China used its veto twice: to reject the membership of Mongolia in 1955 and to reject the Bangladeshi application in 1972.

Id. at 146.

16. Consider for example, the prospect of Japan and Germany becoming permanent members of the S.C. which has not been realized. *See* Winkelmann, *supra* note 14, at 43. Some observers, however, remain opposed to increasing the number of permanent members. This view is espoused by Amber Fitzgerald, for example, who also argues that

> [i]f Germany were selected this would lead to three seats being maintained by Western European countries. If Japan were chosen this would cause more domination by the industrialized nations. France, Great Britain, and the United States want Japan to become a permanent member because they all have strong political ties with Japan, and Japan would most likely vote similarly to them. This is not a solution to provide more equality and representation.

Amber Fitzgerald, *Security Council Reform: Creating A More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 345 (2000).

17. Kelly, *supra* note 7, at 331.

18. Indeed, many nations have made a similar observation. *See* U.N. Security Council, *Rep. of the*

called for a renewed effort to reform the Security Council to infuse it with the legitimacy, representation, and accountability it needs to lead the U.N.," he also expressed "the view, long held by the majority, that a change in the Council's composition is needed to make it more broadly representative of the international community as a whole, as well as of the geopolitical realities of today, and thereby more legitimate in the eyes of the world."[19] Indeed, the "composition and working methods are considered to be outdated and no longer reflecting today's realities."[20] Another argument in support of continued reform effort is the democratic ideal and legitimacy.[21] As U.N. Secretary General Kofi Annan said, "[t]he Council must be not only more representative but also more able and willing to take action when action is needed. Reconciling these two imperatives is the hard test that any reform proposal must pass."[22]

The argument against increasing the membership of the SC is that such a change would make the decision-making process less efficient by having too many members. The counterarguments are that "increased membership otherwise might not increase perceptions of legitimacy"[23] and increased membership may make decision-making more difficult.[24]

Reduced competition between the leading military powers is another reason for optimism that reform efforts may be more successful than in the past. Even with renewed competition between the Russian Federation and the U.S., it is unlikely that there will be a full scale return to the Cold War dynamic.[25] As Professor O'Connell

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Open-ended Working Group on the Question of Equitable Representation on and Increasing in the Membership of the Security Council, U.N. Doc. A/58/47 (2004) [hereinafter U.N. Working Group Report] (observing that "[m]any delegations expressed support for an increase in both permanent and non-permanent membership categories, stressing the increase in the general membership of the United Nations and taking into account new economic and political circumstances.").

19. U.N. Secretary-General, *In larger freedom: towards development, security, and human rights for all*, ¶ 168, U.N. Doc. A/59/2005 (Mar. 21, 2005).

20. Winkelmann, *supra* note 14, at 36-37.

21. As John Caron notes, it is important to take concerns for legitimacy seriously because, among other things, illegitimacy,

> may make it difficult for states to build the domestic support necessary to act under a resolution. For example, because of such perceptions, a state may have trouble convincing its citizenry that granting landing rights to aircraft en route to a UN-authorized action is supportive of community concerns rather than the thinly veiled imperialism of the Council's permanent members … may lead states to move more slowly in supporting a resolution, in terms of the sending of troops, the provision of financial support, or the enforcement of embargoes.

John D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, AM. J. INT'L L. 552, 558 (1993).

22. U.N. Secretary-General, *supra* note 19, at 42.

23. Caron, *supra* note 21, at 573.

24. *Id.* (citing an Australian Permanent Representative to the UN, who said that "[p]erhaps the greatest drawback in making the Council more representative is the practical risk that a significantly enlarged Council would make decision-making more difficult.")

25. *See* Keith L. Sellen, *The United Nations Security Council Veto in the New World Order*, 138 MIL. L. REV. 187, 236 (1992) (arguing that "[b]ecause the conflict over communism is over, Cold War enemies have less reason to mistrust each other, paling the original justifications for the permanent member veto.").

notes, "[t]he end of the Cold War gave rise to a lively and hopeful period when it seemed everyone had a plan for expanding the Security Council and modifying the veto."[26] This may be the case even as some scholars believe that "reforming the veto, does not appear likely to occur any time in the near future."[27] In times of reduced competition, the permanent members have been now more willing to refrain from using their veto power even when their national interests are at stake.[28] Cases in point are the Sudan and Libya SC resolutions regarding the referral of Sudan's President Bashir to the International Criminal Court, and the imposition of a no-fly zone over Libya and referral of Libya's Gadhafi to the ICC.[29] In those cases, Russia and China simply abstained.[30] This happened even though China had strategic interests in Sudan, and Russia had strategic alliances with Libya. It is true that "[t]he relatively high degree of accord among the five permanent members has permitted the council to take decisions with an efficacy not heretofore known."[31]

Abstentions alone cannot not provide sufficient antidote to the disfunction of the SC. The old rivalries appear to be making a comeback with a Russia that in some respects longs to recapture some of its past glory and an increasingly geopolitically powerful China. This has made it increasingly difficult for the SC to pass resolutions regarding badly needed action during the so-called "Arab Spring'' as well giving impetus to Iran, Syria and North Korea to do as they please well aware that a divided and gridlocked SC would be unable act.[32] The U.S. is still considered the sole super power,[33] but there are signs of an increasingly confident China that has turned its increasing economic wealth to military buildup.[34] In sum, the SC can't "meet the unprecedented current and future challenges while structured essentially as it was fifty years ago."[35]

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26. O'Connell, *supra* note 12, at 108.

27. Caron, *supra* note 21, at 555.

28. *See generally* U.N. Security Council, Repertoire of the Practice of the United Nations Security Council: Voting (July 3, 2018) http://www.un.org/en/sc/repertoire/rules/overview.shtml#rule8.

29. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (authorizing the International Criminal Court to investigate crimes allegedly committed in Darfur, Sudan); S.C. Res.1973, U.N. Doc. S /RES/1973 (17 Mar.17, 2011) (imposing a no-fly zone over Libya to protect the civilian population); S.C. Res.1970, U.N.Doc. S/RES/1970 (2011) (referring the situation in the Libyan Arab Jamahiriya since February15, 2011 to the Prosecutor of the International Criminal Court).

30. *Id.*

31. Bruce Russett, Barry O'Neill & James Sutterlin, *Breaking the Security Council Restructuring Logjam*, 2 GLOBAL GOVERNANCE 65, 67 (1996).

32. Since the start of the Russian intervention in Crimea, Ukraine in February 2014 (in 5 years), Russia vetoed SC resolutions 13 times (or 2.6 resolutions per year). The current rate of Russian vetoes exceeds the rate during the Cold War. The USSR vetoed SC resolutions 90 times (or 2 resolutions per year while the USA vetoed SC 65 times. It is instructive that between 1991 and 2014 (in 23 years)—when supposedly the Cold War had ended—Russia used the veto only 9 times (or 0.4 resolutions per year). *See* Dag Hammarskjöld Library, Security Council – Veto List http://research.un.org/en/docs /sc/quick/ [hereinafter UN Documentation Guide].

33. Kelly, *supra* note 7, at 331 (citing GUY ARNOLD, WORLD GOVERNMENT BY STEALTH, THE FUTURE OF THE UNITED NATIONS 156 (1997)).

34. *See* Wouters & Ruys, *supra* note 15, at 158 (observing that"[a]lready some are warning of a second Cold War between the United States and China, if the latter country's economic growth were to be translated into a military build-up.").

35. Russett, O'Neill & Sutterlin, *supra* note 31, at 67.

This article reviews the work of the United Nations Security Council (SC) and asks whether it has lived up to its expectations in light of criticisms that it is radically in need of reform or whether its record only confirms the need for continued reform efforts. This article proposes the addition of the more economically advanced countries to the SC; alternatively, it proposes the amendment of the SC to provide for restrains on the veto powers, for example a U.N. General Assembly overriding two-thirds majority vote. To these ends, Part II of this article presents a background of the SC in terms of its objectives as spelt out in the Charter and as conceived by its framers. Part III presents an assessment of SC's record. Part IV discusses areas of possible reform such as the veto, composition, SC's relationship with the General Assembly and the International Court of Justice. Finally, Part V is a concise summary of recommendations.

I. HISTORICAL BACKDROP TO PROVISIONS ON SECURITY COUNCIL

It is imperative to review the historical background in order to assess whether the rationale for SC provisions of the Charter have been borne out based on the record of the SC over the years. Against the backdrop of the Second World War, the framers of the Charter of the United Nations deliberately provided for an enormously powerful SC. The SC's core functions would be the maintenance of international peace and security,[36]as well as enforcement of the rule of law.[37]

The SC voting provisions of the Charter regarding the SC were the most consequential. Article 27 entrenches the unanimity principle, which effectively grants veto powers to the permanent SC members.[38] Under Article 27, ¶ 3 UN Charter, both elected and permanent SC members are obliged to abstain from voting in

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36. Specifically, the SC is empowered to permit the use of force. The U.N. Charter provides that

> [s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Charter, *supra* note 2, at art. 42.

37. Charter, *supra* note 2, at art 94, ¶ 1. The Charter provides that,

> [i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The SC, although so empowered, has been largely ineffective in this regard. For example, in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua. But it is submitted that at San Francisco "[i]t seems to have been understood, though, that the Council would not do so if the losing party's failure to comply with a judgment presented no threat to the peace." Kirgis, *supra* note 5, at 509.

38. The U.N. Charter provides that "[d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." Charter, *supra* note 2, at art 27, ¶ 2-3. The U.N. Charter provides that "[t]he Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council." *Id.* at art. 23.

decisions regarding the peaceful settlement of disputes whenever they are a party to the dispute under consideration.[39] Wouters and Ruys observe that "[t]his provision was a compromise solution between the idea that the Council should never adopt coercive measures against one of its permanent members on the one hand."[40] Beyond that, however, the five permanent SC members can freely deploy their veto with little Charter restraint.

The veto provision grants the five permanent SC members incredibly enormous powers over almost all the important decisions that can be undertaken under the Charter. Veto powers were meant to avoid "the [extreme] paralysis that gripped it [the SC] during the Cold War"[41]as well as the unilateral action with its accompanying perceived lack of legitimacy that otherwise is characteristic of multilateral action. However, these provisions would have little effect on situations where one of the SC permanent member's violation of the prohibition on the use of force is involved. This can be seen in the U.S. vetoing a resolution "in response to complaints of aggression by Nicaragua in 1984-1986 and regarding the invasion of Grenada in 1983, as well as the Soviet veto with regard to its invasion of Hungary in 1956 and Afghanistan in 1980."[42] As Francis Wilcox writes:

> No important decision could be taken by the Organization without their approval. Any Great Power, if it chose, could block the admission of new members. It could prevent the expulsion of a member or the suspension of membership rights. It could hold up the appointment of the Secretary-General. It could block the admission of a state to the International Court of Justice. More important still, it could prevent the adoption of an amendment to the Charter … the Great Powers locked the amending process with the veto and put the keys in their pockets.[43]

Francis Wilcox adds, however:

> Nor can one doubt that the principle of unanimity reflects accurately the realities of power relationships in the modern world. The great states alone possess the material resources and the military might necessary to wage total war. They alone are capable of preventing war … . It was on the assumption that continued harmony among the Great Powers was the only sure guarantee for peace that the principle of unanimity was inserted in the Charter. They had pooled their resources magnificently during the war to smash the Axis. If they could meet the complex issues of the future with that same spirit of teamwork and cooperation, the problem of world peace, at long last, would be solved. The Yalta voting formula, calling for

39. Charter, *supra* note 2, at art 27, ¶ 2-3.

40. Wouters & Ruys, *supra* note 15, at 147.

41. Caron, *supra* note 21, at 570.

42. 257 vetoes have been cast in the period between 1946 and 2004. *See* Wouters & Ruys, *supra* note 15, at 145.

43. Francis 0. Wilcox, *The Rule of Unanimity in the Security Council*, 40 AM. SOC'Y INT'L L. PROC. 51, 54 (1946).

> unanimity at every step, might encourage the Great Powers to work as a team.[44]

The deliberations of the framers of the Charter explain the rationale for the veto powers as well as the composition of the SC. With respect to membership, there were two principles that delegates had to balance regarding the membership of the SC. First, they had to consider whether the SC was democratic enough and second, they considered whether it was capable of acting quickly and effectively.[45] Regarding membership of the SC, framers of the Charter expressed concern about having too many members on the SC which "might unduly increase the number of Council members and delay its decisions."[46] A French delegate also noted that "it is impossible to prevent delays resulting from … meetings … from the transport from countries … . And this, coupled with the lighting rapidity which aggression in modern war is capable of."[47]

The voting procedure of SC has been contentious from the very beginning of the United Nations. Charter negotiators "at Dumbarton Oaks could not arrive at any agreement with respect to the voting procedure in the Security Council and the whole matter was deferred until the Yalta Conference."[48] From a broad perspective, "[t]he work of the Dumbarton Oaks Conference, as elaborated on at Yalta in February 1945, was the starting point for negotiations at the United Nations Conference on International Organization held in San Francisco in May and June of 1945."[49] When the delegates met in San Francisco, one of their primary objectives was to ensure that the Security Council was "placed in a position to act *quickly* and *effectively*."[50] In this respect, one of the issues was the relation between the SC and the U.N. General Assembly.[51] The San Francisco conference was well aware of the need for the U.N. General Assembly to participate in decisions regarding enforcement measures in Chapter VII of the Charter. However, Commission III,[52] the commission that negotiated the structure, function and powers of the Security Council vis-a-vis the General Assembly, ultimately recommended that "the application of enforcement measures, in order to be effective, must … above all be swift … it is impossible … if the decision of the Council must be submitted to ratification by the Assembly, or if the measures applied by the Council are susceptible of revision by the

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44. *Id.* at 54-55.

45. U.N. Conference Commission III, *supra* note 1, at 109-10 (citing the address by Badawi Pasha (Egypt)).

46. *Id.* at 16 (quoting the address by Mr. Paul-Boncour (France)).

47. *Id.* at 59.

48. Wilcox, *supra* note 43, at 52.

49. Caron, *supra* note 21, at 568.

50. UN Conference Commission III, *supra* note 1, at 13 (quoting the address by Mr. Morgenstierne (Norway)) (emphasis added). *See also* Krasno, *supra* note 1, at 94 (stating that "[t]he Security Council was designed to be small enough to meet quickly in an emergency and decide on issues in a timely manner.").

51. The Charter provides that "[t]he General Assembly shall consist of all the Members of the United Nations." U.N. Charter art. 9, ¶1.

52. When the nations met to discuss and negotiate the United Nations, the work of the conference was conducted in its constituent twelve committees grouped under commissions. Alfred P. Fernbach, *The United Nations Security Council*, 32 VA. L. REV. 114, 119, n.3 (1945-1946).

Assembly."[53] Denying the General Assembly a consequential role in the maintenance of international peace and security on that basis may no longer be defensible given the SC's record marked by gridlock and dysfunction. The history of SC gridlock is well-documented—from failure to intervene in the Kosovo,[54] Darfur,[55] Rwanda,[56] and now Syria[57]—with each Member of the Security Council jockeying for their strategic national interests.[58] There are very few examples of cooperation. One of them is the authorization of use of force to forcing Iraq out of Kuwait pursuant to Resolution 687 of 1991.[59]

Ultimately, the overriding consideration for the negotiators appeared to be the avoidance, at any cost, of another world war. Thus, a Norwegian delegate, referring to the work of committee 3 of Commission III stated that:

> I am sure the Committee has had in mind the bitter experience of the last thirty years. It has clearly realized that the executive body of the new world Organization must be so organized and equipped that it can

53. UN Conference Commission III, *supra* note 1, at 14 (quoting the address by Mr. Paul-Boncour (France)).

54. *See* Wouters & Ruys, *supra* note 15, at 151 (observing that "in 1998 and 1999, when large-scale fighting between Serbs and ethnic Albanese Kosovars in the Federal Republic of Yugoslavia (FRY) turned into ethnic cleansing of the latter population group, causing hundreds of thousands of people to flee their homes. Despite the situation on the ground, China and Russia made it clear that they would veto any authorisation to use armed force by the United Nations.").

55. *Id.* (observing that in "2004, Russia and China threatened to use their veto with regard to the Sudanese region of Darfur, where Arab militias committed large-scale killing and raping of civilians, aided and abetted by government officials.")

56. *See id.* (noting that, "[w]hen the Security Council considered the possibility of intervening to halt the [Rwanda] massacres, two permanent members, France and the United States (the latter partially motivated by the loss of 18 soldiers in Somalia in 1993) blocked the establishment of a robust intervention force.").

57. On 4 October, 2012, a draft resolution on the Syrian Arab Republic was put to the vote. The draft was not adopted owing to the negative vote of two permanent members. *See* Rep. of S. C., at 33, A/67/2 (2012) [hereinafter Report of the Security Council] *See also* MEGAN PRICE ET AL., UPDATED STATISTICAL ANALYSIS OF DOCUMENTATION OF KILLINGS IN THE SYRIAN ARAB REPUBLIC 2 (June 13, 2013) (stating that between March 2011 and April 2013, conflict-related violent deaths in Syria had reached at least 92,901).

58. *See, e.g.*, Richard Butler, *Bewitched, Bothered, and Bewildered: Repairing the Security Council,* 78 FOREIGN AFF. 9, 10 (1999) (arguing that permanent members of the SC have in the past "weighted their narrow national interests over collective responsibility."). *See also* Wouters & Ruys, *supra* note 15, at 141, 160 (arguing that "[t]he veto is considered fundamentally unjust by a majority of States and is thought to be one of the main reasons why the Council failed to respond adequately to humanitarian crises such as in Rwanda (1994) and Darfur (2004)). It is thus not surprising that most States wish to abolish or restrain it." This is the case, even though the San Francisco Declaration, stated that **"**It is not to be assumed, however, that the permanent members **…** would use their 'veto' power willfully to obstruct the operation of the Council." *Id.*

59. Crispin Tickell, *The Role of The Security Council in World Affairs*, 18 GA. J. INT'L & COMP. L. 307, 312 (1988). (stating that the Security Council's "more impressive achievements in the past were the withdrawal of Soviet forces from Iran in 1946; the sending of a peacekeeping force to Suez ten years later which allowed the British and French troops to withdraw; and the creation of peacekeeping forces which helped establish the ceasefire during the Yom Kippur war of October 1973. The UN-supervised ceasefire was an essential precursor to the subsequent peace negotiations which led to the Camp David Agreement.").

> prevent, as far as it is humanly possible to prevent, the outbreak of another devastating world struggle like the one which today we are only half through. Even now, when we feel a tremendous and justified relief at the war in Europe being over, we cannot forget for one moment that, on the authority and ability of the Security Council to act with all possible dispatch and forcefulness, may very well depend at some future date, the security, the peace, and the very existence of the freedom- and justice-loving nations of the world.[60]

Nevertheless, the veto power remained a particularly contentious issue and the delegates vigorously debated it, with some countries mounting some resistance to the proposal. The delegates were interested in the question of whether "the new security organization is to prove impotent and, therefore, be a failure, or whether it is to be provided with the necessary means for carrying out its important task."[61]

> The inclusion of permanent seats with the veto was initially required to keep the major powers in the organization… . The twenty-one Latin American nations, joined by Australia and the Philippines, led the resistance to the privileged status of veto-wielding members. They resented the notion of the veto, but in the end knew that there would be no U.N. Charter without the five major powers. In the final vote on the veto, thirty-three nations supported, two opposed, and fifteen countries abstained.[62]

The delegates understood that ultimately, "the United Nations cannot function properly without the support of the world's most powerful States … safeguarding the essential interests of the latter States is the necessary price to pay."[63] For example, the Australian delegate observed that "the provision requiring unanimity of the great powers in affirmative votes on matters other than procedure means that each one of the five powers can prevent a decision being reached even though ten out of the eleven members favor such a decision."[64] However, the Australian delegation's argument—which was also supported by other delegations—was that the scope of the veto power "should be as restricted as possible so that no one great power could by its individual action block Council decisions."[65] This was a sensible proposition in light of the gridlock that would later characterize the SC.[66] Whereas the negotiators "assumed that five Permanent Members of the Security Council could act as world policemen with real powers … . It soon became clear that things would not work out in the way that everyone had hoped. Wartime cooperation among the allies broke down into the Cold War."[67] One scholar notes that:

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60. UN Conference Commission III, *supra* note 1, at 13 (quoting the address by Mr. Morgenstierne (Norway)).

61. *Id.* at 25 (quoting the address by Mr. Dejean (France)).

62. Krasno, *supra* note 1, at 96.

63. Wouters & Ruys, *supra* note 15, at 164.

64. UN Conference Commission III, *supra* note 1, at 122 (citing the address by Dr. Evatt (Australia)).

65. *Id.* at 123.

66. *See* Wouters & Ruys, *supra* note 15, at 145 (stating that "257 vetoes have been cast in the period between 1946 and 2004.").

67. Tickell, *supra* note 59, at 307-08.

> Far from being a forum in which they could cooperate in coping with post war problems, the United Nations, and the Security Council in particular, became a battleground between East and West in which the West faced seemingly endless vetoes from the Soviet Union. By 1968 when the Soviet Union vetoed a resolution which would have condemned its invasion of Czechoslovakia, they had used the veto no fewer than 100 times. This East/West rivalry polarized and paralyzed international activity, most acutely before the death of Stalin. The sole, aberrant, exception was over the Korean War when the Soviet Union made the fatal mistake of absenting itself from the Security Council, thus allowing the West to put together an intervention force to fight on South Korea's behalf. This is the only example of the Security Council acting with military force in a way envisaged in the Charter.[68]

Nevertheless, it would appear that, ultimately, the delegates were swayed by the idea that unless all the great powers supported certain decisions—especially those relating to the use of force—there was no chance of success in creating an effective U.N. As the Australian delegate put it, "[i]t is understandable that unanimity may reasonably be required when the Council has to make a decision to use force, since the permanent members of the Council will be expected to take a prominent part in the application of force."[69] It was hoped that the great powers would use their veto power with great restraint,[70] but there was no guarantee that they would always do that. For the United States in particular, however, their essential argument can be summed up by U.S. Senator Connally's statement at the conference:

> We believe that the Security Council when united, can preserve peace; we fear that if it is not united, it cannot preserve peace. Therefore, we are voting and did vote for those measures that would contribute to the continued unity and harmony among the permanent members of, the Security Council, in order that their powers and their prestige may be utilized in behalf of peace. It was essential that the Organization be endowed with a relatively small, powerful executive authority. That is the Security Council. The voting formula, in brief, is much more liberal than that adopted by the League of Nations, in which it was required that there be complete unanimity.[71]

With regard to any potential abuse of the veto by the great powers, Senator Connally offered the theory that "they [permanent SC members] will be sensible of that sense of responsibility and that they will discharge the duties of their office not as representatives of their governments, not as representatives of their own ambitions or their own interests, but as representatives of the whole Organization in behalf of world

68. *Id.* at 308.

69. UN Conference Commission III, *supra* note 1, at 123 (quoting the address by Dr. Evatt (Australia)).

70. *Id.* at 127 (noting that "[t]he great powers can perform, a great service to the world if they demonstrate in practice that the special power of veto given to each and every one of them individually under this Charter will be used with restraint and in the interest of the United Nations as a whole.").

71. *Id.* at 131 (quoting the address by Senator Connally (United States of America)).

peace and in behalf of world security,"[72] adding:

> Fifty nations would not permit the arbitrary or willful use of the powers of the Security Council when it was adverse to the interests of all of the Organization or of world peace. And so I do not believe that that can occur. Let me say, furthermore, that if there should be one recalcitrant member of the Security Council, with four other members sitting by his side and counseling and warning him as to the course … to pursue, and with six other members elected by the Assembly, the moral influence, the pressure, and the prestige of these other members would make him think many times before that power should be used arbitrarily or willfully.[73]

However, that moral influence would be insufficient restraint on the use of the veto. In fact, the framers of the Charter continued to worry about the potential of abuse. For example, delegate Loudon of the Netherlands said, "[w]e have been asked repeatedly to have confidence and faith in the permanent members of the Security Council. Our answer is: '[c]onfidence and faith we have, or otherwise we would not acquiesce. We hope and we trust that the future will justify our course.'"[74] Additionally, the delegate from Columbia predicted the possibility of ineffectiveness of the SC, stating, the "unanimity rule or the vote of the permanent members of the Council should not be obligatory even if highly desirable. It [Columbia] believes that the obligatory unanimity will make effective action by the Council impossible because it can be blocked by the vote of a single permanent member."[75] At the same time, even those countries opposed to the veto power recognized that "the states here represented do not want and cannot deny to the five great powers upon whose shoulders rests the heaviest weight of the maintenance of peace and security in the future the instrument which they consider essential."[76] Ultimately, the delegates granted veto powers to the great powers, because of "a tremendous amount of confidence in the certainty that the veto shall not be applied except in exceptional cases."[77]

Some delegates hoped that the possibility of amendment of the Charter would remedy any future abuse of the veto. As the Peruvian delegate acknowledged, "we were presented with the dilemma of a Charter with the veto or no Charter at all. In consequence we decided to propose that the Charter be subject to easy and just amendment in the future and at the same time that if such amendment does not pass a nation may have the right to withdraw."[78] But, as it turned out, the amendment process itself would not be that easy.

Ultimately, the five great powers insisted on the veto power and as the New Zealand delegate put it, the "question of the rule of unanimity or a question of the veto … was a question of organization; a new world organization or no world

72. *Id.*
73. *Id.* at 131-32.
74. *Id.* at 164 (quoting the address by Mr. Loudon (The Netherlands)).
75. *Id.* at 165 (quoting the address of Mr. Lleras Camaroo (Columbia)).
76. *Id.*
77. *Id.*
78. *Id.* at 166 (quoting the address of Ambassador Belaundo (Peru)).

organization."[79] At that time, the nations were desperately searching for a way to stop another world war. They simply had to succeed in bringing the United Nations organization into existence, however defective. In the words of the Indian delegate, "[w]e realize as earnestly as anyone else in this Conference that it is vital to bring into existence an organization however defective on which the hopes the aspirations of the people of the world depend."[80]

Ultimately, only fifteen out of the fifty countries that attended the conference abstained from the vote on granting veto powers to the five SC permanent members.[81] Most delegates accepted the reality that in the community of nations there existed some nations that precisely because of their economic and military prowess would be first among equals, the principle of sovereign equality notwithstanding. The Prime Minister succinctly captured the mood of the conference:

> [T]hey [great powers] said, "But as a precondition we … cannot place our countries under even the most democratic vote of all the nations even under a two-thirds or a four-fifths or a nine-tenths. We the five powers who have the power cannot put that power and our forces and our resources at the disposal of the body unless we are all agreed". Then the question was raised what will happen if in its own interest one of the powers who may break the rules of the Charter and want to break out in aggression after everybody is convinced that they are wrong and that they are morally convicted of aggression should defy not only the Security Council and the Assembly but the world? What will happen then? Again the representatives of the larger nations were frank when they said if that should happen —-we think it is unlikely and we can't see such circumstances arise at the moment but if it did happen then that certainly would mean going outside of the league of the United Nations Organization to deal with it. And it would mean that the Security Council would be really broken up.[82]

The reason for the failure of the League of Nations—predecessor to the U.N.—was that it overemphasized the equality of sovereign states, unanimity,[83] and sought to put every nation at par.[84] Bruce Russett, Barry O'Neill and James Sutterlin, noted that:

> The League had often been immobilized by the requirement for consensus; therefore, a system of majority voting was provided for the council.

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79. *Id.* at 170 (quoting the address of Prime Minister Fraser (New Zealand)).

80. *Id.* at 176 (quoting the address of Sir Ramaswami Mudaliar (India)).

81. *Id.* at 121.

82. *Id.* at 171 (quoting the address of Prime Minister Fraser (New Zealand)).

83. *See* Wouters & Ruys, *supra* note 15, at 142. With regard to the new organization, "[t]he Allied Powers attempted to reassure other countries by pointing out that despite the veto right, the operation of the Council would be less subject to obstruction than was the case under the League of Nations, where unanimity among all members was required." *Id.*

84. The delegates at San Francisco noted that during the era of the League of Nations, "[t]here were, side by side, the League with its principles, its procedures, and its jurisdiction, and parallel to it and in rivalry with it, arrangements made for settlement which did not, as we know, conform to the great principles of the League of Nations." U.N. Conference Commission III, supra note 1 (citing the address by Dr. Evatt (Australia).).

> In the League there had been confusion between the responsibilities of the assembly and the council; therefore, the authority to take action was, in the UN, concentrated in the Security Council. The United States did not join the League in part because it worried that it could not adequately protect its interests; therefore, the right of veto in the Security Council was given to those powers who would share principal responsibility for the maintenance of peace.[85]

Under the League of Nations, decisions on nonprocedural matters required unanimous agreement.[86] Under this dispensation, "each member effectively had a veto."[87] Thus drafters of the Charter, especially the United States, had their "eyes on the past—on the sad experience of the League of Nations."[88] In other words, "[p]roponents of the veto—some of whom would make a virtue of necessity—point out that it represents commendable progress over the League of Nations. In the League Council every one of the 15 members, including the smallest nations with little responsibility for the maintenance of peace."[89] The big nations simply chose not to participate.[90] In the opinion of some scholars, the real reason that the great powers sought to have the veto power in the U.N. organization was to "prevent a council decision authorizing the use of force against them."[91] Some scholars maintain that the veto is one of the reasons for the apparent success of the U.N.:

> But the veto is vital. First, the veto, paradoxically, does more than anything else to ensure that the United Nations bears some resemblance to the real world and is treated seriously as an organisation. Imagine what would happen if there were no veto. Resolutions of mounting fatuity would be passed, instructing the Permanent Members to do things which they had no intention of doing. Through ignoring these resolutions, the leading countries of the world would soon ignore the Security Council, thereby devaluing not only the Security Council but the whole U.N. system.[92]

In sum, the historical backdrop demonstrates that the delegates were cautiously optimistic that the five permanent SC members would not abuse their veto, or if they did the Charter would be amended to address any abuse.

II. ASSESSING THE EFFECTIVENESS OF THE SECURITY COUNCIL

It may be argued that there is no need for reform unless a compelling case is made that the SC has been utterly ineffective because of the lack of any proposed

85. Russett, O'Neill & Sutterlin, *supra* note 31, at 66.

86. League of Nations Covenant art. 5, ¶ 1.

87. Sellen, *supra* note 25, at 234.

88. Russett, O'Neill & Sutterlin, *supra* note 31, at 66.

89. Wilcox, *supra* note 43, at 54.

90. *See Members Of The League of Nations*, ENCLOPEDIA BRITTANICA, https://www.britannica.com/topic/League-of-Nations/Members-of-the-League-of-Nations, last accessed Dec., 2018 (indicating that big powers such as Germany, the United States of America, and the USSR were either not part of the League of Nations at all or with-drew from the organization before the Second World War).

91. Butler, *supra* note 58, at 10.

92. Tickell, *supra* note 59, at 312.

reforms. This section analyzes the resolutions of the SC in terms of those that have been effective and those that have not been effective in accordance with its essential responsibilities and charge. Under the Charter, the SC is created "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." In terms of the record of the SC, save for a hiatus at the height of the Cold War[93] and shortly after the end of the Cold War,[94] the East-West divide made for a mostly effective SC. It is noteworthy that "[o]ut of more than 600 resolutions since 1991, the United States has only exercised its veto four times, three to prevent censure of Israel and once to block a second term for then Secretary-General Boutros Boutros Ghali."[95] John Van Oudenaren observes that:

> The period of Cold War deadlock went through two distinct phases. In the first, the United States and its allies generally had the upper hand; the Soviet Union was forced to rely on the veto to defend its interests. Between 1946 and 1965, Moscow used the veto 106 times, compared with none for the United States. In the second phase, this situation was reversed, as the United States and the West were placed on the defensive by the coalition of the communist countries and radicalized developing countries that came to dominate the UN system. From about 1970 (when the United States cast its first Security Council veto) until the end of the Cold War, the United States was the main wielder of the veto, which it used to neutralize attacks on Israel and in relation to other issues. Between

93. John Van Oudenaren, *Effectiveness and Ineffectiveness of the UN Security Council in the Last Twenty Years: A US Perspective*, ISTITUTO AFFARI INTERNAZIONALI (IAI) 4 (2009), http://www.iai.it/sites/default/files/iai0930.pdf. Van Oudenaren observes that,

> Even at the height of the Cold War, however, the Security Council was able to exercise some of what scholars have called its role as both a great power concert and a force for global governance. In 1956, the United States joined with the Soviet Union in supporting two resolutions calling for an end to the military intervention in Suez. France and the UK vetoed these resolutions, but pressure in the Security Council was one of the factors that helped to bring a swift end to the Suez crisis. The Security Council also played a role in containing conflicts in Cyprus and the Congo, in stopping the 1967 Arab-Israeli war, and in providing a venue for the resolution of the first Berlin crisis and the Cuban missile crisis.

94. *Id.* at 5. Van Oudenaren observes that,

> The end of the Cold War meant the end of the post-1945 deadlock in the Security Council. A period of maximum cooperation in the council began with the international response to Iraq's 1990 invasion of Kuwait, which roughly coincided with a number of other momentous events, including the breakup of the Soviet Union, the dissolution of Yugoslavia and the onset of the wars in the Balkans, the reunification of Germany, and the conclusion of the Maastricht treaty establishing the European Union (EU). Between the late summer of 1990 and the early winter of 1991, the Security Council passed a total of twelve resolutions dealing with the Iraq crisis, including ones that mandated, under Chapter VII of the Charter relating to the existence of a breach of the peace or act of aggression, the imposition of sanctions and that authorized the use of all necessary force' should the sanctions fail.

95. Lyman, *supra* note 4, at 131.

> 1966 and 1989, the United States vetoed 67 Security Council resolutions, compared to just thirteen for the Soviet Union.[96]

More recently, a resurgent Russian Federation and an increasingly economically and militarily assertive China has resulted in the SC deadlock. Since the start of the Russian intervention in Crimea, Ukraine in February 2014 (five years), Russia vetoed SC resolutions thirteen times (or 2.6 resolutions per year). Meanwhile, in the same period USA took an opposing position and voted for the same resolutions thirteen times. The current rate of Russian veto exceeds the rate during the Cold War. The USSR only vetoed SC resolutions ninety times (or two resolutions per year while the USA vetoed SC sixty-five times. It is instructive that between 1991 and 2014 (twenty-three years)—when supposedly the Cold War had ended—Russia used the veto only nine times (or 0.4 resolutions per year).[97] It can be said that by 2005, "[t]he dubious honour of having cast the most vetoes goes to Russia (formerly the Soviet Union), which invoked the privilege 122 times. With 80 vetoes, the United States is entitled to the silver medal. Next in line are Britain and France with 32 and 18 vetoes, respectively."[98]

The voting record of the five permanent members of the SC appears to be motivated by ideological, geopolitical and national interests, rather than objectives of the UN and responsibilities of SC.[99] The following illustrations seem to lead to this conclusion. In 2006, USA vetoed a draft resolution "on the Israeli military operations in Gaza, the Palestinian rocket fire into Israel, the call for immediate withdrawal of Israeli forces from the Gaza Strip and a cessation of violence from both parties in the conflict."[100] In 2009, Russia vetoed "a resolution in on the extension of the UN observer mission's mandate in Georgia and Abkhazia."[101] On 4 October, 2012, a draft resolution on the Syrian Arab Republic was put to the vote. The draft was not adopted owing to the negative vote of two permanent members.[102] In fact, "of the eight vetoes China has cast in the Security Council, two have now involved Syria. The first one was in October 2011, when China joined Russia in blocking a Europe-backed sanctions resolution."[103]

Additionally, "[i]n January 2007, China, together with Russia, vetoed a measure imposing sanctions on Burma, a Chinese client state at the time. Then in July 2008, China joined Russia in killing a resolution punishing the Mugabe regime in

96. Oudenaren, *supra* note 93 at 3, 4.

97. *See* U.N. Documentation Guide, *supra* note 32.

98. Wouters & Ruys, *supra* note 15, at 145.

99. *See* U.N. Documentation Guide, *supra* note 32. Several nations have expressed a similar view, noting "that the veto should be used for the benefit of all Member States of the United Nations … on many occasions, the veto had been used to protect national interests." U.N. Working Group Report *supra* note 18.

100. *Subjects of UN Security Council Vetoes*, GLOBAL POL'Y F., http://www.globalpolicy. org/component/content/article/102/40069.html.

101. *Id.*

102. Report of the Security Council, *supra* note 57.

103. Minxin Pei, *Why Beijing Votes With Moscow*, N.Y. TIMES (Feb. 7, 2012), http://www.nytimes.com/2012/02/08/opinion/why-beijing-votes-with-moscow.html?_r=0).

Zimbabwe, another of Beijing's allies."[104] Additionally, the Chinese has used the veto in "ideological hostility to democratic transitions."[105] This conclusion is arrived at on the basis of the fact that during the Arab Spring, attempts to topple dictatorships in the Middle East, the Chinese "propaganda machine has spared no effort in portraying the events in the region in the most negative light. Fearing a similar upheaval in China."[106] On 15 June 2009, the SC voted on the draft resolution, seeking to extend by two weeks the mandate of United Nations Observer Mission in Georgia (UNOMIG) which was to expire on the same day. The resolution received ten votes in favor, one against (Russian Federation), with 4 abstentions (China, Libyan Arab Jamahiriya, Uganda, Viet Nam), and was not adopted.[107]

Perhaps the only exception in recent times is the case of Libya. It is noted that:

> By resolution 1973 (2011), adopted on 17 March by 10 votes to none, with 5 abstentions, the Council demanded the immediate establishment of a ceasefire and a complete end to violence and all attacks against and abuses of civilians, stressed the need to intensify efforts to find a solution to the crisis, authorized all necessary measures to protect civilians, and established a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians.[108]

When national interests were not particularly at stake, the votes tended to be unanimous and in promotion of the purposes and objectives of the U.N. and responsibilities of the SC. Such is the case with regard to Guinea Bissau and Ivory Coast.[109] In this regard, "[e]xpressing its concern at the continuing instability in Guinea-Bissau, the Council by resolution 1949 (2010), adopted unanimously on 23 November, extended the mandate of UNIOGBIS until 31 December 2011. The Council urged the armed forces in Guinea-Bissau to respect the constitutional order, the rule of law and human rights."[110] However, with the Cold War practically making a comeback, the record appears to promote the narrow ideological, geopolitical and national interest. Thus, between 2005 and June 2018, Russia vetoed SC resolutions nineteen times, while the U.S. vetoed SC resolutions five times.[111]

This article would be remiss not to observe that reliable conclusions based exclusively on the agenda items and the voting record may be hard to make based on various complicating factors. It should be noted, for example, that "objective analysis is hampered by the fact that States often fail to provide clarification of their exact

104. *Id.*
105. *Id.*
106. *Id.*
107. Rep. of the S.C., at 3, U.N. Doc. S/PV.6143 (2009).
108. *Id.*
109. *See* S.C. Res. 1949, U.N. Doc. S/RES/1949 (Nov.23, 2010).
110. *Security Council Renews Mandate of United Nations Integrated Peacebuilding Oce in Guinea-Bissau until 31 December 2011*, Concerned at Persistent Instability (Nov. 10, 2010), https://www.un.org/press/en/2010/sc10091.doc.htm.
111. *See* U.N. Documentation Guide, *supra* note 32.

motives for casting a vote."[112] In recent years, China has tended to abstain[113] rather than veto SC resolutions unless it is necessary to go along with Russia or the subject matter is connected to China's national interest.[114] Here, as in other cases, the veto was not used to promote the principles for which the U.N. was established. As Pei observes that "the most important factor in China's decision had little to do with Beijing-Damascus ties, and everything to do with its diplomatic cooperation with Moscow."[115]

Increasingly, a rift exists in the SC that pits the United States and Europe on the one hand and Russia and China on the other. This appears to be driven by national interest and jockeying for global influence. Thus, "[t]he Russia-China axis of obstruction at the Security Council has now become a critical variable in the council's decision-making process. The two countries seem to have reached a strategic understanding: they will act to defy the West together, so that neither might look isolated."[116] Although between 1946 and 2008, China[117] used the veto six times, as its global and strategic interests increase they are more willing to use the veto.

