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Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish

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Toward an International Law of Piracy *Sui Generis*: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish

By
Lucas Bento*

I.
INTRODUCTION

"The sea with its winds, storms, dangers, doesn't change; it calls for a necessary uniformity of juridical regimes."[1]
"Who are you, strangers? From where have you set sail / Along liquid paths? Do you roam for trade / Or for adventure, crossing the seas, like pirates, / Risking their lives and bringing harm to others?"[2]

This article explores the divergence between international and national legal responses to maritime piracy, and it addresses the benefits of a unified international legal framework. Current domestic, regional, and international legal frameworks fail to adequately combat the nature and scale of maritime

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1. PASQUALE STANISLAO MANCINI, *Prelezione al corso di diritto pubblico marittimo insegnato nella R. Università di Torino nell'anno 1852-1853* (Nov. 29, 1852), *in* DIRITTO INTERNAZIONALE – PRELEZIONI CON UN SAGGIO SU MACHIAVELLI, Naples, 1873, 93, at 105-106, English translation by VAN DEN BOSCH, L., LE COMITÉ INTERNATIONAL 1897-1972 (Antwerpen, 1972), at 6.

2. HOMER, ODYSSEY, 15.427; 3.71-74; 9.252-55 *in* DANIEL HELLER-ROAZEN, THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS 31 (2009).

piracy,[3] which increasingly impacts the shipping, global manufacturing[4] and tourism industries,[5] and which governments now consider to be a serious problem.[6] As of yet, no unified legal approach exists to address the problem of modern piracy. The crux of the argument advanced in this article is that an inadvertent–yet dangerous–bifurcation of legal developments has unfolded within the field of maritime piracy, consequently creating a body of law that lacks harmony.

Effective anti-piracy efforts require uniformity of law, such that legal solutions suppress piracy internationally rather than treat its symptoms in an ad hoc local or regional fashion. Although piracy off the coast of Somalia has recently attracted significant media attention, maritime piracy is a *global* crime impacting a number of areas around the world, such as South East Asia, the Far East, and the Americas.[7] Until now, states and international legal institutions have addressed the piracy problem through a series of conventions, treaties, resolutions, codes, and regional and bilateral agreements. Without a uniform, comprehensive legal framework to rely on, state, commercial and private actors have attempted to tackle piracy as best they can. These limited approaches highlight the deficiencies of international anti-piracy instruments. Now that piracy is growing at an alarming rate,[8] there is a great need for a definitive, international,[9] body of law to systematically govern this field.[10]

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3. *See* S.C. Res. 1918, ¶ 17(1), UN Doc S/RES/1918 (Apr. 27, 2010) (affirming that "*the failure to prosecute* persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community" (emphasis added)) [hereafter "S.C. RES. 1918"].

4. *See* Alexa K. Sullivan, *Piracy in the Horn of Africa and Its Effects on the Global Supply Chain*, 3 J. Transp. Sec. 231, 231 (2010) ("Piracy is not only a major issue to the shipping industry, but also to any companies that manufacture goods and transport them internationally.")

5. *See* Cosco Bulk Carrier Co. Ltd. v. Team-Up Owning Co. Ltd. [2010] EWHC (Comm) 1340 [11] (Gross, J., stating: "The issue of piracy is topical and, I suspect, of interest to the industry."). *See also* HOUSE OF COMMONS TRANSPORT COMMITTEE, PIRACY: GOVERNMENT RESPONSE TO THE COMMITTEE'S EIGHTH REPORT OF SESSION, 2005–06, ¶ 5 (U.K.) [hereafter "Trans. Comm. Report"].

6. *See* Trans. Comm. Report, *supra* note 5, ¶ 100 ("The popular image of piracy as a joke is redundant and has failed to keep pace with reality. The Government must now consider what imaginative and practical measures might be taken to broaden the public understanding of piracy as a brutal and cowardly crime."). *See also Sixth Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia*, U.S. DEPARTMENT OF STATE (Jun. 11, 2010), http://www.state.gov/r/pa/prs/ps/2010/06/143010.htm.

7. *See generally Piracy and Armed Robbery Against Ships Annual Report*, ICC INTERNATIONAL MARITIME BUREAU (Jan. 2011), http://www.simsl.com/Downloads/Piracy/IMBPiracyReport2010.pdf [hereinafter "IMB Annual Report"].

8. Heller-Roazen, *supra* note 2, at 27: "In the ten years between 1995 and 2005, the number of attacks at sea rose by more than 47 percent."

9. *See* Martin Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?, in* VIOLENCE AT SEA: PIRACY IN THE AGE OF TERRORISM 163 (Peter Lehr, ed., 2007) ("If piracy is a universal crime, then it should merit a universal response.").

10. *See* Michael J. Struett et al., *Maritime Piracy and Regime Complexes: Explaining Low Levels of Coordination* (International Studies Association Annual Meeting, Working Paper Abstract,

This article is divided into six parts. Part I is the introduction. Part II briefly reviews the history of piracy law in England as a backdrop to, and point of comparison with, modern piracy. Part III provides an overview of modern piracy, especially its criminal dimensions and impact on international commercial and individual actors. Part IV explores the international, regional and national responses to piracy law. It also identifies a number of deficiencies in the international response, which arise from today's dual legal frameworks. Part V considers a number of legal and practical proposals to suppress piracy off the coast of Somalia and across the world. Finally, Part VI concludes by highlighting how greater uniformity in maritime piracy law and legal institutions might also contribute to the continuing theoretical and institutional development of international law.

On a final note, international piracy law appears in literature as "piracy jure gentium," "general piracy," "piracy as defined by the law of nations," and the "international crime of piracy."[11] Here it will be referred to as international piracy law or piracy jure gentium. By comparison, the literature on piracy also often refers to national or domestic piracy law as "municipal" piracy law.[12] For the sake of clarity among a wider readership, this article refers to piracy laws within individual nation-states as national or domestic piracy law.

II.
HISTORICAL PERSPECTIVES DEFINING PIRACY

An historical divergence in the definition of and approach to piracy creates our present difficulties in devising adequate responses to piracy. Although Roman authorities considered pirates to be common enemies of mankind,[13] and while "[s]tates going back to the days of the Roman Empire reserved the right to capture and summarily execute pirates,"[14] there has never been a single, comprehensive body of international law or legal system for addressing piracy. As a result, international and domestic piracy laws have always been inconsistent.[15] The rich history of English piracy law serves as a model for a

2011) ("There is a 'regime complex,' or web of regimes, that addresses maritime piracy, and while some states have taken modest steps to deter and punish pirates, in general states are not taking aggressive action against piracy, and policy coordination between states has been limited . . . . We hypothesize that the overlapping regime covering piracy is itself a major barrier to effective cooperation because it does not comprise a coherent, comprehensive, and focused anti-piracy regime.")

11. United States v. Hasan, No. 2:10cr56, 2010 U.S. Dist. LEXIS 115746, at *70 (E.D. Va. Oct. 29, 2010).

12. *Id.* at *18-19.

13. *See* Heller-Roazen, *supra* note 2, at 16. *See also* Marcus Tullius Cicero, *De officiis* 3.107, *translated in* ON DUTIES (E. Margaret Atkins, ed., 1991).

14. Max Boot, *Pirates, Then and Now: How Piracy was Defeated in the Past and Can be Again*, 88 FOREIGN AFF. 94, 99 (2009).

15. Murphy, *supra* note 9, at 156.

modern legal solution to the piracy problem because it exemplifies how successful a singular, coextensive geographic and jurisdictional approach to piracy can be.

States have not always recognized piracy as an objectionable crime. Indeed, there is a long tradition of romanticizing pirates in popular culture that goes back at least as early as the mid-nineteenth century.[16] This treatment of the *pirate* in popular culture may have under-stigmatized the crime of piracy. This in turn may have handicapped the gravitas of anti-piracy provisions in the law.

In England, the fine and cyclical distinctions between independent pirates and state-sponsored privateers, which shifted in time of war and peace, may have lessened the seriousness attributed to acts of piracy.[17] Piracy often masqueraded as privateering,[18] with the sole distinction that privateering was conducted under a state-authorized license granted by a prize court, a special type of maritime court for ships in times of war.[19] Arguably, England and other states manipulated the legal status of piracy to fulfill their desired political or military interests.[20] It was not until 1856 that the Paris Declaration Respecting Maritime Law abolished privateering as a distinct category from piracy.[21] This may have set the foundations for international law's classification of piracy as a serious and definite crime.

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16. *See, e.g.*, Robert J. Antony, *Piracy on the South China Coast through Modern Times, in* PIRACY AND MARITIME CRIME: HISTORICAL AND MODERN CASE STUDIES 48 (Bruce A. Elleman et al., ed., 2010), http://www.usnwc.edu/Publications/Naval-War-College-Press/Newport-Papers/Documents/35.aspx (discussing the American comic strip about a female Chinese pirate, among other examples from the mid-nineteenth century). *See also* Trans. Comm. Report, *supra* note 5, at 12 (discussing the statement that the "popular image of piracy as a joke is redundant" and the "Hollywood myths" of piracy).

17. *See* Lauren Benton, *Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism*, 47 COMP. STUD. IN SOC'Y AND HIST., 700, 706-07 (2005). *See also* Máximo Q. Mejia Jr. et al., *Piracy In Shipping* 5 (Laboratoire d'Economie et de Management Nantes-Atlantique, Université de Nantes, Working Paper, 2010), *available at* http://hal.archives-ouvertes.fr/docs/00/47/06/16/PDF/LEMNA_WP_201014.pdf.

18. *See Hasan*, 2010 U.S. Dist. LEXIS 115746, *35 (noting that privateering and piracy largely consisted "of the same acts.").

19. JANICE E. THOMSON, MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE 107-08 (Princeton University Press, 1994).

20. For a treatment of this issue in the American context, *see* Jeffrey Gettleman's New York Times article on February 26, 2011, titled "Suddenly, a Rise in Piracy's Price." Gettleman writes:

> For years, the infant American government, along with many others, had accepted the humiliating practice of paying tribute—essentially mob-style protection fees—to a handful of rulers in the Barbary states so that American ships crossing the Mediterranean would not get hijacked. But in 1801, Tripoli's pasha, Yusuf Karamanli, tried to jack up his prices. Jefferson said no. And when the strongman turned his pirates loose on American ships, Jefferson sent in the Navy to bombard Tripoli, starting a war that eventually brought the Barbary States to their knees. Rampant piracy went to sleep for nearly 200 years.

Available at http://www.nytimes.com/2011/02/27/weekinreview/27pirates.html?_r=1.

21. Murphy, *supra* note 9, at 160.

Further, the elusive nature of pirates – that they "roam" along unpredictable "liquid paths"[22] – defied and continues to defy the application of laws intended to prosecute them. The history of the British Empire's struggle to develop practical solutions for piracy, which historians widely recognize as successful, exemplifies how difficult it is to translate legal regimes into practice. England first tried pirates under a civil law process that required a confession from the alleged pirate or two testimonial eyewitnesses before the court could declare that an act of piracy had occurred.[23] The civil law procedure was deficient, however, because neither of the eyewitnesses could be accomplices. This ruled out the possibility that the authorities strike a deal with the pirates in exchange for providing evidence incriminating the accused.

In 1536, England enacted the Offenses at Sea Act and began to try pirates under the common law.[24] This was an improvement over the civil law because it allowed accomplice testimony. The authorities could therefore extract evidence from a wider pool of witnesses, facilitating the prosecution of pirates. However, it soon became apparent that the common law procedure under the Offenses at Sea Act was also flawed, as it did not provide practical ways to prosecute pirates in a continuously expanding British Empire. This delayed criminal prosecutions because colonies extradited pirates to England. Given the delays and costs of extradition, some colonies assumed power by improvising their own legal procedures to handle piracy cases.[25]

In 1684, however, the British government terminated most colonial trials of pirates when it decided that its colonies lacked jurisdiction to try piracy cases.[26] The English Parliament passed An Act for the More Effectual Suppression of Piracy,[27] which established vice-admiralty courts in the colonies and authorizing these to try pirates.[28] The jurisdictional reach of the vice-admiralty courts, coupled with the geographic expansion of the Royal Navy,[29] greatly enhanced the British Empire's ability to capture and prosecute pirates.

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22. HOMER, *supra* note 2.

23. Peter T. Leeson, *Rationality, Pirates, And The Law: A Retrospective*, 59 AM. U. L. REV. 1219, 1220 (2010).

24. *Id.* at 1221.

25. *Id.*

26. *Id.*

27. An Act for the More Effectual Suppression of Piracy, 1700, 11 Will. 3, c. 7 *in* BRITISH PIRACY IN THE GOLDEN AGE: HISTORY AND INTERPRETATION, 1660– 1730, 59 (Joel H. Baer ed., 2007).

28. Boot, *supra* note 14, at 99.

29. *Id.* at 100. *See also* PIRACY AND MARITIME CRIME, *supra* note 16, at 2 ("Many navies were created in the fourteenth and fifteenth centuries to protect their shipping and trade from piracy, which was then widespread. However, absent a navy, a state had only limited means of redress or protection [from piracy].")

III.
MODERN PIRACY: NATURE, SCOPE, IMPACT AND RESPONSE

A. The Nature and Scope of Modern Piracy

Eugene Kontorovich of the Northwestern University Law School has characterized modern piracy as an "epidemic."[30] Indeed, maritime piracy is a growing global issue in today's world. Pirates interfere with shipping and maritime transport in diverse locations such as the coast of Somalia, the Straits of Malacca, the South China Sea, the Gulf of Nigeria and the Americas. The number of piracy incidents has consistently increased over the last two decades, with a significant percentage of this increase occurring in Somalia since 2007.[31] According to the International Maritime Organization (IMO), there were 5,667 acts of piracy and armed robbery against vessels reported worldwide between July 2002 and December 2010.[32] Correspondingly, in January 2009 the International Maritime Bureau (IMB) noted an "unprecedented rise" in maritime hijackings, which it attributed to pirates operating in the Gulf of Aden and off the coast of Somalia.[33] In 2010, the Contact Group on Piracy off the Coast Somalia noted "with concern" that Somali piracy "continues to pose a serious threat to international navigation," expanding from the Gulf of Aden to the Indian Ocean.[34] Hijackings off the coast of Somalia accounted for 92 percent of all ship seizures in 2009, with 49 vessels hijacked and 1,016 crewmembers taken hostage.[35] The "red zone" of piracy now covers one million square miles of water and is becoming increasingly difficult for naval forces to patrol.[36]

Professor Daniel Heller-Roazen noted that at the outset of the 20th Century

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30. Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 243 (2010) [hereafter "Kontorovich (Guantanamo)"].

31. Máximo Q. Mejia Jr. and Proshanto K. Mukherjee, *Selected Issues of Law and Ergonomics in Maritime Security*, 10 J. INT'L MAR. L. 316, 318 (2004) [hereafter "Mejia and Mukherjee"].

32. *Reports On Acts of Piracy and Armed Robbery Against Ships*, INTERNATIONAL MARITIME ORGANIZATION (2010). Note that by the time of publication the figure cited will undoubtedly be higher. The collected reports are available at http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/PirateReports.aspx.

33. *IMB Reports Unprecedented Rise in Maritime Hijackings*, ICC INTERNATIONAL MARITIME BUREAU (2009), http://www.icc-ccs.org/news/332-imb-reports-unprecedented-rise-in-maritime-hijackings.

34. Sixth Plenary of the CGPCS, *supra* note 6.

35. IMB Annual Report, *supra* note 7.

36. *See Responding to the Scourge of Piracy - Circular Letter No. 3164*, INTERNATIONAL MARITIME ORGANIZATION 2 (2011) http://www.imo.org/About/Events/WorldMaritimeDay/Documents/3164.pdf. The letter states: "Notwithstanding the unprecedented effort, the vast sea area in which the pirates now operate makes it difficult to patrol and monitor effectively, particularly with the limited resources available. Member Governments are aware of the limitations of the resources presently available and of the need for more such resources."

the issue of piracy appeared "academic."[37] In 1932, the British historian Philip Gosse remarked that the age of piracy had "permanently" ended.[38] But piracy has firmly and obviously re-emerged.[39] This is due in part to the unfolding of globalization, which has provided greater economic opportunities for pirates as world trade intensifies.[40] It is also a byproduct of the political and economic insecurity in some regions that enables piracy to flourish. This is especially true of Somalia, where the absence of a coherent and authoritative political body results in lack of economic security for Somali citizens as well as an ineffective police and naval force to patrol its borders.[41] As Mr. Justice David Steel explains: "Somalia is a failed state with no effective government or law enforcement. It is also one of the poorest countries in the world. This provides a fertile breeding ground for piracy conducted by fishermen living along the lengthy seaboard of Somalia."[42] The lack of an effective national administration in Somalia also complicates attempts to combat piracy by diplomatic means.[43]

The modern pirate also differs from his historical counterpart in that piracy has adapted to modern technical, political, economic, and social developments. Indeed, "today's pirates are considerably more sophisticated than their counterparts of yesteryear."[44] It is arguable that many of today's pirates are technologically savvy[45] individuals who strategically plan each attack with the

37. Heller-Roazen, *supra* note 2, at 24. Heller-Roazen advances three reasons to explain the *assumption* that piracy disappeared during this period. First, the later stages of the nineteenth century experienced a relative period of peace between maritime nations, which consequently undermined the importance of privateers at sea. Second, technological advances during this period reduced security risks associated with ocean travel. Third, maritime nations believed that the outlawing of the slave trade would also "cleanse[]" the oceans of piracy.

38. Philip Gosse, THE HISTORY OF PIRACY 297-98 (Longmans, Green & Co. eds., 1932). Not all contemporary writers, however, agreed with Gosse. *See* Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 334 (1925): "There have been recent events, however, which challenge the assumption that the law of piracy is chiefly of historical significance."

39. Heller-Roazen, *supra* note 2, at 26.

40. *See* PIRACY AND MARITIME CRIME, *supra* note 16, at 2 (noting the positive correlation between increases in maritime trade and piracy events).

41. *See* UN SCOR, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results*, 8 UN Doc. S/2010/394 (July 26, 2010) [hereinafter UN SCOR Report of the Secretary General] ("Acts of piracy and armed robbery at sea off the coast of Somalia are a symptom of the instability and lack of rule of law in Somalia.").

42. Masefield AG v. Amlin Corporate Member Ltd. [2010] EWHC (Comm) 280 [12] [Eng.].

43. *Masefield*, EWHC 280, ¶ 13: "The absence of any national administration [in Somalia] means that any attempt to intervene by diplomatic means is fraught with difficulty."

44. Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L. J. 1, 6 (2008).

45. *See* Sullivan, *supra* note 4, at 231 (discussing pirates use of "the latest technology" to

help of publicly available information about their target.[46] They "often carry satellite phones, global positioning systems, automatic weapons, [and] antitank missiles."[47] Some pirates now hijack "mother ships,"[48] which they use as bases from which to launch attacks against other vessels up to more than 1,000 miles from shore using "rocket-propelled grenade[s], ladders and extra barrels of fuel."[49] This author hypothesizes that there may be unreported and illicit market activity by unknown actors providing pirates with vital insider information about cargo value, vessel layout and specific shipping routes. Further, *some* pirate networks may have access to legal expertise in order to better plan their operations. As Professor Peter Leeson observed, "pirates will manipulate the law," just as the law acts on them.[50] The use of modern technical expertise and weaponry appears to have shifted piracy from a 'hit and miss' approach to more precise, effective operations. Therefore, the new shape of piracy requires new means for its suppression.[51]

B. Quantifying the Impact of Modern Piracy

Evidence demonstrates that piracy impacts global shipping, world trade, and the tourist industry.[52] It is difficult, however, to precisely quantify the costs of international piracy. Studies calculating the global cost of piracy place the figure at one billion[53] to fifteen billion dollars,[54] with some estimates even up to

target high-value ships).

46. *Id.* at 241 ("Pirates thrive on the unsecure nature of the information posted on the Internet, using it in conjunction with satellite phones to select lucrative targets for attack. . . . Martintraffic.com and sailwx.info provide real time ship location information, vessel details and historical information and vesseltracker.com provides more detailed information like whether or not a ship is moored in a certain port.").

47. Passman, *supra* note 44, at 6; Jack A. Gottschalk et al., JOLLY ROGER WITH AN UZI: THE RISE AND THREAT OF MODERN PIRACY 22 (U.S. Naval Institute Press, 2000).

48. *See* the International Chamber of Commerce's Commercial Crime Service website, which maintains a section on Piracy Prone Areas and Warnings, and which is available at http://www.icc-ccs.org/home/piracy-reporting-centre/prone-areas-and-warnings. As of April 2010, the website warned that Somalis hijack ocean going fishing vessels for piracy operations, using these as mother ships from which to launch smaller boats to attack other vessels.

49. Gettleman, *supra* note 20.

50. Leeson, *supra* note 23; *see also* Jeffrey Gettleman, *Pirates Outmaneuver Warships off Somalia*, N.Y. TIMES, Dec. 15, 2008, http://www.nytimes.com/2008/12/16/world/africa/16pirate.html (recounting a pirate's statement that they "know international law" and were not worried about being captured as they would be released shortly).

51. Patricia W. Birnie, *Piracy Past, Present and Future in* PIRACY AT SEA 131, 131-32 (Eric Ellen ed., 1989).

52. *See also ICC Condemns Piracy in the Gulf of Aden,* INTERNATIONAL CRIMINAL COURT (Sept. 22, 2008), http://www.iccwbo.org/policy/transport/index.html?id=24056 [hereafter "ICC Condemns Piracy"] (noting "a tenfold increase in insurance premiums" for cargo shipments in the Gulf of Aden).

53. Peter Chalk, *Maritime Piracy: A Global Overview*, 12 JANE'S INTELLIGENCE REV. 47, 47, 50 (2000).

twenty-five billion dollars.[55] A recent study by the One Earth Future Foundation reports that maritime piracy drains between seven and twelve billion dollars per year from the international economy.[56] This overlaps with an early 2011 estimate by former French minister Jack Lang, an advisor to the United Nations on piracy issues. Lang estimates that the economic cost of piracy ranges from five to seven billion dollars annually.[57] The variations among these figures can be attributed to analysts' disagreements over what inputs to include under the rubric of "piracy costs." Factors considered include insurance premiums,[58] ransom payments, and rerouting expenses, among others.

In particular, the magnitude of piracy off the coast of Somalia presents a significant ongoing commercial risk. In the twelve months leading up to November 2008, Somali pirates seized approximately thirty vessels, which were released on payment of ransoms in excess of $60 million.[59] Worryingly, ransom payments are increasing as pirates successfully manage to prey on larger carriers.[60]

Piracy also has potential macroeconomic costs, such as the risk of reduced foreign investment revenue for countries located in affected regions.[61] For example, one source estimated that Kenya loses approximately $139 million in revenue per year because of piracy.[62] From a commercial perspective, pirate attacks in the aggregate could cause the prices of commodities to rise, thus affecting countries that are not directly involved in shipping.[63]

Oil is of central importance to the world economy, yet pirates threaten its

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54. *The Maritime Security Market 2010-2020: Piracy, Shipping & Seaports,* VISIONGAIN, April 12, 2010, http://www.visiongain.com/Report/467/The-Maritime-Security-Market-2010-2020-Piracy-Shipping-Seaports.

55. Vijay Sakhuja, *Sea Piracy: India Boosts Countermeasures*, INST. PEACE & CONFLICT STUD., Mar. 15, 2003, http://www.ipcs.org/article/military/sea-piracy-india-boosts-countermeasures-987.html.

56. Anna Bowden, *The Economic Costs of Maritime Piracy* (One Earth Future, Working Paper, December 2010), *available at* http://www.oneearthfuture.org/index.php?id=120&pid=37&page=Cost_of_Piracy.

57. *See at Sea: Piracy off the Coast of Somalia is Getting Worse*, ECONOMIST, Feb. 3, 2011, http://www.economist.com/node/18070160 [hereafter "Somali Piracy"].

58. *ICC Condemns Piracy*, *supra* note 52 (noting a "tenfold increase in insurance premiums" in the Gulf of Aden).

59. *Masefield,* EWHC 280, ¶ 13.

60. Peter Chalk, *Piracy Off the Horn of Somalia: Scope, Dimensions, Causes and Responses*, 16 BROWN J. WORLD AFF. 89, 93 (2010) (noting a positive increasing correlation between the size of the vessel seized and the size of hostage ransom payments).

61. Bowden, *supra* note 56, at 23 (hypothesizing that "instability and volatility" in piracy-prone regions will cause investors to look elsewhere).

62. *Multi-National Force Deployed To Combat Piracy Off East African Coast*, THE SOMALILAND TIMES, Jan. 29, 2006, http://www.somalilandtimes.net/sl/2005/211/24.shtml.

63. *See* Kontorovich (Guantanamo), *supra* note 30, at 252 n.64 (noting a global increase from fifty-seven to fifty-eight dollars a barrel following the November 200 hijacking of a Saudi Arabian oil tanker).

security. Ten percent of the world's daily oil supply passes through the pirate-prone region of the Gulf of Aden, which has the potential to affect oil prices in both direct and indirect ways.[64] On at least one occasion, a pirate hijacking of the oil supertanker the Sirius Star caused global oil prices to temporarily increase by over a dollar and then drop by a few dollars over the course of a day.[65] More generally, shipping and insurance companies shift the costs of piracy to consumers through protection and indemnity clauses and higher insurance premiums.[66] Further, piracy affects the interests of a number of countries simultaneously, since cargo ships are often owned by one nation; fly the flag of a second, often a "flag of convenience"; carry cargo destined for multiple countries; and operate with multinational crews.[67] Shipping activities also often involve transnational financing from multiple banking and financial institutions that have a vested interest in vessels and cargos.

Piracy also has a human dimension. *The Economist* reported that Somali pirates took 1,181 people hostage in 2010, of which 760 remained in captivity as of early 2011.[68] The average time in captivity to date for a hostage is six months.[69] In February 2011, in a shocking and unusual turn of events, pirates killed four American sailors that they had taken hostage days earlier, while the United States Navy was shadowing them.[70] Less than a week later, referencing the death of the American sailors, Somali pirates threatened to kill a Danish family of five if any rescue attempt were made.[71] Whether the deaths of the Americans marks a game-changing event or a distressing anomaly, it is safe to say that piracy has an incalculable human cost for those unfortunate enough to be caught. Further, as news coverage of tourists taken captive by pirates becomes more ubiquitous, countries in areas affected by piracy may well see their attractiveness as tourist destinations decline.[72] Finally, piracy also

64. *See* U.S. NAT'L SEC. COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN, 4 (2008), http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_Partnership__Action_Plan.pdf.

65. Kontorovich (Guantanamo), *supra* note 30.

66. Michael L. Baker, *Building African Partnerships to Defeat Piracy*, COUNCIL ON FOREIGN RELATIONS, Jun. 23, 2010, *available at:* http://www.cfr.org/publication/22465/building_african_partnerships_to_defeat_piracy.html.

67. Nat'l Sec. Council, *supra* note 64.

68. *Somali Piracy*, *supra* note 57.

69. Gettleman, *supra* note 20.

70. Adam Nagourney and Jeffrey Gettleman, *Pirates Brutally End Yachting Dream*, N.Y. TIMES, Feb. 22, 2011, http://www.nytimes.com/2011/02/23/world/africa/23pirates.html?_r=1&ref=weekinreview.

71. *Pirates Threaten to Kill Captive Danish family*, CBS NEWS, Mar. 1, 2011, http://www.cbsnews.com/stories/2011/03/01/501364/main20037696.shtml.

72. *See* John Bingham, *Paul and Rachel Chandler to be Taken Away for Foreign Office "Debriefing,"* TELEGRAPH, Nov. 15, 2010, http://www.telegraph.co.uk/news/worldnews/piracy/8135239/Paul-and-Rachel-Chandler-to-be-taken-away-for-Foreign-Office-debriefing.html (independent British travelers were captured by Somali pirates and released in return of an $800,000 ransom payment).

threatens food aid to the Somali people,[73] which countries deliver under the protection of foreign naval forces.[74]

Not all piracy scholars would agree that these facts reveal a need to rethink our global approach to piracy, as the author contends. Defense expert Bjørn Møller, for example, asserts that the risk of attack is "minuscule," that most attacks are "minor," and modern piracy's impact on global shipping or world trade is not yet "significant."[75] Additionally, some of the most effective IMB/IMO recommended antipiracy policies continue to be low-cost mechanisms. These include using barbed wire and high-pressure hoses, having the crew retreat to an inaccessible locked safe room, operating ships within patrolled corridors, and registering transit with multinational authorities.[76] Pirates, however, have already shown adaptability in response to stopgap measures like greater naval patrols and the use of designated shipping lanes by moving farther offshore and using larger ships as bases to launch attacks.[77] While there is no clear evidence that pirates have become sophisticated actors in the manner of Colombian or Mexican drug cartels, their technologies are improving. As a result, the cost of piracy is rising, and it should be cause for concern.

C. *The Response to Modern Piracy*

To a certain extent, modern nations experience geographic difficulties similar to those experienced by Britain and her colonies; however, the political and logistical barriers for addressing modern piracy are greater. No single country exercises geopolitical power equivalent to the British colonial system. Nor is there a global enforcement agency to police the high seas. The following paragraphs discuss various difficulties in policing piracy, including: the political-military perspective; the legal doctrine, legal institution, and legal evidentiary perspectives; and the development perspective.

Some states have surpassed the nation-state collective action problem by participating in coordinated regional efforts to address piracy. Such efforts include the Contact Group on Piracy off the Coast of Somalia (CGPCS), created pursuant to UN Security Council Resolution 1851.[78] They also include the

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73. Passman, *supra* note 44 (citing a Washington Post article published May 22, 2007 on page A-10 titled *Piracy Threat Curbing Food Aid to Somalia*).

74. *ICC Condemns Piracy*, *supra* note 52 (noting a "tenfold increase in insurance premiums" in the Gulf of Aden).

75. Bjørn Møller, *Piracy, Maritime Terrorism and Naval Strategy*, Danish Institute for International Studies, DISS Report 2009:2, at 8.

76. E.U. NAVAL FORCE, MARITIME SECURITY CENTER HORN OF AFRICA (MSCHOA), *BMP3: Best Management Practices to Deter Piracy Off the Coast of Somalia and the Arabian Sea* 27 (June 2010) http://www.mschoa.org/bmp3/Documents/BMP3%20Final_low.pdf.

77. Gettleman, *supra* note 20.

78. For information on the CGPCS, *see Contact Group on Piracy Off the Coast of Somalia*, U.S. DEP'T OF STATE, http://www.state.gov/t/pm/ppa/piracy/contactgroup/index.htm (last visited

Shared Awareness and Deconfliction (SHADE) meetings, which integrate various task forces and national missions.[79] Also, the European Union's Naval Force initiative (EU NAVFOR)[80] patrols the Gulf of Aden, the Red Sea, and the western part of the Indian Ocean, including the Seychelles, to deter, prevent, and repress acts of piracy and armed robbery.[81]

Such regional military efforts have had an important but limited effect.[82] Naval patrols off the Horn of Africa and in the Gulf of Aden have reduced the success rate of piracy attacks, from 63 percent in 2007 to 34 percent in 2008 and 21 percent in 2009.[83] In the Gulf of Aden, adjacent to Somalia, around ten warships combat piracy in the region at any given time.[84] The region, however, extends over one million square miles of ocean through which 33,000 cargo vessels pass every year.[85] Pirates therefore may continue "[to] threaten to scare shipping away from a waterway that carries 7.5 percent of the world's seaborne trade and 30 percent of Europe's oil."[86] Military intervention alone is unlikely to be sustainable and effective in the long run.

Moreover, even if pirates are caught by military operations, they are afforded rights under international and human rights law. Despite occasional calls for patrolling warships to adopt more ruthless treatment of pirates, modern international human rights and humanitarian customary and conventional law prohibits extrajudicial killing of civilians except in self-defense.[87] International conventions exist to protect how any civilian, pirates included, is treated in times of war, capture, or arrest. Courts might, in rare circumstances, also apply certain provisions of the Geneva Conventions concerning the treatment of war prisoners to pirates.[88] The international legal framework limits the range of actions naval forces can take when confronting a pirate ship. Modern countries are legally restricted in their methods to combat piracy as compared to their predecessors.

From a legal-institutional perspective, modern countries also face difficulties because there is no centralized court to prosecute pirates. Instead, many states prosecute pirates within their own body of law when an act of

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Mar. 13, 2011).

79. For an example of SHADE's coordinated efforts *see Seventh Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia*, U.S. DEP'T OF STATE, Nov. 17, 2010, http://www.state.gov/t/pm/rls/othr/misc/151795.htm.

80. *See* the EU NAVFOR website for more information at http://www.eunavfor.eu/about-us/mission/ (last visited April 9, 2011).

81. *Id.*

82. UN SCOR Report of the Secretary General, *supra* note 41, at 10, Part II(B)(8).

83. *Id.*

84. *Id.* at 10, Part II(B)(9).

85. Boot, *supra* note 14, at 95.

86. Kontorovich (Guantanamo), *supra* note 30, at 250.

87. *Id.*

88. *See* Protection of War Victims: Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see also* Passman, *supra* note 44, at 20.

piracy occurs within their jurisdiction. This includes the United States, the United Kingdom, Italy, the Netherlands, Spain, South Korea, and India. But national and state laws, law enforcement agencies, and domestic court systems are often designed to operate only within their country's territorial limits.[89] In many instances, domestic prosecution is of limited effect given the states' lack of resources, experience, legal competency, and legal clarity regarding the issue of piracy.

An example of this arose in February 2011, when Madagascar captured a hijacked vessel flying under a Comoros flag. Twelve pirates had used the vessel as a mother ship from which to attack other vessels.[90] Madagascar and Comoros had trouble figuring out how to charge the pirates.[91] As reported at the time:

> While the prosecutor rifles through national and international maritime agreements to figure out whether the unknown foreigners can be charged with piracy laws last used in the 19th century, justice ministers from Comoros and Madagascar are also questioning who should try them, where they should be tried, and for what.[92]

The news report continued to discuss other charges that the pirates might face if the piracy charge were unavailable to prosecutors, such as charging the foreign pirates for illegal detention of the ship's crew or for their lack of identification papers.[93]

Kontorovich points out that one of the principal challenges to prosecution involves evidentiary issues. He notes, "[I]t can be difficult to prove that armed men in a boat on the high seas are pirates" because there is no proof that they have committed, or are about to commit, an act of piracy.[94] Many suspected Somali pirates captured at sea are stripped of their weapons and returned to shore because there is no conclusive evidence that they are pirates. This policy is known as "catch-and-release," and it is common among naval forces of many nations.[95]

Further, there are legal and practical difficulties with keeping suspected pirates in detention for long periods of time in a warship for investigation purposes. In one reported case, Russia wished to prosecute Somali pirates but could not identify them conclusively because the twenty-three Russian

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89. Hannah McNeish, *Madagascar Captures Somali Pirate "Mother Ship." Now what?*, CHRISTIAN SCI. MONITOR, Mar. 1, 2011, http://www.csmonitor.com/World/Africa/2011/0301/Madagascar-captures-Somali-pirate-mother-ship.-Now-what.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Eugene Kontorovich, *Equipment Articles for the Prosecution of Maritime Piracy* 1 (One Earth Future, Discussion Paper, 2010), http://www.oneearthfuture.org/index.php?id=121&pid=37&page= Equipment_Laws_for_the_Prosecution_of_Piracy [hereafter "Kontorovich (Equipment Articles for Prosecution)"].

95. Carrie Johnson, *Fighting Piracy At Sea And In Court*, NAT'L PUB. RADIO, Feb. 26, 2011, http://m.npr.org/news/front/134063231.

crewmembers had secured themselves in a safe-room during the attack and did not see the pirates' faces.[96] The suspected pirates then claimed that they had been hostages of the "real pirates."[97] In situations like these, some states must release suspected pirates because of the lack of evidence to successfully try them.

Bilateral agreements also exist to facilitate prosecution of pirates close to their region of operation. Such agreements exist between Kenya and the U.K., U.S., and EU. According to the agreements, the U.K., U.S., or EU turn suspected pirates over to Kenya. Although these bilateral agreements enabled prosecution of pirates for a time, Kenyan courts are now prosecuting over one hundred pirates and resist handling more.[98] This is probably because they lack sufficient resources to manage the increasing number of prosecutions.[99]

In response to this situation, the UN Office on Drugs and Crime's Counter-Piracy Program built a high security courtroom in Mombasa, which opened in June 2010. Kenya's criminal justice system will use the courtroom to hear piracy cases and to try other serious criminal offenses.[100] It is too soon to ascertain whether the specialized court will be a success. Even if it is, the question still exists as to how Kenya will manage the imprisonment of convicted pirates, since convicted pirates become inmates in Kenyan jails.

Finally, for Somalia, piracy is as much a problem of the land as it is of the sea, given its status as a failed state.[101] Dismantling piracy networks in Somalia depends on local capacity-building solutions, such as the development of good governance and economic and legal reform. Local institutions could then provide the on-going land-based compliment to sea-based operations. Without such land-based policing, any success in suppressing piracy is ephemeral. One way to develop local capacity might be through the imposition of international regency similar to the UN administration in Kosovo.[102]

But land-based operations come into conflict with strongly held modern ideas regarding state sovereignty. These may undermine any attempt to reach agreement to both tackle piracy at sea and its networks on land. Further, the socio-political climate in many places where piracy flourishes can prevent foreign capacity-building efforts. Security concerns in Somalia, for example, expose land-based operations to unquantifiable security risks. This makes any land-based intervention unlikely, even under military protection.

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96. *Pirates Seize Russian Tanker*, FAIRPLAY NEWS, May 05, 2010, http://www.fairplay.co.uk, as reported in *Dealing with Pirates – Russia Makes them Walk the Plank*, U.S. NAVAL INST. BLOG (May 2010), http://blog.usni.org/2010/05/10/pirates-walk-the-plank/.

97. *Id.*

98. *Id.*

99. Boot, *supra* note 14, at 106.

100. UN SCOR Report of the Secretary General, *supra* note 41.

101. Murphy, *supra* note 9, at 168.

102. Boot, *supra* note 14, at 107.

IV.
PIRACY LAW UNDER THE EXISTING LEGAL REGIME

Piracy's international and domestic legal development creates a fragmented set of laws with overlapping rules and principles that are difficult to reconcile. The following account provides the limitations of the law as it stands and proposes a number of recommendations. First, this section will explore the UNCLOS framework, the SUA convention, the UN resolutions, and regional agreements. Next, it will address domestic law aimed at piracy, focusing on statutory, contractual, and insurance issues. Throughout both sections, this article will highlight how dualism in the law frustrates existing efforts to address modern piracy. This sets the scene for Part V, which recommends a number of solutions to achieve greater uniformity in piracy law.

A. The Dual Nature of International Maritime Piracy Law

As will become clear in the following sections concerning UNCLOS, the SUA, the UN Security Council Resolutions, and domestic laws, a defining characteristic of modern piracy is that there is substantial dualism in the fabric of the law among states and the international regime. At the center of this dual development is the fundamental distinction between monist and dualist states. Whereas monist states, such as France, welcome international law without any further internal enactment, dualist states, like the United States, require national legislation to give effect to international law. To this end, dualist states inadvertently encourage divergent practices in the law as written and practiced because they insulate their national laws from external legal developments under international law (*piracy jure gentium*). They also inadvertently encourage dualist practices by enabling the proliferation of municipal laws that are sometimes inconsistent, not only with their international counterparts, but also inter se.

This divergence in piracy law was noted as early as 1932. In that year, a Harvard Research in International Law study concluded that "[p]iracy under the law of nations and piracy under domestic law are entirely different subject matters and . . . there is no necessary coincidence of fact-categories covered by the term in any two systems of law." [103] The recent English case of *R. v. Margaret Jones* also recognized this distinction.[104] There, Lord Justice Cornhill noted that: "[A] distinction must be drawn between piracy under any municipal [a]ct of a particular country and piracy jure gentium."[105] Municipal is best

103. *Harvard Research in International Law: Original Materials*, 26 AM. J. INT'L L. Spec. Supp. 281 app. at 749 (1932).

104. R. v. Margaret Jones [2006] UKHL 16, [2007] 1 AC 136 (appeal taken from England) (Cornhill, J., drawing a distinction between piracy under national law and piracy under international law).

105. *Id.*

understood as "domestic" for the purposes of this paper.

This distinction between piracy as defined under national law and piracy as defined by international law has also been made in the recent case of *United States v. Hasan.*[106] There the court noted: "[T]he *unique* dual characterization of piracy as an offense against both municipal and international law."[107]

Unsurprisingly, Alfred Rubin was able to identify six possible origins for definitions of the word "piracy," three of which highlight the dual nature of piracy law. These are:

> (4) *An international law meaning* related to the private acts of foreigners against other foreigners in circumstances making criminal jurisdiction by a third state acceptable to the international community despite the absence of the usual territorial or national links that are normally required to justify the extension abroad of national criminal jurisdiction;
> (5) *Various special international law meanings* derived from particular treaty negotiations; and
> (6) *Various domestic (i.e., national, domestic) law meanings* defined by the statutes and practices of individual states.[108]

Passman has also noted this multi-faceted characteristic of piracy law in the context of maritime law, where there are at least five interpretations of piracy. Passman found that "[p]iracy has one meaning in the insurance industry, another in the international shipping industry, another in international law, another in criminal law, and yet another in the 'common law.'"[109] This leads Passman to note that "the *context* of the word may determine its meaning."[110]

The fact that an identical act may be piracy or not depending on factual circumstances indirectly related to the act, such as whether it occurs in a geographic location governed by national or international law, or whether it occurs in the context of an insurance claim verses a shipping claim, inhibits the effective and consistent prosecution of pirates. Although "in law *context* is everything,"[111] the serious consequences of piracy require a more precise, principled definition of what constitutes an act of piracy. Such a definition should present no room for opportunistic behavior by pirate transgressors. As such, it would empower the international, and especially the commercial, community with a legal tool that is certain, coherent and uniform in both its interpretation and implementation.

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106. *Hasan,* 2010 U.S. Dist. LEXIS 115746.

107. *Id.* at *36.

108. ALFRED P. RUBIN, THE LAW OF PIRACY 1 (University Press of the Pacific, 2nd ed. 1988).

109. Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM. 59, 61-62 (2009).

110. *Id.* Author's emphasis.

111. Stack v. Dowden [2007] UKHL 17, [2007] 2 AC 432 [69].

B. International Piracy Law: UNCLOS and the SUA

The United Nations Convention on the Law of the Sea (UNCLOS) defines piracy as an "extraterritorial crime" that targets "crews and vessels"[112] which the transgressor commits on the high seas.[113] The high seas are collectively shared by all states such that no single state has a property interest therein.[114] Thus, by its definition, piracy is an international crime, and it has long been recognized as such under public international law.[115] But while the nature of the crime of piracy has "evolved dramatically" in recent decades, the international piracy law remains largely unchanged over the last two centuries.[116]

Of course, modern treaties and conventions now govern maritime law, along with a number of UN resolutions; however, the laws' substance remains firmly rooted in the earlier legal treatment of piracy as recounted above. Two of the foundational treaties are the UNCLOS and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).[117] These agreements address piracy, and their substance shapes both the international legal and practical responses to piracy, as discussed below. But these agreements do not themselves create a body of piracy law. Indeed, Rubin even argues that piracy law does not exist as a body of law at the international level, but only in a national-domestic context insofar as states act against the crime of piracy when it suits their interests.[118] Further, although there is no coherent, overarching body of piracy law in the international context, there are important advances in addition to the aforementioned treaties.[119] These include

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112. *See ICC Recommendations with regard to Piracy in the Indian Ocean*, INT'L CHAMBER OF COMMERCE (2010), http://www.iccwbo.org/uploadedFiles/ICC/policy/transport/statements/304_78%20ICC%20Recomms%20Piracy%2025_1_10.pdf.

113. United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter "UNCLOS"].

114. *See id.* art. 87 ("The high seas are open to all states, whether coastal or land-locked."); *see also* HUGO GROTIUS, *MARE LIBERUM: THE FREEDOM OF THE SEAS, OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* 28 (Oxford Univ. Press ed., 1916) (1608) ("The sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.")

115. Kontorovich (Guantanamo), *supra* note 30, at 5.

116. Mike Madden, *Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws*, 21 U.S.F. MAR. L. J. 139, 140 (2008-2009).

117. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 [hereinafter "SUA Convention"].

118. *Id.*

119. Part of the reason why international piracy law has not kept pace with the rise of modern piracy may be that a single act of piracy can trigger a number of legal fields simultaneously. These include but are not limited to maritime, shipping, contract, insurance, human rights, trade and criminal law, as well as the international law of war. This reflects international law's diversification, fragmentation, and expansion in modern times. As Martti Koskenniemi notes, the field of international law is now fragmented into "specialist systems . . . each possessing their own principles and institutions." Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising*

the IMO Djibouti Code Of Conduct Concerning the Repression Of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and The Gulf Of Aden ("Djibouti Code") [120] and agreements concretizing regional multinational operations, such as the EU's NAVFOR Task Force.

1. The UNCLOS Framework

The preamble to UNCLOS states that the convention's purpose is "to settle . . . all issues relating to the law of the sea" so as to maintain "peace, justice and progress for all peoples of the world." UNCLOS addresses piracy within the framework of this ambitious goal, in addition to other issues like the rights of landlocked states, the execution of maritime research, and the legal status of different sea areas. Article 100 requires all signatory states[121] to "cooperate . . . in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state." Article 101 of UNCLOS defines piracy as "any illegal acts of violence or detention . . . committed for private ends by the crew or the passengers of a private ship or a private aircraft." Piracy must also occur "on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft" and "against a ship, aircraft, persons or property in a place outside the jurisdiction of any state." Article 105 allows that "every state may seize a pirate ship" on the high seas, and authorizes "[t]he courts of the state which carried out the seizure" to "decide upon the penalties to the imposed on" the alleged pirates. Under Article 106, which addresses seizure without adequate grounds, makes the state that executed the seizure liable to the state under which the seized ship was registered. Finally, Article 107 clarifies that pirates may only be seized by "warships or military aircraft" or another vessel "clearly marked and identifiable as being on government service and authorized to that effect."

These provisions may seem complete, but UNCLOS' limitations are well documented. These limitations include: (i) restricting the definition of piracy to "private" ends; (ii) the geographical restriction of piracy to the high seas; (iii) issues of reverse hot pursuit; (iv) the "two ship" requirement that excludes internal seizure; and (v) the lack of a mandate for states to adopt domestic counter-piracy laws that implement their international commitments.[122] The

from the Diversification and Expansion of International Law, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION ¶ 8, A/CN.4/L.682.

120. International Maritime Organization, Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, Jan. 29, 2009, C 102/14.

121. As of November 2010, 161 states had ratified UNCLOS, including Somalia. UN DIVISION FOR OCEAN AFFAIRS AND LAW OF THE SEA, CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND THE RELATED AGREEMENTS, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.

122. Murphy, *supra* note 9, at 159.

brief analysis that follows of UNCLOS's deficiencies underscores why piracy law is in dire need of reform and, specifically, its own separate body of international law.

a. Piracy Must Be for Private Ends

The essence of piracy is that it must be committed for private ends,[123] which appears to arise from the distinction between piracy and state-sponsored privateering of the 16th and 17th centuries. UNCLOS, however, does not clarify who or how to determine what the true purpose was of an attack by one vessel against another.[124] It is also unclear whether the motivations behind an act of piracy must be exclusively for "private" ends or whether it can be a mix of private-public ends. Sometimes, however, it is difficult to ascertain precisely where the private boundary ends and the public one commences.

Although there is no recent example of the mixed motives problem, an historical example will suffice. In 1909, Brazilian rebels seized a Bolivian ship, '*the Labrea*', in the Amazon River because of political disagreements with Bolivia. Bolivia, which had taken out piracy insurance on the ship, sued the insurer in an English court.[125] Bolivia argued that this type of attack was "piracy," and thus was an insured peril under the policy. Focusing on the political organization and motivations of the alleged pirates, and their lack of for-profit motivations, the court distinguished the seizure from a traditional act of piracy under international law and found for the insurer. As Justice Pickford wrote, a pirate "is a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end . . . ."[126]

Like the definition of piracy that Justice Pickford advanced, modern piracy appears to be economically motivated. Commentators are in relative agreement that terrorism and piracy are not substantially related.[127] Some scholars, however, have speculated whether the Somali pirates might be susceptible to developing a political ideology or agenda that might provide mixed motivations for pirate attacks.[128] These could cause an "ends" issue for courts applying UNCLOS, since it defines piracy as occurring for private ends. Others have

123. MALCOLM N. SHAW, INTERNATIONAL LAW 549 (Cambridge University Press, 5th ed., 2005); UNCLOS, *supra* note 113, art. 101(a).

124. Samuel P. Menefee, *The Achille Lauro and Similar Incidents as Piracy: Two Arguments*, *in* PIRACY AT SEA 179, 179-80 (Eric Ellen ed., 1989).

125. Republic of Bolivia v. Indemnity Mutual Marine Assurance Co. (1909) 1 K.B. 785 (Eng. C.A.).

126. *Id.* at 791.

127. STEFAN EKLÖF, PIRATES IN PARADISE: A MODERN HISTORY OF SOUTHEAST ASIA'S MARITIME MARAUDERS 111 (2006).

128. JOHN S. BURNETT, DANGEROUS WATERS: MODERN PIRACY AND TERROR ON THE HIGH SEAS 310 (2003).

questioned whether terrorists might also use or piggyback on piracy as a fundraising tool.[129] The distinction between piracy and terrorism is particularly important for the purposes of insurance coverage, since protection and indemnity liabilities arising from acts of piracy are not an excluded risk whereas terrorism is concerned; rather, these would fall under a war risk.[130] As of now, however, no proven link exists between Somali piracy and terrorist groups.[131]

The private ends proviso excludes acts of terrorism that are politically motivated, such as hijacking and ones of internal seizure, as was the case in the *Achille Lauro* incident.[132] There, members of the Palestinian Liberation Front boarded a cruise ship, seized it and demanded the release of fifty Palestinians detained in Israel.

The private ends requirement should be extended to encompass instances where piracy is used as a vehicle for non-private purposes, regardless of what those might be. As such, current legal analysis should shift its perspective from the motivations of the hijacker to the impact on the victim(s), namely, whether the perpetrators have deprived a lawful owner of property? This shift also has the benefit of serving as a bright line standard for piracy that national or international courts could easily apply. To this end, the act ought to be considered as piratical regardless of whether it has been committed for an alternative purpose, such as funding terrorist activities. Where the transgressors can also be charged under terrorism laws is a different matter to be treated as a separate offence.

b. Piracy Limited to the High Seas

UNCLOS geographically restricts piracy to the high seas and does not address acts that occur in the territorial, internal waters, or any other areas of the sea excluding the high seas, such as the exclusive economic zone, or the contiguous zone.[133] These acts could be identical to piracy in all ways except the location. Martin Murphy argues that this has also enabled the growth of

129. Mark J. Valencia, *The Politics and Anti-Piracy and Anti-Terrorism Responses in Southeast Asia*, *in* PIRACY, MARITIME TERRORISM AND SECURING THE MALACCA STRAITS 84, 87 (Graham Ong-Webb ed., 2006). For background information, also consult the websites of the Free Acheh Movement (GAM) at http://www.asnlf.com/ (last visited Mar. 13, 2011) and the Moro Islamic Liberation Front at http://www.globalsecurity.org/military/world/para/milf.htm (last visited Mar. 13, 2011).

130. *Piracy: FAQs*, THE LONDON P&I CLUB (2009), http://www.londonpandi.com/_common/updateable/downloads/documents/IGroupPiracyFAQs.pdf.

131. Louise Butcher, *Shipping: Piracy*, BUSINESS AND TRANSPORT REPORT 7, SN/BT/3794.

132. *See* L. F. E. Goldie, *Legal Proceedings Arising from The Achille Lauro Incident in the United States of America*, *in* MARITIME TERRORISM AND INTERNATIONAL LAW 107 (Natalino Ronziti ed., 1990).

133. Article 3 of UNCLOS expanded the territorial seas to up to twelve miles from the coast. Internal waters are those bodies of water connected to the territorial seas but within a designated baseline, such as bays, mouths of rivers, etc. UNCLOS, *supra* note 113, art. 3.

piracy "by entrenching the sovereign rights of states over these territorial waters."[134] This is because weak states leave a fertile ground for pirates, yet foreign states capable of repressing piracy must respect the weak state's sovereign rights. As such, pirates can launch attacks from within the territorial and internal waters with relative impunity.

Some commentators describe this definition of piracy under UNCLOS as "very narrow."[135] Indeed, between the years 1989-1993, almost 62 percent of attacks by pirates occurred in the territorial waters of a country, usually in territories with insufficient capability to control piracy.[136] This situation highlights how UNCLOS' piracy provision is frequently ill suited to regulate a significant percentage of piracy incidents.

The Somali case helps illustrate how this works in practice. The Somali pirates' response to increased antipiracy measures in the territorial waters, such as patrolled shipping corridors, has been to attack ships sailing on the high seas. But even then, UNCLOS has been insufficient to address piracy because pirates often reenter territorial waters where foreign actors cannot follow. The UN Security Council passed a resolution to resolve this problem by authorizing the international force patrolling the Gulf of Aden to "enter the territorial waters of Somalia for the purpose of repressing acts of piracy" and to use "all necessary means" for such repression.[137]

But this is a local solution, and states still face the aforementioned sovereignty limitations in other parts of the world where piracy occurs, such as East Asia. A simple alternate solution might be to reform UNCLOS to allow foreign states to address piracy beyond the high seas. But the principle of *mare liberum*, or freedom of the high seas,[138] is central to UNCLOS, which guarantees that "[t]he high seas are open to all states, whether coastal or land-locked."[139] In essence, freedom of the high seas means that no state may exercise sovereignty over waters more than two hundred nautical miles from shore; and conversely, all states must respect state sovereignty when entering foreign waters from the high seas.[140]

It is thus understandable that UNCLOS limits itself to the high seas. Issues between state sovereignty and the doctrine of universal jurisdiction mean that limiting piracy to the high seas enables a state to exercise jurisdiction over pirates without interfering with the sovereignty of any other state. As Shaw put

134. Murphy, *supra* note 9, at 165.

135. Vijay Sakhuja, *Sea Piracy in South Asia, in* VIOLENCE AT SEA: PIRACY IN THE AGE OF TERRORISM 27 (Peter Lehr, ed., 2007).

136. Barry Hart Dubner, *Human Rights and Environmental Disaster – Two Problems that Defy the "Norms" of International Law of Sea Piracy*, 23 SYRACUSE J. INT'L L. & COM. 1, 25-26 (2007).

137. S.C. Res. 1816, ¶ 7, UN Doc. S/RES/1816 (Jun. 2, 2008) [hereinafter "S.C. Res. 1816"].

138. *See* Grotius, *supra* note114.