III. REFORM OF CHARTER PROVISIONS ON THE SECURITY COUNCIL

A. The Veto and Difficulty of Amending the Charter

Commentators have made varied recommendations regarding the reform of the

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112. Wouters & Ruys, *supra* note 15, at 145.

113. Abstention relative to the veto has an ambiguous legal value and there has been no official interpretation of the effect of an abstention. According to Wilcox:

> One problem which was raised at San Francisco but never definitely settled is this: what effect would the abstention from the vote of one of the permanent members have on the principle of unanimity? If a Great Power abstained would the Council nevertheless be able to reach a decision? Or would an abstention serve as a kind of passive veto? In the League Council the practice arose of counting as absent any member that abstained from voting. Under such a procedure it was often possible to obtain a unanimous vote on a measure even though some states did not actively support it."

Wilcox, *supra* note 43, at 55-56. Wilcox adds, "the principle of unanimity is based on the assumption that all of the Great Powers must agree before important action is taken." *Id*. *See e.g.* S.C. Res. 1593 (referring the President of Sudan to the International Criminal Court on which the U.S. and China abstained). *See also* S.C. Res. 1972 (outlining a similar resolution on Libya which China and Russia abstained.). If recent events are to be followed, it can be argued that the practice of the SC itself indicates that they have come to view abstention as passive consent, so to speak. There are series of resolutions on which a member of the veto wielding club simply abstained and yet the resolution was passed, and their legality were not in question. Kirgis argues that "[t]he proviso in Article 27(3)—calling for abstention by a party to a dispute-seems to distinguish abstention from a "concurring vote." The proviso seems to have been regarded originally as identifying a narrow category of cases in which a permanent member's abstention would not stand in the way of a substantive decision." Kirgis argues that "Abstentions are treated as though they were "concurring votes" within the meaning of Article 27(3)." *See* Kirgis, Jr., *supra* note 5, at 510, 537.

114. Pei, *supra* note 103.

115. *Id.*

116. *Id.*

117. Between 1946 and 1971, the Chinese seat on the Security Council was occupied by the Republic of China (Taiwan), which used the veto only once (to block Mongolia's application for membership in 1955). *Changing Patterns in the Use of the Veto in the Security Council*, GLOBAL POL'Y F., http://www.globalpolicy.org/component/content/article/102/32810.html.

SC.[118] The drafters of the Charter agreed that if any of the members of five permanent members of the SC voted against a resolution on substantive grounds, then the resolution would not pass.[119] Hence, the permanent members have the right to veto. This right has resulted in logjam over the years resulting in a less effective SC than the one it was intended to be. Richard Butler noted that to fix the SC one of the critical areas "is the veto, which has been abused by permanent members in defense of interests, client states, and ideological concerns that very often had nothing to do with maintaining international peace and security."[120] But even Butler recognizes that "the veto issue is a vexed one. Clearly, the major powers will not give up their veto power voluntarily, and the charter allows them to block any proposal that it be removed."[121] Some scholars argue that the "veto is essentially immune from reform."[122] Butler proposes that permanent SC members "voluntarily agree to a more constructive interpretation of the veto's nature and the uses to which it may legitimately be put."[123] In other words, Butler focuses on the distinction on substantive and procedural issues[124] and proposes a new understanding of the use of veto power. He propounds that because it is only substantive issues that would require new rules on use of the veto. It would be necessary to "include other understandings on substantive issues."[125] The problem is that this involves what Francis Wilcox calls "the hazy no man's land between procedural and substantive questions,"[126]observing that "it will often be difficult to distinguish between procedural and substantive matters."[127] Kirgis observed that "[t]hree times in the early years the Soviet Union vetoed a preliminary determination that a matter was procedural, claiming that the determination was itself substantive."[128] Additionally, "[t]he official interpretation of the voting procedure which the sponsoring governments issued at San Francisco made clear that any decision taken by the Council to determine whether or not a matter is procedural or substantive is in itself a substantive question and will require the unanimous vote of the permanent members."[129]

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118. *See e.g.*, Kirgis, Jr., *supra* note 5; Butler, *supra* note 58; Caron, *supra* note 21; Russett, O'Neill & Sutterlin, *supra* note 31.

119. Charter, *supra* note 2, at art 27(3).

120. Butler, *supra* note 58, at 10.

121. *Id.*

122. Caron, *supra* note 21, at 569.

123. Butler, *supra* note 58, at 10.

124. The Charter makes a distinction between SC's vote on substantive matters and its vote on procedural matters. It provides that,

> [d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

Charter, *supra* note 2, at art. 27, ¶¶ 2, 3.

125. Butler, *supra* note 58, at 10.

126. Wilcox, *supra* note 43, at 53.

127. *Id.*

128. Kirgis, *supra* note 5, at 510.

129. Wilcox, *supra* note 43, at 53.

Perhaps the most important provision that would be the focus of amendment relates to the voting procedure of the SC. The U.N. Charter provides for several organs of the United Nations Organization, the most prominent of which is the SC. Article 24 of the Charter provides:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

This provision embodies the rationale of the delegates who wanted to establish an SC that would deliver promptly and effectively on its objectives. If this objective turned out to be elusive, the Charter of the United Nations provides for its amendment.[130] Realizing that permanent SC members would have their veto, if there was to be any United Nations organization at all, some delegations tried to provide for a mechanism to revisit these provisions.[131] They "expressed the hope that such a revision of the Charter will not be subject to the rule of unanimity of the permanent members of the Security Council."[132] However, it is almost impossible to see how the SC specifically can be reformed based on the provisions relating to the amendment process that is so dependent on the willingness of the five SC permanent members. The Charter provides:

> Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, *including all the permanent members of the Security Council*.[133]

The Charter also provides that "[a] General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly."[134] Additionally, the Charter provides that "[a]ny alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council."[135] It was in the interest of stability that the amendment process was

130. Charter, *supra* note 2, at arts. 108-109.
131. U.N. Conference Commission III, *supra* note 1, at 119.
132. *Id.*
133. Charter, *supra* note 2, at art.108 (emphasis added).
134. *Id.* at art. 109 ¶ 1.
135. *Id.* at art. 109 ¶ 2.

made so difficult by the framers of the Charter.[136] In fact, "since 1955, all attempts to convene such a General Conference have failed."[137] In 2000, the General Assembly (GA) resolved to "to achieve a comprehensive reform of the Security Council in all its aspects."[138] But by the end of 2005, the GA was still deadlocked.[139] The 2005 World Summit simply reaffirmed the Charter.[140] That same year, a "high-level panel report commissioned by Secretary-General Annan on United Nations reform released in December 2004, *A More Secure World: Our Shared Responsibility,* took up the idea of a four-year seat in one of its two proposals for Security Council reform."[141]

The difficulty of amending the Charter is evidenced by the dearth of scholarly attention.[142] Indeed, the United Nations also acknowledges that "[t]he most difficult issues concern the categories of membership to be enlarged, the veto and the overall numbers of an expanded Security Council."[143] The most significant hurdle is the requirement that any amendment must be "ratified in accordance with *their respective constitutional processes* by two thirds of the Members of the United Nations, *including all the permanent members of the Security Council.*"[144]

Permanent SC members have strategic global as well as nationalistic interests to protect.[145] It is implausible that any legislature body of a permanent SC member

136. Constance Jean Schwindt, *Interpreting the United Nations Charter: From Treaty to World Constitution*, 6 U.C. DAVIS J. INT'L L. & POL'Y 193, 205 (2000).

137. Winkelmann, *supra* note 14, at 84.

138. G.A. Res. 55/2, ¶ 30 (Sept. 8, 2000).

139. *See*, Krasno, *supra* note 1, at 99. According to Krasno, this was because of the clashing of regional and national interests. Krasno writes that "Brazil, Germany, India, and Japan formed the "Group of Four" (G-4) and agreed to seek permanent seats as a group without requesting the veto," "Italy, Mexico, Spain, Argentina, Pakistan, Costa Rica, and others formed another group, calling themselves the "Coffee Club," to support Model B, with its four-year renewable seats," "the African Group, with fifty-four members, proposed six new permanent seats to include two from Africa, with the veto," and "China has been working to thwart any Security Council reform that might give Japan permanent Security Council membership." *Id.*

140. *See generally*, World Summit Outcome, G.A. Res 60/1 (Sept. 16, 2005), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

141. Krasno, *supra* note 1, at 99

142. Caron, *supra* note 21, at 569 (observing that "[t]he difficulty of amending the Charter, and hence reforming the veto, can be taken to explain the evolution of the literature. This difficulty also may explain why … literature is comparatively a trickle").

143. U.N. Working Group Report, *supra note* 18.

144. Charter, *supra* note 2, at art. 108 (emphasis added).

145. *See e.g. Russia Vetoes the Abolition of the Veto*, GLOBALPOLICY.ORG (March 24, 1999), http://www.globalpolicy.org/security-council/security-council-reform/32893.html (stating that "[b]road experience gained through the Council's activity convincingly attests to the fact that the Charter provisions governing the scope and application of the veto are crucial to its ability to function effectively and to arrive at balanced and sustainable decisions. Moreover, these Charter provisions facilitate the subsequent implementation of such decisions. That is why Russia continues to firmly oppose any restriction or curtailment of the veto, be it through amendment to the Charter or otherwise"); *See also*, Krasno, *supra* note 1, at 94 (observing that "[p]ractically speaking, not one of the five would approve any measure that would remove itself from the council or take away the power to veto resolutions").

would ratify an amendment—such as a change to the veto power rule[146]—that would likely diminish the clout and influence of a permanent member over world affairs. Permanent SC members are simply "not willing to abandon this privilege."[147] But, even if the veto remains, something has to be done to reform the structure of the SC for it to continue to serve its purpose. As Russett, O'Neill and Sutterlin put it, the question is "whether the authority of the council can long endure if its structure remains unchanged."[148] One of the things that appears plausible is reform of the composition of the Security Council.

B. Reforming the Composition of the Security Council

In terms of the composition of the SC, the Charter explicitly recognized the economic as well as military stature of SC permanent members. The Charter provides that "[t]he Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council."[149] The Charter also provides that:

> The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.[150]

Some commentators argue that the provision referenced above could provide a formula for the addition of more permanent members to the SC.[151] Times have changed significantly since the 1940s when the Charter was adopted. At the time of its adoption, the signatories were primarily concerned with the carnage of war and they wanted to prevent another war,[152] which led them to proclaim in the opening of the preamble that an objective of this document was to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to

146. Charter, *supra* note 2, at art. 27 ¶ 3 (providing that "[d]ecisions of the Security Council on all other matters [non-procedural matters] shall be made by an affirmative vote of nine members including the concurring votes of the permanent member").

147. Winkelmann, *supra* note 14, at 78-79 (stating"[i]nstead of abolishing the veto, the proposals are aimed at rationalizing it. Four types of proposals can be distinguished: (aa.) proposals for a clearer definition of the scope of application of the veto; (bb.) proposals for restricting the scope of application of the veto; (cc.) proposals for restricting the manner in which the veto is used; (dd.) proposals for additional provisions regarding the veto").

148. Russett, O'Neill & Sutterlin, *supra* note 31, at 66.

149. Charter, *supra* note 2, at art. 23 ¶ 1.

150. *Id.*

151. Kamrul Hossai, *The Challenge and Prospect Of Security Council Reform*, 7 REGENT J. INT'L L. 299, 303 (2010) (citing Justin Morris, *United Nations Security Council: Prospects for Reform*, 31 SECURITY DIALOGUE 265 (2000); U.N. Secretary-General, *The United Nations Secretary General's High Level Panel on Threats, Challenges and Changes*, ¶ 249, U.N. Doc A/59/565 (Dec. 2, 2004)).

152. Krasno, *supra* note 1, at 93.

mankind."[153]

At that time, there were few countries with nuclear capability and only a handful were economic and military powerhouses. Since the inception of the U.N., the emergence of Brazil, Japan, Germany and India, among others, as economic and/or military powers changes the dynamic. Before India and Brazil, there was "Japan, with the status of a global economic power and second largest contributor to the UN, pressed for permanent membership, as did Germany."[154] The main argument in support of increasing the composition of the SC is that:

> [I]f economic strength is given its full weight … Germany and Japan together are now able to offer a contribution to the maintenance of international security comparable to that of the United States … . Japan, as the second largest economic power and second largest contributor to the UN, is making a strong case for permanent membership on the ground of 'taxation with representation.' Germany has staked a similar claim.[155]

This matters because "if Germany and Japan are denied this status, their willingness to make the large financial contributions needed, and ultimately greater military ones as well, will likely be undermined."[156]

The reasons for proposing Japan, Germany and other similarly situated countries, to becomes SC members are not without historical precedent. Scholars have noted that "[t]he United States, the United Kingdom, the U.S.S.R., France, and China were made permanent members of the council in 1945 as the most powerful countries at the time and the ones expected to bear the brunt of defending peace with their armed forces."[157] The criteria used were "gross national product or other economic indicators; population; military prowess; geography, either in terms of size or regional distribution; and/or general international influence."[158]

Some of these factors are still relevant even today. For example, "France and the United Kingdom may claim that their colonial influence, still extant despite the demise of colonialism itself, justifies their permanent position since international influence is the main criterion."[159] During the negotiations for the Charter, it may also have been true that the "the atomic bomb has made the need for Great Power unanimity even more compelling than it was."[160] But other countries have gained international influence and nuclear weapons capability. For example, India has nuclear weapons capability while Germany and Japan have international influence that rivals that of Great Britain and France.[161] These developments tend to "upset the

153. Charter, *supra* note 2, at Preamble.

154. Russett, O'Neill & Sutterlin, *supra* note 31, at 65.

155. *Id.* at 68.

156. *Id.*

157. *Id.*

158. Toby D.J. Mendel, *Restructuring the Security Council*, 1 DALHOUSIE J. LEGAL STUD. 161, 162 (1992).

159. *Id.* at 163.

160. Wilcox, *supra* note 43, at 61.

161. *See India: Nuclear*, NUCLEAR THREAT INITIATIVE (NTI), https://www.nti.org/learn/countries/india/nuclear/. *See generally*, Toby D.J. Mendel, *Restructuring the Security Council*, 1 DALHOUSIE J. LEGAL STUD. 161 (1992).

existing balance of power within the United Nations."[162]

At the inception of the U.N., there were only a handful of nation states in existence and represented at the negotiation conference.[163] Because of this, the General Assembly (GA) has tried not being oblivious to the need for increased representation. The world has changed a great deal since 1945, politically[164] and economically. There is the possibility that SC permanent members may be more willing to accept changes, as more countries like Brazil, India, Germany and Japan increase their economic and political leverage internationally. As U.N. Secretary General Kofi Annan observed, "[t]he Security Council must be broadly representative of the realities of power in today's world."[165] To this end, he proposed that in accordance with Article 23[166] of the Charter, there should be an increase in

> [t]he involvement in decision-making of those who contribute most to the United Nations financially, militarily and diplomatically, specifically in terms of contributions to United Nations assessed budgets, participation in mandated peace operations, contributions to voluntary activities of the United Nations in the areas of security and development, and diplomatic activities in support of United Nations objectives and mandates. Among developed countries, achieving or making substantial progress towards the internationally agreed level of 0.7 per cent of GNP for ODA should be considered an important criterion of contribution.[167]

The GA has had on its agenda the "[q]uestion of equitable representation on and increase in the membership of the Security Council" and in December 1992 invited member states to submit written comments "on a possible review of the membership of the Security Council."[168] More than one hundred states provided their views."[169] The nations were responding to issues such as membership, increased transparency, closer cooperation between the Security Council and the GA, wider consultations with regional organizations, and limitation of the right of veto enjoyed by the permanent members.[170] It is noteworthy that as soon as discussion at the United Nations "turns to considering how many states should be added, or which ones, any apparent consensus evaporates."[171] Some scholars recommend that if the

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162. Wilcox, *supra* note 43, at 62.

163. *Member States*, UNITED NATIONS, http://www.un.org/en/member-states/ (Aug. 1, 2018). The number of member states of the United Nations in 1945 was 51. By 2011, that number had almost quadrupled to 193. *Id.*

164. *Id.* While the Charter was negotiated by only 51 nations, the current membership of the United Nations is 193.

165. Annan, *supra* note 19.

166. Charter, *supra* note 2, at art. 23 ¶1 (providing that "[t]he Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council.").

167. Annan, *supra* note 19.

168. Russett, O'Neill & Sutterlin, *supra* note 31, at 1 (citing, U.N Gen-eral Assembly document A/48/264)

169. *Id.*, at 65.

170. *Id*.

171. *Id.*

"logjam is to be broken, it is time to review various proposals from the point of view of the interests they represent and try to design a package that would respond to at least the minimum interests of all."[172]

This minimalist approach focuses only those areas where there is overlapping consensus. If each region is to be represented among the permanent members, Africa, Asia, and Latin America are likely to have great difficulty in finding a mechanism by which the permanent members from their respective regions would be allocated.[173] Longstanding regional rivalries—between Pakistan and India, or among Argentina, Mexico, Brazil, and between South Africa and Nigeria could pose a real problem in terms of choosing the regional representatives.

Some scholars have proposed that regional organizations such as the African Union or Organization of American States could work out a solution. For example, "permanent seats allocated to Africa should be assigned to countries on the decision of the Africans themselves, in accordance with a system of rotation based on the criteria of the OAU currently in force and subsequent elements which might subsequently improve those criteria."[174] This is "concept of permanent regional representation,"[175] which was once proposed by Malaysia, according to which "[a]ny country in a region could serve in the permanent seat."[176] This proposition tends to ignore economic and military factors and might not be acceptable to current permanent SC members.

Former U.N. Secretary General Kofi Annan recommended two models of reform of the SC: "Model A provides for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats, divided among the major regional areas"[177] and "Model B provides for no new permanent seats but creates a new category of eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas."[178]

Some scholars have opposed the idea of "permanent regional, rotating seats" because while "there are developing states that are emerging world powers, they are not yet sufficiently developed to undertake the tasks that would be required to make them effective permanent members."[179] The rotating basis, that simultaneously takes into account economic and military considerations, makes sense because "[n]o one state in any of the regions would be a completely acceptable representative for that

172. *Id.* at 66.

173. Krasno, *supra* note 1, at 95. Krasno further stated that,

> [a]lthough giving permanent seats to India to represent Asia, Brazil to represent Latin America, or South Africa to represent Africa, sounded promising initially, other countries in the regions challenged this proposal, claiming that these continental giants did not necessarily represent the interests of others in the region. In fact, they might take advantage of their newfound prominence in the Security Council to solidify their local hegemony."

174. Winkelmann, *supra* note 14, at 64.

175. *Id.* at 65.

176. *Id.*

177. Annan, *supra* note 19, at 43.

178. *Id.*

179. Kelly, *supra* note 7, at 338.

region."[180] For example, "India's presence on the UNSC [United Nations Security Council] would also likely be contested by Pakistan."[181] It remains necessary, however, to "devise the alternative arrangement of voting that will both facilitate such a change and make it successful."[182] If current permanent members of the SC are willing to accept new permanent members, they will probably be amenable to accepting the extension of the veto right to those new members as well.

There are counterarguments to expansion of the SC that need to be considered. One of the counter-arguments is that the SC would continue to be undemocratic and not sufficiently inclusive. This argument underscores the difficulty of limiting the number of new economically and militarily advanced countries that would need to be added to the SC once the doors to a more inclusive SC are opened. Increasing the composition based on economic considerations is opposed by some countries. For example Italy, insists that the economic premise "would be neither equitable nor democratic."[183] Additionally, "Italy argues that Germany's ascension would produce three Western European permanent members, excluding Italy which has contributed more peacekeepers than any other country, and which has a larger economy and makes a greater contribution to the United Nations than the United Kingdom."[184] In sum, even if more economically advanced countries were included on the SC, the underlying and fundamental problem would remain: SC would remain an exclusive club of the more powerful nations, which other nations view as largely unrepresentative and arrogant, trying to monopolize global power.[185] As some commentators have noted, "[c]oncerns for decision-making efficacy have clashed with those for legitimacy … . The dilemma is how to resolve that contradiction without weakening the newly achieved capacity of the UN often to act decisively, if not always wisely, on behalf of international peace and security."[186]

At the same time, there are concerns regarding "whether in an enlarged form it [SC] would retain the effectiveness on which its authority also depends."[187] Former Secretary General of the United Nations, Kofi Annan argued, that changes to the SC "should not impair the effectiveness of the Security Council."[188] If the current structure of permanent and non-permanent members of the SC is retained, it may be necessary to reduce the number of non-permanent members in the interest of efficiency. However, if there is no change to the number of permanent members, then it is worth-considering the views of those who have, for example, advocated for the expansion of "the nonpermanent membership … to sixteen, for a total council body of twenty-one … [because] such expansion of the council is essential to meet the wish of smaller states for some greater opportunity to serve as members."[189]

180. *Id.* at 345.
181. *Id*.
182. Caron, *supra* note 21, at 570.
183. Winkelmann, *supra* note 14, at 64.
184. Lyman, *supra* note 4, at 139.
185. Russett, O'Neill & Sutterlin, *supra* note 31, at 65.
186. *Id.* at 67.
187. *Id.* at 66.
188. Annan, *supra* note 19, at 42.
189. Russett, O'Neill & Sutterlin, *supra* note 31, at 76.

There are no perfect solutions. A more representative SC that reflects the current economic, political and military realities would be better than maintaining a structure conceived more than fifty years ago when there were only a few countries in existence. In fact, the five permanent SC members recognize that the SC cannot remain exactly the same due to changed circumstances. As long as the proposed changes are evenhanded and respect the strategic interests of current permanent SC members whose cooperation in the reform process is indispensable. In this respect, "the United States … has expressed strong support for adding Germany and Japan as permanent members and up to three more nonpermanent members."[190] Britain and France have also expressed support for Germany and Japanese candidacy for permanent membership.[191] But these propositions would be non-starters for Russia because Japan and Germany are allies of the United States, France and Britain.[192] In order to balance power on the SC, Russia proposed that Germany and Japan could become permanent members on condition that India too became a permanent member.[193]

C. Reforming the Relationship Between General Assembly and Security Council

Other provisions that would be the focus of reform concern the relationship between the SC and the GA. If the GA were decisively capable of stepping in when the SC is deadlocked, there would probably be no need for any reform of the Charter with regard to the SC. However, one the one hand, the Charter provides that "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary* responsibility for the maintenance of international peace and security."[194] On the other hand, the Charter provides that "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."[195]

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190. *Id.* at 73-74. Russett, O'Neill & Sutterlin also noted that

> [The United States] has also called for setting the required majority at twelve in an expanded council of twenty. Consequently, instead of five permanent members needing to find four out of ten nonpermanent votes as at present, in the new council the seven permanent members would need five nonpermanent votes out of thirteen. Even if two of the permanent members abstained, only seven nonpermanent votes would be required. The job of finding support would be easier, and the voting power of nonpermanent members, as defined above, would be even less than its current minuscule value.

Id. at 74.

191. *Id.* at 74.

192. Russett, O'Neill & Sutterlin observe that this proposition would be a non-starter, anyway. This is because "granting permanent membership only to Japan and Germany, and thereby increasing the already disproportionate representation of the industrialized North, is unacceptable to the non- aligned majority in the UN." *Id.* at 74.

193. *Id.*

194. Charter, *supra* note 2, at art. 24, ¶ 1 (emphasis added).

195. Charter, *supra* note 2, at art. 12, ¶ 1.

The first provision can be read to mean that the SC has the primary, but not exclusive, responsibility for the maintenance of international peace and security. However, the second provision suggests that the GA can only intervene if and when requested by the SC. While the Charter provides that "[t]he General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security,"[196] there is no indication of whether the GA can overrule any negative vote of the SC or a permanent member of the SC.[197] The Charter has other provisions which urge the SC to function in a manner that would not frustrate the objectives of the U.N. more generally, [198] but there is no indication of what would happen in the event it does not.[199]

The International Court of Justice (ICJ) has indicated that the GA may have a role to play in the event that SC is deadlocked with regard to non-enforcement measures, but it did that in the context of a non-binding advisory opinion.[200] This opinion is nevertheless significant—even if to a limited extent—in the event reform of the Charter is not achieved.

The case in point is *Certain Expenses of the United Nations*.[201] This case arose in the context of:

> the manifest failure of the Council to fulfill its tasks as primary actor regarding international peace and security in the Cold War era … [and the] dissatisfaction led UN Member States to adopt the Uniting for Peace resolution in the General Assembly in 1950, providing for an alternative mechanism in the case of Security Council paralysis.202

196. *Id.* at art. 15, ¶ 1.

197. It has been proposed by several nations that "it should be possible to overrule the veto by a two-thirds majority vote in the General Assembly under the 'Uniting for Peace' formula (General Assembly resolution 377 (V) of 3 November 1950) and under a progressive interpretation of Article 24.1." U.N. Working Group Report, *supra* note 18.

198. The Charter provides that, "[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. Charter, *supra* note 2, at art. 24 ¶ 2.

199. The Charter provides that,

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

Charter, *supra* note 2, at art. 11 ¶ 2. Beyond reiterating the effect of Article 12 of the Charter, this provision does not categorically state what would happen if the SC is deadlocked. *See Id.*

200. *See* Schwindt, *supra* note 136, at 200-201 (observing that "neither the requesting organs nor member states are bound to comply with the Court's advisory opinion" and "decisions by the International Court of Justice have reiterated this lack of power" to review acts by organs of the United Nations.").

201. *Certain Expenses of the United Nations*, 1962 I.C.J. Rep. 151 (July 20).

202. Wouters & Ruys, *supra* note 15, at 153.

The *Certain Expenses Case*[203] sought to determine the validity of this resolution. Because the SC could not act due to the Cold War gridlock, the GA adopted certain resolutions pertaining to expenses in connection with the maintenance of international peace and security.[204] The issue before the ICJ was whether the expenditures authorized by the GA to cover the costs of the United Nations operations in the Congo (ONUC) and of the operations of the United Nations Emergency Force in the Middle East (UNEF), constituted "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter.[205]

The former Soviet Union argued that expenses "resulting from operations for the maintenance of international peace and security, are not "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter.[206] The expense fall exclusively to the Security Council for dispersal, "and more especially through agreements negotiated in accordance with Article 43 of the Charter."[207] The ICJ opined that, however,

> The responsibility conferred is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action" … [i]t is only the Security Council which can require enforcement by coercive action against an aggressor… . Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with "decisions" of the General Assembly "on important questions."[208]

In sum, the ICJ determined that the GA may legally be involved regarding measures concerning international peace and security measures, subject to the limitation in Article 12(1) of the Charter. That is, the SC has exclusive authority over coercive or enforcement actions. Essentially, the ICJ reaffirmed the Security Council's "primary place ascribed to international peace and security."

The Charter indicates that the GA may discuss issues of international peace and security, but its resolutions on those issues are mere recommendations.[209] Although

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203. *Certain Expenses of the United Nations*, *supra* note 201, at 157.

204. See, G.A. Res. 1583 (XV) (Dec. 20 1960) and G.A. Res.1590 (XV) (Dec. 20 1960); G.A. Res. 1595 (XV) (Apr. 3 1961); G.A. Res. 1619 (XV) (Apr. 21, 1961); G.A. Res. 1633 (XVI) (Oct. 30, 1961); G.A. Res. 474 (ES-IV) (Sept. 20, 1960); G.A. Res. 1599 (XV) (Apr. 15, 1961), G.A. Res. 1600 (XV) (Apr. 15, 1961), and G.A. Res. 1601 (XV) (Apr. 15, 1961); G.A. Res. 1122 (XI) (Nov. 26, 1956); G.A. Res. 1089 (XI) (Dec. 21, 1956); G.A. Res. 1090 (XI) (Feb. 27, 1957); G.A. Res. 1151 (XII) (Nov. 22, 1957); G.A. Res. 1204 (XII) (Dec. 13, 1957); G.A. Res. 1337 (XIII) (Dec. 13, 1958); G.A. Res. 14.41 (XIV) (Dec. 5, 1959); G.A. Res. 1575 (XV) (Dec. 20, 1960).

205. *Certain Expenses of the United Nations*, *supra* note 201, at 152, 156.

206. *Id.* at 162.

207. *Id.*

208. *Id.* at 164.

209. The Charter provides that,

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security

in the *Certain Expenses* case the ICJ seems to argue that the GA can make decisions regarding international peace and security, the Charter clearly indicates that those decisions are in fact recommendations.[210] Additionally, the ICJ further opined that "[t]he Assembly does not have to defer to the Security Council under Article 11(2) of the Charter unless enforcement action is necessary."[211]

The reality is that the GA only makes recommendations to the SC, and the SC is not obligated to refer any matter to the SC for final resolution in the event it is deadlocked. The Charter unambiguously states: "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."[212] All that the GA can do on its own is "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."[213]

What might need to change, however, is the configuration of the relationship of the GA and SC to make them co-equal with the possibility of a GA override in the event of SC logjam, assuming that this proposal is acceptable to permanent SC members. According to the current structure, the SC is configured to function as the "executive agency for the whole Organization."[214] Ingo Winkelmann has noted the efforts aimed at strengthening the General Assembly.[215] The idea would be to create a sort of "participatory governance."[216] This is a fundamental challenge because much of the Council's agenda is 'urgent,' or can be argued to be urgent."[217]

Reconfiguring the relationship of the SC and GA also might assuage the concerns of those who argue that the SC should not be legislating for the rest of the world without consultation with the more representative body—the GA. Chapter VII

> Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make *recommendations* with regard to any such questions to the state or states concerned or to the Security Council or to both.

Charter, *supra* note 2, at art.11¶ 2. The Charter provides that,

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make *recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Id. at art. 10. (Emphasis added).

210. The Charter provides that "decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security." Charter, *supra* note 2, at art. 18 ¶ 2.

211. Kirgis, Jr., *supra* note 5, at 534.

212. Charter, *supra* note 2, at art. 12 ¶ 1.

213. *Id.* at art. 14.

214. Fernbach, *supra* note 52, at 123.

215. Winkelmann, *supra* note 14, at 56-57.

216. Caron, *supra* note 21, at 575.

217. *Id.* at 576.

"Security Council's adoption of resolutions that impose far-reaching, binding obligations on all 191 U.N. Member States"[218] is of concern to critics who argue SC engages in a form of "global legislating."[219] Critics maintain "that having the Security Council, a fifteen-Member body not accountable to other U.N. organs, impose obligations on all 191 members threatens to weaken one of the cornerstones of the traditional international law structure, namely, the principle that international law is based on the consent of States."[220] Critics believe that the current configurations amounts to "deviating from the traditional method of creating multilateral obligations, namely, the intergovernmental treaty-making process."[221]

The question that arises is whether the so-called "global legislating" or legal hegemony,[222] is consistent with the overall purpose of the Charter. At first glance, it seems global legislating is mandated by Article 25 of the Charter, pursuant to which U.N. member states "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[223] Further, it appears that "UN Charter Articles 41 and 42, buttressed by Articles 25 and 48, clearly authorize the Security Council to take legislative action."[224] The ICJ had had the opportunity to comment on the SC's legislative authority. In *Namibia* Advisory Opinion,[225] the SC issued Resolution 276 calling on all states to refrain from any dealings with South Africa. The ICJ held that this directive was binding on all member states under

218. Eric Rosand, *The Security Council As "Global Legislator": Ultra Vires Or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542, 542 (2004-2005).

219. *Id.*

220. *Id.* at 544.

221. *Id.* at 548.

222. Daniel H. Joyner, *The Security Council As A Legal Hegemon*, 43 GEO. J. INT'L L. 225, 227 (2011-2012) (arguing that in regard to filling in gaps in existing international treaties, especially within regard to countries that are non-signatories to Nuclear Nonproliferation treaties, "[T]he Security Council appears now to consider itself to possess ultimate and essentially unlimited legal authority-i.e. to represent something of a legal hegemon-by virtue of its UN Charter mandate to maintain and restore international peace and security.").

223. U.N. Charter art. 25. *But see*, *id.*, at 235-36. Joyner observes that

> However, the fact that, under this provision, members agree to accept and carry out the decisions of the Security Council "in accordance with the present charter" suggests that the measure of this obedience should be contingent upon the validity of the Council's decisions and actions as held up to the standard of the provisions of the Charter, and further that it is conceivable that other provisions of the Charter might in some cases take precedence over conflicting Security Council decisions.

Id. So it is imperative, for example, that the SC pays attentions to the limitations contained in Articles 11(1) and 25 of the Charter). Joyner argues that the SC has no basis to act as if "[I]t is essentially unbound by law, whether UN Charter law or otherwise, in its fulfillment of its broad and vague mandate to maintain and restore international peace and security." *See id.* at 251. In addition to Jus Cogens norms which the SC would not be able to contradict, Joyner cites a European precedent (Cases C-402/05 P, C-415/05 P, Kadi v. Council, 2008 E.C.R. 1-6351, 3 C.M.L.R. 41) for the proposition that "the UN Security Council cannot override domestic law when that domestic law contains fundamental legal rights." *Id.* at 254.

224. Kirgis, Jr., *supra* note 5, at 520.

225. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, 58 (June 21) [hereinafter *Namibia*].

Article 25.[226]

An example of this "global legislating" activity is the creation of "an *ad hoc* criminal tribunal for the former Yugoslavia to prosecute those responsible for committing serious violations of international humanitarian law."[227] The SC "adopted a statute deciding both the substantive and procedural rules to be applied by the Court."[228] Article 29 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) statute, for example, requires states to cooperate with the tribunal and Article 9 of the ICTY statute "States must stay or defer domestic criminal proceedings for cases falling within the ICTY's jurisdiction when requested by the ICTY to do so."[229] Some members of the United Nations argued that they "would have preferred the initiative to establish a criminal tribunal to have been brought to the attention of the U.N. General Assembly."[230] The establishment of the International Criminal Court, it was argued, would "obviate the need for the Council to establish future *ad hoc* tribunals."[231] But when the validity of these statutes where challenged, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that Council had the authority under Article 41 to establish the Court.[232] Because the courts (ICJ and ICTY) are unanimous in their view that the SC has legislative, albeit contested, authority there is need to address the issue of the role of GA in SC's legislative decisions that bind all nations with little or no input of the SC.[233] But because of the potential of increased inefficiency, increasing the permanent membership of the SC could be the solution as that would increase perceived legitimacy of SC legislative action.[234]

D. Relationship Between Security Council and International Court of Justice

Beyond restructuring the SC's composition and veto power, the next issue is whether SC's legislative powers could be subject to ICJ's judicial review. The issue is "whether it is appropriate for the Council, a small and unaccountable political body, whose decisions are immune from judicial review, to create far-reaching legal obligations for the entire international community."[235] If the GA has little or no impact on SC's global legislating should the ICJ have the power to review the SC's

226. *Id.*

227. Rosand, *supra* note 218, at 563.

228. *Id.*

229. *Id.* at 564.

230. *Id*. at 566.

231. *Id.* at 567.

232. *Prosecutor v. Dusko Tadić*, Case IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 35-36 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

233. Several nations have expressed the need for "strengthening the legislative role of the General Assembly." U.N. Working Group Report, *supra note* 18, at 25 ¶ 45

234. Rosand, *supra* note 218, at 578 (noting that "Expansion of Security Council membership to make it more representative and reflective of current political realities will help allay legitimacy concerns.").

235. *Id.* at 573.

resolutions regarding their consistency with the Charter? The issue is really whether the power of the SC is untrammeled, allowing it to override international law. Some scholars, like Reisman, contend that SC's power is unlimited because of the discretion granted to it in order to execute its responsibility regarding international peace and security.[236] But other commentators contend that the powers of the SC were not intended to be used in that manner.[237] To support this argument, Orakhelashvil refers to the opinion of Judge Jennings who stated that:

> [A]ll discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.[238]

Orakhelashvil concludes that "the key to understanding the powers of the Security Council lies in understanding their delegated nature."[239] But, beyond the opinion of Judge Jennings, Orakhelashvil makes no reference to original documents or negotiating history for this conclusion, whose corollary proposition is that the decisions (or laws) of the SC can be second-guessed or reviewed by the ICJ. Indeed, as "Professor Reisman has pointed out, it would not be easy for the court to find judicially manageable standards to review the Security Council's exercise of chapter VII enforcement authority."[240] In fact, the legislative history attests to the fact that "attempts at San Francisco to empower the Security Council to refer legal disputes directly to the Court were defeated."[241] One scholar notes that:

> It was recognized at San Francisco that the Security Council, like other UN organs, would interpret Charter provisions relating to its own functions. At the same time, it was understood that if an interpretation by the Council was not generally acceptable, it would be no more binding on members than a comparable interpretation by any other organ.[242]

The problem this involves is that it goes "against the general principle of law: not to be judge of one's own actions."[243]

Further, Orakhelashvil contends that "[i]f the Security Council resolution exceeds its powers by offending the Charter or *jus cogens,* it is open to states to refuse

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236. W. Michael Reisman, *Peacemaking*, 18 YALE L. J. 415, 418 (1993).

237. Alexander Orakhelashvil, *The Acts of the Security Council: Meaning and Standards of Review*, 11 MAX PLANCK Y.B. U.N. L. 144, 146 (2007).

238. *Case concerning questions of interpretation and application of the Montreal Convention arising out of the Aerial incident at Lockerbie (Libya v. UK, Libya v. US)* Preliminary Objections, Judgment of 27 February 1998, I.C.J. Rep. 110 (Feb. 27). *See also*, Orakhelashvil, *supra* note 237, at 147; *Tadić*, *supra* note 232, at ¶ 28 (stating that "In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).").

239. Orakhelashvil, *supra* note 237, at 147.

240. Kirgis, Jr., *supra* note 5, at 518.

241. *Id.* at 509.

242. *Id.* at 527.

243. Katak B. Malla, *UN Security Council Reform and Global Security*, 12 ASIAN Y.B. INT'L L. 31, 36 (2005-2006).

to obey it."[244] But these observations do not seem to be in accord with the intention of the framers of the Charter who clearly wanted to create an all-powerful law-making, as well as political, organ within the U.N..[245] Even if it is true that the Charter did not create the SC to be above the law, this cannot mean that its decisions or laws are subject to revision by another organ. The interpretation of the law must be understood to be left to the same organ, namely the SC. This seems the logical conclusion from the veto power granted to the permanent members of the SC, which could only be undermined by granting to the ICJ the power to review the legality of the SC's decisions. What is being proposed here is to achieve by judicial fiat, what could not be achieved via legitimate legislative reform. Such shortcuts would be of little avail because the decisions of the ICJ would not be implementable without the same SC coming to the aid of the ICJ.[246] It appears that Orakhelashvil too quickly dismisses the observation of the ICJ in the *Namibia* case, according to which "the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".[247] Orakhelashvil argues that:

> [T]his passage does not rule out the power of judicial review by the Court for at least two reasons. First, in the court indicated that its attitude was based on the limited scope of the request for an Advisory Opinion by the General Assembly. Secondly, the Court has indeed scrutinised certain resolutions in order to respond to the objections put before it."[248]

At least one scholar argues however, that "[i]ndirect judicial review may be possible when the ICJ is asked to interpret or apply Security Council resolutions that one or more parties assert to be procedurally or substantively improper"[249]

If there is justification for the non-reviewability of SC's resolutions, or the non-participation in U.N.'s legislative action, it is because of the need for SC to act with "speed and efficiency."[250] There is greater legitimacy that accrues from consensual treaty-making approach, but at a global level. Such legitimacy can negatively impact efficiency, unless in current circumstances it is possible to achieve the same efficiency while allowing judicial review and GA's participation, which may not have been possible in the 1940s. For example, even "where the General Assembly had reached consensus on the text of a counter-terrorism treaty, States, particularly in the regions where the terrorist threat is probably greatest, were slow to take the necessary domestic steps to become parties to (i.e., be legally bound by) them, thus limiting their practical relevance."[251] So, when particularly confronted with imminent and proximate threats the SC is left with little choice but to fill in the void rather

244. Orakhelashvil, *supra* note 237, at 191.

245. *See generally*, Charter, *supra* note 2, Ch.5.

246. The Charter provides that "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Charter, *supra* note 2, at art. 94(2).

247. *Namibia*, *supra* note 225, at 45 ¶ 89.

248. Orakhelashvil, *supra* note 220, at 192.

249. Kirgis, Jr., *supra* note 5, at 518.

250. Rosand, *supra* note 218, at 573.

251. *Id.* at 577.

than wait for the slow treaty making process to run its course.

In light of this, it is imperative to advocate for the "[e]xpansion of Security Council membership to make it more representative and reflective of current political realities[, which] will help allay legitimacy concerns, such as those described above, when the Council chooses to act as a 'global legislator.'"[252] Additionally, while the Provisional Rules of Procedure of the Security Council provide that "[u]nless it decides otherwise, the Security Council shall meet in public," [253] "[s]ince the early 1990s, the Security Council … began carrying out most of its work in its closed consultation room, meeting in public only to adopt resolutions already agreed upon."[254] This would also have to change.

There are some who argue that the SC is subject to law because the Charter provides that the a purpose of the United Nations is "to bring about by peaceful means, and in conformity with the principles of justice and *international law*, adjustment or settlement of international disputes."[255] According to Mary Ellen O'Connell, those who argue that the SC is not bound by any laws beyond the principles established in the Charter cite the reasoning used in the *Namibia* case: "[T]he Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter."[256] Even then, this would not be inconsistent with the proposition that SC should be subject to judicial review even if the scope of that review is limited to consistency with principles of the Charter.

It has been observed that the *Lockerbie* case provides probably the most detailed discussion of judicial review of decisions of the SC.[257] In that case, the United States and the United Kingdom intended to ask the Security Council to use its mandatory authority under Chapter VII of the UN Charter to compel Libya to turn over

252. *Id.* at 578.

253. Provisional Rules of Procedure of the Security Council, Rule 48, UN Doc. S/96/Rev.7 (1983).

254. Kirgis, Jr., *supra* note 5, at 518.

255. Charter, *supra* note 2, at art.1 ¶1. (Emphasis added). *See also*, O'connell, *supra* note 12, at 118 (arguing that because "[UN Charter] Chapter I, Article 1(1) does refer to international law." The UN Security Council is bound by international law, beyond the principles established in the Charter.) O'connell also cites to several cases of the ICJ in support of this proposition, namely: Judge *ad hoc* Sir Elihu Lauterpact who stated in the *Genocide Case,* "one only has to state the proposition thus-that a Security Council Resolution may even require participation in genocide-for its unacceptability to be apparent." *See Application of the Convention on the Prevention and Punishments of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro),* Provisional Measures, (1993) I.C.J. Rep. 325 at 440 (Sept. 13) (discussing the separate opinion of Judge Lauterpacht). Judge Weeramantry also stated in the *Lockerbie Case:* "The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with well- established principles of international law." *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya* v. *UK; Libya v. US)*, Provisional Measures, Dissenting Opinion of Judge Weeramantry, (1992) I.C.J. Rep. 114 at 65 (Apr. 14).

256. *Namibia, supra* note 225, at 52 ¶ 110.

257. Michael J. Matheson, *ICJ Review of Security Council Decisions*, 36 GEO WASH. INT'L L. REV. 615, 615 (2004).

the suspects in the Lockerbie incident.[258] Unwilling to comply, Libya turned to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention):

> Libya pointed to the provision of the Convention, which provides that a State in which persons who were alleged to have committed such acts of aircraft sabotage were found has the obligation to prosecute or extradite. Accordingly, Libya contended that it had the right to prosecute if it so chose and that it is a violation of the Convention for the United States and the United Kingdom instead to go elsewhere and apply measures designed to compel Libya's surrender of these individuals.[259]

Matheson notes that the "Security Council disregarded the fact that the case was before the ICJ and proceeded to adopt a decision under Chapter VII, requiring Libya to respond to the U.S. and U.K. demands for the surrender of the individuals and imposing a variety of sanctions on Libya."[260] Once the SC adopted those resolutions, the ICJ declined to adopt the provisional measures sought by Libya.[261] The ICJ decided that "at least as a prima facie matter, it assumed that this was a valid decision of the Council, superseding any inconsistent provisions in the Montreal Convention."[262] The case never went to the merits stage, but had it done so then "the ICJ would have been faced with the question of whether it had the authority to review and possibly invalidate decisions of the Security Council under Chapter VII of the Charter."[263] But as Matheson put it, this would have meant the "the possibility of judicial review over a body that is not subordinate to the ICJ but rather has a horizontal relationship to it."[264] However, Matheson notes that "[t]he drafters of the Charter assumed that the Security Council would be making its own judgments on legal issues that might arise in its work, and did not find it necessary to give the ICJ any right of review over Security Council decisions."[265] Matheson adds, "it was clear that the framers of the Charter did not intend to provide for a process of ICJ review of the actions of political decisions. Such a solution was proposed but not accepted at the time of the Charter's drafting."[266]

Matheson refers to at least one case[267] within the U.N. system where an international court came close to claiming the right to review decisions of the SC. In *Prosecutor v. Dusko Tadic*, the "defendant alleged, among other things, that the Security Council's action in creating the Tribunal was invalid as contrary to the

258. *Id.*
259. *Id.* at 616.
260. *Id.* at 617.
261. *Id.* at 615.
262. *Id.* at 618.
263. *Id.*
264. *Id.* at 619.
265. *Id.* (citing Rep. of the Spec. Subcomm. of Comm. IV/2 on the Interpretation of the Charter, at 831-32, U.N. Doc. IV/2/B/1 (1945)).
266. *Id.* at 620 (citing Rev. Summary Rep. of Fourteenth Meeting of Comm. IV/2, at 653, U.N. Doc. 873, IV/2/37 (1945)).
267. *See e.g. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

Charter."[268] Even then, Matheson observes:

> The Tribunal decided it would review that question, but it did so not on the basis of some general assertion of a judicial right to review Council decisions; rather, review was based on the unique situation of the Tribunal, which required the Tribunal to decide whether it was lawfully created so as to comply with the requirement of fundamental international due process in criminal proceedings … . But, with that exception, there has been no assertion by a judicial body of a right to review decisions of the Security Council.[269]

The reason that has been advanced for denying the ICJ the right to review of SC decisions is that

> in crisis situations, there is a definite need for rapid decisions that are authoritative, that will be taken by all parties as being final and binding, and that they cannot hope to reverse through some other process. Otherwise, the effectiveness of the Council in such crisis situations would be seriously compromised.[270]

At least one scholar is of the view that because SC is primarily a political, and not legislative body, its resolutions are not to be taken as legislation in every case.[271] In fact, resolutions are "frequently not clear, simple, concise or unambiguous. They are often drafted by non-lawyers, in haste, under considerable political pressure, and with a view to securing unanimity within the Council."[272] In some cases the SC wants to ensure that the mandatory nature of the resolution is clear and so it may ensure that "the resolution contains or refers to an Article 39 determination, and includes the words "acting under Chapter VII" or reference to an appropriate article thereof, as well as the word 'decides'".[273] But for the most part, the primary concern of the SC is "the need for flexibility if general agreement is to be reached, and as often as not reached swiftly."[274] In light of the way SC resolutions are drafted, and the "fact that for the most part they are intended to have political and not legal effect, it would be a mistake to approach the text as if it were drawn up with the care and legal input of a treaty."[275] According to this view, it would be misplaced to review those resolutions as if they were analogous to treaties or statutes under domestic legislation. In an age that promotes a more democratic and accountable U.N., changes may be necessary to ensure that the SC does not act without any judicial oversight when it remains possible that it may not always act in the interest of Charter principles or consistent with international law more generally.

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268. Matheson, *supra* note 257, at 621.
269. *Id.*
270. *Id.* at 622.
271. Michael C. Wood, *The Interpretation of Security Council Resolutions*, 1998 2 MAX PLANCK Y.B. U.N. L. 73, 79 (1998).
272. *Id.* at 82.
273. *Id.*
274. *Id.*
275. *Id.* at 89.

IV. RECOMMENDATIONS AND CONCLUSION

A. Composition, Veto and Relationship of Security Council with the General Assembly

Amber Fitzgerald sums up the areas currently considered for SC reform:

> The following are the five main areas of reform currently being discussed regarding increased representation and equality of Member States in the Security Council: 1) adding additional Permanent Members; 2) increasing the overall Security Council membership; 3) changing the veto power; 4) increasing participation in the decision making process; and 5) increasing transparency.[276]

Reform of the SC must take a multi-faceted approach that considers a number of criteria. Any meaningful reforms must bear "in mind the simultaneous goals of legitimacy, representation, accountability, and effectiveness."[277] As Krasno notes, "[w]hile expansion is necessary, there must also be a balance between the need for greater representation and the need to act efficiently. A body that is too large could be unwieldy, rendering it difficult to make timely decisions."[278] Thus it is proposed that "[t]he Council could probably expand somewhat without significantly decreasing its effectiveness."[279]The U.N. has notes regarding the number of Member States of an enlarged SC:

> [P]roposals put forward by Member States have varied, although not considerably. The specific numbers proposed start at 20 but none exceeds 30. Member States proposing a size range have also remained in the 20-30 range, suggesting, for example, an enlarged Council of 15-24 and 24-26. Additionally, those proposing an upper limit for membership of an enlarged Council have also remained in the 20-30 range, proposing, for example, numbers "no greater than 25".[280]

To be reasonable and legitimate, the proposals must not be arbitrary and unprincipled. This article proposes that because of the principle of sovereign equality enshrined in the Charter,[281] it would seem less controversial to increase the number of SC Member States in proportion to the current number of Member States in the United Nations. At the time the Charter was adopted by only fifty-one nations. The current membership of the United Nations is 193.[282] In other words, because the

276. Fitzgerald, *supra* note 16, at 341.

277. Krasno, *supra* note 1, at 95.

278. *Id.*

279. Caron, *supra* note 21, at 567.

280. U.N. Working Group Report, *supra* note 18, at 9.

281. Charter, *supra* note 2, at art. 2, ¶1 (stating The United Nations is based, inter alia, "on the principle of the sovereign equality of all its Members.").

282. Fernbach, *supra* note 52, at 120. A UN Working Group notes that "were 11 members of the Security Council and 51 Member States at the birth of the United Nations in 1945. Council membership at that time represented 21.56 per cent of the membership of the Organization, or a ratio of one Council member to every five Member States." That ratio would be about the same if the SC membership is increased to 42. *Id.*; *see also, Growth in United Nations Membership, 1945-present*, United Nations,

membership of the SC at the inception of the UN was eleven,[283] or 0.22 SC Member States per each of the fifty-one founding nations, the enlarged non-permanent and permanent membership of the United Nations needs to be increased to at least forty-two, that is 193 multiplied by 0.22.[284] A similar approach can be adopted with regard to the permanent membership of the SC. While taking into account the economic and military stature of potential candidates, it is important to note that of the current fifteen members of the SC, only five are permanent members, that is one permanent Member State per every three member states. If the SC is increased to forty-two members, that means that the permanent members need to be increased to fourteen.[285]

Consistent with the criteria of a more equitable SC[286] and cognizant of the changed times in which more economic powers play a bigger role in geopolitics and contribution to the U.N.[287] than when the U.N. was formed about fifty years ago, there would need to be a change to the use of the right to veto.[288] The right to veto

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http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html (last visited Sep. 19, 2018).

283. U.N. Working Group Report, *supra* note 18, at 7. It should be noted that "the membership of the Security Council was increased once. In accordance with General Assembly resolution 1991 (XVIII) of 17 December 1963, the membership was increased from 11 to 15 members, the total increase being in the non-permanent member category." *Id.*

284. *See id.* at 20-21. This idea has been found acceptable to some UN member states. A UN Working Group notes that,

> In 1963, when the Council was enlarged to 15 members and the total United Nations membership was 112, Council membership represented 13 per cent, or a ratio of one Council member to every 8 Member States. Today [2004], with a total membership of 191 Member States, the Council represents 7.85 per cent of the United Nations membership or a ratio of 1 Council member to every 12.5 Member States. Some delegations considered that an expanded Security Council should reflect similar proportions and ratios to those of 1963 (i.e., that the Council should represent 13 per cent of the Organization or a ratio of one Council member to every 8 Member States.

Id. at 20.

285. *Id.* at 21, 23-24. The idea of increasing the number of Permanent SC member that also takes into consideration the economic stature of the new members is supported by many nations. *See id*. at 21 (noting that "[m]any speakers expressed support for an increase in the membership of the Security Council in both the permanent and non-permanent categories. A number of delegations proposed that certain Member States from the industrialized and developing countries should assume permanent seats in an enlarged Council."); *see also* United Nations, *Main Organs* (http://www.un.org/en/sections/about-un/main-organs/index.html) (last visited Sep. 19, 2018).

286. *See generally, Growth in United Nations Membership*, *supra* note 282. It should be noted that for all of the emphasis on effectiveness—an overriding consideration for limiting the SC to a few nations and the inclusion of permanent Members of the SC—the body has been largely ineffective. It appears, however, that "[t]he effectiveness of the Council would benefit from an enlargement that would make the Council more representative … efficiency and effectiveness …[have] already lacking in the Council's current configuration." U.N. Working Group Report, *supra* note 18, at 21. In fact, it is possible that "expansion of the Security Council could achieve the goal of legitimacy, without limiting the effectiveness" of the SC. *Id.* at 23.

287. *Id.* at 22. This idea is also supported by the "importance of regional organizations in dealing with matters of international peace and security." *Id.*

288. *Id.* at 23, 28, 30-31. These criteria are explicitly recognized by the Charter, which provides that

of the original SC permanent members could be subject to a two-thirds overrule vote by other members of the other permanent members of the SC.[289] For consistency with the objectives of efficiency and effectiveness of the U.N., an override by a majority of the enlarged SC would be better than an override by a majority of the GA.[290] In effect, this would mean that the countries with the highest Gross Domestic Product (GDP) from each region would have a chance to get on the SC. The original permanent members who would wish to veto a resolution would have to convince their respective allies to avoid a veto override.

It is possible that the five permanent members of the SC may accept this reform. This is because of the possibility that the new SC permanent members would be allies of current permanent SC who are unlikely to vote against their allies. Past voting patterns appear to provide anecdotal evidence that this happen. It has been noted that the U.N. has voting blocs and that the "voting bloc effect … means that the impact of adding new permanent members with veto rights depends heavily on who is added. Germany and Japan vote regularly with other rich industrial states in the General Assembly, and in the Security Council when they happen to hold non-permanent seats."[291] What that means is that "[s]o long as their alignment in international politics holds relatively constant … their acquisition of permanent (and veto-wielding) membership would not fundamentally alter the balance of political forces on the council."[292] So, political alignments across the world might determine who becomes a permanent and veto-wielding member of the SC. So, it really depends on what nations are added to the SC. It is noted, for example, that the 1965 expansion[293] of the SC from eleven to fifteen members actually worked in favor of the permanent and veto-wielding members of the SC because the "required majority

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"[t]he General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution." Charter, *supra* note 2, at art 23, ¶1. There could be additional criteria, such as "the level of financial contribution to the United Nations, size of population, standing and role at the regional level, size of military forces, contributions to peacekeeping operations, as well as accountability." U.N. Working Group Report, *supra* note 18, at 23. It is to be noted that "financial contributions were the most important and scarce asset for the United Nations, and was of paramount importance as an objective criterion." *Id.* at 24-25.

289. U.N. Working Group Report, *supra* note 18, at 6. Several nations have proposed that "the veto should not be abused but should be used with utmost restraint, particularly in authorizing force or implementing sanctions; permanent members should commit to not using the veto when a decision was supported by majority of Security Council members; the use of the veto should be limited to Chapter VII issues only; the veto should not be used on procedural issues." *Id.* at 31. *See also*, Winkelmann, *supra* note 14, at 80.

290. U.N. Working Group Report, *supra note* 18, at 21. This reasoned proposal may provide rationale which several nations where looking for when they recommended that the "possibility of overruling the veto within the Security Council by an affirmative number of votes in an expanded Security Council should be studied." *Id.* at 32.

291. Russett, O'Neill & Sutterlin, *supra* note 31, at 71.

292. *Id.*

293. Kirgis, Jr., *supra* note 5, at 506 (observing that "Articles 23 and 27 were amended in 1965 to increase the membership of the Security Council from its original eleven to its present fifteen, with a corresponding change from seven to nine votes for the adoption of resolutions.").

went up only from seven to nine, meaning that a lower percentage of affirmative votes was needed after expansion (60 percent) than before (63.6 percent). On balance, it was easier for the permanent members to find the remaining votes they needed."[294]

More importantly, however, increasing the number of non-veto members on the SC can also make it more difficult for the permanent and veto-wielding members to use their veto. It is noted for example, that following the 1965 expansion:

> [T]he increase in nonpermanent members also made it easier for the nonaligned to find a nine-vote majority in favor of a resolution opposed by the United States, and thus to force the United States to use the veto … while the United States could usually obtain modification of a resolution by threatening to veto, it was often forced to accept wording it disliked so as to *avoid* using the veto with the adverse political fallout that would entail.[295]

It is imperative, however, to understand that a

> Council hobbled by new veto-wielding or veto-threatening states might not act quickly or decisively in a crisis, or perhaps could not act at all. Much the same effect could be produced if there were a substantial enlargement of even the nonpermanent membership, or a serious increase in the majority threshold. Either of these would greatly complicate the task of assembling sufficient votes to pass a resolution.[296]

With regard to the issue of inefficiency due to increased membership of the SC, this could be avoided by restricting new permanent SC membership of the most economically advanced countries.

If no change is made to the current composition of SC, at least changes could be made with regard to the number of votes required to pass a resolution. Currently under the Charter, nine of the fifteen members must vote affirmatively for a resolution to pass. A higher threshold would increase the power of nonpermanent members. It has also been proposed that there is need to restrict "the scope of issues on which a veto can be cast, or a big rise in the voting threshold, would be required to materially diminish the veto's importance."[297] The effect is that under that scenario nonpermanent SC members would limit the use of the veto by SC permanent members.[298]

Alternatively, the instances in which the veto can be applied could be curtailed. It has been "proposed that the Charter be amended so that, as a first step, the veto power only applies to decisions taken under Chapter VII of the Charter" and that "Article 27 be amended specifically to this end."[299] Ultimately, it is important to note that all that current SC permanent members will most likely not give up their

294. Russett, O'Neill & Sutterlin, *supra* note 31, at 72.
295. *Id.*
296. *Id.* at 73.
297. *Id.* at 71.
298. Kelly, *supra* note 7, at 329-30.
299. Winkelmann, *supra* note 14, at 79.

power in SC easily. The solution may lie in ensuring that SC permanent members retain at least most of their power, in exchange for increasing the effectiveness and legitimacy of the SC. As a group of experts noted:

> The Charter of the UN provided the most powerful states with permanent membership on the Security Council and the veto. In exchange, they were expected to use their power for the common good and promote and obey international law … . In approaching the issue of UN reform, it is as important today as it was in 1945 to combine power with principle. Recommendations that ignore underlying power realities will be doomed to failure or irrelevance.[300]

B. Amendments Regarding Role of the International Court of Justice

It is also important to subject decisions of the SC to judicial review.[301] The ICJ should be able to review the decisions of the SC. But currently, there is no provision that explicitly provides for this step just in case the SC oversteps its mandate or does not act in conformity with the Charter. The Charter provides that "[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."[302] The Charter also provides that:

> The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question… . Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."[303]

If the ICJ is truly a judicial organ of the U.N. and if the U.N. and its SC are committed to acting in conformity with the Charter in all instances, rather than in furtherance of narrow self-serving national interests of SC permanent members, it should render legally binding decisions rather than mere opinions with regard to SC resolutions and vetoes. The above referenced Charter provisions, as well as related provisions of the Statute of the International Court of Justice,[304] would need to be amended to reflect this recommendation.

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300. Ian Johnstone, *Discursive Power in the UN Security Council*, 2 J. INT'L L & INT'L REL. 73, 90 (2005) (citing Woodrow Wilson International Center for Scholars, *Legitimacy and the Use of Force: Discussion on the United Nations' High-level Panel on Threats, Challenges and Change*, at 64 (2005).

301. *See* U.N. Working Group Report, *supra* note 18, at 29. Some nations have expressed the same idea, proposing to "look into the question of judicial review of cases of broad disagreements between members of the Security Council and the wider membership on whether a decision was ultra vires, or was in keeping within the mandate of the Security Council." *Id.*

302. Charter, *supra* note 2, at art. 92.

303. Charter, *supra* note 2, at art. 96.

304. *See, e.g.* Statute of the International Court of Justice, art. 65, ¶ 1 (providing that, "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.").

C. Conclusion

It is not as if the U.N, has not previously tried to reform the SC. Realizing that eliminating the veto requires the amendment of the Charter and that process too requires the support of the veto permanent members of the SC,[305] U.N. member states have in the past simply abandoned attempted reform efforts. Amending the Charter especially with regard to the composition of the SC and/or veto powers of current SC permanent members or reconfiguring the relationships between the SC and the GA and ICJ should not be viewed as impossible.[306] This paper has attempted to show that opportunities exist for trying again. The five permanent members of the SC realize that their veto may not matter a great deal if the increasingly influential economic powers such as Germany, Japan, Brazil and India do not support the interests that those vetoes are supposed to serve in the first place. As long as those circumstances continue, it will become increasingly plausible to propose changes that include allies of the current SC members on a reconfigured SC, or even to propose to curtail instances in which the veto can be used. In fact, some permanent members of the SC have already expressed interest in moving in that direction. For example, "extension of the veto power is supported by France and Russia,"[307] although the U.S. argues that the veto power should remain with the original permanent five and China the UK have not made a public statement on the issue.[308]

In sum, the veto is premised on a world order that no longer exists.

> [I]t has to be admitted that the current allocation of the veto is a product of the Allied victory in the Second World War and no longer reflects the modern-day distribution of economic and military power. The British and French colonial empires have long ceased to exist and the break-up of the Soviet Union has seriously reduced Moscow's power.[309]

Moreover, more countries now possess nuclear weapons, rather than just the five permanent members of the SC.[310] The Security "Council's five permanent members, with veto power, were supposed to represent the world's power centers. But, there

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305. *See*, Wouters & Ruys, *supra* note 15, at 155 (observing that "the United States and Russia have repeated time and again that they will not accept any limitations to the veto.").

306. There are many other areas that need amendment. But even with regard to those, it is thought that there is no chance for any amendments soon. For example,

> obsolete articles like the superseded names of two permanent members (China, Russia) in Article 23, and like the enemy state clauses (Arts 53 para. 2 and 107) dealing with World War II and the years immediately afterwards, and like Arts 82 and 83 on the Security Council's functions with respect to 'a strategic area' which, together with the rest of the Chapters on Trusteeship (Chapters XI, XII, XIII), have lost their field of application after the emancipation of the last 'strategic area' (Palau).

Tono Eitel, *The UN Security Council and its Future Contribution in the Field of International Law: What may we expect?* 4 MAX PLANCK Y.B. U.N. L. 53, 63 (2000).

307. Wouters & Ruys, *supra* note 15, at 155. *See also*, Lyman, *supra* note 4, at 137-38 (observing that U.S. is open to "Germany and Japan to become permanent members.").

308. Wouters & Ruys, *supra* note 15, at 155-56.

309. *Id.* at 157-58.

310. *Id*. at 158.

are other power centers today not so represented."[311]

At the very least, if there is no reform of the composition of the SC or the provisions on veto power, the relationships of SC with GA and ICJ need to be amended. As long as it becomes increasingly difficult or futile for permanent SC members to try to act unilaterally to protect their national interests in an increasingly changed global order, the permanent members will probably more and more act in furtherance of the objectives of the U.N.. If that is the case, then there is no reason for not amending the Charter to ensure that the SC's resolutions and exercise of the veto are subject to judicial review of the ICJ (or other judicial body created by the U.N.) or overrule by a majority of GA. Under that scenario, the International Court of Justice or the International Criminal Court could be asked for a judicial review especially with regard to SC's primary responsibility of the maintenance of international peace and security.[312]

311. Lyman, *supra* note 4, at 136.

312. Wouters & Ruys, *supra* note 15, at 163 (citing the European Parliament for the proposition that the "possibility must be created of circumventing the veto … should an independent body endowed with legitimacy under international law (for instance, the International Court of Justice or the International Criminal Court) establish that there is an imminent danger of [genocide, war crimes and crimes against humanity] being committed.").

EFFECTIVE ENGAGEMENT OF MULTINATIONAL CORPORATIONS TO ADDRESS EXISTING INADEQUACIES IN THE ENFORCEMENT OF NORMS AGAINST HUMAN TRAFFICKING AND FORCED LABOR[†]

*Taylor Hannegan**

I. INTRODUCTION

In all its forms, human trafficking is the third largest criminal enterprise in the world, generating roughly 150 billion dollars every year and growing rapidly.[1] Though there is arguably some dispute about the number of victims of human trafficking and forced labor, the most widely accepted number seems to fall between twenty-one and twenty-seven million people living in conditions of modern slavery today.[2] Even the lowest estimates suggest there are millions of victims.[3] Though the estimates vary somewhat, private forced labor exploitation constitutes roughly sixty-four percent of the victims; forced sexual exploitation makes up nineteen percent, with state-imposed forced labor as the last sixteen percent.[4] Estimates also suggest that these abuses disproportionately impact women and girls, with females comprising roughly seventy percent of the victims.[5] Regardless of the exact number, it is clear that the situation is dire and demands global attention and action.

Norms against human trafficking and forced labor are certainly developing, and they have a strong theoretical foundation upon which to grow. Article 4 of the Universal Declaration of Human Rights expressly states "no one shall be held in slavery

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[†] This is a revised version of the Article that appears in the print version of this volume of the *Denver Journal of International Law and Policy*.

* Taylor Hannegan, Esq. is a 2019 graduate from the University of Denver Sturm College of Law, where he received a certificate in International Law. He previously worked in Thailand to prevent commercial sexual exploitation of children and studied both public and private international law at The Hague Academy of International Law. As a human rights lawyer, he is now seeking to advance the practice of corporate social responsibility in the law around the world. He wishes to thank Professor Ved Nanda for his guidance on this paper and would also like to thank Professor Phoenix Cai and Professor Celia Taylor for their mentorship in school.

1. *Human Trafficking by the Numbers*, HUM. RTS. FIRST (Jan. 7, 2017), https://www.humanrightsfirst.org/resource/human-trafficking-numbers.

2. International Labour Organization, *Global Estimates of Modern Slavery*, *Forced Labour and Forced Marriage*, ALLIANCE, 2017, at 21 – 22. The ILO's newest estimate is that there are 40.3 million people in modern slavery, with 24.9 in forced labor and 15.4 in forced marriage. This article focuses specifically on the 24.9 million people in forced labor.

3. Business & Human Rights Resource Centre, *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action*, BUS. & HUM. RTS. RESOURCE CENTRE, 2018, at 3.

4. International Labour Organization, *supra* note 2, at 10.

5. *Id.*

or servitude; slavery and the slave trade shall be prohibited in all their forms."[6] There are fourteen international conventions related to the prohibition of trafficking and similar crimes, and countless more domestic laws dealing with the same.[7] Yet, as the continually high number of victims demonstrates, these initiatives clearly are not working fast enough. There is no simple solution to deal with the enormity of this problem. It requires a multi-faceted approach spanning the social, economic, and political spheres.

Given the attention dedicated to preventing these abuses and the long history of such efforts, there is a strong argument to be made that the norms against human trafficking are reaching a *jus cogens*[8] status. This, in turn, would permit greater state involvement and intervention to encourage action be taken to curb these abuses.

To such an end, engaging private, multinational corporations and subjecting them to more concrete enforcement mechanisms would address the problem from one angle that is currently underdeveloped.[9] It is true that an ever-increasing number of companies are implementing some form of the "People, Planet, Profit" triple bottom line maxim when making business decisions.[10] Corporate social responsibility is no longer a term being discussed solely by human rights scholars and cutting-edge companies. Dana Raigrodski maintains that a paradigm-shift is needed that factors in the true cost of business, but "[a]dmittedly, such a paradigm-shift will take time and significant commitment by companies, and it may not be attainable across the board."[11] Many other companies still adhere to the adage that a business's only responsibility is to increase its profits. Others still may engage in "whitewashing" of

6. G.A. Res. 217 (III) A, at art. 4, Universal Declaration of Human Rights (Dec. 10, 1948).

7. Susan W. Tiefenbrun, *Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers,* 23 T. JEFFERSON L. REV. 199, 200 n.5 (2001). From an international standpoint: "The International community has condemned slavery, involuntary servitude, violence against women and other elements of trafficking in the form of declarations, treaties, and United Nations resolutions and reports. These include the Universal Declaration of Human rights of 1948; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labor Convention; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/67. 51/66. and 52/98; the Final Report of the World Congress Against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); the 1991 Moscow Document of the Organization for Security and Cooperation in Europe; the U.N. Convention Against Transnational Organized Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol Against Smuggling of Migrants by Land, Sea and Air (November 15, 2000); *see also* The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?, 2 LOY. U. CHI. INT'L L. REV. 193, 197 n.24 (2005).

8. International Labour Organization, *supra* note 2, at 5, 15.

9. Rachel Nicolson, Dora Banyasz & Nikita Oddy, *UN Working Group established to create a binding treaty on transnational corporations and human rights,* INT'L BAR ASS'N, June 26, 2015, at 1. Though there is an initiative to develop a binding treaty for transnational corporations, there is currently no strict and enforceable law governing multinational corporations.

10. Eric Engle, *Alternative Corporate Finance: Attracting Capital Through Self-Financing and Corporate Social Reporting*, 22 CURRENTS INT'L TRADE L.J. 17, 21 (2014).

11. Dana Raigrodsky, *Creative Capitalism and Human Trafficking: A Business Approach to Eliminate Forced Labor and Human Trafficking from Global Supply Chains,* 8 WM. & MARY BUS. L. REV. 71, 106 (2016).

their activities, attempting to gain the social and economic benefit of corporate responsibility with hollow efforts.

Beyond that, the fact that human trafficking and forced labor continue to be so widespread indicates either that the companies emphasizing the triple bottom line are not at all involved in these activities, or that they too are involved and the measures are simply ineffective. Regardless of the true nature of the issue, greater regulation to prevent these crimes should be pursued. Imposing legal regulations such as tax incentives and penalties as well as corporate liability can serve as a catalyst to affect such a shift in corporate behavior.

II. THE EXISTING INTERNATIONAL FRAMEWORK: A SOLID BASE FOR POLICY, A LACKING FOUNDATION FOR ENFORCEMENT

As mentioned, there are currently at least fourteen international conventions and agreements related to preventing human trafficking and forced labor.[12] Unlike some other social ills, trafficking is almost universally acknowledged as a global problem requiring global action.

The International Labor Organization's Committee of Experts on the Application of Conventions and Recommendations (CEACR) has determined that the definition of forced labor under ILO standards encompasses human trafficking as defined by the Palermo Protocol.[13] Absent qualification, then, forced labor and human trafficking shall both be used to refer to the broader concept of human rights violations covering forced labor and human trafficking.

Substantively, the laws and conventions related to these crimes are relatively similar in their definitions. Generally speaking, the laws define trafficking in persons as,

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.][14]

12. Tiefenbrun, s*upra* note 7.

13. International Labour Office, *General Survey on the Fundamental Conventions Concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization*, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, 2012, at ¶ 272.

14. G.A. Res. 55/25, art. 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Nov. 15, 2000) [hereinafter Palermo Protocol].

The definition of human trafficking or forced labor has gone through many iterations over many decades.[15] Though this definition seemingly covers the vast majority of situations of human trafficking, some have criticized it as being overly complex.[16] Some have interpreted it as excluding labor that began voluntarily but shifted to be coercive or violent in nature.[17] Many of the critiques of the laws dealing with human trafficking is that they are too narrowly construed and do not offer protections to many people in conditions that, but for one subtle nuance, would normally be considered trafficking.[18] Several authors have attempted to establish a more concise definition that still encompasses all the relevant situations of exploitation and slavery.[19]

Perhaps the most successful definition comes from Professor Kevin Bales who identifies three core factors at issue.[20] First, there is a loss of free will of the victim or slave. Second, is the use of violence to control the victim. Third, is some form of economic exploitation that would typically preclude the victim from receiving compensation for their work.[21] Even this definition has received criticism, with Ann Jordan of the International Human Rights Law Group noting that the definition would exclude cases that involved only psychological coercion.[22] While Professor Bales suggests that psychological coercion and similar practices are accompanied by physical violence, it is still possible that this would not always be the case.

Therefore, the most appropriate and broad definition, for the purposes of this paper, is a variation on the definition offered by Professor Bales. Human trafficking and forced labor are "[a] social or economic relationship marked by the loss of free will where a person is forced" or coerced into giving up the ability to sell his or her own labor power freely.[23] This expansive definition could potentially include a scenario that would not have historically been considered trafficking but still does not go nearly so far as to jeopardize internationally acceptable working conditions.

A. An Extensive International Prohibition on Human Trafficking and Forced Labor

The most comprehensive and current international law focusing specifically on human trafficking is the Palermo Protocol to Prevent, Suppress, and Punish

15. Laura L. Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act*, 17 LEWIS & CLARK L. REV. 931, 936 – 38 (2013).

16. *See* Anne Gallagher, *Trafficking in Persons Report,* 23 HUM. RTS. Q. 1135, 1138 – 39 (2001).

17. John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS. U.L.J. 1, 11 – 12 (2015).

18. *Id.* at 937.

19. Amy Weatherburn, *Dominika Borg Jansson, Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons*, 15 HUM. RTS. L. REV. 775, 777 (2015).

20. Kevin Bales, *International Labor Standards: Quality of Information and Measures of Progress in Combating Forced Labor*, 24 COMP. LAB. L. & POL'Y J. 321, 326 (2003).

21. *Id.* at 327.

22. *Id.* at 326 n.9. Professor Bales states "I suspect that, in fact, we are not in disagreement, for I would argue that psychological coercion and traditional practices are normally backed up by violence."

23. *Id.* at 326 – 27.

Trafficking in Persons.[24] It provides morally binding provisions wherein states are expected to pursue three crucial components: Prevention, Protection, and Promotion.[25] Broadly speaking, the Palermo Protocol is designed to prevent and counteract trafficking, protection and assist victims, and promote cooperation between states.[26]

The Protocol is directed solely toward state parties and technically lays out several obligations.[27] Every state should adopt legal measures to criminalize the offenses as described in the protocol.[28] States must also take steps to protect and repatriate victims, enact policies to prevent trafficking, and undertake information sharing and training programs with other states in order to further address these crimes.[29] State parties should endeavor to implement the components of the Protocol, or seek to improve their existing measures.[30]

The Palermo Protocol on trafficking, however, offers little in the way of concrete enforcement. None of the aforementioned provisions have any legally binding enforcement mechanisms. Instead, the Protocol relies entirely on state parties feeling morally obligated to enact the articles of the Protocol.[31] Some have criticized this dearth of legally binding enforcement as undermining the efficacy of the protocol.[32] Others, though, suggest that legally enforceable measures would be coercive in nature, and therefore both violative of state sovereignty and beyond the scope of the United Nations.[33] Furthermore, if there were legal requirements to the Protocol, it would likely hamper adoption by states that would most benefit from following its guidelines.

Domestically, the United States has one of the more far-reaching statutes.[34] The Trafficking Victim's Protection Act (TVPA) ranks countries into three tiers based on the actions they're taking to prevent human trafficking related crimes.[35] Should a country fall to the bottom tier, the United States will impose certain non-economic sanctions on the country in an effort to enforce the developing norms against human trafficking and forced labor.[36] Contrary to the Palermo Protocol on trafficking, the TVPA has immediate legal effects for those that fail to adhere to its suggestions.[37] Such sanctions, imposed unilaterally on foreign states, have been shown to increase

24. Palermo Protocol, *supra* note 14, at arts. 1 – 20.

25. *Id.* at art. 2.

26. *Id.*

27. *Id.* at Preamble.

28. *Id.* at art. 5.

29. *Id.* at arts. 2, 8, 10.

30. *Id.* at arts. 6, 7.

31. *See, e.g.*, *id.* at 939 – 40.

32. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 466 (2006).

33. *See* Anne Gallagher, *Trafficking in Persons Report,* 23 HUM. RTS. Q. 1135, 1138 – 39 (2001).

34. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, § 101, 114 Stat. 1464, 1466 (2000) (codified as amended at 22 U.S.C. § 7101 (2005)).

35. *Id.*

36. *Id.* at 22 U.S.C § 7107(d)(1).