139. UNCLOS, *supra* note 113, art. 87.

140. Shaw, *supra* note 123, at 543.

it, "the most formidable of the exceptions to the principle of the freedom of the high seas is the concept of piracy. The fact that every nation may arrest and try persons accused of piracy under the doctrine of universal jurisdiction makes that transgression quite exceptional in international law."[141] Perhaps because of this exceptionalism, the principle of universal jurisdiction has rarely been used in piracy cases. A recent study suggests that nations use universal jurisdiction in a "negligible fraction" of piracy cases.[142]

c. Reverse Hot Pursuit

Hot pursuit occurs where a state ship pursues a pirate ship from within a state's territorial waters onto the high seas. There are no problems with hot pursuit, given the freedom of the high seas. Reverse hot pursuit, however, is problematic because it involves the right of any ship pursuing pirates on the high seas to enter into or cross the territorial waters of another state.

The value of reverse hot pursuit is clear. It allows a foreign state to continue pursuing pirates that have committed an international crime in international waters, even after the pirates have entered territorial waters and where the foreign state would otherwise require authorization from the sovereign state. Without reverse hot pursuit, "territorial waters that are poorly monitored and patrolled are, in effect, pirate sanctuaries."[143]

For the reasons previously discussed, UNCLOS does not allow states the luxury of reverse hot pursuit.[144] Nor is it clear that that customary international law would provide a sufficient basis for engaging in reverse hot pursuit, since the UN Resolution 1816 permitting reverse hot pursuit in Somali territorial waters shall "not be considered as establishing customary international law."[145]

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141. *Id.*

142. Eugene Kontorovich and Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 *AM. J. INT'L L.* 436, 444 (2010).

143. Murphy, *supra* note 9, at 163.

144. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) explicitly excludes reverse hot pursuit. Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, Nov. 11, 2004, art. 2(5), http://www.mofa.go.jp/mofaj/gaiko/kaiyo/pdfs/kyotei_s.pdf ("Nothing in this Agreement entitles a Contracting Party to undertake in the territory of another Contracting Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Contracting Party by its national law.") [hereafter "ReCAAP"].

145. S.C. Res. 1816, *supra* note 136, ¶ 9; *c.f.*, U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP1-14M at 3.5.3.2 and 3.10.1.1, http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_%28Jul_2007%29_%28NWP%29:

> If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the nation having sovereignty . . . . The inviolability of the territorial integrity of sovereign nations makes the decision of a warship or

Pirates already take advantage of these sanctuaries to operate with relative impunity within territorial waters. This failure creates a loophole that pirates may one day learn to manipulate, like a game of "cat and mouse."[146]

d. The Two-Ship Requirement

UNCLOS appears to adopt a "two ship requirement."[147] With the exception of Article 102, which treats the mutinying crews of state-owned ships as pirates within the scope of Article 101, UNCLOS classifies an act as piracy where members of one ship attack another.[148] This can be seen from the phrasing of Article 101(a)(i), which states that piracy is an act committed "by the crew or the passengers of a private ship . . . directed . . . *against another ship*."[149]

Aside from mutinying crews of state-owned ships, the two-ship requirement does not appear to contemplate internal seizure of a ship, or those instances where one or more of a ship's own crew or passengers take control, as was the case in the *Achille Lauro*. Although there have been no incidents of pirates infiltrating a ship to hijack it for economic purposes, such an event is within the realm of possibility. One might predict this occurring as naval operations reduce the effectiveness of external pirate attacks.

Regardless, both in legal and practical terms, it is not clear that internal seizure should remain classified separately from piracy. While the motivation may be different, the end result is the same; conversion or theft of property for the hijacker's personal use, and, frequently, loss of life. The more compelling reason for this distinction is that a ship sails under the jurisdiction of its flag state, the state with which it is registered to operate. As such, any offense committed on board, or any act committed by the crew against the ship or its property, falls under the flag state's national jurisdiction as opposed to

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> military aircraft to continue pursuit into these areas without such consent a serious matter. However, the international nature of the crime of piracy may allow continuation of pursuit if contact cannot be established in a timely manner with the coastal nation to obtain its consent.
>
> Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. nationals within and over the internal waters, archipelagic waters, or territorial seas of a foreign nation present special considerations . . . . [W]hen that [coastal] nation is unable or unwilling to [protect vessels, aircraft, and persons] effectively or when the circumstances are such that immediate action is required to protect human life, international law recognizes the right of another nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels, its flag aircraft, and its nationals.

146. Sandeep Gopalan and Stephanie Switzer, *Pirates of the Aden: A Tale of Law's Impotence* (May 14, 2009), *available at* http://ssrn.com/abstract=1404506.

147. Murphy, *supra* note 9, at 159.

148. UNCLOS, *supra* note 113, art. 101(a)(i).

149. *Id.* (emphasis added)

international law.[150] Thus, the fact that piracy does not include cases of internal seizure, mutiny aboard non-state ships, and larceny further widens the divide between the international and domestic dimensions of piracy.

A hypothetical scenario helps exemplify this issue. Suppose ship *La Bella* is registered under the flag of *Narnia*. *Narnia* has an inefficient legal system that does not criminalize piracy and lacks an effective navy. A group of individuals ('*the Scarfaces*') board *La Bella* as crewmembers, seize the ship and, as pirates typically would, make demands for a ransom payment. Under international law, *Narnia* will have sole jurisdiction to prosecute *the Scarfaces*. However, given *Narnia*'s frail legal system, *the Scarfaces* may never be punished for an act that shares all the factual elements of piracy.

e. No Mandate to Adopt Domestic Counter-Piracy Laws

UNCLOS does not require that states enact domestic anti-piracy laws that align with the convention's provisions, nor does it provide model laws to enact if a state wished to adopt such legislation. Indeed, UNCLOS is based on the assumption that states have adequate domestic legislation to prosecute acts of piracy.[151] But the divergence between domestic anti-piracy laws and UNCLOS has encouraged piracy and has created legal and jurisdictional challenges for law enforcement agencies.

The issue is further exacerbated by the fact that a number of states do not criminalize piracy,[152] and some states have only begun to prosecute piracy more recently.[153] In 2010, UN Resolution 1918 called on states "to criminalize piracy under their respective domestic laws." The Resolution therefore was important in that it recognized the need for horizontal uniformity between domestic and international laws vis-à-vis piracy law. Unfortunately, the resolution failed to provide guidance for how to define and criminalize piracy. As such, it left the specifics of domestic laws to the discretion of individual states, which allows the dual framework of piracy law to perpetuate itself, thus undermining the Resolution's attempt for uniformity in this area of law.

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150. *Id.* art. 92; Murphy, *supra* note 9, at 164; Shaw, *supra* note 123, at 549.

151. Murphy, *supra* note 9, at 166.

152. *See* UN S.C. Res. 1918, *supra* note 3, preamble ("*Noting with concern at the same time* . . . that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates.").

153. Japan has only recently begun prosecuting some Somali pirates. *See Japan to Try Suspects in Pirate Attack*, YOMIURI SHIMBUN, Mar. 9, 2011, http://www.yomiuri.co.jp/dy/national/T110308006340.htm; *but see* Murphy, *supra* note 9, at 166 (stating that Japan's older laws did not enable domestic prosecution of foreign pirates). Japan's shift in prosecutions also reflects its recent involvement in the Joint Task Force in the Gulf of Aden. *See* Hitoshi Nasu et al., *Law at Sea: Challenges Facing Japan's Anti-piracy Mission*, JURIST LEGAL NEWS & RES., Mar. 25, 2009, http://jurist.law.pitt.edu/forumy/2009/03/law-at-sea-challenges-facing-japans.php (in 2009 Japan changed its defense policies and dispatched two Maritime Self-Defense Force destroyers to participate in a counter-piracy task force).

f. UNCLOS's Other Limitations

UNCLOS only requires that its 161 signatories cooperate in anti-piracy measures on the high seas and does not require cooperation for acts of piracy elsewhere.[154] Nor does UNCLOS specify any mechanism for penalizing a state's failure to discharge its responsibilities in repressing piracy under Article 100. As a purely historical point, it is interesting to note that, with regard to Article 100, the Drafters' Commentary to UNCLOS stressed that "any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law."[155] Although the consequences of such failure are not clear, any reform in this area of law must impose a duty to cooperate in all matters concerning piracy regardless of where at sea the piracy is committed. The lack of a dispute resolution mechanism under UNCLOS for piracy cases further highlights the need for a specialized tribunal in this area of law.

UNCLOS exhibits a number of other deficiencies. It is silent on inchoate offences, such as soliciting piracy and conspiracy to commit piracy. The treaty also fails to provide for acts of attempted piracy. This is problematic because under UNCLOS, navies can only capture pirates "in the act." Acts of attempted piracy fall outside the scope of Article 101. Further, UNCLOS does not address the issue of ransom payments in piracy cases.

As a final point, Article 110 of UNCLOS gives permission to foreign military ships to board any ship that is suspected of piracy on "reasonable grounds." There is, however, no guidance for what constitutes reasonable grounds. Domestic courts could therefore diverge in their interpretations of what grounds are sufficiently reasonable for a foreign military ship to board and arrest pirates. This void also highlights the need for a coherent body of jurisprudence to provide definitive interpretations of flexible words such as "reasonable" in this context.

g. UNCLOS as an Impediment to the Development of Piracy Law

In summary, it is clear that UNCLOS is ineffective to combat modern piracy. It should therefore be replaced. The requirements under UNCLOS have proved to be "anachronistic in a world of reduced ship manning and cheap high-speed rubber boats, and where the high seas have been pushed 200 nautical miles away from land."[156] The UNCLOS regime is a product of the past,

154. *See* UNCLOS, supra note 113, art. 100 (providing only that "All states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.").

155. *See* Yvonne M. Dutton, *Bringing Pirates to Justice, A Case for Including Piracy within the Jurisdiction of the International Criminal Court* 7 n. 33 (One Earth Future, Discussion Paper, 2010), *available at http://www.oneearthfuture.org/siteadmin/images/files/file_52.pdf.*

156. Mejia and Mukherjee, *supra* note 31, at 324.

intended for a world whose geopolitics and technology have since dramatically changed. As a consequence, the development of piracy law in the international realm has been handicapped by a treaty that was never, *ab initio*, intended to combat international piracy in its current form.

Specifically, UNCLOS's definition of piracy is too restrictive to help the present fight against maritime piracy. As compared to UNCLOS, the IMB has defined piracy more broadly as "an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act."[157] This definition should be a stepping-stone toward creating a specialized body of international piracy law that encapsulates the crime's particular nature, while also addressing the problematic bifurcation between territorial waters and the high seas.[158] Further, the IMB definition does not require piracy to be committed for private ends.

2. The SUA Framework

The abovementioned *Achille Lauro* incident demonstrated the inadequacy of the international regime governing piracy under UNCLOS because it excluded cases of internal seizure and was silent as to prosecuting pirates.[159] Consequently, the SUA Convention was adopted by 156 states[160] and, importantly, by the United States, Kenya, and the Seychelles. However, the SUA was not adopted by coastal states heavily affected by piracy, such as Somalia, Malaysia, and Indonesia.[161]

While in theory the SUA seemed like a promising solution, in practice it has been an ineffective legal tool for dealing with piracy. The SUA authorized

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157. International Chamber of Commerce, International Maritime Bureau (ICC-IMB), *Piracy and Armed Robbery Against Ships Report*, Annual Report (2007), http://www.southchinasea.org/docs/ICC-IMB-PRC-2007.pdf. Contrast this with the IMO definition: "Piracy must be committed on the high seas or in a place outside the jurisdiction of any state. A criminal attack with weapons on ships within territorial waters is an act of armed robbery and not piracy." DEREK JOHNSON AND MARK VALENCIA, PIRACY IN SOUTHEAST ASIA: STATUS, ISSUES AND RESPONSES xi (ISEAS Publications, 2005).

158. Some have also proposed a limited right to pursue pirates into territorial waters. *See Harvard Research in International Law, Draft Convention on Piracy*, 26 AM. J. INT'L L. Spec. Supp. 281 app. at 744, 833 (1932).

159. Article 105 of UNCLOS speaks of sentencing but not prosecution. Thus, it effectively skips a vital part of the sentencing process, as prosecution is arguably a sine qua non for a trial (and thus for the sentencing process). UNCLOS, *supra* note 113, art. 105 ("[T]he courts of the State which carried out the seizure may decide upon the penalties to be impose.").

160. SUA Convention, *supra* note 117.

161. Martin Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* 14 (The International Institute for Strategic Studies, Adelphi Paper 388, 2007) ("[M]any of the states in Asia where the piracy problem is most acute are not signatories [to the SUA]. The result has been that – apart from in one minor case in U.S. waters – SUA has never been invoked.")

any signatory state to prosecute anyone who "seizes or exercises control over a ship by force or threat of force or any other form of intimidation."[162] In this way, the SUA enjoys an advantage over UNCLOS because it covers acts in territorial waters.[163] It also encompasses instances of internal seizure and is not bound by a private ends proviso, unlike UNCLOS. In some circumstances, the SUA actually *requires* states to either prosecute or extradite those who commit acts that encompass piracy.[164] It is important to note that the SUA does not *explicitly* criminalize piracy. In fact, nowhere in the SUA is the word piracy mentioned. The SUA only spells out acts that fall under the rubric of piracy, such as the "seizure of a ship by force."[165]

Despite criminalizing numerous offenses, the SUA is not sufficiently specific regarding sanctions.[166] To the extent that signatory states have followed through with this criminalization provision, there is a lack of penal uniformity among their laws.[167] If comparative leniency were to develop in some states, and if pirates were to become sophisticated actors with a *strong* understanding of international law, such leniency might lead pirates to forum shop in order to manage operational risk.

Further, states have been reluctant to use the SUA as a basis for prosecution.[168] England's Aviation and Maritime Security Act of 1990 incorporated the SUA into English law but, to the author's knowledge, no English case has relied on the SUA. Reluctance to use the SUA may be partially attributable to a lack of guidance about the treaty's application in the treaty itself.[169] Additionally, the SUA does not enable, through recognition or authorization, "preventive constabulary activity at sea."[170]

Given that the SUA's purpose was to enable prosecution of pirates, these absent constabulary provisions do not surprise. However, these missing provisions deprive the SUA of its potential prophylactic strength. This consequentially undermines prosecution, which requires effective policing mechanisms to ensure that perpetrators are arrested properly, sufficient evidence is collected, and criminals are brought to trial. In the context of sea piracy, the SUA therefore relies on the discretion of regional law enforcement efforts, state law enforcement agencies, or naval forces to capture pirates. As piracy typically

162. SUA Convention, *supra* note 117, art. 3(1).

163. *Id.* art. 4.

164. *See id.* arts. 5, 7(1).

165. *Id.* art. 3(1).

166. *See id.* art. 5 ("Each State Party shall make the offences set forth in Article 3 punishable by appropriate penalties which take into account the grave nature of those offences.").

167. Proshanto K. Mukherjee, *Piracy, Unlawful Acts and Maritime Violence*, 10 J. INT'L MAR. L. 301, 302 (2004).

168. Kontorovich (Guantanamo), *supra* note 30.

169. *Id.*

170. Murphy, *supra* note 9, at 165.

occurs in relatively poor areas of the world, it is inevitable that poor states will be reluctant or unable to proactively police their borders and deploy the necessary resources to capture pirates.

C. Regional Frameworks for Piracy

Piracy has prompted the proliferation of a number of regional codes, bilateral agreements, and localized UN Resolutions. This section will provide an overview of some of these frameworks and evaluate their provisions.

1. Regional Cooperation Agreement on Combating Piracy and Armed Robbery

Launched in 2006, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP) is the first multilateral government-to-government anti-piracy effort in Asia. This cooperation agreement has three main objectives: information sharing,[171] capacity building[172] and cooperative arrangements.[173] ReCAAP marks an important step towards greater cooperation between states in an area of the world that is greatly affected by piracy. Seventeen countries, including China, Japan, and Norway, have signed the agreement.[174] ReCAAP requires signatories to prevent and suppress piracy and armed robbery against ships "to the fullest extent possible."[175] The agreement established an information center and various focal points to help signatories share information about piracy incidents. ReCAAP also requires contracting parties to "make every effort to take effective measures . . . to arrest pirates or persons who have committed armed robbery against ships."[176] The agreement nonetheless suffers from a restrictive definition of piracy, as it limits acts of piracy to acts committed on the high seas.[177] A separate offence of "armed robbery" is provided for acts committed inside the jurisdiction of a signatory state.[178] It is not clear why the agreement draws a distinction between the two offences, particularly when the elements are essentially the same, save the geographical distinction.

171. ReCAAP, *supra* note 143, Part II.

172. *Id.* art. 14.

173. *Id.* arts. 12, 15.

174. *Contact Details of the ReCAAP Focal Points and ReCAAP Contact Point*, RECAAP INFORMATION SHARING CENTER (2011), http://www.recaap.org/Portals/0/docs/About%20ReCAAP%20ISC/ReCAAP_Poster_050111.pdf (the other members of ReCAAP are: Bangladesh, the Philippines, Brune, South Korea, Singapore, Cambodia, Sri Lanka, Lao, Thailand, Myanmar, Denmark, the Netherlands, Vietnam, and India).

175. *See* ReCAAP, *supra* note 143, art. 2(1).

176. *Id.* art. 3(1)(b).

177. *Id.* art. 1(1).

178. *See id.* art. 1(2)(a).

2. International Maritime Organization's Djibouti Code of Conduct

The IMO Djibouti Code of Conduct is worth particular mention because it departs in significant ways from UNCLOS and the SUA. The Code is also important because, although it only focuses on the Western Indian Ocean and the Gulf of Aden, it represents a positive step toward a uniform system of governance for international piracy.[179] The Code is particularly noteworthy because it commits signatories to cooperate to the fullest extent possible in the repression of piracy and armed robbery against ships.[180] It also facilitates sharing relevant information through a system of national information centers.[181] Each signatory state commits to criminalizing piracy and armed robbery against ships at the domestic level.[182] Signatory states also agree to ensure that there are adequate guidelines for exercising jurisdiction, procedures for investigations, and prosecutions of alleged offenders. Article 4(5) allows reverse hot pursuit as long as the coast state grants authorization.[183] Finally, Article 2 of the Code also seeks to ensure that persons committing or attempting to commit piracy or armed robbery against ships are apprehended and prosecuted. These provisions are a definitive improvement from the UNCLOS regime, which is silent on these matters.

But, as a regional agreement, the Code's international scope and influence are geographically limited and do not create an international body of piracy law. Further, the Code is a non-binding document and accordingly only carries persuasive force.[184] Like the ReCAAP, it still locates the crime of piracy on the high seas.[185]

3. UN Resolutions: Somali Piracy

The UN has passed a number of resolutions to tackle maritime piracy in Somalia,[186] which give wide berth to foreign and international actors seeking to

179. *See* S.C. Res. 1918, *supra* note 3, ¶ 3 (calling upon participants to implement the resolution in full and "as soon as possible").

180. *See* The Djibouti Code Of Conduct Concerning The Repression Of Piracy And Armed Robbery Against Ships In The Western Indian Ocean And The Gulf Of Aden, Jan. 29, 2009, art. 2 [hereinafter "Djibouti Code"].

181. *Id.*

182. *Id.* art. 11.

183. *Id.* art 4(5) ("Any pursuit of a ship, where there are reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue such a ship in or over the territory or territorial sea of any coastal State without the permission of that State.").

184. Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 *EUR. J. INT. L.* 399, 405 (2009).

185. Djibouti Code, *supra* note 179, art. 1(1)(a)(i).

186. *See* S.C. Res. 1816, *supra* note 136; S.C. Res. 1838, UN Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1844, UN Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1846, UN Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, UN Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1918, *supra* note 3; S.C.

address piracy in Somalia's territorial waters. If the resolutions were permanent and extended worldwide, they might help form the foundation of a sustainable and uniform body of international piracy law. However, the resolutions are limited by their geographic focus and short shelf-life, which is appropriate given concern that the Security Council not act as a legislative body.[187] The resolutions are nevertheless worth reviewing here because of their potential discursive and reactionary effect. The content, successes, and failures of the Security Council's Somali resolutions can provide insight into developing an effective body of international piracy law.

The first important resolution passed by the UN Security Council regarding Somali piracy was Resolution 1816.[188] Under the resolution's terms, states cooperating with Somalia's Transitional Federal Government (TFG) may enter Somalia's territorial waters and use "all necessary means" to repress acts of piracy and armed robbery, for up to six months.[189] Resolution 1950 of November 23, 2010 extended this legal framework for one year. [190] The resolution requires that states entering Somalia's territorial waters act consistently with applicable international law.[191]

The Security Council also passed Resolution 733 in 1992, which was an arms embargo against Somalia.[192] The embargo, however, denies the TFG the means to successfully impose law and order on the country and may ultimately be counterproductive.[193] If the arms embargo is not lifted, Peter Lehr argues that third parties will be forced to deal with piracy through continuous patrolling and monitoring activities.[194] Regardless, third party monitoring has already become necessary. Take, for example, the European Union's Naval Force initiative.[195] However, in the long run, ad hoc third party patrolling and monitoring is likely to become costly[196] and possibly ineffective.

In 2010, the Security Council passed Resolution 1918.[197] This called on all

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Res. 1950, UN Doc. S/RES/1950 (Nov. 23, 2010).

187. *See generally* Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).

188. S.C. Res. 1816, *supra* note 136.

189. *Id.*

190. S.C. Res. 1950, *supra* note 185.

191. S.C. Res. 1816, *supra* note 136, ¶ 7(a).

192. S.C. Res. 733, UN Doc. S/RES/733 ¶ 5 (1992) (implementing a "general and complete embargo on all deliveries of weapons and military equipment to Somalia" until further notice).

193. Lehr, *supra* note 9, at 7.

194. *Id.*

195. *See* EU NAVFOR, *supra* note 80.

196. *See* EUNAVFOR/27, *EU Naval Operations Against Somalia*, COMMON SECURITY AND DEFENSE POLICY (January 2011), http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/110118%20Factsheet%20EU%20NAVOR%20Somalia%20-%20version%2027_EN.pdf (estimating the cost of NAVFOR's operations in its first year at $11.3m).

197. S.C. Res. 1918, *supra* note 3.

states to criminalize piracy, to prosecute suspected Somali pirates, and to imprison convicted Somali pirates, in accordance with international human rights law.[198] Resolution 1918 is interesting in that it addresses Somali piracy by seeking a level of international legal and procedural uniformity at the domestic level. However, it does not specify the contents of such domestic laws and thus fails to promote a unified body of piracy law.

D. Treatment of Piracy Under Domestic Law

As the previous sections make clear, international laws that address piracy rely heavily on corresponding domestic law. The analysis in this section covers statutory, insurance, and commercial-contractual frameworks that address piracy issues in the domestic legal context. This overview presents a short examination of each of these frameworks as they operate in English law. As a common law system, English law presents formidable examples of both statute based and judicial developments in this area of law. Indeed, the common law tradition provides an opportunity for scholars to examine the law in often-detailed judicial interpretations, an opportunity that may not be otherwise available under civil law traditions. This, coupled with the author's background as an English lawyer, make English law a suitable case study for this article.

1. The Statutory Framework

From a statutory perspective, maritime piracy occupies a unique place in international law. This is because, under UNCLOS, pirates are arrested and captured on the high seas for committing a crime that is international by nature, but they are then punished and prosecuted by domestic laws and courts.[199] Unlike other international crimes, such as war crimes, which may be referred to international courts like the International Criminal Court or specialized regional courts such as the International Criminal Tribunal for Rwanda, crimes of piracy have no specialized international forum.

The fact that the global legal regime gives such broad discretion to states to enact domestic piracy legislation means "there is no uniformity of definition in the domestic legislation of different states."[200] Some governments have adopted more inclusive definitions of piracy in their domestic laws. For instance, under the Kenya Penal Code of 1967, piracy occurs "in territorial waters or upon the high seas."[201] By contrast, the Philippine criminal laws only recognize piracy in the state's territorial waters.[202] United States law, on the other hand, only

198. *Id.*

199. Lawrence J. Khan, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TULANE MAR. L. J. 293, 306 (1996).

200. Dubner, *supra* note 135, at 40.

201. Penal Code (1967) Cap. 63 § 69 (Kenya).

202. *See* Pres. Dec. No. 532 (1974) (Phil.) ("Any attack upon or seizure of any vessel, or the

recognizes piracy occurring on the high seas, like UNCLOS.[203] Scottish case law suggests that any geographic distinction under piracy law is only relevant for the purposes of establishing jurisdiction but indicates that wherever it occurs, piracy is piracy because it involves the "same acts" with the "same consequences."[204]

Similar variance is found with regards to piracy and motivations. English courts continue to recognize piracy only as an act committed for private ends, whereas courts in other countries, such as Belgium, have recognized as piracy acts committed for other ends as well.[205] The recent 2009 Japanese Law on Punishment of and Measures against Acts of Piracy criminalizes as piracy[206] acts committed for private ends in the high seas, territorial sea, and internal waters.[207] Finally, some jurisdictions, like Spain, fail to characterize or codify piracy as a crime.[208]

There are a number of political and procedural issues that inhibit states from prosecuting pirates that are worth mention. First, there is the possibility that a pirate may seek and receive asylum if prosecuted in certain states.[209] This is something states do not want to occur because it would carry far too many political costs. Indeed, granting asylum to pirates would promote the message that "piracy pays" and could thus encourage individuals to participate in acts of piracy.[210] For example, in January 2009, five Somali pirates were brought to

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taking away of the whole or part thereof . . . by means of violence against or intimidation . . . committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters, shall be considered as piracy.").

203. 18 U.S.C. § 1651 (2000) ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United states, shall be imprisoned for life.).

204. Cameron v. H. M. Advocate [1971] J.C. 50.

> It was argued that piracy could take place only on the high seas, and that the actions in this case which were said to constitute piracy had all taken place within territorial waters ... [This] difference relates simply to the basis of jurisdiction and nothing else. The same acts are involved and the same consequences. The same offence has been committed. If it is committed within territorial waters, there is automatic jurisdiction. If it takes place on the high seas, then jurisdiction is assumed if the qualifying conditions are satisfied.

Id.

205. *See* Castle John v. NV Mabeco [Court of Cassation] 77 ILR 537 (1986) (Belg.).

206. Jun Tsuruta, *The Japanese Act on the Punishment of and Measures Against Piracy*, AEGEAN REV. L. SEA & MAR. L. (2010).

207. Art. 2 of Law on Punishment of and Measures against Acts of Piracy (Japan).

208. *See* James Kraska and Brian Wilson, *Fighting Piracy*, ARMED FORCES JOURNAL (2009), http://www.armedforcesjournal.com/2009/02/3928962.

209. *See* Marie Woolf, *Pirates Can Claim Asylum*, SUNDAY TIMES, Apr. 13 2008, http://www.timesonline.co.uk/tol/news/uk/article3736239.ece.

210. *See* Bruno Waterfield, *Somalia Pirates Embrace Capture as Route to Europe*, TELEGRAPH, May 19, 2009, http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html (granting asylum to pirates might encourage pirates to surrender for that purpose).

trial in the Netherlands and two of them have expressed an intention to claim asylum.[211] Second, there is a fear that detained pirates may invoke basic human rights law,[212] which would complicate trials and could make prosecutions more expensive. Third, there is a particular procedural flaw insofar as gaps in domestic legislation constrain national courts from handling the prosecution of expatriated pirates.[213]

This last point causes nations to be wary of receiving pirates because their efforts at capturing pirates may be in vain, as prosecutions become problematic,[214] if not impossible. For instance, in 2010 Danish naval forces freed ten pirates because there was no "option of having them tried."[215] As Denmark is a signatory to the European Convention on Human Rights (ECHR), the Danish authorities could not hand the pirates over to the Somali authorities because the ECHR prohibits countries from delivering suspects to states "where they risk the death penalty or being tortured."[216] Further, the Danish authorities also feared that no legal basis existed for extraditing pirates to Denmark for trial.[217]

Some differences among international and domestic laws are inevitable. Moreover, practical and political issues will always arise. However, the world would benefit from a uniform body of international piracy law. This would provide a firm foundation on which states and private actors could rely, and which would encourage greater uniformity at the domestic level over time.[218] These differences, which can ultimately be attributed to the existence of universal jurisdiction over acts of piracy,[219] make the role of international law all the more important[220] in influencing national laws to achieve uniformity both

211. *Id.*

212. *See* Passman, *supra* note 44, at 37.

213. *See* Tilde Kjær and Brendan Sweeney, *What to do with captured Pirates?*, DANISH INST. HUM. RTS., http://www.humanrights.dk/news/archive/news+2010/what+to+do+with+captured+pirates.

214. *See Why Do Naval Patrols Keep Releasing Somali Pirates?* LLOYDS LIST, Mar. 21, 2011, http://www.lloydslist.com/ll/sector/regulation/article358854.ece.

215. Kjær and Sweeney, *supra* note 212.

216. *See European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 312 U.N.T.S. 221, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

217. Kjær and Sweeney, *supra* note 212.

218. *See* UN SCOR Report of the Secretary General, *supra* note 41, at 13, Part III(C)(17) ("The elements that are needed within the national jurisdiction for successful prosecutions are criminal offenses of piracy and armed robbery at sea; criminal responsibility of those who participate in, or attempt to commit, such offenses; provisions establishing national criminal jurisdiction over piracy offenses committed on the high seas; and the necessary evidentiary and procedural provisions to conduct prosecutions."). *See also* MODEL NATIONAL LAW ON ACTS OF PIRACY AND MARITIME VIOLENCE, COMITÉ MARITIME INTERNATIONAL (Feb. 11-17, 2001) http://www.comitemaritime.org/Uploads/Yearboooks/YBK_2001.pdf.

219. UN SCOR Report of the Secretary General, *supra* note 41, at 14, Part III(C)(18).

220. *See* Passman, *supra* note 44.

vertically, between international and domestic laws, and horizontally, between domestic laws themselves.

2. The Insurance Framework

The insurance industry has developed special coverage that insures the shipping industry against the risk of piracy.[221] This coverage can be easily obtained in the market. Insurance coverage for piracy is standard in Institute Clauses for hulls, freight, fishing vessels, yachts, voyage, and port provisions.[222] For a number of specific clauses, such as those dealing with bulk oil and coal, piracy insurance may be negotiated on an individual basis.[223] In modern markets, piracy is designated as a marine peril, but historically piracy has fluctuated between being treated as a marine peril and as a war peril.[224] The latter arguably reflects an uncertainty as to how to precisely categorize 'piracy' as an insured peril.[225]

Piracy's meaning in the insurance context must be distinguished from its meaning as utilized in international law or national legislation, or even its construction in a charter party or bill of lading.[226] In contrast to cases dealing with carriage of goods, in marine insurance it is necessary to engage in "microscopic analysis of whether a particular activity is piratical, war-like, terrorist, malicious, or merely violent."[227] Consequently, conduct that might generally be regarded as piratical, but which is not strictly within the policy definition, will not be covered by the express inclusion of the piracy peril.[228] A clear and uniform legal definition of 'piracy' would benefit all stakeholders, both legal and commercial, by limiting lawsuits over contractual obligations. This would then reduce the probability that contracting parties wind up in court.

In a purely finance-centric world, insurance coverage would provide a formidable mechanism to deal with the piracy problem. At the outset, it appears that a *win-win* situation emerges: companies are able to cover their losses and pirates are able to maximize their gains. This analysis does not, however, factor in the aggregate impact of insurance claims on prices, which may be passed on

221. *See* D. Rhidian Thomas, *Insuring the Risk of Maritime Piracy*, 10 J. INT'L MAR. L. 355, 371 (2004).

222. Institute Time Clauses Hulls 1/11/95, cl. 6.1.5; Institute Voyage Clauses Hulls cl.4.1.5.; Institute Time Clauses Freight 1/11/95, cl. 7.1.5.;nstitute Voyage Clauses Freight 1/11/95, cl. 5.1.5.; Institute Fishing Vessels Clauses 7/20//87, cl. 6.1.5.; Institute Yacht Clauses 1/11/85, cl. 9.1.4.; Institute Time Clauses Hull Port Risks, 7/20/87, cl. 4.1.5.

223. Institute Bulk Oil Clauses 1/2/83; Institute Coal Clauses, 1/10/82.

224. *See* MICHAEL D. MILLER, *MARINE WAR RISKS* 1-9 (2d. ed., 1994).

225. Thomas, *supra note* 220, at 359.

226. *Id.* at 361.

227. Richard Williams, *The Effect of Maritime Violence on Contracts of Carriage by Sea*, 10 J. INT'L MAR. L. 343, 344 (2004).

228. Thomas, *supra* note 220, at 368.

to consumers via higher premiums.[229] Further, as a *compensatory* device, insurance coverage lacks the prophylactic capabilities of other legal and political solutions. Indeed, insurance cannot prevent piracy from occurring. A singular focus on addressing the piracy issue through private sector insurance also fails to consider the human cost of piracy. Nor does it account for the emotional frustration experienced from a pirate attack and its impact on commercial relationships in the long run.

3. The Commercial Contractual Framework

From a commercial perspective, all of the principal actors of maritime industry, the shippers, cargo carriers, banks, and insurers of the ships and cargoes, are strongly affected by maritime piracy.[230] While the statutory framework provides for the criminalization of piracy, the contractual framework allows private parties to define their obligations to one another and how loss should be allocated in the event a ship falls victim to piracy.[231] This often helps private parties limit their exposure to risk. Thus, whether a ship-owner or a charterer (a commercial leaseholder of a vessel) may rely on a specific contractual provision in a charter party (a contract between a ship-owner and merchant) following a piracy incident depends on the circumstances of the incident as it relates to the charter party.[232]

It is interesting to note that commercial contracts define piracy broadly as compared to the more restrictive definitions found in international law. For example, where UNCLOS restricts piracy to the high seas, commercial contracts tend to embrace all violent theft or attempted theft as piracy regardless of where it occurs.[233] In the context of contracts of carriage, terms such as piracy are not to be construed in accordance with the tests and definitions of international or public law, but in accordance with the business and commercial meaning which a reasonable man would give to the term in their commercial context.[234]

Prior to the up swell of piracy in the Gulf of Aden, existing clauses dealing with piracy largely accomplished their function. But more recently, private parties have questioned their rights and obligations under existing clauses,

229. *ICC Condemns Piracy*, *supra* note 52 (noting a "tenfold increase in insurance premiums" in the Gulf of Aden).

230. *See* Dana Dillon, *Maritime Piracy: Defining the Problem*, XXV SAIS REV. 155, 157 (2005).

231. *See* Julian Clark, *Charter Terms Develop to Address Increased Piracy Risks*, HFW BULLETIN: COMMODITIES (Apr. 2, 2009), http://www.mondaq.com/article.asp?articleid=76858.

232. Baltic & Int'l Mar. Council (BIMCO), *Piracy: Where Do You Stand Contractually?*, General News (Dec. 15, 2008).

233. *See* Athens Mar. Enters. Corp. v. Hellenic Mut. War Risks Ass'n ("The Andreas Lemos"), [1983] Q.B. 647 (Bermuda) (giving an example of a marine insurance policy contract).

234. *See* Kawasaki Kisen Kabushiki Kaisha v. Bantham Steamship Co. (No. 2), [1939] 2 KB 544; Republic of Bolivia v. Indemnity Mutual Mar Ass Co. [1909] 1 K.B. 785, 790.

which have proved of limited assistance in certain circumstances.[235] This emerging tendency fails to uphold certainty in the law as it generates competing interpretations of similar terminologies drafted solely for the purposes of advancing private, as opposed to public, legal interests. This interpretive nature of contractual development, leading to varying interpretations in court cases, has further undermined the consistency in interpretation and implementation of piracy law. In addition, the contractual development of legal constructs, such as piracy, lacks the democratic legitimacy and coherence found in a centralized legislator.

4. Case Study: England

In dualist states such as the United Kingdom, the courts regard international and domestic law as separate legal systems, and international law does not automatically apply within the English legal system. Usually Parliament must enact a statute adopting international law for that law to apply domestically.[236] This is, of course, different from customary international law, which is applicable as general practice accepted by law.[237] UNCLOS was incorporated into English law by the Merchant Shipping and Maritime Security Act 1997 (MSMSA).[238] SUA was incorporated into English law by the Aviation and Maritime Security Act 1990 (AMSA).[239] The Piracy Act of 1837[240] at one time specifically criminalized piracy under English law but was effectively superseded by the MSMSA. The latter, however, inherited all the deficiencies of the UNCLOS regime, including its limitation of piracy to the high seas. Piracy in British territorial waters is therefore treated as a domestic offence, such as robbery, pursuant Section 2 of the Territorial Waters Jurisdiction Act 1878.

In the commercial-contractual context, English courts have restricted the freedom to contract vis-à-vis piracy to some degree. An example of this occurs with the courts' interpretation of liberty clauses, which are contractual provisions enabling the vessel to deviate course under specific grounds. When

235. Anna Wollin Ellevsen, *A Contractual View on Piracy*, 9 SHIPPING & TRADE L. 1, 1-3 (2009).

236. *See generally* Philip Sales and Joanne Clement, *International Law in Domestic Courts: the Developing Framework*, 124 L.Q. REV. 388 (2008).

237. In the context of customary international law, *see Trendtex Trading Corporation Corp. v. Central Bank of Nigeria*, 2 [1977] 2 W.L.R. 356 1977 (C.A.), 365 ("Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.")

238. Merchant Shipping and Maritime Security Act, 1997, c. 28 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1997/28/contents.

239. Aviation and Maritime Security Act, 1990, c. 31 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1990/31/contents.

240. Piracy Act, 1837, 7 Will. 4 & 1 Vict., c. 88, § 2 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/Will4and1Vict/7/88/introduction?view=extent.

interpreting liberty clauses, English courts prefer clauses that are specific rather than general. The courts are therefore willing to enforce liberty clauses in cases of piracy if "piracy" is stated as a specific ground.[241] This provides a solution for those cases where a ship deviates course to avoid an unforeseen act of piracy, thereby incurring added costs it wishes to recover from its insurer.

Additionally, the international Hague-Visby Rules further restrain freedom of contract.[242] These provide that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . perils, dangers and accidents of the sea or other navigable waters [or a]ny other cause arising without the actual fault or privity of the carrier . . . ."[243]

In the context of cases arising over insurance claims, English courts have considered both the geopolitical and commercial issues that arise in modern piracy when reaching their judgments.[244] In so doing, they have sought to provide a degree of certainty to the shipping industry, whose business arrangements have been affected by foreseen and unforeseen acts of piracy.[245]

Ironically, in seeking certainty, the English courts have introduced uncertainty into the picture. The leading English case that considered the scope of an alleged act of piracy under a marine insurance policy concerned the vessel *Andreas Lemos*.[246] In *The Andreas Lemos*,[247] the court considered a marine insurance claim arising from an incident where a vessel owned by the plaintiff was attacked by armed men while anchored in the Chittagong Roads within the territorial waters of Bangladesh. The officers and crew of the vessel successfully repelled the attackers by firing pistols and rockets. The vessel owners claimed against the insurers for loss of materials and equipment by piracy. The insurers denied liability as the attack occurred in territorial waters and could not, they argued, constitute piracy. The court disagreed with the insurers' argument and established that *in the context of a marine insurance policy*, a private contract, there was no reason to limit acts of piracy to acts committed on the high seas.[248] The court reasoned:

> [I]n the context of an insurance policy, if a ship is, in the ordinary meaning of the phrase 'at sea' . . . or if the attack upon her can be described as a 'maritime

241. Williams, *supra* note 226, at 344.

242. Protocol To Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading Signed In Brussels on 25 August 1924, Brussels, Feb. 23, 1968, 51 Stat. 233, 1412 U.N.T.S. 128 [hereinafter "Hague-Visby Rules"].

243. *Id.* art. IV, rule 2 ¶¶ (c), (f), (q); *see also* STEPHEN D. GIRVIN, CARRIAGE OF GOODS BY SEA, 272, n. 100 (Oxford University Press, 2007) ("Seagoing pirates have been held to be a 'peril of the seas.'").

244. Keith Michel, *War, Piracy and Terror: the High Seas in the 21st Century*, 12 J. INT'L MAR. L. 313, 317 (2006).

245. *Id.* at 316-18.

246. *Athens Mar. Enters. Corp.*, [1983] Q.B. 647 (Bermuda).

247. *Id.*

248. *Id.* at 490 (Staughton, J.).

> offence' . . . then for the business purposes of a policy of insurance she is . . . in a place where piracy can be committed.[249]

In the insurance context then, the court broadened the definition of piracy given under UNCLOS and enacted into English law by the MSMSA to beyond the high seas. Thus, in following *The Andreas Lemos*, it appears that English common law might recognize piracy against vessels in ports, docks, estuaries, and rivers.[250] The key would be proving that the attack was a "maritime offense." There is no clarity, however, as to what constitutes a maritime offense. The *Andreas Lemos*[251] also established further common law rules about the nature of piracy, holding that "theft without force or threat of force" is not piracy for the purposes of marine insurance policies.[252]

The decision in *The Andreas Lemos,*[253] however, cannot be easily reconciled with the decision in *The Republic of Bolivia.*[254] The effect of the Court of Appeal's decision in *The Republic of Bolivia*[255] is that piracy under a marine insurance policy is to be construed as piracy under what is now prescribed under UNCLOS, and thus does not include robbery on a river.[256] Indeed, the court confined piracy to incidents occurring in "the ocean." On closer analysis, however, it appears that the *ratione decidendi* in *The Republic of Bolivia*[257] was that piracy must be committed for private ends. In other words, it was the "private ends" proviso that was the decisive factor in the case. Thus, the Court of Appeal's confinement of piracy to "the ocean" was arguably decided *obiter*, given Lord Justice Vaughan Williams' admission that he wished to make the point only for himself, as the court did not need to decide the question of where the piracy was committed.[258]

Lord Justice Vaughan Williams further emphasized the distinction between piracy under international law and piracy under a marine insurance policy. The latter, His Lordship argued, must bear "a popular or business meaning."[259]

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249. *Id.*

250. *See also* Bayswater Carriers Pte. Ltd. v QBE Insurance (International) Pte. Ltd., [2005] SGHC 185 (Singapore) (holding that an act of piracy can occur within territorial waters *or* on the high seas).

251. [1983] Q.B. 647.

252. *Id.* at 659. (Staughton, J.).

253. *Id.*

254. [1909] 1 K.B. 785.

255. *Id.*

256. Thomas, *supra* note 220, at 366.

257. [1909] 1 K.B. 785.

258. *Id.*

259. *Id.* at 791-92 (Vaughan Williams L.J.) ("Such an act may be piracy by international law, but it is not, I think, piracy within the meaning of a policy of insurance; because, as I have already said, I think you have to attach to piracy a popular or business meaning, and I do not think, therefore, that this was a loss by piracy." (quoting Pickford, J.)); *see also id.* at 790 (Pickford, J.) (noting the first instance in *The Republic of Bolivia* that "[O]ne has to look at what is the natural and clear meaning of the word 'pirate' in a document used by businessmen for business purposes; one must

Kennedy L.J. echoed the distinction in the same case, where His Lordship noted:

> The authorities show that the word "piracy" is one capable of various shades of meaning, and that, even when used strictly as a legal term, it may be held to cover *different subject-matters* according as it is considered from the *point of view of international or that of municipal lawyers*.[260]

In conclusion, it appears that English courts will construe piracy on a case-by-case basis. Precedent, however, indicates that courts are willing to give piracy a broader definition than provided under international law, as was the case in *The Andreas Lemos*.

Readers should be mindful that U.K. courts have construed piracy more liberally than their international counterparts. To give an example, the Privy Council decided in 1934 in *In re Piracy Jure Gentium* that "a frustrated attempt to commit pirate robbery is equally piracy jure gentium."[261] By contrast, the U.S. District Court for the Eastern District of Virginia decided that "actual robbery" is an essential element of piracy under U.S. law, and it refused to consider attempted robbery as piracy.[262] By comparison, as previously noted, UNCLOS does not explicitly mention attempted piracy in any of the articles in which piracy is considered. This demonstrates, once again, the dualistic nature of piracy law between international and national realms,[263] as well as between states themselves, highlighting the need for greater synergy in the fabric of the law.

V.
PROBLEM-SOLVING: AFFIRMATIVE PROPOSALS FOR ACHIEVING LEGAL UNIFORMITY

The absence of a uniform and holistic approach to combat piracy on an international level has resulted in a lack of harmony, coherence, and effectiveness between and among the international and domestic legal orders. As this article has shown, often international and domestic laws work at cross-purposes to one another in the area of piracy, so that it is extremely difficult for countries to actually bring pirates to justice. This potpourri of laws therefore enables piracy to thrive. This in turn detrimentally affects the shipping and

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attach to it a more popular meaning, the meaning that was given to it by ordinary persons, *rather than the meaning to which it may be extended by writers on international law*") (emphasis added).

260. *Id.* at 802 (Kennedy L.J.) (emphasis added).

261. [1934] A.C. 586 (P.C.) 586.

262. *United States v. Said*, No. 2:10cr57, 2010 WL 3893761, at *2047 (E.D. Va, Aug. 17, 2010) at 11; *but see Hasan*, 2010 U.S. Dist. LEXIS 115746, at *99 (noting that "[a]s of April 1, 2010, the law of nations, also known as customary international law, defined piracy to *include* acts of violence committed on the high seas for private ends *without an actual taking*") (second emphasis added).

263. *See* Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 N.W. L. REV. 149, 166 (2009) ("[I]n addition to piracy under the law of nations, different nations made diverse offenses 'municipal' or 'statutory piracies.'").

tourism industries, has the potential to increase the cost of commodities and insurance premiums, and occasionally has a devastating impact on people's lives. Uniformity allows commercial entities to adequately plan their business strategy, insurance providers to properly devise their policies, and law enforcement agencies to synchronize their activities. The issue then is, what is the best way to encourage uniformity in piracy law.

One alternative for encouraging uniformity might be expanding the use of universal jurisdiction. Universal jurisdiction allows any state to prosecute and try international crimes "without any territorial, personal, or national-interest link to the crime in question."[264] But universal jurisdiction in this sense typically applies to "core international crimes" such as crimes against humanity, genocide, torture, and war crimes.[265] Nor is universal jurisdiction universally recognized. Some states have passed legislation authorizing their courts to employ universal jurisdiction.[266] But a recent survey by Máximo Langer of the use of universal jurisdiction for the core international crimes since 1961 indicates that of 1,051 possible defendants, "only 32 have been brought to trial."[267] Piracy was not included in the study.

The doctrine of universal jurisdiction provides that any nation *can* try pirates it captures *on the high seas*.[268] As this article has shown, a system of law governing piracy *solely* in the high seas is of limited value.[269] In the absence of uniform municipal antipiracy laws, it is arguable that the doctrine of universal jurisdiction actually inhibits the development of uniform principles of law as it grants the arresting nation the freedom to try the pirate according to their domestic laws.[270]

Another alternative for encouraging uniformity would be through the development of customary international law, which consists of "general practice accepted as law" by all states.[271] But there are legitimacy problems associated with relying on customary international law because there can be disagreement among states about what exactly the custom is, since custom is continually evolving and is not a codified body of law.[272] An international convention such

264. Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 1 (2011).

265. *Id.*

266. *Id.* at 2.

267. *Id.* at 7.

268. Kontorovich (Guantanamo), *supra* note 30.

269. *See* Kontorovich and Art, *supra* note 141.

270. UN SCOR Report of the Secretary General *supra* note 41, Part III (A)(12) ("Universal jurisdiction is 'permissive', which means that States are entitled to exercise jurisdiction, but are not obliged to do so.").

271. *See generally* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945).

272. At least one court has argued that UNCLOS embodies international customary law. *Hasan*, 2010 U.S. Dist. LEXIS 115746, at *99.

as a treaty, however, would be hard evidence demonstrating states' consent to submit to new developments in international piracy law. Further, a number of scholars argue that customary international law is secondary to "international conventions . . . establishing rules expressly recognized by the contesting states."[273] Thus, wherever existing international law such as UNCLOS or the SUA conflict with emerging custom, the former should be controlling. This would impede any attempt by customary international law to extend UNCLOS' geographic restriction of piracy to the high seas.

A third alternative for encouraging uniformity in international piracy law would be to create a protocol for piracy law, or a treaty supplementing an existing treaty like UNCLOS or SUA. The problem with creating a protocol rather than a treaty is that protocols typically amend or add provisions to a parent agreement. The scope of a protocol is thus limited by the original purview of the parent agreement. Signatories to the parent agreement would not, under international law, be bound by the protocol. Finally, a protocol on piracy law would indicate that the problem is not serious enough to merit a new treaty, thus undermining the impact of the instrument *ab initio*.

The best alternative for encouraging uniformity is to develop a comprehensive body of international piracy by way of a treaty. The author argues that the Treaty's central objective could be stated as follows:

> To reform the international legal order by creating a body of international maritime piracy law *sui generis*,[274] capable of enforcement under the aegis of a specialized Court, which reflects the international nature of modern piracy and the need to achieve legal uniformity across States, whilst promoting regional and international co-operation to accomplish those objectives.

A treaty would clearly communicate that piracy is a problem that states take seriously and it would clarify which laws states wanted to submit to for governing this problem. A treaty could also close the legal loopholes, fill the legal voids, and encourage harmonization between and among international and domestic piracy laws. Moreover, aside from including provisions that specifically encourage harmonization, a treaty could provide a new model for states to follow in their domestic treatment of piracy. Other advantages of treaties are that they articulate specific global norms, promote a framework to

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273. Statute of the International Court of Justice, *supra* note 270, art. 38, ch. 2; *see* M.E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES, A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 35 (1985) ("[S]ome authorities maintain that Art. 38, by mentioning treaties before customary law, embodies at least the *lex specialis* rule, or it established a sequence of the factual importance of the sources, and of the relative ease of the ascertainment of the respective rules.").

274. *See* SS Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 70 (Sept. 7) ("Piracy ... in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offense against the law of nations; and as the scene of the pirate's operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind - *hostis humani generis* - whom any nation may in the interest of all capture and punish.").

recognize compliance with such norms, establish enforcement mechanisms, provide a benchmark for measurement of progress, and provide criteria to guide contracting parties' activities and legislation.[275]

Although this article will neither attempt to embellish nor particularize the form of such a treaty, it will set out a general framework, providing a basis on which further work can be carried out. Specifically, the treaty should address potential legal and practical reforms. Legal reforms are needed in two particular areas: (a) the substantive law (the legal definition of piracy) and (b) judicial mechanisms for handling piracy (such as the creation of specialized regional judicial forums).[276] In terms of practical reforms, the convention should address three issues: (a) regional cooperation; (b) Somalia-based support; and (c) shipping industry best practices.

To date there has been "no unified pressure from national governments for a new *international* convention on the subject."[277] This may be because achieving uniformity in international piracy law is an ambitious project. It would most certainly engender initial disagreements over the proper balance between more latitude for apprehending pirates and notions of state sovereignty, as well as preferences for flexibility in local policy. Additionally, the fact that piracy is a crime[278] complicates the standardization of domestic laws in this area, as criminal law tends to reflect the social, religious, institutional,[279] and political norms of a state.[280] States may have been reluctant to negotiate a new agreement because they do not yet perceive current piracy incidents as sufficiently serious to create momentum for a new international convention.[281] Finally, negotiating a new international treaty is time-consuming.[282]

Nevertheless, piracy incidents are sufficiently serious to merit the consideration of a new treaty, and one that is solely focused on sea piracy and is capable of encompassing the contemporary characteristics of the crime. The significant cost to the world economy and human life outweighs concerns about time, expense, and other hurdles inherent in the international legal process.

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275. This situation may be compared to that of the non-proliferation of nuclear weapons. *C.f.* NICOLE DELLER ET AL., RULE OF POWER OR RULE OF LAW? XIIII (2003).

276. *See* UN SCOR Report of the Secretary General, *supra* note 41.

277. Frank Wiswall et al., *Report of the Joint International Working Group: Piracy*, COMITÉ MARITIME INTERNATIONAL, 209 Yearbook 2001 Annuaire, http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf.

278. S.C. Res. 1918, supra note 3 (calling on states to criminalize piracy under domestic law).

279. *See* UN SCOR Report of the Secretary General, *supra* note 41, Part III(C) ¶ 18 (noting that national courts sentence pirates according to their "own traditions"); *and see* Kontorovich (Equipment Articles for Prosecution), *supra* note 94, at 6 ("[I]nternational law leaves much of the secondary aspect of criminal law – rules about conspiracy, attempts, evidence and rules of procedure – to the discretion of national legislation.")

280. *But see* UN SCOR Report of the Secretary General, *supra* note 41, Part III(C) ¶ 18 (affirming that legal systems tend to accord an appropriately serious penalty to the crime of piracy).

281. Murphy, *supra* note 9, at 179.

282. *See, e.g.,* Mejia and Mukherjee, *supra* note 31, at 322.

Indeed, the international maritime community has recognized that, at the very least, UNCLOS's piracy provisions require reform.[283] Further, the European Union's Committee on Legal Affairs and Human Rights has noted that: "the international law framework needs to be modified if it is to serve modern needs effectively."[284] To the extent that piracy incidents continue to increase in frequency and severity, as with the recent deaths of American sailors, this may place more pressure on states to negotiate a new agreement pertaining to piracy. In order to save time and build momentum, the treaty should be promoted by an established international organization such as the UN's IMO.

A. Legal Reform

1. Substantive Aspects of an International Maritime Piracy Treaty

First, the proposed treaty (hereby called the United Nations Treaty Against Maritime Piracy, or 'UNTAMP') should create a new definition of piracy that is broader and more inclusive than the existing definition under UNCLOS. To this end, the new definition of piracy must focus on the act of conversion or theft of a vessel (or of its cargo), and not motivations for that theft. This would clarify that any conversion or theft is an act of piracy, whether conducted for private, political, or ideological ends. The new definition should also broaden the geographic range in which piracy may be committed to include those acts occurring in territorial waters.[285] If this is too broad, it should be recognized in at least those territorial waters that are common international shipping lanes, as specified in the treaty. Alternatively, piracy might be recognized in territorial waters under a limited set of conditions. Similarly, UNCLOS's implicit two-ship requirement should be clearly abolished so that a ship's internal seizure also constitutes piracy.

Second, other aspects of piracy should be criminalized. Thus, UNTAMP should contemplate a framework for criminalizing inchoate offenses, such as the solicitation to commit an act of piracy and conspiracy to commit piracy. This would provide a stronger net for effectively prosecuting pirates, and it might give wider berth for apprehending would-be pirates floating on the high seas or in territorial waters waiting for a target. Similarly, UNTAMP should recognize the offense of attempted piracy. That way pirates that are repelled can be pursued and apprehended. Finally, the treaty should suggest that courts consider aggravating factors when sentencing, such as kidnapping for ransom, injury to

283. *Id.*

284. *The Necessity to Take Additional International Legal Steps to Deal with Sea Piracy, Report of the Committee on Legal Affairs and Human Rights*, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY (Apr. 6, 2010), http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12194.htm [hereafter "Necessity of Additional Steps"].

285. Madden, *supra* note 116, at 141.

crew or passengers, and property damage to the vessel and cargo.