37. *Id.*

compliance with international norms such as those dealing with human trafficking.[38] From a purely theoretical perspective, this would very possibly be a positive response. However, the use by the United States of its considerable relative power could also be problematic since these sanctions would be pursued unilaterally without international or regional support.[39]

Since failing to follow the TVPA has tangible consequences, some states attempt to adhere more closely to the TVPA than the Palermo Protocol.[40] This understandably draws criticism of the United States framework for potentially undermining the United Nations system.[41] The coercive measures of the TVPA also raise questions on the issue of sovereignty and whether the United States is using its considerable power to influence governmental affairs in other states.[42]

Both the Palermo Protocol and the TVPA effectively rely on the three-P paradigm.[43] The paradigm examines the issue of trafficking through views on prosecution, prevention of human trafficking, and victim protection.[44] Laws related to this paradigm are typically grounded in criminal law and deal particularly with state actions.[45]

While the concrete enforcement of the United States system may be more effective in bringing about quantifiable shifts in governmental behavior,[46] it is not without its flaws. The United Nations Protocol's reliance on moral enforcement is insufficient to bring about the requisite systematic change. Both frameworks leave much to be desired and concern themselves largely with state parties.

B. An Emerging Jus Cogens Norm Prohibiting Human Trafficking and Forced Labor in All Its Forms

Both of the systems discussed above, and the countless other similar legal frameworks worldwide, are indicative of the severity of the human rights abuses and import of concerted efforts to address them. The fact that there are a great number

38. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions,* 26 YALE J. INT'L L. 1, 31 (2001).

39. *Id.* at 48 – 49, 74 – 75. "[T]he United States sometimes walks a fine line between hypocrisy and straightforward imperialism where it seeks to enforce rights embodied in human rights instruments that it has not ratified itself or where it flexes its economic muscle to dictate policy to smaller developing nations." Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 FORDHAM INT'L L.J. 577, 601 (1998).

40. Chuang*, supra* note 32, at 439-40.

41. *Id.* at 439*; see also, International People Trafficking: Hearing Before the Subcomm. on Near E. and S. Asian Aff. of the S. Comm. Foreign Rel.,* 106th Cong. (2000) (Statement of Frank E. Loy, Undersecretary of State for Global Affairs, describing bilateral anti-trafficking initiatives); *Trafficking in Women and Children: Hearing Before the Subcomm. on Near E. and S. Asian Aff. of the S. Comm. of Foreign Rel.,* 106th Cong. 76–85 (2000) (Testimony of Bill Yeomans, Chief of Staff, Department of Justice Civil Rights Division).

42. Cleveland, s*upra* note 38, at 48.

43. Nicola Jägers & Conny Rijken, *Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations*, 12 Nw. J. Int'l Hum. Rts. 47, 51 (2014).

44. *Id*.

45. *Id.*

46. Chuang, *supra* note 32, at 464.

of international conventions dealing with slavery, dating back even to 1852, lends credence to the notion that the banning of slavery and slave-like practices have reached a status of *jus cogens* norms.[47] *Jus cogens* norms suggest that states may never violate these standards and further implicitly authorize states to take action to prevent violations of such norms.[48]The plethora of stringent modern laws dealing with an absolute prohibition on slavery emphasizes the peremptory rules to which all states must adhere in relation to these human rights abuses.[49] While state parties have traditionally been guilty of such violations with corporations excluded from jurisdiction or regulation, "violations of *jus cogens* norms have been invoked against non-State entities."[50] Corporations are receiving greater attention under both domestic and international law in relation to their actions impacting the communities in which they are based.[51]

The concept of corporate liability for *jus cogens* violations is not an entirely new one. In both *United States v. Krauch* and *United States v. Krupp*, the Court concluded that although it was individuals on trial, it was the company itself that had violated international law through the actions of its employees.[52] Some authors note that current international tribunals may not have specific jurisdiction over corporations, but that national laws may allow claims against non-state actors to proceed based on claims of violations of international law.[53] Particularly given the overriding and fundamental nature of a *jus cogens* norm, it is more than reasonable to suggest that a multinational corporation could face liability for violating international law.

The United Nations Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG), John Ruggie, stated, "Under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes…"[54] He recognized that the potential for corporate liability may exist in international law. National laws have also increasingly ascribed both criminal and civil responsibilities to corporations under international standards.[55]

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47. Robert Smith, *The Lagos Consulate 1851-1861,* appendix A (Univ. of Cal. Press 1989).

48. *Id.* at 55.

49. Jägers & Rijken, s*upra* note 43 at 56.

50. *Id.*

51. *Id.* at 56.

52. Ralph Gustav Steinhardt, Christopher N. Camponovo & Paul Hoffman, INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS, 721 (2009) (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

53. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS*,* 251 (2006).

54. Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 61, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (suggesting further that the most heinous human rights violations would include slavery, human trafficking, and forced labor).

55. *Id.* at ¶ 63.

C. Imposing Obligations on Multinational Corporations: A Moral Request Without Enforcement

Traditionally, discussions of human rights at the international level have focused specifically on state parties and excluded non-state actors (except in occasional advisory roles).[56] Even when dealing with a *jus cogens* norm such as the prohibition on slavery, it is only in the most recent few years that the international community has begun to take measures to impose any sort of legal responsibility on corporations to help protect human rights. Most notably, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights in 2011 (the Guiding Principles).[57] The United Nations endorsement is intended to initiate implementation of the "Protect, Respect, Remedy" framework that was adopted previously in 2008.[58]

The Guiding Principles thus establish that states must take action to protect human rights, corporations must take action to respect human rights, and states must work with corporations to help provide remedies to those who have suffered human rights abuses.[59] These three pillars provide the foundation for the United Nations Guiding Principles, and in theory, the foundation upon which states and corporations should take action.

Corporations, under the Guiding Principles, have a responsibility to act with due diligence to respect internationally recognized human rights.[60] At a minimum, this is stated to refer to those human rights as promoted in the International Bill of Human Rights and the principles contained in the International Labor Organization's Declaration on Fundamental principles and Rights at Work.[61] Corporations are certainly encouraged to go beyond the rights enumerated herein, the Universal Declaration of Human Rights, part of the International Bill of Human Rights, explicitly prohibits slavery in all its forms in Article 4.[62] Even if corporations were only adhering to the Guiding Principles at the lowest level of requested compliance, slavery would still be impermissible.

The Guiding Principles should serve to inform state parties, and corporations, and should provide direction to any initiative being considered. Much like the Palermo Protocol, however, the Guiding Principles fall short because they contain no legally binding provisions. While corporations are encouraged and expected to respect human rights and engage in corporate social responsibility, even the

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56. *Id.* at ¶ 61.

57. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, at 4, U.N. Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Guiding Principles].

58. U.N. Economic and Social Council, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human rights*, ¶¶ 1, 10, 18 U.N. Doc. E/CN.4/Sub.2.2003/12/Rev.2 (Aug. 23, 2003).

59. Guiding Principles, *supra* note 57, at 6-7, 22.

60. *Id.* at 16.

61. *Id.* at 13.

62. G.A. Res. 217 A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948).

corporation found to be in violation of the International Bill of Human rights would suffer no ill consequences under the United Nations provisions. Even the author of the Guiding Principles himself, Professor John Ruggie, was careful to maintain that the international legal system generally shies away from imposing legal obligations on businesses, with the Guiding Principles being no different in that respect.[63]

Accordingly, some have once again criticized the Guiding Principles for the same reasons as they criticize the Palermo Protocols, suggesting that a company's responsibility to respect "is too low a bar, that companies should have so-called 'positive' obligations as well including to fulfill or realize rights."[64] Given the continued scope of the problem internationally, moral obligations are a good initial step. In all likelihood, however, they are insufficient to influence significant change at this time.

III. *JUS COGENS* AND PERMISSIBLE STATE REGULATIONS

It has been suggested that "taking into account the character of the *jus cogens* prohibition on slavery, there might be solid ground to reconsider the corporate *responsibility* to protect, and to rephrase this as a corporate obligation."[65] Particularly as corporations may be increasingly held liable for human rights violations, it would be wise for corporations to treat their responsibility as a legal obligation.

Within the United Nations Guiding Principles, the fact of the *jus cogens* prohibition on human trafficking and forced labor undoubtedly permits much more significant state action and interference on non-state actors such as multinational corporations. In order to realize the state obligation to protect human rights, the state itself can take action to ensure that a corporation similarly fulfills its obligation to respect human rights. Technically, the state's obligations under the Guiding Principles are to protect human rights through regulations and policy, investigation, and enforcement.[66] Imposing regulatory measures on multinational corporations certainly falls within the purview of permissible and encouraged state action within the Guiding Principles. Despite the usual hesitancy to regulate businesses in their international affairs, if states are truly committed to protecting human rights such actions should be pursued.

IV. EXISTING STATE REGULATIONS IMPOSED ON MULTINATIONAL CORPORATIONS: A STEP IN THE RIGHT DIRECTION

BSR, a global nonprofit consulting group committed to assisting companies develop sustainable business strategies, recently suggested in their report on the future of business and human rights that "[a] mandatory legal and social framework

63. Christine Bader et al., *The U.N. Guiding Principles on Business and Human Rights: Analysis and Implementation*, THE KENAN INST. FOR ETHICS AT DUKE UNIV. REP., at 1, 7 (2012) https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf.

64. *Id.*

65. Jägers & Rijken, s*upra* note 43, at 56.

66. Guiding Principles, s*upra* note 57, at 10–1.

for respecting human rights is emerging," and "[i]n the future, successful companies will be those that comply, and thrive, in this new legal and normative context."[67] Their report points to efforts such as the United Kingdom's Modern Slavery Act (Modern Slavery Act) and France's Corporate Duty of Vigilance law (Duty of Vigilance).[68] Each of these laws, as well as California's Transparency in Supply Chains Act (Supply Chains Act),[69] represents something of a milestone in enforcing human rights standards on corporations. While similar laws have historically been scarce, an ever-increasing number of states have proposed or adopted laws with almost identical requirements.[70] While the requisite levels of legal compliance and penalties may vary, the mere existence of such laws is a promising development.

A. Due Diligence and Disclosure Requirements Relying on Naming and Shaming: California's Transparency in Supply Chains Act and the United Kingdom's Modern Slavery Act

The Supply Chains Act and the Modern Slavery Act contain examples of the most widely enacted provisions with other states recently implementing or pursuing similar statutes.[71] These laws require certain disclosures but typically require little more and impose few, if any, legal consequences.[72] The Supply Chains Act and the Modern Slavery Act have substantively similar requirements[73] but also suffer from similar shortcomings.

California's Supply Chains Act was the absolute first initiative of its kind designed to address potential corporate involvement in trafficking and forced labor through reporting requirements.[74] Along with the general affirmation of the criminal nature of slavery and human trafficking, the act principally relied on the finding that

> consumers and businesses are inadvertently promoting and sanctioning these crimes through the purchase of goods and products that have been tainted in the supply chain, and that, absent publicly available disclosures, consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking.[75]

67. Bus. for Soc. Responsibility, *Human Rights: What Are They? What Do They Mean for Your Company?*, BUS. FOR SOC. RESP., 4 https://www.bsr.org/files/work/bsr-human-rights.pdf.

68. *Id.*

69. S. B. 657, 2010 Leg., 111th Cong., para. 4 (Cal. 2010).

70. Sharan Burrow, *Eliminating Modern Slavery: Due Diligence and the Rule of Law,* BUS. & HUMAN. RIGHTS. RESOURCE CTR., https://www.business-humanrights.org/en/eliminating-modern-slavery-due-diligence-and-the-rule-of-law.

71. *See* Joint Standing Committee on Foreign Affairs, Defence, and Trade, Parliament of the Commonwealth of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, (2017), at 14 [2.24]–[2.25].

72. Modern Slavery Act 2015, c. 30, pt. 6, § 54(9)–(11) (U.K.); Cal. Civ. Code § 1714.43(d) (West 2012).

73. Modern Slavery Act 2015, c. 30, pt. 6, § 54(1) (U.K); Civ. Code § 1714.43(a)(1).

74. Civ. Code § 1714.43(g).

75. Cal. Office of the Attorney Gen., *The California Transparency in Supply Chains Act (2015)*, ST. OF CAL. DEPT. OF JUST., para. 1, https://oag.ca.gov/SB657.

Entering into force in 2012, the Act has two key components: its defined scope of coverage and its disclosure requirements.[76] While the Supply Chains Act is successful in its scope, the legal requirements are likely insufficient to act as a catalyst for true and significant change. The law does still represent an important step forward in mandating corporate social responsibility, and it is able to offer guidance to companies and other governments looking to pursue similar laws.

The Supply Chains Act limits its applicability to "[e]very retail seller and manufacturer doing business in [California] and having annual worldwide gross receipts that exceed one hundred million dollars…"[77] Retail seller and manufacturer classification are both determined by the entity's status on their tax return.[78] "Doing Business in California" is a broad grant of jurisdiction under California Law; it applies to companies that are either organized or domiciled in California as well as any that meet any of the following conditions: 1) have sales in California over $500,000 or twenty-five percent of its total sales; 2) have retail property and tangible personal property worth more than $50,000 or represent twenty-five percent of the business' total real and tangible personal property value; or 3) the amount paid by the taxpayer in the state for compensation is greater than $50,000 or twenty-five percent of the total compensation.[79] Finally, gross receipts references the "gross amounts realized… on the sale or exchange of property, the performance of services, or the use of property or capital… in a transaction that produces business income." [80]

Concerning disclosures, the Supply Chains Act mandates that the retail sellers and manufacturers falling within its scope post disclosures related to five specific categories.[81] Specifically, the covered companies must at least "disclose to what extent, if any," it does the following:

> (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
> (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
> (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
> (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.

76. S. B. 657, 2010 Leg., 111th Cong., para. 4 (Cal. 2012).
77. Cal. Civ. Code § 1714.43(a)(1) (West 2012).
78. *Id*. at §1714.43(C)–(D).
79. Cal. Rev. & Tax Code §23101(b)(1) (West 2012).
80. Cal. Rev. & Tax Code § 25120(f)(2) (West 2009).
81. Civ. Code § 1714.43(c).

> (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.[82]

More simply put, companies must disclose their efforts to combat human trafficking and forced labor, or lack thereof, through verification, audits, certifications, accountability, and training.

If every company covered by the Supply Chains Act were to pursue corporate social responsibility initiatives in each of these five categories, the impact could be tremendous. However, the Supply Chains Act not only fails to require that companies pursue such initiatives, it fails to require that companies even provide positive statements for each of these five categories. Effectively, as long as a company states that it takes no action related to a particular category, the requirements of the law would be met.[83] Should a corporation fail to meet its disclosure obligations, the sole remedy is an action brought by the Attorney General of California for injunctive relief.[84]

The United States Federal Government did, at one point, propose similar legislation. It seems unlikely, however, to pursue such legislation anytime soon.[85]

The United Kingdom's Modern Slavery Act is identical in many ways to the Supply Chains Act, though it will likely impact a larger cross-section of companies. Section 54 of the Act deals specifically with Transparency in supply chains and is the only article imposing obligations on businesses.[86] Whereas the Supply Chains Act covered "retail sellers and manufacturers," the Modern Slavery Act targets "commercial organisations."[87] Such "commercial organisations" are within the scope of the law if they both 1) supply goods or services and; 2) have a turnover of at least the "amount prescribed by regulations made by the Secretary of State."[88] Currently, this amount is set to 36 million pounds, or about 48 million dollars. The potential scope of application is much greater under the Modern Slavery Act than the Supply Chains Act with its lower revenue bar and slightly more forgiving definition of relevant organizations.

The two acts do require essentially the same information in their mandatory disclosures. Though the Modern Slavery Act does not necessitate information on the

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82. *Id.*

83. *Id.*

84. *Id.* at § 1714.43(d).

85. H.R. 2759, 112th Cong. (2011). The United States Federal Government has proposed legislation similar to that in California as of 2011. *Id.* Titled the "Business transparency on Trafficking and Slavery Act" the last action taken was referral to committee as of August 22, 2011. *Id.* Even though the Bill is, for all intents and purposes dead, it is still encouraging as it represents a departure from the previously held belief that the state should be the sole actor in attempting to combat human trafficking and forced labor. Now, given the political priorities of the Trump administration and the inclination to remove regulations, it does seem even less likely that a new Bill would succeed at the federal level. Marieke Koekkoek, Axel Marx & Jan Wouters, *Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Supply Chains Act,* 4 GLOBAL POLICY 522, 527 (2017).

86. Modern Slavery Act 2015, c. 30, pt. 6, § 54 (U.K.).

87. *Id.*; Cal. Civ. Code § 1714.43(a)(1) (West 2012).

88. Modern Slavery Act 2015, c. 30, pt. 6, § 54(2) (U.K.).

same five categories as the Supply Chains Act, it does suggest that the slavery and trafficking statement ought to include information about the organizations structure, policies, due diligence process, risk management, organizational efficacy, and related trainings.[89] Substantively, it covers similar topics as the five categories listed explicitly in the Supply Chains Act.[90]

Once again, if the organization has taken no action and has no information to share, the organization must only release a statement establishing such.[91] Even if the organization has taken no steps to eradicate human trafficking, a statement indicating such would be sufficient to fulfill the organization's obligations. The High Court may issue an injunction, and in Scotland a civil proceeding may be brought for specific performance.[92] This would still only require that the company release an official statement determining that no actions had been taken.

Under neither law would a business suffer immediate negative consequences as a result of a violation of the law. Though laws such as these typically rely on so-called "naming and shaming," neither law contains provisions allowing the release of a list of companies that must comply, nor do they authorize publication of the names of companies failing to do so. Absent these sorts of provisions, "naming and shaming" would rely on an active and engaged consumer seeking out an organization's statement.

Several non-governmental organizations (NGOs) have taken it upon themselves to collect and disseminate the statements published by companies, or to indicate when a company has failed to adhere to the mandatory disclosure under either the Supply Chains Act or the Modern Slavery Act.[93] One such NGO, KnowTheChain, was able to identify roughly 500 companies subject to the Supply Chains Act.[94] However, the Attorney General issued a guidance document designed to clarify the application of the law to 2,600 companies, suggesting that there are far more than 500 companies that must disclose their efforts.[95] Without additional public insight into the companies from whom disclosure is required, the purpose of the law—

89. *Id.* at § 54(5*).*

90. *Id.*; Civ. Code § 1714.43(c).

91. Modern Slavery Act 2015, c. 30, pt. 5, § 54(4) (U.K.).

92. *Id.* at § 54(11).

93. Taylor Wessing, *Modern Slavery Act – Home Office and NGOs Drive for Compliance*, LEXOLOGY, (Nov. 20, 2018), https://www.lexology.com/library/detail.aspx?g=f303cb64-d737-479b-8425-4cd2cbd20079.

94. KnowTheChain, *Insights Brief: Five Years of the California Transparency in Supply Chains Act*, 3 (2015) https://knowthechain.org/wp-content/uploads/2015/10/KnowTheChain_InsightsBrief_093015.pdf [hereinafter *Insights Brief*].

95. *Id.* at 6. Effectively, this means that KnowTheChain was only able to identify 19 percent of covered companies without additional information upon which to rely. *Id.* at 4. In their report, KnowTheChain states that it "recognizes that its dataset does not fully reflect all the companies subject to SB 657 and may reflect some companies not subject to SB 657. With the public information available, it is not feasible to definitively determine all of the companies that are subject to the law." *Id.* at 13; *See also 2017 Results,* CORPORATE HUMAN RIGHTS BENCHMARK (2017) https://www.corporatebenchmark.org/ (examining efforts by the top 98 publicly traded companies on 100 human rights indicators. Unsurprisingly, their results indicate a small group of companies leading the rest).

providing consumers with information to enable them to make educated purchases promoting human rights—would appear to be significantly frustrated.

Given the similarities between the two laws, it is certainly not surprising to find that the European disclosures are as similarly skewed as those in California. A separate initiative, the Modern Slavery Registry under the NGO Business and Human Rights Resource Centre, collected 3,316 statements across twenty-six sectors touching thirty-five countries.[96] Government estimates suggest, however, that more than 12,000 companies are required to comply with the Modern Slavery Act. [97]

Of the 500 companies *identified* by KnowTheChain, only fifty-three percent had statements as required by law that adequately addressed all five categories.[98] A full twenty percent failed to address even a single one of the five categories.[99] Further, only forty-six percent of the available disclosures could be accessed from a company's homepage online, a separate requirement of the law.[100] Of the nineteen percent of companies identified, only thirty-one percent complied with every requirement of the law.[101] Ideally, these numbers will see an increase now that the Attorney General has released their guidance document; despite the fact compliance was required as of 2012, the Attorney General did not make clear how companies should interpret the law until April 2015.[102] Even under the new guidelines, increased adoption is certainly not guaranteed, particularly given the absence of transparency afforded to consumers and the number of companies that seemingly have yet to attempt to comply with any provision of the law.

There is less information available about compliance with the Modern Slavery Act; though former Prime Minister Theresa May commissioned an independent review to determine the impact of the law, the final report did not contain a single mention of the impact of Article 54.[103] As this is the sole article implicating corporations and their role in preventing human trafficking,[104] it seems to be a glaring omission. The most in-depth report comes from the Business and Human Rights Resource Centre. The NGO analyzed statements from companies in the Financial Times Stock Exchange 100 Index (FTSE).[105] The Business and Human Rights

96. *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action*, MODERN SLAVERY REGISTRY, (2017) http://www.modernslaveryregistry.org/ (last visited Dec. 11, 2017).

97. Press Release, U.K. Prime Minister's Office, Home Office, and Prime Minister David Cameron, PM Seeks Stronger Co-Operation with Vietnam to Stop Modern Slavery as New Measures Come into Force, (July 29, 2015), ¶ 4, https://www.gov.uk/government/news/pm-seeks-stronger-co-operation-with-vietnam-to-stop-modern-slavery-as-new-measures-come-into-force.

98. *Insights Brief*, *supra* note 94, at 7.

99. *Id.*

100. *Id.*

101. *Id.* at 5.

102. *Id.* at 6.

103. Caroline Haughey, *The Modern Slavery Act Review*, (2016), at 32 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf (report commissioned by then Home Secretary Theresa May).

104. Modern Slavery Act 2015, c. 30, at i–iii (U.K.).

105. Bus. & Human Rights Res. Ctr., *FTSE 100 At the Starting Line: An Analysis of Company Statements Under the UK Modern Slavery Act*, BUS. & HUM. RTS. RESOURCE CTR. at 1 (2016) https://business-

Resource Centre identified twenty-seven company statements disclosed as of September 30, 2016.[106] According to the report, "[t]he performance of the FTSE 100 is a litmus test… [w]ith their resources and experience, these companies should be leading the rest."[107]

The report scored each company's disclosure in each of the six identified areas for potential reporting. Under their analysis, no company received a top score in any of the six areas.[108] Each topic was scored out of a possible five points.[109] In aggregate, the companies scored an average of 2.1 out of five.[110] These scores were based on companies that actually submitted statements as required by law; if estimates are correct that more than 12,000 companies fall within the scope of the law and only 3,316 statements have been submitted, then the vast majority of companies are severely lacking under the law.[111] Despite these shortcomings, the report was optimistic that the companies would take significant steps to improve. Since it was the first year of required disclosure, the report posits that companies may still be in the early stages of developing official policies.[112] Additionally, the report suggests that some companies may be wary of true transparency for fear of repercussions or standing out negatively amongst their peers.[113]

Both the reports by KnowTheChain and the Business and Human Rights Resource Centre recommend that the government should produce a list of companies required to put forth statements under the acts.[114] This would provide consumers information, and also enable companies to learn best practices from one another, ideally facilitating adoption throughout industries.[115]

The Business and Human Rights Resource Centre report makes an important recommendation absent from KnowTheChain's report. It states that the United Kingdom should work with other governments worldwide to "create mandatory transparency; mandatory due diligence… and government incentives in the form of access to public procurement contracts for those demonstrating due diligence and access to remedy."[116] This recommendation recognizes the importance of mandatory, legally binding measures while also suggesting incentives for companies engaged in best practices.

While both the Supply Chains Act and the Modern Slavery Act have flaws related to their lack of legal consequences and fall short of truly providing consumers

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humanrights.org/sites/default/files/documents/FTSE%20100%20Modern%20Slavery%20Act.pdf [hereinafter *FTSE 100*].

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 6.
110. *Id.* at 8.
111. *Id.* at 1–2.
112. *Id.* at 13–4.
113. *Id.*
114. *Id.* at 15.
115. *Id.* at 14; *see also Insights Brief, supra* note 94 at 6.
116. *FTSE 100*, *supra* note 105 at 15.

the requisite information to make an informed choice, their importance should not be understated. Prior to the Supply Chains Act, there were no similar laws targeting corporations and their role in curbing or supporting human trafficking. Laws such as these provide the foundation upon which to develop stronger norms and more stringent laws. They represent the first crucial steps in addressing actors other than the state to tackle a problem that has no single solution. Elements of these laws can be seen in new laws with stronger mechanisms, such as France's Corporate Duty of Vigilance law.[117]

B. Going Beyond Transparency and "Naming and Shaming" through Mandated Implementation and Vigilance

The Duty of Vigilance law was introduced not by the government, but by Sherpa, an organization based in Paris designed to protect victims of economic crimes.[118] The group acts as both a think tank and an advocate and was obviously integral in the development and passage of the law.[119] The law itself was adopted on February 21, 2017. Shortly thereafter, the law was challenged and subsequently found constitutional in France's highest court, after which it came into force on March 28th.

Though the Duty of Vigilance law is similar in many ways to the Supply Chains Act and the Modern Slavery Act, it contains a critical component different than almost every previous law. Whereas both the California the United Kingdom laws technically permit companies to fulfill their disclosure obligations by stating that they take no action in a particular context, the Duty of Vigilance law does not provide inaction as an option. Instead, companies are mandated to "establish and implement an effective vigilance plan."[120] If a company were to submit a statement saying that no actions had been taken, the lack of action would be considered a violation of the Duty of Vigilance law.[121]

The Duty of Vigilance law does not rely on revenue to determine which companies fall within its purview instead defining its scope based on location and number of employees.[122] If a company's main office is in French territory and it employs at least 5,000 employees, including within its direct and indirect subsidiaries, then the law applies.[123] Alternatively, if the company employs 10,000 employees worldwide and has at least a French subsidiary, then the law may apply even if headquartered outside France.[124] Unfortunately, this is likely a much more narrow scope of coverage. According to the International Bar Association, the Duty of Vigilance law will likely only be applicable to approximately 150 of the biggest companies in

117. Trade and Industry Code [C. COM.] art. L. 225-102-4-5 (Fr.), http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf.

118. SHERPA, *About Us* (2014), https://www.asso-sherpa.org/mandate.

119. *Id.*

120. Trade and Industry Code, *supra* note 117 at Art. L. 225-102-4(I).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

France.[125] That said, France is home to twenty-nine of the Global 500, the world's 500 largest companies ranked by revenue.[126] Those twenty-nine companies represent 1.52 trillion dollars of revenue,[127] meaning the law could still have a profound effect.

Broadly speaking, under the Duty of Vigilance Law covered corporations must establish and implement a vigilance plan; they must publish that plan publicly; and they must release implementation reports detailing their efforts on a yearly basis.[128] The plan should be designed to address not only human rights violations and risks, but also environmental impacts, and should do so throughout the company's supply chain and subsidiaries.[129] In essence, the law mandates that companies establish and implement corporate social responsibility initiatives.

More specifically, companies have five principal obligations. First, the vigilance plan should include "a mapping that identifies, analyses and ranks risks."[130] Based on this mapping, the plan should then establish procedures to assess the situation throughout the supply chain, including subsidiaries, subcontractors, and suppliers; essentially, anyone with whom the company has a commercial relationship.[131] Third, corporations should take action to lessen possible risks and mitigate serious violations of human rights or environmental impacts.[132] Fourth, the plan must contain "an alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned."[133] This cannot be done in isolation, helping to guarantee a more effective and inclusive alert scheme based in the company's reality.[134] Finally, the company must develop a monitoring system to continually evaluate the previous measures and gauge their efficacy.[135]

Each one of these components is mandatory. It is not sufficient for the company to state that they have taken no actions to mitigate potential violations or that they have no alert mechanism.[136] If a company is not meeting its obligations under the law, formal notice may be given requesting they cure their deficiencies.[137] If, three months after receiving formal notice to comply, the company has not rectified the

125. Anna Triponel & John Sherman, *Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law,* INT'L BAR ASS'N. (May,17 2017), https://www.ibanet.org/Article/Detail.aspx?ArticleUid=E9DD87DE-CFE2-4A5D-9CCC-8240EDB67DE3.

126. FORTUNE, *France, Global 500* (2017), http://fortune.com/global500/list/filtered?hqcountry=France.

127. *Id.*

128. Trade and Industry Code, *supra* note 117.

129. *Id.*

130. Trade and Industry Code, *supra* note 117 at art. L. 225-102-4(I)(1).

131. *Id.* at art. L. 225-102-4(I)(2).

132. *Id.* at art. L. 225-102-4(I)(3).

133. *Id.* at art. L. 225-102-4(I)(4).

134. *Id.* at art. L. 225-102-4(I)(1).

135. *Id.* at art. L. 225-102-4(I)(5).

136. *Id.* at art. L. 225-102-4(I)(1).

137. *Id.* at art. L. 225-102-4(I)(2).

situation, a court with proper jurisdiction may, at the request of a party with sufficient interest, enjoin said company to comply with the possibility of penalty.[138]

Originally, the law drafted by Sherpa provided for the possibility of a civil penalty if a company failed to comply and create a vigilance plan.[139] The law first underwent significant changes while it was being considered in parliament, largely due to lobbying efforts from businesses.[140] Even then, the law initially allowed courts to impose a fine of up to ten million Euros on the company solely for noncompliance.[141] If the company breached its legal duties under the law, and such a breach caused damages, the court could increase the fine up to thirty million Euros.[142] However, after it was finally adopted, "120 right-wing legislators from both chambers of the French Parliament referred the Bill to the Council, France's highest court, on the grounds of unconstitutionality."[143] Many believed that the Council would strike down the law, or would, at the very least, apply a liberal reading to a company's obligations under the law, weakening it considerably.[144] Instead, the Council issued somewhat of a landmark decision and upheld a significant portion of the law, striking only the civil fines.[145]

While it is unfortunate that the Council removed what would have been one of the more substantial enforcement mechanisms proposed to address both human rights and environmental issues, the court's decision seems to suggest that it was primarily based on unclear language in the law.[146] Seemingly nothing in the decision appears to take a stance directly on the constitutionality of a possible civil fine, which ideally leaves the door open for future legislation imposing such a penalty.

The Duty of Vigilance law also provides the possibility of a remedy for victims of a violation in Article 2.[147] Should a company fail to perform its obligations under the law, they may be held liable for damages and to compensate for any harm that

138. *Id.* at art. L. 225-102-4(II).

139. Sandra Cossart, Jérôme Chaplier, & Tiphaine Beau De Lomenie, *Developments in the Field, The French Law on Duty of Care: A Historic Step Towards Making Globalization work for All,* 2 BUS. & HUMAN RIGHTS J. 321 (2017), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7C85F4E2B2F7DD1E1397FC8EFCFE9BDD/S2057019817000141a.pdf/french_law_on_duty_of_care_a_historic_step_towards_making_globalization_work_for_all.pdf.

140. *Id.* at 317.

141. *Id.*

142. *Id.*

143. *Id.* at 318.

144. *Id.*

145. Decision No. 2017-750 DC of March 23, 2017, (Fr.) http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-750-dc/decision-n-2017-750-dc-du-23-mars-2017.148843.html.

146. *Id.* The Council, stating that "[i]n view of the generality of the terms it has used, the broad and indeterminate nature of the reference to "human rights" and "fundamental freedoms" and the scope of the companies, enterprises and activities falling within the scope of the plan of action. vigilance which it instituted, the legislator could not, without disregarding the requirements deriving from Article 8 of the Declaration of 1789 and in spite of the objective of general interest pursued by the law referred, retain that may be subject to payment a fine of up to EUR 10 million for a company which has committed a defined breach in terms which are also insufficiently clear and precise."

147. Trade and Industry Code, *supra* note 117 at art. L. 225-102-5.

occurs.[148] This provision of the law, in theory, represents merger of all three pillars of the United Nations Guiding Principles. France is mandating protection of human rights with a legal system that requires companies to respect such rights. Should the company fall short of respecting these rights, then the company may be held liable for the violation in court, and is thus required to provide the victims with a remedy.[149]

Where the Duty of Vigilance law falters, though, is in placing the burden of proof upon victims of violations. There is no simple solution regarding the burden of proof, particularly when dealing with human rights violations. However, under the Duty of Vigilance law, victims have to prove both that they suffered some sort of harm and also that the harm could have been avoided had the company practiced due diligence.[150] Therein lies the issue; the reality facing many of the workers in a company's supply chain would make it extraordinarily difficult to access the resources required to meet such a burden of proof. In its decision striking down the civil fines of the law, the Council also determined that the provisions of Article 2 did not create a new system of vicarious liability, and instead upheld the traditional notion of civil liability in tort.[151] This requires that a "direct causal link between these breaches [of the duty of vigilance and due diligence] and the damage" be established.[152] In this sense, the law could have an even greater impact if the burden of proof were for the victim to prove only that a harm had occurred, at which point the burden would shift to the employer to demonstrate due diligence had been followed. Even then, this would ideally be done only to mitigate damages instead of absolving liability.

The law should have also required that companies implement extra non-judicial options for victims seeking remedies. The Guiding Principles discuss this as an important component of access to remedy.[153] Once again, however, this law represents a tremendous step forward in governments holding corporations responsible for respecting human rights, something that would have been almost unfathomable even fifteen years ago.[154]

148. *Id.*

149. *Id.*

150. *Id.* at art. L. 225-102-4(I) and art. L. 225-102-5. Some critics have also suggested that the law may only require "reasonable vigilance" which could be interpreted as a lower standard than the international due diligence standard discussed in the United Nations Guiding Principles. Under Article 1 of the law, it does state that "[t]he plan shall include the reasonable vigilance measures to allow for risk identification and the prevention of sever violations of human rights and fundamental freedoms…"However, when examining the law in its entirety, including Article 2's access to remedy provisions, it maintains that the standard is one of due diligence. Additionally, proponents of the law have proposed that typical interpretations of the law would suggest a due diligence standard be used; given the international standards implicated by the law, this seems to be the most reasonable interpretation.

151. Decision No. 2017-750 , *supra* note 145.

152. *Id.*

153. Guiding Principles, s*upra* note 57.

154. Cossart et. al., *supra* note 139 at 323.

V. REALIZING THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS THROUGH STRENGTHENED LEGAL FRAMEWORKS

In addition to the three laws discussed above, there have been many attempts to tactfully encourage or require corporate social responsibility in some form.[155] They have seen varying degrees of success, though the consensus seems to be that they are marginally effective at best.[156] As previously noted, the international norms prohibiting trafficking and forced labor are well-developed and reaching *jus cogens* status if they have not done so already. Regardless, the nature of these norms, in conjunction with the United Nations Guiding Principles on Business and Human Rights, would seem to permit stronger state intervention and regulation into corporate affairs to encourage or mandate corporate social responsibility.

Building upon the foundation of those norms and the existing laws as discussed, there are several potential avenues states could pursue when seeking to further their protections for human rights. The most feasible option seems to be a system of tax incentives and penalties. States could also expand access to remedies for victims by adjusting civil liabilities. Finally, though unlikely under many governments, states could develop a system to impose criminal liability on corporations and those most responsible or complicit in egregious violations of human rights.

A. Requiring Respect for Human Rights and Combatting Human Trafficking through Stronger Legal Enforcement Systems

Traditionally, advocating for the protection of human rights at the international level would be done through systems such as the United States Trafficking Victim's Protection Act, or the United Nations Palermo Protocols.[157] The discussions are between state actors and the need for effective protections is curbed by considerations of state sovereignty. Oftentimes, the negotiating parties hold more or less equal bargaining power and success may hinge on compromises that undercut the potential of a law or treaty.

These issues are nearly absent when states are dealing with corporations. The private sector still wields tremendous power in many political situations through well-developed lobbying machines, but imposing a penalty on a corporation for violating human rights does not impermissibly violate that corporation's sovereignty.

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155. For example, the Dutch parliament is considering a law that would establish a duty of care to prevent child labor and could also impose fines for violations similar to the initial draft of the French Duty of Vigilance law. Barbara Bier, Christien Saris, & Daan Doorenbos, *Bill adopted by Dutch Parliament introducing a duty of care to prevent child labour*, STIBBE (May 22, 2017), http://stibbe.m17.mailplus.nl/genericservice/code/servlet/React?encId=Sw4ZZe9GRvHkWbW&actId=222732&command=openhtml. The Dodd-Frank Act in the United States had several strong provisions including Section 1502 that would have required companies to state if a product had "not been found to be 'DRC Conflict Free.'" This required disclosure was found to violate the First Amendment of the Constitution in *Nat'l Ass's of Mfrs. v. SEC,* 800 F.3d 518 (D.C. Cir. 2015) and has instead become optional as a result.

156. Melissa Zacharias, *The Effectiveness of Corporate Social Responsibility Programs: A Legal Perspective,* FORDHAM J. CORP. & FIN. L. (Nov. 10, 2017) https://news.law.fordham.edu/jcfl/2017/11/10/the-effectiveness-of-corporate-social-responsibility-programs-a-legal-perspective/.

157. Laura L. Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act,* 17 LEWIS & CLARK L. REV., 931 (2013).

There are even some corporations that may have more power in practice than a state's government; far more often, however, the corporation must be servient to the controlling government where the corporation is domiciled. Corporations may be involved in the political process and may request that compromises be made that would undermine the efficacy of a law, but ultimately the government has the final say in the matter.

1. Tax Programs to Incentivize Corporate Behavior and Further Promote Human Rights Norms Globally

Tax incentives and penalties are well-founded means to encourage or discourage certain behavior and have historically been used to do just that.[158] Most notably, green initiatives and environmental issues have been addressed extensively through various regulations and tax policies.[159] Indeed, federal tax policies in the United States have been successfully implemented to apply pressure both legally and economically to bring about social change.[160] Other countries have used tax rules for similar effects; Switzerland implemented an alternative tax rule to curb carbon emissions wherein a carbon tax would be imposed, but only if the industry failed to meet carbon abatement objectives through voluntary means.[161] Nordic countries have used tax incentives to reduce emissions and pollution for many years.[162] Though also discussing global climate change and environmental issues, Roberta Mann suggests "[t]he tax system is an appropriate and effective way to encourage businesses to adopt an environmental ethic and take action to reverse global warming."[163] Tax incentives have been used to facilitate incredible growth in renewable energy, particularly with private and commercial use of solar panels.[164] On the other side, tax penalties may "provide the 'stick' to go along with the 'carrot' of tax incentives."[165] Using both concurrently would help maximize the potential for corporate compliance.

Economic incentives such as tax policies would ideally facilitate a change in behavior by corporations. These instrumental sanctions seek to alter conduct by

158. Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 975-76 (1986), noting that "tax incentives may be more efficient for the implementation of government policies than direct expenditure programs because of lower transaction costs."

159. *Id.*

160. *Id.*

161. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *Environmentally Related Taxes in OECD Countries: Issues and Strategies*, 21, 133 (2001), https://www.cbd.int/financial/fiscalenviron/g-fiscaltaxes-oecd.pdf.

162. Christina K. Harper, *Climate Change and Tax Policy,* 30 B.C. INT'L & COMP. L. REV. 411 (2007).

163. Roberta Mann, *Waiting to Exhale: Global Warming and Tax Policy,* 51 AM. U. L.REV. 1135, 1222 (2002).

164. Sara Matasci, *Congress extends solar tax credit - everything you need to know about the federal ITC,* Energysage (Jan. 6, 2019), https://news.energysage.com/congress-extends-the-solar-tax-credit/.

165. Mann, *supra* note 163.

adjusting the cost/benefit analysis.[166] Along these same lines, in his remarks to the World Economic Forum in 2008, Bill Gates advocated for profit-based market incentives to be used whenever possible.[167] Typically, however, businesses largely ignore externalities "or values not internalized by the market system and by the business itself."[168] Companies may be especially likely to ignore these costs "when the shared risks imposed by those costs seem to be some else's risk, be it environmental degradation [or an] exploited workforce…"[169]

In essence, state governments can increase the cost of noncompliance and can internalize risks previously ignored by corporations. Increasing that cost will increase a corporation's attention to the risk, which will in turn increase efforts to diminish that risk. Applied, governments can impose tax penalties on corporations that are either committing human rights violations or failing to take preventative measures as prescribed in laws like France's Duty of Vigilance law.[170] These potential penalties, if costly enough, will adjust the cost/benefit analysis of a failure to comply. In turn, they will effectively force corporations to pursue initiatives respecting human rights and preventing—or at least mitigating—human trafficking and forced labor. Eventually, this may have the desired end result of shifting norms to go further in respecting human rights and could influence business attitudes with regard to corporate social responsibility on a much broader scale.

If a company's true concern were, in fact, their bottom line and profit maximization for their shareholders, a system of tax incentives and penalties related to compliance or noncompliance, respectively, would be effective. In a 2008 survey of 566 executives in the United States, the top three reasons given for a firm's pursuit of corporate citizenship were all somehow related to the company's bottom line.[171] Tax revenues earned from noncomplying companies could be assigned to facilitate remedies for victims or to establish independent monitoring programs to investigate possible violations. Given that the Guiding Principles prescribe that non-judicial

166. Diane L. Fahey, *Can Tax Policy Stop Human Trafficking?,* 40 GEO. J. INT'L L. 345, 371 (2009). Professor Fahey advocates essentially more for tax incentives and penalties on the wealthiest private citizens in other countries, suggesting they would be able to influence law and policy in their home country to discourage human trafficking. She identifies several types of sanctions, including symbolic sanctions (attempting to reassure the public that "something" is being done to address a particular problem), expressive sanctions (seeking to change norms generally instead of the behavior of a specific target) and instrumental sanctions (adjusting the cost/benefit analysis as mentioned).

167. Bill Gates, *Prepared Remarks be Bill Gates, Co-Chair and Trustee,* GATES FOUND. (Jan. 24, 2008), https://www.gatesfoundation.org/media-center/speeches/2008/01/bill-gates-2008-world-economic-forum.

168. Michael J. O'Hara, *Governing for Genuine Profit,* 36 VAND. J. TRANSNAT'L L. 765, 768 (2003).

169. Raigrodsky, *supra* note 11.

170. *See generally* Trade and Industry Code, *supra* note 117 at art. L. 225-102-2.

171. Economist Intelligence Unit, *Corporate Citizenship: Profiting from a Sustainable Business,* ECONOMIST, 20 (2008), http://graphics.eiu.com/upload/Corporate_Citizens.pdf. The survey found that revenue growth, increasing profit, and cost savings were the top reasons motivating corporate social responsibility initiatives. The survey also included interviews with "16 senior executives and experts in corporate citizenship."

remedies should be available to victims,[172] tax revenue could be integral in providing these services.

In order to give companies the opportunity to cure any deficiencies they may have in their corporate social responsibility and human rights structures, the tax penalties should be imposed over a span of time, gradually getting more costly if noncompliance continues. There should, however, be strong incentives immediately for verified proactive and preventative measures put into place by a company, even if they were established before the tax provisions were to take effect.

Naturally, corporations and their lobbyists would push back on this sort of proposal. These efforts in and of themselves could be criticized through "naming and shaming;" in all likelihood, the companies protesting tax penalties for failing to establish human rights due diligence programs or for violating human rights would be the ones committing such action. Alternatively, companies that have already put such measures in place voluntarily would seek to benefit from tax incentives for doing so, and may even advocate for the tax program.

Tax incentives and penalties offer companies a financial incentive to change their negative behavior or continue their beneficial human rights initiatives. It could help bring about a much-needed paradigm-shift in corporate attitudes and approaches to corporate social responsibility.

2. Increasing Corporate Liability in the Civil and Criminal Spheres

Though it is likely a far less politically feasible option, states could attempt to impose additional liability on corporations in both the civil and criminal systems. Imposing any sort of new liability on a corporation would undoubtedly face considerable challenges. An attempt to do so would most certainly have to contend with an army of lobbyists while the bill was being considered; if, by chance, it was adopted, corporations would send their best lawyers to fight it in court. It is still worth consideration though, as it could have a truly significant impact in providing remedies to victims of corporate violations of human rights related to human trafficking. As the specifics of imposing liability in these types of situations would be tremendously complicated, this paper seeks only to introduce the possibility of such measures.

On the civil side, the Duty of Vigilance law at least permits victims to pursue recompense from corporations.[173] It also requires that a corporation pay damages to a victim, assuming the victim is able to prove that due diligence by the corporation would have prevented the harm.[174] As previously discussed, this is a high burden of proof for the victim. Countries could improve on the French law in future iterations by lowering the burden of proof or even shifting it to the corporation in particularly egregious scenarios of human rights violations.

The French Council's decision stating that there was no new standard for vicarious liability in the Duty of Vigilance law demonstrates to some degree a

172. Guiding Principles, s*upra* note 57.
173. Trade and Industry Code, *supra* note 117 at art. L. 225-102-2.
174. *Id.*

disinclination to assign additional liability to corporations.[175] Other jurisdictions may not follow France's reasoning.

For example, it is possible that victims may be able to bring a civil case in the United States under the Alien Tort Statute (ATS). The law permits that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[176] After the decision in *Filártiga v. Peña-Irala*, the statute has been interpreted by the courts as permitting foreign citizens to seek a remedy in the United States for human rights violations when those violations occurred abroad.[177] The Supreme Court had not, until recently, explicitly considered whether or not corporations could be held liable under the ATS.

Then, in *Jesner v. Arab Bank, PLC*, the Court first turned to the question of "whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights."[178] To this question, the Court looks largely to the jurisdictional reach of international tribunals and determines that there exists "sufficient doubt on the point to turn to… whether the Judiciary must defer to Congress."[179] In the absence of a clear norm permitting corporate liability under international law, the Court examines whether the ATS contains a private right of action that could impose liability upon a corporation.[180] The Court examines similar laws, such as the Torture Victim Protection Act, and the causes of action contained therein. Ultimately, the Court determines that "Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations."[181] The Court further cautions that holding foreign corporations liable under the ATS would permit other nations to hale United States' corporations into their courts, thereby "hinder[ing] global investment in developing economies."[182] In conclusion, the Court states that "[f]or these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for the violations of international law must be determined in the first instance by the political branches of the Government."[183]

The dissent is compelling, however, and criticizes the plurality's approach. The dissent notes both that the Court has previously "held that the ATS permits federal courts to recognize private causes of action for certain torts in violation of the law of nations without the need for any further congressional action"[184] and that there

175. Cossart et. al., *supra* note 139 at 322.

176. 28 U.S. Code § 1340 (1999).

177. *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980); *See also Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (clarifying that the ATS did not create a cause of action but merely helped establish a grant of jurisdiction).

178. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1399 (2018).

179. *Id.* at 1402.

180. *Id.* at 1403.

181. *Id.* at 1405.

182. Brief for United States as *Amicus Curiae*, in *American Isuzu Motors, Inc. v. Ntsebeza.* O.T. 2007, No. 07-919, p.20.

183. *Jesner, supra* note 178 at 1408.

184. *Id.* at 1419 (internal quotations omitted).

need not be "sufficient international consensus with regard to the mechanisms of enforcing these [international] norms."[185] Effectively, the dissent argues that the question is not whether there is an international norm permitting Corporate Liability, but rather whether there is a norm prohibiting the behavior that gives rise to a claim against a corporation. *Jesner* concerns itself with injuries and deaths as a result of terrorism, against which there exists a norm. Similarly, as this paper argues, there should be a norm against trafficking and forced labor.

Though the outcome of *Jesner* was a disappointment for advocates of transnational human rights,[186] the plurality opinion still seems to leave open the possibility of Congressional expansion of the ATS to encompass corporate liability. Though that seems unlikely, it is not beyond the realm of future possibility. Importantly, *Jesner* did not eviscerate all potential for holding corporations responsible for violations of internationally recognized human rights norms.

Beyond laws such as the Duty of Vigilance law and the ATS, the legal notion of *respondeat superior* may allow for corporate liability in both civil and criminal cases. For civil cases, respondeat superior could be applied to establish vicarious liability and hold a corporation generally liable for the actions of one of its agents.[187] Criminally, "[i]t is now well established under the respondeat superior doctrine that corporations can be held criminally responsible for wrongs committed in their names."[188] As this doctrine has evolved in the United States, its scope has been curtailed and now relies on the "scope of authority" requirement.[189] Essentially, the employee or agent who committed the crime must have acted within his or her scope of employment and with the intent to benefit the corporation.

That said, courts have permitted prosecutions to go forward based on acts done by employees if they were within the duty of the employee and done on behalf of a corporation.[190] Furthermore, corporations cannot absolve themselves of criminal liability by demonstrating that they had programs to guarantee that their employees comply with the law. Essentially, due diligence is not typically a valid legal defense: "[A] corporate compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law."[191]

Due to the nature of the business structure of many multinational corporations, it could prove difficult to assign corporate criminal liability to a business in one country based on the acts of a subsidiary based in another country. Under the current scope of corporate criminal liability, the courts would also likely only have

185. *Id.* at 1420.

186. Rebecca J. Hamilton, *Jesner v. Arab Bank,* 112 Am. J. Int'l L. 720-727 (2018)

187. Definition of "Respondeat Superior" https://www.law.cornell.edu/wex/respondeat_superior.

188. Kathleen F. Brickley, *Perspectives on Corporate Criminal Liability,* Wash. U. St. Louis (Jan. 2012), https://ssrn.com/abstract=1980346. She notes that the United States Supreme Court formally recognized respondeat superior for corporate prosecutions in *New York Central & Hudson River Railroad Co. v. United States,* 212 U.S. 481 (1909).

189. *Id.* at 7.

190. *U.S. v. Amer. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-5 (3d Cir. 1980).

191. *U.S. v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009) (internal quotations omitted).

jurisdiction in the country wherein the criminal act actually occurred, which does little to bring effective justice to many of the victims of crimes such as human trafficking and forced labor. The ATS is limited to civil actions based in tort, but a similar law-granting jurisdiction over criminal acts would again face staunch opposition to its passage and its implementation.

As previously mentioned, the details of imposing either civil or criminal corporate liability are beyond the scope of this paper. Civil liability could provide valuable recourse for victims, while criminal liability would be a powerful stick to wield over corporations. Both avenues would bolster the corporate response and help to prevent further human rights abuses.

VI. CONCLUSION

The norms against human trafficking and modern slavery are well established and have seemingly reached *jus cogens* status. With that, states must take action to protect the rights of those being abused. While not every state is able or willing to do so, the states that can, must. The strength of the norms permits greater state regulation and involvement in enforcing them. Under the Guiding Principles, corporations have a moral obligation to respect human rights. This obligation, however, has thus far proved to be limited in its efficacy. Therefore, states should impose legally binding and enforceable systems to engage multinational corporations in a manner that is still underdeveloped.

Regardless of whether states decide to adopt tax incentives, impose stronger corporate liability, or pursue a different route entirely, the scope of the human trafficking and forced labor problem demands action. A select few countries could have a tremendous impact on businesses and the corporate social responsibility sphere. France is home to twenty-nine of the Global 500, and 428 of those 500 are based in ten countries.[192] If even half of those countries implemented stronger requirements for corporations to respect human rights, the effect would be dramatic.

There may come a time when corporations and governments alike have changed course and adhere to moral obligations simply because it is the right choice. That time has yet to come; instead, those with the power to influence change must not stand idly by.

192. FORTUNE, *supra* note 126.

THE NEW GLOBAL ATTACK ON PERSONAL TAX EVASION USING FOREIGN INVESTMENT AND THE ROLE OF THE UNITED STATES

ROBERT T. KUDRLE*

Policy development related to international tax evasion grew substantially in the first decade of this century and has exploded in the years since. A fear that the growing ease of global financial asset movements had increased the number of persons – particularly rich persons – evading home country tax obligations provided an important impetus in the first period, although the suppression of money laundering and terrorism were at least as significant. These concerns led to almost universal acceptance of the principle of the international exchange of tax- relevant information upon request by 2009.

A second wave of activity began in 2010 with the passage of the U.S. Foreign Account Tax Compliance Act (FATCA) as part of the Obama administration's economic stimulus package. The legislation demands that foreign financial institutions provide detailed information on accounts held by U.S. persons under penalty of a thirty percent withholding tax. This quickly led to scores of bilateral agreements between the U.S. and foreign governments that gathered and transmitted the requested information. Subsequently, the Organisation for Economic Cooperation and Development's (OECD) Common Reporting Standard (CRS), modeled roughly on FATCA without its enforcement mechanism, was presented in 2014, and automatic tax-relevant information exchange was accepted by more than 100 countries by late 2017. The universal acceptance of exchange upon request would not have been predicted as late as the turn of the twenty-first century. And the automatic exchange of tax information was widely regarded as a faraway dream before the financial crisis.

This study has several purposes. First, it will briefly trace the economic, political, and legal developments that generated such huge shifts in policy over a very short period of time.

Second, it will examine the widespread claim that, whatever its justification in the abstract, FATCA—and, by extension, the CRS—are simply too resource-intensive to pass a benefit-cost analysis. Third, it will explore the arguments that such international information sharing is a violation of privacy. Fourth, the related

* Freeman Professor of International Trade and Investment Policy Humphrey School of Public Affairs and the Law School University of Minnesota

issue of which countries should qualify for automatic information exchange is examined. Finally, the question of U.S. reciprocity will be explored. As matters now stand, the U.S. has successfully demanded from others what it has not been willing to provide to them.

I. THE ROAD TO FATCA AND BEYOND

One of the first highly developed arguments in favor of international cooperation to combat tax evasion was the U.S. Gordon Report of 1981.[1] Richard Gordon, at the behest of the Treasury Department, documented the abuses connected with so-called tax havens—jurisdictions that typically had no international agreements to share tax information with other states.[2] Many of these jurisdictions stressed that they levied no personal or corporate income taxes and therefore collected no information for their own purposes.[3] The sufficiency of this argument rested on the well-recognized "revenue rule" of customary international law that states had no obligation to assist other jurisdictions in collecting those states' taxes.[4]

The Gordon Report generated no important policy changes. Indeed, the Reagan Administration extended the long-standing exemption from U.S. taxation of bank interest earned by foreigners to all foreign portfolio interest in a declared effort to assist in financing the U.S. current account deficit in the balance of payments and to make foreign financing of U.S. business more attractive.[5] But this lack of taxation coupled with investor anonymity generated the same "havening" result for evasion that similar practices did for the recognized tax havens; the U.S. did not collect information that it did not need for its own purposes. This failure to collect information on foreign financial holdings also prevailed in many other countries not generally seen as tax havens, including several in Europe.

The next round of concern came nearly two decades after the Gordon Report. The European Union found certain tax practices of some of its members as well as the activities of the traditional tax havens to be "Harmful Tax Competition" (HTC), a position reflected in the

1998 OECD report of that name.[6] The Clinton Administration generally supported the ensuing OECD effort that targeted a number of practices concerning both personal income tax evasion and corporate income tax avoidance.[7] Although

1. Richard A. Gordon, Tax Havens and Their Use by United States Taxpayers: An Overview (1981).

2. *Id.* at 14-32.

3. *Id.*

4. William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L. J. 161, 161 (2002) (this is what Dodge calls a "public law taboo").

5. Deficit Reduction Act of 1984, 26 U.S.C. § 871(h), 881 (2018).

6. Organisation for Economic Cooperation and Development, *Harmful Tax Competition: An Emerging Global Issue*, at 11, 16 (1998), https://read.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en#; European Council, *Conclusions of the ECOFIN Council Meeting Concerning taxation Policy of 1 Dec. 1997* (98/C 2/01) (setting out the Code of Conduct for Business Taxation), http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/coc_en.pdf.

7. Lee A. Sheppard, *It's the Bank Secrecy, Stupid*, 91 TAX NOTES 385 (Apr. 16, 2001).

domestic law and penalties vary greatly, tax evasion is usually a crime while avoidance is not.[8] HTC shared with the Gordon Report a tendency to mix concern about personal and corporate taxes together, but it emphasized corporate tax issues more heavily.[9]

The U.S. has historically held a distinctive view of many international taxation issues that grows from its now almost unique embrace of global, as opposed to territorial, taxation. Nearly all other states have exempted its corporations operating abroad from domestic taxation if it is deemed to have paid an acceptable level of tax to the "host" country in which they operate.[10] In sharp contrast to this territorial approach, the U.S. has merely credited foreign corporate tax payments of U.S. firms against what would have been tax liability to the U.S. Treasury, although it has allowed any remaining tax obligation to be delayed until the dividends from the foreign subsidiary are repatriated, a practice known as deferral.[11] The tax bill passed in late 2017 moves U.S. corporate taxation towards the territoriality approach but retains a global approach to personal taxation. If a citizen or permanent resident of nearly all countries other than the U.S. works abroad, those personal earnings are not taxed by the home country.[12] But the U.S. allows foreign income taxes only to be credited against U.S. liability.[13] In fact, tax rates at the same income levels are typically higher in other rich countries, so there is often no residual obligation, and U.S. claims are further softened by the generous earned income exclusion extended to those working abroad: it was $102,100 in 2015.[14]

Very significantly for the policy discussion that follows, nearly all "home" countries attempt to tax the foreign investment income of those who are deemed "tax resident."[15] But again the U.S. stands apart from nearly all other states. The U.S. holds its citizens (and permanent residents) liable for U.S. income taxation no matter where they live unless they formally relinquish their citizenship.[16] Many high

8. BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM, (2003). The identification of evasion with personal income tax and avoidance with the corporate tax is, of course a simplification. Institutions liable for the corporate tax are often involved with evasion: the most spectacular example is perhaps the Enron Corporation, which was exposed in 2001. Personal avoidance strategies sometimes stray into evasion.

9. Joel Slemrod, *Tax Compliance and Enforcement*, 57 J. OF ECON. LITERATURE, 904 (2019).

10. Kevin S. Markle & Leslie D. Robinson, *Tax Haven Use Across International Tax Regimes*, 12 U. of Iowa and Dartmouth C. working paper 1, 6-7 (Nov. 2012), http://mba.tuck.dartmouth .edu/pages/faculty/leslie.robinson/docs/MarkleRobinson.pdf (presenting a survey of various practices).

11. *Id*. at 7.

12. An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

13. Internal Revenue Service, *Foreign Tax Credit*, https://www.irs.gov/individuals/international-taxpayers/foreign-tax-credit (last visit November 7, 2019).

14. *See* Internal Revenue Service, Form 2555-EZ, *Foreign Earned Income Exclusion*, https://www.irs.gov/pub/irs-pdf/f2555ez.pdf (last visited Oct. 12, 2018) (the exclusion is indexed for U.S. inflation; there are also special exclusions and deductions for housing expenditures).

15. Cynthia A. Blum & Paula N. Singer, *A Coherent Policy Proposal for US Residence-Based Taxation of Individuals*, 41 VAND. J. OF TRANSNAT'L LAW 707 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188443.

16. Internal Revenue Service, *Frequently Asked Questions (FAQs) About International Tax M*atters,

income countries allow citizenship to be retained without continuing tax obligation for those who are located abroad permanently or indefinitely, although many levy some kind of tax penalty for doing so.[17]

Tax havens have been employed as financial switching stations to keep U.S. corporate profits abroad, but the U.S. has historically been hesitant about restrictions on their use, based on the argument that such activity mitigated the residual home tax liability that corporations based elsewhere did not face. The George W. Bush administration insisted that the OECD HTC project drop most corporate tax concerns and focus entirely on personal tax evasion.[18] After a confrontational beginning in its dealings with the tax havens, the OECD made peace and established a Global Forum in which a model bilateral Tax Information Sharing Agreement (TIEA), upon request, was developed in 2001.

The events of September 11, 2001 greatly increased attention to illicit global financial flows on grounds far more urgent than tax evasion. Financial information demands by the Financial Action Task Force (FATF), a 1989 G-7 project established to combat global money laundering, began to eclipse the HTC's drive for TIEAs, as the FATF shifted its focus to terrorist financing.[19] But much of the desired information on account ownership, balances, and activity were quite similar.[20]

A perceived need for visible international cooperation drove a spate of new adherents to the TIEAs as well as to cooperation with the FATF, and this produced a remarkable result. By early 2009 there were only three holdouts from a declared willingness to strike bilateral TIEAS, and they were all European semi-states: Andorra, Liechtenstein, and Monaco.[21] The London G-20 conference in April 2009, focusing on the failures of the world financial system that had produced the prevailing crisis, announced unanimity—although some backsliders were called on the carpet.[22]

Despite the apparent success of global agreement on the principle of tax information exchange, most tax professionals had long doubted the efficacy of such mechanisms. Tax enforcers need to know what they are looking for before requests can be made, and this limits the usefulness of the approach to a subset of particularly egregious or accidentally discovered cases. This, in turn, drastically reduces the

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https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-about-inter national-individual-tax-matters (last visited Nov. 7, 2019).

17. Robert T. Kudrle, *Expatriation: A Last Refuge for the Wealthy*?, 6 GLOB. POL'Y 408, 408 (2015).

18. Robert T. Kudrle, *U.S. Defection from the OECD 'Harmful Tax Competition Project: Rhetoric and Reality*, in HEGEMONY CONSTRAINED: INTERNATIONAL CHALLENGES TO AMERICAN POLICIES: EVASION, MODIFICATION, AND RESISTANCE TO AMERICAN FOREIGN POLICY 193 (Davis Bobrow ed., 2008). (There was also a multilateral version, but it was largely irrelevant). *Id*. at 195.

19. *See generally id*.

20. *Id.* at 196.

21. Robert T. Kudrle, *Did blacklisting hurt the tax havens?*, 12 J. OF MONEY LAUNDERING CONTROL 33 (2009).

22. Philip Aldrick, *Blacklisted Tax Havens Face Sanctions*, THE TELEGRAPH (Apr. 3, 2009), https://www.telegraph.co.uk/finance/g20-summit/5096348/G20-summit-Blacklisted-tax-havens-face-sanctions.html.

TIEAs' value in encouraging compliance. Moreover, the level of partner state resource commitment and timeliness in response to requests is problematic, particularly to serve a smaller and weaker inquiring partner. The OECD had clearly seen these limitations as early as the 1990s in discussions of the technical feasibility of automatic information exchange, but the political feasibility of such a massive policy innovation was much in doubt.[23] The OECD's Global Forum on Taxation became the Global Forum on Transparency and Information Exchange for Tax Purposes in 2009 with the cooperation of the G-20, just as concern about the inadequacy of anything short of automatic information exchange was almost universally acknowledged.[24]

The Obama Administration provided a great impetus towards automatic exchange with the passage of the Foreign Account Taxation Compliance Act (FATCA) of 2010, although the initiative was not taken in cooperation with other states.[25] Many in the U.S. federal tax bureaucracy shared the OECD view that automatic exchange was needed to attack the suspected trillions of dollars of secret private holdings abroad.[26] U.S. federal income tax compliance drops sharply from a high of about ninety-nine percent where withholding is practiced and ninety-three percent with direct earnings reporting to the government down to sixty-three percent when only self-reporting is involved.[27]

United States Senator Max Baucus and Representative Charles Rangel devised and shepherded FATCA as a small section of the massive Hiring Incentives to Restore Employment (HIRE) Act,[28] known as "the stimulus package," which aimed to combat the U.S. economic contraction. The Administration strongly supported FATCA; as a senator President Obama had co-sponsored anti evasion legislation in the previous Congress.[29]

II. THE U.S. POLICY WINDOW AND FOREIGN REACTION

FATCA seems an almost perfect example of political scientist John Kingdon's conditions for U.S. policy change: the confluence of a perceived policy problem, a ready policy response, and a conducive political environment.[30] There was

23. *See Model Memorandum of Understanding between the Competent Authorities of (State X) and (State Y) on the Automatic Exchange of Information for Tax Purposes,* ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), at 3, https://www.oecd.org/ctp/exchange-of-tax-information /2662204.pdf.

24. *See generally* Org. for Econ. Co-operation and Dev. (OECD), *Global Forum on Transparency and Exchange of Information for Tax Purposes*, https://www.oecd.org/tax/transparency/ (last visited November 7, 2019).

25. *See generally* 26 U.S.C. §6038D (2010).

26. John A. Koskinen, Prepared Remarks of Commissioner Internal Revenue Service John A. Koskinen Before the U.S. Council for International Business-OECD International Tax Conference 2 (June 7, 2016), https://www.uscib.org/uscib-content/uploads/2016/06/OECD-Intl-Speech.pdf.

27. Internal Revenue Service*, Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2008–2010*, at 11 (2016).

28. Hiring Incentives to Restore Employment Act (HIRE), Pub. L. No. 111–147, 124 Stat. 71 §§ 501-02 (2010).

29. Stop Tax Haven Abuse Act, S. 681, 110th Cong. (2007).

30. *See generally* JOHN W. KINGDON, AGENDAS, ALTERRNATIVES, AND PUBLIC POLICIES (1984).

widespread understanding that information exchange upon request was a weak weapon against evasion. Both common sense and the hard evidence about tax compliance with and without verification pointed to need for automatic exchange. The OECD's tax experts and member state tax authorities had been discussing the automatic exchange of information, and the technical and organizational requirements for its effectuation for many years.[31] Finally, the financial crisis and U.S. Senate Hearings of 2009 on foreign bank complicity in massive evasion created a favorable political climate.[32]

While the time was ripe for a U.S. initiative, FATCA was completely unilateral and offensive. As *The Economist* later complained, FATCA was "a piece of extraterritoriality stunning even by Washington's standards."[33] U.S. power to act unilaterally with success rested on the need of virtually all foreign investment institutions for access to U.S. financial markets and the threat that, if they failed to cooperate with the IRS by providing information on their accounts held by U.S. parties, all of the institution's U.S. investment would face a thirty percent withholding tax.[34] Countries all over the world, including the closest U.S. economic and military partners, complained strenuously about such a naked exercise of American power.[35] But there was essentially no recourse other than some form of accommodation, despite the fact that many countries had laws that forbade their financial institutions from providing the information demanded by the Americans, a problem that the U.S. government treated with apparent lack of concern.

If any contemporary observers correctly forecast the ensuing chain of events, they have not yet told their stories. Automatic information exchange of some kind was widely supported, but the nationalistic focus employed by the U.S. emphatically was not.[36] Nevertheless, almost immediately, several major European states found a solution to the confidentiality problem that also seemed to promise a gain for the cooperating state. First, internal legal obstacles were overcome by the establishment of an Intergovernmental Agreement (IGA) within which the required information was provided to the domestic government and then transmitted to the Americans.[37] Second, the IGAs between the U.S. and several major states with which the U.S. had tax treaties were promised a measure of reciprocity: "The United States is committed to further improve transparency and enhance the exchange relationship with [FATCA Partner] by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal

31. OECD Improving Access to Bank Information for Tax Purposes, Paris 2000.

32. U.S. Senate, Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, One Hundredth Eleventh Congress, First Session, March 4, 2009.

33. *Taxing America's Diaspora: FATCA's Flaws*, THE ECONOMIST, June 28, 2014.

34. Erika K. Lunder & Carol A. Pettit, Cong. Research Serv., R44616, *FATCA Reporting on U.S. Accounts: Recent Legal Developments*, 1 (2016).

35. *Taxing America's Diaspora: FACTA's Flaws, supra* note 33.

36. Koskinen, *supra* note 26.

37. *See generally* Erika K. Lunder & Carol A. Pettit, Cong, *supra* note 34.

automatic exchange."[38] This form of IGA is known as Model 1(reciprocal).[39] In addition, there are Model 1(non-reciprocal) IGAs that also do not involve the U.S. interacting directly with foreign firms and Model 2 IGAs that directly confront foreign financial firms as originally envisioned.[40]

The reciprocal Model 1 IGAs acknowledge that the U.S. Executive cannot promise but only seek reciprocity.[41] It is constrained on two fronts: the Congress and the states. Some Republicans opposed FATCA on libertarian principles,[42] and the Republican platform of 2016 promised to repeal FATCA..[43] Moreover, business formation in the U.S. is almost entirely a state matter. Bipartisan legislation mandating the tracking of balances at financial institutions as well as complete beneficial ownership information on business entities had been introduced four times by late 2017 and never got out of committee.[44] It is opposed (inter alia) by the American Chamber of Commerce and the American Bar Association, on grounds of cost and business confidentiality.[45] But it has also drawn the opposition of the National Association of Secretaries of State.[46] Republican and Democrat state officials alike resist federal intrusion and poorly funded mandates.[47] And state level special economic interests have fought federal initiatives to assist foreign tax collection. The Florida Banking Association and the entire Florida congressional

38. Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA, https://www.treasury.gov/press-center/press-releases/documents/reciprocal.pdf; U.S. Dep't of the Treasury, Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA (2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf.

39. *See generally* Erika K. Lunder & Carol A. Pettit, *supra* note 34, at 3.

40. *Id*. at 4.

41. *Id.*

42. *See, e.g*, Rand Paul: U.S. Senator for Kentucky, *Sen. Paul Introduces Bill to Repeal FATCA*, https://www.paul.senate.gov/news/sen-rand-paul-introduces-bill-repeal-fatca (last visited October 10, 2017) (Ron Paul is the best known).

43. Republican National Committee, Republican Platform, 2026, at 13, https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf.

44. Most recently in late 2013; *See* Incorporation Transparency and Law Enforcement Assistance Act, S. 1465, 113th Cong. (2013).

45. Brian O'Shea, Statement of the U.S. Chamber of Commerce on Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency, February 6, 2018; https://www.uschamber.com/sites/default/files/020618_brian_oshea_testimony_beneficial_ownership.pdf.;
American Bar Association, ABA Opposes Legislation Imposing Beneficial Ownership Reporting on Small Businesses and Their Lawyers, November 29, 2017. americanbar.org/news/abanews/aba-news-archives/2017/11/aba_opposes_legilat/#:~:text=ABA%20opposes%20legislation%20imposing%20beneficial%20ownership%20reporting%20on%20small%20businesses,WASHINGTON%2C%20Nov.&text=The%20ABA%20support.

46. *See Report and Recommendations on Assisting Law Enforcement in Fighting the Misuse of Corporate Entities*, Nat'l Ass'n of Secretaries of State (NASS) Company Formation Task Force (Dec. 2012), http://www.nass.org/component/docman/?task=doc_download&gid=1336&Itemid=[https://perma.cc/ZQ4Q-UU99]

47. For further discussion, *see* Robert T. Kudrle, *Tax Havens and the Transparency Wave in International Tax Legalization*, 37 U. PA. J. INT'L L. 1153, 1177 (2016).

delegation publicly opposed reciprocal cooperation after FATCA.[48] This reflects the enormous financial investments in that state by Latin Americans in various levels of compliance with home countries laws.

The international sharing of information on interest earned was authorized by Treasury regulation in 2012—although only 16 countries had been actually authorized to receive such information by early 2016; this climbed to forty-five by the end of 2017.[49] The furor over the Panama Papers'[50] exposure of massive evasion, mainly by non-Americans, is thought to have provided impetus for a May 2016 Treasury regulation requiring all financial institutions to collect information on the beneficial ownership of new accounts.[51] But this did not apply to existing accounts or to all legal entities.

III. OECD ACTIVITY

As countries were signing FATCA IGAs in droves—112 jurisdictions had signed by 2014[52]—important complementary activity was taking place on another track. As early as 2010, the OECD had been urging states to sign the Convention on Mutual Administrative Assistance on Tax Matters,[53] which aimed to strengthen the regime of TIEAs (information on request) and also to lay the foundation for automatic information exchange. The Common Reporting

Standard (CRS) for automatic information exchange was promulgated in July 2014.[54] By September 2017, 100 countries had subscribed to the Convention,[55] and there were over 2000 bilateral exchange relationships activated. And more than

48. Letter from Congressman Bill Posey, et al. to President Barack Obama (March 3, 2011),https://posey.house.gov/uploadedfiles/irs-delegationletter-march3-2011.pdf.

49. U.S. INTERNAL REVENUE SERVICE, INTERNAL REVENUE BULLETIN: 2012–20, D. 9584, GUIDANCE ON REPORTING INTEREST PAID TO NONRESIDENT ALIENS (2012); U.S. INTERNAL REVENUE SERVICE, 26 CFR 601.201, RULINGS AND DETERMINATION LETTERS (ALSO PART 1, §§ 6049; 1.6049-4, 1.6049-8) SEPTEMBER 2017 SUPPLEMENT TO REV. PROC. 2014-64, IMPLEMENTATION OF NONRESIDENT ALIEN DEPOSIT INTEREST REGULATIONS, REV. PROC. 2017-46.

50. *Explore the Panama Papers Key Figures*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/ (last visited September 15, 2018).

51. Press Release, U.S. Dep't of the Treasury, Treasury Announces Key Regulations And Legislation To Counter Money Laundering And Corruption, Combat Tax Evasion (May 5, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0451.aspx.

52. *Resource Center: Foreign Account Tax Compliance Act (FATCA)*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last visited September 4, 2017).

53. Org. for Econ. Co-operation and Dev. (OECD), *Convention on Mutual Administrative Assistance in Tax Matters*, http://www.oecd.org/g20/topics/international-taxation/convention-on-mutual-administrative-assistance-in-tax-matters.htm.

54. Org. for Econ. Co-operation and Dev. [OECD], *What is the CRS?*, http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (last visited August 8, 2017).

55. Org. for Econ. Co-operation and Dev. (OECD), *Convention on Mutual Administrative Assistance in Tax Matters*, http://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (last updated July 2018).

seventy jurisdictions had committed to automatic information exchange, with first exchanges scheduled to take place in September 2017.[56]

The OECD-G20 project is sometimes called "GATCA" because it aims at the exchange of tax-relevant information somewhat similar to that of FACTA. Moreover, FATCA necessitated the development of the expensive data collection infrastructure that the CRS adherents could work from. Nevertheless, the CRS also differs in important ways. CRS agreements are all fully reciprocal, the information to be provided is broader than FATCA, smaller investments are covered, and yet there is no enforcement mechanism corresponding to the FATCA thirty percent withholding tax.[57] The conspicuous holdout from the CRS is the United States; its failure to collect detailed information on foreign accounts including beneficial business ownership makes full compliance impossible.

IV. COSTS AND BENEFITS—AND FOR WHOM?

The collection of taxes is both expensive and highly imperfect. Slemrod and Yiztaki report that about twenty-six percent of U.S. income taxes due went uncollected and that collection costs accounted for about ten percent of revenue raised in 1996.[58] They emphasize that the single most effective means of increasing income tax compliance (beyond withholding) is third party information provided to the government.[59]

The economic approach to tax evasion began as special case of Gary Becker's theory of general crime prevention.[60] In the early 1970s Allingham and Sandmo[61] proposed an elegantly simple model in which evasion is deterred by a combination of the size of the punishment and the probably of its infliction. In the years that followed, many extensions and elaborations of the model were presented, but they all followed from the same basic premise: individuals respond only to immediate financial incentives, and the only reason they pay taxes is to avoid punishment.[62]

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56. *International Framework for the CRS*, ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), *http*://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/ (last visited Sept. 15, 2018).

57. MARKUS MEINZER, *Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?* Forthcoming in AUTOMATIC EXCHANGE OF INFORMATION AND PROSPECTS OF TURKISH-GERMAN COOPERATION, ISTANBUL (eds. Leyla Ates & Joachim Englisch) (Forthcoming), Presented at the 2nd Turkish-German Biennial on International Tax Law in Istanbul Conference, Mar. 3, 2016; https://ssrn.com/abstract=2924650, also at http://dx.doi.org/10.2139/ssrn.2924650.

58. Joel Slemrod & Schlomo Yitzhaki, *Tax Avoidance, Evasion, and Administration*, *in* 3 HANDBOOK OF PUBLIC ECONOMICS 1423, 1426 (Alan J. Auerbach & Martin Feldstein, eds., 2002).

59. *Id*. at 1449.

60. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

61. Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis,* 1 J. PUB. ECON. 323, 330 (1972).

62. Eric Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1782 (2000).

Progress in many branches of economics has taken place on the basis of extreme simplification, but a glaring weakness of the Allingham-Sandmo model was evident from the beginning: the level of tax compliance in the U.S. and many other countries, however low for self-reported income, was far higher than could be plausibly explained by the modest penalties and miniscule probabilities of detection. Eric Posner observed in 2000:

> A widespread view among tax scholars holds that law enforcement does not explain why people pay taxes. The penalty for ordinary tax convictions is small; the probability of detection is trivial; so the expected sanction is small. Yet large numbers of Americans pay their taxes. This pattern contradicts the standard economic model of law enforcement, which holds that people violate a law if the benefit exceeds the expected sanction. Some scholars therefore conclude that the explanation for the tendency to pay taxes must be that people are obeying a norm—presumably a norm of tax payment or a more general norm of law-abiding behavior."[63]

Unsurprisingly, a literature on tax compliance developed outside of economics,[64] and some of the economics literature on taxation became "behavioral." Alm identifies two major strands of heterodox economics on taxation, one of which stresses group behavior based on "social norms," which may embrace "social customs, tax morale, appeals to patriotism or conscience, or feelings of altruism, morality, guilt, and alienation."[65]

An example of the complex possible causality suggested by these broader models is illustrated by a study of the impact of Margaret Thatcher's 1990 "local services charge" in the U.K. that hastened the end of her government. The new policy essentially replaced a percentage property tax with a charge not directly related to income or wealth. This was so widely regarded as unfair that it generated mass evasion and was abandoned three years later. Very significantly, the increased evasion did not immediately abate after the policy status quo was restored but instead persisted for up to a decade following the original policy change.[66] Many other less quantified examples of the importance of tax morale are presented by Luttmer and Singhal.[67] Such evidence suggests that a persuasive cost-benefit analysis of major tax initiatives must consider issues beyond the narrow analysis that is often applied.

A. Possible Revenue Gains

FATCA was added the HIRE Act without any formal cost-benefit analysis but after the exposure of wrongdoing by Americans using aggressively complicit Swiss

63. *Id*. at 1782.