Third, UNTAMP should provide states with better tools to apprehend, prosecute and imprison pirates. To this end, the treaty should authorize reverse hot pursuit such that states pursuing pirates on the high seas may enter the contiguous zone, Exclusive Economic Zone, and territorial waters of the coastal state for the purpose of apprehension.[286] Requiring prior consent from the coastal state is unadvised, as this would weaken the flexibility of navies and their ability to act decisively when capturing pirates. Correspondingly, the state that enters the territorial waters of another country to apprehend pirates should be authorized to assert jurisdiction over the crime in domestic courts, thereby retaining and extending UNCLOS's grant of universal jurisdiction to states for the crime of piracy. For those states that do not have the capacity to prosecute the pirates they have apprehended, UNTAMP could establish a specialized regional or international judicial forum for such prosecutions, as argued below. This would require a corresponding provision for the imprisonment of pirates convicted by the regional or international judicial forum, for example by mandating that states enter regional agreements for this purpose.

To the extent that piracy is prosecuted in domestic courts, the treaty should leave sentencing to the discretion of states. But to the extent that states rely on regional or international forums to prosecute pirates, the treaty should set forth sentencing guidelines for such forums. These might also act in a dual capacity as suggested guidelines for states adopting or reforming sentencing guidelines. Of course, UNTAMP should recognize that piracy is also subject to international human rights law, such as a right to a fair hearing. This would encourage states to guarantee pirates' basic human rights anywhere in the world.[287] If possible, the treaty should permit states to refuse asylum status to convicted pirates. This would resolve a current problem faced by some countries, such as Denmark and the Netherlands, and would eliminate any incentives for individuals to utilize piracy as a fast track to asylum status.

Fourth, the treaty ought to establish or direct that states establish information centers to coordinate and streamline global incident reporting and other data relevant to the suppression of piracy. UNTAMP could absorb current regional efforts at creating information centers and provide for a central coordination of information, thereby maximizing the availability of data to all participating states. Such data is important for developing an accurate understanding of the magnitude of the piracy problem. This could in turn facilitate the design of constabulary strategies that are more efficient and can be rolled out faster in response to pirates' shifting tactics.

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286. *See* Necessity of Additional Steps, *supra* note 283, ¶ 93 ("Adoption of a new treaty on policing at sea, based on agreed mechanisms for obtaining any necessary flag or coastal state consent, is a possibility.").

287. The human rights suggested herein would be narrow, e.g., the right to a fair trial, since a broad construction of human rights would include rights like freedom from the death penalty, which would challenge many jurisdictions.

Finally, UNTAMP could render ransom payments illegal under international law. This point is supported by Professor John Norton Moore, of the Virginia University School of Law, who suggested that the IMO develop a new treaty requiring countries to make the practice of payment of ransom illegal.[288] As Kraska notes, "although this would not stop all payment of ransom, it would make it easier for ship owners to decline payment for hostages, reducing the benefits that pirates expect for their crimes."[289] The logic here is to eliminate the fundamental motivations of the crime by removing the *economic incentive* to commit piracy.

2. An International Piracy Court

Successful investigation and prosecution not only requires a statutory basis for effective prosecution, enforcement, and, if necessary, extradition procedures, but also functioning judicial institutions. In a number of critical cases concerning Somali pirates, such procedures have been found lacking.[290] For this reason, UNTAMP should seriously consider establishing a new court, imbued with investigative powers, to try pirates.

The idea for such a court has already been debated in the Somali context,[291] and so it makes sense to discuss the conversation in brief here.[292] In particular, Russian President Dmitry Medvedev has called for creating an international court to try Somali pirates.[293] But there has been strong opposition from the U.S., U.K., and other states that are active in counter-piracy efforts.[294] This is because such tribunals take a long time to set up, are very expensive to run, and their trials often last for years.[295] Given the high cost of piracy, reaching into the billions,[296] including increasing ransom payments, it would be cheaper to "pool funds for a common cause once than to continue to suffer huge

288. John Norton Moore, Toward a More Effective Counter-Piracy Policy, at the Booz Allen Hamilton Maritime Piracy/Counter Piracy Workshop (Jun. 12, 2009) *in* James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197, 216 n. 76 (2009).

289. Kraska, *supra* note 287.

290. Michel, *supra* note 243, at 317.

291. *See* Waterfield, *supra* note 209.

292. Spain proposed this solution. *Somali Pirates Will Be Prosecuted by an International Anti-piracy Tribunal*, SPANISH REVIEW, Dec. 9, 2010, http://www.spainreview.net/index.php/2010/12/09/somali-pirates-will-be-prosecuted-by-an-international-anti-piracy-tribunal/.

293. *Medvedev Calls for Creating International Court for Sea Pirates*, MARITIME CONNECTOR, Jul. 14, 2009, http://www.maritime-connector.com/NewsDetails/4255/lang/English/Medvedev-calls-for-creating-international-court-for-sea-pirates.wshtml.

294. The United States opposes an international court of maritime piracy. Andrei Ptashnikov, *USA Is Against International Piracy Court*, THE VOICE OF RUSSIA, Dec. 8, 2010, http://english.ruvr.ru/2010/12/08/36456887.html.

295. John Knott, *Somalia, the Gulf of Aden, and Piracy: An Overview, and Recent Developments*, HOLMAN FENWICK WILLAN (2009), www.hfw.com/articles.

296. *See* Bowden, *supra* note 56.

losses every year."[297]

The UN Secretary General also appears to support the idea of a better forum or forums for handling Somali pirates. In July 2010, it produced a report (hereafter "the Report") on "options to further the aim of prosecuting and imprisoning [Somali pirates]."[298] The Report produced seven options for the Security Council's consideration, which are as follows.

The first option of the Report recommends the enhancement of United Nations assistance to build capacity of regional states to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. This is already in progress, as the UN Office on Drugs and Crime has provided concrete assistance to both Kenya and the Seychelles for exactly this purpose.[299] The second option proposes the establishment of a Somali court sitting in the territory of a third state in the region (like in the Gulf of Aden),[300] either with or without the assistance of the United Nations.[301] However, identifying a regional state willing and able to provide the facilities for hosting a Somali court may present challenges because assistance to the Somali court under this option would not benefit the host state's criminal justice system. On a positive note, this option may enable Somalia to play a role in the solution to the problem of piracy and engineer the capacity building of the Somali judicial system, thereby contributing to strengthening the rule of law in that country.[302] Alternatively, the Report suggested, as its third and fourth option, the establishment of a special chamber within the national jurisdiction of a state or states in the region, with[303] or without[304] United Nations participation.

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297. Ptashnikov, *supra* note 293.

298. *See* S.C. Res. 1918, *supra* note 3, ¶ 4 (providing a legal basis for this argument insofar as it:

> *Requests* the Secretary-General to present to the Security Council within 3 months a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the CGPCS, the existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results.)

299. *See* COUNTER PIRACY PROGRAMME: SUPPORT TO THE TRIAL AND RELATED TREATMENT OF PIRACY SUSPECTS, UNITED NATIONS OFFICE ON DRUGS AND CRIME (Feb. 2011) http://www.unodc.org/documents/easternafrica//piracy/20110209.UNODC_Counter_Piracy_February_Issue.pdf.

300. *See also* Butcher, *supra* note 130, at 10 (calling for "a specialized international anti-piracy . . . preferably in Africa and associated with the African Union").

301. Sixth Plenary of the CGPCS, *supra* note 6, at 3 (noting that France proposed locating "a special Somali Court relocated [in] a State in the region, with international support").

302. UN SCOR Report of the Secretary General, *supra* note 41, at 3.

303. *See id.* (Option 3).

304. *Id.* (Option 4).

The fifth, sixth, and seventh options are more in line with this author's argument. The fifth option considers the establishment of a regional tribunal on the basis of a multilateral agreement among regional states, with United Nations participation. This option would require a multilateral treaty to be negotiated among regional states, ideally Somalia. The UN would assist the creation of the tribunal with input and advice by UN judges, prosecutors, and staff. The benefit of this option includes capacity building for the participating regional states, proximity for the purpose of the transfer of suspects by patrolling naval states and the transfer of those convicted to third states for imprisonment. The drawbacks include the need to establish the jurisdiction of a new tribunal, time, and costs.[305]

The sixth option suggests the establishment of an international tribunal on the basis of an agreement between a state in the region and the United Nations. This option would require an agreement between the United Nations and the state concerned to establish an international tribunal with both UN and national components. As the Report notes, "the practice has been to establish such tribunals with United Nations selected judges in the majority."[306] However, there may be challenges associated with the establishment of a tribunal with Somalia at present as the latter's institutional standards[307] are likely inadequate. If the host state were Kenya or Seychelles, the tribunal would benefit from the host State's growing and existing expertise and resources. The costs and benefits mirror those of the fifth option.[308]

While all of these would be positive steps, none of these options is equivalent to a truly international court, which would enable the prosecution of any pirate no matter where the act of piracy occurred. An international court for all incidents of piracy is valuable because piracy occurs in places other than the Gulf of Aden and the Indian Ocean. Indeed, as briefly discussed above, piracy is becoming a serious problem in South Asia too.[309]

Thus, the seventh and last option recommends the establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations. Such a tribunal would consist of entirely United Nations selected judges, prosecutors and staff, and may be located in a region other than the Gulf of Aden. The tribunal could nonetheless incorporate a regional component by including judges from the region, including Somalia.

The benefits of this option are that it: (1) holds greater capacity than a special chamber within a national jurisdiction and (2) the Security Council is

305. *Id.*

306. *Id.*

307. *See* S.C. Res. 1918, *supra* note 3 (the Preamble states: "*Stressing* the need to address the problems caused by the limited capacity of the judicial system of Somalia and other States in the region to effectively prosecute suspected pirates.").

308. UN SCOR Report of the Secretary General, *supra* note 41, at 4-5.

309. *See* Sakhuja, *supra* note 134.

able to require the cooperation of third states with the tribunal through its resolution under Chapter VII. The shortcomings of this final option include higher costs, especially if the tribunal is not located in the region. Costs might be incurred if a suspect was apprehended far from the tribunal, and then again, if the convicted pirate were transferred back to a prison in the region where the act of piracy was committed. A possible solution to the proximity issue is to establish different branches of the international tribunal in the most piracy prone areas of the world, under the auspices of the United Nations.

The establishment of an international tribunal raises a number of issues, a detailed treatment of which is beyond the scope of this paper. The following few paragraphs will discuss these issues in brief, however, to give the reader an idea of what these issues are and how they might be resolved. The issues primarily include sovereignty and funding issues.

With regards to the sovereignty issue, an international tribunal impinges on the "primacy-complementarity" dilemma. The principle of primacy dictates that an international court has supremacy over domestic courts, whereas the principle of complementarity allows that state courts complement international law by providing for domestic prosecution of international law crimes.[310] Primacy would be valuable because it is the best way to ensure uniform common law development and standardization in the application of the new body of piracy law as codified in the treaty. But complementarity provides a more realistic platform in the present international legal order. One way around this problem might be to grant the international piracy court "primacy over national jurisdictions" on the issue of piracy broadly or for a specified subset of piracy incidents.[311] Another way around it might be for countries to be allowed to unilaterally grant or revoke their acceptance of the international court's primacy. But in light of national sovereignty concerns and the current trend in international criminal law, complementarity may be the only available option.[312] As such, the new tribunal would have jurisdiction only if there were no state willing and able to investigate and prosecute.[313]

With regards to funding issues, an international court would depend on financing from a number of states and/or organizations. The issue is a complex one because some states may argue that as they are rarely affected by piracy they should not be required to make disproportional contributions to funding a court from which it will seldom derive benefit. Such an argument is flawed,

310. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the Int'l Criminal Court*, 167 MIL. L. REV. 20, 23, 26 (2001).

311. UN SCOR Report of the Secretary General, *supra* note 41.

312. *See* Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998). Article 1: "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and *shall be complementary to national criminal jurisdiction.*" (emphasis added).

313. UN SCOR Report of the Secretary General, *supra* note 41.

however, because a state cannot predict with precision whether it, or its citizens, will be affected by piracy. Further, as an international crime, piracy is likely to affect a number of states simultaneously. Accordingly, a specially designated fund should be created with contributions required from all signatory states to UNTAMP, as well as voluntary contributions from industries and organizations with a vested interest in suppressing piracy (e.g., protection and indemnification clubs, shipping associations, oil companies).

B. Practical Reform: Promoting Security

At the practical level, solutions should essentially focus on the promotion of three aspects of security: (a) regional cooperation, (b) Somali-based support, and (c) shipping industry best practices. Cooperation between states is crucial to resolving the piracy problem, particularly in the areas of crime investigation, constabulary action, and punishment. Somali piracy is unique because it is rooted in a country that lacks any effective national administration. To this end, the suppression of piracy off the coast of Somalia ultimately depends on the country's political reform.[314] In the meantime, ship owners can also employ a number of mechanisms to protect their vessels from piratical attacks. This section of the paper will accordingly provide an overview of how UNTAMP might facilitate the implementation of shipping industry best practices.

1. Regional Cooperation

The enhancement of international and regional cooperation is fundamental to achieving global maritime security.[315] As John Knott, a consultant on piracy law at Holman Fenwick Willan LLP argues, "[T]he benefits of international cooperation are becoming visible in some parts of the world and with increasing evidence of the willingness of naval forces to intervene when piracy occurs."[316] However, a key obstacle to regional cooperation is that "the desire for change, particularly if it requires the reordering of national priorities, has to be driven internally. Defeating [piracy] requires an honest, effective, and determined police and criminal justice system." [317] To this end, in its Sixth Plenary Meeting the members of the CGPCS have agreed that: "It is . . . of paramount importance to continue to enhance international cooperation in finding ways and means to

314. I do not explore the point in great detail here, but an alternative to accelerate political reform in Somalia would be to categorically accept that it is an invariably failed state and thus recognize Somaliland and Puntland as independent states.

315. Maurizio Moreno, President, International Institute of Humanitarian Law, Introductory Address at the Addressing the Resurgence of Sea Piracy: Legal, Political and Security Aspects Conference (June 16, 2009), *available at* http://www.iihl.org/iihl/Documents/Ambassador%20Speech%20PIRACY.pdf.

316. John Knott & Toby Stephens, *Piracy and Terrorism at Sea*, HOLMAN FENWICK WILLAN (2008), http://www.hfw.com/articles.

317. Murphy, *supra* note 9, at 174.

address piracy attacks in an effective manner."[318] Cooperation will need to continue in three main areas: piracy investigations, constabulary enforcement, and prosecution and sentencing of pirates.[319] UNTAMP could set out a framework for states to cooperate in these respects.

a. Investigatory Efforts

There is a need for stronger investigations into pirate activities. In order to assist domestic criminal agencies in the detection of piracy activity, including the identification of land-based networks, states must share information about pirates and their organizations, if any, centralize the reporting of piracy incidents, and investigate pirates' funding sources. In this context, "tracing of funds used to finance piracy attacks including the tracking of ransom payments continues to remain a significant part of a broad anti-piracy strategy."[320] In its Sixth Plenary Meeting, the CGPCS encouraged nations and international organizations to tackle this problem "in a proactive way" and urged "close cooperation among competent national authorities of Participating States and INTERPOL in fulfilling this task."[321] In January 2010, the IMO issued a Code of Practice urging states to investigate all acts of piracy and armed robbery against ships under their jurisdiction, as well as to report to the IMO pertinent information on all investigations and prosecutions relating to these acts.[322] In a similar vein, the Djibouti Code of Conduct established a center for gathering information on pirate incidents. Thirteen nations have signed the Code, including Somalia, Yemen, Kenya, and the Seychelles.[323] As noted earlier, ReCAAP also provides for information sharing between Asian states. However, a one-stop international reporting center is needed to enable states to fully understand the global nature of piracy.[324]

b. Constabulary Action

Signatories to UNTAMP will have to promote constabulary action at both domestic and international levels. To this end, the current ad hoc naval operation in the Gulf of Aden and Indian Ocean will have to continue until states adopt a definitive legal framework to combat piracy or, in the case of Somalia, an

318. Sixth Plenary of the CGPCS, *supra* note 6, at 1.

319. *See* IMO, *Code Of Practice For The Investigation Of Crimes Of Piracy And Armed Robbery Against Ships*, A 26/Res.1025, 18 January 2010 [hereafter "IMO Code of Practice"].

320. Sixth Plenary of the CGPCS, *supra* note 6, at 5.

321. *Id.*

322. IMO Code of Practice, *supra* note 318, at 2.

323. *Saudia Arabia Signs Djibouti Anti-Piracy Code,* MARITIME EXECUTIVE, Mar. 11, 2011, http://www.maritime-executive.com/article/saudi-arabia-signs-djibouti-anti-piracy-code/

324. See the International Maritime Bureau's twenty-four hour piracy reporting center as a potential model at http://www.icc-ccs.org/home/piracy-reporting-centre.

effective land-based solution emerges in the country. Further, major maritime states should promote cooperation for training local coast guards and providing of patrol craft, thus shifting responsibility for counter-piracy to the states of the neighborhood.[325]

Another possible constabulary action is for a coalition of states to adopt an "ink blot strategy" for pirate-generating regions.[326] The British in Malaya first successfully used this strategy against communism.[327] There, the British enhanced the living conditions in communist regions, such that the locals no longer wished to fight against the British troops. They then expanded the areas of wellbeing out "like ink blots."[328] In Somalia, the inkblot strategy might combine social improvement projects in local towns with the capture and detention of pirates by local law enforcement.[329] Unfortunately, the inkblot strategy might be difficult to effectuate given the Somali state's ineffectiveness.

c. Prosecutorial and Sentencing Cooperation

In the absence of an international piracy tribunal, bilateral or multilateral agreements with states like Kenya to prosecute regionally captured pirates provide a temporary workable solution in the implementation of international legal norms.[330] The country's limited resources in this area preclude it from providing a permanent solution to the piracy problem in the region. Kenya's institutions are currently burdened by a plethora of cases, which will inevitably cause an overload, backlog, and inefficiencies in the Kenyan legal system, hindering piracy trials.

Denmark, Oman and other countries have stated: "[D]eveloping standard rules for arrest, detention and criminal prosecution of pirates is the most pressing issue for suppressing piracy."[331] This concern was also expressed in the Preamble to UN Security Council 1918, which affirmed "that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermine[s] international anti-piracy efforts."[332] UNTAMP should therefore provide for a general framework for the arrest, expatriation, prosecution, and imprisonment of pirates.

325. Kraska, *supra* note 287, at 142.

326. Butcher, *supra* note 130, at 10.

327. *Id.*

328. *Id.*

329. *Id.*

330. Gopalan and Switzer, *supra* note 145.

331. Kraska and Wilson, *supra* note 207.

332. S.C. Res. 1918, *supra* note 3, Preamble.

2. Somalia-Based Support

Law cannot be divorced from politics.[333] Historical analysis demonstrates how "the surest way to create peace at sea is to impose the rule of law on the lands where the pirates hid."[334] This requires the sufficient galvanization of political will and capital to engineer a land-based operation. Somalia's permissive political environment and under-resourced law enforcement exacerbates the problem and provides a platform whereby pirates can operate almost risk-free.

Jon Mak reiterates the long-held argument that as a long-term solution, Somalia would need to alleviate poverty[335] and employ good governance measures in order to deal with piracy effectively.[336] In the absence of structured employment opportunities, piracy is an attractive alternative profession. Indeed, piracy is a "logical way out of misery, since waiting for the nonexistent government to step in would be equal to starving to death."[337] If international actors could develop international legal instruments to address factors such as poverty and unemployment in coastal communities,[338] it would reduce the incentives for piracy.

The underlying solution to Somali piracy can only be achieved by the national reconstruction of the country. To this end, there is a strong need "for well-coordinated efforts in the field of regional capacity-building by all international players involved, in close cooperation with the Transitional Federal Government of Somalia and regional authorities."[339] In particular, a sustainable solution requires the establishment of effective governance, the rule of law, reliable security agencies, and alternative employment opportunities for the Somali people.[340] Further, education may also play a vital role in preparing the next generations of Somalis, particularly the youth, to raise awareness of the risks associated with involvement in piracy and other criminal activities.[341]

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333. Shaw, *supra* note123, at 75.

334. Boot, *supra* note 14, at 102.

335. *See* Robert R. Frump, *Poverty and Political Instability in Somalia Foster Growth of Piracy*, SHIPPING DIGEST, Jan. 12, 2009, at 11.

336. Joon Num Mak, *Going on the Offensive: Taking the Fight to Pirates and Terrorists*, Presentation at the Institute of Southeast Asian Studies' Public Seminar, Securing the Malacca Straits: Developments, Challenges and Opportunities held by the Institute of Southeast Asian Studies (Aug. 23, 2004), *in* Lehr, *supra* note 9, at 93.

337. Peter Lehr and Hendrick Lehmann, *Somalia – Pirates' New Paradise*, *in* Lehr, *supra* note 9, at 14.

338. Lehr, *supra* note 9, at xi.

339. Sixth Plenary of the CGPCS, *supra* note 6.

340. UN SCOR Report of the Secretary General, *supra* note 41, Part II (A)(6).

341. *See id.* at 54 ("The International Trust Fund to Support Initiatives of states Countering Piracy off the Coast of Somalia was established on 27 January 2010 [and has helped raise funds for a number of activities including helping] the Transitional Federal Government to raise awareness among Somali populations in general, and young people in particular, of the risks associated with

Such investment would take decades to materialize.

To this end, UNTAMP could accelerate and centralize the development of these solutions by setting out a legal framework whereby states agree to mobilize resources to combat the root causes of piracy in all states that are unable to deal with piracy. The treaty would commit signatories to cooperate and assist such states in three areas: poverty alleviation, political and legal capacity building, and education.

3. Shipping Industry Best Practices

As the technology available to pirates improves, the shipping industry is often accused of not doing enough to protect its own assets. This is not an entirely fair assessment. While a number of technological developments have enhanced security on ships, financial, regulatory and practical considerations pose a challenge to vessel-based security. For instance, the International Ship and Port Facility Security Code (ISPS) seeks to assemble "an international framework involving ... government agencies, local administration and the shipping and port industries to detect/access security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade."[342]

An advantage of the ISPS Code, in contrast with UNCLOS and SUA, is that it deals with ergonomics. That is, "it attempts to influence the behavior of seafarers and port managers through elaborate regulatory procedures as preventive measures" to combat "criminal offenses that pose a threat to maritime security."[343] In this context, an important area where improvements can be made is in the way in which Ships Security Alert Systems operate.[344]

Max Boot argues that most ship-owners have been reluctant to spend what it takes to defend their ships because this may affect their profit margins.[345] However, best management practice guidance issued by the IMO and the Maritime Security Center Horn of Africa (MSCHOA) suggests that ships may protect themselves by taking a number of relatively cheap steps, such as deploying razor wire as a barrier to prevent pirates from hooking on their boarding ladder to the ship's structure.[346] Other basic precautions include standing extra watches, priming fire hoses so they are ready to be used to repel small suspicious boats if they come too close, and fitting locks to doors to create

involvement in piracy and other criminal activities.").

342. INTERNATIONAL SHIP AND PORT SECURITY SHIPPING CODE, INTERNATIONAL MARITIME ORGANIZATION iii (2003).

343. Mejia and Mukherjee, *supra* note 31, at 323.

344. Knott, *supra* note 315 (noting that ship security alert systems normally send warning messages to the flag state and ship owners office, but sending "more detailed warning messages" to coastal states would be more efficient as they could and would react more quickly).

345. Boot, *supra* note 14, at 101.

346. MSCHOA, *supra* note 76.

self-contained "mazes" where the crew can expel attackers from the ship.[347] However, other equipment, such as electronic tracking systems and high voltage fences can be far too expensive for those smaller ships that are typically attacked.[348] Technical defensive measures also include the use of long-range acoustic devices that generate a beam of highly painful sound with an intensity of up to 150 Db.[349] Finally, ship-owners are reluctant to arm crews or hire armed guards, as this could lead to an escalation of violence.[350] In any event, many states place restrictions on what arms, if any, can be carried at sea, and the ISPS demands that ships declare any arms on board on entering a port.

Despite the diversity of techniques available, greater education and dissemination of the types, indicative costs and likely practical and legal consequences of these self-help tools should be promoted by international organizations such as the IMO. The latter has already committed to "making industry-development best management practice guidance" one of its priorities.[351] UNTAMP could promote cooperation between states and organizations to implement best management practice by, for instance, providing that signatories incorporate these into domestic health and safety legislation. At the very least, the treaty should provide that signatories impose a duty on certain carriers to comply with best management practice or explain failures to do so.

VI.
CONCLUSION

This article has considered the dual nature of maritime piracy law, and how the divergence among international and domestic legal frameworks frustrates efforts to suppress piracy. The need for uniformity in this area of law is of paramount importance to maritime security. The shipping industry would undoubtedly benefit from a single definition that encompasses the modern characteristics of piracy. Indeed, "there is considerable uneasiness in the industry about the absence of a single definition."[352]

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347. *Id.*

348. Murphy, *supra* note 160.

349. Knott and Stephens, *supra* note 315. Note that a 150 dB is a noise comparable to a 12-gauge gunshot or fireworks, see the *Decibel Exposure Time Guidelines* at http://www.dangerousdecibels.org/education/information-center/decibel-exposure-time-guidelines/. *But see* Sullivan, *supra* note 4, at 240 (arguing there is no clear evidence that "loud, uncomfortable noises" deter pirates).

350. Boot, *supra* note 14, at 103; *see also* Stephen Jones, *Armed Action*, MAR. SEC. REV., Mar. 21, 2011, http://www.marsecreview.com/2011/03/armed-action/ (calling for a code of conduct for armed guards).

351. *Piracy: Orchestrating the Response Action Plan*, INTERNATIONAL MARITIME ORGANIZATION (2011), http://www.imo.org/About/Events/WorldMaritimeDay/Documents/2011%20WMD%20theme%20Action%20Plan%20handout.doc.

352. *See* Trans. Comm. Report, *supra* note 5, ¶ 26.

The duality of uncoordinated responses to piracy, in their domestic and international guises, further frustrates efforts toward uniformity in piracy laws. The international nature of commerce requires a centralized and coordinated[353] prophylactic solution to the problem as opposed to scattered and divergent domestic criminal provisions. Indeed, as piracy is an international crime, it merits an equally international legal response. An uncoordinated approach to the development of this area of law will only exacerbate the issue by further entrenching the dualism in the fabric of the law. Legal intervention at the international level would help engineer the dissemination of more effective anti-piracy laws. This article has argued for a new law of piracy in the form of a new treaty, as well as a new tribunal with jurisdiction over piracy cases. It has also made a number of practical recommendations in the areas of cooperation, political development, and vessel security.

In the final analysis, maritime piracy not only presents a number of challenges to international law *per se*, but also, perhaps more worryingly, provides a rational and empirical basis for questioning the credibility and effectiveness of some key aspects of the international legal system. As Kontorovich argues, "the abject failure of the international response to piracy is a cautionary tale about the limits of international law."[354] He also notes that the piracy problem illustrates how the liberal international legal regime is poorly suited to deal with organized and violent transnational criminal networks.[355]

The problem is not so much one of liberalism, however, but of perspective. International law has chronically suffered from its atypical nature: there is no central legislative, executive, or judicial mechanism. Enforcement is complex and often impossible. To borrow a term from the study of economics, the current international legal order suffers from the "tyranny of small decisions," which essentially means that people lack the ability to foresee the wider consequences of their decisions.[356]

Despite its potential, the development of international law remains at the mercy of the political interests of individual sovereign states. Naturally, the conflict of interests inherent in this development creates the right political environment in which international and domestic laws develop with a lesser degree of uniformity than they should. However, the creation of an international legal order that is competent *per se*, with its own institutions and legal capacity,

353. *See* Robert G. Edmonson and Peter T. Leach, *Facing Down Piracy*, J. COMMERCE MAGAZINE, Apr. 26, 2009 ("With a growing threat to global shipping, commercial carriers believe common strategies and a *coordinated response* are needed.") (emphasis added).

354. Eugene Kontorovich, *Piracy and International Law*, GLOBAL LAW FORUM (Feb. 8, 2009), http://www.globallawforum.org/ViewPublication.aspx?ArticleId=96.

355. Kontorovich (Guantanamo), *supra* note 30, at 275.

356. Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*, 19 KYKLOS 23, 28 (1966). The contrary argument, of course, is that state sovereignty is of such critical importance that it must be supported even if there are negative implications for international law solutions.

capable of developing laws and interpreting them in its own right, subject only to the principle of complementarity, may be a real possibility in the context of maritime piracy.[357] The latter provides an unrivalled legal laboratory where international law can capitalize on its strengths and demonstrate its potential as a system of law *sui generis*, independent from the participation of states in its formulation, observance, and even enforcement. This, however, will ultimately depend on a shift in perspective in how sovereign states position themselves in the international legal order and in the sphere of international relations.[358] Thus, solutions to international problems like piracy must not only focus on reforming legal and practical tools but must also stimulate new perspectives in the development of international law.

A case in point that exemplifies such potential a shift in perspective of international law can be found in the development of European Union law. The eminent English judge Lord Denning characterized the incorporation of European Union law – and its correspondent supranational legal order[359] – into English law as a "tide" which would enter all English rivers and engulf its legal system:

> But when we come to matters with a European element, the [European Community] treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back .... In future, in transactions that cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of [European] Community law, of [European] Community rights and obligations, and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system .... *We must get down to it.*[360]

Having explored the dual and amorphous nature of piracy law it is possible to analogize that public international law and domestic law frequently run in estuaries of the same river. The incoming tide of international law cannot be held back.[361] This may pose great challenges to politicians and lawyers around the world in accepting an autonomous system of piracy law *sui generis* to combat maritime piracy. Despite such difficulties, "we must get down to it." If the fate of international law is to reestablish hope for the human species,[362] we must first deal with the problems that challenge the very essence of its existence; to this end, piracy has rocked the boat in which the international legal order is

357. *C.f.* Frank J. Lechner, *Religion, Law and Global Order*, *in* RELIGION AND GLOBAL ORDER, 263, 268 (Roland Robertson and William Garret, eds., 1991) ("commercial law has become an intricate, autonomous legal order on a transnational scale, developed over many centuries by participants in a truly international community.").

358. *See generally* DONALD W. GREIG, INTERNATIONAL LAW (Butterworths, 2d ed., 1976).

359. *See* Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.

360. *H.P. Bulmer v. J. Bollinger*, [1974] 2 All ER 1226 at 1230. Author's emphasis.

361. *See Trendtex*, 2 W.L.R. at 365 (Lord Denning gave another characterization of international law as a dynamic legal order: "I would use of international law the words which Galileo used of the earth: 'But it does move.'").

362. *See* Koskenniemi, *supra* note 119, at 30.

contained – it is now time for the latter to tame the "salt-water thieves"[363] and re-establish order at sea.

363. WILLIAM SHAKESPEARE, TWELFTH NIGHT OR WHAT YOU WILL, act 5, sc. 1, l. 63 ("Notable pirate! Thou salt-water thief!").

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Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions

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Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*

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INTRODUCTION

For nearly thirty years, thousands of claimants from Nicaragua have been filing lawsuits in both the United States and Nicaragua against multi-national companies relating to alleged injuries suffered through exposure to the pesticide Dibromochloropropane ("DBCP").[1] Called among "the most wide-ranging efforts at forum shopping in our legal history,"[2] United States' courts largely have dismissed DBCP cases from Nicaragua and elsewhere on *forum non conveniens* grounds.[3] In recent years, the litigation has been impacted by a Nicaraguan law designed to compel corporate defendants to accept jurisdiction in the United States, along with a wide range of out-of-court tactics employed by plaintiffs and their advocates to advance their cause. In addition, judicial findings of impropriety and corruption have marked this litigation. One judge detailed a "broad[] conspiracy of fraud" involving the falsification of plaintiff

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1. *See, e.g.*, Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1217 n. 5 (11th Cir. 1985); *see also* Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1362 (S.D. Tex. 1995).

2. Rojas v. Dement, 137 F.R.D. 30, 32 (S.D. Fla. 1991) ("In *Cabalceta,* Judge Atkins wrote that the actions were 'one of the most wide-ranging efforts at forum shopping in legal history,'" and taking judicial notice of the decision.) (quoting *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833, 837 (S.D. Fla. 1987), *aff'd in relevant part*, 883 F.2d 1553 (11th Cir. 1989)).

3. *See* Armin Rosencranz et al., *Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts*, 3 GOLDEN GATE U. ENVTL. L.J. 161, 166-67 (2009). Under the *forum non conveniens* doctrine, a court may refuse to take jurisdiction if it determines that another forum is more appropriate to hear the dispute.

injuries,[4] while another found that the plaintiffs' lawyers proffered a "persistent use of known falsehoods,"[5] and a third concluded that Nicaraguan law does not "even come close" to "basic fairness." [6]

In a similar vein, beginning with a 1993 lawsuit under the Alien Tort Statute ("ATS"),[7] a law that enables foreign citizens to bring suits in the United States for violations of certain international laws, claimants have filed multiple cases in the United States and Ecuador seeking recovery from Texaco[8] for alleged environmental contamination and related personal injuries in Ecuador's Lago Agrio region.[9] In these actions, too, plaintiffs' attorneys have engaged in a broad set of out-of-court tactics.[10] As with the DBCP litigation, United States' courts have rebuked certain plaintiffs' attorneys, and there has been concerning evidence regarding the fairness of the local proceedings in Ecuador.[11]

In February 2010, Guatemalan labor activists filed lawsuit in New York state court against Coca-Cola on the basis of allegations of union-related violence against workers at a Guatemalan bottling facility.[12] The plaintiffs timed the filing to coincide with the release of a documentary, "The Coca-Cola Case," that featured the plaintiffs' lawyers who brought the Guatemalan action.[13] It was the sixth such case the plaintiffs' attorneys brought against Coca-Cola. Courts had dismissed the previous five ATS actions, arising from Turkey and Colombia.[14]

These transnational tort cases are part of a larger trend of litigation against multi-national defendants that has arisen over the past fifteen years involving

4. Mejia v. Dole Food Co. & Rivera v. Dole Food Co., Los Angeles Superior Court Case Nos. BC340049, BC379820 (June 17, 2009) (Findings of Fact and Conclusions of Law Supporting Order Terminating *Mejia* and *Rivera* Cases for Fraud on the Court) (hereinafter "*Mejia Op.*") at 2.

5. Franco v. Dow Chem. Co., No. 03-05094, Amended Report & Recommendation of the Special Master at 62-63 (Oct. 7, 2009) (hereinafter "Report & Recommendation").

6. Sanchez Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1345 (S.D. Fla. 2009). To date, courts overseeing DBCP-related cases arising from other countries have not made findings regarding similar conspiracies.

7. 28 U.S.C. § 1350 (2010).

8. Now Chevron, after a merger between Texaco and a subsidiary of Chevron.

9. Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 W.L. 142006 (S.D.N.Y. Apr. 11, 1994); Ashanga Jota v. Texaco, No. 94 Civ. 9266 (JSR) (S.D.N.Y.).

10. The corporate defendant in this case has pursued its own set of out-of-court tactics in defending itself.

11. *See* Gonzales v. Texaco, Inc., No. C 06-02820 WHA, Order Granting Motions for Summary Judgment and Terminating Sanctions (Aug. 3, 2007).

12. Palacios v. Coca-Cola Co., 102514/2010 (N.Y. Sup. Ct. Feb. 25, 2010); Palacios v. Coca-Cola Co., No. 10-CV-03120 (S.D.N.Y.), removed to federal court April 13, 2010.

13. *See, e.g., The Coca-Cola Case* (Trailer), NATIONAL FILM BOARD OF CANADA, http://www.nfb.ca/film/coca_cola_case_trailer (last visited March 8, 2011).

14. Sinaltrainal v. Coca-Cola Co., 572 F.3d 1252 (11th Cir. 2009) (four cases consolidated from Colombia); Turedi v. Coca-Cola Co., 2009 WL 1956206 (2d Cir. July 7, 2009) (from Turkey).

allegations of corporate misconduct overseas.[15] In connection with those cases, plaintiffs, defendants, and their advocates are increasingly employing certain out-of-court tactics in part to advance or defend their legal positions and tout larger sets of causes. Although defendants and interested third parties may pursue such tactics, this Article focuses on those tactics pursued by plaintiffs, discussing their implications for corporate defendants, and identifying certain rule of law concerns given the cases to date and the nature of transnational tort litigation.

Part I provides a legal background, discussing the ATS and the growing frequency of transnational tort lawsuits filed in the United States and abroad. Part II discusses the results of a study the authors conducted of twenty-five of transnational tort matters, identifying the patterns of the plaintiffs' use of media, community-organizing, investment and political efforts. Part III discusses those tactics in three case studies, the Nicaraguan DBCP, Texaco-Ecuador, and Coca-Cola litigations. This part also notes, based on judicial findings in the Nicaraguan DBCP and Ecuador matters, transnational court cases' potential susceptibility to litigation improprieties and rule of law concerns generally, to which out-of-court tactics may contribute.[16] Part IV suggests some approaches that companies, courts, and legislators might consider given the implications and concerns that arise from the increasing number of transnational tort cases and their accompanying tactics. This Article does not argue in favor of specific normative changes, or that out-of-court tactics are *per se* improper. However, the Article concludes that given the rise of transnational tort cases and out-of-court tactics, it is important that all direct and indirect participants in the legal system, including courts, plaintiffs, defendants, interested third parties, and legislators, be cognizant of the nature of the tactics and the problems that have arisen as a result. In the long run, that cognizance will help ensure that litigation proceeds fairly and that legal judgments are rendered equitably.

I.
LEGAL BACKGROUND

Over the past fifteen years, with the growth of the global economy, the number of transnational tort cases has grown substantially.[17] Plaintiffs bring

15. According to one commentator, the tactics and the rise in ATS litigation, discussed below, emerged co-extensively from *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), *vacated,* 403 F.3d 708 (9th Cir. 2005). The case, filed in 1996, in many respects gave rise to the modern corporate ATS trend, and "expanded the tactical repertoires of grass-roots activists as well as those of litigators," including investment and protest tactics. Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal*, 43 LAW & SOC'Y REV. 271, 291 (2009) (discussing NGOs who litigate ATS cases).

16. *See* Armin Rosencranz et al., *Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts*, 3 GOLDEN GATE U. ENVTL. L.J. 161, 178-179 (2009).

17. *See* Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational*

these cases in the United States, under the ATS and common law tort theories, as well as in foreign courts. After discussing the ATS and the patterns of cased filed under the law, this section addresses lawsuits filed in the United States under other theories and lawsuits filed abroad.

A. The Alien Tort Statute

The ATS, enacted as part of the first United States' Judiciary Act in 1789,[18] provides that the "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."[19] Courts have construed the key relevant substantive term of the ATS – "violations of the law of nations" – to cover a limited class of alleged harms that are interpreted according to international law principles.[20] Those principles include torture, extrajudicial killing, genocide, war crimes, crimes against humanity, forced labor, slave labor, child labor, human trafficking, forced disappearances, prolonged arbitrary detention or arrest, forced exile, rights of association (in the labor context), systematic racial discrimination and cruel, and inhuman or degrading treatment.[21]

For nearly 200 years, the law remained essentially unused.[22] However, it was revived in 1980, in *Filartiga v. Pena-Irala,* a case in which Paraguayan citizens filed suit in New York against a Paraguayan police official for acts of torture and murder of a relative in Paraguay.[23] The lawsuit thus had no link to the United States. The plaintiffs filed the claim to vindicate foreign human rights abuses committed abroad by a non-United States citizen against a non-United

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Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute, 31 MICH. J. INT'L L. 385, 388 (2010) ("There has been an explosion of ATS litigation centered almost exclusively on human rights violations").

18. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77. The ATS also has been referred to as the "Alien Tort Claims Act," or "ATCA."

19. 28 U.S.C. § 1350 (2006). For a discussion of the origins and intended meaning of the ATS, *see* M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT'L L. 316 (2009).

20. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

21. *See, e.g.*, Beth Stephens, *Sosa v. Alvarez-Machain: 'The Door Is Still Ajar' for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 537 & n.18 (2004).

22. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115-16 (2d Cir. 2010); Jonathan Drimmer & Laura Ardito, "Emerging Issue Analysis," Abdullahi v. Pfizer, Inc. 2009 U.S. App. LEXIS 1768 (2d. Cir. Jan. 30, 2009), Lexis/Nexis (April 2009).

23. 630 F.2d 876 (2d Cir. 1980). *See also* Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745, 748 (2010) (discussing the revival of the ATS); Jonathan Drimmer, *Corporate Exposure under the Alien Tort Claims Act*, 22 No. 1 Corp. Couns. 7 (2007); Paul L. Hoffman, Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 50 (2003); Sinan Kalayoglu, *Correcting Mujica: The Proper Application of the Foreign Affairs Doctrine in International Human Rights Law*, 24 WIS. INT'L L.J. 1045, 1045-1046 (2007).

States citizen. When the United States Court of Appeals for the Second Circuit allowed the lawsuit to proceed, dozens of others quickly followed.[24]

Initially, cases brought under the ATS followed the pattern of *Filartiga*, often seeking redress for unpunished international human rights abuses against government officials or oppressive regimes.[25] Plaintiffs brought these actions, often unopposed,[26] in large part to document and validate human rights abuses with the imprimatur of a judicial finding. Although the cases led to hefty damage awards regularly in excess of ten million, and sometimes even 100 million, dollars,[27] they presented little meaningful prospect of recovery.[28] Instead, these awards would represent a form of intangible justice.

The mid-1990s brought a new trend, however, as corporate defendants regularly began to be targeted in multi-million dollar actions.[29] To date, plaintiffs have filed more than 155 ATS cases against corporations, with 125, approximately 80 percent of all actions, arising in the past fifteen years.[30] Plaintiffs now file the majority of ATS cases against corporate defendants, and since 1994 they are filing on average six to ten corporate ATS cases annually.[31] One study, noting the dozens of corporate ATS cases against some of the most well known companies in the world, estimated the potential aggregate ATS

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24. *See* Vega, *supra* note 17, at 394; Kalayoglu, *supra* note 23, at 1045-46; Ian Kierpaul, *The Mad Scramble of Congress, Lawyers, and Law Students after Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407, 433 n.292 (2008).

25. Kalayoglu, *supra* note 23, at 1045-46

26. *See, e.g.*, Mushikiwabo v. Barayagwiza, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. April 9, 1996); Kadic v. Karadzic, No. 93-cv-01163 (S.D.N.Y. Aug. 29, 2000) (Letter from defendant to court noting impossibility of litigating in the United States); Paul v. Avril, 901 F. Supp. 330, 331 (S.D. Fla. 1994); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

27. *See, e.g.*, Arce v. Garcia, 434 F.3d 1254, 1256 (11th Cir. 2006) ($54 million in damages); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) ($140 million); Mushikiwabo v. Barayagwiza, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1996) ($103 million).

28. *See* Kalayoglu, *supra* note 23, at 1045-46; Charles Curlett, *International Law Weekend Proceedings, Introductory Remarks-Alien Tort Claims Act*, 6 ILSA J. INT'L & COMP. L.Q. 273, 274 (2000) ("Although [ATS litigation has] generated two billion dollars in damage awards, none has been collected."); *see also* Shirin Sinnar, Book Note, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 38 STAN. J. INT'L L. 331, 332 (2002) (noting, on the subject of ATS law suits, that while "obtaining redress from perpetrators is often cited as an objective of transnational human rights cases, few claimants actually receive compensation even after a favorable judgment").

29. *See* Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 EUR. J. INT'L L. 1035, 1036 (2008); Jonathan Drimmer, *Corporate Exposure under the Alien Tort Claims Act*, 22 No. 1 Corp. Couns. 7 (2007); Kalayoglu, *supra* note 23, at 1045-46; *see, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), *aff'd*, 395 F.3d 932 (9th Cir. 2002), *vacated* 403 F.3d 708 (9th Cir. 2005); Aguinda v. Texaco, Inc., 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994).

30. *See* Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, AM. LAW., Oct. 12, 2010, and accompanying table. That calculation includes similar actions that courts later consolidated.

31. *See id.*

corporate liability to exceed 200 billion dollars if all the cases succeeded.[32]

B. ATS Litigation Trends

1. Where They Are Filed, Against Whom and Why

The ATS cases involve several clearly definable groups.[33] Excluding class actions involving multiple companies, some two-dozen industries in total have been the subject of one or more ATS lawsuits.[34] Companies in the extractive sector, mining, oil, gas, and energy, such as Texaco, are the most frequent targets of ATS lawsuits, serving as defendants in approximately 22 percent of cases filed.[35] Approximately 15 percent have been filed against the financial services industry, most of which were directed against banks.[36] Companies in

32. *See* Arthur Fergensen & John Merrigan, *"There They Go Again": The Trial Bar's Quest for the Next Litigation Bonanza*, National Legal Center for the Public Interest, January 2007, at 17 n. 68; Gary Hufbauer & Nicholas Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. LAW 246 (2004). The reasons plaintiffs bring these cases in United States' courts are several. Among them are: (1) a broad ability to obtain personal jurisdiction over defendants; (2) the unique nature of the ATS as a law that permits the filing of tort actions premised on customary international law; (3) the availability of the class action, contingency fee and pre-trial discovery mechanisms in the United States; and (4) the widespread belief that damage awards are higher in United States' courts, which includes the potential for punitive damages. *See, e.g.*, Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 577-78 (2007); E.E. Daschbach, *Where There's A Will, There's A Way: The Cause for A Cure and Remedial Prescriptions for Forum Non Conveniens As Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 L. & Bus. Rev. Am. 11, 28-39 (2007); Manuel A. Gomez, *Like Migratory Birds: Latin American Claimants in U.S. Courts and the Ford-Firestone Rollover Litigation*, 11 SW. J. L. & TRADE AM. 281, 295-96 (2005).

33. The demographics and calculations contained in this section derive from a collection of ATS cases collected by the authors. The cases are identified, along with some of the characteristics contained herein, in the table that accompanies Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, AM. LAW., Oct. 12, 2010. While some 155 corporate ATS cases have been lodged, a significant percentage do not facially involve cognizable harms under the ATS. That is particularly true for cases filed before the *Sosa* decision clarified the meaning of the "law of nations" for these purposes. Such cases include commercial or employment disputes, lawsuits premised on securities laws, actions involving negligence-based injuries aboard vessels or airlines and other similar suits, and most have been dismissed rapidly. To conduct a meaningful analysis of ATS trends, the authors made the subjective determination to exclude those cases, and the following statistical analyses focus on the roughly 120 "core" ATS cases that plausibly fall under the statute.

34. These include the following industries: agriculture/food, auction, banking, accounting, chemical, pharmaceutical, media and communications, extractive, hospitality, engineering, medical (hospital), housing, insurance, manufacturing, prison, school, suppliers, technology, transportation, construction and a talent agency. *See* Goldhaber, *supra* note 33, accompanying table at: http://amlawdaily.typepad.com/ATS%20Cases.pdf.

35. *See, e.g.*, Mujica v. Occidental Petroleum Corp., 564 F.3d 1190 (9th Cir. 2009); Bowoto v. Chevron, 557 F. Supp. 2d 1080 (N.D. Cal. 2008); Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

36. *See, e.g.*, Alperin v. Vatican Bank, 2008 WL 509300 (N.D. Cal. Feb. 21, 2008); Almog v.

the food and beverage industries, such as Coca-Cola, also are frequent corporate defendants in ATS cases, appearing in roughly 15 percent of cases.[37] Cases against transportation[38] or manufacturing[39] companies also are relatively common, especially recently, and there have been several cases against communications and technology firms.[40] Defendants are not limited to companies based in the United States, as plaintiffs have sued foreign companies with a presence in the United States,[41] and courts have not deemed parent

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Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); United Bank for Africa, PLC v. Coker, 2003 WL 22741575 (S.D.N.Y. Nov. 18, 2003).

37. *See, e.g.*, Aldana v. Del Monte Fresh Produce, N.A. Inc., 416 F.3d 1242 (11th Cir. 2005); Doe v. Nestle *S.A.*, No. 2:05-CV-5133 (C.D. Cal. July 14, 2005); *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273 (S.D. Fla. 2006).

38. *See* Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978); Robert v. Bell Helicopter Textron, Inc., No. 3:01-CV-1576, 2002 WL 1268030 (N.D. Tex. May 31, 2002); Mohammed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir. 2009); Abrams v. Societe Nationale des Chemins de Fer Francais, 332 F.3d 173 (2d Cir. 2003), *vacated*, 542 U.S. 901 (2004); Aikpitanhi v. Iberia Airlines of Spain, 553 F. Supp. 2d 872 (E.D. Mich. 2008); Hereros ex rel. Riruako v. Deutsche Afrika-Linien Gmblt & Co., 232 Fed. Appx. 90 (3d Cir. 2007).

39. *See, e.g.*, Doe v. Wal-Mart Stores, Inc., 2009 WL 1978730 (9th Cir. July 10, 2009); Does I v. Gap, Inc., 2002 WL 1000068 (D.N. Mar. I. May 10, 2002); Friedman v. Bayer Corp., 1999 WL 33457825 (E.D.N.Y. Dec. 15, 1999); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

40. *See, e.g.*, Zheng v. Yahoo, Inc., 3: 08-01068-MMC (N.D. Cal. filed Feb. 22, 2008); Xiaoning v. Yahoo! Inc., 07-CV-02151 (N.D. Cal. Apr. 18, 2007); Chen v. China Ctr. Television, 2007 WL 2298360 (S.D.N.Y. 2006). *See also* Chowdhury v. Worldtel Bangladesh Holding, Ltd., 588 F. Supp. 2d 375 (E.D.N.Y. 2008); Park v. Korean Broad. Sys., No. 07-2233, 2008 WL 4724374 (C.D. Ill. Oct. 24, 2008); Akbar v. N.Y. Magazine Co., 490 F. Supp. 60 (D.D.C. 1980).

41. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (underlying acts allegedly committed by a foreign subsidiary imputed up to the foreign parent, and parents' ties to its United States subsidiary are permitted United States jurisdiction); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (jurisdiction found where a foreign defendant was listed on the New York Stock Exchange). Under United States law, litigation can proceed against a corporate defendant only where it maintains certain "minimum contacts with the forum such that the maintenance of the suit does not offend traditional conceptions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The logic is that where parties intentionally engage in activities within a state, availing themselves of the state's laws, it is deemed reasonable to require that the defendants "submit to the burdens of litigation in that forum as well." Burger King v. Rudzewicz, 471 U.S. 462, 475-76 (1985). Applying this 'minimum contacts' test, a court may gain general or specific jurisdiction over a foreign defendant. If the foreign defendant's activities are substantial, continuous, and systematic, the defendant is subject to lawsuits on matters unrelated to the contacts with the forum. If the foreign defendant has less significant contacts with the forum, but those contacts give rise to the cause of action, jurisdiction also can be upheld. *See* Hanson v. Denckla, 357 U.S. 235, 250-53 (1958); Perkins v. Bengued Consolidated Mining Co., 342 U.S. 437, 446 (1952). In contrast, where a foreign defendant maintains no direct business tie to the United States, and does not maintain an agency relationship with a United States subsidiary or the subsidiary is the alter ego of the parent – such as where corporate formalities are maintained, there is no direct control by the parent over the subsidiary, and the parent would not necessarily maintain the same activity if the subsidiary did not exist – or where the subsidiary is not the alter ego of the parent company, courts have found jurisdiction against the parent company not to exist. *See* Bauman v. DaimlerChrysler Corp., 2009 WL 2634795 (9th Cir. 2009) *vacated*, 603 F.3d 1141 (9th Cir. 2010); Unocal, 248 F.3d at 962-931; *In re* S. African Apartheid Litig., 2009 WL 1841056 (S.D.N.Y. 2009).

companies immune simply because the underlying acts involve a subsidiary.[42]

The acts alleged under the ATS against these companies have been varied and diverse. They range from cases involving Chinese dissidents to those involving the use of forced labor to manufacture soccer balls to cases involving alleged terrorist financing.[43] Most commonly, however, these cases involve (1) alleged acts by a security force (25 percent), generally a foreign police, military, or paramilitary unit;[44] (2) labor-related issues (20 percent), such as those in the Coca-Cola actions;[45] (3) environmental claims akin to those in the Ecuador matters;[46] or (4) claims seeking redress for historical wrongs.[47] Plaintiffs also

42. *See, e.g.*, Doe v. Exxon Mobil Corp., 573 F. Supp. 2d 16 (D.D.C. 2008) (denying summary judgment because Indonesian subsidiary could have been acting as the parent's agent); Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (denying summary judgment because Nigerian subsidiary could have been acting as the parent's agent or alternatively that the parent aided and abetted the subsidiary); *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 274-76 (S.D.N.Y. 2009). Plaintiffs often pursue agency, alter ego, ratification, and other theories in seeking to attribute to a parent the acts of its affiliates. Under an alter ego theory, where the corporate relationship between a parent and subsidiary is sufficiently close, one corporation's liability can be attributed to the other. Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995). Under an agency theory, principals are liable for the acts of their agents in the scope of their authority. *See* Meyer v. Holley, 537 U.S. 280, 285 (2003). A party demonstrates ratification through knowing acceptance after the fact by the principal of an agent's actions, including covering up misdeeds, and through refusing to disavow the acts of an agent outside the scope of authority. *See* Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004); *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 273 (S.D.N.Y. 2009).

43. Zheng v. Yahoo, Inc., 3: 08-01068-MMC (N.D. Cal. filed Feb. 22, 2008); Almog v. Arab Bank PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); Bao Ge v. Li Peng, 201 F. Supp. 2d 14 (D.D.C. 2000).

44. Doe v. Unocal Corp., 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), *aff'd*, 395 F.3d 932 (9th Cir. 2002), *vacated* 403 F.3d 708 (9th Cir. 2005); Bowoto v. Chevron Corp., 2007 WL 2349341 (N.D. Cal. 2007); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 301 (S.D.N.Y. 2003); *Doe,*, 573 F. Supp. 2d at 6; Shiguago v. Occidental Petroleum Co., No. 06-4982 (C.D. Cal., filed Aug. 10, 2006).

45. *See* Romero v. Drummond Company, Inc., 552 F.3d 1303 (11th Cir. 2008); Licea v. Curacao Drydock Company, Inc., 584 F. Supp. 2d 1355 (S.D. Fla. 2008); Adhikari v. Daoud & Partners, 2:08-cv-05626-RGK-AJW (C.D. Cal. filed Aug. 27, 2008); Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D Ind. 2007); Sinaltrainal, Estate of Gil v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003); Sarei v. Rio Tinto, 487 F.3d 1193, 1209-1210 (9th Cir. 2007), *remanded on other grounds* 550 F.3d 822 (9th Cir. 2008). *See generally* Wesley V. Carrington, *Corporate Liability for Violations of Labor Rights Under the Alien Tort Claims Act*, 94 IOWA L. REV. 1381 (2009).

46. *See, e.g.*, Flores v. Southern Peru Copper Corp., 414 F.3d 233, 256 (2d Cir. 2003); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th.Cir. 1999); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d .Cir. 2002); *Sarei*, 487 F.3d at 1193; *see also* Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After Sarei and Sosa*, 41 COLUM. HUM. RTS. L. REV. 275, 275-276 (2009) (discussing environmental and discrimination claims). In addition, cases premised on environmental harms have been pursued under traditional tort theories, without relying on the ATS as a component. *See, e.g.*, Carijano v. Occidental Petroleum Corp., 548 F. Supp. 2d 823 (C.D. Cal. 2008); Gonzales v. Texaco, 2007 WL 3036093 (N.D.Cal. Oct. 16, 2007).