64. For a review, *see* Ken Devos, FACTORS INFLUENCING INDIVIDUAL TAXPAYER COMPLIANCE BEHAVIOUR 13-62 (2014).

65. James Alm, *Measuring, Explaining, and Controlling Tax Evasion: Lessons from Theory, Experiments, and Field Studies*, 19 INT'L TAX PUB. FIN. 54, 64 (2012). The other strand employs subjective probabilities and non-expected utility theories at the level of the individual.

66. Timothy Besley, Anders Jensen, & Torsten Persson, *Norms, Enforcement, and Tax Evasion* 2,15, http://people.su.se/~tpers/papers/Draft_140302.pdf. (last visited May 23, 2017).

67. *See* Erzo F. P. Luttmer & Monica Singhal, *Tax Morale*, 28 J. ECON. PERS. 149, 155 (2014).

institutions in a general environment of post-crash disgust with the financial system.[68] Nevertheless, there were lost tax revenue estimates used to justify the initiative. One close student of FATCA[69] suggests an unverified $70 billion dollars estimate by a contract Treasury consultant in 2001 as the basis for a Senate Permanent Subcommittee Report estimate of $100 billion dollars 2008, a number that had been enlarged to $150 billion dollars four years later.[70] But the source footnotes for neither estimate includes a direct reference to that Treasury source. Moreover, the numbers clearly result in part from combining estimates of corporate tax avoidance with personal tax evasion in what the first report calls "offshore tax abuses" and the second "offshore tax schemes."[71]

The Congressional Joint Committee on Taxation in 2010 produced estimates more than two orders of magnitude smaller than the 2008 estimate—only $870 million dollars a year.[72] This number too seems to have no clear source. But whether evasion is distinguished from avoidance or not, the Director of the Internal Revenue Service cast doubt on all estimates in his 2009 testimony that there was no credible estimate of lost tax revenue from offshore tax abuse because "[i]f it is over there and we have not found it, it is hard to estimate what is there."[73]

FATCA might assist in the recovery of some corporate tax revenue, but its justification and declared major aim is to attack evasion of the personal income tax.[74] How might one estimate the potential revenue gain from an effectively functioning FATCA? Pioneering research, some it based on access to previously unobtainable data, led Gabriel Zucman to the conclusion that there was approximate $5.8 trillion of private financial wealth held offshore in 2008, of which three quarters was

68. Scott D. Michel & H. David Rosenbloom, *FACTA and Foreign Bank Accounts: Has the U.S. Overreached?*, VIEWPOINTS, May 2011, at 709.

69. William Byrnes, *Is FATCA 'Much Ado About Nothing'? Is FATCA's Tax Revenue Going to Offset Its IRS and Industry Costs?* KLUWER INT'L TAX BLOG, April 18, 2017 at http://kluwertaxblog.com (last visited July 20, 2017).

70. U.S. Senate, Permanent Subcommittee on Investigations, Staff Report on Tax Haven Banks and U.S. Tax Compliance July 17, 2008 and United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts, February 26, 2014, at http://www.hsgac.senate.gov/subcommittees/investigation (last visited August 1, 2017).

71. There is no method suggested for either the $100 billion or the $150 billion figure, but the many of sources cited for both estimates explicitly involve corporate income tax issues.

72. Joint Committee on Taxation, JCS610, Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment to the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 2847, the Hiring Incentives to Restore Employment Act.

73. Committee on Homeland Security and Governmental Affairs, United States Senate, *Tax Haven Banks and U.S. Tax Compliance: Obtaining the Names of U.S. Clients with Swiss Accounts*, *Hearings, March 4, 2009*, at 23 at https://www.gpoaccess.gov/congress/index.html (last visited August 14, 2017).

74. John S. Wisiackas, *Foreign Account Tax Compliance Act: What It Could Mean for the Future of Financial Privacy and International Law*, 31 EMORY INT'L. L. J. 586 (2017) (citing *Foreign Account Tax Compliance Act*, IRS (July 15, 2015)).

unrecorded.[75] This is financial wealth only and does not include real property such as land, buildings, and art.[76]

The Zucman stock estimation procedure might yet be challenged, but it seems the best available, and the global number corresponds roughly to estimates from the U.S. State Department of $4.8 trillion dollars in 2000 (based on IMF data) and an OECD 2007 estimate of $5 to $7 trillion dollars.[77] Zucman also estimated that the U.S. fraction was about twenty percent of the total. The U.S. hidden amount in 2008 would then be $870 billion dollars. Zucman's 2014 loss estimate for the U.S., which includes inheritance and estate taxes revenue foregone was $36 billion dollars.[78] One observer based in tax law regards the income and wealth taxation rates used by Zucman as unrealistic because they ignore widely used means of legally avoiding taxes on domestic investment and hence exaggerate tax losses resulting from hiding investment abroad.[79] He uses the same stock figures to estimate U.S. tax losses of from $10 to $23 billion dollars annually.[80]

Little is yet known about how much revenue has actually been raised from FATCA, in part because FATCA was only one of several measures taken by the IRS to increase tax compliance following the financial crisis. These include 1) John Doe summonses (for suspected wrongdoing without knowing the identity of the wrongdoers) 2) suspicious transaction reporting, which began in the 1990s, and 3) various voluntary disclosure programs. The later allows miscreants not yet under audit to step forward for reduced penalty. Several disclosure programs produced 60,000 non-compliant taxpayers between 2009 and 2016.[81]

Using confidential data, a team of researchers discovered that these efforts as a group had a substantial effect on U.S. tax collections through 2011, but the gains recorded were miniscule by comparison with lost revenue as calculated above.[82] Approximately 60,000 accounts with a total value of $120 billion were disclosed.[83]

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75. Gabriel Zucman, *The Missing Wealth of Nations: Are Europe and the U.S. Net Debtors or Net Creditors?* 128 QJ ECON 1321 (2013).

76. *Id*. at 1344.

77. Cited in United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts, Released in Conjunction with the Permanent Subcommittee on Investigations, February 26, 2014, at 9 at http://www.hsgac.senate .gov/subcommittees/investigations (last visited July 9, 2017).

78. Gabriel Zucman, *Taxing Across Borders: Tracking Personal Wealth and Corporate Profits,* 28 J. ECON. PERSPECTIVES 121 (2014).

79. Conor Clarke, *What are Tax Havens and Why Are They Bad?* 95 TEX. L. REV. 59, 65 (2016).

80. *Id.*

81. William Byrnes & Robert J. Munro, *Background and Current Status of FATCA*, Texas A&M University School of Law, Research Paper Series, Research Paper No. 17–31, at 1- 21 at https://www.americansabroad.org/media/ files/files/8f1c0f32/SSRN-id2926119.pdf (last visited Dec. 17, 2017).

82. Niels Johannesen, Patrick Langetieg, Daniel Reck, Max Risch, & Joel Slemrod, *Taxing Hidden Wealth: The Consequences of U.S. Enforcement Initiatives on Evasive Foreign Accounts*, NBER Working Paper No. 24366.

83. *Id.*, at 4.

This translates into an increase in capital income of $2.5 to $3.8 billion and $.7 to $1 billion in tax revenue.[84]

The research just cited found the undeclared funds to be heavily skewed toward large accounts and those held in tax havens.[85] This corresponds with other recent research. Tax compliance in Scandinavia is very high; only about three percent of personal taxes are evaded overall.[86] Nevertheless, employing hacked data from "Swiss Leaks"[87] and "the Panama Papers"[88] Alstadsaeter, Johannesen, and Zucman found that thirty percent of personal taxes are evaded by those in the .01 percent of the wealth distribution[89] largely because so much of their income comes from assets that can be hidden.

The single U.S. study is suggestive, but it was conducted with data so early in the new regime that little can be concluded about FATCA's eventual impact. Moreover, the total compliance benefits of FATCA will always be difficult to assess. The main purpose is to uncover and tax hidden investment, mostly in the hands of very wealthy people. This does mean more revenue collected – ultimately perhaps $10 billion dollars or more per year. But FATCA's success should also affect tax morale and overall compliance behavior—the question is: how much? Put less positively, after nearly a decade of outrage about overseas tax evasion by the rich, what would be the impact on tax morale of an abandonment of attack on evasion using foreign investment? And there are other benefits. Many observers think that FATCA will assist in fighting money laundering and terrorism.[90] Obviously and understandably, combatting terrorism has emerged as a policy goal justifying expenditure greatly exceeding any ordinary cost-benefit calculation of life-saving measures.[91]

B. Cost Estimates

FATCA's cost has caused widespread complaint from the beginning. Much of the foreign outrage in the earliest days after passage was driven by the U.S. government's demand that foreign institutions—and later foreign governments as well—should bear heavy compliance costs while the U.S. alone enjoyed the benefits. Those costs were never estimated by the American government, but many other public and private institutions have presented a raft of figures, most of which appear as notional as many of the revenue estimates.[92] There are some exceptions. For

84. *Id.*, at 38.

85. *Id.*, at 3.

86. Annette Alstadsæter, Niels Johannesen & Gabriel Zucman, *Tax Evasion and Inequality* (Sep. 2017) https://www.nber.org/papers/w23772.pdf (last visited Nov. 14, 2017).

87. International Consortium of Investigative Journalists, *Swiss Leaks: The leaked HSBC files offer a rare glimpse inside one of the world's most private banking systems*, http://projects.icij.org/swiss-leaks (last visited December 20, 2017).

88. International Consortium of Investigative Journalists, *The Panama Papers: Exposing the Rogue Offshore Finance Industry*, https://panamapapers.icij.org (last visited December 20, 2017).

89. Annette Alstadsaeter, Niels Johannesen, & Gabriel Zucman, *supra* note 86.

90. Byrnes & Munro, *supra* note 81.

91. JOHN MUELLER & MARK G. STEWART, CHASING GHOSTS (2015).

92. *Taxing America's Diaspora: FATCA's Flaws, supra* note 33.

example, Her Majesty's Revenue and Customs (HMRC) estimated in 2013 that the initial cost of FATCA in the U.K. would be $1.4 to $2.48 billion dollars with an ongoing annual cost of $77.5 to $139.5 million dollars during the first five years of the program.[93] The German Bankers Association (*Bundesverband deutscher Banke*n) estimated initial costs of $.51 billion dollars and ongoing annual costs of $39.3 million dollars.[94] These are large figures, but they were incurred with the recognition that FATCA would be only the first phase of a web of automatic reporting arrangements that would allow for considerable economies of scope. Moreover, sunk costs are sunk; the large initial costs could be used retrospectively in evaluating overall costs and benefits of the program, but they should have no role in deciding policy now.

All of this ignores compliance costs at the taxpayer level. FATCA set off a firestorm of objections from Americans living abroad that has no analogue in the politics of the CRS, and this is easily explained. As noted, U.S. citizens and permanent residents are taxed on their total income from all sources wherever they are in the world. Many have little or no U.S. tax liability because of the generous and continually adjusted earned income exemption, but income tax forms must still be filed. Moreover, the global taxation system of the U.S. requires a recording of financial (and other) assets quite independent of earnings taxation. While the U.S. does not have a continuous wealth tax, the federal government levies an estate tax and a citizenship relinquishment tax based on wealth, and many U.S. states have either an estate or an inheritance tax or both.[95] These concerns help justify the Foreign Bank and Financial Accounts (FBAR) annual reporting, mandated by 1970 legislation, that until recently was largely ignored by Americans living abroad. FBAR compliance appears to have dropped by fifty percent over the period of 2002–2013.[96] More generally, until the post-crisis crackdown on evasion, Byrnes and Munro have suggested that most Americans abroad were *de facto* in a territorial rather than a global tax system because they simply ignored legally mandated reporting to U.S. authorities.[97] Elise Bean, a former staff member of the Permanent Subcommittee on Investigations testified at FATCA Congressional Hearings in 2017: "Essentially, FATCA leveled the playing field between U.S. taxpayers who open accounts here at home and those who open accounts abroad - subjecting both sets of accounts to equivalent disclosure obligations."[98] This parallels what the CRS does for non-Americans, but the CRS falls much less comprehensively on citizens

93. *Id.*

94. *Id.* The exchange rates used were those prevailing at the time the estimates were presented: 1 pound = 1.55 dollars and 1 euro = 1.31 dollars.

95. Center on Budget and Policy Priorities, *Policy Basics: The Federal Estate Tax* (Nov. 7, 2018), https://www.cbpp.org/research/federal-tax/policy-basics-the-federal-estate-tax (last visited Nov. 14, 2019).

96. Byrnes & Munro, *supra* note 81 at 1–61.

97. Byrnes & Munro, *supra* note 81 at 1–9.

98. Statement of Elise J. Bean before U.S. House Subcommittee on Government Operations on Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act, at 4 (April 26, 2017), https://oversight.house.gov/hearing/reviewing-unintended-consequences-foreign-account-tax-compliance-act/ (last visited July 25, 2017).

of one country who are living in another. Although countries regulations differ, a long-term sojourn abroad—a change in tax residence—usually cancels home country taxation of all income, sometimes with a departure penalty.[99]

Attacks on FATCA because of its impact on Americans abroad is usually coupled with advocacy of the kind of territorial taxation practiced by nearly all other countries. As U.S. law now stands, however, U.S. taxation paperwork can be avoided only by relinquishment of U.S. citizenship and the payment of capital gains tax on a "deemed realization" of assets evaluated the day before expatriation. Moreover, the U.S. tax obligation does not end there: the U.S. inheritors of the estate of a person relinquishing citizenship will ultimately be taxed at federal estate tax rates.[100]

There are strong arguments both for and against a U.S. shift to territorial taxation for personal income taxation, but until and if that happens, the overseas Americans' quarrel is mainly with the tax code and not FATCA, which increases and enforces their filing obligations but does not raise taxes due.[101]

C. Complicated Reporting

All Americans or resident aliens wherever they are must file form 1040,[102] the basic income tax form. In addition, Congress mandated FBAR in 1970 primarily to bolster the work of the Financial Crimes Enforcement Network (FinCen) of the Treasury although FBAR collection was transferred to the IRS in 2003.[103] FBAR requires the reporting of an enumerated set of financial assets including checking, savings and retirement accounts that reach a value of $10,000 dollars over the course of a year, and such reporting is independent of the income tax.[104] The FBAR threshold has never been modified and now obviously covers a large fraction of Americans living abroad. In addition, FATCA mandates a new report, Form 8938, that demands some of the same information; indeed some call it "shadow FBAR."[105] While IRS officials have stressed the extent to which the forms do not overlap,[106] no complete explanation has been offered for the failure to clarify and integrate asset

99. For a thorough discussion of how various countries deal with the relation among citizenship, residence, domicile (permanent home), and taxation, *see* Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289 (2011).

100. Kudrle, *Expatriation*, *supra* note 17.

101. *See* Bean, *supra* note 98 at 4.

102. Non-resident aliens file Form 1040NR. FR 26,468, May 16, 2003, codified at 31 CFR § 103.56(g).

103. Allison Christians, *Paperwork or Punishment: It's Time to Fix FBAR*, 76 TAX NOTES INT'L 147 (Oct. 13, 2014).

104. Internal Revenue Service, *Comparison of Form 8938 and FBAR Requirements*, https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements (last visit November 14, 2019).

105. Ajay J. Gupta, *News Analysis: The Fifth Amendment, FBARs, and Their Shadows*, 80 TAX NOTES INT'L 563 (Nov. 16, 2015).

106. Marie Saprie, *Officials Discuss Goals Of Proposed Foreign Asset Reporting Regulations*, 65 TAX NOTES INT'L 989, 992 (2012).

reporting. This has been criticized by both the IRS, Taxpayer Advocate,[107] and a report by the General Accountability Office.[108]

Organizations of Americans living abroad have pressed for a so-called "same country" exception from FATCA requirements of those living outside of the U.S. who hold those assets in the country where they reside.[109] Various proposals either modify the FBAR requirement for such persons[110] or eliminate 8938 reporting.[111] Such measures could be introduced with regulatory discretion, but the Obama administration decided against using it. Although no detailed rationale was offered, the Treasury position is apparently that it should have approximately the same information on persons living abroad as those in the U.S. This does not address the argument that the two asset reports could be better integrated to reduce confusion and redundancy while perhaps melding their major requirements more clearly with the standard 1040 form.[112] Nevertheless, the government could argue generally that additional transactions cost for those abroad, including compliance costs with the U.S. tax system, provides much of the justification for the inflation-indexed income exclusion of more than $100,000 dollars. In fact, some legislative initiatives have tried to repeal that exclusion, apparently as an undesirable "loophole."[113]

Evidence has not yet been gathered on the relative importance of various motivations for the sharp increase in relinquished U.S. citizenship following the heightened attention to foreign reporting of which FATCA is such an important part.[114] The raw number of expatriates jumped from 742 in 2009 to 5411 in 2016, a twenty-six percent increase over the previous year.[115] But this must be considered against the estimated 9 million Americans living abroad in 2016.[116] Anecdotal evidence emphasizes the inconvenience of complying with FATCA, including the refusal of some foreign financial institutions to bear the cost and liability of dealing

107. Byrne, *Is FATCA 'Much Ado About Nothing'? supra* note 69 at 3.

108. *Id*. at 2.

109. Institute on Taxation and Economic Policy, *Foreign Account Tax Compliance Act (FACTA): A Critical Anti-Tax Evasion Tool* (May 2, 2017), https://itep.org/foreign-account-tax-compliance-act-fatca-a-critical-anti-tax-evasion-tool/ (last visited Nov. 14, 2019).

110. Christians, *supra* note 103.

111. John Richardson, *FATCA's Same Country Exemption Won't Work,* TAX CONNECTIONS, 2 (May 10, 2017), https://www.taxconnections.com/taxblog/fatcas-same-country-exemption-wont-work/#.WXPR0oTyupo (last visited August 1, 2017).

112. Christians, *supra* note 103.

113. U.S. Congress, The Bipartisan Tax Fairness and Simplification Act of 2010 (The Wyden-Gregg Bill), 111th Congress, 2nd Session, http://wyden.senate.gov/issues/Legislation/Wyden-gregg/bill_draft.pdf, 11 March 2010 (last visited September 23, 2016).

114. Kudrle, *Expatriation*, *supra* note 17, at 2, suggesting government collection of information about the reasons offered for relinquishing citizenship but, to the author's knowledge, this has not been done.

115. Andrea Darling de Cortes, Alan Winston Granwell & William M. Sharp, *New IRS Procedure Provides Favorable Path for Non-Compliant Expatriates to Become Tax Compliant*, HOLLAND & KNIGHT (Sep. 11, 2019), https://www.hklaw.com/en/insights/publications/2019/09/new-irs-procedure-provides-favorable-path-for-noncompliant-expatriates (last visited Nov. 14, 2019).

116. U.S. Department of State, *Consular Affairs by the Numbers*, https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf (last visited August 10, 2017).

with Americans in a post-FATCA world.[117] But the latter argument may be exaggerated. Foreign banks and other financial institutions have come to accept FATCA; U.S.-based banks abroad, which must report U.S. depositor earnings directly to the IRS, are almost ubiquitous; and complex banking services are increasingly available online. Nevertheless, as many observers have pointed out, the combination of poor IRS communication, draconian threated penalties for even minor violations, and confusing and duplicative forms, have undoubtedly lowered respect for the U.S. tax system by many Americans living abroad.[118] Among the many problems, the system for matching taxpayers' documents with those of payers has been producing massive false positives and unwarranted withholding that has been corrected only after lengthy delays.[119]

D. IRS Problems

The introduction of FATCA highlighted some very important weaknesses in the IRS. First, the service has seen a dramatic decline in its total resources in relation to assigned tasks. The IRS always faces the need to balance compliance, fairness, helpfulness, and political neutrality. Although these were reconciled with some success as late as the early twenty-first century,[120] the period since has seen an increasingly destructive spiral of declining public confidence, increasing political attack, and declining resources. The IRS budget fell by ten percent from 2010 to 2015 despite the new activity for FATCA and the daunting challenges of handling the records of the Patient Protection and Affordable Care Act (Obamacare).[121] The Trump administration then froze the IRS budget for 2017[122] although the IRS asked for about $127 million dollars in new funding to bolster support for FATCA alone.[123]

117. For an extreme example of difficulties abroad generated by FATCA, *see* Testimony of Daniel Kuettel U.S. House of Representatives Subcommittee on Government Operations, *Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act*, April 26, 2017, https://oversight.house.gov/wpcontent/uploads/2017/04/Kuettel-Statement-FATCA-4-26.pdf (last visited August 5, 2017); *see* Bean, *supra* note 98, at 5–6.

118. Christians, supra note 103; Byrnes & Munro, *supra* note 81. See also National Taxpayer Advocate, 2013 Annual Report to Congress, Volume 1 , December 31, 2013 pp. 205-247. https:// taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf.

119. Byrnes & Munro, *supra* note 81, at 1–33.

120. Joel Slemrod & Jon Bakija, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 184 (2004).

121. Byrnes & Munro, *supra* note 81, at 1–30.

122. CCH Tax Day Report, IRS Funding Maintained in 2017 Budget Bill May 3, 2017 available at http://news.cchgroup.com/2017/05/03/irs-funding-maintained-2017-budget-bill (last visited September 1, 2017).

123. Byrnes & Munro, *supra* note 81, at 1–34; Taxpayer Advocate Service, Full 2012 Annual Report to Congress, 5, https://taxpayeradvocate.irs.gov/2012-Annual-Report/FY-2012-Annual-Report-To-Congress-Full-Report.html, states "The significant and chronic underfunding of the IRS poses one of the most significant long-term risks to tax administration today. Because of funding shortages, the IRS is unable to answer millions of taxpayer telephone calls or timely process letters; the tax gap (i.e. the amount of tax due but uncollected) stands at nearly $400 billion each year; taxpayers believe the tax laws are not being fairly enforced against others; and the federal deficit is unnecessarily large." Cited in, Byrnes & Munro, *supra* note 81, at 1–49.

FATCA critics have used the challenges of the IRS as a way of attacking the program. A leading FATCA opponent, Congressman Mark Meadows of North Carolina, cites then IRS commissioner John A. Koskinen as claiming that the IRS can raise $20 dollars for every dollar spent in enforcement.[124] So shifting about $200 million to implement FATCA in the fiscal 2017 budget . . . to the general enforcement area "would increase our tax revenue by over $1 billion, and that is without spending another penny on the overall budget of the IRS."[125] This argument completely ignores tax morale and appears to assume that the social benefits of enforcement activity at every margin can be assessed by revenue raised.[126]

V. OBJECTIONS TO INFORMATION COLLECTION AND SHARING

Conflicting principles of privacy, social obligation, and sovereignty condition the estimates of costs and benefits just reviewed. In particular, from the earliest days of the HTC project, there were objections to international information sharing on grounds of cartelizing the tax collection for bloated governments and of diminishing privacy.

A. Feeding the Beast

The "tax cartel" objection, emanating largely from libertarians, seems demonstrably false. The OECD, the HTC, and both Forums have never suggested minimum personal and corporate tax rates. So U.S. Representative Dick Armey's letter to Treasury Secretary Lawrence Summers in the last days of the Clinton Administration claiming that Administration support for the OECD project threatened to "stamp out tax competition" appears to be wide of the mark.[127] It did indeed aim, as Armey claimed, to "tell other countries to dismantle their privacy laws" to allow the objecting states to collect taxes owed by their citizens and residents.[128] But the absence of an evasion alternative might actually *increase*

124. Mark Meadows, speaking at the *House Subcommittee on Government Operations Hearing: Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act* (Apr. 26, 2017), at 24:10, available at http://isaacbrocksociety.ca/2017/04/27/reviewing-the-unintended-consequences-of-the-foreign-account-tax-compliance-act-video-and-summary-of-hearing/#Meadows-Closing.

125. *Id.*

126. Michael Keen & Joel Slemrod, *Optimal Tax Administration, Working Paper* 17/8 (July 2016), available at https://www.nber.org/papers/w22408.pdf. Models relating the tax base (all or part of the state's economic activity) and tax rates to costly enforcement and compliance have also generated optimal rules for tax administration. Nevertheless, not only are some of the necessary empirical measures to implement the rules elusive or missing, but the entire framework necessarily omits broader issues of tax morale. As Keen & Slemrod conclude:" the framework here attaches no importance to horizontal equity, either as a welfare concern in itself or in potentially shaping compliance behavior a caveat that applies, however, to almost all optimal tax analysis." *Id.* at 22. Horizontal equity—similarly placed persons should pay similar taxes—would seem to be a very important component of tax morale.

127. Stanley C. Ruchelman & Susan K. Shapiro, *Exchange of Information*, delivered at Step 2002 National Conference in Toronto, Ontario (June 3-4, 2002), at 18, http://publications.ruchelaw.com/pdfs/ExchangeOfInformation11.pdf.

128. *Id.* at 19.

personal income tax competition for high earners because expatriation would be the only escape from residence tax liability.[129]

Opponents of international information sharing often also oppose government withholding on grounds that it enables tax to be collected more easily and arguably less visibly,[130] but, as data presented earlier show, the big compliance gap is not between withholding and automatic reporting but instead between both of those and unverified self-reporting. Libertarian writing fails to confront the connection between government information and tax compliance. For example, one major statement attacking international tax information from two well-known figures connected with the Cato Institute written in 2003 never uses the words "evasion" or "avoidance" at all.[131] Their response might be that government opportunism should not trump financial privacy. But just what kind of privacy claim is being made? Julie Roin wondered many years ago if Representative Dick Armey would oppose employer-based wage reporting to the U.S. government.[132] One inference is that many opposing international exchange of tax information tread lightly on such an issue because their views on *domestic* tax collection would appear extreme[133] and therefore less than compelling as a guide for foreign economic policy.

B. Varying Views on Financial and Tax Privacy

If the U.S. libertarian position on international tax exchange rests on privacy assumptions that most persons find unpersuasive, it can be juxtaposed with another position with very little appeal: that privacy does not exist as an independent right at all because it is not explicitly treated in the Constitution. Perhaps the nearest approach to a privacy right is found in the fourth amendment's strictures on searches and seizures, but the word "privacy" does not appear.

U.S. legal concern for privacy is usually traced to an 1890 article by Charles Warren and Louis Brandeis called "The Right to Privacy."[134] The core of their argument is that the privacy right is the "right to be left alone." Some of the concerns expressed by Warren and Brandeis are captured in the 1948 Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and

129. And such behavior will likely grow considerably in the future. *See* Kudrle, *Expatriation, supra* note 17; *see also* George J. Borjas, Ilpo Kauppinen, & Panu Poutvaara, *Self-Selection of Emigrants: Theory and Evidence on Stochastic Dominance in Observable and Unobservable Characteristics*, NBER Working Paper No. 21649, http://www.nber.org/papers/w21649 (last visited October 1, 2017).

130. For the case of Veronique de Rugy, an opponent cited here, *see* Joseph J. Thorndike, *Tax Day Is a Drag. Should We Keep It That Way?* TAX ANALYSTS BLOG (March 27, 2017), http://www.taxanalysts.org/tax-analystsblog/tax-day-drag-should-we-keep-it-way/2017/03/27/195826 (last visited 4 September 2017).

131. Richard Rahn & Veronique de Rugy, *Threats to Financial Privacy and Tax Competition,* 491 POLICY ANALYSIS 1 (2003).

132. Julie Roin, *Competition and Evasion: Another View of International Tax Competition*, 89 GEO. L.J. 543 (2001) at footnote 193.

133. *See, e.g.*, Rahn & de Rugy, *supra* note 131, which appears to support the financial privacy practices of Switzerland.

134. Charles Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

reputation. Everyone has the right to the protection of the law against such interference or attacks."[135]

The history of U.S. financial privacy with respect to taxes reveals a contest between two opposing positions that Schwarz has personified as those of Benjamin Harrison and Andrew Mellon (both establishment Republicans).[136] The Harrison position on public tax information for individuals (and corporations) rested on the belief that citizens had a right to know who was paying what share for the common purposes of government and, more practically, that taxes on the well-off were being widely evaded in the gilded age when Harrison was president.[137] Moreover, social pressure against evasion by the well-off could be applied more forcefully if their fellow citizens knew how much or how little they paid. In sharp contrast, Mellon, serving as Treasury secretary a quarter of a century after Harrison was president, strongly favored privacy as what would now be called a human right and adduced evidence from tax inspectors in the field that compliance was not increased by the public availability of tax information, which had been intermittently available in previous years and was being actively debated in the twenties and again during the New Deal.[138] Mellon argued that compliance was actually enhanced by confidentiality on the analogy of the privileged lawyer-client relation.[139]

The actual course of U.S. policy has shown elements of both positions at various points. The Supreme Court position shifted sharply over ninety years. In the 1886 *Boyd* case,[140] compelling the production of business records relevant to taxation was deemed a violation of the fourth and fifth amendments. By the *Garner*[141] case in 1976 involving self-incrimination, it was accepted that such records must be produced.

This change resulted in part from what came to be called "tax exceptionalism," which includes the idea that "The notion of privacy in tax law is not as broad as in tort law or in constitutional law."[142] In *Bull v. United States* in 1935, The Supreme Court observed that ". . . taxes are the lifeblood of government, and their prompt and certain availability an imperious need."[143] *Bull* was decided during an unprecedented expansion of federal activity, but even earlier, following the Revenue of Act of 1913, there was widespread presumption of public access.[144]

The President exercised great authority over the use of federal tax information as "public records" until the Tax Reform Act of 1976 that attempted to narrow the

135. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), http://www.un.org/en/universal-declaration-humanrights/.

136. Paul Schwarz, *The Future of Tax Privacy*, 61 NAT'L TAX J. 883 (2008).

137. *Id.* at 887.

138. *Id.* at 885.

139. *Id.* at 891.

140. *Boyd v. U.S.,* 116 U.S. 616 (1886).

141. *Gamer v. U.S.,* 424 U.S. 648 (1976).

142. Reuven S. Avi-Yonah & Gianluca Mazzoni, *Taxation and Human Rights: A Delicate Balance*, Public Law and Legal Research Series, University of Michigan Law School, Paper No. 520, September 5, 2016.

143. *Bull v. United States*, 295 U.S. 247, 259 (1935).

144. Schwarz, *supra* note 136, at 885.

range of uses for which tax information would be used and shared.[145] However, there were several acceptable intra-governmental uses at the time of the legislation, and they have grown considerably since.[146] Moreover, there is ample legal precedent for U.S. sharing of financial information with foreign countries for tax purposes. In *Yeong Yae Yun v. United States*, a California court determined that "petitioners have no legitimate expectation of privacy in their bank accounts."[147]

The situation in Europe differs from the U.S. for a number of reasons. First, the EU and associated states have had very different intra-state practices in the past concerning the privacy of financial affairs as well as definitions of and penalties for tax evasion. Second, many European states have historically experienced far more government misuse of financial information than has the U.S.[148] Privacy concerns have been recently bolstered by the growing challenge of data protection in the digital age, which has seen much more highly developed vesting of rights with individuals rather than firms in the EU than in the U.S. This has been codified in the General Data Protection Regulation (GDPR) of 2016.[149]

Europe faces the constant need to reconcile the practices of member states with each other, and this raises the level of attention on many issues that are often taken for granted or ignored in the U.S. In fact, concerns about financial and tax privacy and confidentiality in Europe seem not to have generated much parallel political interest in the U.S., although they were briefly stated in the U.S. "Taxpayers' Bill of Rights" legislated in 2015 to little fanfare.[150] After many years of public declaration of those rights prior to the legislation, the founding

Taxpayer Advocate, Nina Olson, declared her dismay at the widespread view among U.S taxpayers that they have few, if any rights, to contest the procedures or findings of the Internal Revenue Service.[151] Nevertheless, confidentiality *within* the IRS is widely recognized and respected.[152]

A leading European student of the relation of taxation to human rights, Philip Baker, notes: "Although rights-based challenges to [international] information exchange are unlikely to succeed, tax authorities within the Council of Europe must respect fundamental rights when legislating and implementing measures for such practices."[153] Elements of that respect include informing the subject that data will be transmitted with sufficient lead time for the subject to examine those data and correct inaccuracies, and that the data may not be retained for longer than is necessary to

145. Tax Policy Center, *Major Enacted Tax Legislation, 1970-1979*, https://www.taxpolicycenter.org/laws-proposals/major-enacted-tax-legislation-1970-1979 (last visit Nov. 19, 2019).

146. Schwarz, *supra* note 136, at 893.

147. *Yeong Yae Yun v. United States*, 2000 WL 33267334, at *1 (C.D. Cal. Nov. 21, 2000).

148. Commission Regulation, 2016/679 O.J. (L. 119) (2016).

149. *Id*.

150. H.R. 1058, 114th Cong., (2015–2016): Taxpayer Bill of Rights Act, https://www.congress.gov/bill/114thcongress/house-bill/1058

151. Nina Olsen & Philip Baker, *The View from Vienna: Conversations with Jeffrey Owens*, 81 TAX NOTES INT'L 595 (2016).

152. *Id.* at 595.

153. Philip Baker, *Privacy Rights in an Age of Transparency: A European Perspective*, 82 TAX NOTES INT'L 583 (2016).

accomplish the objective of transmittal.[154] In addition, "foreign tax authorities that have inadequate provisions for guaranteeing the confidentiality of data, and which are prone to data leaks, are clearly providing inadequate data protection and cannot possibly receive data whilst these inadequate safeguards exist."[155]

A working party charged to monitor the European Commission's Directive 95/46/EC (the "Data Protection Directive"), concluded in 2016 that "the practical roll-out of CRS in Europe based on existing FATCA IT solutions currently lacks adequate data protection safeguards, notwithstanding the EU proposal to amend the Directive 2011/16/EU regarding [i.e. allowing] mandatory automatic exchange of information in the field of taxation. This Directive—which could be considered as transposition of the US FATCA and CRS into EU law—so far falls short of data protection safeguards."[156] Overall, Baker concludes: "The CJEU [Court of Justice of the European Union] has struck down entire legislative arrangements on information processing due to inadequate protections therein. Large parts of the edifice being erected for AEI [automatic information exchange] could be struck down because the authorities concerned have, in their haste to establish a system for exchange, failed to respect taxpayers' rights."[157] All of this implies that reciprocity in automatic reporting will be watched with great care by EU states; the OECD is very specific that CRS states can demand higher standards for data control in partners than those partners would typically employ for internal purposes.[158]

C. Privacy: Contested Norms

Two major dimensions of data privacy issues need to be distinguished, and FATCA involves both. One relates to the breach of what is understood to be data privacy; the other concerns what information should be private. The European concerns discussed earlier implied that even intra-European financial information exchange could raise questions. Most governments, however, appear to take the position that the current level of tax-relevant information gathering and exchange *within* most high-income countries can be defended, and the major open question is how much international exchange can meet a sufficient standard of confidentiality. Nevertheless, national problems remain, and the U.S. is a prime example.

A GAO Report released in March of 2016 stated:

> Until IRS takes additional steps to (1) address unresolved and newly identified control deficiencies and (2) effectively implement elements of its information

154. *Id.* at 585.

155. Taxpayer Rights Conference, *The Right to Confidentiality and Privacy in an Age of Transparency: A European Perspective*, (August 2019), https://taxpayerrightsconference.com/wp-content/uploads/2016/08/Baker_Final_Paper.pdf.

156. European Union, Article 29 Data Protection Working Party, OECD Common Reporting Standard, Ref. Ares (2014) 3066381 18/09/2014, http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm (last visited 12 October 2017).

157. Baker, *supra* note 153, at 6.

158. Organisation for Economic Cooperation and Development (OECD), Standard for the Automatic Exchange of Financial Information in Tax Matters: The CRS Implementation Handbook (2016), https://www.oecd.org/tax/exchange-of-tax-information/implementationhandbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf (last visited October 10, 2017).

> security program, including, among other things, updating policies, test and evaluation procedures, and remedial action procedures, its financial and taxpayer data will remain unnecessarily vulnerable to inappropriate and undetected use, modification, or disclosure. These shortcomings were the basis for GAO's determination that IRS had a significant deficiency in internal control over financial reporting systems for fiscal year 2015.[159]

These problems, of course, are much broader than FATCA, but they strongly relate to the European misgivings already recounted. They highlight that confidentiality of data is a problem of utmost urgency within the developed countries, and one that will only increase in complexity as more data are shared among them. To this must be added the challenges posed by the transmission of data to countries with lower technical competence and generally lower probity. Some observers apparently do not regard financial privacy as a very serious concern at all and see the current policy challenges of evasion (and avoidance) as sufficient reason to greatly diminish the levels of financial privacy that currently prevail within many countries, including the U.S. Zucman, for example, suggests a public registry of world financial wealth with amounts and beneficial owners, although he concedes that there would likely be political objection.[160] He writes "there might be a case for starting such a world financial registry only with those countries sharing similar attitudes toward transparency, or to initially keep the information confidentially in the hands of tax and regulatory authorities."[161]

Much OECD activity now aims at gathering data on major firms by country to assist in the collection of the corporate income tax, but there is considerable dispute about how much of that information—if any—should be made public.[162] And many observers draw a sharp distinction between public disclosure for large firms and that for individuals,[163] noting that disclosure for the latter threatens "the right to be left alone" Consistent with this view, the EU is contemplating much more public disclosure of financial information on corporations while public disclosure of financial information linked to individuals would appear to violate the European norm that applies the test of necessity for the intended goal.[164] Given that both FATCA and CRS are in their incipient phases, and their sufficiency when coupled with more conventional measures against evasion remains to be seen, increased public personal information disclosure would be widely regarded as at best premature. And, of course, the U.S. still faces the challenge of fully implementing the reciprocity sought by its FACTA IGA partners.

159. General Accountability Office, *Information Security: IRS Needs to Further Improve Controls Over Financial and Taxpayer Data*, 16–398 (March 2016).

160. Zucman, *supra* note 78.

161. *Id.* at 145.

162. Organisation for Economic Co-operation and Development (OECD), *OECD Work on Taxation*, (2018-2019) https://www.oecd.org/tax/centre-for-tax-policy-and-administration-brochure.pdf.

163. Avi-Yonah & Mazzoni, *supra* note 142.

164. Baker, *supra* note 153.

D. Data Control beyond the U.S. and the EU

The G-20 has now replaced the G-7 (or 8) as the central steering committee of global economic governance, and the OECD has smoothly shifted from its role as a secretariat of the latter to the former group.[165] But the new members of the larger group are very different in many dimensions relevant to international tax cooperation. For example, Transparency International's Corruption Perception Index[166] yields an average score for the G-7 in 2016 of 72.3 (out of 100), while the non-G7 members of the G-20 had an average of 42.1.[167] In fact, Australia at 77 was the only country in the larger group with a score above 46.[168]

The precise meaning of the Transparency Index (or any other) can be debated, but the point is still broadly true that the level of probity is generally much lower among the G-20 newcomers. Moreover, most of the lower income countries are concerned not only with tax matters but also with the violation of exchange controls. For example, using complete absence of controls as "1," the G-7 in recent years has been at that value, as are Canada and Australia, but group also includes Mexico at .70, Russia at .59, Turkey at .45, Brazil at .41, and South Africa at .16.[169] And the figures behind Zucman's average of 8 percent of total financial wealth held offshore reveal enormous variation: the U.S. figure is four percent, as is Asia; Europe is ten percent. But Latin America is twenty-two percent, Africa is thirty percent, and Russia is fifty percent.[170] The sharply contrasting measures on corruption, exchange control, and estimated financial wealth held offshore suggest that many of the states most eager for automatic information exchange are also those with whom such exchange may prove most problematic.