47. *See, e.g.*, Anderman v. Fed. Repub. of Austria, 256 F. Supp. 2d 1098 (C.D. Cal. 2003); Friedman v. Bayer Corp., 1999 WL 33457825 (E.D.N.Y. Dec. 15, 1999); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999); Bauman v. DaimlerChrysler AG, 2007 WL 486389 (N.D.

commonly file cases against companies that allegedly provide support, goods, or services to disfavored or repressive political regimes.[48]

These cases have arisen from roughly sixty different countries. Most common, however, are cases from the Middle East (23 percent), often involving events related to Iraq, and cases from South America (23 percent).[49] Cases from Asia (18 percent)[50] and Africa (13 percent)[51] are also present. Plaintiffs have filed ATS cases against corporations in numerous judicial districts, more than twenty-five in total. However, the cases have been clustered in a few locales. Plaintiffs have filed roughly twenty-five percent in federal district courts in New York, with most filed in the Southern District of New York.[52] Just under twenty percent of the ATS cases have been filed in California district courts, with more than one-half of such cases filed in the Central District of California.[53] The District of Columbia and the Southern District of Florida are also popular venues, with over ten percent of ATS cases filed in each.[54]

Cal. Feb. 12, 2007); Hereros ex rel. Riruako v. Deutsche Afrika-Linien Gmblt & Co., 232 Fed Appx. 90 (3d.Cir. 2007); Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192 (D.C. Cir. 2004).

48. *See In re* S. African Apartheid Litig., 2009 WL 960078 (S.D.N.Y. Apr. 8, 2009); *Presbyterian Church of Sudan* at 321 ; Stutts v. De Dietrich Group, 2006 WL 1867060 (E.D.N.Y. June 30, 2006).

49. *See, e.g.,* Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003); Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003).

50. *See* Zheng v. Yahoo, Inc., 3: 08-01068-MMC (N.D. Cal. filed Feb. 22, 2008); Xiaoning v. Yahoo! Inc., 07-CV-02151 (N.D. Cal. filed Apr. 18, 2007); Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009).

51. *See, e.g.*, Wiwa v. Shell Petroleum Dev. Co. of Nigeria, Ltd., 2009 WL 1560197 (2d Cir. Jun. 3, 2009). Other notable cases include two consolidated actions against Pfizer for alleged nonconsensual medical experimentation, as well as the Apartheid litigation. *See* Pfizer v. Abdullahi, 562 F.3d 163 (2d Cir. 2009); *In re* S. African Apartheid Litig., 2009 WL 960078 (S.D.N.Y. Apr. 8, 2009).

52. In *Filartiga*, the ATS was essentially "rediscovered" in the Southern District of New York, and the United States Court of Appeals for the Second Circuit permitted the case to proceed. The Southern District of New York is also a popular forum because foreign companies' presence on a United States stock exchange and involvement in related investment activities can provide bases for jurisdiction. *See, e.g.,* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

53. *Unocal,* the first major corporate ATS case to survive motions to dismiss, was filed in California, perhaps contributing to the number of actions filed in California.

54. Many of the Florida actions arise from South America, perhaps explaining that choice of forum. The reason for the cluster of cases filed in the District of Columbia is less clear. Of the remaining jurisdictions, plaintiffs have filed approximately 8% of ATS in the United States Court of Appeals for the Fourth Circuit, with most being filed in the Eastern District of Virginia. They filed the remaining cases in the Fifth Circuit (4%), Third Circuit (4%), Seventh Circuit (2%), and Sixth Circuit (2%).

2. The Results in ATS Cases

For years, federal courts regularly dismissed corporate ATS cases.[55] Recently, however, plaintiffs have gained victories. Since 2007, four corporate ATS cases have proceeded to trial, resulting in one verdict for plaintiffs on ATS grounds.[56] In addition, several corporate ATS cases have settled for well over ten million dollars.[57] In 2008, two courts entered judgments against corporate ATS defendants, for 7.7 million dollars[58] and eighty million dollars respectively.[59] In short, over the past few years, ATS cases appear to be achieving greater successes than before.[60]

3. Continued Confusion about the Development of the Law

The legal landscape from which these ATS cases arise remains in substantial flux.[61] Since *Filartiga*, courts have struggled with the concept of the "law of nations," grappling to decipher the scope of the ATS, and the types of cases that they should allow to proceed.[62]

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55. *See* Goldhaber, *supra* note 33, and accompanying table.

56. *See* Chowdhury v. Worldtel Bangladesh Holding, Ltd., Judgment in Favor of the Plaintiff, No. 1:08CV01659 (E.D.N.Y. 2009); Jama v. Esmor Corr. Servs., 577 F.3d 169 (3d Cir. 2009) (holding for the plaintiff on non-ATS grounds); Bowoto v. Chevron, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

57. *See A Milestone for Human Rights*, BUS. WK., Jan. 24, 2005 (reporting that Unocal was said to have settled its action for $30 million); Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 9, 2009; Jenny Strasburg, *Saipan Lawsuit Terms OK'd: Garment Workers to Get $20 million*, S.F. CHRON., Apr. 25, 2003, at B1. *See also* Sue Reisinger, "Pfizer Settles Lawsuits over Drug Trials on Children in Nigeria," Law.com, Feb. 23, 2011 (stating that Pfizer agreed to pay up to $175,000 per child able to prove death or permanent disability from the use of the drug Trovan).

58. *See* Aguilar v. Imperial Nurseries, 2008 WL 2572250 (D. Conn. 2008).

59. Licea v. Curaçao Drydock Co., Inc., 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (involving alleged labor trafficking and slave labor working conditions in connection with a drydock company).

60. Various factors may explain that result. Given the body of law that now exists to guide claimants, corporate ATS lawsuits tend to be sounder in nature. In addition, complaints now regularly rely on both ATS and non-ATS based claims; in some instances, courts may not dismiss ATS claims when discovery on the same basic facts will proceed nonetheless. Third, the judiciary seems increasingly comfortable with ATS cases, and in cases involving egregious allegations of human rights abuses, the judiciary has become less willing to issue dismissals on perceived technical grounds. *See* Jonathan Drimmer & Laura Ardito, "Emerging Issue Analysis," Abdullahi v. Pfizer, Inc. 2009 U.S. App. LEXIS 1768 (2d Cir. 2009), LexisNexis (April 2009); Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008) (*en banc*) (plurality holding that whether an exhaustion doctrine analysis should be applied depends in part on the gravity of the underlying allegations).

61. *See* Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 62 (2008) ("Judges and scholars have reached, and continue to reach, divergent conclusions about how to identify the applicable standards in ATS cases, leading to confusion in the lower courts and persistent uncertainty for litigants.")

62. Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 457-458 (2007). That struggle can be attributed to several factors. They include a relative lack of familiarity with the intricacies of international law by many United States

In 2004, the Supreme Court stepped in to try to provide some of that missing guidance.[63] In *Sosa v. Alvarez-Machain*,[64] a Mexican doctor sued other Mexican nationals under the ATS, claiming that they had conspired with the United States Drug Enforcement Agency (DEA) to abduct him and bring him to the United States to stand trial for his alleged role in torturing and killing a DEA agent. After he was found not guilty of criminal charges, he filed a successful ATS lawsuit alleging arbitrary detention. In overturning that decision, the Supreme Court urged judges to exercise restraint in recognizing new ATS claims, admonishing them to engage in "vigilant doorkeeping" in these extraterritorial cases.[65] Though the Court did not limit the Act to violations accepted in 1789, it declared that the ATS would apply to "a narrow set" of international norms that are obligatory, universally accepted and defined with specificity.[66] The Court ruled that arbitrary detention for a short period of time was not such a norm.[67]

The Court's attempt to clarify the law has been partially successful. Certainly, *Sosa* indicates, and lower courts have generally concluded, that the norms recognized under the ATS are the most serious crimes under international law. The framework the Supreme Court provided for analyzing ATS claims also has brought a greater degree of consistency than previously existed. The ATS's precise scope, however, remains elusive. As one court noted, "[t]he *Sosa* opinion provides little guidance concerning which acts give rise to a claim."[68] Another stated that *Sosa* has "invite[d] the kind of judicial creativity that has caused the disparity of results and differences of opinion that preceded the decision."[69] As a result, while *Sosa* did provide needed clarity on important aspects of the ATS, and provided a framework of analysis, there remains a confused body of lower court decisions.

A particular area of confusion for the courts has been determining the scope of the "law of nations." [70] Furthermore, courts have been unclear about the

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attorneys and courts. They also include a seeming unease among courts with identifying potential causes of action in the first instance – a task in the United States that is typically left to legislative bodies – particularly given the lack of a concrete framework for how claims under the "law of nations" should be determined.

63. Drimmer, *supra* note 23. For a discussion of *Sosa*, *see* Benjamin Berkowitz, *Sosa v. Alvarez-Machain: United States Courts As Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R.-C.L. L. REV. 289 (2005).

64. 542 U.S. 692 (2004).

65. *Id.* at 729.

66. *Id.* at 729, 732.

67. *Id.* at 738.

68. *Kiobel*, 456 F. Supp. 2d at 462.

69. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004). For a discussion of the pros and cons of ATS litigation, *see* John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 7-11 (2009).

70. For instance, in cases involving multi-national corporations, lower courts have squabbled

required elements of actionable violations. For instance, diverging constructions of the state action element,[71] a required component of most ATS claims,[72] have led to much confusion.[73] The pertinent standards associated with accessory

in deciding whether certain widely-recognized international claims, such as cruel, inhuman, or degrading treatment, fall under the ATS. *Compare, e.g.,* Aldana v. Del Monte, 416 F.3d 1242, 1247 (11th Cir. 2005), and Chowdhury v. WorldTel Bangladesh Holding, Ltd., 588 U.S. 375, 382 (E.D.N.Y. 2008), *with Doe v. Qi,* 349 F. Supp. 2d 1258 (N.D. Cal. 2004), Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1093-95 (N.D. Cal. 2008), and Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995). Another confused issue is the deference that courts have provided to the executive branch when statements of interest are filed. *See, e.g.*, Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1205-1207 (9th Cir. 2007); Doe v. Exxon Mobil Corp., 473 F.3d 345, 354-55 (D.C. Cir. 2007); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005); Presbyterian Church of Sudan v. Talisman, No. 01 Civ. 9882, 2005 U.S. Dist. LEXIS 18399 (S.D.N.Y. Aug. 30, 2005). Exhaustion of local remedies is yet another area that has not yielded clear judicial guidance. *See generally* Steffanie Bevington, *Requiring Exhaustion: An International Law Perspective of the Alien Tort Claims Act in Sarei v. Rio Tinto,* 38 GOLDEN GATE L. REV. 461 (2008); Charles Donefer, *Sarei v. Rio Tinto and the Possibility of Reading an Exhaustion Requirement into the Alien Tort Claims Act,* 6 NW. U.J. INTL. HUMAN RIGHTS 155 (2007).

71. *See generally* Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 475 (2007); Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?*, 21 EMORY INT'L L. REV. 789, 804 (2007).

72. Because the reach of international criminal law has traditionally been restricted to misconduct by states or by state officials, all but a few cognizable causes of action contain a "color of law" requirement. Accordingly, outside of cases premised on theories of genocide, war crimes, crimes against humanity, and a few others that do not require state action, to satisfy the ATS, the underlying acts must be committed either by (a) government agents acting on behalf of the company, or (b) the company or its employees if vested with the imprimatur of government power. *See* Jonathan Drimmer, *Human Rights and the Extractive Industries: Litigation and Compliance Trends*, 3 J. WORLD ENERGY L. & BUS. 121, 130 (2010); *see also* Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 475 (2007) (discussing the general requirement of state action in ATS cases). For example, in cases involving events in Colombia, alleged conduct by a state security force acting on behalf of a petroleum company was deemed to satisfy the "color of law" requirement, but attacks against labor leaders in connection with their activities at a coal mine without proof of participation by state actors did not. *Compare* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005), with Romero v. Drummond Company, Inc., 552 F.3d 1303 (11th Cir. 2008); *see also Aldana*, 416 F.3d at 1248 (attacks by licensed private security firm, without more, fails to satisfy state action).

73. Most federal courts, relying on pre-*Sosa* precedent, have looked to domestic definitions based on the civil rights jurisprudence of 42 U.S.C. § 1983. *See, e.g., Aldana*, 416 F.3d at 1247-48 (citing Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)). Following *Sosa*, several courts and commentators have argued that, in fact, the proper principles should derive from international law. *See* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005); Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?* 21 EMORY INT'L L. REV. 789 (2007). That conclusion plainly seems to be the right one, since courts construe the causes of action that comprise the "law of nations" under international law, and state action is a mandatory element for those international claims. *See* Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?*, 21 EMORY INT'L L. REV. 789 (2007). However, even among courts that look to international law on state action, some have determined that international law on state action is not defined with specificity, as *Sosa* requires, while others have clearly struggled with the appropriate doctrinal approach, particularly given the long history of judicial reliance on § 1983 in this context. *Compare* Bowoto v. Chevron Corp., 2006 WL 2455752, *5 (N.D. Cal. 2006), *with* Bowoto v. Chevron Corp., 2007 WL 2349341, *2-7 (N.D. Cal. 2007); *see generally* Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?*,

liability are also unclear.[74] This is especially germane as most plaintiffs in corporate ATS cases seek to attribute liability to the company based on agency, joint venture, conspiracy, ratification, aiding and abetting, and other related theories.[75] Those theories have been met with mixed success in United States' courts, which have recognized, rejected, or offered competing and sometimes widely differing interpretations of theories of secondary liability.[76] Most

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21 EMORY INT'L L. REV. 789 (2007).

74. *See generally* Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008). For other discussions of theories of liability under the ATS, *see* Frank Olah, *MNC Liability for Human Rights Violations Under the Alien Tort Claims Act: A Review and Analysis of the Fundamental Jurisprudence and a Look at Aiding and Abetting Liability Under the Act*, 25 QLR 751 (2007); William Simmons, *Liability of Secondary Actors Under the Alien Tort Statute: Aiding and Abetting and Acquiescence to Torture in the Context of the Femicides of Ciudad Juárez*, 10 YALE HUM. RTS. & DEV. L.J. 88 (2007); Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005).

75. *See* Curtis A. Bradley, et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 925-26 (2007) ("most of the ATS claims brought against corporations have alleged that they were indirectly liable for human rights abuses committed by foreign government actors as a result of their acts of aiding and abetting, such as providing the perpetrators with financial support or materials").

76. Aiding and abetting liability is a prime example. *See generally* Jonathan Drimmer, *Is Second Circuit Ruling a "Talisman" Against Alien Tort Statute Suits?*, Legal Backgrounder, Washington Legal Foundation, Feb. 12, 2010; Michael Garvey, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Prerogative*, 29 B.C. THIRD WORLD L.J. 381, 383 (2009). Some courts, relying on *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-82 (1994), which held that aiding and abetting liability should be permitted in civil cases only where Congress expressly authorizes it, have concluded that corporate defendants cannot be liable under an aiding and abetting theory. *See, e.g.*, Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005); *see also* Lucien J. Dhooge, *Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 247, 273-93 (2009) (arguing that *Central Bank* should be applied in the ATS context). Most courts, however, have permitted secondary theories of liability to be pursued. *See, e.g.*, Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007); Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006); Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006), *aff'd*, 582 F.3d 244 (2d Cir. 2009); Bowoto v. Chevron Corp., No. C 99-02506, 2006 U.S. Dist. LEXIS 63209 (N.D. Cal. Aug. 22, 2006); *In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7, 52-54 (E.D.N.Y. 2005). Among those courts, however, some judges defined the applicable standard by looking to interpretations provided by international legal sources, such as the International Criminal Court, or decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda. These judges might define the theory broadly to include an *actus reus* of assistance or encouragement to a wrongdoer and a *mens rea* of knowledge or even recklessness, in which the aider and abettor need not even know the precise crime that the principal intends to commit. *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 950-51 (9th Cir. 2002), *vacated* 403 F.3d 708 (9th Cir. 2005) (quoting *Prosecutor v. Furundzija*, IT-95-17/1 T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999)); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 333 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part); Almog v. Arab Bank PLC, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007)("practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," though assistance need not be indispensable) (internal quotations omitted); *In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d at 54;

significantly, there is a heated ongoing dispute over whether corporations can even be liable under the ATS.[77]

C. Non-ATS Litigation

In addition to ATS cases, a much larger pool of non-ATS transnational tort cases have been brought in United States federal and state courts over the past decade.[78] Plaintiffs base some of those cases, like the most recent Coca-Cola case, on human and environmental rights claims against companies with some tie to the United States. They thus closely resemble ATS cases in their underlying factual allegations.[79] Many others, like the DBCP Nicaraguan matters, are based on traditional commercial and personal injury tort theories against companies over whom personal jurisdiction can be obtained. As with ATS cases, this larger pool of transnational tort cases continues to grow.

Like the ATS cases, these non-ATS suits span a wide range of industries and conduct. The spectrum of legal theories upon which these cases rely are similarly broad. Much like the ATS cases, frequent defendants include extractive companies, food and beverage companies, apparel companies, and financial companies. Several of these cases arose from circumstances of environmental degradation,[80] harsh labor conditions,[81] or claims for damages

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Cabello Barrueto v. Fernandez Larios, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148 (11th Cir. 2005). Or they might define the theory narrowly, to include a *mens rea* of intent, in which the aider and abettor must purposefully facilitate the underlying crime. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009). Other jurists have looked to domestic definitions, which has an *actus reus* similar to international law -- assistance or encouragement of a wrongdoer -- and a *mens rea* that requires the alleged aider and abettor know that the assistance is facilitating an underlying harm. Doe v. Unocal, 395 F.3d at 965 (Reinhardt, J., concurring); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J, concurring). Still others have not indicated whether the international or domestic definition may be applicable. *See, e.g.*, Burnett v. Al Baraka Inv. & Dev. Co., 274 F. Supp. 2d 86, 100 (D.D.C. 2003); Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000).

77. *Compare* Kiobel v. Royal Dutch Petroleum Co., Nos. 621 F.3d 111 (2d Cir. 2010), Flomo v. Firestone Natural Rubber Co., No. 1:06-cv-00627, 2010 WL 3938312, at *7 (S.D. Ind. Oct. 5, 2010); Viera v. Eli Lilly & Co., No. 1:09-CV-0495, 2010 WL 3893791, at *2 (S.D. Ind. Sep 30, 2010); Doe v. Nestle, No. CV 05-5133, 2010 WL 3969615, at *75 (C.D. Cal. Sept. 8, 2010), *with* Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008), Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 754 (D.Md. 2010), *In re* XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 588 (E.D. Va. 2009), and Arias v. Dyncorp, 517 F. Supp. 2d 221, 227 (D.D.C. 2007).

78. *See, e.g.*, Lear, *supra* note 32, at 590, 598 (discussing transportation disaster cases); *see also* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41 (2003) (discussing global plaintiff classes).

79. *See, e.g.*, Perez v. Dole Food Co., Los Angeles Superior Court, April 28, 2009, http://www.iradvocates.org/4.27.09%20Dole%20Complaint%20FINAL.pdf. There may be differing reasons why plaintiffs in these cases choose not to invoke the ATS. Some plaintiffs may prefer to litigate in state court because of the jury pool, state procedural rules, or other reasons. Others who may wish to litigate in federal court may feel that the ATS is unnecessary to obtain federal jurisdiction.

80. *See, e.g.*, Carijano v. Occidental Petroleum Corp., 548 F. Supp. 2d 823 (D.C. Cal. 2008) (discussing alleged environmental contamination in Peru); Gonzales v. Texaco, Inc., 2007 WL

based on activities performed decades before.[82] Many arose from transportation related injuries including airplane, helicopter, train, and automobile accidents that occurred in Latin America, Europe, Asia, and elsewhere.[83] Others have involved injuries allegedly caused by a range of pharmaceutical and other health-related products.[84]

Plaintiffs have filed these cases in numerous jurisdictions, and a few have resulted in plaintiffs' verdicts and settlements.[85] However, most have been dismissed on *forum non conveniens* grounds.[86] In light of that hurdle, plaintiffs

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3036093 (N.D. Cal. Oct. 16, 2007) (discussing alleged cancer caused by Texaco's operations in Ecuador); Native Federation of the Madre de Dios River & Tributaries v. Bozovich Timber Prod., Inc., 491 F. Supp. 2d 1174 (Ct. In'l Trade 2007) (discussing alleged violations of endangered species treaties in Peru); Sahu v. Union Carbide, 548 F.3d 59 (S.D.N.Y. 2008) (discussing alleged injuries from water pollution in India).

81. David v. Signal Int'l, LLC, 257 F.R.D. 114 (E.D. La. 2009) (discussing alleged trafficking to the United States to work in substandard conditions); Bureerong v. Uvawas, 922 F. Supp. 1450 (C.D. Cal. 1996) (same); Kasky v. Nike, Int'l, 45 P.3d 243 (Cal. 2002) (discussing false advertising and unfair competition action premised on alleged misrepresentations to the public about factory working conditions).

82. The most common types of actions are individual lawsuits filed by injured workers aboard foreign vessels in and out of port, and by patrons at foreign hotels, in which the allegations have ranged from stolen valuables, to terrorist attacks, to injuries and deaths on site. *See, e.g.*, Niv v. Hilton Hotels Corp., 2008 WL 4849334 (S.D.N.Y. No. 10, 2008); Mirian Ramirez de Arellano v. Starwood Hotels & Resorts Worldwide, Inc., 448 F. Supp. 2d 520 (S.D.N.Y. 2006); Tarasevich v. Eastwind Transp. Ltd., 2003 WL 21692759 (S.D.N.Y. July 21, 2003); Gonzales v. P.T. Pelangi Niagra Mitra Int'l, 196 F. Supp. 2d 482 (S.D. Tex. 2002).

83. *See, e.g.,* Clerides v. Boeing Co., 534 F.3d 623 (7th Cir. 2008); Reers v. Deutsche Bahn, AG, 320 F. Supp. 2d 140 (S.D.N.Y. 2004); Van Humbeck v. Robinson Helicopter Co., 2007 WL 4340996 (Cal. Ct. App. Dec. 13, 2007); Herrera v. Michelin N. Am., Inc., 2009 WL 700645 (S.D. Tex. Mar. 16, 2007). *See also* Gomez, *supra* note 32, at 285. The lawsuits have included allegations against United States and foreign airlines, the manufacturers of airplanes, helicopters, trains, automobiles, and tires, and the makers of the constituent parts. *See, e.g.,* Hosaka v. United Airlines, Inc., 305 F.3d 989 (9th Cir. 2002); Lueck v. Sundstarnd Corp., 236 F.3d 1137 (9th Cir. 2001); *In re* Air Crash Near Peixoto de Azeveda, Brazil, 574 F. Supp. 2d 272 (E.D.N.Y. 2008); Faat v. Honeywell Int'l, 2005 WL 2475701 (D.N.J. Oct. 5, 2005); Anandan v. Singapore Airlines Ltd., 2005 WL 758444 (Cal. Ct. App. Apr. 5, 2005); Juanes v. Cont'l Tire North America, Inc., 2005 WL 2347218 (S.D. Ill. Sept. 26, 2005); Rihbany v. Fleetwood Enters., Inc., 2003 WL 1901354 (Ca. Ct. App. Apr. 18, 2003).

84. *See, e.g., In re* Factor VIII or IX Concentrate Blood Prods. Liab. Litig., 2008 WL 4866431 (N.D. Ill. June 4, 2008) (suits brought by hemophiliacs who claim to have been infected with HIV and/or the Hepatitis C Virus through the use of concentrate blood products manufactured by pharmaceutical companies); *In re* Rezulin Prods. Liab. Litig., 214 F. Supp. 2d 396 (S.D.N.Y. 2002); *In re* Vioxx Litig., No. 619, 2006 WL 2950622 (N.J. Super. Oct. 2, 2006).

85. *See, e.g., Kasky*, 45 P.3d 243, which was resolved for $1.3 million. In 1992, a DBCP suit by Costa Rican plaintiffs reportedly settled for some $20 million. In 1997, another action reportedly settled for $41 million, and in 2007, an action involving 13 workers settled for $300,000. *See Panama Banana Workers Bid on a Perilous Business*, NOTICEN: CENTRAL AMERICAN & CARIBBEAN AFFAIRS, Feb. 13, 2003, at 2003 WLNR 16919700; Christian Miller, *Pesticide Company Settles Sterility Suit for $300,000*, L.A. TIMES, Apr. 16, 2007, *at* http://articles.latimes.com/2007/apr/16/local/me-amvac16.

86. That outcome is not surprising. Foreign plaintiffs electing to file actions outside of the jurisdiction where the alleged injury occurred receive substantially less deference in their choice of

have increasingly filed actions in specific state courts where they perhaps believe a *forum non conveniens* dismissal is less likely.[87]

1. The Frequency of Forum Non-Conveniens Dismissals

Perhaps because the ATS is contained in an express federal statute, it appears that courts dismiss non-ATS claims on *forum non conveniens* grounds more frequently than in ATS cases, although courts often still dismiss ATS cases on *forum non conveniens* grounds. Regardless of the ATS or non-ATS nature of the suit, it has become increasingly common for courts to place conditions on defendants, such as agreements to accept the jurisdiction of a foreign tribunal or to abide by the alternative forum's final judgment, before granting a motion to dismiss based on *forum non conveniens*.[88]

Even with such agreements, however, multiple surveys confirm that plaintiffs refile a very small percentage of cases abroad after dismissals from United States' courts.[89] However, in the relatively few cases that plaintiffs do refile in foreign jurisdictions, and as discussed in detail in the context of the Ecuadorian environmental litigation against Texaco, companies may end up facing litigation in unpredictable legal systems subject to political and other external influences.[90] Indeed, no doubt with such concerns in mind, Pfizer, after prevailing on a *forum non conveniens* argument in the District of Connecticut in an ATS case involving alleged involuntary medical experimentation in Nigeria,

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forum. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981); Lear, *supra* note 3, at 567-8 (discussing *Piper*). In addition, the factors courts consider in evaluating *forum non conveniens* motions tend to favor dismissal, including court congestion, local interest in resolving the controversy, the preference for applying familiar law, ease of access to evidence and the convenience of witnesses. *See Piper*, 454 U.S. at 251 n.6. Likewise, courts typically reject the arguments made by plaintiffs that alternative forums are inadequate, whether because of a lack of class action procedures, less developed law, less favorable remedies, fewer available causes of action, or other reasons. *See, e.g., Piper*, 454 U.S. at 256; *In re* Vioxx Litig., 395 N.J. Super. 358, 366 (App. Div. 2007).

87. Delgado v. Shell Oil Co., 231 F.3d 165, 169 (5th Cir. 2000). *See also* Tonah v. Dow Chem. Co., 561 F.3d 945, 949 (9th Cir. 2009) (copycat cases based on plaintiffs' alleged exposure to DBCP, filed with just under one hundred class members, thereby avoiding the one hundred class member threshold that would permit the defendants to invoke the Class Action Fairness Act (28 U.S.C. § 1332(d)(11)(B)(i)) and remove the case to federal court).

88. *See* Daschbach, *supra* note 32, at 25-26.

89. *See, e.g.*, Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) ("Empirical data available demonstrate that less than four percent of cases dismissed under the doctrine of *forum non conveniens* ever reach trial in a foreign court."); Lear, *supra* note 32, at 577 (few cases dismissed on *forum non conveniens* are refiled); Daschbach, *supra* note 32, at 25-26; Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 672 (1992); Hilmy Ismail, *Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?*, 11 B.C. THIRD WORLD L. J. 249, 250 n.7 (1991); Winston Anderson, *Forum Non Conveniens Checkmated? - the Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 193 (2001).

90. *See* Section IV, *infra*.

changed its mind and conceded the *forum non conveniens* point on appeal.[91] Corporate defendants thus must be careful what they ask for, as prevailing on a *forum non conveniens* argument can lead to litigation in far more difficult locations.

D. Foreign Litigation

Although the large majority of transnational tort cases involving companies with a presence in the United States have been brought in the United States, similar matters also are being raised abroad. Some, as in the DBCP context, discussed *infra*, involve efforts to obtain judgments from local courts to be exported to the United States for attempted enforcement. Others involve cases filed in foreign domestic courts where a judgment can be enforced locally.[92] Still others have sought favorable decisions from international or regional tribunals.[93] While such tribunal-related cases may not involve monetary damage awards, and usually involve the state as the putative real party in interest, they can provide plaintiffs with a finding that permits them to assert the merit of their cause and achieve some of their desired results.[94] Indeed, several such cases

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91. *See* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 189 (2d Cir. 2009).

92. *See, e.g.,* Choc v. HudBay Minerals Inc., CV-l0-411159 (Ont. Sup. Ct. filed Nov. 29, 2010) (Canada); Ramirez v. Copper Mesa Mining Corp., CV09-37504 (Ont. Sup. Ct. filed March 3, 2009) (Canada); Oguru v. Royal Dutch Shell PLC, Court of the Hague, Docket Number HA ZA 09-579 (Netherlands); Pedro Emiro Florez Arroyo v. BP Petroleum (Colombia) Ltd., Particulars of Claim, Claim No. HQO8X00328 (High Court of Justice Dec. 1, 2008); Guerrero v. Monterrico Metals PLC, [2009] EWHC 2475 (QB); Canada Assoc. Against Impunity v. Anvil Mining Ltd., (Quebec Prov. Ct. filed Nov. 8, 2010), *available at* http://www.haguejusticeportal.net/Docs/NLP/Canada/Kilwa_Complaint_8-11-2010.pdf.

93. There exists a patchwork of international bodies and quasi-adjudicative tribunals with varying degrees of powers of enforcement over companies. They include U.N. committees that investigate and seek remedies through the pertinent states parties in connection with certain U.N. Conventions, like the Torture Convention, the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination Against Women. They also include regional agreements and conventions, such as: The Convention for the Protection of Human Rights and Fundamental Freedoms, which is enforced by the European Court of Human Rights, *see* http://www.echr.coe.int/echr; the American Convention on Human Rights, implementation of which is maintained by the Inter-American Commission, *see* http://www.cidh.org/DefaultE.htm; and the African Charter on Human and Peoples' Rights, implementation of which is maintained by the African Commission, *see* http://www.achpr.org. Plaintiffs have pursued relatively few actions against companies in these venues, although several have been considered against states themselves in connection with private corporate interests.

94. *See, e.g.*, Guerra v. Italy, 26 Eur. Ct. H.R. 357 (1998) (concerning environmental issues); SERAC and CESR v. Nigeria, African Commission on Human & Peoples' Rights, Comm. No. 155/96 (2001) (concerning alleged abusive activities in the Niger Delta by the Nigerian government and a consortium of oil companies); Taskin v. Turkey, 42 Eur. Ct. H.R. 50 (2006) (regarding a waste dump); Report No. 69/104, Petition 504/03, Admissibility Community of San Mateo De Huanchor and its Members, IACHR (Oct. 15, 2004); *Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala*, PM 260-07, IACHR (2010). *See generally* Nsongurua Udombana, *Between Promise and*

have resulted in multi-million dollar settlements.[95]

II.
PATTERNS OF OUT-OF-COURT TACTICS

In these transnational tort cases, parties frequently employ out-of-court tactics in part to publicly advance their cause, pressure their opponents, or initiate corporate change. While defendants, plaintiffs, and third parties may employ such tactics, this Article focuses on those pursued by plaintiffs.

A. Methodology

In analyzing those tactics, the authors reviewed public information, including court records, judicial decisions, publications and reports, transcripts, press releases, public emails and correspondence, news articles, documentaries, mini-documentaries, television programs, video clips, webpages, web-logs ("blogs"), and other internet media, associated with some twenty-five recent transnational tort matters.[96] The cases were not selected at random. The authors intentionally chose cases with diverse characteristics. The cases involve: individual and class actions; companies that operate in a variety of sectors, including chemicals, agriculture, oil and gas, mining, manufacturing, pharmaceuticals, finance, and the Internet; underlying conduct arising from countries in Latin America, Africa, Asia and Europe; companies that are well known to the public, and less well known; and many different alleged acts, including chemical exposure, environmental harms, working conditions, child labor, attacks on union leaders, violence caused by state security forces or paramilitary units, non-consensual medical experimentations, and involvement

Performance: Revisiting States' Obligations Under the African Human Rights Charter, 40 STAN. J. INT'L L. 105 (2004).

95. For instance, in July 2005, a group of Colombian farmers sought £15 million in damages from the English High Court against BP Exploration Company (Colombia), alleging environmental degradation and security force abuses from an oil pipeline constructed by a BP-led consortium. The parties reached an undisclosed settlement in July 2006, which likely included a payment of several million pounds. Another similar matter was instituted in 2008 and remains pending. *See* Pedro Emiro Florez Arroyo v. BP Petroleum (Colombia) Ltd., Particulars of Claim, Claim No. HQO8X00328 (High Court of Justice Dec. 1, 2008); Robert Verkaik, *BP pays out millions to Colombian Farmers*, INDEPENDENT, July 22, 2006; Leigh Day return to Colombia to meet more farmers, March 18, 2008, http://www.leighday.co.uk/news/news-archive/leigh-day-return-to-colombia-to-meet-more-farmers. *See also* Clara Nwachukwu, *Shell Appeals N15.4bn Oil Spill Penalty*, VANGUARD, July 8, 2010 (Nigerian Federal High Court ordered Shell Petroleum Development Company to pay $100 million related to an oil spill); Adam Nossiter, *Payments in Ivory Coast Dumping At Risk, Lawyer Says*, N.Y. TIMES, Nov. 4, 2009; *Waste Victims Waiting for Compensation*, AFP, Nov 21, 2009 (Settlement of $49 million in London High Court Action against petroleum trader Trafigura arising from alleged dumping of toxic waste off Cote d'Ivoire in 2006).

96. Some of these cases are related, and courts consolidated some. This Article treats related and consolidated cases as one case; based on individual filings, the number of cases studied exceeds 40 in total.

with repressive governmental regimes. In addition, the authors selected cases in which plaintiffs prevailed, in which defendants prevailed, which settled, and which are ongoing. While nearly all involve grave claims of wrongdoing that, if true, are deeply disturbing, we did not assess the underlying legal or factual merits of any of the cases studied.

Instead, for each of these cases, we attempted to identify out-of-court tactics plaintiffs or their advocates employed. We did not attempt to identify every tactic plaintiffs used on those cases, but selected twenty-four tactics that we previously observed in individual transnational tort actions to determine whether they appeared in other cases.[97] To be clear, this Article does not suggest that any of these twenty-four tactics are *per se* proper or improper, though as indicated by some of the case studies there are instances in which the tactics may have influenced foreign legal determinations or been launched in conjunction with questionable claims. In addition, it is possible that a study focusing on defense tactics in these same cases may identify similar tactics, although we did not observe defendants using these tactics with the same degree of frequency.[98]

The twenty-four tactics we studied fall into four general categories: media tactics, community organizing tactics, investment tactics, and political tactics. The patterns we observed for each of these categories are set forth below, followed by three case studies.

B. Media Tactics

In all twenty-five of the cases reviewed, plaintiffs used media-related approaches. These methods most commonly took the form of Internet campaigns, news articles, radio and television programs, films, and documentaries.

1. Internet Campaigns

Because of its unique features, the Internet is a very popular communications device in litigation. The Internet is in many respects the perfect messaging medium, as websites are inexpensive and easy to maintain, and information can be fully controlled with little oversight or censorship. A site can host stories that appear to be legitimate news, but contain arguments or party positions. Indeed, websites are now often treated as mainstream news sources. The Internet also has a remarkably broad reach because it operates on a worldwide basis and can host multi-media sources. An individual or entity can

97. The tactics are below and appear in Table 1. Certain additional tactics were present in several cases reviewed during the study; while these additional tactics do not appear in the Table, some may be noted within the text.

98. That likely is due to the fact that, as a general proposition, the plaintiffs in these cases have a greater interest in increasing publicity surrounding the suit or in seeking change.

also establish multiple interrelated sites to maximize readership.

The study found the use of Internet campaigns in most cases, 21 out of 25. They generally operate as public relations, advocacy, and community organizing vehicles. Plaintiffs' organizations and plaintiffs' advocates house most of the web campaigns.[99]

Case related Internet campaigns commonly consist of various elements. They include 'fact' sheets, which outline the core case details from the plaintiffs' perspectives;[100] summaries of the legal proceedings and legal documents;[101] press kits, composed of media backgrounders, key documents, press releases, and other case details for members of the media interested in providing coverage;[102] a collection of the press releases that have been issued by the plaintiffs' attorneys or third parties;[103] reports of various types;[104] favorable articles;[105] campaign posters and postcards to express support for the effort;[106] photographs; YouTube videos of plaintiffs, attorneys and others; trial coverage, where applicable; and blogs in which participants, typically pro-plaintiff, can discuss their views of the case.[107]

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99. *See, e.g.*, EarthRights International, "Wiwa v. Royal Dutch/Shell" page, http://www.earthrights.org/legal/shell; Center for Constitutional Rights, "Wiwa et al. v. Royal Dutch Petroleum et al" page, http://www.ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum. Several websites set up by defendants in the cases studied likewise appeared.

100. *See, e.g.*, Fact Sheet, EarthRights International and Center for Constitutional Rights, *Bowoto v. Chevron: International Human Rights Litigation, Chevron Pays, Houses, Transports, Schedules and Directs the Nigerian Police and Military*, http://ccrjustice.org/files/Chevron_Nigerian_Police.pdf; *see also* Fact Sheet, EarthRights International and Center for Constitutional Rights, *Bowoto v. Chevron: International Human Rights Litigation, Dead Fish, Dead Trees, No Water to Drink*, http://ccrjustice.org/files/Chevron_Environment.pdf.

101. *See, e.g.*, *Bowoto v. Chevron*, CENTER FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/current-cases/bowoto-v.-chevron (last visited April 5, 2011); *Bowoto v. Chevron Case Overview*, EARTHRIGHTS INTERNATIONAL, http://www.earthrights.org/legal/bowoto-v-chevron-case-overview (last visited April 5, 2011); BIGIO FAMILY LAWSUIT AGAINST COCA-COLA, http://www.bigiofamily.com/11801.html (last visited April 5, 2011).

102. *See, e.g.*, *Wiwa v. Shell: For Journalists*, WIWA V. SHELL, http://wiwavshell.org/press/for-journalists (last visited April 5, 2011).

103. *See, e.g.*, *Press Coverage of Wiwa v. Shell*, EARTHRIGHTS INTERNATIONAL, http://www.earthrights.org/about/news/press-coverage-wiwa-v-shell (last visited April 5, 2011).

104. *See, e.g.*, *Ethical Standards and Working Conditions in Wal-Mart's Supply Chain*, INTERNATIONAL LABOR RIGHTS FORUM (October 24, 2007), http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10586; *see also*, *Wal-Mart in China: The High Cost of Low Prices*, INTERNATIONAL LABOR RIGHTS FORUM (October 25, 2006), http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10662.

105. *See, e.g.*, *News & Press*, INTERNATIONAL RIGHTS ADVOCATES, http://www.iradvocates.org/drummond.html (Drummond); http://www.iradvocates.org/oxy.html (*Occidental v. Mujica)*; *see also Press Links*, JUSTICE IN NIGERIA NOW (February 9, 2009), http://justiceinnigeria.wordpress.com/press-links (Bowoto).

106. *See, e.g.*, *Posters and Postcards*, WIWA V. SHELL, http://wiwavshell.org/resources/posters-and-postcards (last visited April 5, 2011).

107. *See, e.g.*, Labor is Not a Commodity blog, a collaboration of NGOs, covering labor rights issues, including information about Wal-Mart, http://laborrightsblog.typepad.com/international_

These Internet campaigns frequently also involve calls-to-action. Those often include: appeals for letter-writing campaigns to company executives, board members and defendant supporters, along with form letters;[108] student activism kits, which may describe how students can become educated about the issues and then educate others on campus through forums and rallies;[109] calls for protests[110] as well as boycotts of the defendants' products, and explanations for how the public citizenry can seek the same;[111] and calls for others to write op-eds or letters to the editor, attend trials or hearings, host video screenings of documentaries, and engage in other forms of activism.[112] Many of the Internet campaigns also include connections to the social media sites Facebook and Twitter, where part of the campaign is lodged for supporters.[113]

2. News Articles

Websites also often feature news articles.[114] Though, focusing on print media, the study identified articles in newspapers, journals, and magazines, both in print and online, in all twenty-five cases.[115] The study tracked print media

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labor_right/walmart (last visited April 5, 2011).

108. *See, e.g.*, Press Release, International Labor Rights Forum, Burmese Workers Suing Unocal in Los Angeles Will Have Their Day in Court (August 30, 2001), http://www.icai-online.org/xp_resources/icai//burmese_workers_suing_unocal.pdf.

109. *See, e.g.*, *Hel-Mart's Call Regarding Wal-Mart*, HELL-MART, http://www.hel-mart.com/links.php; STOP FIRESTONE COALITION, http://www.laborrights.org/files/StudentActionKit.pdf (last visited April 5, 2011).

110. *See, e.g.*, *Hel-Mart's call regarding Wal-Mart*; International Labor Rights Forum's Call Regarding Firestone (July 30, 2008), http://www.laborrights.org/stop-child-labor/stop-firestone/news/11687; *Stop Firestone Coalition's Protest,* STOPFIRESTONE.ORG (July 24, 2008) http://www.stopfirestone.org/2008/07/report-from-stop-firestone-protest-at-public-strategies; http://www.laborrights.org/files/StudentActionKit.pdf

111. *See, e.g.*, The Bigio Family Court Case, "Bigio Family Lawsuit Against Coca-Cola" section, http://www.bigiofamily.com/24043.html; *see also* Amazon Watch, "Everyday actions" page, http://www.amazonwatch.org/take_action/everyday.

112. For instance, the Stop Firestone campaign, related to *Flomo v. Bridgestone*, a case alleging forced and child labor on a Liberia plantation, includes, among other things, letter writing, protests, urging city councils to adopt resolutions, student toolkits, and an online action campaign to tell the NFL to stop supporting Bridgestone/Firestone. *See, e.g.*, NFL-related campaign, INTERNATIONAL LABOR RIGHTS FORUM, http://www.unionvoice.org/campaign/NFL09 (last visited June 2010); *Student Action Kit*, INTERNATIONAL LABOR RIGHTS FORUM, http://www.laborrights.org/files/StudentActionKit.pdf. In response to the suit, Firestone argues that its employees, including the plaintiffs, are free to leave their jobs at any time. *See* Defendant's Reply Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint, No. CV 05-8168 (C.D. Cal. Apr. 3, 2006).

113. *See, e.g.*, www.wiwavshell.org; www.stopfirestone.org (maintained by a coalition, including plaintiffs, of *Flomo v. Bridgestone Americas Holding* (involving allegations of forced and child labor) lawsuit supporters).

114. *See, e.g.*, INTERNATIONAL RIGHTS ADVOCATES, *supra* note 105, JUSTICE IN NIGERIA NOW, *supra* note 105.

115. Given that the cases often involved high profile lawsuits, that result is not wholly surprising.

generally and articles in which the plaintiffs or their attorneys appeared specifically. News articles include traditional news pieces and opinion pieces, such as op-eds and blog posts.

Although some articles originated organically, many seem to result from press releases that plaintiffs' attorneys and organizations issued. The study identified such press releases in twenty of the cases.[116]

Print media and press releases are simple, effective, and inexpensive means to broadcast messages, and they tend to spike in frequency around major events in the lawsuit, such as the filing of a complaint and important rulings. Articles based on press releases also increase around the time of plaintiff activism events, such as protests and shareholder actions. The articles often include strong language by plaintiffs' attorneys about the underlying merits of the case,[117] and may include pieces plaintiffs or their advocates authored.[118] Following their publication, the press releases, like other articles, may be maintained on the Internet, which increases and prolongs their impact.

3. Television/Radio Broadcasts

In addition to print media, radio and television covered seventeen of the cases, a number that is likely underrepresented because of the lack of publicly available materials for review. Only a minority of the cases had national television or radio coverage, as most of the radio and television appearances were in local media.

As with other forms of media, some of the television and radio broadcasts may have developed organically; these programs, however, often contain what seem to be a pro-plaintiff slant, or at a minimum repeat the graphic allegations in the case. Like other materials, these television and radio broadcasts often appear on plaintiffs' attorneys' websites, thus expanding the broadcasts' circulation and duration.[119] As with all media coverage, television and radio

116. The press releases were issued by various different firms and NGOs. Defendants in several cases issued press releases at key points, such as when they obtained dismissals.

117. *See, e.g.*, *Chavez & Gertler Announces Lawsuit Filed Against DaimlerChrysler Over "Dirty War" Human...*, BUS. WIRE, January 14, 2004, *at* http://www.allbusiness.com/government/government-bodies-offices/5212466-1.html (DaimlerChrysler "wanted to get rid of the union leaders," and "[m]anagers of that Mercedes plant knew they could get away with this"); *Exxon 'helped torture in Indonesia'*, BBC NEWS, June 22, 2001, http://news.bbc.co.uk/2/hi/business/1401733.stm (related to alleged abuses by Indonesian security forces at an Exxon facility, "Exxon knew from the beginning about the security forces' reputation of brutality"); Peter Vermaas, *Apartheid Victims Want Western Companies To Cough Up*, NRC HANDELSBLAD, October 2, 2009 (changed October 5, 2009), http://www.nrc.nl/international/article2376593.ece/Apartheid_victims_want_Western_companies_to_cough_up ("Our case is not only about the apartheid past, but also about how companies behave in general in countries where human rights are violated").

118. Larry Bowoto (assisted by Bert Voorhees, one of his lawyers), *Chevron Should Pay* (Op-Ed), L.A. TIMES, May 29, 2008, http://articles.latimes.com/2008/may/29/opinion/oe-bowoto29.

119. Of the media sources that retain publicly searchable materials, a review of archived public

appearances increase in number at the filing of a lawsuit or commencement of a trial, after any important court rulings, and around events planned by plaintiffs' organizations.[120]

4. Films, Documentaries and Mini-Documentaries

Though less frequent than television or radio appearances, thirteen of the studied cases featured films, documentaries, and mini-documentaries, a substantial number given the effort and expense involved in creating these visual media.[121] In some instances, it is unclear whether plaintiffs directly funded or participated in directing these films and documentaries. In most instances, however, plaintiffs or their attorneys participated in the production of the film; sometimes they are even featured in the film itself.[122] Regardless of their participation, most of the films sympathize with the plaintiffs, who often place movie clips on their websites or plan activism events around them. For example, plaintiff websites create both Internet toolkits for students and others to watch the documentaries and press kits to help shape media coverage.

A fairly recent creation is the "mini-documentary," akin to a political campaign video, made by plaintiffs or their attorneys. These typically run for roughly ten minutes, emphasize key arguments and evidence, and can carry the visual message of the plaintiffs in a powerful manner. The documentaries'

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materials found that the Voice of America service, Democracy Now! (a daily television/radio news program) and public radio syndicates provided the most frequent coverage of the plaintiffs' cases. *See, e.g.*, *NPR Marketplace* (American Public Media Broadcast), *transcript available at* http://lrights.igc.org/press/ChildLabor/cocoa/fairtradecocoa_marketplace_020606.htm; Democracy Now!, *Occidental Petroleum Sued for Role in Civilian Massacre in Colombia* (May 2, 2003), http://www.democracynow.org/2003/5/2/occidental_petroleum_sued_for_role_in#; *Saro-Wiwa's Memory Kept Alive: CNN's Christian Purefoy reports on what the Ogonis feel about the trial of Nigerian activist Ken Saro-Wiwa vs. Shell*, CNN.COM (added on June 9, 2009), http://www.cnn.com/video/#/video/world/2009/06/09/purefoy.nigeria.shell.court.cnn.

120. Although as a general matter we observed less use of the media by corporate defendants, we did observe several instances in which corporate defendants issued short statements at key points in the cases.

121. Though not a focus of the study, we observed few instances in which corporate defendants created films, documentaries, or mini-documentaries.

122. For instance, Plaintiffs' counsel played a pivotal role in the documentary *Litigating Disaster*, which was based on *Bano v. Union Caride Corp.*, the dismissed action arising from the Bhopal gas leak. *See* Icarus Films, *Litigating Disaster: A film by Ilan Ziv*, http://icarusfilms.com/new2004/lit.html. The makers constructed the film around a judicial theme; it shows the plaintiffs' attorney presenting his case to a fictitious jury, the documents secured in discovery, the evidence against the company, and includes interviews with former company employees. *See also*, *Nigerian Delta Force*, JOURNEYMAN PICTURES (April 18, 1995), http://www.journeyman.tv/?lid=59032 (chronicling the life of Ken Saro-Wiwa, the deceased plaintiff from *Wiwa v. Royal Dutch Petroleum*, and Shell's activities in Nigeria); *Drilling and Killing*, Democracy Now! (July 11, 2003), *transcript available at* http://www.democracynow.org/2003/7/11/transcript_of_drilling_and_killing_documentary (about *Bowoto v. Chevron Corp.*); *Total Denial*, http://www.totaldenialfilm.com (a documentary about *Doe v. Unocal Corp.*); *Poison Fire The Movie*, www.poisonfire.org (about the environmental practices that underlay the protests leading to *Wiwa v. Royal Dutch Petroleum*).

brevity and the fact that they are typically posted on YouTube or plaintiffs' websites render them readily accessible to the public. Tens of thousands of viewers often see these mini-documentaries, as anyone with an internet connection can access them.[123]

5. Other Media Publicity: Press Conferences, Reports and Seminars

The study identified a number of other media efforts by plaintiffs and their attorneys. For instance, they may hold press conferences to coincide with the filing of lawsuits and other events.[124] Another tactic is the publication of detailed subject matter reports, whether prepared by plaintiffs' organizations themselves or by outside consultants, on the issues surrounding the lawsuits.[125] Plaintiffs' attorneys also sometimes speak on university campuses and in other fora to publicize their cases and encourage activism.[126]

C. Community Organizing Tactics

While media tactics were most commonly used by plaintiffs in the cases studied, community organizing tactics, including partnering with other organizations, boycotts, and protests, also appeared frequently.

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123. *See, e.g.*, *Campaign Video: The Case Against Shell: Landmark Human Rights Trial (Wiwa v. Shell)*, WIWA V. SHELL, http://wiwavshell.org/resources/campaign-video (last visited April 5, 2011); *The Case Against Shell: 'The Hanging of Ken Saro-Wiwa Showed the True Cost of Oil'*, YOUTUBE (May 18, 2009) http://www.youtube.com/watch?v=htF5XElMyGI; Press Release, Amazon Watch, Occidental Petroleum's Toxic Legacy in the Peruvian Amazon To Dominate Annual Meeting (October 27, 2009), http://www.amazonwatch.org/newsroom/view_news.php?id=1777.

124. For example, the plaintiff, his attorney, and a former state senator participated in a press conference surrounding the filing of the *Mujica* lawsuit against Occidental Petroleum, involving alleged abuses in Colombia. *See* Joint Press Release, Global Exchange/Amazon Watch, Occidental Petroleum Sued in U.S. Courts For Role in Civilian Massacre in Colombia Role in Civilian Massacre in Colombia, Global Exchange, Apr. 24, 2003, http://www.globalexchange.org/countries/americas/colombia/663.html. Occidental Petroleum denies any responsibility for any injuries to the plaintiffs. *See* Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal of Defendant, Mujica v. Occidental Petroleum Corp., 564 F.3d 1190 (9th Cir. 2009) (Nos. 05-56056, 05-56175, 05-56178).

125. *See, e.g.*, *Firestone and Violations of Core Labor Rights in Liberia*, INTERNATIONAL LABOR RIGHTS FORUM, http://www.laborrights.org/stop-child-labor/stop-firestone/resources/12060 (last visited April 5, 2011).

126. For example, an attorney from the *Bano* case claims to have spoken at a variety of universities, including Princeton, New York University, University of Chicago, and the New England School of Law. *H. Rajan Sharma Biography*, SHARMA & DEYOUNG LLP, http://sharmadeyoung.com/sharma.html. *See also* Terry Collingsworth, Beyond Reports and Promises: Enforcing Universally Accepted Human Rights Standards in the Global Economy (Seminar #3), THE CARNEGIE COUNCIL, February 6, 2003, http://www.cceia.org/resources/articles_papers_reports/874.html.

1. Partnering with Like-Minded Organizations

In most of the cases studied, one or more of the plaintiffs' attorneys were from nonprofit legal organizations or public interest firms. In fifteen of the cases, there were joint efforts between those attorneys and like-minded human and labor rights organizations.[127]

In several cases, plaintiffs' organizations formed new coalitions to support a legal action.[128] Of particular note, in the cases reviewed, labor unions were a frequent partner for the plaintiffs' organizations, appearing, quite logically, in nearly all cases involving allegations of labor violations and of the killing of labor unionists.[129]

In at least two cases, plaintiffs' attorneys filed the lawsuit in part on behalf of institutional plaintiffs.[130] In numerous other cases, plaintiffs' organizations

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127. *See generally* Holzmeyer, *supra* note 15, at 287-88.

128. For example, in *Flomo v. Bridgestone Americas Holding,* the Stop Firestone Coalition consists of the plaintiffs' attorneys who filed the lawsuit, along with a wide range of environmental groups, finance organizations, civil rights groups, human rights units, and labor unions. *See Who We Are*, STOP FIRESTONE COALITION, http://www.stopfirestone.org/about/coalition (last visited Mar. 13, 2011); *Cases: Bridgestone-Firestone*, INTERNATIONAL RIGHTS ADVOCATES, http://www.iradvocates.org/bfcase.html (last visited Feb. 7, 2011); Press Release, Stop Firestone Coalition, *Super Bowl Halftime Sponsor, Bridgestone Firestone, Uses Child Labor, Abuses Workers and Environment in Liberia*, INTERNATIONAL LABOR RIGHTS FORUM, January 29, 2008, http://www.laborrights.org/stop-child-labor/stop-firestone/news/11309. The groups are based both in the United States and Liberia, the site of the underlying acts at issue in the case. EarthRights International was also formed for the *Unocal* case. *See* Holzmeyer, *supra* note 15, at 282.

129. For instance, a United Steelworkers Union ("USW") counsel is an attorney of record in *Bauman v. DaimlerChrysler*, *see* Bauman v. DaimlerChrysler Corp., No. 04 Civ. 00194 (N.D. Cal. Jan. 14, 2004) and *Drummond*; in *Drummond*, the USW also provided Congressional testimony and wrote letters to the Secretary of State about the action. *See, e.g.*, Complaint, Estate of Rodriguez v. Drummond Co., Inc., No. 02-CV-0665 (N.D. Ala. Mar. 14, 2002); *Protection and Money: U.S. Companies, Their Employees, and Violence In Colombia: A Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on the Western Hemisphere of the House Comm. on Foreign Affairs and the Subcomm. on Health, Employment, Labor, and Pensions and the Subcomm. on Workforce Protections of the Committee on Education and Labor*, 110th Cong. (June 28, 2007); Letter from USW to Hillary R. Clinton (Sept. 17, 2009), http://assets.usw.org/News/GeneralNews/09-17-09secyclintonltrondrummond.pdf; *see also* James Parks, *AFL-CIO Solidarity Center Honors Liberian Rubber Workers*, AFL-CIO NOW BLOG, June 27, 2008, http://blog.aflcio.org/2008/06/27/afl-cio-solidarity-center-honors-liberian-rubber-workers/ (regarding the *Bridgestone* case, the AFL-CIO awarded the plaintiffs' workers' union, the Firestone Agricultural Workers Union of Liberia with an award).