VI. CONCLUSION: U.S. CHOICES IN A RADICALLY CHANGED ENVIRONMENT

At least three broad American positions concerning policy towards international personal tax evasion can be discerned. First, there are those who believe that for reasons of privacy or the efficient deployment of enforcement resources, the modest estimated revenue foregone by comparison with GDP or total federal revenue, imply that rather minor attention should be directed to the evasion

165. The members of the G-20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, the Russian Federation, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, the United States, and the European Union. For more detail on the governance shift, *see* Robert T. Kudrle, *International Tax Cooperation: Different Taxes Imply Different Policy Logics*, prepared for presentation at the 57nd Annual Convention of the International Studies Association Atlanta, March 16–19, 2016 (on file with author).

166. Transparency International, Corruption Perception Index, https://www.transparency.org /research/cpi/overview (last visited December 29, 2017).

167. Byrnes and Munro have noted that of the 167 countries ranked in this index, 117 scored 50 or lower; Byrnes & Munro, *supra* note 81, at 1–119.

168. Transparency International, *supra* note 166.

169. The score is from the Chinn-Ito Index, http://web.pdx.edu/~ito/Chinn-Ito_website.htm (last visited September 23, 2017).

170. Zucman, *Taxing across Borders*, *supra* note 78, at 140.

of tax by Americans using secret overseas investments;[171] this view completely ignores the value of assisting other states. Second, there are those such as the tax law scholar Reuven Avi-Yonah who join the critics of FATCA as intrusive and inefficient, but accept the urgency of addressing tax evasion through foreign investment.[172] He suggests a variant of an approach that was considered some years ago: the small group of modern countries where most of the world's economic activity and real investment take place—the U.S., the EU, and Japan— should revive a thirty percent withholding tax on all payments to tax havens.[173] But such a focus on traditional tax havens does not solve major problems for low income countries, and, in particular, it leaves the aspirations of most of the newer members of the G-20 unfulfilled. The third position is that the U.S. should move towards automatic information exchange on all legal entities, in line the CRS position, and this view seems almost certain to prevail eventually. Within the limits of regulatory authority, the Obama administration did move in that direction, first with the collection of bank interest information for highly restricted sharing and later with the mandate for beneficial ownership information on new financial accounts. The later was introduced with draft legislation mandating the collection of beneficial ownership information on all "legal entities,"[174] a prerequisite for full reciprocity. This clearly fell outside regulatory discretion, and, so far, has gotten no further than the Congressional initiatives discussed earlier. If the U.S. fully implements the current beneficial ownership information on financial accounts mandated by FinCen, the level of reciprocally provided information will likely avoid international censure despite its shortfall from the requirements of the CRS. Perhaps unsurprisingly, given the centrality of the U.S. to both OECD activity and funding, OECD automatic exchange documents now simply explain the U.S. position without condemning it.[175] Should there be backsliding, however, the situation could change.

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171. Tim Worstall, *Gabriel Zucman Shows How Irrelevant Offshore Tax Evasion Is, How Trivial*, FORBES (April 10, 2016), https://www.forbes.com/sites/timworstall/2016/04/10/gabriel-zucman-shows-how-irrelevant-offshoretax-evasion-is-how-trivial/#7da7d6e46764 (last visited August 1, 2017).

172. Avi-Yonah and Mazzoni, *supra* note 142.

173. When this scheme is married to automatic information exchange within the tax-levying groups, it resembles earlier policy suggestions by Hufbauer and Assa and by Kudrle. GARY CLYDE HUFBAUER & ARIEL ASSA, US TAXATION OF FOREIGN INCOME (Peterson Institute for International Economics, 2007); Robert T. Kudrle, *Ending the Tax Haven Scandals,* 9 GLOBAL ECONOMY J. (2009). The Kudrle proposal involves three groups of countries rather than two: automatic exchangers, fully cooperative countries with TIEAs but lacking the probity for automatic information sharing, and non-cooperative states. Both of the last two categories would face 30 percent withholding, but those investors affiliated with the second set could get the withholding released if they could demonstrate that taxes were paid to their home governments. The third category would be comprised of states resistant to information sharing: they would face full non-fundable withholding.

174. *See* U.S. Department of the Treasury, *Amending the Bank Secrecy Act to Require Reporting and Recordkeeping on Beneficial Ownership of Legal Entities* (May 6, 2016), https://www.treasury.gov/press-center/pressreleases/Documents/20160506%20BO%20Legislation.pdf (last visited October 12, 2017).

175. Organisation for Economic Co-operation and Development (OECD), *AEOI Status of Commitments*, https://www.oecd.org/tax/transparency/AEOI-commitments.pdf (last visited October 15, 2017).

The Trump administration will almost certainly not act to strengthen reciprocity because the implementation of FATCA met a narrow nationalist goal. There can be scant confidence that the IRS will be provided with adequate resources and direction to enforce FATCA fairly and efficiently by an unprecedentedly chaotic administration. Still more doubtful would be a substantial closing of the current cooperation gap with nearly all other states. Progress here will probably persist until there is a change in the U.S. executive and legislative branches. But this not certain. Some of those in power now must realize that the prevailing policy asymmetry does more than withhold benefit from others. Tightening the grip on global evasion employing the U.S. would reduce some evasion by Americans, but it would also play a role in diminishing international crime and terrorism. This suggests that the current policy stasis is unlikely to precede a serious reversal of U.S. policy and almost certainly not to one that is long-lasting. The U.S., with the U.K., was slow to concede the need for automatic information exchange, largely out of concern for discouraging financial investment activity. FATCA and developments since have spoken volumes about the urgency and ubiquity of that perceived need. Notwithstanding its highly nationalist introduction, FATCA served as a critical accelerant[176] for a very rapid shift to widespread automatic exchange. The Director of the Internal Revenue Service, John Koskinen, observed in a 2016 speech:

> I had braced for a great deal of negative feedback on FATCA, since we were requiring financial institutions in FTA [Federation of Tax Administrators] countries, at some cost, to provide us information about U.S. taxpayers. But instead, I found uniform enthusiasm among the FTA member countries for the system of reporting that FATCA calls for.[177]

The contagion of CRS suggests that the current trend towards automatic information exchange is irreversible, regardless of immediate impact on tax revenues or evasion estimates. The CRS stands as a visible symbol of commitment that, having been embraced, is vanishingly unlikely to be abandoned. And what foreigners want is almost exactly what the U.S. sought with FATCA but so far has been reluctant to give.

Gaining fully reciprocity from the U.S. for tax-relevant information challenges the global tax community. But that community also faces the need to restrict information to authorities that will use it responsibly. Some of the most corrupt governments are also the most *dirigiste* in economic policy, including international transactions. Bad decisions about automatic exchange—or even about compliance with requests under TIEAs—will almost certainly lead to extortion and other crimes. Striking the right balance between supporting a foreign state's fiscal system and

176. Robert Stack, former Treasury deputy assistant secretary (international tax affairs), declared in late 2017: ". . . without FATCA, there would be no CRS. And not only without FATCA, but without the United States putting a withholding tax on institutions that were not going to give us the information on FATCA, CRS would be nothing. Because no bank in the world would have and no country in the world would have forced their banks to get this information and exchange it if they hadn't already been required to do it under FATCA." *Conversations: Jeffrey Owens and Robert Stack*, 87 TAX NOTES INT'L 715 (Doc 2017–61520).

177. Koskinen, *supra* note 26.

protecting its citizens will challenge policymakers for the indefinite future. More immediately, visible failures with the CRS could provide both a pretext and a reason for delaying a U.S. embrace of greater reciprocity with a larger number of states. Nevertheless, automatic reporting of the kind embodied in FATCA and the CRS will remain permanent parts of the global institutional architecture.

INTERNATIONALIZING DOMESTIC DISPUTES? TRANSNATIONAL PUBLIC–PRIVATE PARTNERSHIP IN WTO LITIGATION

*Yujia Wei**

For approximately two decades, commentators have extensively investigated the production of World Trade Organization (WTO) cases.[1] The WTO Dispute Settlement Body has been the central pillar of the WTO system since its establishment, because it is the institution within the system that can authorize sanctions for violations of the WTO agreements, but also plays a critical role in shaping and developing WTO law.[2] On the other hand, trade negotiations in the WTO have almost been paralyzed, and the WTO agreements – as a result of conference diplomacy – contain significant ambiguity leaving ample room for judicial interpretation.[3] Thus, the cases brought before the WTO court structure the development of WTO law and influence the international economic order.[4] Motivated by these concerns, scholars have probed into the process behind WTO proceedings, unearthing the players that have driven the legal actions.[5] Scholars have documented that governmental agencies often rely on the assistance of the private sec-

* Yujia Wei, who holds a Doctor of Juridical Science (S.J.D.) from University of Wisconsin Law School and an LLM in International Law from Xiamen University (China), is practicing securities and corporate law. The author is indebted to Professor Alexandra Huneeus, Professor Joe Conti, Professor Congyan Cai, Eric Klemm, and Amy Free for their invaluable comments.

1. Lindsay Prior, *Following in Foucault's Footsteps: Text and Context in Qualitative Research*, in APPROACHES TO QUALITATIVE RESEARCH: A READER ON THEORY AND PRACTICE 324–29 (Sharlene Nagy Hesse-Biber & Patricia Leavy eds., 2004).

2. *Understanding the WTO: Settling Disputes*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Oct. 21, 2019).

3. Appellate Body, *"Unprecedented Challenges" Confront Appellate Body, Chair Warns*, WORLD TRADE ORGANIZATION (June 22, 2018), https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm.

4. *Understanding the WTO: Settling Disputes*, *supra* note 2.

5. *See, e.g.*, GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) [hereinafter Shaffer, Defending Interests]. *See also* DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010) [hereinafter Dispute Settlement at the WTO]; Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 1 U. ILLINOIS L. REV. 115, 115-184 (forthcoming 2018), *available at* https://ssrn.com/abstract=2937965; James J. Dedumpara, '*Naming, Shaming and Filing': Harnessing Indian Capacity for WTO Dispute Settlement*, 5 TRADE L. & DEV. 68 (2013); Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008); Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 442 (1998).

tor to cope with demanding WTO dispute procedures.[6] Despite the fact that only WTO members have standing to participate in WTO actions, private interests infuse the initiation, development, and implementation of WTO cases.[7]

The collaborative efforts between public agencies and the private sector to advance their interests through WTO litigation is often termed "Public Private Partnership" ("P-P partnership").[8] The private side of these partnerships can be companies, trade associations, environmental groups, or labor unions, but business interests account for a lion's share of such collaborations.[9] Though a wealth of research has been dedicated to studying *internal* public-private coalitions in WTO legal actions, there is only brief discussion about the *transnational* type of these coalitions.[10]

Transnational P-P partnership in WTO litigation does more than merely change the nationality of the private party in the partnership. In many cases, its origin, nature, and purpose are strikingly different from domestic P-P partnerships, and consequently, represent a distinct production pattern of WTO cases that have different impacts on the development of WTO law as well as the development of the international legal order.[11] While domestic P-P partnerships arise from mobilization, cooperation, and alliance among domestic forces, the transnational type tends to spring from internal conflict, rivalry, and struggle. A remarkable example of domestic P-P partnership in WTO litigation is the high-profile, long-lasting WTO disputes between the U.S. and EU regarding U.S. subsidies to Boeing and EU subsidies to Airbus, where each side working with its commercial aircraft industry contested that the other's industry had received illegal governmental subsidies.[12] By contrast, the case studies below show that transnational P-P partnerships are often related to failures or barriers in domestic political and judicial process-

6. *See, e.g.* DISPUTE SETTLEMENT AT THE WTO, *supra* note 5 at 15.

7. *Introduction to the WTO Dispute Settlement System,* WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm. (last visited Oct. 17, 2019).

8. *See, e.g.*, SHAFFER, DEFENDING INTERESTS, *supra* note 5. (Professor Gregory Shaffer seems to be the first person to coin the phrase—"public private partnership in WTO litigation.").

9. *See* Marco Schäferhoff et al., *Transnational Public-Private Partnerships in Int'l Relations*, COLLABORATE RES. CTR. WORKING PAPER SERIES 1, 10 (Aug. 2007).

10. Shaffer, Defending Interests, *supra* note 5, at 139–42.

11. *Id.* at 5-6.

12. *See* Request for Authorization by the Dispute Settlement Body, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/42 (Oct. 6, 2019); Request for Panel to Suspend Work by the United States, *European Communities—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO Doc. WT/DS347/1 (July 20, 2006); Request for Consultations by the European Committees, *United States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS317/1 (Oct. 12, 2004); Request for Consultations by the European Committees, *Unites States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint),* WTO Doc. WT/DS353 (Dec. 4, 2006); Panel Report, *United States—Conditional Tax Incentives for Large Civil Aircraft*, WTO Doc. WT/DS487/11 (Sep. 26, 2017).

es—they often occur when corporate interests want to leverage international pressures to modify unfavorable domestic policies.[13]

Transnational P-P partnerships' association with domestic feud impacts the international legal order in two important ways: first, it connects national and international legal orders in unexpected manners; second, it raises concern that current international institutions further tilt the power balance toward corporate interests in relation to other interests. As the following case studies illustrate, trade barriers are more than protectionist measures discriminating against foreign producers—they can be weapons against domestic companies that moved operations abroad, or a potent legal right to be invoked to resolve non-trade issues.[14] Through the device of transnational P-P partnership, conflict and competition between domestic groups is reframed, repackaged, and brought up to an international court as a dispute between two states. This internationalization of domestic disputes impinges on the traditional meaning of interstate disputes and makes national law increasingly affected by international law. Private actors' innovative framing of their problems in terms of *trade barriers* and leveraging international courts also imparts "discursiveness" to the development of international law as well as the interaction between international and national legal orders.[15]

The phenomenon of transnational P-P partnership at the WTO court (arguably the most powerful international court to-date) also causes fears that it provides corporate interests an additional venue to exert pressure, circumvent traditional controls established in national legislative and judicial course, prioritize corporate values over other values, and restrict state autonomy in policy-making.[16] In this manner, transnational P-P partnership allows corporate interests to empower themselves in the WTO dispute settlement system. Yet international law and courts not only empower but also constrain corporate interests. Indeed, the case studies here offer valuable lessons for private interests attempting to try their case before the WTO court by displaying how the complexity of interstate relations complicates what would be a much simpler issue under national law. In addition, from an institutional perspective, the capacity of private interests to leverage the intergovernmental WTO court is quite restricted: access to the international court depends on a state's sponsorship; the legality and reasonableness of its case are examined by judges who are delegates from member states and surely take into consideration the regulatory concerns of those states; and the enforcement of the court's decisions relies on state apparatus.[17]

The remainder of this essay proceeds as follows: Part I provides two case studies that exemplify two types of transnational P-P partnerships in utilizing the WTO dispute system: public-dominated and private-dominated. Through in-depth process-tracing, the case studies reveal the capabilities and mechanisms of how

13. Schäferhoff, *supra* note 9 at 10.
14. *See infra* Part I.
15. Schäferhoff, *supra* note 9 at 4.
16. *See id.* at 23-24.
17. *Understanding the WTO: Settling Disputes*, *supra* note 2.

transnational partnerships engage the WTO court. Continuing with the concern of how WTO cases are produced, Part II digs into the formation process of transnational P-P partnerships. Part III turns to theoretical reflections exploring the implications of transnational P-P partnerships in WTO litigation for international legal order. Part IV offers ideas for further research.

I. PUBLIC-DOMINATED AND PRIVATE-DOMINATED TRANSNATIONAL P-P PARTNERSHIPS

Public-Private Partnership, built upon the assumption of a "public-private divide," readily captures a joint venture of public and private actors based on pooling their resources and capabilities to accomplish "public interest" related goals.[18] The phrase "transnational P-P partnership in WTO litigation" is employed here as a metaphor to conceptualize the cooperative efforts between cross-border public and private actors in pursuing WTO lawsuits. One example of this phenomenon occurred in the context of China–U.S. clashes over the U.S. application of countervailing duty to Chinese imports. A second example involves the Antigua–U.S. dispute regarding internet gambling. The two cases represent divergent patterns of how the partnership emerged and functioned. The divergence between the partnerships was influenced by the public partner's economic size, administrative culture, and issue areas involved.

A. China–U.S. WTO Disputes on U.S. Countervailing Duty Law

Many works have documented the Chinese government's efforts to engage its private sector for effective participation in the WTO dispute system.[19] Compared with its proactive and strategic role in fostering internal P-P partnerships, the Chinese government in the following case seemed to forge the transnational alliance by accident. The private party in this transnational alliance is GPX International Tire Corporation ("GPX"), a U.S.-based tire company. The partnership between the Chinese government and GPX took place amid intensified friction between the U.S. and China over China's non-market economy status and the treatment of Chinese goods in trade remedy investigations.[20] The related legal battle was remarka-

18. Schäferhoff, *supra* note 9 at 7

19. *See*, *e.g.,* Shaffer & Gao, *supra* note 5; Henry Gao, *Public-Private Partnership: The Chinese Dilemma*, 48 J. WORLD TRADE 983 (2014); Han Liyu & Henry Gao, China's Experience in Utilizing the WTO Dispute Settlement Mechanism, in DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE 137, 158 (2010); Pasha L. Hsieh, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON. L. 997 (2010).

20. *See, e.g.*, Vivian C. Jones, Cong. Research. Serv., RL33550, Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries 9–10 (2007), *available at* https://www.everycrsreport.com/files/20071206_RL33550_a1fdae9e774c687be5bfdf05f5726107a5143565.pdf. A non-market economy ("NME") is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (2012). The NME status creates a rebuttable presumption that the prices of a surrogate market-economy country will be used in calculating dumping margins for exports from the NME country, *id.*

bly lengthy and complex, involving a string of four WTO disputes (DS368, DS379, DS437, DS449) and two appeals to the U.S. Court of Appeals for the Federal Circuit.

i. Prologue

The reliance on China as a low-cost manufacturing base makes U.S. multinational corporations share China's interest in maintaining a liberalized trade policy, but the U.S. multinationals typically are reluctant to side with China regarding trade remedy issues. China did not accede to the WTO organization until December 2001, approximately seven years after the WTO came into being.[21] In China's accession negotiations, the U.S. was both the major obstacle and motivator for China to enter the organization.[22] U.S. business lobbying groups made great effort to push through the approval of China's accession in the U.S. Congress.[23] Though the U.S. Congress finally overwhelmingly supported admitting China to WTO,[24] the U.S. imposed non-market economy status and a special safeguards provision in China's Accession Protocol. While such provisions are not common in WTO members' accession protocols, their disadvantageous impacts are limited to the scope of trade remedy investigations.[25] In spite of the disadvantage of non-market economy status, China's first few years at the WTO were a honeymoon period for the U.S.-China trade relation.[26] U.S. trade deficits with China multiplied during this time, however, leading to mounting pressure on the U.S. Congress to take a tough stance with China on trade matters.[27]

In light of these developments, the U.S. Department of Commerce broke with its long-standing tradition of not applying countervailing duty to imports from non-market economies, and initiated a countervailing duty investigation of coated free sheet paper from China on November 27, 2006.[28] The respondent companies and

21. Preliminary Ruling by the Panel, *Accession of the People's Republic of China*, ¶¶ 15-16, WTO Doc. WT/L/432 (Nov. 23, 2001).

22. Joseph Fewsmith, *China and the WTO: The Politics Behind the Agreement*, THE NAT'L BUREAU OF ASIAN RESEARCH (Nov. 1999), https://www.iatp.org/sites/default/files/China_and_the_WTO_The_Politics_Behind_the_Agre.htm. On one hand, in the protracted negotiations for China's accession, most of the time was spent on reaching a bilateral WTO agreement with the US, *see id.*. On the other hand, the significance of the U.S. market and the uncertainty deriving from lack of permanent normal trading status with the U.S. motivated China to seek WTO membership. *See, e.g.*, John B. Judis, *Open Door*, THE NEW REPUBLIC (Dec. 19, 1999), https://newrepublic.com/article/77434/world-trade-organization-china-labor-rights-open-door.

23. *See, e.g.*, Robert G. Kaiser & Steven Mufson, *U.S. Business Lobby Poised for China Trade Deal*, WASH. POST (Nov. 14, 1999), http://www.washingtonpost.com/wp-srv/WPcap/1999-11/14/052r-111499-idx.html.

24. Judis, *supra* note 22.

25. WTO Doc. WT/L/432, *supra* note 21. These provisions are a departure from the most-favored-nation treatment and non-discrimination principles underpinning the WTO regime.

26. *See* Xiuli Han, *China's First Ten Years in WTO Dispute Settlement*, 12 J. WORLD INV. & TRADE 49, 50 (2011).

27. JONES, *supra* note 20, at 1.

28. JONES, *supra* note 20, at 16. Countervailing duty refers to the extra duty charged on imports that are subsidized by a foreign government or public entity and have caused material injury or a threat

the Chinese government in this investigation filed suit in the U.S. Court of International Trade, requesting a preliminary injunction to prevent the U.S. Department of Commerce from conducting the countervailing investigation.[29] Alongside this investigation, the U.S. Department of Commerce solicited public comment on the issue of whether the countervailing duty law should apply to non-market economies.[30] The majority of responses from U.S. industries backed extending countervailing duty law to Chinese exports.[31] The coated free sheet paper investigation ended without imposing countervailing duty after finding no material injury nor threat of material injury to a U.S. industry, and that the establishment of an industry was not retarded.[32] In reaction to the U.S. Department of Commerce's change of practice, the Chinese government originally filed a complaint with the WTO, which was later withdrawn following the investigation's negative determinations.[33]

ii. First Round of the Battle

The previous sub-section introduced the background of U.S.–China clashes over countervailing duty and trade remedies in general.[34] This brief review indicates that U.S. import industries tended to be opportunistic on trade remedy issues and were not willing to be outspoken on disciplined use of trade remedy measures. GPX's experience will be a case in point. The company partnered with the Chinese government in legal fights against the U.S. government as it had no choice after suffering financial devastation as a result of countervailing and anti-dumping duties imposed on its imports from its Chinese subsidiary.[35] However, with regard to

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of material injury to domestic industries, or the establishment of an industry was retarded. The U.S. Commerce Department's practice of not applying countervailing duty to imports from non-market economies was established in countervailing investigations of carbon steel wire rod imports from Czechoslovakia and Poland. 49 Fed. Reg. §19374 (1984).

29. Gov't of the People's Republic of China v. U.S., 483 F. Supp. 2d 1274, 1275–76 (Ct. Int'l Trade 2007). The Court declined to grant the injunction for the reason that the plaintiffs could seek judicial review after conclusion of the investigation, which was not a manifestly inadequate remedy for plaintiffs. Interestingly, the Chinese government and the respondent companies shared counsel on this suit, *id.* at 1274, 1284.

30. 71 Fed. Reg. § 75507 (2006).

31. *See* Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Admin., Issues & Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the PRC (May 29, 2019). Submissions supporting application of countervailing law to Chinese products include various trade associations and individual companies, *id*.

32. Coated Free Sheet Paper from China, Indonesia, and Korea, Inv. Nos. 701-TA-444-446, 731-TA-1107-1109 U.S.I.T.C. Pub. 3965 (Dec. 2007) (Final), *available at* https://www.usitc.gov/publications/701_731/pub3965.pdf.

33. Summary Request for Consultations by China, *United States—Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WTO Doc WT/DS368/1 (Sept. 2007).

34. *See, e.g. An Introduction to U.S. Remedies*, U.S. INT'L TRADE ADMIN., https://enforcement.trade.gov/intro/index.html (last visited Jan. 27, 2018).Trade remedies refer to anti-dumping and countervailing actions taken by the importing government to protect the market share of domestic producers from unfair competition of exports, *id.*

35. *GPX Int'l Tire Corp. Announces Chapt. 11 Restructuring*, BUSINESS WIRE (Oct. 27, 2009),

the U.S. Department of Commerce request for comment on applicability of countervailing duty to Chinese imports, GPX did not provide comment, probably because by then it did not foresee its imports would soon be affected by this policy change.

GPX was incorporated in 2005 after a merger of Boston-based Galaxy Tire & Wheel Inc. and Toronto-based Dynamic Tire Corp.[36] In 2006, GPX acquired a factory in China through its wholly-owned subsidiary Starbright.[37] One year later, in 2007, the U.S. Department of Commerce initiated concurrent anti-dumping and countervailing duty investigations of pneumatic off-the-road tires imported from China.[38] This investigation was one of the earliest that resulted in countervailing duty for imports from China. GPX's subsidiary Starbright, a respondent company in the investigations, received stiff countervailing and anti-dumping duty rates.[39] Soon after the investigations were completed, GPX contested the U.S. trade authorities' determinations in the U.S. Court of International Trade.[40] At roughly the same time, on September 19, 2008, China requested consultations with the U.S. at the WTO regarding four sets of concurrent anti-dumping and countervailing determinations by the U.S. government on goods from China: circular welded carbon quality steel pipe, pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks.[41] Among the four products, the investigations of pneumatic off-the-road tires concluded lastly. The Chinese government seemed to wait until the conclusion of pneumatic off-the-road tires investigations to lodge a complaint at the WTO.[42]

There was convincing circumstantial evidence that the Chinese government likely contributed funds to GPX's legal actions in the U.S. trade courts. GPX filed for bankruptcy on October 26, 2009, approximately 45 days after suing in the U.S. Court of International Trade.[43] The Chinese government then moved to intervene in the GPX litigation when it learned that the plaintiffs could no longer afford the

https://www.businesswire.com/news/home/20091027006027/en/GPX-International-Tire-Corporation-Announces-Chapter-11.

36. *Galaxy, Dynamic Complete Merger Boston*, TIRE BUS. (Oct. 10, 2005), http://www.tirebusiness.com/article/20051010/NEWS/310109967/galaxy-dynamic-complete-merger.

37. GPX Int'l Tire Corp. v. U.S., 893 F. Supp. 2d 1296, 1320 (Ct. Int'l Trade 2013).

38. *See* Certain New Pneumatic Off-the-Road Tires from China, 72 Fed. Reg. 43591 (Dep't of Commerce Aug. 6, 2007) (AD Initiation); Certain New Pneumatic Off-the-Road Tires from China, 72 Fed. Reg. 44122 (Dep't of Commerce Aug. 7, 2007) (CVD Initiation).

39. GPX Int'l Tire Corp. v. U.S., 645 F. Supp. 2d 1231, 1236 (Ct. Int'l Trade 2009), (discussing how Starbright's countervailing duty rate was 14% and anti-dumping was 29.93%.).

40. GPX Int'l Tire Corp. v. U.S., 587 F. Supp. 2d 1278, 1283 (Ct. Int'l Trade 2008).

41. Request for Consultations by China, *United States—Definitive and Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/1 (Sep. 22, 2008).

42. *Id*. (discussing the date of anti-dumping and countervailing duty orders being July 22, 2008 for Circular Welded Carbon Quality Steel Pipe, August 5, 2008 for Light-Walled Rectangular Pipe and Tube, August 7, 2008 for Laminated Woven Sacks, and September 4, 2008 for Pneumatic off-the-road Tires).

43. *In re* GPX Int'l Tire Corp. v. U.S., Debtor., No. 09-20170-JNF, 2010 WL 6595319 (Bankr. D. Mass. June 4, 2010).

legal action, but the motion was denied because of untimely filing.[44] In the Chinese government's motion to intervene, the attorneys for the Chinese government interestingly also represented GPX.[45] Despite the Chinese government's failure to effectively intervene, GPX did not quit the lawsuit. GPX continued the litigation for nearly seven years.[46] Additional incidents further indicate that the Chinese government likely assisted with GPX's litigation.[47]

A Chinese official admitted in his book that the Chinese government took a dual-track approach in this legal battle.[48] He stated that China:

> "adopted a litigation strategy of making multilateral and bilateral mechanisms complementing each other: on one hand, we planned to sue the U.S. anti-dumping and countervailing measures at the WTO; on the other hand, we pushed forward the U.S. domestic proceedings."[49]

On the WTO front, there seemed to be relatively minor private involvement. China's WTO claims focused on the definition and interpretation of generic legal elements of countervailing duty measures, and procedural requirements for the importing government in requesting information from the exporting government.[50] These issues were shared among the investigations of the four products.

At the national venue, the Chinese government submitted an *amicus curiae* brief to endorse GPX's positions when GPX litigation proceeded to the U.S. Fed-

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44. *See* GPX Int'l Tire Corp. v. U.S., No. 08-00285 (Ct. Int'l Trade Sept. 18, 2009), *available at* http://www.cit.uscourts.gov/SlipOpinions/Slip_op09/Slip%20Op.%2009-11.pdf.

45. *See id.*

46. *See* GPX Int'l Tire Corp. v. U.S., 587 F. Supp. 2d 1278 (Ct. Int'l Trade 2008). The series of GPX cases in U.S. courts spanned from 2008 to 2015. GPX Int'l Tire Corp. v. U.S., 587 F. Supp. 2d 1278 (Ct. Int'l Trade 2008) *reh'g denied*, 593 F. Supp. 2d 1389, *motion denied*, 33 Ct. Int'l Trade 114 (2009), *remanded by* 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009), *remanded by* 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010), *request denied* by 34 Ct. Int'l Trade 1307 (2010), *motion denied by and motion granted by* 2011 U.S. App. LEXIS 4758 (Fed. Cir. Mar. 10, 2011), *motion granted by* 2011 U.S. App. LEXIS 10122 (Fed. Cir. May 17, 2011), *motion denied by and motion granted by* 2011 U.S. App. LEXIS 10048 (Fed. Cir. May 18, 2011), *motion granted by* 2011 U.S. App. LEXIS 10061 (Fed. Cir. May 18, 2011), *aff'd by* 666 F.3d 732 (Fed. Cir. 2011), reh'g granted and remanded by 893 F. Supp. 2d 1296 (Ct. Int'l Trade 2013), *appeal after remand at* 942 F. Supp. 2d 1343 (Ct. Int'l Trade 2013), *aff'd by* 780 F.3d 1136 (Fed. Cir. 2015), *motion granted by* 70 F. Supp. 3d 1266 (Ct. Int'l Trade 2015).

47. *See* Motion for Final Decree, *In re* GPX Int'l Tire Corp., Debtor., No. 09-20170-JNF, 2011 WL 7783264 (Bankr. D. Mass. Nov. 23, 2011); Docket, *In re* GPX Int'l Tire Corp., Debtor., No. 1:09-BK-20170 (Bankr. D. Mass. 2012) (Westlaw). GPX's bankruptcy files show that a Massachusetts-based holding firm MITL Acquisition Company LLC ("MITL") purchased Hebei Starbright, and agreed to assume responsibility for the prosecution of anti-dumping & countervailing actions at its sole cost and expense, *id*. Records state that MITL was incorporated in 2010, and has only two staff. *Mitl Acquisition Company LLC*, MANTA, https://www.manta.com/c/mb0b15b/mitl-acquisition-company-llc (last visited Jan. 28, 2018). This seems unable to undermine the speculation that the Chinese government helped GPX on legal fees.

48. Sun Zhao (孙昭), Cuntu Bizheng de Shimao Zhengduan (寸土必争的世贸争端) 10 (2015).

49. *Id.*

50. *See* Request for Consultations by China, *supra* note 41. The government of foreign producers/exporters is a mandatory participant in the importing country's countervailing investigation. *See* Appellate Body Report*, infra* Part II.

eral Circuit Court of Appeals.[51] In this amicus brief, the Chinese government noted the U.S. Department of Commerce by then had initiated twenty-eight countervailing investigations against Chinese goods, and therefore it,

> "ha[d] an interest in the legal issue presented in this appeal that [went] well beyond the outcome of Commerce's investigation of alleged subsidies to producers of off-road tires, and [gave] the Government of China a perspective that [was] distinct from that of the private party Appellees in this action."[52]

At that time, the WTO Appellate Body in dispute DS379 had determined "offsetting the same subsidization twice by the concurrent imposition of anti-dumping duties calculated on the basis of a [non-market economy] methodology and countervailing duties" (commonly known as the "double remedies" issue) was inconsistent with the WTO rules.[53] The Chinese government thus asked the Federal Circuit to consult the WTO Appellate Body's decision for its "persuasive value."[54] The Federal Circuit ruled in favor of GPX, affirming the trial court's position on the double remedy issue but on a different ground. The Federal Circuit's reasoning was indeed closer to the GPX's arguments.[55]

China subsequently initiated the WTO complaint DS437 in May 2012, about a year after the WTO Appellate Body's decisions in DS379.[56] The DS437 addressed another 17 countervailing duty investigations by the U.S. Department of Commerce following the four investigations covered in DS379.[57] Again, China's claims in DS437 concerned its burden of proof as the exporting government in countervailing investigations, and thus can be seen as an extension of DS379 to include more products.[58] To conclude, in the first round of legal combat, China launched two WTO disputes against the US involving a wide array of products, and GPX was marching toward victory in U.S. domestic courts.

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51. *See* Brief of Amicus Curiae, Ministry of Commerce of China, GPX Int'l Tire Corp. v. U.S., 666 F.3d 732 (Fed. Cir. 2011) (Nos. 2011-1107, 2011-1108, 2011-1109), 2011 WL 2323800, at 1 [hereinafter Amicus Brief of China].

52. *Id.* at 2.

53. Appellate Body Report, *United States—Definitive and Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ VIII.1(d), WTO Doc. WT/DS379/AB/R (Mar. 11, 2011). Overall, China scored partial success in WTO DS379, *id.* at 121–23.

54. Amicus Brief of China, *supra* note 51, at 28.

55. *See* GPX Int'l Tire Corp. v. U.S., 666 F.3d 732, 732–45 (Fed. Cir. 2011). The Federal Circuit held that the countervailing law could not be applied to NME countries because that was the intent of the U.S. Congress, as evidenced by the Congress acquiescing on U.S. Commerce's and the Federal Circuit's earlier consistent interpretation that subsidies did not exist in the NME context, *id.* at 745. Regarding GPX's arguments, *see* Brief of Plaintiffs-Appellees GPX Int'l Tire and Hebei Starbright, 666 F.3d 732 (Nos. 2011-1107, 2011-1108, 2011-1109), 2011 WL 1748633 (Apr. 19, 2011).

56. Request for Consultations by China, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/1 (May 30, 2012).

57. *See* Request for the Establishment of a Panel by China, *United States—Countervailing Duty Measures on Certain Products from China*, 5–9, WTO Doc. WT/DS437/2 (Aug. 21, 2012).

58. *Id.* at 1–4.

iii. Second Round of the Battle

The initial winnings of GPX and China on national and international fronts were not the end of the legal battle. Unexpectedly, while the U.S. Federal Circuit's ruling was pending, the U.S. Congress swiftly passed an act on March 13, 2012 authorizing the U.S. Commerce Department to conduct countervailing investigations on merchandise from non-market economies in order to prevent the Federal Circuit ruling from taking effect.[59] In the face of this dramatic change, the Chinese government and GPX started another round of legal battle.

In the national venue, GPX brought constitutionality challenges against the new act in the U.S. Court of International Trade.[60] It argued that this legislation violated the Ex Post Facto Clause of the U.S. Constitution, and Due Process and Equal Protection of the Fifth Amendment.[61] In employing a highly deferential review standard that national courts apply with respect to economic legislation, the trial court did not accept GPX's arguments.[62] GPX appealed the trial court's findings to the U.S. Federal Circuit again.[63] The Chinese government, without participating in the lower court proceeding, appeared before the Federal Circuit as a *plaintiff* (not an appellant).[64] What makes the Chinese government's appearance more mysterious was there was neither information on the attorneys representing it nor any briefs submitted by it in the case files.[65] The Federal Circuit found the new legislation retroactively imposed countervailing duties on exporters from non-market economies, but affirmed the lower court's decisions that the new statute was not unconstitutional.[66]

In the WTO, the Chinese government lodged a new complaint DS449 against the U.S. on September 17, 2012, approximately three months after GPX started constitutionality litigation in the U.S. Court of International Trade.[67] China argued that the new law was inconsistent with the WTO provisions preventing WTO members from taking measures that effect an advance in duty rate or other charge on imports before official publication of such measures (the transparency and no-

59. An Act to Apply the Countervailing Duty Provisions of the US Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes, Pub. L. No. 112-99, 126 Stat. 265 (2012) (codified as amended at 19 U.S.C. §§ 1671, 1677f-1).

60. GPX Int'l Tire Corp. v. U.S., 893 F. Supp. 2d at 1296. GPX's constitutionality claims were first raised before the Federal Circuit. The Federal Circuit remanded the case to the lower court to have it evaluate the claims in the first instance. GPX's challenges targeted the different effective dates of the two sections of the new law. The different effective dates mean that the U.S. Commerce is only obliged to adjust antidumping duty rate calculated by non-market economy methodologies to avoid the double remedies problem from the enactment of the new law onward; no adjustment is required to be made to investigations initiated before March 13, 2012 when the new law took effect, *id.* at 1304, 1337.

61. GPX Int'l Tire Corp. v. U.S., 893 F. Supp. 2d at 1309.

62. *Id.* at 1310-11.

63. *See* GPX Int'l Tire Corp. v. U.S., 780 F.3d 1136 (Fed. Cir. 2015).

64. 780 F.3d at 1138.

65. *Id.*

66. *Id.* at 1136.

67. GPX Int'l Tire Corp. v. U.S., 893 F. Supp. 2d at 1305 (showing GPX's constitutionality challenges in the U.S. Court of International Trade started on June 4, 2012 when the case was reopened).

tice requirement).[68] The WTO Appellate Body concluded it was unable to "complete the analysis" to determine whether the new law violated the WTO requirement because the panel's report did not provide sufficient factual findings to examine this claim.[69] Thus, GPX and the Chinese government did not succeed in challenging the new legislation. GPX's bankruptcy proceeding closed on January 3, 2012 with its assets broken apart and sold.[70]

B. Antigua–U.S. WTO Dispute on Internet Gambling

The transnational P-P partnership that drove the Antigua-U.S. confrontations at the WTO exemplifies a different kind of power dynamic within the partnership. Contrasted with the public-dominated pattern in the first case study, the private party in this case played a leading role. This second partnership revolved around a prominent case in WTO jurisprudence, entitled *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling)* (DS285).[71] Many commentators viewed this case as notable progress both from legal and institutional perspectives; it touched upon a number of first-ever legal issues under the WTO law, such as "digital trade" and "electronically-supplied service trade," and it was brought by a small country, Antigua and Barbuda ("Antigua"), against a great power, the United States, claiming that a number of U.S. national laws were inconsistent with the WTO provisions.[72]

Antigua was one of the smallest WTO members. It had been a British colony until 1981.[73] Before the 1970s, Antigua's economy relied heavily on the production and export of cane sugar.[74] To diversify its economy, the Antiguan government encouraged the development of Information and Communications Technology ("ICT") infrastructure, and encouraged the growth of information-intensive

68. General Agreement on Tariffs and Trade 1994, arts.X:1, X:2, X:3(b), Apr. 15, 1994, 1867 U.N.T.S. 187 (GATT 1994). *See* Appellate Body Report, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, ¶ 1.7, WTO Doc. WT/DS449/AB/R (July 7, 2014).