130. In *Doe v. Nestle*, involving labor practices in Cote d'Ivoire, Global Exchange – a "membership-based international human rights organization" that focuses on fair trade, labor rights and environmental practices – is a plaintiff in the lawsuit. *Cases: Nestle, Archer Daniels Midland, and Cargill*, INTERNATIONAL RIGHTS ADVOCATES, http://www.iradvocates.org/bfcase.html (last visited on Feb. 7, 2011). Global Exchange helps coordinate activism surrounding the action through organizing protests, letter-writing campaigns, and other means. The defendants deny the allegations in the complaint, arguing that, if anything, the conduct at issue sought to prevent improper labor practices. *See* Notice of Motion and Motion to Dismiss Plaintiffs' Amended Complaint, Doe v. Nestle, CV-05-5133-SVW (C.D. Cal. July 20, 2009), *see also* Kelly Hearn, *For Peru's Indians, Lawsuit Against Big Oil Reflects a New Era: Outsiders and High-Tech Tools Help Document Firms'*

have worked or partnered with like-minded groups on certain activism events, internet campaigns, or media publicity.[131]

2. Protests & Boycotts

Eighteen of the cases studied involved organized protests. Plaintiffs and their advocates often organized protests near the defendants' corporate headquarters or to coincide with an event involving a corporate defendant. As with other tactics, protests can be an inexpensive and effective way to advance a message.[132] In the same vein, boycotts were quite common, appearing in seventeen of the cases reviewed.[133]

D. Investment Related Tactics

Much like media and community-activism tactics, the study identified numerous instances of investment-related tactics by plaintiffs and their supporters; eighteen cases in all. While plaintiffs and their advocates use media

Impact, THE WASHINGTON POST (Jan. 31, 2008), http://www.washingtonpost.com/wp-dyn/content/story/2008/01/31/ST2008013100037.html. In other cases, organizations plan events to bring attention to the lawsuits, but it is unclear whether the interests of these organizations in the actions developed organically and separate from the plaintiffs and their advocates, or whether the organizations work in partnership with plaintiffs. *See* STOP THE TRAFFIK, http://www.stopthetraffik.org/about/who/coalition.aspx (last visited Feb. 7, 2011) (related to *Doe v. Nestle*).

131. For example, in *Bowoto v. Chevron Corp.*, the organization Justice in Nigeria Now, noted above, posted fact sheets on its website, assisted with media publicity, and gave interviews at the start of the 2008 trial. *See Chevron*, JUSTICE IN NIGERIA NOW, http://justiceinnigerianow.org/about-chevron (last visited on Feb. 2, 2011), JUSTICE IN NIGERIA NOW BLOG, http://justiceinnigeria.wordpress.com (last visited Mar. 13, 2011); Robin Rose, *Bowoto v. Chevron*, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM BLOG, November 4, 2008, http://wilpf.blogspot.com/2008/11/bowoto-v-chevron.html.

132. *See generally* Holzmeyer, *supra* note 15, at 291 (discussing protests related to *Unocal*). For instance, in connection with the *Carijano* lawsuit, the plaintiff joined other supporters and activists in demonstrating outside Occidental Petroleum's headquarters. In connection with the *Mujica* case, a protest organized by the USW was held outside Occidental Petroleum's headquarters to coincide with a public hearing against the company by the People's Permanent Tribunal in Colombia, a citizens group that considered alleged "crimes" against Occidental Petroleum and others accused of participating in attacks on union leaders. Media Advisory, *United Steelworkers, Occidental Petroleum on Trial in Colombia Tribunal: Steelworkers Demand Justice*, UNITED STEELWORKERS, July 18, 2008, http://www.usw.org/media_center/releases_advisories?id=0047.

133. For example, SAMFU, part of the Stop Firestone campaign, has called for a boycott of the company's products until it addresses the coalition's concerns about working conditions. *Poor Conditions in Liberia's Rubber Plantations*, TRÓCAIRE'S, May 23, 2006, http://www.trocaire.org/news/2006/05/23/poor-conditions-liberias-rubber-plantations. Royal Dutch Shell, in which the NGO Essential Action (a group whose stated mission is to encourage citizens to become socially active) demanded the boycott – while it is unclear whether that organization was related to the plaintiffs, the boycott was in response to the events of the *Wiwa* lawsuit. *Boycott Shell*, ESSENTIAL ACTION, http://www.essentialaction.org/shell/index.html (last visited on Feb. 13, 2011); *Shell in Nigeria: What are the issues?*, ESSENTIAL ACTION, http://www.essentialaction.org/shell/issues.html (last visited on Feb. 13, 2011).

tactics and community organizing techniques to place public pressures on corporate defendants, the investment strategies directly target corporate stock prices, executives, and shareholders. The tactics include appearances at annual shareholder meetings, introducing resolutions, and divestment campaigns.

1. Plaintiffs' Attendance at Annual and Shareholder Meetings

When plaintiffs attend and speak at annual shareholder meetings, as they did in eight cases studied, they can communicate directly with stockholders, technically the owners of the company, and company executives. Plaintiffs often generate media attention in the process. Coupled with the relative ease and lack of expense, shareholder meeting participation is a popular tactic.[134] Of the tactics studied, it is perhaps among the most likely to be underrepresented, since participation at a shareholders meeting may not generate the type of publicly retrievable documentation primarily used in this review.

2. Introducing Resolutions at Shareholder Meetings

The study found that introducing resolutions is the most frequent investment tactic. This was present in seventeen cases.[135] Typically, the resolutions seek reviews of and reports on the companies' practices at issue in the lawsuit, and attempt to improve company compliance with human rights standards.[136] Plaintiffs and their advocates typically pursue such resolutions because even if the resolutions do not pass, which they rarely do, they still raise the plaintiffs' concerns in a visible manner to the company's board of directors, management, employees, and shareholders. Institutional funds in New York have been particularly active in these efforts.[137] In some of the cases reviewed,

134. *See generally* Holzmeyer, *supra* note 15 at 291 (discussing shareholder resolutions, including in relation to *Unocal*). For instance, in connection with his lawsuit against Chevron, Larry Bowoto traveled to the Bay Area in May 2008 to speak at Chevron's annual shareholder meeting. *Lawyers For Larry Bowoto Respond to Chevron Executive's Comments*, EARTHRIGHTS INTERNATIONAL, May 29, 2008, http://www.earthrights.org/content/view/539/62; *see also* Pat Murphy, *Nigerian Plaintiffs' Attorneys in Bowoto Case Should Pay Chevron Court Costs – Attorneys Talked Bowoto, Nigerians Into Losing Suit – Why Shouldn't They Bear Costs?*, THE SAN FRANCISCO SENTINEL, Apr. 11, 2009, http://www.sanfranciscosentinel.com/?p=22618.

135. *See generally* Alex Markels, *Showdown for a Tool In Human Rights Lawsuits*, N.Y. TIMES, June 15, 2003 ("In resolutions being put before corporate directors, shareholders are calling for companies to pull out of projects implicated in human-rights lawsuits.").

136. *Id.*

137. For example, the New York City pension fund filed shareholder resolutions to challenge Yahoo! and Google's policies in China and other countries. See Jill Gardiner, *Thompson Targets Google, Yahoo Over China Policy*, N.Y. SUN, Dec. 14, 2006, http://www.nysun.com/new-york/thompson-targets-google-yahoo-over-china-policy/45150. Reporters Without Borders, which later assisted the plaintiffs in the lawsuit against Yahoo!, also noted that it would ask institutional shareholders to press Yahoo!'s management on their policies. *See Anti-Yahoo! Campaign Begins*, ASIA NEWS, Sept. 14, 2008, http://www.asianews.it/index.php?l=en&art=4118. Similarly, the New York City Comptroller and the New York City pension systems, which represented over 10,000,000

the plaintiffs' involvement in introducing resolutions was clear. In others, because of lack of involvement or methodological limitations, it was not. However, the pattern of resolutions introduced bearing a correlation with the facts at issue in the underlying litigation raise the possibility of plaintiff involvement.

3. Pressuring Shareholders to Divest Stock in Defendant Companies

In a related vein, the study identified several instances of pressures to divest stock holdings; seven cases in all. Divestiture can, if successful, drive down stock prices, bring along other investors, and create negative media attention.[138]

However, in the cases studied as part of the review, there was no evidence that divestiture efforts impacted corporate stock prices. Nor were there clear causal links between divestiture efforts and the plaintiffs in the cases studied, whether because the plaintiffs were not involved or because of methodological limits.

In seven instances that we observed, however, divestiture did cause investment firms who make decisions based on social criteria to give negative ratings to some defendant companies, citing the then-outstanding litigation as their reason for doing so.[139] Among those who divested in the cases studied were universities[140] and pension funds, particularly TIAA-CREF, a retirement fund, which provides retirement plans for educational, religious, and nonprofit organizations.[141]

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shares in Wal-Mart, also had a shareholder resolution introduced on their behalves at one of Wal-Mart's shareholder meeting. Rev. Rhett Baird, Minister at the Unitarian Universalist Fellowship of Fayetteville, Ark., Speech on behalf of the New York City Comptroller and the New York City pension systems at the annual shareholders meeting of Wal-Mart in Fayetteville, Ark. (June/Sept. 2002), http://www.uujec.org/bbr/walmartshareholderaction.pdf.

138. *See, e.g.*, Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425, 438-41 (2004).

139. *See, e.g.*, *Dexia Equities L Sustainable Emerging Markets: European SRI Transparency Guidelines*, DEXIA ASSET MANAGEMENT, at 10 (Sept. 2009), https://www.dexia-am.com/NR/rdonlyres/47096CA9-4675-46E9-AF20-3C69E0F780B3/0/TG_Dexia_Equities_L_Sustainbale_Emerging_Markets_2009_EN_20090904.pdf.

140. *See* Mark Thomsen, *Students Push University of Virginia Out of Unocal*, SOCIALFUND'S SUSTAINABILITY INVESTMENT NEWS, Oct. 23, 2001, http://www.socialfunds.com/news/article.cgi/693.html (University of Virginia divested 50,000 shares of Unocal in response to student protests that the company was complicit in human rights violations perpetuated by the Burmese military).

141. *See* TIAA-CREF, http://www.tiaa-cref.org/public/about/index.html. For instance, activists also urged NY TIAA-CREF to divest from Wal-Mart. Al Norman, *New York, NY TIAA-CREF Urged To Divest Wal-Mart Stock*, WAL-MART WATCH BLOG, July 17, 2009, http://walmartwatch.com/blog/archives/al_norman_new_york_ny_tiaa_cref_urged_to_divest_wal_mart_stock. *See also* Bill Baue, *Norwegian Government Pension Fund Dumps Wal-Mart and Freeport on Ethical Exclusions*, SOCIALFUND'S SUSTAINABILITY INVESTMENT NEWS, June 16, 2006, http://www.socialfunds.com/news/article.cgi/2034.html (Norwegian Ministry of Finance's

E. Political Tactics

Of the categories of tactics studied, plaintiffs employed political tactics the least frequently, only fourteen times in all. The primary tactics the study identified were testimony at congressional hearings by plaintiffs or their advocates, alignment with politicians and well-known leaders to garner support and publicity, and pressure for resolutions on local levels.[142]

1. Congressional Hearings

In ten of the cases reviewed, the plaintiffs or their supporters testified at friendly congressional hearings.[143] Much like others studied, this tactic has appeal on multiple levels: it is essentially cost-free, generates publicity, and may influence lawmakers and others.[144] In addition, on two occasions in recent years

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Government Pension Fund divested $416 million worth of Wal-Mart stock upon recommendation from the Government's Council on Ethics).

142. In several of the cases reviewed, defendants likewise appeared to have used certain political efforts.

143. *See, e.g., Protection and Money: U.S. Companies, Their Employees, and Violence In Colombia, a joint hearing before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on the Western Hemisphere of the Committee on Foreign Affairs and the Subcomm. on Health, Employment, Labor, and Pensions and the Subcomm. on Workforce Protections of the Committee on Education and Labor*, 110th Cong. at 27 (2007) (testimony by counsel for plaintiffs in *Drummond*, *Sinaltrainal*, and *Occidental* cases); *Wal-Mart's 2008 Shareholder Resolutions: Human Rights Committee*, WAL-MART WATCH, May 13, 2008, http://walmartwatch.com/blog/archives/wal_marts_2008_shareholder_resolutions_human_rights_committee; Z. Byron Wolf, *Sweatshop Toys? China's Goods Find U.S. Homes: Free Versus Fair Trade Fails to Inspire Most in Congress*, ABC NEWS, Oct. 25, 2007, http://abcnews.go.com/Politics/story?id=3775750&page=1.

144. In 2006 and 2007, in perhaps the most well-known Congressional hearings among the cases reviewed, the House Committee on Foreign Affairs called upon Yahoo! executives to testify. *See Yahoo! Inc.'s Provision of False Information to Congress, Hearing Before the Committee on Foreign Affairs*, 110th Cong. (Nov. 6, 2007). In 2006, company officials told the Committee that they had been unaware of the nature of an investigation by the Chinese government against a dissident at the same time the Chinese government sought, and received, from Yahoo! online information about the dissident – the facts underlying *Xiaoning v. Yahoo! Inc.* In the suit, Yahoo! argued that its subsidiary acted lawfully under Chinese laws, obeyed requests of the Chinese government and the lawsuit sought to hold the company liable for the acts of the Chinese government. See Defendant Yahoo! Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint, No. 4:07-cv-02151-CW (N.D. Cal. Aug. 27, 2007) ("Yahoo! has no control over the sovereign government of the People's Republic of China ("PRC"), the laws it passes, and the manner in which it enforces its laws."). However, when evidence in the Xiaoning case suggested that perhaps Yahoo! knew more than it had told Congress, the committee called the company to testify again. *See The Internet in China: A Tool for Freedom or Suppression? J. Hearing Before the Subcomm. on Africa, Global Human Rights, and Int'l Operations and the Subcomm. on Asia and the Pacific of the H. Comm. on Int'l Relations* , 109th Cong. 55-57 (2006); *Yahoo! Inc.'s Provision of False Information to Congress, Hearing Before the Committee on Foreign Affairs*, 110th Cong. (Nov. 6, 2007). In a high profile and testy session, with family members of the plaintiff in the audience, House members grilled Yahoo! executives on the issue. The case settled immediately thereafter. *Families of Shi Tao and Wang Xiaoning (Yahoo! Inc.)*, WORLD ORGANIZATION FOR HUMAN RIGHTS USA, http://www.humanrightsusa.org/index.php?option=com_content&task=

hearings were scheduled to coincide with upcoming high-profile trials.[145] Whether the timing of those hearings was coincidental, or whether the plaintiffs played a role in the timing, was not clearly discernable from the information reviewed.

2. Other Political Pressure

Other political tactics, including the participation of politicians in public campaigns, appeared in ten of the cases reviewed. Seeking supportive letters from political figures seems common.[146] Plaintiffs also sometimes contacted public officials to request investigations.[147] In a few instances, foreign

view&id=15&Itemid=35 (last visited Mar. 6, 2011); Jacqui Cheng, *Congress Unimpressed by Yahoo Apology for China Dissident E-mail Testimony*, ARS TECHNICA, http://arstechnica.com/tech-policy/news/2007/11/yahoo-calls-withholding-of-info-on-chinese-arrests-a-misunderstanding.ars (last updated Nov. 6, 2007). For a discussion of *Xiaoning* and its implications, see DeNae Thomas, *Xiaoning v. Yahoo! Inc.'s Invocation of the Alien Tort Statute: An Important Issue but an Improper Vehicle*, 11 VAND. J. ENT. & TECH. L. 211 (2008); Khurram Nasir Gore, *Xiaoning v. Yahoo!: Piercing the Great Firewall, Corporate Responsibility, and the Alien Tort Claims Act*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 97, 98 (2008).

145. In April 2009, in a joint hearing, the United States House of Representatives' Committee on Foreign Affairs and Committee on Education and Labor heard testimony focusing on oil production in Nigeria. The hearing discussed the *Wiwa* case and included testimony regarding Ken Saro-Wiwa's environmental and human rights concerns. *Environmental and Human Rights Concerns Surrounding Oil Production in the Niger Delta Before the H. Tom Lantos Human Rights Commission*, 111th Cong. (2009) (testimony of Stephen M. Kretzmann, Executive Director, Oil Change International); *Congressional Commission Hears Testimony on Shell's Environmental Abuses in the Niger Delta,* EARTHRIGHTS INTERNATIONAL (Apr. 28, 2009), http://www.earthrights.org/legal/congressional-commission-hears-testimony-shell-s-environmental-abuses-niger-delta. The hearing occurred roughly one month before the trial in *Wiwa* was set to begin. In a similar vein, in September 2008, one month before the *Bowoto* trial was to start, the United States Senate's Subcommittee on Human Rights and the Law held a hearing titled, *Extracting Natural Resources: Corporate Responsibility and the Rule of Law*, 110th Cong. (Sept. 24, 2008). The hearing, which featured testimony from plaintiff organizations involved in several of the studied cases, discussed the facts underlying *Bowoto* as well as *Unocal*, and *Exxon*. *See id.* at 18, 19, 23-24, 30, 32, 33.

146. For instance, in connection with the lawsuit against Drummond, Representative Bill Delahunt from Massachusetts, the Chairman of the Committee on Foreign Affairs' Subcommittee on International Organizations, Human Rights, and Oversight, drafted a letter to the President of Colombia urging protection for two jailed witnesses. Notably, the letter was sent just days before a plaintiffs' attorney in Drummond testified to Rep. Delahunt's subcommittee. *See* Frank Bajak, *Drummond Union: Govt Muffles Key Witness*, FORBES/ASSOCIATED PRESS, July 24, 2007, http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x2928336.

147. For example, one of the plaintiffs' attorneys in the Drummond litigation wrote a public letter to United States Secretary of State Hillary Clinton, requesting that the United States State Department pressure the Government of Colombia to investigate and prosecute the killings of trade union leaders, order Drummond to increase safety conditions, and to not permit Drummond to engage in retaliatory firings. The President of Colombia, as well as several United States Members of Congress were copied on the letter. See Letter from Leo W. Gerard, Int'l President, United Steelworkers, to U.S. Sec'y of State, regarding "Continued Repression of Drummond Union and Workers in Colombia" (Sept. 17, 2009), http://assets.usw.org/News/GeneralNews/09-17-09secyclintonltrondrummond.pdf; *see also* Congressman Dennis J. Kucinich, *Foreign Affairs Policy*

governments submitted letters to courts.[148] On a local level, of the cases reviewed, there was at least one instance of a city passing a resolution supportive of the plaintiffs.[149] Other political efforts observed include politicians participating in press conferences,[150] submitting supporting briefs to courts in favor of plaintiffs,[151] and visiting affected plaintiffs on fact-finding missions and then releasing plaintiff-friendly reports.

F. General Trends Associated with the Tactics

1. Timing Considerations

In addition to the specific tactics identified, several other general trends are noteworthy. From a timing standpoint, the number and variety of tactics continues to grow. The cases studied range from the mid-1990s until 2009. From those, it appears that plaintiffs use more tactics more frequently today than in prior years.[152] More recently, it appears that plaintiffs are learning new tactics

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on Colombia, http://kucinich.house.gov/Issues/Issue/?IssueID=1563#Colombia (last visited Mar. 2, 2011).

148. *See, e.g.*, Letter from Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Dev., Republic of S. Afr., to Judge Shira A. Scheindlin, U.S. Dist. Court, S. Dist. of N.Y. (Sept. 1, 2009), *available at* http://www.hausfeldllp.com/content_images/file/09_01_09%20SA%20Ministry%20of%20Justice%20Ltr%20to%20Judge%20Scheindlin.PDF.

149. The Stop Firestone Coalition ran a campaign encouraging people to press their city governments to pass resolutions supporting the plaintiffs in Flomo. In December 2007, Berkeley, California, became the first United States city to do so, passing a resolution expressing solidarity with the plaintiffs. The resolution stated that Berkeley residents "do not wish their city to be a profit center for Bridgestone/Firestone." *See City Resolutions, Stop Firestone Coalition*, http://www.stopfirestone.org/action/city-resolutions (last visited Mar. 18, 2011).

150. *See, e.g.*, *Joint Press Release, Occidental Petroleum Sued in U.S. Courts For Role in Civilian Massacre in Colombia*, GLOBAL EXCHANGE/AMAZON WATCH (Apr. 24, 2003), http://www.globalexchange.org/countries/americas/colombia/663.html; *see also Senator Says Wal-Mart Sells Products From Sweatshops*, N.Y. TIMES, Dec.13, 2007, http://www.nytimes.com/2007/12/13/business/13ornaments.html.

151. *See, e.g.*, Press Release, Eleven Members of Congress File Amicus Brief in Support of Bhopal Victims' Lawsuit (Apr. 4, 2006), http://www.house.gov/list/press/nj06_pallone/pr_apr4_india.html. In 2006, United States Representative Frank Pallone, Jr. (D-NJ), founder of the Congressional Caucus on India and Indian Americans, filed, along with 11 Members of Congress, an amicus brief in the United States Court of Appeals for the Second Circuit for the plaintiffs in the Union Carbide case. Representative Pallone had also filed an amicus brief on behalf of the plaintiffs in 2003. Dismissal of the case was ultimately upheld by the Second Circuit.

152. For example, Kasky v. Nike, Int'l, 45 P.3d 243 (2002), filed in April 1998 and settled in 2002, was a high profile matter involving corporate statements about alleged sweatshop working conditions in China, Vietnam, and elsewhere. Yet relatively little of the press focus appears to be attributable to any concerted effort by the plaintiff-activist who initiated the lawsuit. The case was premised on allegedly false public statements by the company; Nike strenuously denied the allegations, legally and factually. *See* Respondents' Brief on the Merits, Kasky v. Nike, Inc., No. S087859, 2000 WL 1508256 (Cal. Sept. 21, 2000). Similarly, the execution by the Nigerian government of environmental activist Ken Saro-Wiwa in the mid-1990s generated international attention before the filing of an ATS lawsuit against Royal Dutch Petroleum. As *Wiwa v. Royal*

from each other.

2. Case Variances

In addition to timing considerations, while one or more of the tactics studied appeared in every case, substantial variances in the number and types of tactics exist between cases. In some cases, such as *Doe v. Unocal Corp.*,[153] a well-known matter involving allegations of misconduct by a foreign security force, the study observed numerous tactics by plaintiffs and others. In different cases, such as *Bauman v. DaimlerChrysler Corp.*,[154] involving alleged corporate misconduct during Argentina's "Dirty War," the study identified only four tactics. In some instances, such as the Apartheid litigation, in which the court ordered that the parties not make public statements about the case, or *Flores v. Southern Peru Copper Corp.*,[155] which involved a less well-known corporate defendant and relatively rapid dismissal by the courts related to environmental claims in Peru, the relative paucity of tactics is explicable.[156] For others, the reasons are not readily evident.[157]

Dutch Petroleum moved closer to a scheduled 2009 trial, the plaintiffs began to increase the number of tactics, including the mini-documentary and Internet efforts discussed above. The same is true of other cases, such as *Bowoto v. Chevron Corp.*, also related to alleged violence by Nigerian authorities after the plaintiffs overtook a Chevron oil platform, which was filed in the late 1990s and resulted in a jury verdict for Chevron in late 2008. In *Wiwa*, Royal Dutch Shell asserted that any misconduct was committed by, and attributable to, the Nigerian government, not the company. *See generally* Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 31988 (S.D.N.Y. Feb. 28, 2002). In *Bowoto*, Chevron argued that Nigerian authorities were called because the plaintiffs assumed control over a company oil platform, took employees hostage, and attacked the authorities themselves. *See, e.g.*, Bowoto v. Chevron Corp., No. 99-02506 , 2008 WL 4822251 at *1 (N.D. Cal. Nov. 5, 2008); Corrected Joint Pretrial Conference Statement, Bowoto v. Chevron Corp., No. 99-02506, 2008 WL 4524503 (N.D. Cal. Sept. 26, 2008). The jury found for Chevron. *See* Bowoto v. Chevron Corp., 2009 WL 593872, at *1 (Mar. 4, 2009).

153. 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), *vacated* 403 F.3d 708 (9th Cir. 2005). *Unocal* is a settled case involving alleged misconduct by Burmese security forces in connection with the construction of a pipeline. Unocal asserted that it did not contribute to any wrongful act and bore no responsibility for any harmful conduct allegedly committed by the military forces of a sovereign country. See Defendants/Appellees Consolidated Answering Brief, Doe v. Unocal Corp., Nos. 00-56603 & 00-56628, 2001 WL 34093599 (9th Cir. July 3, 2001).

154. 579 F.3d 1088, 1091 (9th Cir. 2009), *vacated*, 603 F.3d 1141 (9th Cir. 2010).

155. 414 F.3d 233, 256 (2d Cir. 2003).

156. *See* John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 6-7 (2009) (discussing the Apartheid litigation); Lucien J. Dhooge, *Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 247 (2009). For a discussion of Flores, see Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 760-762 (2007).

157.In addition, of the tactics identified, in many instances, the documentation directly connects those efforts to plaintiffs and their attorneys. In other instances, public information does not include such a connection between the activities being conducted by sympathizers and the plaintiffs or their representatives.

3. Litigation as a Tactic and Larger Campaigns

As a final general observation, it is worth noting the existence of larger campaigns for corporate change, and the use of litigation itself as a tactic. For several of the cases studied, there were extant coordinated efforts against corporations related to the lawsuits themselves.[158] In several other cases, plaintiffs' attorneys, shortly after having had cases dismissed, filed lawsuits that largely repeated the underlying allegations in the cases just rejected. For example, the Court of Appeals for the Eleventh Circuit upheld a jury verdict in favor of Drummond in multiple consolidated cases involving murders of union representatives allegedly killed by paramilitary units retained by Drummond at its Columbian coal mine.[159] After the Circuit Court's ruling, the plaintiffs' attorneys filed a substantially similar matter on behalf of the children of the deceased union representatives. The district court dismissed this action,[160] though the Circuit Court has reversed that ruling.[161]

In these subsequently filed actions, it is possible that a likelihood of success on the merits is not the attorneys' primary consideration. Instead, the filing of the litigation may serve as a means of advancing a larger goal of drawing attention to the broader advocacy campaign. As one ATS plaintiff's lawyer stated, "[t]he weakness of most campaigns is that they lack teeth . . . . Using litigation in tandem with a campaign could provide this necessary element."[162] Indeed, there is some evidence that, in deciding whether to pursue transnational tort cases, the ability to launch an effective campaign now seems to be a consideration.[163]

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158. For instance, for the past few years, a labor-related campaign involving protests, boycotts, and other measures against Wal-Mart has gained major press attention. Incidental to that campaign, a lawsuit dismissed by the courts was filed in California in 2005 against Wal-Mart based in part on labor practices at the company's suppliers. *See* Doe v. Wal-Mart Stores, Inc., 573 F.3d 677 (9th Cir. 2009). Wal-Mart sharply disputes the allegations, arguing that the lawsuit well exceeds United States law, that it had no authority to police its suppliers, and that the complaint otherwise is unfounded. *See* Notice of Motion and Motion to Dismiss Plaintiffs' First Amended Complaint, Doe I v. Wal-Mart Stores, Inc., No. 05-7307 (C.D. Cal. Feb. 13, 2006). In other corporate campaigns, however, the results differed. For instance, in the labor-oriented campaign Stop Firestone (http://www.stopfirestone.org), tactics could be connected to the attorneys involved in the related ATS case Flomo v. Bridgestone Americas Holding, Inc., 492 F. Supp. 2d 988 (7th Cir. 2009) (pending case involving labor conditions on a Liberian rubber plantation). The evidence is unclear as to the reasons for the different approaches in *Wal-Mart* and *Flomo*, since the same plaintiffs' attorneys brought both lawsuits.

159. Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008). Drummond claimed that the alleged violence was caused by third-parties unaffiliated with the company. Defendant's Trial Brief, Romero v. Drummond, No. CV-03-BE-0575-W (N.D. Ala. June 15, 2007).

160. Baloco v. Drummond Co., Inc., No. 09-CV-00557 (N.D. Ala.) (filed Mar. 20, 2009 and dismissed Nov. 9, 2009).

161. Baloco v. Drummond Co., Inc., 2011 WL 321646 (11th Cir. Feb. 3, 2011).

162. Holzmeyer, *supra* note 15, at 291 (internal quotation omitted) (discussing NGOs who litigate ATS cases).

163. *Id.*

III.
DBCP, CHEVRON IN ECUADOR, AND COCA COLA

Three sets of cases exemplify the use of these tactics: the DBCP litigation arising from Nicaragua, ATS and environmental cases against Texaco-Chevron from Ecuador, and the ATS and non-ATS lawsuits against Coca-Cola from Colombia, Turkey, Guatemala and elsewhere. Each features a multinational litigation strategy by plaintiffs that includes a wide span of out-of-court efforts. In addition, as raised by the DBCP and Ecuador matters, the tactics may contribute to an extant concern about adherence to the rule of law in transnational tort cases given particular judicial susceptibilities to influence in such matters.

A. DBCP in Nicaragua[164]

This section first provides a background on the use of DBCP in Nicaragua and litigation in the United States. It then discusses the enactment of a Nicaraguan statute designed to deter dismissals from United States courts, and the range of media, political and other out-of-court tactics employed in Nicaragua and the United States. Finally, it addressed the ensuing findings of misconduct by courts in the United States in direct and judgment enforcement actions.

1. Background on DBCP in Nicaragua

For years, planters used DBCP to combat pests that damage the roots of various crops, including bananas, grapes, tomatoes and pineapples.[165] That use continued in the United States until 1977, when the Environmental Protection Agency deregistered DBCP for all crop uses except pineapples.[166]

In 1984, the first round of DBCP litigation premised on overseas use began.[167] Attorneys brought cases in Florida, California, Texas, and elsewhere on behalf of tens of thousands of foreign plaintiffs claiming sterility and other

164. While this section focuses on DBCP litigation from Nicaragua, there is also litigation in the United States over the use of DBCP in the Ivory Coast, Costa Rica, Honduras, Panama, and Guatemala. To date, the problems associated with the Nicaraguan DBCP litigation have not been found in DBCP litigation elsewhere, and this Article should not be construed to suggest otherwise.

165. *Basic information about 1,2-Dibromo-3-chloropropane (DBCP) in Drinking Water*, U.S. ENVIRONMENTAL PROTECTION AGENCY, http://water.epa.gov/drink/contaminants/basicinformation/1-2-dibromo-3-chloropropane.cfm (last visited Mar. 4, 2011). *See* Rosencranz et al., *supra* note 3, at 164-65.

166. *See* Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1311 (S.D. Fla. 2009); *An Evaluation of Dibromochloropropane (DBCP)*, CORNELL UNIVERSITY, PROGRAM ON BREAST CANCER AND ENVIRONMENTAL RISKS (July 2004), http://envirocancer.cornell.edu/FactSheet/pesticide/fs50.dbcp.cfm.

167. Winston Anderson, *Forum Non Conveniens Checkmated? - the Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 190 (2001).

injuries.[168] Though a few cases resulted in settlements,[169] in large part, courts ruled that the cases were inappropriate attempts to seek justice in the United States,[170] dismissing them on *forum non conveniens* grounds.[171]

2. Nicaraguan Special Law 364

In Nicaragua, in late 2000, in response to these results, plaintiffs' lawyers and the Asociacion de Trabajadores y Ex Trabajadores Afectados por Nemagon-Fumazone (ASOTRAEXDAN, or the Association of Workers and Former Workers Affected by Nemagon) successfully lobbied the Nicaraguan legislature to pass Special Law 364.[172] The law is retroactive in nature.[173]

Special Law 364 specifically addresses the claims of individuals allegedly exposed to and injured by DBCP on banana plantations.[174] It is a "blocking statute"[175] designed to counter *forum non conveniens* dismissals by including numerous provisions that openly aid claimants, thus compelling defendants to

168. *See id.* at 184; *see also* Rosemary H. Do, *Not Here, Not There, Not Anywhere: Rethinking the Enforceability of Foreign Judgments with Respect to the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act of 1962 in Light*, 14 SW. J. L. & TRADE AM. 409, 410 (2008) (hundreds of DBCP lawsuits pending in Nicaragua with potential damages estimated at over $11 billion).

169. *See, e.g.*, *Costa Rica: The Price of Bananas*, ECONOMIST, Mar. 12, 1994.

170. *See, e.g.*, Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1217 n.5 (11th Cir. 1985); Rojas v. Dement, 137 F.R.D. 30, 32 (S.D. Fla. 1991) ("In *Cabalceta,* Judge Atkins wrote that the actions were "one of the most wide-ranging efforts at forum shopping in legal history.") (quoting Barrantes Cabalceta v. Standard Fruit Co., 667 F. Supp. 833, 837 (S.D. Fla. 1987), *aff'd* in relevant part, 883 F.2d 1553 (11th Cir. 1989)). *See also* Do, *supra* note 168, at 412.

171. *See, e.g.*, Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1362 (S.D. Tex. 1995). *See generally* Rosencranz et al., *supra* note 3, at 166-67.

172. *Mejia Op.*, *supra* note 4, at 23; M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 B.Y.U. INT'L L. & MGMT. REV. 21, 34 (2007); *Victims of Nemagon Hit the Road*, ENVIO MAGAZINE, June 2005, http://www.envio.org.ni/articulo/2972.

173. Do, *supra* note 168, at 415.

174. Ley de Emergencia para los Trabajadores Bananeros Damnificados por el Uso de Pesticidas Fabricadas a Base de DBCP [Emergency Law for Banana Workers Injured by Usage of DBCP-Based Manufactured Pesticides], No. 364, Oct. 5, 2000 (Nicar.) [hereinafter "Law 364"], *translated in* Henry S. Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 50–53 (2004).

175. *Osorio*, 665 F. Supp. 2d at 1324 ("Special Law 364 may be properly viewed as a "blocking statute." In this context, a blocking statute is a law that closes the doors of a foreign country's courts to prevent a United States court from finding that an alternative forum exists under the *forum non conveniens* doctrine."). Nicaragua is not alone in passing a blocking statute. *See, e.g.*, Dahl, *supra* note 174, at 22-23; Casey & Ristroph, *supra* note 172. For example, in Guatemala, the government passed a law that withdrew jurisdiction from local courts if a lawsuit had first been filed in any other jurisdiction. *See* Hal Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 HARV. INT'L L.J. ONLINE 95, 100 (2009). The theory was that, if a plaintiff from Guatemala filed a case in the United States, the law would make a *forum non conveniens* dismissal less likely, since the law forecloses Guatemalan courts as an adequate alternative, which is a key *forum non conveniens* consideration. *Id.*

choose between litigating in a forum where the law is stacked against them, or agreeing to litigate in the United States.[176] Such provisions include: an irrefutable presumption of causation where the plaintiffs present medical test results as proof of injuries;[177] the elimination of the statute of limitations for claims by plaintiffs;[178] a requirement that defendants must post a bond of 300,000,000 NCD (approximately 14.6 million dollars) to appear in the case to ensure adequate means of satisfying a judgment;[179] the adoption of the so-called "3-8-3" schedule in which the defendant has three days to answer the complaint, the parties have eight days for discovery, and the judge has three further days to issue a judgment;[180] upon proof of liability, individual plaintiffs are entitled to at least $100,000 in damages;[181] and highly curtailed appellate procedures, including no ability to appeal a decision to the Nicaraguan Supreme Court.[182]

In addition, telling as to the law's intent, Special Law 364 contains a clause allowing defendants to opt-out of the Nicaraguan litigation if they agree to submit to jurisdiction in the United States.[183] Accordingly, Special Law 364 effectively creates a litigation system that pressures defendants to affirmatively agree to litigate in the United States, or face the prospect of likely judgments in Nicaragua that plaintiffs' attorneys could then bring to the United States for attempted enforcement.[184] To date, over 10,000 plaintiffs have brought claims under the law, and Nicaraguan judges have awarded over two billion dollars in damages for alleged harms related to sterility and other physical maladies.[185]

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176. *See Osorio*, 665 F. Supp. 2d at 1324 (calling Special Law 364's terms "onerous"); Rosencranz et al., *supra* note 3, at 167; Casey & Ristroph, *supra* note 172, at 29; Do, *supra* note 168, at 410. As the court in *Osorio* found, however, even where defendants choose to opt-out by refusing to make a required deposit, plaintiffs nonetheless have brought actions in Nicaragua, and local courts will assume jurisdiction and issue a judgment. Defendants then are not permitted to challenge that judgment in Nicaragua, even on jurisdictional grounds, without consenting to participate in the case. 665 F. Supp. 2d at 1339.

177. Special Law 364 art. 9

178. *Id.* arts. 6, 14, 15.

179. *Id.* art. 8.

180. *Id.* arts. 6, 14, 15. *See* Do, *supra* note 168, at 415.

181. Special Law 364 art. 12.

182. *Id.* art. 14.

183. *Id.* art. 7.

184. *See generally* Paul Santoyo, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine As an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT'L L. 703, 704 (2005). After Nicaragua passed Special Law 364, the country's Attorney General lodged a protest, arguing that the statute was unfair; that included an argument that by its very terms, the law did not contemplate that a plaintiff could possibly lose a case. *Osorio*, 665 F. Supp. 2d at 1316. The Nicaraguan Supreme Court originally declared the law unconstitutional. After large-scale marches and protests, the Nicaraguan Supreme Court issued an advisory opinion stating that the law is in fact is constitutional, reasoning that Law 364 did not offend due process because the defendants may opt-out of the litigation if they submit to jurisdiction in the United States. *Id.* at 1317-18; *see* Casey & Ristroph, *supra* note 172, at 35.

185. *Osorio*, 665 F. Supp. 2d at 1312.

3. Influx of Lawyers to Nicaragua and Out-Of-Court Tactics

After Nicaragua passed Special Law 364, United States attorneys and law firms quickly partnered with local attorneys and opened offices in Chinandega, Nicaragua, near the former banana farms. Juan Dominguez, a personal injury lawyer from Los Angeles, in particular, sought to capitalize on cases in Nicaragua, opening a law office aptly named the Oficinas Legales Para Los Bananeros, or "Law Office of the Ex-Banana Workers."[186]

These offices and others have represented thousands of plaintiffs primarily alleging sterility from DBCP.[187] Dominguez and others have staged rallies and demonstrations against the use DBCP and the corporations that allegedly used it. Dominguez rented a football stadium in Nicaragua to hold one such rally.[188] Dominguez also advertised on the radio and broadcast information about DBCP exposure[189] and the potential for a substantial legal recovery.

There have been numerous similar efforts by plaintiffs' lawyers and other sympathetic groups. ASOTRAEXDAN has organized yearly marches on the capital, and overseen other protests and community organizing events.[190] Other groups have published articles and publicized legal updates related to DBCP in Nicaragua.[191]

Another out-of-court effort was the professional documentary, *BANANAS!**. The film is a chronicle of Dominguez's efforts in the DBCP cases:

> Juan "Accidentes" Dominguez is on his biggest case ever. On behalf of twelve Nicaraguan banana workers he is tackling Dole Food in a ground-breaking legal battle for their use of a banned pesticide that was known by the company to cause sterility. Can he beat the giant, or will the corporation get away with it? In the

186. *Mejia Op., supra* note 4, at 24.

187. According to a 2006 public filing by Dole, there were 537 lawsuits against the company at various stages of litigation alleging injury from exposure to DBCP or seeking enforcement of judgments already rendered by Nicaraguan courts. *See* Dole Food Co. Inc., Quarterly Report (Form 10-Q), at 16 (Oct. 7, 2006).

188. Alan Zarembo & Victoria Kim, *L.A. Lawyer Accused of Fraud in Pesticide Litigation*, L.A. TIMES, Aug. 5, 2009, http://articles.latimes.com/2009/aug/05/local/me-dominguez5.

189. *Id.*

190. *Victims of Nemagon Hit the Road*, ENVIO MAGAZINE, June 2005, http://www.envio.org.ni/articulo/2972.

191. The NGO Alliance for Global Justice, which seeks to create social justice through grassroots organizing, has a project called "Nica Net" or The Nicaragua Network, which touts itself as a "leading organization in the United States committed to social and economic justice for Nicaragua." *See* ALLIANCE FOR GLOBAL JUSTICE http://www.clrlabor.org/afgj/index.html (last visited Mar. 4, 2011); *About the Nicaragua Network: Over 30 Years of Solidarity with the People of Nicaragua*, THE NICARAGUA NETWORK, Mar. 27, 2009, http://www.nicanet.org/?cat=24. While Nica Net does not solely focus on the DBCP claims, its website has published articles about related trials (including press releases by Dominguez's law firm and regularly included updates on the legal proceedings in its weekly "Nicaragua Network Hotline" news bulletin. *See, e.g.*, Press Release, Nemagon Case Goes to Jury in California!, THE NICARAGUA NETWORK, Oct. 15, 2007, http://www.nicanet.org/?p=368; *Dole Tries to Squash 'Bananas'; Activists fight back via Internet; Dole drops suit!*, THE NICARAGUA NETWORK, October 13, 2009, http://www.nicanet.org/?p=839.

suspenseful documentary BANANAS!*, filmmaker Fredrik Gertten sheds new light on the global politics of food.[192]

In June 2009, *BANANAS!** premiered at the Los Angeles Film Festival and has been screened in Europe, North America, South America and Asia.[193] The makers of the documentary have also used other forms of social media, including a website and Twitter, to gain publicity for the film.[194]

Students at Bucknell University made another documentary, *Missing Seeds,* which focuses on the plight of those in a shantytown that has grown outside of the national legislature in Managua.[195] People claiming to suffer the ill effects of DBCP exposure populate the shantytown, which is overseen by *Asociacion de Obreros Afectados por Nemagon* (Association of the Working Class Affected by Nemagon), a grass-roots organization dedicated to supporting former banana workers.[196] The documentary features Antonio Hernandez Ordenana, the Nicaraguan law partner of Juan Dominguez,[197] and attributes at least 2500 deaths to DBCP in Nicaragua.[198]

Despite such publicity efforts and other tactics, the plaintiffs' law firms identified relatively few ex-banana plantation workers in Nicaragua, and even fewer who are sterile.[199] According to detailed judicial findings, to circumvent that hurdle, the American and Nicaraguan attorneys involved in the litigation

192. *About the Film, BANANAS!**, http://www.bananasthemovie.com/about-the-film (last visited March 18, 2011).

193. *See Screenings, BANANAS!**, http://www.bananasthemovie.com/screenings (last visited March 18, 2011). After the subsequent dismissal of the *Mejia* and *Rivera* cases, Dole attempted to stop screenings of the *BANANAS!**, or have the makers include a statement explaining that the subject of the documentary was a fraud. Dole Food Co. v. Gertten, No. BC 417435 (L.A. Sup. Ct. July 8, 2009) (complaint for defamation). The makers of the film refused and continued to screen the movie. After an unsuccessful attempt to stop the screening at the Los Angeles Film Festival, Dole filed a defamation lawsuit. *Id.* In mid-October 2009, Dole voluntarily dropped the lawsuit, citing free speech concerns but continuing to point out that the content of the movie is "fundamentally flawed." Dole Food Company, Inc., News Release, Dole to Withdraw Defamation Suit, Oct. 14, 2009, http://www.dole.com/PDFs/dbcp/BananaMoviePressReleaseWithdrawFINAL101409.pdf. Dole was thereafter fined $200,000 for legal costs incurred by the filmmakers in defending the lawsuit. Matthew Belloni, *Dole Hit With $200,000 Penalty Over Movie Lawsuit*, REUTERS, Nov. 28, 2010, *available at* http://www.reuters.com/article/2010/11/29/us-dole-idUSTRE6AS0S020101129.

194. Profile of "Bananasmovie," TWITTER, http://twitter.com/bananasmovie (last visited Mar. 4, 2011); Bananas!* Facebook page, FACEBOOK, http://www.facebook.com/pages/BANANAS/121163091704 (last visited Mar. 4, 2011).

195. *HearOutYellow, Missing Seeds: Part 1*, YOUTUBE (Jan 15, 2009), http://www.youtube.com/watch?v=5wD7WRLD5ok.

196. The video, originally published at www.hearyellow.org, is now available at http://www.youtube.com/watch?v=5wD7WRLD5ok and http://www.youtube.com/watch?v=P-WTda9-faU&feature=channel.

197. *See* Rosencranz et al., *supra* note 3, at 163 (discussing Dominguez and Ordenana).

198. The documentary also notes that, in addition to sterility, the shantytown residents complain of skin rashes, headaches, blindness, and birth defects; none of those physical conditions are suspected effects of DBCP exposure. *Id.*

199. *Mejia Op.*, *supra* note 4, at 26-27.

engaged in a wide-scale conspiracy to knowingly present overtly false claims, which included teaching impoverished plaintiffs the facts of their "story," and colluding with Nicaraguan laboratories and at least one Nicaraguan judge to "fix" judgments.[200] In the end, the cases brought by plaintiffs and their attorneys based on alleged exposure to DBCP in Nicaragua have not yielded recoveries, either as direct actions filed in the United States, or in seeking to enforce judgments in the United States that had been obtained in Nicaraguan courts.

4. The Tellez/Mejia Litigation in the United States and the Findings of Fraud

In 2004, plaintiffs' attorney Juan Dominguez filed three separate cases on behalf of multiple injured banana workers in Los Angeles County Superior Court: *Mejia v. Dole Food Co.*,[201] *Rivera v. Dole Food Co.*,[202] and *Tellez v. Dole Food Co.*[203] Each sought damages as a result of alleged exposure to DBCP by Nicaraguan banana workers. In May 2007, the court designated the cases "complex cases" and assigned them to Judge Victoria Chaney.[204] To identify and determine the relevant issues, she designated *Tellez* a test case and it proceeded to trial before the others.[205]

At trial, the twelve plaintiffs alleged various injuries as a result of DBCP exposure, including sterility. In November 2007, the jury returned favorable verdicts for six of the twelve plaintiffs.[206] For the six plaintiffs who prevailed, the jury awarded five million dollars in damages, including $2.5 million in punitive damages against Dole.[207] Judge Chaney subsequently reduced the compensatory award to $1.58 million and eliminated the punitive damages

200. As relevant legal findings detail, to identify Nicaraguans who could serve as plaintiffs and train them in the details of their stories, the law firms used local "captains" to find potential plaintiffs, brought them to the law offices, provided them with false documents, took them to banana farms, and provided them with sufficient details about banana farm life to enable them to testify. *Id.* at 24-25, 27-33, 37-38. To help these plaintiffs, the captains created a system of false information. They distributed manuals depicting the life of a typical banana worker, including descriptions of alleged DBCP use and other workers on the farm. *Id.* As one plaintiff stated, "I don't feel good about this . . . I feel I was involved in foul play." Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, WALL ST. J., August 19, 2009, http://online.wsj.com/article/SB125061508138340501.html. To solidify the claims and satisfy the irrefutable presumption of the causation provision of Special Law 364, the plaintiffs' lawyers enlisted the aid of local Nicaraguan laboratories to generated false medical reports. *Mejia Op.*, *supra* note 4, at 30, 37-38.

201. Mejia v. Dole Food Co., No. BC 340049 (L.A. Sup. Ct. June 17, 2009).

202. Rivera v. Dole Food Co., No. BC 379820 (L.A. Sup. Ct. June 17, 2009).

203. Tellez v. Dole Food Co., No. BC 312 852 (L.A. Sup. Ct. Mar. 7, 2008).

204. *Mejia Op.*, *supra* note 4, at 5.

205. *Id.* at 5-6.

206. *Id.*

207. Dole Food Company, Inc., News Release, Dole Food Company, Inc. Wins Court Rulings, Mar. 10, 2008, http://www.dole.com/servedocument.aspx?fp=documents/dole/punitive-damages-verdict.pdf; Rosencranz et al., *supra* note 3, at 161.

against Dole.[208] While the plaintiffs' judgment was on appeal, and *Mejia* and *Rivera* were proceeding toward trial, Dole discovered and notified the court of the misconduct in Nicaragua, and Judge Chaney stayed the litigation and ordered that fraud discovery proceed.[209]

In April 2009, after a three-day hearing, Judge Chaney dismissed the plaintiffs' claims.[210] Although the plaintiffs premised their claims on the allegation that DBCP rendered them sterile at banana plantations, Judge Chaney found that many of the plaintiffs had never been employed at the plantations, and explained the recruitment scheme involving the local captains working in concert with Dominguez and others.[211] Judge Chaney also issued detailed findings concerning the conspiracy among plaintiffs' attorneys, medical labs and a judge in Nicaragua involved in DBCP litigation filed in that country.[212] She found that Dominguez and his Nicaraguan law partner obstructed justice and abused the judicial process, including: suborning perjury, bribing and intimidating witnesses, intimidating defense investigators, and making false allegations of bribery against the defendants.[213] Judge Chaney also found that there was a "broader conspiracy that permeates all DBCP litigation arising from Nicaragua,"[214] naming other lawyers and firms not involved in *Mejia, Rivera* or *Tellez* as playing roles,[215] and ruled that "no sanction other than dismissal of the Plaintiff's claims with prejudice would cure the harm here because the misconduct has been so widespread and pervasive such that this Court now questions the veracity of DBCP Plaintiffs coming from Nicaragua."[216] Judge Chaney finally noted, "I find by clear and convincing evidence, and, actually, if you want to say that, beyond a reasonable doubt, that each and every one of the

208. *See id;* Rosencranz et al., *supra* note 3, at 162. Judge Chaney also granted Dole's motion for a new trial against one plaintiff. *See* Tellez v. Dole Food Co., No. BC 312 852, 2008 WL 744048 (L.A. Super. Ct. Mar. 7, 2008) (trial order).

209. *Mejia Op., supra* note 4, at 10.

210. *See generally id.* ETHISPHERE MAGAZINE, a journal dedicated to business ethics, listed Dominguez first on its 2009 worldwide list of the "top ten individuals that have influenced business ethics through professional flubs." *2009's 100 Most Influential People in Business Ethics*, ETHISPHERE, Dec. 16. 2009, *available at* http://ethisphere.com/2009s-100-most-influential-people-in-business-ethics/. Part of the article featured a segment called *Learning from Others' Mistakes: 2009's Top 10 People We Won't Miss*, ETHISPHERE lists Dominguez ahead of the former anti-corruption chief of Indonesia, accused of murdering his lover's lover, and the director of a Vietnamese real estate investment company, accused of hiring people to kill the whistleblower accusing him of corruption. *Id.*

211. *Mejia Op., supra* note 4, at 1, 24-26.

212. *Id.* at 24-28, 38-39.

213. *Id.* at 41-50. Dole investigators reported receiving threats against their lives, "wanted" posters featuring a drawing of one investigator, and radio broadcasts warning citizens not to cooperate with the Dole investigators and threatening harm if they did. False criminal charges were also pressed against the Dole investigators. *Id.* at 46-50.

214. *Id.* at 1.

215. *Id.* at 2, 3, 24, 27-29.

216. *Id.* at 58.

plaintiffs in the *Mejia* and the *Rivera* cases have presented fraudulent documents and actively participated in a conspiracy to defraud this court, to extort money from the defendants, and to defraud the defendants."[217]

In July 2009, the Second Appellate Division of the Court of Appeal of California remanded the *Tellez* case to the Superior Court, with an order for the plaintiffs to show cause why that case should not also be dismissed.[218] After several hearings, Judge Chaney dismissed the *Tellez* case in July 2010, noting that the case was rife with "blatant fraud, witness tampering, and active manipulation."[219] Significantly for this Article, Judge Chaney also found that the Nicaraguan court system "is, at best, fragile in its ability to present consistent rule of law and outcomes" and that "while many Nicaraguans live in relative poverty and with limited economic opportunity, '[t]his lawsuit is not the appropriate vehicle to rectify this situation.'"[220]

5. Rulings by United States Courts in Judgment Enforcement Actions

The efforts to enforce judgments issued in Nicaragua under Special Law 364 have had similar problems. In August 2007, a group of 150 alleged former Nicaraguan banana workers claiming DBCP exposure filed suit in Florida state court to enforce a ninety-seven million dollar Nicaraguan judgment. They obtained the judgment under Special Law 364.[221] The same judge that Judge Chaney found participated in the conspiracy to "fix" Nicaraguan cases under Special Law 364 issued the judgment.[222]

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217. Mejia v. Dole Food Co. & Rivera v. Dole Food Co., Nos. BC340049, BC379820 (L.A. Sup. Ct. Apr. 23, 2009) (Oral Ruling at 15).

218. Dole Food Co. v. Tellez, No. B216182, B216264 (L.A. Sup. Ct. July 7, 2009) (order to show cause). Recently, plaintiffs have launched allegations that Dole investigators bribed witnesses as part of the fraud investigation, which Dole denies. *See* Marcos Aleman, *Nicaraguan Workers Deny Conspiracy Against Dole*, ASSOCIATED PRESS, May 14, 2010.

219. Dole Food Company, Inc., Press Release, Dole Food Company, Inc. Announces Los Angeles Superior Court Vacates Judgment and Dismisses Fraudulent Lawsuit Brought by Nicaraguans Claiming to Have Been Banana Workers, July 15, 2010, http://www.dole.com/CompanyInformation/PressReleases/PressReleaseDetails/tabid/1268/Default.aspx?contentid=11722.

220. *Id.* Additionally, alluding to certain types of lawsuits considered "impact litigation," the Judge further observed that "[c]ivil actions are sometimes brought to induce social change. This is neither the platform nor the time to discuss using the court system to bring about different policies that affect society in general." *Id.*

221. Osorio, 665 F. Supp. 2d at 1320. *See generally* John R. Crook, *U.S. District Court Refuses Enforcement of Nicaraguan Judgment, Finding Absence of International Due Process*, 104 AM. J. INT'L L. 105, 105 (2010).

222. *See* Rosencranz et al., *supra* note 3, at 176. During the proceedings, the trial court barred introduction of 151 birth certificates showing that the allegedly infertile plaintiffs had fathered children after their alleged exposure to DBCP. Crook, *supra* note 221, at 106; *see also* Do, *supra* note 168, at 416 (indicating that many United States-based corporate defendants "sued under Nicaraguan Special Law No. 364 did not participate in the litigation process," most likely because "the Nicaraguan court refused to hear legal arguments or accept contrary proof," with "none of the

After the defendants removed the case to the United States District Court for the Southern District of Florida in October 2009, in *Sanchez Osorio v. Dole Food Co.*,[223] Judge Paul Huck issued an opinion refusing to enforce the Nicaraguan court judgment.[224] In addition to finding that Nicaraguan courts lacked jurisdiction over the defendants, Judge Huck ruled that Special Law 364 denied defendants basic due process,[225] citing among other things Special Law 364's "irrefutable presumption" that DBCP exposure caused plaintiffs' sterility, a presumption Judge Huck found was "the antithesis of basic fairness."[226] That and other procedural failings led the court to hold that the Nicaraguan proceedings did "not even come close" to the "basic fairness" required by the "international concept of due process."[227] Judge Huck also noted the "unanimous view among United States government organizations and officials (including United States ambassadors to Nicaragua), foreign governments, international organizations, and credible Nicaraguan authorities . . . is that the judicial branch in Nicaragua is dominated by political forces and, in general, does not dispense impartial justice."[228] Indeed, he wrote that the underlying trial in Nicaragua was conducted in an "*ad hoc*, unpredictable, discriminatory, and confusing manner."[229]

Another DBCP enforcement action, *Franco v. Dow Chemical Co.*,[230] also revealed troubling findings of ethical breaches. *Franco* was an action filed in Los Angeles by United States lawyers to enforce a $489 million DBCP judgment obtained in Nicaragua.[231] In October 2009, Senior Judge A. Wallace Tashima, appointed as Special Master by the United States Court of Appeals for the Ninth Circuit, issued an amended Report and Recommendation suggesting fines against the United States lawyers in amounts totaling nearly $400,000.[232] He found that the "sanctions are justified in this case because Respondents' filings," claiming that the Nicaraguan court issued the judgment against an

multinational defendants participated in this proof process.").

223. 665 F. Supp. 2d 1307 (S.D. Fla. 2009). For a discussion of *Osorio*, *see* Crook, *supra* note 221.

224. *Osorio*, 665 F. Supp. 2d at 1351-52. The also court granted motions to dismiss for lack of personal jurisdiction filed by Shell Oil and Occidental Petroleum due to their lack of contact with Nicaragua. *Id.* at 1311 n.1.

225. *Id.* at 1327-45.

226. *Id.* at 1335.

227. *Id.* at 1345 (internal cites omitted).

228. *Id.* at 1349.

229. *Id.* at 1343. Judge Huck's opinion did not consider the fraud issues raised in the proceedings before Judge Chaney. *Id.* at 1312, 1321 n.7. He instead bifurcated the fraud issue, stating that it would be addressed if the defendants fail to prevail on their other defenses. *Id.* at 1311 n.3.

230. 2003 WL 24288299 (C.D. Cal. 2003).

231. *Report & Recommendation*, *supra* note 5, at 10.

232. *Id.* at 64-65.

entity not in the case,[233] were "made in bad faith" and "recklessly and intentionally misled this Court."[234] Judge Tashima deemed the lawyers' factual contentions so baseless as to "provide objective evidence of improper purpose."[235] The Report and Recommendation concluded that the lawyers' "efforts went beyond the use of 'questionable tactics' – they crossed the line to include the persistent use of known falsehoods . . . ."[236] The United States Court of Appeals for the Ninth Circuit formally reprimanded the lead attorneys, and suspected two lawyers for six months.[237]

At this juncture, as Judge Chaney implied and others have stated,[238] the tactics of the plaintiffs and their lawyers have now rendered all of the Nicaraguan DBCP cases suspect. It is possible, if not likely, that the substantial publicity efforts and other tactics instilled a hope for a monetary recovery in the plaintiffs' that led them to participate in the scheme, and may have impacted a judiciary "that is, at best, fragile in its ability to present consistent rule of law and outcomes." Certainly, the legislative and political efforts helped enact a law that is not likely to lead to enforceable judgments in the United States, as *Osorio* indicates. The actions in *Franco* only contributed to the suspicion of DBCP decisions from Nicaragua. In all, the tactics employed by plaintiffs' attorneys in the Nicaraguan DBCP cases, coupled with other factors, appears to have caused the plaintiffs far more harm than good.

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233. *Id.* at 5.

234. *Id.* at 49 (citations omitted).

235. *Id.* at 53.

236. *Id.* at 62-63.

237. *In re* Girardi, Nos. 08-80090, 03-57038, slip op. at 10011 (9th Cir. July 13, 2010). Although the judicial findings of misconduct, to date, have been limited to Nicaragua, there are hints of similar problems in cases arising from at least one other locale. Regarding a series of DBCP cases originating from the Ivory Coast, Dole received information from a plaintiffs' coordinator -- similar to a Nicaraguan "captain" -- that the plaintiffs' attorney had illegally collected sperm samples from over 2,000 potential litigants. Abagninin v. Amvac Chem. Corp. Inc., No. BC 359259 (L.A. Sup. Ct. May 18, 2009) (Dole Defendants Proposed Agenda of Issues for May 19, 2009 Status Conference and attached affidavit), *available at* http://amlawdaily.typepad.com/Agenda.pdf. In 2009, the lawyer withdrew as counsel of record, in part because he and his staff had become "potential witnesses to an alleged fraud and could not ethically continue to represent the plaintiffs without their expressed consent." David Bario, *Gibson Dunn Knocks Out African Pesticide Case For Dole*, AMLAW LITIGATION DAILY, November 19, 2009, www.law.com/jsp/tal/digestTAL.jsp?id=1202435667127. The judge then dismissed the case when the plaintiffs, hundreds of peasants, failed to find new counsel or appear themselves. *Id.* In addition, in DBCP cases arising from non-Nicaraguan locations, the plaintiffs' attorneys have filed a series of copycat cases, each with just under one hundred class members to avoid the one hundred class member threshold that would permit the defendants to invoke the Class Action Fairness Act (28 U.S.C. § 1332(d)(11)(B)(i)) and remove the case to federal court. Vanegas v. Dole Food Co., 2009 WL 690198 (C.D. Cal. Mar. 9, 2009); Tanoh v. AMVAC Chemical Corp., 2008 WL 4691004, at *5 (C.D. Cal. Oct. 21, 2008). *See also* Tonah v. Dow Chem. Co., 561 F.3d 945 (9th Cir. 2009). Defendants have settled, and offered to settle, other DBCP claims without admitting liability. *See, e.g.*, Richard Clough, *Doe Proposes New Settlements*, L.A. DAILY BUS. J., May 31, 2010, http://labusinessjournal.com/news/2010/may/31/dole-proposes-new-settlements.

238. *See* Rosencranz et al., *supra* note 3, at 166-67.

B. Chevron in Ecuador

Although the underlying facts and case postures in the Nicaraguan DBCP cases differ widely from the series of matters surrounding the claims against Texaco in Ecuador, some of the same legal and non-legal patterns are present.[239] These include some of the same out-of-court tactics, as well as troubling evidence and court findings of impropriety. This section first discusses the factual and legal background, then the litigation and out-of-court tactics in Ecuador, and a related case, *Gonzales v. Texaco*,[240] filed in the United States.

1. Background

In 1964, TexPet, a Texaco subsidiary, acquired the right to explore and drill for oil in Ecuador's Oriente region.[241] Throughout the 1970s and 1980s, operating under an oil concession granted by the government of Ecuador, TexPet drilled in Ecuador as part of a consortium consisting of Texaco and Gulf Oil subsidiaries.[242] Ecuador subsequently joined the consortium and granted its state oil company, CEPE (which later became Petroecuador), a 25 percent ownership interest.[243] In 1976, Ecuador purchased Gulf's interest in the consortium, thereby becoming the majority owner with 62.5 percent.[244] At the time, TexPet held a 37.5 percent interest in the consortium.[245] Although TexPet was a minority owner in the consortium, it largely served as the consortium's operator until July 1990, when Ecuador's state-run oil company, then Petroecuador, became the operator.[246] In 1992, TexPet relinquished its interests in the consortium and Petroecuador assumed sole ownership.[247]

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239. The Plaintiffs' advocates accuse Chevron of using some of the same tactics discussed below. *See Chevron's Ten Biggest Lies About Ecuador*, AMAZON WATCH (Spring 2009), http://amazonwatch.org/documents/ecuador-press-kit/chevrons-top-ten-lies-long.pdf. Indeed, while this Article focuses on plaintiffs' tactics and their implications for companies doing business overseas, Chevron has pursued sustained and visible efforts on the Internet, in the media, politically in the United States, and elsewhere in response the plaintiffs' tactics and to substantiate their position that the legal system in Ecuador is strongly and unfairly tilted against them.

240. Gonzales v. Texaco, Inc., No. C 06-02820 WHA (N.D. Cal. Aug. 2 2007).

241. *In re* Application of Chevron Corp., 2010 WL 1801526, at *1 (S.D.N.Y. May 6, 2010); Second Amended Complaint at 1, Gonzales v. Texaco, Inc., No. C 06-02820 WHA (N.D. Cal. Nov. 15, 2007). In 2001, a Chevron subsidiary merged with Texaco (of which TexPet was a subsidiary). *See* Second Amended Complaint at 1, *Gonzales*, No. C 06-02820 WHA.

242. *In re* Application of Chevron Corp., 2010 WL 1801526, at *1; Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron,* http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf, at 2 ("Chevron Corp."); *Texaco in Ecuador Timeline*, http://www.texaco.com/sitelets/ecuador/en/history/chronologyofevents.aspx (last visited Mar 22, 2011).

243. Chevron Corp., *supra* note 242, at 2.

244. *See id.*

245. *Id.*

246. *Id.*; *see also In re* Application of Chevron Corp., 2010 WL 1801526, at *1

247. *In re* Application of Chevron Corp., 2010 WL 1801526, at *1.

As the oil concession was ending, TexPet, Petroecuador, and the government of Ecuador agreed to divide the responsibility for environmental remediation. Petroecuador allegedly declined to remediate its share of the operations' environmental impact while the government of Ecuador directed TexPet to remediate its portion and leave Petroecuador's portion for Petroecuador to complete at a later date.[248] In 1998, TexPet completed a forty million dollar environmental remediation program conducted through independent contractors; representatives of Petroecuador and the Ecuadorian government certified the work.[249] Also in 1998, TexPet and the government, and TexPet and Petroecuador, entered into separate releases with the government, and Petroecuador discharged TexPet from liability for environmental damage.[250]

2. Series of Lawsuits

Plaintiffs in Ecuador have filed three primary lawsuits against Chevron/Texaco involving many of the same lawyers and issues. In short, the plaintiffs claim that TexPet engaged in improper byproduct disposal techniques,[251] which contaminated nearby water sources and diffused the Oriente region with carcinogenic toxins.[252] That set of allegations is at the core of each of the major legal actions.[253]

248. Chevron Corp., *supra* note 242, at 3.

249. *See id.*; *see also* Chevron Corp. v. Donziger, 2011 WL 778052, *5 (Mar. 7, 2011) (discussing the final release). According to Chevron, TexPet's remediation program included closing and remediating 161 well pits, closing 18 wells, closing and remediating 7 spills areas, and installing three systems for reinjecting the produced water from the drilling.

250. *In re* Application of Chevron Corp., 2010 WL 1801526, at *1-2; Chevron Corp., *supra* note 242, at 3.

251. *See* Second Amended Complaint at 1, *Gonzales*, No. C 06-02820 WHA.

252. *See id.* at 11. The plaintiffs allege that TexPet knew its practices were harmful. *Id.* at 14-15. Texaco's response to these lawsuits is that its practices comported with all applicable standards. The company states that any contamination is properly attributable to Petroecuador, which continues to pollute, and that water contamination and related illnesses are the product of bacteria unrelated to petroleum. *See Chevron Asks, 'Show us the Evidence,'* AMAZON POST, Apr. 29, 2010, http://theamazonpost.com/tag/petroecuador; *Ecuador Lawsuit Myths*, AMAZON POST, Oct. 23, 2009, http://theamazonpost.com/category/ecuador-lawsuit-myths.

253. The plaintiffs have not filed actions against Petroecuador, though Petroecuador was the majority partner in the consortium, has been solely responsible for oil production in the area since 1992, and has a dubious environmental record. The plaintiffs assert that they are not seeking relief against Petroecuador because "the systems put in place by Texaco allowed Petroecuador to go on polluting." *See* Simon Romero & Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, N.Y. TIMES, May 14, 2009, http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1. Apparently, the plaintiffs promised the Government of Ecuador that they would not sue Petroecuador to win the Government's support in the lawsuits. *See* Paul M. Barrett, *Amazon Crusader. Chevron Pest. Fraud?*, BLOOMBERG BUS. WEEK, Mar. 9, 2011.

a. Aguinda v. Texaco

In 1993, public interest attorneys Cristobal Bonifaz and Steven Donziger, along with others, filed an ATS action, *Aguinda v. Texaco*, in the United States federal district court in Manhattan premised on Texaco's activities in Ecuador.[254] The Philadelphia-based plaintiffs' firm Kohn, Swift & Graf PC financed the suit.[255] In 1994, Bonifaz filed a similar action, *Ashanga Jota v. Texaco*,[256] on behalf of indigenous peoples in Peru, alleging that Texaco's practices in Ecuador polluted a river and thereby impacted the plaintiffs' livelihood.

When Bonifaz filed *Aguinda*, the Frente de Defensa de la Amazonia ("Amazon Defense Front") was formed to support the action.[257] The group purports to be "part of a regional, national and global struggle for environmental and collective rights in the Ecuadorian Amazon."[258] Bonifaz represented the Amazon Defense Coalition until 2006.[259]

In 1996, the court dismissed the *Aguinda* and *Jota* lawsuits on *forum non conveniens* grounds.[260] In 2002, after trial and appellate court proceedings that required Texaco to stipulate to jurisdiction in Ecuador as part of a *forum non*

254. *See* Complaint, Aguinda v. Texaco, Inc., No. 93 Civ. 7327 (S.D.N.Y. Sept. 3, 1993).

255. *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7327, 1994 WL 142006 *1 (S.D.N.Y. Apr. 11, 1994).

256. No. 94 Civ. 9266 (JSR) (S.D.N.Y. 1998). *Sequihua v. Texaco, Inc.* was also filed in 1993, based on the same allegations. *Sequihua* was dismissed on *forum non conveniens* grounds. Sequihua v. Texaco, Inc., 847 F. Supp. 61, 65 (S.D. Tex 1994).

257. *See Communities Mobilize Against Chevron*, CHEVRONTOXICO, http://chevrontoxico.com/about/affected-communities/communities-mobilize-against-chevron.html (last visited Mar. 22, 2011) (Frente formed in 1993); *see also* Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 2-3, Gonzales v. Texaco, Inc., No. C 06-02820 WHA (N.D. Cal. Nov. 15, 2007) (Frente formed in 1994); *Amazon Defense Coalition, Who We Are,* TEXACOTOXICO, http://www.texacotoxico.org/eng/node/1 (last visited Mar. 22, 2011).

258. *See Amazon Defense Coalition, Who We Are, supra* note 257.

259. There are some claims that a plaintiff's attorney formed the group. *See* The Blog Report With Zennie62, *Amazon Defense Coalition is Foreign Nonprofit Corporation*, SAN FRANCISCO CHRONICLE, Nov. 12 2009, http://www.sfgate.com/cgi-bin/blogs/abraham/detail?blogid=95&entry_id=51564. Bonifaz and others dispute that claim. *See Communities Mobilize Against Chevron*, *supra* note 257; Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 2-3, *Gonzales*, No. C 06-02820 WHA.

260. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996). When the Amazon Defense Coalition learned of the *Aguinda* dismissal, it organized a protest in Ecuador's capital city, Quito. The protest included a sit-in at the Ecuador Attorney General's Office, and the Amazon Defense Coalition threatened to remain there until the Government of Ecuador agreed to support the lawsuit, which it had been opposing. Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 3, *Gonzales*, No. C 06-02820 WHA. Shortly thereafter, Ecuador moved to intervene in the litigation and asked for a reconsideration based on its changed litigating position. *Id.* Petroecuador also moved to intervene. Aguinda, 945 F. Supp. at 625. The district court refused to permit Ecuador and Petroecuador to intervene, and denied the motion for reconsideration. Aguinda v. Texaco, Inc., 175 F.R.D. 50 (S.D.N.Y. 1997).

conveniens ruling, the United States Court of Appeals for the Second Circuit finally dismissed the case.[261] After that dismissal, Bonifaz helped file two subsequent lawsuits, one in Ecuador involving alleged environmental harms, and one in the United States involving alleged personal injuries.

b. Lago Agrio Litigation

In 2003, with Bonifaz's assistance, Plaintiffs filed the Ecuador matter against Chevron[262] in Lago Agrio.[263] The Amazon Defense Coalition, represented by Bonifaz when the case was filed, is the named beneficiary of the lawsuit.[264] As with the *Aguinda* case, Kohn, Swift & Graf PC financed the lawsuit.[265]

Akin to the litigation under Special Law 364, the Lago Agrio Complaint is premised in part on Article 43 of an Ecuadorian law, the Environmental Management Act ("EMA"), that Bonifaz and other lawyers in the matter

261. *See* Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002). In 1998, the Second Circuit reversed the district court for failing to require that Texaco was subject to jurisdiction in Ecuador. Aguinda v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). The district court dismissed the case again in 2001 after Texaco agreed to suit in Ecuador. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

262. In 2006, the Amazon Defense Coalition terminated Cristobal Bonifaz. A resolution regarding his termination cited that Bonifaz's actions were "unilaterally decided and personal" and violated the Coalition's "internal decision-making processes with respect to the legal process, which has created a feeling of distrust in the directors and the legal team members alike." Gonzales v. Texaco, Inc., No. C 06-02820 WHA, 2007 WL 3036093 *2 (N.D. Cal. Oct. 16, 2007).

263. In September 2009, Chevron and TexPet also filed a claim before the Permanent Court of Arbitration asserting that Ecuador's conduct in connection with the Lago Agrio litigation breached settlement and release agreements that were protected under the United States-Ecuador Bilateral Investment Treaty, and also violated provisions of the Treaty itself. In late 2009, Ecuador filed an action in the United States District Court for the Southern District of New York to enjoin the arbitration from proceeding. See Petition to Stay Arbitration, Republic of Ecuador v. Chevron Corp., No. 09 Civ. 09958 (S.D.N.Y. Dec. 3, 2009). The court rejected the petition on March 11, 2010, allowing the arbitration to proceed. Republic of Ecuador v. Chevron Corp., No. 09 Civ. 09958, 2010 WL 1028349 (S.D.N.Y. March 11, 2010). That ruling is being appealed. In addition, in 2009, ChevronTexaco Corp. filed a claim against Ecuador before the Permanent Court of Arbitration, arising from seven lawsuits filed by Texaco against the government in the 1990s. The arbitrators found that the slow pace of the decisions in Ecuador entitles the company to $700 million in damages. *See* Ben Casselman, *Ecuador to Pay Chevron Damages*, WSJ ONLINE, Mar. 30, 2010.

264. On its website, the Amazon Defense Coalition describes itself as "a group of Amazonian grass roots organizations and communities who have joined to defend and sustain our peoples and environment through unification of our forces and the integration of the entire Ecuadorian Amazon." *See Amazon Defense Coalition, Who We Are, supra* note 257.

265. *See Chevron Corp.*, 2011 WL 778052 at *17. As Mr. Kohn made clear in a documentary about Chevron-Ecuador, this matter "was not taken as a pro bono case, you know a lot of my motivation is, at the end of the day, is that it will be a lucrative case for the firm. And I think it put us in a position to do more of these kinds of cases." Chevron Corp., *supra* note 242, at 1. According to reports, Kohn Swift has ceased financing the action, noting their concern regarding recent actions by the plaintiffs' attorneys and findings by courts, discussed below. *See* Barrett, *supra* note 253.

"substantially drafted and . . . procured."[266] Enacted in 1999, after TexPet completed its Ecuadorian operations and cleanup efforts, the law gave individuals the ability to sue in Ecuador for "environmental remediation of public land."[267] As a United States federal court recently found, the lawyers worked to enact the law because, in having to litigate in Ecuador, "which had no class actions and thus no vehicle for the sort of giant" litigation found in the United States, they "intended the EMA to provide a basis for suing in Ecuador to recover billions in damages in the absence of any other vehicle for doing so."[268]

That vehicle led the plaintiffs to their desired result. Recently, a local Lago Agrio court awarded nearly $9 billion in damages against Chevron.[269] The ruling included a punitive damages provision that, unless Chevron apologized publicly within fifteen days, the award would double.[270] Chevron did not issue an apology,[271] and the award now exceeds $18 billion. Chevron states that it will appeal the judgment, while the plaintiffs state that they will appeal to seek a higher award.[272]

Accompanying the Lago Agrio litigation, and perhaps contributing to the judgment, have been a variety of out-of-court tactics by the parties, including the plaintiffs in particular,[273] "to pressure the company into settling."[274] In the United States, with the help of public relations personnel and lobbyists,[275] the plaintiffs' attorneys have testified at largely sympathetic congressional hearings,[276] and obtained letters and other supportive statements from United

266. *Chevron Corp.*, 2011 WL 778052 at *5-6.

267. Chevron Corp., *supra* note 242; *see Chevron Corp.*, 2011 Westlaw 778052, at *5-6. After the plaintiffs filed the lawsuit, Chevron moved to dismiss the case, arguing, among other things, that retroactive application of the 1999 EMA was unconstitutional and that the Settlement and Release executed between TexPet and the Government of Ecuador barred plaintiffs' claims for public land remediation. Chevron Corp., *supra* note 242, at 4. The Ecuador Government did not take a position in the lawsuit at the time, and the court decided to wait on the pending motions until final resolution of the case on the merits. *Id.* at 5.

268. *Chevron Corp.*, 2011 Westlaw 778052, at *6, *22.

269. *Id.* at *22.

270. *Id.*

271. *Id.*

272. Barrett, *supra* note 253.

273. *Chevron Corp.*, 2011 Westlaw 778052 at *7; *see In re* Application of Chevron Corp., 2010 Westlaw 4910248, *12 (Nov. 10, 2010).

274. David Baker, *Chevron Braces for Protests at Annual Meeting*, S.F. CHRON., May 27, 2009 (discussing "coordinated campaign to pressure the company into settling a landmark lawsuit in Ecuador").

275. *Trial Lawyers Bankroll Lawsuit, Bank on Payday*, THE AMAZON POST, Dec. 9, 2009, http://theamazonpost.com/news/trial-lawyers-bankroll-lawsuit-bank-on-payday. The plaintiffs also assembled a powerful public relations and lobbying team to assist in their efforts. Kenneth P. Vogel, *Chevron's Lobbying Campaign Backfires*, POLITICO.COM, Nov. 16, 2009, http://www.politico.com/news/stories/1109/29560.html.

276. Statement by Steven R. Donziger to the Tom Lantos Human Rights Commission (Apr. 28,

States politicians.[277]

In addition, the Amazon Defense Coalition and its counterpart in the United States, Amazon Watch, run a substantive joint Internet campaign called *ChevronToxico, The Campaign for Justice in Ecuador*.[278] It includes fact sheets, press kits, press releases, letter writing and other social organizing campaigns, news items, photos, videos, and plaintiffs' court documents. Videos hosted on the website include mini-documentaries created by plaintiffs, such as a video message from affected Amazon communities to Chevron CEO John Watson and public service announcements, as well as television interviews with plaintiffs and their advocates. The website contains a link to the plaintiffs' blog, *Chevron in Ecuador*, which houses opinion pieces and commentaries, news items, videos, and links back to ChevronToxico and other plaintiffs' websites.[279] It also includes mini-reports on different topics, such as health impacts, waste pits, and community mobilization in Ecuador.[280] It also has called for boycotts and other organizing efforts, and encourages viewers to support and publicize the Internet campaign on social media.[281]

2009), http://chevrontoxico.com/assets/docs/20090428statement-by-steven-donziger.pdf.

277. Michael Isikoff, *A $16 Billion Problem*, NEWSWEEK, July 26, 2008; *U.S. Congressman Jim McGovern: Chevron's Legacy in Ecuador Left Me 'Angry and Ashamed'*, THE CHEVRON PIT BLOG, Dec. 11, 2008, http://thechevronpit.blogspot.com/2008/12/us-congressman-jim-mcgovern-chevrons.html; Letter from Linda T. Sanchez (D-CA) to Members of Congress, http://www.politico.com/static/PPM136_091112_sanchez_colleague.html. On a local level in the United States, plaintiffs have also succeeded in pressing a local government to pass a resolution against Chevron. *See* Recommendation to the Hon. Mayor and Members of the City Council of Berkeley, California, from the Peace and Justice Commission (Jan. 29, 2008), http://chevrontoxico.com/assets/docs/berkeley-resolution.pdf.

278. CHEVRONTOXICO, http://www.chevrontoxico.com (last visited April 6, 2011). Amazon Watch is a San Francisco-based group whose mission is to "protect the rainforest and advance the rights of indigenous peoples in the Amazon Basin," partnering with other "organizations in campaigns for human rights [and] corporate accountability." *See About Us*, AMAZON WATCH, http://amazonwatch.org/about (last visited Mar. 9, 2011). Amazon Watch also is a sponsor of the True Cost of Chevron campaign, which focuses on the Lago Agrio litigation and other Chevron international activities. Its centerpiece is an alternative annual report, issued in 2009 and again in 2010, that bears the title of the website, "The True Cost of Chevron." Antonia Juhasz, *The True Cost of Chevron: An Alternative Annual Report* (May 2009), http://truecostofchevron.com/alternative-annual-report.pdf. For the 2010 Alternative Annual Report, *see* Antonia Juhasz, *The True Cost of Chevron: An Alternative Annual Report* (May 2010), http://truecostofchevron.com/2010-alternative-annual-report.pdf. Amazon Defense Coalition maintains its own website, called TexacoToxico (http://www.texacotoxico.org/eng), which maintains similar types of information. *See, e.g.*, Lago Agrio Team, Amazon Def. Coal., *Rainforest Catastrophe: Chevron's Fraud and Deceit in Ecuador*, (Nov. 20066), http://chevrontoxico.com/assets/docs/fraud-invest-report-nov.pdf.

279. CHEVRON IN ECUADOR, http://www.chevroninecuador.com (last visited April 6, 2011). Chevron has its own website with documents and information about the case. *See Ecuador Lawsuit*, CHEVRON CORPORATION, http://www.chevron.com/ecuador (last visited Mar. 9, 2011). It also maintains the Amazon Post, a website with news and information. *See* AMAZON POST, http://theamazonpost.com (last visited Mar. 9, 2011).

280. *About the Campaign*, CHEVRONTOXICO, http://chevrontoxico.com/about (last visited Mar. 9, 2011).

281. A variety of other NGOs have expressed support or lent assistance in various capacities in

More recently, the 2009 documentary *Crude*,[282] directed and produced by Joe Berlinger, has increased publicity for the case. In 2005, a Lago Agrio plaintiffs' lawyer approached Berlinger to make a film to "tell his clients' story," in effect to "create a documentary depicting the Lago Agrio Litigation from the perspective of his clients."[283] The result was *Crude*, a film describing itself as focusing on "the human cost of our addiction to oil and the increasingly difficult task of holding a major corporation accountable for its past deeds."[284] Though it intersperses occasional responses from Chevron personnel, the film primarily follows the plaintiffs' lawyers as they develop and implement litigation, media, tactical, and political strategies.[285] The movie begins, for instance, with a plaintiffs' lawyer taking Lago Agrio residents to a Chevron shareholders meeting, scripting the speech they will deliver and helping them prepare their comments. Other scenes show the lawyer meeting with public relations personnel, and escorting Ecuador President Rafael Correa and Trudie Styler, wife of the musician Sting, to Lago Agrio. Berlinger also apparently removed at least one scene at the request of the plaintiffs' lawyers, which they deemed unhelpful to the case.[286]

Other visual media include videos on YouTube about the Lago Agrio

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the United States and elsewhere. *See, e.g.*, *Mr. Watson: Do the Right Thing in Ecuador!*, EARTHRIGHTS INT'L (Jan. 13, 2010), http://www.earthrights.org/campaigns/mr-watson-do-right-thing-ecuador; *Chevron (CVX) in the Amazon – Oil Rights or Human Rights? Texaco's legacy, Chevron's responsibility*, AMNESTY INT'L, http://www.amnestyusa.org/business-and-human-rights/chevron-corp/chevron-in-ecuador/page.do?id=1101670 (last visited Mar. 9, 2011); *The Chevron Program*, GLOBAL EXCHANGE, http://www.globalexchange.org/campaigns/chevronprogram (last visited Mar. 9, 2011).

282. CRUDE: THE REAL PRICE OF OIL, http://www.crudethemovie.com (last visited Mar. 9, 2011). Chevron has, apparently, commissioned a documentary that describes the litigation from its standpoint. *See* Chevron Corp. v. Berlinger, 629 F.3d 297, 309 n.6 (2d Cir. 2011). That movie does not appear to have received the same level of publicity as *Crude*.

283. *In re* Application of Chevron Corp., 2010 WL 1801526, at *3 (S.D.N.Y. May 6, 2010) (quoting a declaration submitted by Berlinger). *See also* Chevron Corp, 629 F.3d at 300 (noting that changes were made to the film at the plaintiff's request).

284. *Production Notes*, CRUDE: THE REAL PRICE OF OIL, http://www.crudethemovie.com/blog/wp-content/uploads/2009/08/CRUDE-Press-Kit-081909.pdf (last visited Mar. 9, 2011). Chevron has instituted an action to obtain unused footage from the filmmakers, for potential use in the case. *See NY Court to Hear Filmmaker Protest in Chevron Case*, ASSOCIATED PRESS, May 22, 2010.

285. *See Chevron Corp.*, 2010 WL 1801526, at *11 (stating that "[p]laintiffs' counsel indeed are on the screen throughout most of *Crude*"); *see also Chevron Corp.*, 629 F.3d at 309 n.5 (upholding district court's rejection of "self-serving testimony" of Berlinger that the movie would be a "human rights advocacy film") (internal quotations omitted).

286. The scene shows the assistant of the supposed independent expert appearing jointly with plaintiffs' attorneys. *See Chevron Corp.*, 2010 WL 1801526, at *4; *see also Chevron Corp.*, 629 F.3d at 309. The ChevronToxico internet campaign features a press kit on *Crude* and instructions on how to host a "CRUDE screening party." It also notes that "Amazon Watch has worked to promote the theatrical run of CRUDE with grassroots outreach in cities around the country . . . ." *Throw a CRUDE House Party!*, CHEVRONTOXICO, http://chevrontoxico.com/take-action/crude-house-party.html (last visited Feb. 6, 2011). Other plaintiffs' and plaintiff-friendly websites also advertise *Crude*.

litigation specifically, and Chevron's actions in Ecuador generally, that the plaintiffs and their advocates created. To appear in those documentaries and videos, and otherwise lend support, the plaintiffs have recruited celebrities and other high profile personalities, including Styler, Daryl Hannah, Cary Elwes, and Bianca Jagger.[287]

Plaintiffs and their advocates and supporters likewise have appeared multiple times on television and radio news channels to provide interviews or commentary on the Lago Agrio litigation.[288] Perhaps most well-known was a 2009 episode on the news program *60 Minutes*, which featured the plaintiffs' attorneys, some responses from Chevron, and a purported study of the litigation.[289] The Columbia Journalism Review sharply criticized the program; in a fact audit titled "How *60 Minutes* Missed on Chevron," the Review issued a report identifying various misimpressions left by the program regarding Texaco's conduct. The Review accused the segment of unfairly downplaying the role of Petroecuador, and all but omitting any mention of Petroecuador's poor environmental record. It called the segment "an exercise in innuendo," concluding that, "even in these days of cutbacks to news operations, *60 Minutes* could have—and should have—done better."[290] Frequent interviews, profiles, and opinion editorials also have appeared in print and online news media.[291]

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287. Derek Markham, *Activist Invites 6,000 Chevron Employees to Watch CRUDE Documentary*, TWILIGHT EARTH, http://www.twilightearth.com/activism/activist-invites-6000-chevron-employees-to-watch-crude-documentary (last visited Feb. 6, 2011); *Eye on the Amazon: The Monthly Newsletter of Amazon Watch*, AMAZON WATCH (June 2007), http://www.amazonwatch.org/newsletter/newsletterPHP/newsletter_09.php; Duncan Campbell, *Bianca Jagger Shares Honour*, GUARDIAN, Oct. 8, 2004, *available at* http://chevrontoxico.com/news-and-multimedia/2004/1008-bianca-jagger-shares-honour.html; *Bianca Jagger Promotes Lawsuit Against ChevronTexaco in Ecuador*, ASSOCIATED PRESS, Oct. 10, 2003, *available at* http://chevrontoxico.com/news-and-multimedia/2003/1010-bianca-jagger-promotes-lawsuit-against-chevron.html; Michael Liedtke, *Bianca Jagger Speaks About Ecuadorean Health at Chevron Texaco Annual Meeting*, ASSOCIATED PRESS, April 28, 2004, *available at* http://chevrontoxico.com/news-and-multimedia/2004/0428-bianca-jagger-speaks-about-Ecuadorian-health-at-chevron.html; *ChevronTexaco: Clean Up Ecuador TV Ad*, CHEVRONTOXICO (Dec. 2002), http://chevrontoxico.com/news-and-multimedia/video.html.

288. Chevron representatives do not appear to have sought the same type of visual media exposure as have the plaintiffs, though they have issued press releases and statements that have been picked up by print media.

289. *Amazon Crude*, CBS NEWS.COM (May 4, 2009), http://www.cbsnews.com/video/watch/?id=4988079n.

290. Martha Hamilton, *How 60 Minutes Missed on Chevron,* COLUM. JOURNALISM REV., Apr. 14, 2010. According to one website, after the *60 Minutes* piece, ChevronToxico.com had an increase in internet traffic of 350%. *See* Phil Robibero, *Chevron and the Amazon*, MAKE MEDIA MATTER BLOG (June 5, 2009), http://www.ifc.com/makemediamatter/blog/2009/06/cevron-and-amazon.php. The extent to which plaintiffs' representatives and attorneys secured those appearances or influenced their content – as opposed to their arising organically – is not known.

291. *See, e.g.*, William Langeweische, *Jungle Law*, VANITY FAIR (May 2007), http://www.vanityfair.com/politics/features/2007/05/texaco200705 (front cover feature article on Ecuadorian lawyer Pablo Fajardo); Steven Donziger, *The Chevron Way*, FORBES.COM (Sept. 16, 2009), http://www.forbes.com/2009/09/16/chevron-texaco-crude-amazon-ecuador-opinions-

The plaintiffs further have engaged in a variety of investment-related tactics. They seem to organize such efforts around shareholder meetings, including bringing Ecuador community activists to Chevron shareholder meetings, introducing shareholder resolutions, and targeting Chevron's executives and board of directors with letter writing campaigns.[292] Other efforts appear to include targeting institutional investors for divestment in order to question Chevron's litigation approach, [293] and introducing resolutions at Chevron shareholder meetings.[294]

A number of tactics also have been visible in Ecuador that, like the DBCP-Nicaragua matters, are particularly troubling from a rule of law standpoint.[295] The plaintiffs' attorneys, according to judicial findings, "have orchestrated a campaign to intimidate the Ecuadorian judiciary."[296] On a political level, the plaintiffs solicited and obtained the support of the Correa Socialist

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contributors-steven-donziger.html (commentary by Steven Donziger); Bret Stephens, *Amazonian Swindle, Daryl Hannah goes to Ecuador and Gets in Over Her Head*, WALL ST. J. (Oct. 30, 2007), http://www.opinionjournal.com/columnists/bstephens/?id=110010801 (quoting plaintiffs' expert Dave Russell as saying the ecological fallout was "larger than the Chernobyl disaster"); Elizabeth Day, *Trudie Styler: Why I had to Use my Celebrity to Try to Save the Rainforest*, THE OBSERVER (Mar. 22, 2009), http://www.guardian.co.uk/environment/2009/mar/22/trudie-styler-environmentalist (interview with Styler on Chevron's actions in Ecuador).

292. *See About the Campaign*, *supra* note 280; Letter from Amazon Watch to Chevron Shareholders (May 25, 2009), http://chevrontoxico.com/assets/docs/aw-letter-to-shareholders-may-2009.pdf; *see Will You Join Us?*, TRUE COST OF CHEVRON, http://truecostofchevron.com/protest.html (last visited April 5, 2011).

293. *See* Email from Stu Dalheim to Indigenous Peoples Committee, CSIF (Nov. 26, 2003, 11:24 AM), http://theamazonpost.com/web-of-influence/files/amazon_watch/03_amazon_watch_shareholder_campaign.pdf (email noting that seeking divestment as a strategic effort was discussed during a conference call with other plaintiffs' supporters). In 2009, a number of public pension funds contacted Chevron with questions or concerns about the case, and in 2005, the Swedish National Pension fund sold its holdings in Chevron after a Swedish investment research firm recommended divestment based on the company's activities in Ecuador. Neil King, Jr., *Pension Funds Fret as Chevron Faces Ecuador Ruling*, WALL ST. J., Apr. 8, 2009, http://online.wsj.com/article/SB123914867284999153.html; Press Release, ChevronToxico, A New Coalition of Chevron Texaco Shareholders Gather Support for Resolution Addressing Ecuadorian Contamination Controversy (Apr. 7, 2005), http://chevrontoxico.com/assets/docs/resolution-release-proxy-solicit.pdf.

294. Braden Reddall, *Chevron: Lawyers Behind Environment Report Proposal*, REUTERS, May 20, 2009, http://www.reuters.com/article/idUSTRE54J6S920090520; *see also* Email from Stu Dalheim, *supra* note 293; Press Release, ChevronToxico, Pressure Mounts on ChevronTexaco to Confront its Responsibility for the 'Rainforest Chernobyl' (Apr. 26, 2004), http://chevrontoxico.com/news-and-multimedia/2004/0426-press-release-on-chevron-shareholder-meeting.html.

295. *See Chevron Corp.*, 2010 WL 4910248, at *4 ("There is evidence . . . that [a plaintiffs' lawyer] and others associated with him have presented false evidence and engaged in other misconduct in Ecuador."); Chevron Corp. v. Camp, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010) ("what has occurred in this matter would in fact be considered fraud by any court . . . . If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."). Chevron Corp., 2011 WL 778052, at *15-16.

296. *Chevron Corp.*, 2011 Westlaw 778052, at *15-16.

government.[297] Correa has called the plaintiffs "comrades" and heroes, and has announced his solidarity with their cause.[298] He has publicly called Chevron's actions in Ecuador "a crime against humanity,"[299] met with the plaintiffs to discuss their case, toured the affected area of the rainforest, encouraged their efforts,[300] and publicly campaigned for them.[301] In a country whose judiciary is susceptible to political pressures and other influences,[302] and is even perhaps in "severe institutional crisis" in which independence is lacking,[303] such overt declarations raise obvious concerns about the ability of the courts to render a fair judgment. Indeed, plaintiffs' counsel themselves have opined that any judge who ruled against the plaintiffs would be "killed," and have acknowledged that the Ecuadorian judiciary is susceptible to influence.[304] Equally concerning, at the plaintiffs' apparent encouragement, Correa persuaded the State Prosecutor to investigate, and ultimately file fraud charges against, Chevron personnel involved in obtaining the earlier releases of liability following the remediation programs.[305] These allegations had been deemed meritless twice before in Ecuador.[306]

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297. *Id.* at *18.

298. Weekly Presidential Network, AMAZON POST, August 9, 2008, http://theamazonpost.com/web-of-influence/files/yanza/04_080908_CANAL_DEL_ESTADO.pdf; *see also* Press Conference for Prosecutor Washington Pesantez, AMAZON POST, September 4, 2009, http://theamazonpost.com/web-of-influence/files/rcorrea/08_20090904_Rueda_de_Prensa_del_Fiscal_Pesantez_eng.pdf.

299. Simon Romero and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, N.Y. TIMES, May 14, 2009, http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1.

300. *See* Excerpt from President Correa radio address (Radio Caravana April 28, 2007), http://theamazonpost.com/web-of-influence/files/yanza/03_070428_Radio_Caravana_Correa_eng.pdf.

301. Bret Stephens, *Amazonian Swindle, Daryl Hannah goes to Ecuador and gets in over her head*, WALL ST. J. OPINION ARCHIVES, October 30, 2007, http://www.opinionjournal.com/columnists/bstephens/?id=110010801.

302. The United States Department of State has observed the susceptibility of the Ecuadorian judiciary to external pressures, including political and media pressures, and corruption. United States Dept. of State, Bureau of Democracy, Human Rights and Labor, *2009 Human Rights Report: Ecuador*, http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136111.htm.

303. Chevron Corp., 2011 WL 778052, at *19-21.

304. *Id.* at *14-15, *17.

305. *See In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 287 (S.D.N.Y. May 6, 2010); *Chevron Corp.*, 2011 WL 778052, at *17-19.

306. See *Chevron Corp.*, 2011 WL 778052, at *7-8; *Chevron Corp.*, 709 F. Supp. 2d 283, at *2; *see also* ChevronToxico, *Chevron's $16 Billion Environmental Problem in Ecuador: Fact Sheet on Legal Case and Indictments of Two Chevron Lawyers* (September 2008), http://chevrontoxico.com/assets/docs/fact-sheet-2008-indictment-chevron-lawyers.pdf; Request of Dr. Washington Pesantez Munoz, District Prosecutor of Pichincha, to The Hon. Judge of the Third Criminal Court of Napo (March 13, 2007), http://theamazonpost.com/web-of-influence/files/pesantez/04_prosecutor_pesantez_conf_vega.pdf. In a telling email, the Deputy Attorney General explained to plaintiffs' counsel in the Lago Agrio case that prosecutions could "nullify or undermine the value of the" settlements TexPet obtained. Chevron Corp., *Texaco*

Other evidence also raises rule of law concerns about the political and judicial branches. For instance, in late 2009, three videos surfaced that appear to show the judge then presiding over the Lago Agrio litigation stating that he will rule against Chevron and hold the company liable for roughly twenty-seven billion dollars.[307] In one of the videos, an individual claiming to be associated with Alianza PAIS, Ecuador's ruling party, apparently tells two businessmen, with the judge in the room, that he will direct remediation contracts to them after the verdict is rendered, if they pay him three million dollars in bribes. He is recorded as saying that one million dollars would go to the judge, one million dollars would be for "the presidency," and the other one million dollars would be directed to the plaintiffs.[308] When the videos became public, the judge recused himself.[309]

Troubling evidence also exists regarding judicial inspections, a process that led to the scope of the environmental harms and the allocation of responsibility.[310] Originally, the court ordered a process in which each party would submit expert reports for the court to consider. The plaintiffs apparently filed reports under the expert's name that, according to a United States federal court, the expert did not author. They instead were "entirely false and

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Petroleum, Ecuador and the Lawsuit against Chevron, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf (last visited April 6, 2011), at 8. After issuing the indictments, the Attorney General then recused himself. Mercedes Alvaro, *Ecuador: Prosecutor Recuses Himself In Chevron Case,* DOW JONES (December 16, 2008), http://theamazonpost.com/web-of-influence/files/pesantez/03_pesantez_recusal.pdf.

307. Press Release, Chevron Corp., Chevron Provides Ecuador Authorities Evidence in Bribe Plot (Sept. 7, 2009), http://www.chevron.com/news/press/release/?id=2009-09-07.

308. Press Release, Chevron Corp., Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit Chevron Calls for Investigation, Disqualification of Judge in Ecuador Case (August 31, 2009), http://www.chevron.com/news/press/release/?id=2009-08-31. Although it is not clear whether the judge himself was soliciting a bribe, he describes the Lago Agrio litigation as "a fight between a Goliath and people who cannot even pay their bills." Simon Romero and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, N.Y. TIMES, May 14, 2009, http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1. As the New York Times notes, "[t]he sympathies of the judge . . . are not hard to discern."

309. After the videos appeared, the plaintiffs' representatives claimed that Chevron had orchestrated the potential bribery scheme. They hired investigators, issued press releases, and asked that government authorities investigate Chevron (there is no evidence that the Department of Justice pursued such an investigation). *See Chevron's Bribery Scandal, Evidence Suggests a Chevron Plan to Disrupt Ecuador's Judicial System*, CHEVRONTOXICO (October 29, 2009), http://chevrontoxico.com/assets/docs/20091029-chevrons-bribery-scandal.pdf; *see also* Press Release, ChevronToxico, Report of Investigation of Wayne Hansen (October 29, 2009), http://chevrontoxico.com/assets/docs/20091029-fine-report-without-annexes.pdf; *Chevron's Story on Ecuador Bribery Scandal Continues to Unravel*, CHEVRONTOXICO (Oct. 13, 2009), http://chevrontoxico.com/news-and-multimedia/2009/1013-chevrons-story-on-ecuador-bribery-scandal-continues-to-unravel.html; *Chevron Admits Its Lawyers Present at Key Meeting with Ecuador Man Who Taped Video Scandal*, AMAZON DEFENSE COALITION (October 28, 2009), http://www.texacotoxico.org/eng/node/339.

310. *See Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, *supra* note 306, at 7.

fraudulent."[311]

Then, at the behest of the plaintiffs, and with the support of an amicus curiae brief filed by the campaign manager for President Correa, the court deviated from the original plan and appointed the plaintiffs' choice of Richard Cabrera, a mining engineer, as the sole expert responsible for the assessment.[312] According to a United States federal court, statements by the plaintiffs raise "at least serious questions" and even a "likelihood" that they pressured the Ecuadorian judge to deviate from the original expert process by withholding a complaint against him related to a "sex for jobs" scandal, selected Cabrera to serve as the expert, and paid him money "before he was appointed."[313] Indeed, though he was purportedly independent, it has become known that Cabrera previously served as a paid expert and prepared two reports in a different case that Bonifaz filed in the United States.[314]

In the Lago Agrio matter, the United States federal court also found that the plaintiffs and their consultants secretly wrote much or all of Cabrera's report.[315] Those consultants made statements to the plaintiffs' lawyers, captured on film, that seem to cast doubt on the merits of at least part of the plaintiffs' case. Nonetheless, a plaintiffs' lawyer discounted those statements because, in his view, the pressure on the court, not the legal and factual merits, would lead to victory.[316] Cabrera's report, whoever authored it, determined that Chevron has sole responsibility for damages, in the amount of twenty-seven billion dollars.[317]

While the plaintiffs contend that Chevron has also engaged in improper

311. *Chevron Corp.*, 2011 WL 778052, at *8; *see id.* at *10-11.

312. *Chevron Corp.*, 2011 WL 778052, at *2.

313. *Id.* at *11-12, *15.

314. The case, Arias v. DynCorp, 517 F. Supp. 2d 221 (D.D.C. 2007), involves the alleged use of a pesticide in Ecuador. It is pending in the United States District Court for the District of Columbia. Chevron contends that the conclusions in those reports directly contradict its conclusions in the Lago Agrio matter regarding the cause of certain harms alleged. *See* Motion To the President of the Provincial Court of Justice of Sucumbios at 9, No. 002-0003 (May 24, 2010) (Lago Argio), *available at* http://www.chevron.com/documents/pdf/ecuador/cabrerafilingmay242010english.pdf (hereinafter "Chevron Motion").

315. *Chevron Corp.*, 2011 WL 778052, at *12-14; *see also Chevron Corp.*, 2010 WL 3584520, at *6 ("ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own").

316. *See Chevron Corp.*, 2010 WL 4910248, at *7.

317. *See id.* at *6; *see also In re* Application of Chevron Corp., 735 F. Supp. 2d 773, 776-77 (S.D.N.Y. 2010) (discussing similar findings of another court). The Ecuadorian court stated that it did not rely on Cabrera's report. *See* Barrett, *supra* note 253. A U.S. federal court concluded that subsequent reports upon which the court did claim to rely simply recycled Cabrera's findings. *Chevron Corp.*, 2011 WL 778052, at *14-15, *34. That court issued an order temporarily enjoining enforcement of the award. *Id.* In addition, Chevron alleges that 90 percent of the twenty-seven billion dollar figure was allocated to issues unrelated to remediation of the sites operated by the former consortium, and included such things as money for modernizing Petroecuador. Chevron Motion, *supra* note 314, at 10-16 (Lago Argio).

tactics,[318] multiple United States federal courts have issued criticisms of the efforts of the plaintiffs' counsel that are reminiscent of those issued by Judge Chaney. One court noted that one lawyer "and others associated with him have presented false evidence and engaged in other misconduct in Ecuador."[319] Another stated, "what has occurred in this matter would in fact be considered fraud by any court . . . If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."[320] Nor does a claim that a corporate defendant has engaged in improper tactics assuage the larger concern that the plaintiffs' out-of-court actions, coupled with the fragility of the Ecuadorian legal system, influenced the local court in issuing its massive nine billion dollar judgment – now doubled.[321] Indeed, the circumstances surrounding the Lago Agrio litigation raise the very concrete question about the capacity of local courts in Ecuador to provide reliable decisions in corporate transnational tort matters, which may involve highly charged, high stakes lawsuits involving foreign companies.[322] In a country where "the rule of law is not respected . . . in cases that have become politicized,"[323] the use of out-of-court tactics by plaintiffs, defendants, or their supporters very well may end up impacting legal outcomes themselves.

c. Gonzales v. Texaco

The concerns of misconduct have not been limited to litigation in Ecuador, however. They likewise appeared in *Gonzales v. Texaco*,[324] a personal injury action filed in 2006 by Bonifaz in San Francisco. The plaintiffs alleged that Texaco's byproduct disposal practices contaminated available water sources in Lago Agrio, leading to various physical maladies among local residents.[325]

Defense counsel, when deposing plaintiffs in Ecuador, discovered that several of the claims made in the complaint were false. One plaintiff's son, alleged to have suffered from leukemia, did not have the disease. In her deposition, the plaintiff stated that the paralegal who interviewed her before the

318. Barrett, *supra* note 253.

319. *Chevron Corp.*, 2010 WL 4910248, at *4.

320. Chevron Corp. v. Camp, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010).

321. *See Chevron Corp.*, 2011 WL 778052, at *33-34 ("Chevron has raised substantial questions that present a fair ground for litigation as to whether the Ecuadorian judgment is a result of fraud practiced on the Ecuadorian tribunal").

322. *Id.* at *19-22, *32-33 ("Chevron thus is likely to prevail on its contention that the Ecuadorian judgment in this case was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law, at least in cases of this sort.") (internal quotation omitted).

323. *Chevron Corp.*, 2011 WL 778052, at *21.

324. Gonzales v. Texaco Inc., No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 84523 (N.D. Cal. Nov. 15, 2007).

325. Second Amended Complaint at 12, 19, Gonzales v. Texaco, No. C 06-02820 WHA (N.D. Cal.).

lawsuit never asked if her son had cancer, and never told her that the firm would sue Texaco based on these claims.[326] Another plaintiff told the paralegal that she had cancer but admitted during her deposition that this was false.[327] Her husband, also a plaintiff, never completed a legal intake form, and never met with attorneys in the case prior to the deposition.

When the court learned of these problems, it dismissed the three plaintiffs, with statements that echoed the concerns raised by Judge Chaney. The court found that the plaintiffs did not understand or expect that a lawsuit would be brought in their names, concluding that counsel "relied on the unsophistication of plaintiffs."[328] The court found that "[t]his is not the first evidence of possible misconduct by plaintiffs' counsel in this case."[329] Alluding to *Aguinda* and the Lago Agrio litigation, the court further found that the litigation was a tactic itself, unrelated to a potential recovery: "[i]t is clear to the Court that this case was manufactured by plaintiffs' counsel for reasons *other* than to seek a recovery on these plaintiffs' behalf. This litigation is likely a smaller piece of some larger scheme against defendants."[330] The court later granted Chevron's motion for summary judgment dismissing the remaining two plaintiffs, thereby ending the litigation.

C. The Coca-Cola Cases

The use of litigation as part of a larger campaign, noted in *Gonzales*, is perhaps even more visible in the series of cases that have been filed against Coca-Cola arising out of alleged violence by third parties toward union workers. The cases, premised on the ATS and common law theories, have garnered little legal success, but have been accompanied by a similar array of tactics to those seen in the DBCP and Ecuador matters, and other transnational tort cases. This section first discusses the cases that have been filed, and then addresses the tactics that have accompanied them and statements by plaintiffs' attorneys discussing the use of litigation as part of a larger campaign.

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326. *See* Order Granting Motions for Summary Judgment and Terminating Sanctions, Gonzales v. Texaco, Inc., No. C 06-02820 WHA (N.D. Cal Aug. 3, 2007). According to the court, in seeking to obtain the plaintiffs' depositions, Bonifaz noted in a letter to a lawyer with whom he was working in Ecuador, "[i]t is possible that with this last action in court that I am planning we will give Chevron 'la copa de gracia'," which is roughly translated to mean "we'll finally stick it to Chevron." *See* Gonzales v. Texaco, Inc., No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 56622, *10 (N.D. Cal. Aug. 3, 2007).

327. *See* Gonzales, 2007 U.S. Dist. LEXIS 56622, at *5, *10.

328. Gonzales v. Texaco, Inc., No. C 06-02820 WHA, 2007 WL 3036093, at *3 (N.D. Cal. Oct. 16, 2007).

329. Gonzales v. Texaco, Inc., No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 56622, at *10 (N.D. Cal. Aug. 3, 2007).

330. *Id.* at *9. Although the district court issued sanctions against the lawyers, the court of appeals ruled that the district court did not apply the correct legal standard and remanded the case so the district court could reconsider sanctions using the correct standard. Gonzales v. Texaco, Inc., 2009 WL 2494324 (9th Cir. 2009).

1. The Cases Filed

a. The Sinaltrainal Lawsuits

For decades, Colombia has been embroiled in a bloody civil war involving drug cartels, guerillas, and paramilitary forces.[331] Throughout that conflict, Colombian unions have been targets of violence: over the past twenty-five years, thousands of union members have been killed.[332]

One such victim was Isidro Segundo Gil, a local union leader allegedly murdered by paramilitary forces inside a Coca-Cola bottling facility, Bebidas y Alimentos de Urabá, S.A. ("Bebidas").[333] Gil's estate and his former union, Sindicato Nacional de Trabajadores de la Industria de Alimentos ("Sinaltrainal"), akin to the institutional plaintiff in the Lago Agrio case, sued Bebidas, The Coca-Cola Company ("Coca-Cola USA"), and Coca-Cola de Colombia, S.A. ("Coca-Cola Colombia").[334] In three other complaints, Sinaltrainal sued the same defendants, as well as Panamco Colombia, S.A. ("Panamco"), claiming that paramilitaries and local police had also intimidated, kidnapped and tortured union leaders at Panamco Coca-Cola bottling facilities.[335] All four complaints alleged that bottling facility managers conspired with the armed groups, and sought a recovery on the various defendants through secondary theories of liability.[336]

In 2003, the district court dismissed the claims against Coca-Cola USA and Coca-Cola Colombia for lack of subject matter jurisdiction.[337] The court found that the bottler's agreements did not give these defendants control over the bottling facilities' operations and labor policies.[338] Without that control, the plaintiffs could not show that the Coca-Cola defendants had acted in concert with the paramilitaries and local police.[339] The court later dismissed the

331. *See* Background Note: Colombia, U.S. DEP'T OF STATE (Oct. 2010), http://www.state.gov/r/pa/ei/bgn/35754.htm. *See also Eleventh Circuit Dismisses Alien Tort Statute Claims Against Coca-Cola Under Iqbal's Plausibility Pleading Standard*, 123 HARV. L. REV. 580, 581 (2009).