69. *Id*. ¶ 5.1(g). *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, WTO WT/DS449/AB/R at ¶ 5.1(g).

70. *See, e.g.,* Gov't of the People's Republic of China v. U.S., 483 F. Supp. 2d 1274, 1275–76 (Ct. Int'l Trade 2007); 71 Fed. Reg. § 75507 (2006); Coated Free Sheet Paper from China, Indonesia, and Korea, supra note 32; Memorandum from Stephen J. Claeys, supra note 31; Summary Request for Consultations by China, *supra* note 33. *See also* Christie Smythe, Blaming Chinese Tire Duties, GPX Files Ch. 11, LAW360 (Oct. 27, 2009, 3:03 PM), http://www.law360.com/articles/130707/blaming-chinese-tire-duties-gpx-files-ch-11. *See also* In re GPX Int'l Tire Corp., Debtor, No. 09-20170-JNF, 2011 WL 7783264 (Bankr.. D. Mass. Nov. 23, 2011).

71. Dispute Settlement, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/1 (initiated Mar. 27, 2003).

72. *See, e.g.*, Tom Newnham, *WTO Case Study: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 7 ASPER REV. INT'L BUS. & TRADE L. 77 (2007); Sacha Wunsch-Vincent, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US—Gambling*, 5 WORLD TRADE REV. 319 (2006).

73. First Submission of Antigua Before the Panel of the WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 2, WTO Doc. WT/DS285 (Oct. 1, 2003).

74. *Id*. at 3.

businesses.[75] In 1994, Antigua was one of the first jurisdictions that issued licenses to online wagering companies.[76] The WTO dispute DS285 centers on whether companies in Antigua were allowed to provide gambling and betting services remotely to customers within the U.S.[77] In the U.S., gambling is a legal but highly regulated industry where it is under the dual regulations of federal and state governments.[78] At that time, several states outlawed online gambling, and several federal acts banned the use of communication technology to assist or enable betting or wagering.[79] Nevertheless, the U.S. was the predominant market for Antigua's internet gambling companies.

Jay Cohen was the first person convicted on federal charges of internet gambling.[80] He lived in San Francisco and was formerly a stock trader.[81] Inspired by the new technology of the internet, he left his job in San Francisco, moved to Antigua, and cofounded the World Sports Exchange by the end of 1996.[82] The World Sports Exchange solicited Americans through the internet, telephone calls, and advertisements in U.S. newspapers and magazines to place sports bets.[83] Cohen and another twenty U.S. citizens who had similar operations overseas were indicted in 1998 for illegally using interstate telephones and the internet to take wagers from U.S. customers.[84] The federal prosecutors alleged that Cohen and other defendants tried to circumvent the U.S. law by taking their business overseas.[85]

While the other twenty citizens who were indicted either entered guilty pleas prior to trial or became fugitives, Cohen elected to fight the charges in court.[86] A Manhattan federal jury subsequently found Cohen guilty.[87] Cohen appealed his conviction to the Second Circuit, and the Second Circuit upheld the trial court decisions.[88] He then petitioned the U.S. Supreme Court to hear the case but was re-

75. *Top Reasons to Invest in Antigua and Barbuda*, ANTIGUA AND BARBUDA INV. AUTHORITY, http://investantiguabarbuda.org/top-reasons-to-invest.

76. *See* First Submission of Antigua, *supra* note 73, at 8; *See also Antigua and Barbuda Online Gambling Jurisdictions*, GAMBLING SITES.COM, http://www.gamblingsites.com/online-gambling-jurisdictions/antigua-barbuda/ (last visited Jan. 30, 2018).

77. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,1*, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005).

78. *See, e.g.*, Douglas A. Irwin & Joseph Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS 285), 7 WORLD TRADE REV. 71, 74 (2008).

79. *Id.*

80. Reuters, *Man Jailed in 1st U.S. Online Gambling Conviction*, N.Y. TIMES (Aug. 11, 2000), http://partners.nytimes.com/library/tech/00/08/biztech/articles/11gambling.html.

81. *Id.*

82. United States v. Cohen, 260 F.3d 68, 70 (2d. Cir. 2001).

83. Reuters, *supra* note 80.

84. Mike Brunker, *Net Betting Conviction Upheld: Online Gambling Pioneer Suffers Legal Setback*, NBC NEWS (July 31, 2001), http://www.nbcnews.com/id/3071037/ns/technology_and_science-internet_roulette/t/net-betting-conviction-upheld/#.VotgzPkrLIU.

85. Reuters, *supra* note 80.

86. Brunker, *supra* note 84.

87. Reuters, *supra* note 80.

88. *United States. v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001).

jected in June 2002.[89] Shortly afterwards, he began serving his 21-month prison sentence.[90] Mark Mendel, Cohen's attorney, who did not gamble and knew little about international trade law when he took this case, became involved because the other partner, Robert Blumenfeld, of his law firm, was a friend with Cohen.[91] Cohen asked Blumenfeld "to see if there was anything his firm could do."[92] Mendel innovatively persuaded officials in Antigua to initiate a trade complaint against the United States at the WTO.[93]

To make the case politically appealing, Mendel framed the case as a dispute between a powerful developed country and a vulnerable developing country; cross-border gambling was characterized as a development issue and a life-or-death matter for Antigua's economy.[94] Besides merely leveling political charges, Antigua was able to overcome the difficulty of proving "gambling and betting services" fell within the scope of U.S. commitments under its GATS (WTO General Agreement on Trade in Services) Schedule.[95] Next, Antigua successfully linked the U.S. ban on internet gambling with Article XVI of the GATS agreement which prohibits certain quantitative restrictions on market access.[96] Finally, it convinced the WTO Appellate Body that though the relevant U.S. federal acts (the Wire Act, Travel Act, and Illegal Gambling Business Act) forbidding online gambling were measures necessary to protect public morals or maintain public order, the U.S. Interstate Horseracing Act permitted domestic operators to provide remote betting services for horse racing, and thus those federal acts discriminated against foreign service suppliers.[97]

Nonetheless, these wins at the WTO did not result in real economic benefits to Antigua or Cohen, which ultimately led to the collapse of this transnational partnership. The U.S. declined to implement the WTO decision or pay monetary compensations.[98] Antigua asked the WTO to authorize it to suspend its obligations under the WTO Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement to allow infringing on the copyrights of U.S. films, music and software.[99] Antigua received authorization of retaliation against the U.S., but did not

89. *Cohen v. U.S.*, 122 S. Ct. 2587 (2002).

90. Brunker, *supra* note 84.

91. Gary Rivlin, *Gambling Dispute with a Tiny Country Puts U.S. in a Bind*, N.Y. TIMES (Aug. 23, 2007), http://www.nytimes.com/2007/08/23/business/worldbusiness/23gamble.html.

92. *Id*.

93. *Id. See also* Paul Blustein, *Against All Odds*, WASH. POST (Aug. 4, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080301390_2.html. Before Cohen was convicted in July 2001, Cohen seemed to have good connections with the Antiguan government, as an Antiguan government official wanted to be a witness for him in his trial. *United States v. Cohen*, 260 F.3d at 78.

94. *See* First Submission of Antigua Before the Panel of the WTO, *supra* note 73, at 1, 35.

95. Appellate Body Report, *supra* note 77, at 73.

96. *Id.* at 73-74.

97. *Id.* at 116.

98. Blustein, *supra* note 93.

99. Recourse to Arbitration by the United States under Article 22.6 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 1, WTO Doc.

implement it.[100] WTO trade cases typically cost millions of dollars, which was unaffordable for a small country like Antigua with an annual governmental budget of about $145 million USD.[101] Indeed, Antigua-based online gambling companies had incurred between $10 million to $15 million in legal fees for the WTO litigation. And the Antiguan government agreed that these companies' legal expenses would be reimbursed first from any settlement Antigua could reach with the U.S., and the gambling companies were also entitled to claim 75 percent of the rest.[102]

In 2013, Cohen's World Sports Exchange was shut down.[103] In 2014, Antigua's new government administration fired Mendel and made an offer to resolve the gambling dispute with the United States.[104] Antigua's new Prime Minister, Gaston Browne, rebuked the United Progressive Party – which controlled Antigua previously – for striking a deal with Antigua's online gambling companies that had benefited these companies far more than the country.[105] Browne saw little value in continuing this arrangement.[106] At the time this article was written in September 2017, Antigua was still asking the U.S. to pay damages for not implementing the WTO rulings, hoping the compensation could help it recover from the great loss due to Hurricane Irma.[107]

II. HOW THE "TRANSNATIONAL COALITIONS" FORMED

One question often asked about P-P partnerships is "how was the P-P partnership formed?" This question is of particular importance because, since P-P partnerships draw on public authority and resources, they tend to attract scrutiny over private capture. For example, in infrastructure construction projects where the P-P partnership model is widely used, special focus is placed on the bidding process to assuage these concerns.[108] By virtue of the low frequency of WTO actions, P-P partnerships in this context not only invite scrutiny, but also entice scholarly interests to investigate the formation process and mechanisms of litigation P-P partnerships .[109]

WT/DS285/ABR (Dec. 21, 2007).

100. *Id.* at 78. *See also* Tom Miles, *Storm-Battered Antigua Askes U.S. to Settle 12-Year Old WTO Bill*, REUTERS (Sept. 29, 2017, 4:27 AM), https://www.reuters.com/article/us-usa-antigua-wto/storm-battered-antigua-asks-u-s-to-settle-12-year-old-wto-bill-idUSKCN1C4165.

101. Blustein, *supra* note 93.

102. Steven Stradbrooke, *Antigua Fires Attorney Mark Mendel, Makes New $100M Offer to End US WTO Dispute*, CALVINAYRE.COM (Sep. 9, 2014), http://calvinayre.com/2014/09/09/business/antigua-fires-attorney-mark-mendel-makes-new-100m-offer-to-end-us-wto-dispute/.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Miles, *supra* note 100.

108. *See, e.g.*, D. Joseph Darr, *Current Trends in Public-Private Partnership Laws*, 28 CONSTR. LAW. 53, 53–54 (2008).

109. *See Understanding the WTO: Settling Disputes, supra* note 5.

The formation process of national P-P partnerships in WTO litigation is less institutionalized than that found in construction projects, and the development of *transnational* P-P partnerships tends to be further less institutionalized than that of national ones. For instance, the United States is a pioneer and notable user of P-P partnerships in WTO disputes.[110] The tradition of engaging private interests in establishing U.S. trade policy agenda and strategies was rooted in the "Section 301" petition procedures.[111] This institutional device along with the "revolving door" culture in the U.S. trade law circle encourage private interests to influence U.S. trade litigation and negotiation.[112] The U.S. thus enjoyed a competitive edge in early WTO litigation, and the EU/EC thus installed mechanisms such as a procedure similar to U.S. "Section 301" and a Market Access Unit office to encourage private participation in the EU's use of the WTO dispute settlement function.[113] Commentators have noted that the ability to leverage P-P partnership is a key aspect of a state's "legal capacity" in accessing the WTO dispute system.[114] In response to the challenges arising from WTO dispute procedures, emerging countries such as Brazil, China, and India have followed suit, purposely cultivating public-private coalitions to enhance their WTO legal capacity and make better use of the dispute settlement mechanism.[115]

While WTO members actively implement an array of measures to foster internal P-P partnerships, they take on transnational partnerships mostly by chance. As the case studies suggest, there were neither pre-existing institutions nor plans aimed to promote transnational partnerships for WTO actions. Also, in the case studies, the multinational corporations did not become involved in transnational partnerships until they had no choice. By contrast, WTO disputes involving recurring national P-P partnerships tend to associate with a specific segment of economy.[116] Transnational partnerships, on the other hand, appear to be a onetime endeavor.[117]

To be sure, operation-globalized multinational corporations and investment-craving, developing countries share interest in a liberalized world economy. Yet

110. SHAFFER, DEFENDING INTERESTS, *supra* note 5.

111. *Id*.

112. *Id*.

113. *Id.* at 69.

114. *See, e.g*., Marc L. Busch et al., *Does Legal Capacity Matter? A Survey of WTO Members*, 8 WORLD TRADE REV. 559 (2009).

115. *Id.*at 561.

116. Industries such as aircraft, steel, lumber, paper are frequently litigated for before the WTO. Aircraft, for example, has been the product at issue in 10 cases so far. *Brazil—Export Financing Programme for Aircraft*, WT/DS46 (June 19, 1996); *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70, WT/DS/71 (Mar. 10, 1997); *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222 (Jan. 22, 2001); *European Communities—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316 (Oct. 6, 2004), WT/DS347 (Jan. 31, 2006); *United States—Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, WT/DS353 (June 27, 2005); *United States—Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487 (Dec. 19, 2014); *China—Tax Measures Concerning Certain Domestically Produced Aircraft*, WT/DS501 (Dec. 8, 2015).

117. *See supra* Part I.

this does not easily translate into litigation partnerships. The forging of a partnership involves significant transaction costs—it takes effort and money for the parties to get connected, build confidence, and negotiate terms of the risky cooperative undertaking. As the case studies above indicate, the power discrepancy between the parties affects the power structure within transnational P-P partnerships. In a partnership dominated by private actors, the public partner tends to be a small or weak state that is susceptible to private actors' economic clout. Another related feature of private-dominated partnership is that the substantive legal issues involved may have only loose nexus with the state's trade profile. The five WTO suits brought by Ukraine, Honduras, Dominican Republic, Cuba, and Indonesia, against Australia, regarding the plain packaging requirements on tobacco products are a case in point.[118] These five WTO members had little to no trade flows with Australia.[119]

However small, getting a state to commit to international litigation imaginably demands considerable networking and lobbying efforts from private actors.[120] Nonetheless, the issue areas and related institutions and procedures can play a game-changing role in the partnership formation. Countervailing investigations are an area that bridges the gap between private actors and foreign states through a mandatory cooperative procedure and greatly reduces the barriers to establishing transnational coalitions.

Pursuant to the WTO Agreement on Subsidies and Countervailing Measures ("SCM"), the government of the exporting country (*e.g.* China in the first case study) is a mandatory participant in a countervailing investigation, along with private exporters.[121] This institutional mechanism simplifies the formation of the transnational partnership between an exporting country and foreign investors whose subsidiary companies produce imports in the exporting country. The importing government solicits comprehensive, detailed information from the exporting government and private exporters through questionnaires.[122] It also visits the exporting country to verify the information provided.[123] Since the exporting gov-

118. Dispute Settlement, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, brought by Ukraine (WT/DS434), Honduras (WT/DS435), Dominican Republic (WT/DS441), Cuba (WT/DS458), and Indonesia (WT/DS467).

119. Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383, 411 (2016).

120. *See, e.g.*, WORLD HEALTH ORGANIZATION, CONFRONTING THE TOBACCO EPIDEMIC IN A NEW ERA OF TRADE AND INVESTMENT LIBERALIZATION 83–97; Oliver Teves, *WHO Urges Philippine Senate to Defy Tobacco Lobby*, MED. XPRESS, July 27, 2020, https://medicalxpress.com/news/2012-07-urges-philippine-senate-block-tobacco.html.

121. The minimum procedural requirements for conducting countervailing duty investigations are provided in the WTO SCM Agreement and incorporated into national laws by WTO members. Agreement on Subsidies and Countervailing Measures Part V, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex B, 1869 U.N.T.S. 14 [hereinafter SCM].

122. *See, e.g.,* Certain Carbon and Alloy Steel Cut-to-Length Plate from China, No. C-570-048, Doc. 3470867 (Dept. of Commerce May 19, 2016) (CVD Questionnaire), ACCESS database, https://access.trade.gov/.

123. Antidumping and Countervailing Duties, 19 C.F.R. § 351.307 (2018).

ernment's input constitutes the factual basis to evaluate if a countervailable subsidy exists, its quality is important. From responding to questionnaires to on-site verification, private companies and the exporting government must coordinate to reconcile their answers.[124] The exporting government's participation in the investigation allows it to be familiar with the private exporters and legal issues involved, thus paving the way for a potential partnership in subsequent litigation.

The standard of review that the WTO court adopts in evaluating national countervailing duty determinations further reinforces the need for sound cooperation between the exporting government and private exporters at the investigation stage. The standard for assessing the importing country's countervailing determinations is whether "a reasonable and objective investigating authority could, *based on the evidence before it*," have made the same findings.[125] This means the success of contesting countervailing determinations in the WTO depends on a solid documentation of relevant financial and legal data provided by the investigation phase. Thus, private exporters and the exporting government must submit good-quality responses. In this way, the countervailing investigation procedures organize the interaction between the exporting government and private exporters, and facilitate their alliance. Looking back on the first case study, it is this institutional linkage that brought GPX and the Chinese government together.

III. IMPLICATIONS FOR INTERNATIONAL LEGAL ORDER

The mere image of a transnational alliance between a state and a multinational corporation attacking the policies of another state incurs bitter feelings, as it offends the nation-state loyalty deeply rooted in society for the past several centuries.[126] Indeed, the phenomenon of transnational coalitions in inter-state litigation violates the nation-state model that has been a dominant organizing principle of the

124. For example, the Chinese government hired U.S. law firms to represent it in countervailing duty investigations before the U.S. Department of Commerce. The U.S. attorneys representing the Chinese government worked with investigated companies in answering the U.S. Department of Commerce's questionnaires to ensure the Chinese government's response aligned with that of private companies. If none of the Chinese producers were willing to respond to the U.S. Department of Commerce's investigation, the Chinese government would withdraw from the investigation. *Where Are China's WTO Lawyers?,* FORBES, (Apr. 27, 2009, 1:14 AM), https://www.forbes.com/2009/04/27/china-wto-law-business-economy-trade.html#b6493786fa42; *China's Coming of Age in the WTO War,* FORBES (Apr. 29, 2009, 9:00 PM), https://www.forbes.com/2009/04/20/china-wto-trade-markets-economy-law.html#661648a924c3.

125. *See, e.g.*, Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 18, 40, 76, WTO Doc. WT/DS379/AB/R (Mar. 11, 2011).

126. *See, e.g.*, Kim Rubenstein, *Rethinking Nationality in International Law*, 101 AM. SOC'Y INT'L L. PROC. 99 (2007); Gerald L. Neuman, *The Resilience of Nationality*, 101 AM. SOC'Y INT'L L. PROC. 97 (2007); Ernest Barker, *Nationality*, 4 HIST. 135 (1919). The Treaties of Westphalia in 1648 which ended the Thirty Years War marked the beginning of the "nation-state" era characterized by an international society that consists of sovereign states possessing the monopoly of force within their mutually recognized territories. LAIN MCLEAN & ALISTAIR MCMILLAN, THE CONCISE OXFORD DICTIONARY OF POLITICS (2009) ("Westphalian State System").

WTO trading system,[127] and exposes internal divides within states that underlie the disputes between states. This captivating phenomenon will be examined in this Part, in terms of its implications for the understandings of international disputes, the interface between international and national law, and the power of multinational corporations in the globalization trend.

A. Internationalization of Domestic Disputes

Transnational litigation partnerships are a manifestation of internationalization of conflicts that used to be "nation-centered."[128] While internationalization of domestic affairs is not news,[129] internationalization of domestic *disputes* is a recent phenomenon that comes with the "judicialization" trend of international relations.[130] The "enormous expansion of the international judiciary"[131] after the end of the Cold War created new opportunities and venues for private actors to pursue their cause. The availability of international adjudication makes commitments under treaties enforceable and credible, and the role of international courts in influencing states' behaviors inspires private actors to attempt international litigation when efforts do not fare well domestically.[132]

Internationalization of domestic disputes means confrontations between internal individuals or groups are turned into disputes between sovereign states, framed in international law terms (e.g. trade barriers), and evaluated before an international body. Conflicting economic interests that used to compete exclusively in national courts—such as capital *versus* labor, new technology *versus* traditional production methods, state paternalism *versus* free market—now vie for international venues as well. Transnational P-P partnership enables private interests to make their way into the WTO court by collaborating with foreign governments, even if they lose at the national level. The changes to the way conflicts are displayed and tackled mark the changing nature of international disputes; interstate lawsuits drift away from conventional nation-state competition for resources and power, and are increasingly driven by transnational private actors.

Interstate conflicts are often more than conflicts between two states. More commonly, conflicts happen between two blocs of states along ideological, cultural, socio-economic, or geographic divisions.[133] Without the disclosure of behind-

127. Janne Nijman & André Nolkaemper, NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 8 (Janne Nijman & André Nolkaemper, 1st ed., 2007).

128. ROBERT W. COX & TIMOTHY J. SINCLAIR, APPROACHES TO WORLD ORDER 515 (Steve Smith et al. eds., 1st ed. 1996).

129. *See, e.g.*, Harlan Cleveland, *The Internationalization of Domestic Affairs*, 442 ANNALS AM. ACAD. POL. & SOC. SCI. 125 (1979).

130. *See, e.g.*, Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, *supra* note 6.

131. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 INT'L L. & POL. 709, 709 (1999).

132. *See e.g.*, KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 335–65 (Jeffrey L. Dunoff et al. eds., 1st ed. 2014).

133. *See, e.g.*, ROBERT E. HUDEC WITH J. MICHAEL FINGER, DEVELOPING COUNTRIES IN THE

the-scene corporate interests, the WTO disputes of Antigua–U.S. or China–U.S. seem to embody the continuation of the developing-developed countries divide, *i.e.,* the divide between rich, industrialized countries, and countries that have a colonial history, are late in industrializing, and boast a relatively cheap manufacturing base. But the actual involvement of multinational corporations not only defies the connotation of "state-to-state" disputes, but also casts doubt on some conventional characterizations of interstate disputes (e.g. developing-developed disputes).

Categorizing countries into *developing* and *developed* used to be an important distinction in the discourse of international relations. For a long time, until the Uruguay round of negotiations, developing countries largely remained outside the trade liberalization system (the GATT system).[134] At the peak of developing/ developed country tension in the 1970s, developing countries demanded exemptions from tariff disciplines obliging developed countries, and maintained hostile attitudes toward multinational corporations by asserting the territoriality principle and control over multinationals.[135] In spite of this tough environment, multinationals, in their pursuit for internationalization of *production*, have been an important force to integrate developing countries to the world economy and elevate the economic status of developing countries.[136] The convergence of financial interests between multinationals and developing countries shatters the solidarity within developed countries and, to some degree, renders the phrase of "developing-developed countries disputes" much less relevant. In fact, the linkage among states deriving from multinationals' globalized operations blurs and transcends the borders between states, as well as that between categories of states.

Bringing internal problems to the international level, however, raises the question of whether the international court is the suitable venue to deal with these thorny problems.[137] For example, the first case study arose from disputes over countervailing duty law, and countervailing duty is one of the most controversial legal areas in international trade. When a country's importers want to bring their perceived unfair treatment in countervailing investigations into the international venue, they tend to underrate the empathy and flexibility the WTO court gives to national trade remedy measures in considering the role of such measures in dealing with economic uncertainty and political sustainability.[138] Evaluating trade remedy

GATT LEGAL SYSTEM (2011) (the conflicts between developing and developed member countries).

134. ROBERT E. HUDEC WITH J. MICHAEL FINGER, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 1–19 (2011).

135. *See id.* at 71.

136. *See, e.g.*, WTO, INTERNATIONAL TRADE STATISTICS 2015, 25 ("The share of developing economies' exports in world trade increased from 26 per cent in 1995 to 44 per cent in 2014 while the share of developed economies' exports decreased from 70 per cent to 52 per cent."), https://www.wto.org/english/res_e/statis_e/its2015_e/its15_highlights_e.pdf; JOHN H. BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW AND ECONOMICS OF THE GATT AND THE WTO 7 (2006).

137. JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 128–33 (2006).

138. *See supra* Part I.A.

measures is not simply a matter of whether a WTO member observes its obligations and commitments; it must consider the measures' impacts on the stability of the WTO member's economy as well as the entire multilateral trading system. Further, what underpins and perpetuates the trade remedies controversy is the trade imbalances between countries, which the WTO court alone cannot fix.

In addition, private actors may underestimate how the disputing party state's relations with other states will come into play and add complexity to the problem. In the first case above, when GPX made the "double remedies" argument before the U.S. Court of International Trade, the Court did not struggle in sympathizing with GPX's positions.[139] In stark contrast, when the same argument was raised before the WTO, third participant states either explicitly asserted or acquiesced that simultaneous imposition of countervailing duty and anti-dumping duty calculated by non-market economy methodology is not forbidden by the WTO laws.[140] This position was understandable given that the influx of Chinese exports would pose threats to the trade balance of many countries in the world. The WTO panel sided with the popular opinion that the concurrent application of anti-dumping and countervailing duties to non-market economies is not inconsistent with the WTO law.[141] Resisting substantial pressure, the WTO Appellate Body ruled in favor of China's stance on this issue.[142] This seriously dismayed the U.S., and the U.S. blocked the reappointment of the WTO appellate judge, Seung Wha Chang, who voted for China in this case.[143] Internationalization of domestic disputes is not necessarily a more promising path than domestic proceedings.

B. The "Discursive" Unity of National and International Law

Legal pluralism has become a widely accepted characterization of legal orders that currently organize our society.[144] With developments such as "globalization, the emergence of common values, and the dispersion of authority over different public and private actors,"[145] there are increased communications and interactions between international and national law. Scholars that study the divide and continuity between international and national law largely place their empirical focus on the role of domestic courts.[146] This leads scholars to stress the persuasive power/

139. *See* GPX Int'l Tire Corp. v. U.S., 645 F. Supp. 2d 1231, 1240–46 (Ct. Int'l Trade 2009).

140. *See* Appellate Body Report, *United States—Definitive and Anti-Dumping and Countervailing Duties on Certain Products from China,* § II.C, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).

141. Panel Report, *United States—Definitive and Anti-Dumping and Countervailing Duties on Certain Products from China*, 281–82, WTO Doc. WT/DS379/R (adopted Oct. 22, 2010).

142. Gov't of the People's Republic of China v. U.S., 483 F. Supp. 2d 1274, 1284 (Ct. Int'l Trade 2007).

143. Bryce Baschuk, *U.S. Blocks Korean Judge from WTO Appellate Body*, BLOOMBERG (May 24, 2016), https://www.bloomberglaw.com/product/blaw/document/X52F0090000000?criteria_id=c00510b723cfd58795f6db82e5da9a96&searchGuid=8e90169a-9068-418b-8db4-b68d3e9a1028.

144. Nijman & Nolkaemper, *supra* note 127, at 348–51.

145. Nijman & Nolkaemper, *supra* note 127, at 1.

146. Nijman & Nolkaemper, *supra* note 127, at 343-4.

influential value of international law for domestic judges who are looking for guidance in deliberation and justification of hard cases.[147] As Professor Harold Hongju Koh observes, the model predicts that through "*interaction*, *interpretation*, and *internalization*, international legal rules become integrated into national law."[148]

The multilateral trading regime provides unique examples of the relationship between international and national law. The WTO regime is close to a centralized, monistic system with member states incorporating their WTO commitments into national law. This is the "traditional legislative incorporating"[149] model where "the validity of a rule of international law in the domestic legal order [is] contingent on an authorizing rule of domestic law and vice versa."[150] Nevertheless, the WTO regime is distinguished from the traditional model, due to its unique judicial body that has compulsory jurisdiction over a wide range of economic issues, an expansive membership, and the authority to make binding rulings. Other international courts with a membership of similar size cannot match the magnitude of authority delegated to the WTO court.[151]

Transnational P-P partnership is of considerable importance in terms of improving the availability of the powerful WTO court to a broad scope of potential litigants. The legalized WTO court stimulates private actors to creatively associate their problems with trade issues, particularly trade barriers. These invisible private plaintiffs instill diversity and unpredictability in the interaction between international and national law. For example, the second case study shows how Cohen cast his criminal conviction of internet gambling as unjustified discrimination by the U.S. government against foreign service providers.[152] One journalist reported, "[m]ore than a few people in Washington initially dismissed as absurd the idea that the trade organization could claim jurisdiction over something as basic as a country's own policies toward gambling."[153] Private actors often attempt international venues when they encounter obstacles in domestic legislative or juridical process. As various private actors may be frustrated by various national laws and try to combat various national laws with WTO law, their approaches of linking national law and the WTO law can be hard to predict, and be best captured by the "discursive" model.[154]

The Antigua–U.S. case suggests one relatively convenient way for private actors to invoke the WTO court to disrupt unfavorable domestic political outcomes—

147. Christine Chinkin, *Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 8, *supra* note 127, 341—60.

148. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 626 (1998) (*italics original*).

149. Nijman & Nolkaemper, *supra* note 127 at 352.

150. *Id.* at 341.

151. *See, e.g.*, Gregory Shaffer et al., *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS. 237, 237 (2016).

152. *See* Mike Brunker, *supra* note 84.

153. Rivlin, *supra* note 91.

154. *See, e.g.*, *supra* Part I.B. *See also* Schäferhoff, *supra* note 9 at 4.

use of the Non-Discrimination principle. This principle is commonly acknowledged in international treaties. More importantly, it significantly reduces burdens on international judges who worry about the complicated, sometimes profound implications of their decisions, since if the national policy under review empowers certain entities while refusing others the same opportunity, international judges can avoid the struggle of weighing conflicting values or commitments, and just demand an equal treatment. The fundamental principle "all are equals in the eyes of the law" undermines the legitimacy of arbitrarily discriminatory policies. Such complaints for equal treatment may lose in national courts due to the greater deference national judiciary accords to its legislative branch.[155] International courts, however, can invoke international commitments to exercise stricter scrutiny. In the Antigua–U.S. internet gambling case, U.S. statutes recognized as valid the differential treatments between online horseracing gambling and sports gambling. However, such differential treatments were not seen as legal by the WTO court.[156] While stories involving domestic P-P partnerships in WTO disputes demonstrate that seemingly-neutral national measures may be effectively disguised trade barriers to protect domestic producers, transnational P-P partnerships reveal how unexpected issues can be packaged as trade barriers discriminating against foreign exporters.

This private actor-driven linkage is a further step toward the amorphous development of international law. In terms of degree of discursiveness in the growing body of international law, the internalization model noted by scholars represents an advance from the conventional model of treaty-making by state consent.[157] The unorthodox leverage of international law by private actors surpasses the internalization model in pushing international law into unpredictable direction. Despite its infrequency, this connection between national and international law, through private actors and international judiciary, further impinges on state autonomy by implicating an expansive scope of national law as well as on state supremacy in international law-making.

C. Corporate Power in Check

Since the 1990s, the movement of goods, services, information, capital, and people across boundaries has grown dramatically—an embodiment of the globalization trend. Critique of globalization often overlaps with criticisms of multinational corporations. As one commentator contends:

> [M]arket forces are increasingly mobile and powerful, often pitting governments as well as workers against each other. . . . The purpose of the actors who push for and benefit from economic globalization is to maximize profit and secure continual economic growth. They thus seek to reproduce and maintain the prevailing patterns of governance, which refer to the liberalization of trade and finance, the pri-

155. *See, e.g.*, Anja Seibert-Fohr, *The Rise of Equality in International Law and Its Pitfalls: Learning from Comparative Constitutional Law*, 35 BROOK. J. INT'L L. 1, 33 (2010).

156. *See* Tom Newnham *supra* note 72 at 84-5.

157. Schäferhoff, *supra* note 9 at 4.

> vatization of production (often including health and other public services), competitiveness, and consumerism.[158]

The WTO, as a core institution in the globalization process, has been blamed for acting as a vehicle for enriching corporate interests, and painted as the common enemy of workers, environment, democracy, and human rights by some radical views.[159] Transnational P-P partnership in WTO litigation seems to reinforce such skeptical views of globalization and corporate interests in that it indicates corporate power extends beyond the domains of international trade negotiations and national trade policy-making,[160] and gains additional ground to pursue their interests. In other words, it appears that traditional controls on corporate power are further compromised due to corporate interests ability to abet foreign states and invoke international courts.

Multinational corporation use of international adjudication has received strong criticisms, particularly in the area of investor-state investment arbitration.[161] Multinationals are blasted for abusing the availability of suing states to intimidate poor countries, encroach on state regulatory autonomy, and obstruct policies important for environment protection and public health.[162] Transnational P-P partnership enhances the chance for a multinational to access international courts where they have no standing, and thus, raises concern of whether it will enable multinationals to manipulate such venues as they have done to investor-state arbitrations.

Yet it is evident that multinationals did not recover financial losses in the case studies here.[163] Complaining to the WTO did not get them to a better situation than if they had not done so. Admittedly, their inability to secure real financial gains from WTO litigation is the result of the inherent weaknesses of international courts which operate in the shadow of power politics and lack policing power to implement judgments.[164] But there is more to that.

The WTO dispute settlement mechanism is a state-centered system with embedded constraints on corporate interests in each step of the proceeding. First, whether requests from multinationals would reach the WTO court depends on state

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158. Marie-Josee Massicotte, *Global Governance and the Global Political Economy: Three Texts in Search of a Synthesis, review Essay,* 5 GLOBAL GOVERNANCE 127, 142.

159. *See, e.g.*, LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION: CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY: AN ASSESSMENT OF THE WORLD TRADE ORGANIZATION (1999).

160. Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 459 (2001).

161. *See, e.g.*, Lise Johnson et al., *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get US There?*, COLUM. CTR. ON SUSTAINABLE INV. (Dec. 11, 2017), http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/#_edn1.

162. Michael Robinson, *Is Democracy Threatened If Companies Can Sue Countries?*, BBC NEWS (Mar. 31, 2015), http://www.bbc.com/news/business-32116587.

163. *GPX Int'l Tire Corp. v. U.S.*, 666 F.3d 732, 732–45 (Fed. Cir. 2011). The Federal Circuit held that the countervailing law could not be applied to NME countries because that was the intent of the U.S. Congress, as evidenced by the Congress acquiescing on U.S. Commerce's and the Federal Circuit's earlier consistent interpretation that subsidies did not exist in the NME context, *id.* at 745.

164. *See supra* Part I.

approval and sponsorship. Only WTO members are allowed to participate in WTO proceedings as a party or third participant to the dispute.[165] Not only do private actors not have legal standing before the Court, but also private participation of any sort in the WTO dispute procedures is tightly controlled. For example, the WTO provisions do not expressly address the issue of *amicus curiae* submissions.[166] Though the WTO Appellate Body maintains that both WTO panels and the Appellate Body have authority to accept and consider amicus briefs, this issue remains highly controversial.[167] In practice, the Appellate Body never considers unsolicited amicus submissions.[168] Another example is the appearance of private counsel on behalf of WTO members in hearings before the panels and Appellate Body.[169] Private counsel was not allowed in the proceedings of GATT, the predecessor of WTO.[170] It was in *EC—Bananas III* that the Appellate Body ruled WTO members have the right to determine the composition of its delegation in the WTO dispute procedures, including to have private counsel as their representatives.[171]

Second, the legality and reasonableness of multinational corporation petitions are examined by judges who are state delegates, and certainly would take into account state regulatory concerns. WTO members monopolize the selection process of the Appellate Body jurists, and in fact, the selection process has become increasingly politicized.[172] Candidates are nominated by WTO members, and it has become practice for WTO members to carefully investigate the "exact preferences and dispositions" of candidates in the screening process.[173] Besides, WTO members emphatically pronounce their "commitment to the objective of sustainable development,"[174] and the WTO Appellate Body materialized such commitment prioritizing non-trade values over free trade in a number of cases.[175]

Third, the implementation of the WTO court's decisions relies on state apparatus. The WTO Dispute Settlement Body is responsible for monitoring the im-

165. WTO, *Understanding the WTO: Settling Disputes*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 3, 2018).

166. WTO, *Participation in Dispute Settlement Proceedings 9.3*, DISPUTE SETTLEMENT SYSTEM TRAINING MODULE, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm (last visited Feb. 3, 2018).

167. *Id*.

168. *Id*.

169. WTO, *Participation in Dispute Settlement Proceedings 9.2*, DISPUTE SETTLEMENT SYSTEM TRAINING MODULE, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s2p1_e.htm (last visited Feb. 3, 2018).

170. *Id*.

171. *Id*; *see also* Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, 4–7, WTO Doc. WT/DS27/AB/R (adopted Sept. 9, 1997).

172. Shaffer, *supra* note 151, at 271.

173. *Id.*

174. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) [hereinafter Doha Declaration].

175. Henrik Andersen, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18 J. INT'L ECON. L. 383 (2015).

plementation of WTO panel and Appellate Body reports.[176] Yet the only sanction the Dispute Settlement Body can authorize is retaliation from the complainant state against the respondent state by suspending concessions or other obligations under WTO agreements.[177] The threat of countermeasures is hardly effective by a small economy against a major power. Further, it is difficult to tell if the respondent has complied with Dispute Settlement Body reports because the Body recognizes there are different understandings of what constitutes full compliance.[178] It is not surprising this gives powerful countries ample room to discount, delay or evade compliance. Thus, even if transnational P-P partnerships can help corporations win complaints, they are not able to guarantee implementation of the decisions.

In sum, the fear about corporate power in maneuvering the WTO court is excessively exaggerated. Transnational P-P partnerships are subject to the WTO court's own institutional limitations. In working with other states, transnational P-P partnerships circumvent, to some degree, restraints from national political and legal systems. Yet they are far from being unchecked as globalization literature suggests.

IV. CONCLUDING REMARKS

Exploring transnational P-P partnerships in the WTO court supplements our understanding of the role of multinational corporations in international law. The behaviors and power of multinational corporations are a significant, if not the most important, aspect of globalization. Multinationals are not only key economic players, but also influential political actors, shaping national and international legal orders.

Yet their attempts to internationalize domestic disputes are not as fruitful as would be assumed based on the impressions that international judges tend to share cosmopolitan values with multinationals, and stay relatively remote from national politics. Rather, an inter-governmental court, like the WTO Dispute Settlement Body, has layers of institutional controls on private interests. Besides, bringing actions in a larger context may complicate the matter due to the expansive scope of interests implicated.

There is more to learn about transnational alliances forged for international litigation—this phenomenon raises intriguing questions such as how this phenomenon affects the development path of international law, whether corporate nationality matters, and how such transnational collaborations distribute over issue areas and countries. What's more, studying transnational alliances offers important insight concerning the underlying conflicts, competitions, and dominance that actual-

176. DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes art. 21.6, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (1994) [hereinafter DSU].

177. DSU, *supra* note 176, art. 22.

178. *See, e.g.*, H.E. Mr Shahid Bashir, *WTO Dispute Settlement Body Developments in 2012*, WTO, https://www.wto.org/english/tratop_e/dispu_e/bashir_13_e.htm.

ly fueled the studied legal actions. By transcending doctrinal debates and the characterization of problems in case reports, transnational P-P partnership drives new avenues to help resolve international economic disputes.

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