332. *Sinaltrainal*, 2009 WL 2431463, at *8.

333. *Id.* at *2.

334. *See* Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003). *See also Eleventh Circuit Dismisses*, *supra* note 331. Richard Kirby, the owner of Bebidas, also was named as a defendant. Coca-Cola asserted that while violence may have occurred against union members, the company was being targeted for the activities of unaffiliated third-parties. *See* Brief for Defendants-Appellees, Sinaltrainal v. Coca-Cola Co., No. 06-15851 (11th Cir. Jun. 30, 2008).

335. *Sinaltrainal*, 2009 WL 2431463, at *2. Panamerican Beverages Company, LLC and Panamco, LLC, the owners of Panamco Colombia, also were named as defendants. *Id. See Eleventh Circuit Dismisses*, *supra* note 331.

336. *See In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1274 (S.D. Fla. 2006).

337. *Sinaltrainal*, 256 F. Supp. 2d at 1352-57.

338. *Id.* at 1354.

339. *Id.* at 1355.

plaintiffs' remaining claims without prejudice.[340] The United States Court of Appeals for the Eleventh Circuit affirmed that decision.[341]

b. The Turedi and Palacios Lawsuits

Within weeks of that affirmation, the United States Court of Appeals for the Second Circuit affirmed a dismissal in *Turedi*, a similar ATS action involving Coca-Cola and its Turkish subsidiary.[342] A few months later, the plaintiffs filed a new complaint, *Palacios*, which was similar to *Turedi* and *Sinaltrainal*, in connection with Coca-Cola bottling operations in Guatemala.[343]

Given the prior results in *Turedi* and *Sinaltrainal*, however, the likelihood of the case succeeding does not seem especially high. The plaintiffs' lawyers may know that fact. As one of the attorneys has stated,

> [Litigation] . . . served to focus a broader campaign seeking to persuade [Coca-Cola] to accept responsibility for violence in its bottling plants, wholly apart from any potential legal liability . . . The campaign is using factual information developed from the investigations connected to the litigation, as well as traditional human rights reports, to support specific demands that Coca-Cola respond to the violence . . . The campaign provides a promising model of cooperation to change corporate behavior that supports or tolerates human rights

340. *Sinaltrainal Litig.*, 474 F. Supp. 2d at 1273.

341. *See* Sinaltrainal v. Coca Cola Company, 2009 U.S. App. LEXIS 17764 (11th Cir. 2009); Jonathan Drimmer & Laura Ardito, *Emerging Issue Analysis,* Abdullahi v. Pfizer, Inc., 2009 U.S. App. LEXIS 1768 (2d Cir. Jan. 30, 2009), Lexis/Nexis (April 2009). In one of the four cases, the court of appeals affirmed the dismissal without prejudice for the plaintiffs to refile their claim. *Sinaltrainal*, 2009 U.S. App. LEXIS 17764, at *32-37.

342. Turedi v. Coca Cola Co., 2009 WL 1956206 (2d Cir. July 7, 2009). For a discussion of *Turedi*, *see* Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 760-62 (2007). In *Turedi*, truck drivers and transport workers employed by Coca-Cola's facilities in Istanbul, Turkey, and family members, filed an action in New York under the ATS. The plaintiffs alleged that the Turkish "special branch" police (Cevik Kuvvet) used violence in response to a protest by workers who were fired for joining a labor union, and that the plaintiffs suffered additional injuries after they were arrested. The district court granted Coca-Cola's motion to dismiss the case on the grounds of *forum non conveniens*, noting that the "facts give rise to a strong inference that forum-shopping considerations served as a substantial motivation in Plaintiffs' venue choice." Turedi v. Coca Cola Co., 460 F. Supp. 2d 507, 522, 527 (S.D.N.Y. 2006).

343. Palacios v. Coca-Cola Co., 102514/2010 (N.Y. Sup. Ct. Feb. 25, 2010) (removed to federal court on April 13, 2010); *see* Press Release, Campaign to Stop Killer Coke, Coke Hit with New Charges of Murder, Rape, Torture (Mar. 1, 2010), http://www.killercoke.org/nl100301.htm. The complaint alleges that Palacios was subjected to death threats, an armed home invasion and was ultimately fired from his job because of his union membership. Palacios was forced to flee his home and ultimately to flee to the United States. Palacios v. Coca-Cola Co., 2010 WL 4720409, at *2 (S.D.N.Y. Nov. 19, 2010). Another plaintiff alleges that after he made complaints to the managers of the bottling operations, assailants with ties to the management shot and killed his son and nephew, and raped his daughter. *Id. Palacios*, though substantially similar to *Turedi* and *Sinaltrainal*, was filed in a state court in New York, and relied on common law tort theories. Coca-Cola removed the case to federal court, where it is pending. *Id.*

abuses.[344]

Accordingly, like *Gonzales* and the follow-on cases against Drummond and others noted above, the litigation itself may have a relatively low chance of success, but the filings against Coca-Cola may be tactical efforts in a broader campaign seeking to create corporate change.[345]

2. The Tactics in the Coca-Cola Cases

Part of the campaign to create corporate change was the release of the full-length documentary, "The Coca-Cola Case," which coincided with the filing of *Palacios*.[346] Co-produced with the National Film Board of Canada, the film follows the plaintiffs' lawyers in the cases against Coca-Cola "as they attempt to hold the giant United States multinational beverage company accountable in [a] legal and human rights battle."[347] The movie documents the creation of the campaign against Coke, noting that the two plaintiffs' attorneys sought a partnership with a well-known union activist and publicist to help publicize their cases. In the film, one of the lawyers explicitly states his goal to use successes in one ATS case to pressure defendants in other ATS cases. The documentary also shows the attorneys vowing, after settlement negotiations turned sour, to file more lawsuits against Coca-Cola to further pursue the company. The film has since been aired in theaters around the world,[348] although during the film itself plaintiffs' attorneys are seen relating the content of settlement discussions,[349] and the judge overseeing those negotiations stated as part of his Final Settlement Order that the statements "directly violate . . . confidentiality requirements" that were "established by state and federal laws of the United States."[350]

The film has been highlighted in the Killer Coke Campaign, a website run by the plaintiffs in *Sinaltrainal* and the labor activist who appears in the film. Established in 2004, the site states that more than 1.7 million viewers have visited it.[351] The Campaign's stated mission is focused on raising awareness of alleged attacks on union leaders at Coca-Cola bottling facilities in Colombia.

344. Holzmeyer, *supra* note 15, at 291.

345. *See id.* (describing the indirect effects and purposes of litigation concerning social issues).

346. *See, e.g., The Coca-Cola Case* (Trailer), NATIONAL FILM BOARD OF CANADA, http://www.nfb.ca/film/coca_cola_case_trailer (last visited March 8, 2011). The film was released in January 2010, a few weeks before the February *Palacios* filing date.

347. *The Coca-Cola Case – A Documentary Film About Coke and Labour Rights in Latin America*, http://films.nfb.ca/the-coca-cola-case (last visited Feb. 28, 2011) [hereinafter *The Coca-Cola Case*].

348. *See* Jason Farbman, *An Anti-Coke Campaign Effervesces at NYU*, NORTH AMERICAN CONGRESS ON LATIN AMERICA (Apr. 22, 2010), https://nacla.org/node/6527.

349. *See The Coca-Cola Case*, *supra* note 347.

350. Exhibit A to Final Order of Settlement Master, *In re* Sinaltrainal v. TCCC, December 23, 2009, *available at* http://www.killercoke.org/lettertocinemapolitica.pdf.

351. *See Resolutions*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/resolutions.htm (last visited Feb. 28, 2011).

This is done through the campaign website, which includes education, social and political activism, community organizing, and other matters. The campaign website includes a faux Coca-Cola ad with the tag line "Murder: It's the Real Thing," and a Coca-Cola can standing on a pool of blood.[352] The website also has a section on the resolutions that have been passed by universities, unions, and city councils in support of the Killer Coke Campaign's international boycott of Coca-Cola products.[353] It maintains a "Campus Activism" section where people can read sample resolutions and tips on starting campus campaigns.[354] The website has a similar "Labor Union Solidarity" section with news articles and press releases on union activism against Coca-Cola.[355] The website also contains links to archived newsletters,[356] a section on the alleged health effects of drinking Coca-Cola,[357] YouTube videos and documentary clips,[358] and downloadable protest flyers.[359] Finally, it also has links to "The Coca Cola Case" official website, features news articles about the film, highlights the film's opening, and permits the purchase of the film through the website.[360]

The site, like the tactics in the DBCP and Lago Agrio matters, also contains various reports related to Coca-Cola, including a "corporate profile" of Coca-Cola[361] by the Polaris Institute, a Canadian organization that advocates for

352. *See* CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org (last visited Feb. 28, 2011).

353. *See Resolutions*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/resolutions.htm (last visited Feb. 28, 2011).

354. *See Campus Activism*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/student.htm (last visited Feb. 28, 2011).

355. *See Labor Union Solidarity*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/unions.htm (last visited Feb. 28, 2011).

356. *See Newsletters*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/newsletters.php (last visited Feb. 28, 2011).

357. *See Health Issues*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/health_issues.php (last visited Feb. 28, 2011).

358. *See Videos and Interviews*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/videos_and_interviews.php (last visited Feb. 28, 2011).

359. *See Flyers, Mini-Posters & Stickers*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/literature_flyers.php (last visited Feb. 28, 2011).

360. *See Stop Killer Coke Newsletter*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/nl100115b.htm (last visited Feb. 28, 2011). Organizations associated with the plaintiffs' attorneys also host information on their own separate websites. *See Alien Tort Claims: Colombia*, INTERNATIONAL LABOR RIGHTS FORUM, http://www.laborrights.org/end-violence-against-trade-unions/colombia/news/10896 (last visited Feb. 28, 2011); and *Cases*, INTERNATIONAL RIGHTS ADVOCATES, http://www.iradvocates.org/cokelcase.html (last visited Feb. 28, 2011). As noted above, Coca-Cola sharply disputes that it bears any responsibility for violence at the hands of unaffiliated third-parties. *See Sinaltrainal v. Coca-Cola Co.*, Brief for Defendants-Appellees, No. 06-15851 (11th Cir. June 30, 2008).

361. *"Killer Coke Reports" Section*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/reports.htm (last visited Feb. 28, 2011); *see also Coca-Cola Company: Inside the Real Thing*, POLARIS INSTITUTE (August 2005), http://www.polarisinstitute.org/files/

"social change in an age of corporate driven globalization."[362] The sixty-page report claims to describe various aspects of Coca-Cola's alleged corporate harms to obtain profits.[363] The report includes organizational, economic, political, and social sections, including *Sinaltrainal* and other human rights lawsuits against Coca-Cola. It also contains Stakeholder Profiles of Coca-Cola and specifically lists the company's top ten institutional and mutual fund shareholders.[364]

The out-of-court tactics against Coca-Cola have included other investment efforts. Plaintiffs, their attorneys, and union members have attended Coca-Cola shareholder meetings on multiple occasions, some of which were documented in "The Coca-Cola Case" film.[365] Indeed, in the movie, activists tout the use of protests at shareholders meetings as an activism tactic and, in one scene from the film, an activist reads graphic allegations from a plaintiff's complaint at a shareholders' meeting.[366] The investment related efforts include attempts to convince institutional investors to divest, as witnessed in other cases, as well.[367]

Coke%20profile%20August%2018.pdf; *Evidence of The Coca Cola Company's Human Rights Abuses and Environmental Violations* report, ST. JOSEPH UNIV. STUDENTS FOR WORKERS' RIGHTS, http://org.ntnu.no/attac/dokumentene/cocacola/cokeinfopacket.pdf (last visited Feb. 28, 2011).

362. *About Us*, POLARIS INSTITUTE, http://www.polarisinstitute.org/aboutus (last visited Feb. 28, 2011).

363. *Coca-Cola Company: Inside the Real Thing*, POLARIS INSTITUTE (August 2005), at 1, *www.polarisinstitute.org/files/Coke%20profile%20August%2018.pdf.*

364. *Id.*

365. *See The Coca-Cola Case*, *supra* note 347.

366. *See id.; Coca-Cola: Abuses in Colombia, Shareholder Meeting Report-Back*, INTERNATIONAL LABOR RIGHTS FUND (April 19, 2006), http://lrights.igc.org/projects/corporate/coke.

367. In 2005, New York City's then-comptroller William Thompson issued a resolution on behalf of the city pension fund asking Coca-Cola to allow an independent investigation into alleged violence against unionists at its plants in Colombia in connection with the *Sinaltrainal* case. *See* Jill Gardiner, *Thompson Targets Google, Yahoo Over China Policy*, N.Y. SUN (Dec. 14, 2006), http://www.nysun.com/new-york/thompson-targets-google-yahoo-over-china-policy/45150; Press Release, Campaign to Stop Killer Coke, NYC Pension Funds Call For Investigation Into Alleged Human Rights Abuses At Coca-Cola (Jan. 26, 2006), http://www.killercoke.org/pr060126.htm. In connection with its introduction, Thompson stated, "The New York City Pension Funds are concerned about the allegations of alleged human rights abuses at Coca-Cola's Colombian affiliate," and that "[b]y failing to address this issue, Coca-Cola has fostered a negative image of itself and is now the subject of a boycott campaign, which poses a financial risk for its investors." *Id.* The New York City Employees' Retirement System, Teachers' Retirement System for the City of New York, New York City Police Pension Fund, New York City Fire Department Pension Fund, and the New York City Board of Education Retirement System also sponsored the resolution. *Id.*; *see also* Bureau of Asset Management, Office of the Comptroller, City of New York, 2005 Proxy Initiatives of the New York City Pension Funds (December 2005), *available at* http://www.comptroller.nyc.gov/bureaus/bam/corp_gover_pdf/2005-shareholder-report.pdf. Together, the funds held 6,475,918 shares of Coca-Cola, worth more than $267 million. Similarly, in 2006, TIAA-CREF sold 1.2 million shares of Coca-Cola stock, worth $52.4 million, after KLD Research and Analytics, a firm that seeks to make investments premised in part on social concerns, dropped Coca-Cola from its list of socially responsible companies. That occurred in part because of allegations regarding Coca-Cola's actions in Colombia and elsewhere (the bases of the *Sinaltrainal* and *Turedi* lawsuits). Caroline Wilbert, *Social responsibility of Coca-Cola questioned; Giant retirement fund decides to sell shares*, ATLANTA-JOURNAL CONST. (Jul. 19, 2006), http://www.commercialexploitation.org/

Also as seen in many other cases, the efforts against Coca-Cola have included political tactics.[368] They also have included boycotts, and have extended to school campuses and other academic settings.[369] Indeed, according to one plaintiff's account, there are at least 150 colleges and universities around the world that are active in the Killer Coke Campaign targeting alleged misconduct by Coca-Cola against union leaders through education, calls to action, and other means.[370] In addition, one of the attorneys featured in "The

news/cokesocialresponsibilityquestioned.htm.

368. In June 2007, a joint committee hearing in the House of Representatives titled, "Protection and Money: U.S. Companies, Their Employees, and Violence in Colombia," focused on alleged payments by United States companies to military and paramilitary units in Colombia. The hearing included testimony from plaintiffs' counsel discussing *Sinaltrainal*, and other legal actions. *Protection and Money: U.S. Companies, Their Employees, and Violence In Colombia: A Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on the Western Hemisphere of the House Comm. on Foreign Affairs and the Subcomm. on Health, Employment, Labor, and Pensions and the Subcomm. on Workforce Protections of the Committee on Education and Labor*, 110th Cong. (June 28, 2007). Likewise, in 2008, a Boston City Councilman introduced a resolution to make Boston a Coke-free zone. The resolution recognized the boycott sought by the Sinaltrainal union in Colombia and the USW, and pressed the city administration "to not serve Coca-Cola products or stock them in any vending machines that are located on city property." It also "encourage[d] all businesses to immediately cease and desist from the stocking and selling of all Coca-Cola products until the international boycott has been resolved." The resolution did not pass. *See* Frank Neisser, *City Councilors Demand 'Coca-Cola-free' Boston*, WORKERS WORLD (Aug. 11, 2004), http://www.workers.org/2008/us/boston_0814.

369. The United Steel Workers and the Sinaltrainal union in Colombia also called for an international boycott of Coca-Cola. *See* Neisser, *supra* note 368. Those requests have been supported by other unions. *See Resolutions*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/resolutions.htm (last visited Feb. 28, 2011). The Ontario Public Service Employees Union (OPSEU) resolved that "until the situation involving SINALTRAINAL is resolved and the safety and rights of workers in the Coca-Cola Colombian bottling plants are protected, OPSEU will continue the boycott and information campaign against Coca-Cola." *OPSEU Resolution*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/opseuresolution.pdf (last visited Feb. 28, 2011). Local chapters of the Service Employees International Union (SEIU) have passed resolutions as well, for example, to "support the worldwide call to boycott Coca-Cola and work to win AFL-CIO support for the campaign against Killer Coke" by ceasing to sell Coca-Cola or provide it at meetings. *See 12,000 Member SEIU Local 2028 Bans Coke Products, Resolutions*, CAMPAIGN TO STOP KILLER COKE, http://www.killercoke.org/resolutions.htm (last visited Feb. 28, 2011). The Executive Council of the Union of Clerical and Technical Workers of New York University, Oakville and District Labour Council, and Canadian Auto Workers Local 707 have also passed resolutions supporting the boycott. *See* Two Resolutions to Boycott Coca-Cola Products Adopted by the Executive Council of the Union of Clerical and Technical Workers of NYU (UCATS), Local 3882, American Federation of Teachers, NYSUT, AFL-CIO (Mar. 8, 2005), http://www.killercoke.org/aft3882res.htm. The amicus curiae, ZOA, in the *Bigio v. Coca-Cola* lawsuit has also called for a boycott against the company. *See* Press Release, Zionist Organization of America, *ZOA* Protests Outside Coca-Cola's Annual Shareholders' Meeting In Wilmington, Delaware (April 22, 2008), http://www.zoa.org/sitedocuments/pressrelease_view.asp?pressreleaseID=391.

370. *Evidence of The Coca Cola Company's Human Rights Abuses and Environmental Violations* report, ST. JOSEPH UNIV. STUDENTS FOR WORKERS' RIGHTS at 76, http://org.ntnu.no/attac/dokumentene/cocacola/cokeinfopacket.pdf (last visited Feb. 28, 2011). This includes Hofstra University in New York, which passed a resolution not to renew the university's exclusive contract with the company. *Id.* at 60.

Coca-Cola Case" has lectured at the Carnegie Institute. He expressly noted that that it was his organization's "future objective[] . . . to couple each of its cases with a public campaign. The organization did this with its case against Coca-Cola, and intends to use this as a strategy to educate the public and raise people's awareness of human rights violations engendered by corporate policy." [371] He further noted, "his organization has also undertaken initiatives to work with lawyers in other countries so that they can bring cases against the same companies by exploiting their own domestic laws."[372] He concluded by saying, "We're going to continue our efforts to bring these issues to the door of the corporations, and I certainly hope that the war on terror and these other rationales will not allow us to, in effect, sanction a different form of terrorism which is very real to the people who are working in the factories of the global economy."[373] Such statements, of course, identify the larger community-activism oriented motives behind some of the extra-legal tactics employed in the cases.

3. Final Thoughts on the DBCP, Ecuador, and Coca-Cola Cases

The underlying factual postures of the DBCP, Texaco-Ecuador and Coca-Cola cases differ substantially. The DBCP cases involved alleged personal injuries from chemical exposure on produce plantations, the cases against Texaco-Chevron primarily involved alleged direct and derivative environmental harms related to oil production, while the cases against Coca-Cola involved alleged third party attacks on workers and union leaders. They occurred in different countries, over different time periods, and involved different corporate defendants in different sectors. Yet all three sets of cases feature similar out-of-court tactics, including media, investment, political, and community organizing efforts, consistent with the larger trends identified in the study. In addition, in the DBCP and Ecuador matters, plaintiffs and their representatives advocated for the passage of retroactive foreign laws that provided opportunities for litigation to proceed. It appears that certain highly impoverished and "unsophisticated" plaintiffs may have been encouraged – perhaps in part by media tactics – to make dubious claims, there is concerning evidence related to local judiciaries with reputations for malleability, and there is evidence of impropriety by local laboratories and/or experts. While defendants of course

371. Terry Collingsworth, *Beyond Reports and Promises: Enforcing Universally Accepted Human Rights Standards in the Global Economy (Seminar #3)*, CARNEGIE COUNCIL (Feb. 6, 2003), http://www.cceia.org/resources/articles_papers_reports/874.html. Activists in the Bridgestone/Firestone case have also hosted seminars, *see, e.g., Liberian Activists Back in D.C.: Wed (5/20) at 12:30pm* (May 19, 2009), http://www.stopfirestone.org/2009/05/liberian-activists-back-in-dc-wed-520-at-1230pm.

372. Collingsworth, *supra* note 371.

373. *Id.* Activists in the Bridgestone/Firestone case have also hosted seminars, *see, e.g., Liberian Activists Back in D.C.: Wed (5/20) at 12:30pm* (May 19, 2009), http://www.stopfirestone.org/2009/05/liberian-activists-back-in-dc-wed-520-at-1230pm.

also engaged in their own set of tactics in those and other transnational tort cases, and certainly not all or even most transnational tort cases may have such problems, the DBCP, Ecuador and other matters do give rise to a concern that the unique mix of factors in transnational tort cases may make them susceptible to manipulation, false claims, and other litigation improprieties by the parties and other interested participants.

IV.
LOOKING FORWARD

Despite those concerns, this Article does not argue that out-of-court tactics are improper, or in favor of legislative or legal solutions to deter or halt out-of-court tactics in transnational tort litigation. Instead, the purpose of this Article is far more modest. It seeks to identify the patterns in which the tactics, as used by plaintiffs, have appeared, and certain implications arising from them. This section discusses the likely future use of the tactics discussed above, and potential steps that, in light of the presence of the tactics and their implications, companies, courts, and legislators may wish to consider in helping to ensure fairness and consistency in future legal determinations.[374]

A. The Future of Transnational Tort Cases and Their Related Tactics

Looking forward, it seems logical that the out-of-court tactics in transnational tort cases would continue and even grow. With the successes in some of the cases, and the continuing prospect of recoveries and/or corporate change, transnational tort cases will likely remain on the rise.[375] That includes cases like the Lago Agrio litigation, *Osorio* and *Franco*, which plaintiffs filed abroad for potential enforcement in the United States and elsewhere. It also includes cases filed in the United States in the first instance, like *Gonzales*, *Tellez*, and *Sinaltrainal*.

From the plaintiffs' standpoint,[376] it also appears that they believe the tactics can help achieve their ultimate goals. This is seen in the increase in the number and variety of tactics. Just as the cases from the 2000s bore greater numbers of strategic efforts than cases from 1990s, the cases in the 2010s undoubtedly will see even further growth.[377] Plaintiffs' attorneys are learning from the successive cases that they and others bring, and pursuing those extra-legal efforts they believe worthwhile. Those trends certainly suggest that plaintiffs' advocates believe that they work, or at least have little downside.

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374. A study of defense tactics may yield additional considerations for plaintiffs and other participants in the legal process.

375. *See generally* Vega, *supra* note 17, at 402 (discussing ATS cases). That growth likely will cause defendants to increase their own tactics.

376. Perhaps from the defense standpoint, as well.

377. *See generally* Holzmeyer, *supra* note 15.

Indeed, in at least one case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[378] they may be right. Talisman, a Canadian energy company listed on the New York Stock Exchange, became invested in Sudan in 1998 when its subsidiary purchased a company that was part of a consortium with three state-owned oil companies. The consortium, which focused on petroleum development in Southern Sudan, operated through an entity called the Greater Nile Petroleum Operating Company Limited ("GNPOC"). GNPOC's exploration and production activities occurred during a fierce civil war that had long engulfed Southern Sudan, with rebel groups fighting each other and the Sudanese Government.[379] To protect its operation, GNPOC received security support from the government. GNPOC also provided logistical assistance to government units pursuant to a set of guidelines that limited the assistance to the government's defense of the petroleum facilities, as opposed to government military operations against rebel groups. GNPOC also built certain infrastructure for itself, such as roads and airstrips, which the government also used. As part of its social activities, GNPOC and Talisman spent millions of dollars in local development programs.[380] They also apparently aided efforts to bring peace to the civil war ravaged nation, acting as "a significant source of information on conditions in southern Sudan," and playing a role "in assisting U.S. peace envoy John Danforth during the process that lead to the signing of the 2002 Machakos Peace Protocol ending the civil war in southern Sudan."[381] However, during the conflict, the Sudanese military committed widespread human rights violations, allegedly funded in part by royalties the consortium was obligated to pay to the government.[382]

Based on that funding, in 2001, plaintiffs filed an ATS case against Talisman in federal court in New York, relying on secondary theories of liability. The plaintiffs alleged that Talisman assisted the government in its human rights violations. For a decade, the company prevailed in court, and the case has now been dismissed. Nonetheless, the litigation was accompanied by an array of tactics, including protests, a stock divestment campaign targeting institutional investors, and political pressures in the United States and Canada, headed by multiple NGOs working together.[383] The plaintiffs likewise

378. 582 F.3d 244 (2d Cir. 2009).

379. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 647-51 (S.D.N.Y. 2006), *aff'd*, 582 F.3d 244 (2d Cir. 2009).

380. *See, e.g.* Alistair Lyon, *Talisman Hopes Work In Sudan will Silence Critics*, REUTERS, Jan. 22, 2001; *Fact Sheet Two: A History of Oil in the Sudan* at 4, Understanding Sudan: A Teaching and Learning Resource, http://understandingsudan.org/Oil/OilResources/L2FS2-HistoryofOilin Sudan.pdf (last visited Feb. 28, 2011); TALISMAN ENERGY CORPORATE SOCIAL RESPONSIBILITY REPORT 2001, at 21.

381. Vivek Krishnamurthy, Matthew Smith & Naing Htoo, *Energy Security: Security for Whom?*, 11 YALE HUM. RTS. & DEV. L.J. 259, 262 & n.17 (2008).

382. *Id. See also* Edwin L. Gorham, *The Alien Torts Statute and the Search for Energy in Difficult Political Environments*, 29 HOUS. J. INT'L L. 289, 298-301 (2007).

383. Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. &

employed media tactics effectively.[384] In the end, these combined efforts clearly had an impact. As one commentator noted, "[I]t is clear that Talisman's stock price fell despite the success of its oil operations in Sudan. It is reasonable to assume that the decline in valuation of the company reflected the negative publicity and pressure on investors to sell resulting from the efforts of the advocacy groups."[385]

In 2003, Talisman succumbed to the multi-faceted pressures. It sold its interest to an Indian state-controlled oil and gas company, lacking the same commitment to local development and peace efforts, rather than continuing to operate.[386] This was a result, as commentators have noted, that "can hardly be described as a positive development."[387] The lawsuit against Talisman, however, continued.

As *Talisman* demonstrates, while the ultimate success of some or all of the efforts by plaintiffs and defendants may be debatable in any given case, they now are ingrained in many such matters. The tactics are growing in size and frequency, and with the escalation of transnational tort cases, certainly look like they are here to stay.

B. Impact of the Tactics

1. Corporate Considerations

For corporations, that fact has several tangible results. It should help to inform a company about whether and how to engage potential claimants threatening a transnational tort action. It should likewise inform companies that, if there are inquiries and efforts being made by multiple NGOs, it may not be a coincidence, but could be related to a larger campaign with an uncertain planned outcome. It should also help provide awareness of the tactics and concerns that are likely to accompany a lawsuit in the United States or abroad, which should provide companies with some advance warning about how to prepare for and position themselves for the multiple fronts that transnational tort litigation now brings.

From an economic standpoint, the threats posed by these lawsuits and corporate campaigns are difficult to wholly ignore. Certainly, well known multinational companies seeking to invest in or enter emerging markets must be conscious that a perceived failure to adhere to international norms, sometimes

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POL. 425, 438-41 (2004).

384. *Id.*

385. *Id.* at 444.

386. Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 648 (S.D.N.Y. 2006), *aff'd*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009).

387. Krishnamurthy, et. al, *supra* note 381.

regardless of local legal requirements, can lead to a high-profile lawsuit seeking a large damage award, and with it an accompanying set of aggressive tactics that can hurt the company's image and reputation.[388] At a minimum, due diligence and impact assessments in the relatively early phases of investment may make sense in some situations.[389] In extreme cases, some companies likely will be deterred from pursuing certain overseas investments, or, like Talisman, in continuing certain overseas operations.

2. Compliance Solutions

For those companies that elect to pursue overseas investments, or to continue operations abroad, these threats also demand focused efforts designed to minimize potential problems through earnest compliance solutions. That entails more than corporate responsibility measures. It includes meaningful stakeholder engagement, training requirements for relevant personnel, relevant corporate policies and guidelines, means of reporting problems and immediate investigations, disciplinary actions against personnel who fail to adhere to policies, attention to third parties providing services for the company—including in due diligence, in contracts, and through audits—and an overall attention to human rights concerns. In short, management must make a dedicated effort to prevent problems from arising, and quickly address those problems that do arise.[390]

C. The Vulnerabilities of Transnational Tort Litigation

As seems clear, and as Judge Chaney stated in *Tellez* and other commentators have noted, the synergy of issues in these cases, involving facts that can be difficult to verify, zealous advocates, frequently indigent plaintiffs susceptible to undue influence, the potential for substantial damages, and foreign systems particularly prone to manipulation, creates certain vulnerabilities to

388. *See* Holzmeyer, *supra* note 15, at 292.

389. Professor John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights, is in the process of issuing guiding principles that will emphasize these steps and others for companies in seeking to protect and respect human rights. *See* DRAFT REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (November 22, 2010), *available at* http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf.

390. *See* Lucinda A. Low & Jonathan Drimmer, *Specific Corporate Compliance Challenges: Extractive Industry, in* LEXISNEXIS CORPORATE COMPLIANCE PRACTICE GUIDE: THE NEXT GENERATION OF COMPLIANCE (Carol Basri ed., 2009); Jonathan Drimmer, *How to Steer Clear of the U.S. Human Rights Litigation Trend*, ENGIN. & MIN. J. (May 2009); Jonathan Drimmer, *At Home And Abroad*, CORPORATE COUNSEL, Apr. 2009; Jonathan Drimmer, *Don't Be Dubbed A Human Rights Abuser*, LEGAL TIMES, Oct. 30, 2007; Jonathan Drimmer, *Corporate Exposure Under The Alien Tort Claims Act*, CORPORATE COUNSELOR, June 5, 2007. *See also* Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building A Better Business Reputation*, 40 CAL. W. INT'L L.J. 55 (2009).

fraudulent lawsuits and rule of law concerns. Such inherent problems with transnational tort cases, some have observed, "raise[] serious concerns about whether truth can be ascertained when foreigners bring cases to United States courts. Some countries . . . lack the institutional capacity to prevent conspiracy among lawyers, judges, and citizens, and to protect the integrity of the evidence."[391] Without doubt, these vulnerabilities make it paramount for parties and the judiciary to closely scrutinize their own conduct in transnational tort cases and to pay particular attention to suspect circumstances.

1. Potential Legal Solutions in Direct Litigation

In practical terms, in direct litigation, although overseas discovery might be challenging for parties, they should pursue it vigorously. Foreign depositions should be sought and taken. The existence of documents located abroad should not deter parties from seeking their production. These efforts may require the cumbersome use of formal international evidence gathering methods, such as letters rogatory[392] or reliance on the Hague Convention on Taking Evidence Abroad in Civil and Criminal Matters,[393] but they nonetheless can be critical to uncovering the truth. Indeed, it is through exactly such processes that some of the problems in the transnational cases discussed above have been revealed. In addition, given the clear potential hazards faced by Western companies forced to litigate in some foreign courts, requests by defendants for dismissals on *forum non conveniens*, once a staple of transnational tort cases, should be fully thought through.

For the judiciary, the trends in transnational tort cases likewise may suggest actions. The bench perhaps may make certain accommodations, such as permitting a greater number of depositions than it might otherwise, assisting with granting orders for letters rogatory, or increasing the time for discovery to account for overseas fact gathering, in light of some of the unique concerns in transnational tort cases. Courts also might closely assess the propriety of proceeding when important overseas discovery, such as depositions of alleged tortfeasors or the joinder of indispensable parties, cannot be obtained.[394] Given the proliferation of media tactics in the transnational tort cases, judges may also want to incorporate additional questions into *voir dire* for jury pools preceding transnational tort trials. And as did Judge Chaney, where questions of fraud

391. *See* Armin Rosencranz et al., *Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts*, 3 GOLDEN GATE U. ENVTL. L.J. 161, 166-67 (2009). The article rhetorically asks, "Why should U.S. courts be open to cases brought by foreigners from countries where truth is difficult to come by?" *Id.* at 179.

392. Letters rogatory is a process where a court makes a formal request for judicial assistance to a foreign court.

393. 23 U.S.T. 2555 (2010), 28 U.S.C. § 1781 (2006).

394. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 350 (S.D.N.Y. 2003).

arise, courts ought to carefully consider holding separate evidentiary hearings.

On a legislative basis, it may be appropriate, as some courts have done, to impose a heightened pleading standard in ATS cases, if not other types of transnational tort cases. One such court to follow that approach was the district court in *Sinaltrainal*. The court noted that, because the ATS requires that plaintiffs establish that a tort was committed in violation of international law, "the complaint must identify the specific international law that the defendant allegedly violated." That, the court noted, was a higher standard of pleading than is traditionally required under the Federal Rules of Civil Procedure.[395] The court also noted the appropriateness of requiring "some heightened pleading standard when determining whether the complaints . . . sufficiently [pled] facts showing that Defendants violated the law of nations."[396] The court explained that a higher standard may be warranted given the "risk that vague, conclusory, and attenuated allegations will allow individuals . . . to engage in unwarranted international 'fishing expeditions' against corporate entities and to abuse the judicial process in order to pursue political agendas."[397] A higher pleading standard, as that court and others have noted, also helps to ensure courts proceed cautiously in recognizing new theories under the ATS, as *Sosa* mandates.[398]

At present, under the Federal Rules of Evidence, only claims of fraud must be pled under a heightened standard.[399] That higher burden exists because fraud claims may have a stigmatizing effect upon a defendant, and the elevated standard may "protect defendants from harm to their reputation and goodwill . . . prevent plaintiffs from filing baseless claims in an attempt to discover unknown wrongs."[400] Given the similar concerns in transnational tort cases as expressed by the court in *Sinaltrainal,* and the inherent difficulties and expense associated with litigating such cases, formally importing a heightened pleading standard may be worth considering.

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395. *In re* Sinaltrainal, 474 F. Supp. 2d 1273, 1275 (S.D. Fla. 2006), *aff'd in part vacated in part,* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009). *See also* Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1292 (S.D. Fla. 2003) *aff'd in part and rev'd in part* 416 F.3d 1242 (11th Cir. 2006); Arndt v. UBS AG, 342 F. Supp. 2d 132, 138 (E.D.N.Y. 2004).

396. *In re Sinaltrainal*, 474 F. Supp. 2d at 1287.

397. *Id.* at 1275.

398. *Id.* at 1282. *See also* Arndt, 342 F. Supp. 2d at 138. *See generally* Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of* Bell Atlantic v. Twombly*?*, 76 FORDHAM L. REV. 2177 (2009).

399. The Federal Rules of Evidence state that fraud claims must be pled "with particularity." FED. R. EVID. 9(b).

400. Thompson Advisory Group, Inc. v. First Horizon Nat. Corp., 2007 WL 2284352, *2 n.1 (N.D. Tex. 2007); *see* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1296 31 (3d ed. 2004); Jason N. Haycock, *Pleading a Loss Cause: Resolving the Pleading Standard for the Element of Loss Causation in a Private Securities Fraud Claim and a Plaintiff's Heavy Burden Pleading it Under Iqbal*, 60 AM. U. L. REV. 173, 187-88 (2010).

2. Potential Legal Solutions in Enforcement Actions

Litigants, courts and the legislature should also scrutinize foreign judgment enforcement actions. Corporate defendants should vigorously contest, as they no doubt will, attempts to enforce foreign judgments obtained under questionable circumstances.

As *Osorio* and *Franco* demonstrate, judges asked to enforce the increasing number of overseas transnational tort judgments being brought to the United States, whether they originated as ATS cases or otherwise,[401] should pay close attention to rule of law concerns. This is true both in terms of the statutory framework under which the foreign action was litigated, as in the Special Law 364 context, and regarding the specific evidence and procedures in individual matters.[402]

On a legislative level, federal amendments to permit a right of removal in transnational tort cases may be appropriate. At present, plaintiffs in any state court where jurisdiction may reside may bring foreign enforcement actions cases. Because of that, there is an inherent risk of forum shopping, either regarding particularly favorable state laws, or even to obtain a perceived sympathetic state court judge. Although many states have adopted a model law, the Uniform Foreign Money-Judgments Recognition Act,[403] the terms of those state laws can vary, as can their interpretation by state courts.[404] Providing a defendant with a right of removal in a foreign judgment enforcement action may help limit the risks of forum shopping and inconsistent interpretation and enforcement, and thus create greater consistency among decisions related to foreign judgments.[405] Indeed, given the international component of a foreign judgment enforcement action, resolution by federal courts may be more appropriate doctrinally.

CONCLUSION

As the global economy expands, it certainly appears that the prospect of litigation in United States and foreign courts has expanded with it.[406]

401. *See* Asa W. Markel, *International Litigation in Arizona: Litigating Foreign Country Judgments in Arizona*, 1 PHOENIX L. REV. 117, 118 (2008).

402. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). *Cf.* Robert Sedler, *Law Beyond Borders: Jurisdiction in an Era of Globalization*, 51 WAYNE L. REV. 1065, 1094-95 (2005).

403. 13 U.L.A. 263 (1986).

404. Although many states have adopted The Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 263 (1986), the terms of those state laws can vary. *See* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 288 (1991); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 3, 5, 58-59 (2004).

405. Brand, *supra* note 404, at 298-300.

406. *See* Teitz, *supra* note 404 at 3, 9.

Transnational tort cases are on the rise, and now commonly feature tactics from plaintiffs, defendants, and interested third parties. For plaintiffs, the tactics frequently appear to include media, investment, political, and community organizing tactics. For corporate defendants operating overseas, those tactics underscore the importance of conducting due diligence, and seeking to institute meaningful compliance programs to identify and reduce potential negative human rights impacts.

In addition, given certain unique factors associated with transnational tort cases, including impoverished plaintiffs, foreign courts susceptible to influence, and the potential for substantial judgments, the prospect of false claims and tainted judgments—to the benefit of plaintiffs or defendants—is a substantial concern. Responsible parties obviously must seek to avoid unduly pressuring fragile foreign courts, or taking advantage of impoverished and "unsophisticated" plaintiffs.[407] United States courts must be sure to avoid enforcing tainted judgments, ensuring that parties in direct litigation are able to conduct necessary discovery, and verifying that out-of-court tactics that parties may employ does not taint jurors. Legislators also may wish to consider measures, such as federal court jurisdiction in foreign enforcement actions or heightened pleading standards, to ensure that transnational tort cases proceed equitably and reliably. In short, as the world's economy becomes increasingly intertwined, and the actions of foreign litigants and courts further impact legal determinations for United States companies at home and abroad, all participants in the process must work vigilantly to ensure that zealous advocacy outside the courtroom does not create unjust outcomes within it.

407. Gonzales v. Texaco, Inc., No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 56622, *9 (N.D. Cal. Aug. 3, 2007); Press Release, Dole Food Co., Dole Food Company, Inc. Announces Los Angeles Superior Court Vacates Judgment and Dismisses Fraudulent Lawsuit Brought by Nicaraguans Claiming to Have Been Banana Workers (July 15, 2010), http://www.dole.com/CompanyInformation/PressReleases/PressReleaseDetails/tabid/1268/Default.aspx?contentid=11722.

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The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage

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The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage

By
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INTRODUCTION

In the final year of George W. Bush's presidency, proponents of international criminal justice had a reason to be optimistic. The impending change in U.S. administration appeared to signal the end of a then long-standing tension between the United States and the International Criminal Court (hereinafter "ICC" or "Court").[1] After a decade of dormancy, the prospect of the United States joining the ICC appeared to have been surprisingly resurrected, representing a shift in U.S. policy of potentially remarkable magnitude. The possibility of U.S. membership, virtually unthinkable during George W. Bush's two-term presidency, became viable when the 2008 presidential nominations were secured, as each of the leading candidates had publicly expressed their desire to see the United States become a part of the institution.[2]

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1. Created pursuant to the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

2. Then-Senator and future Republican presidential candidate John McCain was quoted as saying, "I want us in the ICC," although he tempered his comments by expressing dissatisfaction with the Court's safeguards. Press Release, Citizens for Global Solutions, Citizens for Global Solutions Applauds Senator McCain's Support of the ICC (Jan. 28, 2005), *available at* http://archive1.globalsolutions.org/press_room/press_releases/press_releases05/icc_mccain.html. As a Senatorial candidate, Democrat Barack Obama answered "Yes" to the question "Should the United States ratify the Rome Statute of the International Criminal Court?" Citizens for Global Solutions, 2008 Presidential Candidate Questionnaire, Response from Barack Obama,

Now, just over two years into the Obama presidency, the world has witnessed renewed and significant U.S. engagement with the Court. In the wake of senior members of the Obama administration both praising the ICC and lamenting the fact that the United States is not a part of the Court, the United States was represented at the annual meeting of the ICC's Assembly of States Parties—for the first time ever—in late 2009. In mid 2010, a strong U.S. contingency was then sent to Kampala, Uganda to attend the ICC Review Conference as observers.[3] Perhaps most remarkably, in February 2011, the United States not only voted in favor of a United Nations Security Council resolution referring the conflict in Libya to the Court,[4] it actually lobbied other states on the Council to support the referral.[5]

This progress, considered alongside the thus-far non-threatening work of the Court, provides a timely opportunity to consider the future of the U.S. relationship with the ICC. Amidst handshakes and promises of continued cooperation with the ICC, is there a reason to think that the relationship between the United States and the Court will become something more? This article addresses that question.

It does so by first critiquing the shifts in the U.S. approach to the ICC, from the Clinton administration to the Obama administration, in view of the Court's framework and work to date. It then analyzes the recent amendments made to the ICC Statute regarding the controversial crime of aggression. Concluding that in this respect the U.S. delegation's Kampala mission was a qualified success, this article then considers the effect of that outcome on the U.S. perception of the Court. As its final area of inquiry, this article examines the early work of the International Criminal Court in an effort to determine whether the ICC is in fact fulfilling its mission to act as a "court of last resort." [6]

Establishing that the Court is not currently poised to fulfill the role of a "court of last resort," this article posits that there is no present incentive for the United States to ratify the Statute of the Court. Put simply, the ICC's existing approach to case admissibility neither provides adequate evidence that the Court is on a path that assures its anti-impunity goal nor comports with the United

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http://www.globalsolutions.org /08orbust/pcq/obama (last visited Mar. 22, 2011).

3. The long-awaited meeting presented the first opportunity for the States Parties to amend the Rome Statute, a process in which the U.S. delegation participated actively and arguably with some success. *See infra* section III.

4. S.C. Res. 1970, U.N. SCOR, UN Doc. S/RES/1970 (Feb. 26, 2011). A Security Council referral is one of three ways in which the ICC's jurisdiction can be triggered. *See infra* note 22 and accompanying text. This marked the first time that the United States voted in favor of such a referral.

5. The United States was one of the four states that circulated the resolution referring the situation in Libya to the Court. Edward Wyatt, *Security Council Calls for War Crimes Inquiry in Libya*, N.Y.TIMES, Feb. 26, 2011. "The U.K., France, Germany and U.S. spent eight hours overcoming opposition in the council by several countries to the ICC referral." Joe Lauria, *U.N. Imposes Sanctions on Gadhafi*, WALL ST. J., Feb. 27, 2011.

6. *See infra* section IV B.

States' clear preference to see justice performed at the national level.[7] Accordingly, this article concludes with some thoughts regarding the changes that will need to be made in order to make U.S. accession a reasonable possibility. It advocates for the Court's prosecutor to facilitate the ICC's anti-impunity mission by focusing solely on situations where justice would not be served other than with the intervention of the ICC. It also recognizes that, difficult though they may be to effectuate, amendments to the ICC Statute by the Assembly of States Parties may be necessary in order to decisively establish that it is national jurisdictions that bear the primary responsibility for prosecuting the egregious crimes that fall within the Court's subject matter jurisdiction.

I.
BACKGROUND

A. U.S. Participation in the Drafting Process of the Court's Statute

Despite the relatively short existence of the International Criminal Court, the United States has managed to develop a notably extensive—and somewhat checkered—history with the institution. In the early 1990s, the possibility of U.S. support for a permanent international criminal justice institution seemed unlikely, as the United States then harbored "a residual mistrust of international tribunals."[8] However, when confronted by "egregious violations of international law [that might] go unpunished because of a lack of an effective national forum

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7. "Our long-term vision is the prevention of heinous crimes through effective national law enforcement buttressed by the deterrence of an international court." Ambassador David J. Scheffer, War Crimes Tribunals: The Record and the Prospects, Address at the Conference Convocation for the Washington College of Law Conference, *in* 13 AM. U. INT'L L. REV. 1389, 1396 (1998). Stephen J. Rapp, current Ambassador at Large for War Crime Issues, further noted:

> Certainly, the U.S. Government places the greatest importance on assisting countries where the rule of law has been shattered. . . . At the same time, the United States recognizes that there are certain times when justice will be found only when the international community unites in ensuring it, and we have been steadfast in our encouragement for action when the situation demands it.

Speech to Assembly of States Parties, Stephen J. Rapp, Ambassador at Large for War Crimes Issues, United States of America, Nov. 19, 2009, [hereinafter Rapp Speech], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf. The U.S. preference to see justice performed at the national level is not peculiar to the ICC. *See e.g.* Goran Sluiter, *Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case*, 8 J. INT'L CRIM. JUST. 365, 367 (2010) (noting a parallel view with respect to Article VI of the Genocide Convention).

8. Michael P. Scharf, *Getting Serious About the International Criminal Court*, 6 PACE INT'L L. REV. 103, 105 (1994). Scharf partially attributes this wariness to the finding of jurisdiction and justiciability by the International Court of Justice in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1984 I.C.J. 392. *Id.* at 105 n.5 (internal citations omitted).

for prosecution,"[9] such as high profile attacks on U.S. peacekeepers by Somali warlords,[10] the U.S position gave way to an understandable and sharp change in policy.[11] In this respect, President Clinton ultimately set the stage for active U.S. participation in the creation of a permanent international criminal court, expressing support for an institution that could serve to fill an unsettling impunity gap and potentially deter atrocity crimes.[12]

The United States went on to play a noteworthy role in the early development of the ICC[13] and, as the idea of establishing the Court gained momentum,[14] in the creation of its draft statute.[15] Congressional backing for the future court was also strong at that time. In fact, a 1997 joint resolution of Congress called upon the President "to continue to support and fully participate in negotiations at the United Nations [and] to conclude an international agreement to establish an international criminal court."[16] Complete participation followed, as the United States continued to be an influential party in the drafting of the ICC Statute, later named the Rome Statute, which was ultimately adopted in 1998.[17] Even though the United States voted against the final draft of the

9. Scharf, *supra* note 8, at 109 (quoting Press Release, United States Mission to the United Nations, Statement by the Honorable Conrad K. Harper, United States Special Advisor to the United Nations General Assembly in the Sixth Committee, U.S.U.N. Press Release #171-(93) (1993)).

10. "If U.N. peacekeepers catch Gen. Mohamed Farrah Aidid, the Somali warlord whose munition dumps are periodically blown up by U.S. air forces, no one is quite sure what to do with him. The goal is to arrest him. There is, however, no international law to accuse him of violating, and no court in which to try him." Don Noel, *Dodd's Court Would Move the World Closer to the Rule of Law*, HARTFORD COURANT, July 12, 1993, at C11; *see also* Editorial, *A Court for International Outlaws*, N.Y. TIMES, July 6, 1993, at A16 (observing that Somalia's lack of a functioning government creates an impunity gap for warlords committing crimes against peacekeepers on Somali territory).

11. Scharf, *supra* note 8, at 109 (describing the shift as "a major U.S. policy and strategy reversal on the issue of an ICC").

12. "[The creation of a permanent court would] send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions." John F. Harris, *Clinton Pushes for U.N. War Crimes Tribunal*, WASH. POST, Oct. 16, 1995, at A4. (quoting Clinton).

13. "From 1995 to 1998, the United Nations General Assembly convened two committees to produce what was called a "consolidated text" of the Draft Statute for the Establishment of an International Criminal Court (ICC)." M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 443 (1999) (internal citations omitted).

14. *See e.g.* G.A. Res. 51/207, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/207 (Dec. 17, 1996) (reaffirming the mandate of the Preparatory Committee on the Establishment of an International Criminal Court and calling for a 1998 conference of plenipotentiaries "with a view to finalizing and adopting a convention on the establishment of an international criminal court").

15. Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of the International Criminal Court*, 91 AM. J. INT'L L. 177, 178 (1997) (noting that the US took "the most active role" on many of the major issues addressed in 1996).

16. 103 H.R.J. Res. 89, 105th Cong. (1997).

17. *See, e.g.*, Bartram S. Brown, *The Statute of the ICC: Past, Present and Future* in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND

Statute,[18] it maintained a prominent position in the later work of the Preparatory Commission,[19] helping to develop both the Elements of Crimes and the Rules of Procedure and Evidence designed to direct the work of the Court.[20]

B. The Rome Statute

The Rome Statute grants the Court subject matter jurisdiction over war crimes, crimes against humanity, genocide, and the crime of aggression.[21] In order for the Court to exercise jurisdiction over one or more of these crimes, an investigation must be "triggered." The Court's prosecutor must either receive a referral of a situation by a State Party or by the Security Council, or must make an independent determination to initiate an investigation.[22] Investigations initiated on the prosecutor's own motion (*proprio motu*) require authorization from the Court's Pre-Trial Chamber,[23] a judicial filter designed to add an element of accountability to the prosecutor's investigatory choices. Except in the

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INTERNATIONAL LAW 61, 109 (Sarah B. Sewell & Carl Kaysen, eds., 2000) (attributing to Theodor Meron, a U.S. citizen-advisor at the Rome Conference, the observation that the statute's due process protections and mens rea requirements "reflected a strong American influence" and that much of the Court's substantive law caused him to conclude that "American fingerprints are all over [the] document"); *see also* David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 73 (2001-02) (maintaining that "the United States achieved many of its negotiating objectives at the Rome Conference"); William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 709 (2004) [hereinafter Schabas, *Security Council*] (crediting the United States with having positively contributed to the drafting of the Rome Statute as to both its substantive and procedural law).

18. "There were a few very fundamental issues which either have to be accommodated within the treaty text or they present very severe difficulties for the United States government. . . . [A]ccommodations were not achieved in the negotiations, and therefore we were not in a position to support the text as it came out of Rome." *On the Record Briefing at Foreign Press Center*, Federal Document Clearing House, Jul. 31, 1998, *available at* 1998 WL 431804 (statement of David Scheffer, then Ambassador–At–Large Designate For War Crimes Issues) [hereinafter Scheffer statement]. The issues that precluded U.S. approval are considered in greater detail *infra* section II A.

19. As a signatory to the Final Act in Rome, a document that acknowledges the events of the Rome Conference and was signed by nations that participated in its negotiations, the U.S. earned the right to be a part of the Commission. Ellen Grigorian, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns*, Congressional Research Service Report, Report RL 30020, at 23 (updated Jan. 6, 1999), *available at* http://fortunaty.net/org/wikileaks/CRS/wikileaks-crs-reports/RL30020.pdf.

20. Scheffer, *supra* note 17, at 74.

21. Rome Statute, *supra* note 1, art. 5(1). At present, the Court can only exercise jurisdiction over war crimes, crimes against humanity, and genocide; the Court will not be able to exercise jurisdiction over the crime of aggression until at least Jan. 1, 2017. Resolution RC/Res.4, Annex I, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, art. 15 *bis* (2) and (3); 15 *ter* (2) and (3) [hereinafter Amendments to the Rome Statute]. The definition of the crime of aggression and its jurisdictional reach is discussed at length, *infra* section III.

22. Rome Statute, *supra* note 1, art. 13 (a)-(c).

23. *Id.* art. 15(3) and (4).

case of a Security Council referral, the Court's exercise of jurisdiction is limited by the requirement of either personal or territorial jurisdiction. As such, the Court has the authority to hear cases involving nationals of states that are parties to the Statute, as well as those involving crimes allegedly committed on the territories of states that are parties to the Statute.[24] It is this latter aspect that makes it possible for nationals of states that are not a party to the Rome Statute to be prosecuted before the ICC. However, any state, regardless of its membership status, may preclude the Court from exercising jurisdiction over a case by conducting a genuine, domestic investigation into the matter and, if necessary, a prosecution.[25] To this end, at the behest of the United States,[26] the Statute's preamble stresses "the duty of every state to exercise its jurisdiction over those responsible for international crimes."[27]

II.
THE U.S. AND THE ICC: A TALE OF THREE ADMINISTRATIONS

A. The Signing of the Rome Statute and Clinton's Concerns

The United States became a signatory to the treaty at the close of 2000 under then-President Clinton. While President Clinton's accompanying statement reiterated U.S. commitment to international accountability and the prosecution of those alleged to have violated the crimes within the Court's subject matter jurisdiction, it also concluded that the Rome Statute contained "significant flaws."[28] Specifically, President Clinton cited the Court's claim of jurisdiction over nationals of non-party states, concern regarding "unfounded charges" being brought against U.S. officials, and the resultant prospect of "politicized prosecutions."[29]

The first noted flaw was frequently cited by the United States from an early stage,[30] despite there being arguably little basis for the criticism. With the exception of matters referred by the Security Council, the ICC is only able to hear a case involving a U.S. national (i.e. a national of a non-party state) if the

24. *Id.* art. 12(2).

25. *Id.* art. 17 (1) (a), (b) and (c).

26. Jeffrey L. Bleich, *Complementarity*, 25 DENV. J. INT'L L. & POL'Y 281, 285 (1996-1997).

27. Rome Statute, *supra* note 1, preamb. ¶ 6, art. 1 (stressing that the ICC is complementary to domestic justice systems).

28. Statement by the President: Signature of the International Criminal Court Treaty (Dec. 31, 2000), *available at http://clinton4.nara.gov/textonly/library/hot_releases/December_31_2000.html*.

29. *Id.*; *see also* Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999); William K. Lietzau, *International Criminal Law after Rome: Concerns from a U.S. Military Perspective*, 64 L. & CONTEMP. PROBS. 119 (2001); Schabas, *Security Council*, *supra* note 17, at 709-712 (2004).

30. *See* Scheffer statement, *supra* note 18; *see also* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999).

alleged crime takes place on the territory of a state party.[31] In the same way, a national of the United States would be subject to the jurisdiction of a second state if accused of having committed a crime on its territory.[32] As a result, this argument against signing the Statute has a primarily visceral appeal,[33] suggesting that the shift in the U.S. position—from Court proponent to critic—was more likely attributable to an unstated motive.[34]

In this respect, commentators have noted that U.S. opposition to the ICC surfaced at a time when early plans for the Court, which featured a prominent role for the United Nations Security Council ("Security Council" or "UNSC"), gave way to a different vision in which the Security Council was comparatively sidelined.[35] Rather than employ an approach that essentially dictated prior UNSC approval of every ICC investigation and prosecution,[36] the draft statute was ultimately revised in such a way that the UNSC has more limited abilities. As amended, the UNSC shares with States Parties and the ICC prosecutor the power to trigger the Court's jurisdiction with respect to a situation[37] and also has the authority to defer for a period of twelve months an ICC investigation or prosecution by way of a Chapter VII Resolution.[38]

There is no doubt that this transformation significantly altered the playing field for the United States. *Ex ante*, UNSC approval would have meant that no ICC investigation could proceed without at least the tacit approval of each permanent Security Council member,[39] of which the United States is one.[40] This approach would have given the United States indirect control over the ICC docket, thereby assuring that no American would be prosecuted at the Court without U.S. consent. To attain the same outcome with an *ex post* deferral, however, the United States would have to successfully lobby the support of the

31. Rome Statute, *supra* note 1, art. 12(2)(a).

32. "The principle that the courts of the place where the crime is committed may exercise jurisdiction has achieved universal recognition, and is but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300 (3d ed. 1979).

33. For a different perspective, *see* Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 199 (2001) (arguing that, at least in cases "where the charged conduct consists of the faithful execution of official policy, the state remains a real party in interest").

34. Schabas, *Security Council*, *supra* note 17, at 712-17.

35. *Id.* at 717.

36. While this method was not affirmatively prescribed, the original draft language had the effect that an ICC prosecution would not be possible unless the Security Council decided to make it so. Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(B) and 16 in* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS AND RESULTS 143, 149-50 (Roy S. Lee, ed., 1999).

37. Rome Statute, *supra* note 1, art. 13.

38. *Id.* art. 16. *See also* Schabas, *Security Council*, *supra* note 17, at 717.

39. U.N. Charter art. 27, para. 3. (requiring "an affirmative vote of nine members *including the concurring votes of the permanent members*" in order for the Security Council to render a decision on non-procedural matters).

40. *Id.* art. 23, para. 1.

four remaining permanent members in order to secure a resolution to that effect.[41] In this respect, as Professor William Schabas rightly notes, the eleventh hour U.S. opposition to the Court was "all about the Security Council."[42] At the same time, however, the loss of *ex ante,* UNSC control and the U.S. concern about being the target of politicized prosecutions at the ICC can be viewed as two sides of the same coin.[43]

This loss of power must also be considered in light of the more or less concurrent decision to instill the Court's prosecutor with independent, or, in the words of the Statute, "*proprio motu,*" investigatory powers,[44] in contrast to U.S. efforts to tightly constrain the prosecutor's authority.[45] Although a judicial filter was added to address concerns about inappropriate *proprio motu*

41. *See, e.g.,* Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court*, 63 SASK. L. REV. 275, 291 (2000). This alteration caused one American to speculate that what was really driving the so-called "middle powers" at Rome was the prospect of "increasing their relative influence by inhibiting and controlling militarily powerful nations." Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 101 (2003); *see also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 26 (3rd ed., 2007) (acknowledging that "the Rome Statute was an attempt by many states to effect indirectly what could not be done directly, namely, reform of the United Nations and amendment of [its] Charter").

42. Schabas, *Security Council*, *supra* note 17.

43. It bears mentioning that *ex ante,* UNSC control was also lacking with respect to the exercise of jurisdiction by the predecessors to the ICC, the International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), whose statutes likewise enabled them to exercise jurisdiction over U.S. nationals on the basis of territorial jurisdiction. *See, e.g.*, U.N. Secretary General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, at 36 (May 3, 1993). Admittedly, the fact that both of these institutions have enjoyed broad U.S. support makes the U.S. argument with respect to the ICC appear disingenuous. Schabas, *Security Council*, *supra* note 17, at 710. Yet it is not clear that this aspect of the Tribunals' jurisdiction was considered at the time of drafting. David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1010, 1023 (2008). In fact, after the ICTY Prosecutor's NATO investigation made it apparent that U.S. nationals were potentially vulnerable to prosecution at the Tribunals, the statute drafted for the Special Court for Sierra Leone (SCSL), which in other respects closely followed that of the ICTY and ICTR, effectively precluded a similar type of investigation at the SCSL. Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion*, 3 J. INT'L CRIM. JUST. 162, 184 (2005). Moreover, from 2003 onwards, the hands of the ICTY and ICTR prosecutors have been similarly tied. Completion strategies imposed by the UNSC have directed the two tribunals to ensure that they only confirm indictments of "the most senior leaders suspected of being the most responsible for crimes within the[ir respective] jurisdiction[s]." *Id.* at 185.

44. Rome Statute, *supra* note 1, art. 15 (1). The decision to expand the triggering of ICC investigations to include the independent prosecutor's decision to investigate emerged at the last Preparatory Committee meeting before Rome. Jelena Pejic, *The International Criminal Court Statute: An Appraisal of the Rome Package*, 34 INT'L LAW. 65, 77 (2000).

45. Pentagon Letter to Military Attaches, Urgent Request for Engagement with Counterparts on the International Criminal Court, Mar. 31, 1998, *in* Congressional Research Service Report, *supra* note 19 at 31 (informing foreign military attaches that it was the U.S. goal to "preclude the creation of a so-called *proprio motu* (independent) prosecutor with unbridled discretion to start investigations").

investigations,[46] U.S. concerns remained and were perhaps intensified by the prediction that investigations initiated by the prosecutor would be the primary mechanism by which matters would come before the Court.[47] The combination of these factors gave rise to concerns about a worst case scenario in which "a politically motivated prosecutor might attempt to convict the United States in the court of public opinion of a violation of international law, by charging one of its military or civilian officials with war crimes, crimes against humanity, or genocide, using the accused as a proxy for the United States."[48]

B. The Bush Administration

1. Bush's First Term: Unsigning and Antipathy

Notwithstanding U.S. concerns about the ICC, President Clinton concluded that signatory status would best position the United States "to influence the evolution of the Court."[49] The effect of Clinton's signature to the Rome Statute, however, was relatively short-lived. Rather than utilize this signatory role as Clinton had intended,[50] the Bush administration (in)famously "unsigned" the Rome Statute approximately a year and a half later,[51] indicative of—and further

46. Rome Statute, *supra* note 1, art. 15 (4). A *proprio motu* investigation cannot be initiated without judicial authorization.

47. "The principal argument was that the proposed court would be unlikely to have much work if it relied upon States Parties and the Security Council to trigger its jurisdiction." SCHABAS, *supra* note 41, at 160; *see also id.* at 143 (noting that referrals made by a state party were considered unlikely, given the historical reluctance of states to lodge complaints against one another).

48. Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124, 129 (2001); *see also* Giovanni Conso, *Are There Hopes of Reconciliation? The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute*, 3 J. INT'L CRIM. JUST. 314 (2005); Congressional Research Service Report, *supra* note 19, at 13 (expressing the concern of some U.S. officials that states with "anti-American sentiments" might attempt to use the Court to thwart "responsible U.S. military actions on their territory" or to "subvert U.S. diplomatic efforts"); Goldsmith, *supra* note 41, at 96-97 (positing that the two plausible explanations for U.S. concerns about the Court are the remote possibility of the prosecution of U.S. troops and the sullying of the U.S. international reputation by engaging in an investigation).

49. Statement by the President, *supra* note 28.

50. "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." *Id.*

51. *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to UN Secretary General Kofi Annan (May 6, 2002), http://www.lb9.uscourts.gov/webcites/08documents/Abagninin_bolton.pdf. The move was likely precipitated by the 60th ratification of the Statute, made less than one month prior, which ensured that the ICC would become operational in July 2002. Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 687 (2003); *see also* Edward T. Swain, *Unsigning*, 55 STANFORD L. REV. 2061 (2003) (defending the decision to "unsign"). Sudan has since followed the U.S. lead in this regard, "unsigning" the Statute in August 2008. *See* Letter from Deng Alor Koul, Minister for Foreign Affairs for the Republic of Sudan (Sept. 8, 2008), http://untreaty.un.org/English/CNs/2008/601_700/612E.pdf. A staunch opponent of the

engendering—the intensity of U.S. dislike for the International Criminal Court. This move was arguably predictable, given that President Bush chose John Bolton as Undersecretary for Arms Control and International Security.[52] Prior to assuming the role, Bolton had publicly espoused his thoughts on the Court, calling its Statute "pernicious and debilitating."[53]

In the early years of George W. Bush's presidency, Bolton, "the architect of the government's campaign against the Court,"[54] successfully turned existing U.S. unease with the ICC to flat-out antagonism by seizing upon the fear of politicized prosecutions and amplifying the importance of distinctions between U.S. and ICC practices. [55] In addition, Bolton questioned the worth of the institution, predicting that it would be incapable of contributing to deterrence.[56] Bolton further argued that the ICC Statute inappropriately altered the balance of authority for the maintenance of international peace and security from the Security Council to the ICC, leaving U.S. civilian and military leaders "potentially at risk" and subject to "an unaccountable prosecutor" and "unchecked judicial power."[57]

The Bush administration also aimed to isolate and undermine the Court.[58]

Court in the face of the Security Council referral of the situation in Darfur, Sudan no doubt wished to liberate itself from its signatorial obligation not to defeat the object and purpose of the Rome Statute. Vienna Convention on the Law of Treaties, art. 18(a), May 23, 1969, 1155 U.N.T.S 331 [hereinafter VCLT].

52. Bolton's sway over Bush was "greater than his title would ordinarily imply because [Bolton] was perceived to have helped Bush win the 2000 presidential election." John P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals*, 18 EUR. J. INT'L L. 277, 293 (2007).

53. John R. Bolton, *Reject and Oppose the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT? THREE OPTIONS PRESENTED AS PRESIDENTIAL SPEECHES 37, 37 (Alton Frye, ed., 1999) [hereinafter Bolton, Reject and Oppose].

54. Anne K. Handel, *The Counterproductive Bush Administration Policy toward the International Criminal Court*, 2 SEATTLE J. FOR SOC. JUST. 345, 364 (2004).

55. At the time, debate on the Court was "define[d] by the Administration . . . and counter-arguments [were] not being heard." Washington Working Group for the ICC, *Fact Sheet: US Public Opinion and the ICC,* at 4, October 2003, *available at* http://www.amicc.org/docs/WICC_USpublicOp.pdf (last visited Mar. 31, 2011).

56. "Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the weak and vulnerable amounts to a cruel joke." John R. Bolton, Under Sec'y for Arms Control and Int'l Sec., Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002), *available at* http://news.lp.findlaw.com/hdocs/docs/dos/dos111402wcstmnt.html.

57. *Id.* (noting further that the attempted marginalization of the Security Council is a "fundamental new problem created by the ICC that will have a tangible and highly detrimental impact on the conduct of U.S. foreign policy").

58. For example, the National Security Strategy announced during George W. Bush's first term in office provided that: "We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court, whose jurisdiction does not extend to Americans and which we do not accept." John R. Bolton, Under Sec'y for Arms Control and Int'l Sec., Remarks to the Am. Enter. Inst.: American Justice and the International

Attempts to weaken the ICC's effect included creating so-called "Article 98 agreements,"[59] bilateral immunity agreements that preclude the consenting state from surrendering "current or former U.S. government officials, military and other personnel" to the Court.[60] Moreover, in a strong legislative parallel to the hostility advanced by the executive branch, Congress adopted the American Service-Members' Protection Act (ASPA).[61] Subject to certain delineated exceptions, the Act prohibits American cooperation with the Court,[62] authorizes the use of "all means necessary" to secure the release of Americans held by or for the ICC,[63] and prohibits military assistance to certain ICC States Parties who refuse to enter into Article 98 agreements.[64]

2. Bush's Second Term: A Warming Towards the Court

George W. Bush's second term in office, however, began with decidedly less antagonism toward the Court. Most notably, the United States decided to abstain from voting on the Security Council referral of the situation in Darfur to

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Criminal Court (Nov. 3, 2003), *available at* http://stage.amicc.org/docs/Bolton11_3_03.pdf (declaring that the ICC has unacceptable consequences for national sovereignty and describing the bilateral agreements designed to ensure that other states do not hand over American citizens to the ICC).

59. Article 98 of the Rome Statute provides that the Court may not proceed with a request for surrender "which would require the requested state to act inconsistently with its obligations under international agreements[.]" Rome Statute, *supra* note 1, art. 98(2).

60. These agreements were negotiated by the United States with more than 100 countries. The term "other personnel" includes non-U.S. nationals and therefore includes foreign sub-contractors working for the United States. Coalition for the International Criminal Court (CICC), *Status of US Bilateral Immunity Agreements (BIAs)* (2006), *available at* http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf (last visited Mar. 31, 2011) (containing a comprehensive list of the states that signed or ratified such agreements as of 2006).

61. 22 U.S.C. § 7421 et seq. (2002).

62. This is tempered by the "Dodd Amendment," found in Sect. 2015 of the law, which provides that "[n]othing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."

63. *Id.* at § 2008. This aspect of the Act earned the ASPA the nickname "The Hague Invasion Act." *See, e.g., 'Hague Invasion Act' Becomes Law*, HUMAN RIGHTS WATCH (Aug. 3, 2002), http://www.hrw.org/en/news/2002/08/03/us-hague-invasion-act-becomes-law.

64. § 2007 prohibits U.S. military assistance to States Parties to the Rome Statute, but provides for exceptions when deemed by the President to be in the U.S. national interest, when the State Party has signed an Article 98 agreement with the United States and with respect to NATO and non-NATO major allies. That the Act for the most part remains good law lies at odds with the U.S.'s present engagement with the ICC. *See infra* section II(C); *see also Eight Initiatives the Obama Administration Should Take on International Justice*, HUMAN RIGHTS WATCH (Mar. 2, 2009), http://www.hrw.org/en/news/2009/03/02/eight-initiatives-obama-administration-should-take-international-justice ("urg[ing] the Obama administration to signal its opposition to all remaining provisions of ASPA. This will . . . remove a potential stumbling block for the US to assist the court in individual investigations").

the International Criminal Court.[65] In the wake of the strong anti-ICC campaign, the decision to abstain was unexpected and, perhaps naturally, was perceived to signal a major change in the U.S.'s relationship with the Court. While there was certainly support for this perspective;[66] there were likewise indications that the abstention was hardly the beginning of a truly new era.[67] First, at the insistence of the United States, the UNSC Resolution referring the Darfur situation to the Court included controversial paragraphs designed to shield U.S. nationals from prosecution and to preclude the use of UN moneys to finance the relevant investigations and prosecutions.[68] The United States also successfully lobbied for the inclusion of a preambular reference to Article 98 agreements, an effort seemingly designed to legitimize the U.S. practice of securing them.[69] In

65. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); *see also* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc SC/8351 (Mar. 31, 2005).

66. *See, e.g.,* Press Briefing on Sudan, Robert Zoellick, Deputy Sec'y of State (May 27, 2005) (asserting that the Security Council referral "send[s] a signal about accountability" and that it's a useful deterrence [sic] against others").

67. The abstention was accompanied by vows of continuing opposition to the institution. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor, U.N. Press Release SC/8351 (Mar. 31, 2005) (noting that "[a]lthough [the United States] delegation had abstained on the Council referral to the Court, it had not dropped, and indeed continued to maintain, its long-standing and firm objections and concerns regarding the Court.") Moreover, the abstention was secured only after alternative American efforts had failed. *US Fiddles over ICC While Darfur Burns*, HUMAN RIGHTS WATCH (Jan. 31, 2005), http:/www.hrw.org/en/news/2005/01/31/us-fiddles-over-icc-while-darfur-burns (noting that the US had attempted to garner support for the creation of a hybrid tribunal in Africa in lieu of a referral because, per then-U.S. ambassador-at-large for war crimes, Pierre-Richard Prosper, "We don't want to be a party to legitimizing the ICC.") Further, the Resolution ensured that jurisdiction over U.S. nationals was effectively precluded by any non-U.S. court and U.S. Article 98 agreements were acknowledged. S.C. Res. 1593, *supra* note 65, ¶ 6 and preamb.

68. S.C. Res. 1593, *supra* note 65, ¶¶ 6, 7; *see also* SCHABAS, supra note 41, at 155-9; Jennifer K. Elsea, *U.S. Policy Regarding the International Criminal Court*, Cong. Research Service Report, Report RL 31495, 25-26 (2006) (updated) (noting that the US abstention might be seen as an endorsement of the type of court the United States wanted rather than a softening towards the Court proper). It bears mentioning here that virtually identical provisions to ¶¶ 6 & 7 of S.C. Res. 1593 can be found in the recent Security Council resolution referring the situation in Libya. S.C. Res. 1970, *supra* note 4, ¶¶ 6, 8. This suggests that the U.S. decision to lobby for and affirmatively support this most recent referral may not be as dramatic a turnaround as it otherwise might seem.

69. "The Security Council... *Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute..." S.C. Res. 1593, *supra* note 65, preamb. In this respect, consider the comments made by Brazil's UNSC representative:

> The text just approved contains a preambular paragraph through which the Council takes note of the existence of agreements referred to in article 98-2 of the Rome Statute. My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue.

U.N. SCOR, 60th Sess., 5158 mtg. at 11, U.N. Doc. S/PV.5158 (Mar. 31, 2005); *see also* The Remarks of the Danish UNSC Representative. *Id.* at 6 (maintaining that the reference to Article 98 agreements is "purely factual" and that the resolution evidences a "genuine and valid compromise"). By contrast, S.C. Res. 1970 contains no reference to Article 98 agreements.

addition, the U.S. abstention was followed by actions taken on behalf of the administration that were decidedly anti-ICC, such as Bolton's request that all references to the ICC be deleted from the outcome document of the 2005 World Summit[70] and the continued pursuit of Article 98 agreements throughout Bush's second term.[71]

Moreover, while President Bush's final year in office included noteworthy support for the prosecutions arising from the situation in Darfur,[72] his presidency also ended with the conspicuous absence of U.S. participation in the then-ongoing process of establishing a definition of the crime of aggression,[73] despite the unquestionable importance of this issue to U.S. interests.[74] Perhaps the U.S. avoided participation because it might have been viewed as an endorsement of the ICC proper, as opposed to the evidently "pragmatic exploitation"[75] of the institution with regard to the situation in Darfur.[76] A sufficiently comprehensive assessment of Bush's second term leads to the conclusion that the administration's shift on the ICC had more to do with opportunism and a growing awareness that the Court was not likely to go by the wayside than it was indicative of a genuine sea change. Indeed, older, more hostile views[77] toward the Court appear to have had a lingering effect, with U.S. engagement with the Court exercised only infrequently and when all else

70. *See, e.g.,* Paul H. Brietzke, *Playing Poker at the U.N.*, 27 PENN ST. INT'L L. REV. 317, 342 (2007).

71. For example, an Article 98 agreement was secured from Montenegro in 2007, less than one year after the state came into being. *See* Letter from U.S. Embassy at Podgorica to Ministry of Foreign Affairs of the Republic of Montenegro (Apr. 17, 2007), *available at* http://www.ll.georgetown.edu/guides/documents/Montenegro07-102.pdf.

72. A seminal example lies in the U.S. decision to abstain on UNSC Res. 1828 because of its notation that the Security Council "intend[ed] to consider" the request from the African Union that it defer the ICC case against Sudanese President Al Bashir. S.C. Res. 1828, ¶ 9, U.N. Doc. S/RES/1828 (Jul. 31, 2008). For a discussion on this issue, *see* Annalisa Ciampi, *The Proceedings Against President Omar Al Bashir and the Prospects of their Suspension Under Article 16 ICC Statute*, 6 J. INT'L CRIM. JUST. 885, 887 (2008). For a comprehensive list of acts and statements that evidence the Bush Administration's support for the Darfur-related prosecutions, *see* The American Non-governmental Organizations Coalition for the International Criminal Court, *Chronology of U.S. Opposition to the International Criminal Court: From "Signature Suspension" to Immunity Agreements to Darfur*, 3-8 (updated Feb. 12, 2010) *available at* http://www.amicc.org/docs/US%20Chronology.pdf.

73. On this issue, *see infra* section III.

74. *See, e.g.*, Patricia M. Wald, *Is the United States' Opposition to the ICC Intractable?* 2 J. INT'L CRIM. JUST. 19, 24 (2004).

75. Cerone, *supra* note 52, at 304.

76. "By the time the U.S. came under severe pressure to drop its proposal for an ad hoc 'Sudan Tribunal' to handle what it termed the 'genocide' in Darfur, it was clear that the U.S. hostility towards the ICC was not achieving it purpose. Far from undermining the ICC, the Bolton-inspired policies appeared to enhance its credibility." Jose Alvarez, *The Evolving U.S.-ICC Relationship*, 24 ASIL Newsletter 1 (2008), http://www.asil.org/newsletter/president/pres080320.html.

77. Many of the stronger anti-ICC advocates had by this time left the Administration or lost their influential roles. Cerone, *supra* note 52, at 304.

failed.[78]

C. A New Era under Obama

Viewed in this way, Obama advisor Harold Koh was not wrong to note that under the Obama administration the default on the U.S. relationship with the Court has been "reset from hostility to positive engagement."[79] Compared to the so-called warming at the close of the Bush era, it is clear that the United States has come a long way in improving its relationship with the Court. The Obama administration announced in its first year that it would review the U.S. policy on the ICC.[80] At the same time, officials in the Obama administration publicly praised the Court's potential and expressed interest in supporting its investigations.[81]

This paved the way for speculation that the new regime would reaffirm former President Clinton's commitment to the Rome Statute,[82] an idea that was later bolstered when Secretary of State Clinton conveyed disappointment over the U.S.'s status as an ICC outsider.[83] The United States then participated for

78. Indeed, the individual who served as U.S. Ambassador at Large for War Crimes at the close of the Bush presidency in 2008 remarked that his office sought first to support the relevant domestic system, then to explore hybrid tribunal options and [f]inally, when other options are not available, we consider international courts, including the ICC." Clint Williamson, *U.S. Efforts to Combat Genocide and War Crimes*, 16 TUL. J. INT'L & COMP. L. 321, 327 (2008). Williamson makes the same argument in a separate writing, highlighting the creation of such hybrid courts as the Special Court for Sierra Leone and the Special Tribunal for Lebanon. Clint Williamson, *When the Fighting Stops*, 38 SETON HALL L. REV. 1253, 1262-63 (2008).

79. Harold Hongju Koh, Legal Advisor, U.S. Dep't. of State, Special Briefing: U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference (June 15, 2010), http://www.state.gov/s/wci/us_releases/remarks/143178.htm [hereinafter *U.S. Engagement*]; *see also* Salvatore Zappala, Editorial, 8 J. INT'L CRIM. JUST. 327, 327 (2010) (noting that "a new mood in the United States, exemplified by the Obama administration's policy of so-called 'positive engagement' . . . promises to herald in our view a new era for the ICC").

80. Press Release, U.S. Department of State, Daily Press Briefing (Feb. 12, 2009) (noting also that the administration supported the work of the Court in relation to the situation in Darfur). These representations comport with then-candidate Obama's campaign position which signaled the coming of a new era with regard to the Court. *See* Citizens for Global Solutions, 2008 Presidential Candidate Questionnaire, Response from Barack Obama, *available at*: http://www.globalsolutions.org/08orbust/pcq/obama (promising cooperation with regard to the situation in Sudan as well a thorough review to determine whether the US should join the ICC).

81. *See* LEE FEINSTEIN & TOD LINDBERG, MEANS TO AN END: U.S. INTEREST IN THE INTERNATIONAL CRIMINAL COURT 48 (2009) (containing statements made by Secretary of State Hillary Rodham Clinton and U.S. Permanent Representative to the UN, Susan Rice).

82. Nicholas Kralev, *US Warms to Global Court*, WASH. TIMES, Apr. 30, 2009, *available at* http://www.washingtontimes.com/news/2009/apr/30/us-warms-to-global-panel/?page=1 (positing that, while it is likely that the US will affirm its earlier signature, "it may be years before the United States joins [the] institution").

83. "This is a great regret that we are not a signatory [to the Rome Statute of the International Criminal Court]. I think we could have worked out some of the challenges that are raised concerning our membership. But that has not yet come to pass." Ewen MacAskill, *Clinton: It is a 'Great Regret'*

the first time as an observer at the Eighth Annual Meeting of the ICC's Assembly of States Parties (ASP),[84] "the clearest sign [at that time that] Washington [was] engaging with the Court."[85] In the wake of that meeting, the United States began to take additional steps towards forging a relationship with the ICC, likely hoping to repair its international reputation along the way,[86] by offering to assist with the institution's investigations and prosecutions.

The United States has since announced that it stands ready to protect the witnesses required to testify against top Kenyan officials at the Court.[87] The Obama administration has also proactively sought out meetings with the ICC prosecutor and other ICC officials in order to determine how the United States can best help the institution.[88] Increased engagement was further demonstrated by a significant U.S. showing at the ICC Review Conference in Kampala in mid-2010,[89] President Obama's reprimand of an ICC State Party for its failure to cooperate with the Court[90] and, most recently, in the U.S. decision to vote in

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the US is Not in International Criminal Court. Hillary Clinton, the Secretary of State, Signals Shift by the US in Favour of the International Criminal Court, THE GUARDIAN, Aug. 6, 2009, *available at* http://www.guardian.co.uk/world/2009/aug/06/us-international-criminal-court; *see also Washington Hints It Might Favor Joining International Court*, RADIO FREE EUROPE, Aug. 7, 2009 (observing that "that the Obama administration already is cooperating with the court in a clear break with Washington's previous policy of ignoring it").

84. Rapp Speech, *supra* note 7. The Assembly of States Parties provides management oversight and is the legislative arm of the Court. It is required to meet annually and may also hold special sessions. Rome Statute, *supra* note 1, art. 112.

85. Aaron Gray-Block, *U.S. Makes Debut Attendance at Hague War Crimes Court*, REUTERS, Nov. 19, 2009.

86. *See, e.g.*, Elsea, *supra* note 68, at 29 (noting that cooperating with the ICC "would enhance the reputation of the United States as a promoter of human rights and the rule of law"). This is seemingly part of a larger campaign aimed at strengthening U.S. international diplomacy as part of a strategy for global leadership. U.S. Secretary of State Hillary Rodham Clinton, Remarks on United States Foreign Policy (Sept. 8, 2010), http://www.state.gov/secretary/rm/2010/09/146917.htm.

87. This offer came before the related ICC investigation was even officially underway. Alan Boswell, *U.S. to Help Protect Kenyan Violence Witnesses*, VOA NEWS, Feb. 11, 2010, http://www.voanews.com/english/news/africa/east/US-to-Help-Protect-Kenyan-Violence-Witnesses-84133462.html.

88. Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes, Regarding Stocktaking at the Eighth Resumed Session of the Assembly of States Parties of the International Criminal Court (Mar. 23, 2010), http://usun.state.gov/briefing/statements/2010/138999.htm. The need for this assistance is strong. "We have our shopping list ready of requests for assistance . . . from the American government." Statement of Beatrice Le Fraper Du Hellen, Special Advisor to the Prosecutor at the ICC, *Seeking Global Justice*, CNN's Amanpour (Transcript), Mar. 24, 2010, http://archives.cnn.com/TRANSCRIPTS/1003/24/ampr.01.html. Unsurprisingly, at the top of the list is a request for U.S. operational support to facilitate the execution of the arrest warrants that have been issued by the ICC. *Id.*

89. The U.S. delegation in attendance at the Review Conference included representatives from the National Security Council, Uniformed Services, and the State, Justice, and Defense Departments. *U.S. Engagement*, *supra* note 79. This showing is a far cry from the "few mid-level career lawyers[] tasked to engage minimally in the discussions on the crime of aggression" under President Bush in 2001. Scheffer, *Staying the Course*, *supra* note 17, at 62

90. *Obama "Disappointed" Kenya Hosted Sudan's Bashir*, AGENCE FRANCE PRESSE, Aug.

favor of referring the situation in Libya to the ICC.[91]

1. The Influence of Ideology

At first blush, the disparity between the Bush and Obama approaches toward the Court might appear to have a straightforward explanation. Bush was an anti-internationalist who surrounded himself, primarily, with anti-internationalists.[92] Obama, on the other hand, is clearly invested in remedying America's international reputation, vowing to do what is right "because there is no force in the world more powerful than the example of America," and rejecting unilateralism as a non-starter.[93] President Obama has appointed individuals who stand ready to support his agenda accordingly[94]and who proudly distinguish this administration from the last "with respect to its approach and attitude toward international law."[95]

It would be a mistake, however, to put the change in U.S. tenor toward the Court down to ideology alone.[96] One must also bear in mind that the Obama administration came into power with two advantages over the Bush administration: the benefit of hindsight and the absence of any negative history with the Court. Owing to the former, the Obama administration is in a better position to assess existing U.S. reservations about the Court in light of the ICC's ongoing work than its predecessor was.

27, 2010, *available at* http://www.google.com/hostednews/afp/article/ALeqM5gBZwsGDmXZU-zu4szjFinzqkKVWg.

91. *See supra* notes 4 and 5 and accompanying text.

92. *See, e.g.*, Cerone, *supra* note 52, at 304; *see also* Philippe Sands, *Lawless World: The Cultures of International Law*, 41 TEX. INT'L L.J. 387, 392 (2006).

93. "[W]e are showing the world that a new era of engagement has begun. For we know that America cannot meet the threats of this century alone, but the world cannot meet them without America." Barack Obama, President, U.S., Address to Joint Session of Congress (Feb. 24, 2009), http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress (concluding that "in our hands lies the ability to shape our world for good or for ill").

94. *See, e.g.*, Harold Hongju Koh, *The U.S. Constitution and International Law*, 98 AM. J. INT'L L. 43 (2004); Harold Hongju Koh, *American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); *see also:* Transcript, *Obama's National Security Team Announcement*, N.Y. Times, Dec. 1, 2008, http://www.nytimes.com/2008/12/01/us/politics/01text-obama.html (including then President-elect Obama's comment that the members of the team he assembled "share [his] pragmatism about the use of power and [his] sense of purpose about America's role as a leader in the world" and relevant remarks from Hillary Clinton, such as "America cannot solve . . . crises without the world, and the world cannot solve them without America.").

95. Harold Hongju Koh, Legal Advisor, U.S. Department of State, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

96. This conclusion comports with the findings of a recent assessment of U.S. attitudes towards International Criminal Courts and Tribunals. U.S. support generally turns on such issues as Security Council control, a preference for domestic prosecutions and a commitment to accountability; the "ideological leanings of those in power" may have an impact, but one that tends to be "moderated over time." Cerone, *supra* note 52, at 314.

2. ICC Investigations and Sovereignty Concerns

Significantly, a survey of the early work of the ICC does not bear out the concern that the United States—or indeed any state—is apt to be unfairly targeted by the Court. In fact, at the start of the Obama administration, the only situation under consideration at the ICC that was fraught with Court-state tension was that of Darfur, brought within the jurisdiction of the Court by the earlier mentioned Security Council referral.[97] Remarkably, the "dangerous" *proprio motu* investigatory powers of the ICC prosecutor were never used prior to Obama taking office. They have since been used only one time with, at least initially, apparent state support[98] in the situation in the Republic of Kenya.[99]

Interestingly, the remainder of the ICC's investigations and cases has come before the Court in a way that had not been previously anticipated: the triggering

97. *See* S.C. Res. 1593, *supra* note 65 and accompanying text. Although subject to still unfolding developments, it may well be that the most recent Security Council referral will similarly engender hostility from the territorial state. Whether Libya will ultimately oppose ICC investigations and prosecutions appears to depend upon the identity of its future government, a matter of some uncertainty as the article goes to press. Alan Greenblatt, *Leaders of the Libyan Opposition Emerge*, NPR, Mar. 14, 2011. The ICC investigation presently focuses on Muammar al Gadaffi and his inner circle. Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya (Mar. 3, 2011), *available at* http://www.icc-cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya_ 03032011.pdf. The ongoing conflict in Libya appears to have prevented any official response to the referral, but it seems fair to surmise that the consequent ICC investigation will be opposed by the Gadaffi regime if it remains in power.

98. "Kenya itself mooted the possibility of ICC investigations for the violence, although it was ultimately taken up by the Prosecutor on his own accord after delays on the part of Kenyan authorities to take appropriate action against those suspected of the violence." Max du Plessis, *The African Union, the International Criminal Court and al-Bashir's Visit to Kenya*, INST. FOR SEC. STUDIES (Sept. 15, 2010), http://www.issafrica.org/iss_today.php?ID=1025. Both political sides in Kenya later expressed willingness to cooperate with the ICC. *Prosecutor Seeks Ok on Kenya Inquiry*, HUMAN RIGHTS WATCH (Nov. 26, 2009), http://www.hrw.org/en/news/2009/11/26/icc-prosecutor-seeks-ok-kenya-inquiry. The official position of the Kenyan government has recently changed, however, with its filing of the first ever state challenge to the admissibility of an ICC case. Situation in the Republic of Kenya, Case Nos. ICC-01/09-01/11 and ICC 01/09-02/11, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf.

99. In the wake of post-election violence in Kenya, a Commission of Inquiry was formed. As a result of its investigation, a list of alleged perpetrators of crimes against humanity was ultimately handed over to the ICC prosecutor. Antonina Okuta, *National Legislation for the Prosecution of International Crimes in Kenya*, 7 J. INT'L CRIM. JUST. 1063, 1064-65 (2009). After the government's failure to establish a domestic criminal tribunal to prosecute the relevant crimes, presumably owing to internal division, the ICC Prosecutor requested that the Pre-trial Chamber authorize his investigation into the matter. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf. An outright self-referral of the situation was not feasible as it "would have been a de facto admission that Kenya is unable to prosecute the perpetrators, and that would have put [it] under the umbrella of failed states." Nick Wadhams, *After Kenyan Stalling, the ICC Will Investigate Post-Election Riots*, TIME, Nov. 6, 2009, *available at* http://www.time.com/time/world/article/0,8599,1935921,00.html (quoting Hassan Omar Hassan, head of the Kenyan National Commission on Human Rights).

of ICC jurisdiction by way of "voluntary referrals,"[100] in which member states have asked the prosecutor to investigate situations involving rebel bands within their borders.[101] The first such referral came from Uganda in late 2003.[102] Uganda's decision to refer a situation that took place on its own territory appears to have opened the door to the second voluntary referral, rendered by the Democratic Republic of Congo (DRC) some months later, in relation to killings in its Ituri region.[103] The following year, the Central African Republic followed suit.[104] At this point, it is logical to consider why half of the investigations undertaken at the ICC have been initiated through an unanticipated channel.

a. The Practice of the Prosecutor

Shortly after assuming office in 2003, Luis Moreno-Ocampo, the ICC's first prosecutor, noted the challenges he would face in putting together a case as an "outsider" to a conflict, recognizing that investigations would not be easy to conduct and that state support would be an imperative factor to achieving success.[105] In making this prediction, Moreno-Ocampo no doubt considered the hardships encountered by his counterparts at the two predecessors to the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY)[106] and the

100. "[T]here had never been even the slightest suggestion in the drafting history of the [Rome] Statute that a State might refer a case 'against itself. . . .'" William A. Schabas, *'Complementarity in Practice': Some Uncomplimentary Thoughts*, 19 CRIM. L. F. 5,7 (2008) [hereinafter Schabas, *Complementarity*].

101. SCHABAS, *supra* note 41, at 36. *See also* Claus Kress, *Self-Referrals and Waivers of Complementarity: Some Considerations in Law and Policy*, 2 J. INT'L CRIM. JUST. 944 (2004).

102. Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 403 (2005).

103. Prior to the referral, the situation had captured the interest of the Prosecutor. "In September 2003 the Prosecutor informed the States Parties that he was ready to request authorization from the Pre-Trial Chamber to use his own powers to start an investigation [into the situation in the DRC], but that a referral and active support from the DRC would assist his work." Press Release, ICC, Office of the Prosecutor of the International Criminal Court Opens First Investigation, ICC Doc. ICC-OTP-20040623-59 (June 23, 2004); *see also* SCHABAS, *supra* note 41, at 42; Akhavan, *supra* note 102, at 405-406.

104. Press Release, ICC, Prosecutor Receives Referral Concerning Central African Republic, ICC Doc. ICC-OTP-20050107-86 (Jan. 7, 2005), *available at* http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Central+African+Republic.htm. More than two years passed before the Prosecutor opened an investigation. Press Release, ICC, Prosecutor Opens Investigation in the Central African Republic, ICC Doc. ICC-OTP-20070522-220 (May 22, 2007), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB. The delay between referral and investigation was the result of the Prosecutor's decision to monitor the development of referring country's justice system. SCHABAS, *supra* note 41, at 52.

105. International Criminal Court, *Paper On Some Policy Issues Before the Office of the Prosecutor* 2 (Sept. 2003) [hereinafter Moreno-Ocampo, 2003 Paper], http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

106. Established under the Statute of the International Tribunal for the Prosecution of Persons

International Criminal Tribunal for Rwanda (ICTR).[107] Like Moreno-Ocampo, ICTY and ICTR prosecutors have had to rely on the cooperation of states and state-like entities in order to perform their investigative and prosecutorial functions. In practice, this has frequently meant an uphill battle, in which prosecutors have struggled in their efforts to investigate crimes in hostile environments, effectuate the arrest of indicted persons, and obtain evidence from obstructive states.[108]

As a result, an annex to a 2003 paper penned by Moreno-Ocampo anticipated the possibility of either minimizing or circumventing these difficulties. After introducing the novel concept of a voluntary referral, a referral by a state of a situation on its territory, Moreno-Ocampo shared the view that, in such cases,

> the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.[109]

Moreno-Ocampo later revisited this issue in 2006, by which time his vision was becoming a self-fulfilling prophecy. The Court's docket in its entirety then consisted of three so-called "self-referrals," arising from situations in Uganda and the Democratic Republic of Congo, with a like referral by the Central African Republic awaiting prosecutorial authorization, and one lone Security Council referral regarding the situation in Darfur. Moreno-Ocampo's three years as prosecutor confirmed the numerous impediments he anticipated, causing him to cite as "exceptional logistical difficulties" safety issues, on-going violence, language barriers and inaccessibility to certain territories.[110] At the same time, he opined that "[t]he method of initiating investigations by voluntary referral has increased the likelihood of important cooperation and on-the-ground

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Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, annex (1993).

107. Established under the Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).

108. *See generally* Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT'L CRIM. JUST. 403 (2004); *see also* James A. Goldston, *More Candour about Criteria*, 8 J. INT'L CRIM. JUST. 383, 396 (2010) (noting that "the reality is that the ICC Prosecutor is substantially more dependent on state cooperation than his ICTY and ICTR counterparts").

109. International Criminal Court, Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications 5 (2004), http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf.

110. The Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003 – June 2006) 7-8, (Sept. 12, 2006), http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf.

support."[111]

The prosecutorial benefit to proceeding in this manner is apparent when compared with Moreno-Ocampo's work in relation to Darfur, the one matter in which the prosecutor was then definitively, and not by his own choosing, operating at odds with the territorial state. At the same time that the prosecutor enjoyed the advantages inherent to the "voluntary referrals" made by Uganda, the DRC, and the Central African Republic,[112] he was initially unable to get his Sudan investigation off of the ground. This seems to have been attributable to a lack of state cooperation and to Moreno-Ocampo's inability to successfully move forward without it.[113] Drawing in particular on the experience of the ICTY, what lies ahead with respect to the Darfur referral is no doubt a Herculean task, requiring "patience and cunning . . . as well as innovative tactics and strategy."[114] As such, a comparison with the Darfur situation perhaps best illustrates the attraction of proceeding with the tacit promise of state cooperation that comes by way of self-referral.

In addition to reaping these noted investigatory rewards, there is arguably a significant supplementary impetus for the prosecutor's decision to court voluntary referrals. In light of the U.S.'s long-standing opposition to the prosecutor's independent powers, it may well have seemed shrewd to avoid utilizing them.[115] Considered alongside the prosecutor's determination to avoid publicly shaming states by privately rejecting inappropriate referrals,[116] avoiding the *proprio motu* option appears likely to have been part of a larger design to quell concerns about his independent authority.[117]

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111. *Id.* at 7.

112. *See infra* section II (C) (2).

113. Even strong supporters of the Court remarked upon the Prosecutor's failure to take the steps necessary to secure the Security Council's assistance. *See* Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434, 439 (2006) (noting, in addition, Moreno-Ocampo's missed opportunity in dramatizing the conflict so as to garner attention and support). Some three years after the Security Council referral, the Executive Director of Human Rights Watch lamented Moreno-Ocampo's failure to employ creative ways of acquiring information, noting that, instead, the Prosecutor "banked on the idea that if he [was] sufficiently nice to Khartoum, he [could] perhaps trick the government into cooperating--get it to turn over a key piece of evidence--but that has not worked." Comments of Kenneth Roth, *The International Criminal Court Five Years on: Progress or Stagnation?* 6 J. INT'L CRIM. JUST. 763, 768 (2008).

114. David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT'L L. 1281, 1290 (2009).

115. "[T]the prosecutor has demonstrated a clear sense of focus on the perceived legitimacy of his investigations." Tod Lindberg, *A Way Forward with the International Criminal Court*, POL'Y REV., Feb. 1, 2010, http://www.hoover.org/publications/policy-review/article/5369. *See also* Conso, *supra* note 48, at 322; SCHABAS, *supra* note 41, at 165.

116. Lindberg, *supra* note 115.

117. *See* Paola Gaeta, *Is the Practice of "Self-Referrals" a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949, 950 (2004):

> It is possible that the Prosecutor's [solicitation of a voluntary referral by the DRC] is aimed at reassuring opponents of the Court who fear that he may wield his investigative powers too boldly: the Prosecutor could have started the

In this respect, one cannot likely overstate the effect that the prosecutor's chosen docket to date has had upon the Obama administration's perception of the Court. As was rightly predicted, "[s]election of early cases by the Prosecutor and Pretrial Chamber [has proved to] be a critical test."[118] According to U.S. Ambassador Rapp, "We've had a concern in the past that the ICC could . . . undertake politically motivated prosecutions, could perhaps come after Americans who were engaged in protecting people from atrocity instead of emphasizing those that were committing the crimes. Thus far, the Court has been appropriately focused."[119]

Of course, the Bush administration also had the opportunity to appreciate the "appropriate focus" of the Court; by mid-way through Bush's second term in office, the ICC's docket consisted solely of voluntary referrals and the situation in Darfur.[120] The Bush administration's comfort level with the Court should therefore have been bolstered by the fact that the ICC had then yet to assert jurisdiction over the objection of any state aside from Sudan, as well as the fact that every matter before the ICC "dovetail[ed] with US foreign policy interests."[121] This situation likely made the Bush administration's ultimately less hostile approach toward the Court possible. However, at that point it seems the relationship was too far gone for the administration to engage extensively with the ICC.[122] To do more than selectively utilize ICC activity to its own advantage would have required not only an implicit admission that its vibrant anti-ICC campaign was unsuccessful and off the mark, but also tacit recognition of the Court's staying power and potential.

> investigation in the DRC on his own initiative, but he pushed for, and gained, a self-referral. Thus, the Court has made its first steps in the guise of an institution that can assist states to obtain justice in the face of mass atrocities committed within their boundaries, rather than as an interfering international watchdog against which states have to defend themselves.

See also MOHAMED EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE 235 (2008).

118. Wald, *supra* note 74, at 22. In fact, Wald notes that it might be particularly useful for the prosecutor to employ a strategy of targeting cases that do not involve US national or residents but in which "the United States has a clear interest in seeing the perpetrators brought to justice." *Id.* at 23.

119. *U.S. Engagement*, *supra* note 79, Comments of Rapp. Rapp later re-emphasized the importance of case selection by noting its importance to acquiring any type of U.S. support: "at least in the situations that have been opened so far, we're prepared to do what we can to assist those prosecutions . . . ." *Id.*

120. *See infra* section II (C) (2).

121. Cerone, *supra* note 52, at 304. On the situation in Uganda, *see, e.g.*, Statement by the President on the Signing of the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009 (May 24, 2010), http://www.whitehouse.gov/the-press-office/statement-president-signing-lords-resistance-army-disarmament-and-northern-uganda-r.

122. Cerone, for example, speculates that the anti-ICC rhetoric espoused in the latter part of the Bush Administration may have been a "smokescreen" designed to veil its change in position. Cerone, *supra* note 52, at 305 n.168.

3. Additional Reasons

The Obama administration also enjoys an enhanced ability to observe the Court in action over that of its predecessor.[123] Indeed, it was not until the end of the Bush presidency that certain U.S. concerns, such as those regarding the ICC's ability to ensure a fair trial,[124] had even the prospect of being genuinely abated.[125] In June 2008, despite widespread criticism regarding the ICC's ability to get up and running,[126] Trial Chamber I made the remarkable decision to stay the Lubanga case because of due process concerns.[127] Placing the integrity of the proceedings ahead of the pressure to show results, the decision halted the case just a few days shy of its highly anticipated commencement as the Court's first trial. The upside of this delay is the positive perception it created; namely, that the ICC judiciary stands ready to ensure a fair trial at any cost,[128] a state of

123. The ICC's first trial did not officially start until 2009. Press Release, ICC, Opening of the First Trial of the Court on Monday 26 January 2009: For the First time in the History of International law the Victims will Fully Participate in the Proceedings, ICC Doc. ICC-OTP-20090123-PR388 (Jan. 23, 2009).

124. *See, e.g.*, Patricia M. Wald, *International Criminal Courts: A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 345 (noting that U.S. opponents occasionally allege that the due process protections embodied in the Rome Statute are inadequate in comparison to those employed by the United States). Despite this, "[s]cholars and commentators have long recognized that fundamental due process rights are protected by the Rome Statute." Scheffer & Cox, *supra* note 43, at 1048.

125. "In terms of procedure, every lawyer knows how difficult, if not dangerous, it is to speak about law without practice." Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 603 (2003).

126. "Like all too many international bodies, the ICC moves at a molasses pace . . . . ICC prosecution efforts to date have been criticized for taking too much time to accomplish very little." Adam Hochschild, *The Trial of Thomas Lubanga*, THE ATLANTIC, Dec. 2009; *see also* Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, Council on Foreign Relations Special Report 55 (Apr. 2010), http://www.cfr.org/publication/21934/from_rome_to_kampala.html; Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409 (2008) (concluding that the record-breaking length of the Lubanga pre-trial phase makes the oft considered glacial pace of ICTY prosecutions appear efficient by comparison).

127. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together With Certain Other Issues Raised at the Status Conference on 10 June 2008 (June 13, 2008).

128. ICC proponents predicted that the initial stay in the Lubanga proceedings would help to dissipate US concerns about the fairness of Court procedures. Dennis Doyle, *ICC Halts Lubanga Trial*, USA FOR THE INTERNATIONAL CRIMINAL COURT (June 18, 2008), http://usaforicc.wordpress.com/2008/06/18/icc-halts-lubanga-trial/; *see also* Rachel Katzman, *The Non-Disclosure of Potentially Exculpatory Evidence and the* Lubanga *Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial*, 8 NW J. INT'L HUM. RTS. 77, 78 (2009) (averring that "[t]he stay of proceedings was a strong assertion by the Chamber that the rights of the accused are paramount"). The Trial Chamber has continued to evidence this commitment. It later stayed the Lubanga proceedings yet again owing to fair trial concerns. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay the Proceedings Pending Further Consultations with the VWU, ¶ 2 (July 8, 2010). The stay remained

affairs that certainly makes U.S. support of the ICC both more likely and more tenable. [129]

What's more, contrary to John Bolton's predictions, since mid-2008, evidence has surfaced that indicates that the work of the ICC is actually having a deterrent effect.[130] Ever since Thomas Lubanga has been on trial in The Hague for "enlisting and conscripting children under the age of fifteen years . . . and using them to actively participate in hostilities"[131] in the Democratic Republic of Congo, "few child soldiers have been seen [in that country]."[132] In fact, the Special Representative of the Secretary-General on Children and Armed Conflict recently testified that the ICC's willingness to prosecute individuals who utilize child soldiers has had an appreciable effect throughout the world, causing "many armed groups" to approach U.N. entities in order "to negotiate action plans for the release of children."[133]

4. Summary

It is therefore against this backdrop that the present U.S. approach to the Court emerged. In the wake of carefully selected investigations whose pursuit

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in place for some three months, until the source of the problem was resolved. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 Entitled "Decision on the Prosecution's Urgent Request for Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay the Proceedings Pending Further Consultations with the VWU" (Oct. 8, 2010).

129. "The American government might . . . become more supportive of the Court if political observers witnessed growing sensitivity to the rights and interests of the accused. The more the ICC becomes like a real criminal court, operating under the rule of law, the more American politicians are likely to shelve their fears of politicized prosecution." George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 561 (2005); *see also* Wald, *supra* note 74, at 23.

130. HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS 64, 68-69 (July 11, 2008), http://www.hrw.org/en/reports/2008/07/10/courting-history-0; *see also* Thadeus Mabasi, *ICC Arrest Warrants No Impediment to Peace*, NEW VISION, Aug. 27, 2008, http://www.newvision.co.ug/D/8/459/646751.

131. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Public Redacted Version with Annex I, Decision on the Confirmation of Charges 156-157 (Jan. 29, 2007).

132. Hochschild, *supra* note 126 (concluding that "if the various rebel groups still fighting have [child soldiers], they are at least being kept well out of sight when journalists, ICC investigators, or UN observers are about"). A key aspect to the deterrent effect lies simply in the fact that the charges have educated the public, informing it that the use of child soldiers is in fact a crime. Human Rights Watch, *supra* note 130, at 69; *see also id.* at 127 (noting that "many people in Ituri did not view the use of child soldiers as being illegal or a particularly serious crime").

133. Testimony of Radhika Coomaraswamy, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 Transcript of Jan. 7, 2010, at 16. *Cf* Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777, 807 (2006) (arguing that, because international prosecutions are less certain and threaten less punishment than their domestic counterparts, they are not likely to contribute to deterrence). There is, however, a downside to the external effect of the Court's work; it appears that some children are now hidden or abandoned rather than demobilized owing to the fear of prosecution. Human Rights Watch, *supra* note 130, at 69-70.

did not affront the relevant states, indications of Court sensitivity to ensuring due process, and signs of a deterrent effect on the ground, there could likely be no better time for the United States to re-engage with the ICC. Moreover, there was a compelling, additional impetus for the Obama administration to be pro-active about the Court. As the first ever opportunity to amend the Court's statute[134] loomed, so did a possible resolution of the crime of aggression, the only crime within the ICC's subject matter jurisdiction for which an agreed upon definition proved elusive in Rome.[135] Renewed U.S. involvement with the Court, in particular its participation in the 2010 Kampala Review Conference, could therefore contribute to the discussions on the ever important issue of aggression and might possibly affect whether and how the Court would be able to deal with the crime.

III.
THE CRIME OF AGGRESSION

For more than a decade prior to the Review Conference, the United States had been uneasy about the ICC's ability to exercise jurisdiction over the crime of aggression. At the Rome Conference in 1998, the crime of aggression was one of the key factors creating doubts for the U.S. delegation and policy-makers over the emerging ICC statute. Once defined, the adopted language had the potential to "redefine or modify the concept and conduct of warfare."[136] An agreed upon definition might therefore alter the manner in which the United States could comfortably employ its global military power.[137] In addition, if the Court's ability to exercise jurisdiction over alleged violations mirrored that of its power in relation to the other crimes that make up the ICC's subject matter jurisdiction,[138] it would effectively dilute the Security Council's existing monopoly over determining acts of aggression.[139] As a result, the vulnerability

134. Rome Statute, *supra* note 1, art. 121 (1) (dictating that no amendment to the Statute can be made until the Statute had been in force for seven years).

135. Rome Statute, *supra* note 1, art. 5(2); *see, e.g.,* Herman von Hebel and Darryl Robinson, *Crimes within the Jurisdiction of the Court*, 79, 85 *in* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS AND RESULTS (Roy S. Lee, ed., 1999) (describing the politicized conflicts among states that prevented agreement as to a definition); Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 170-71 (2008).

136. Congressional Research Service Report, *supra* note 19, at 16 n.61.

137. Indeed, even the prospect of the crime played a role in the United Kingdom's consideration of participation in the 2003 U.S.-led invasion of Iraq. Weisbord, *supra* note 135, at 170-71.

138. *See supra* note 37 and accompanying text.

139. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter, art. 39; *see, e.g.,* Mark S. Stein, *The Security Council, the International Criminal Court and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?* 16 IND. INT'L & COMP. L. REV. 1, 31 (2005) (arguing that the proper interpretation of

of U.S. political and military leaders to prosecution would be widened,[140] as would the possibility of initiating an investigation that might tarnish the reputation of the United States.[141]

Given these issues, it is of little surprise that the agenda of the American delegations present at the ASP meeting in November 2009, where the States Parties decided the potential amendments later to be considered in Kampala,[142]and the subsequent Review Conference in June 2010 were clearly connected to the unresolved issues regarding the crime of aggression.[143]

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this provision is that "no body other than the Security Council may determine aggression *for* the Security Council. . . .")

140. In some respects, this was not a negligible concern. Indeed, prior to the creation of a generally agreed upon definition of the crime, there was no shortage of individuals who voiced the opinion that the 2003 U.S.-led invasion of Iraq was an act of aggression. *See, e.g.*, SCHABAS, *supra* note 41, at 218 (noting that the crime "is well recognized in customary international law"); Ronald C. Kramer & Raymond Michaelowski, *War Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq*, 45 BRIT. J. CRIMINOLOGY 446, 446 (2005). Prominent U.K. legal figures have since testified in hearings held in relation to the country's Iraq Inquiry that Operation Iraqi Freedom amounted to the crime of aggression and was known to be so at the time of the invasion. *See, e.g.,* Richard Norton-Taylor, *Blair's Case for Iraq Invasion Was Self-Serving, Lawyers Tell Chilcot Inquiry*, THE GUARDIAN, Oct. 1, 2010, at 20. *But see U.S. Engagement*, *supra* note 79, (Comments of Koh maintaining that "Of course, [the United States does] not commit aggression. . . .").

141. "[E]ven if no U.S. official ends up in The Hague, the ICC can affect the United States by merely investigating alleged crimes and engaging in official public criticism and judgment of U.S. military actions." Goldsmith, *supra* note 41, at 97.

142. Resolution ICC-ASP/8/Res.6, Review Conference, Annexes II and III, ASP 8th Plenary Mtg., ICC Doc. ICC-ASP/8/20 (Nov. 26, 2009) [hereinafter ICC Resolution on the Review Conference]. The only other amendment proposal, addressing the supplementation of the list of prohibited weapons cited in the existing definition of war crimes, was far less controversial and drew considerably less attention. *Id.* The possible deletion of Article 124, which allows a new State Party to deny the Court's jurisdiction for up to seven years in regards to war crimes, was also up for consideration in Kampala. Its review was statutorily dictated. Rome Statute, *supra* note 1, art. 124. Despite NGO opposition to the provision, it remains in place. Chandra Lekha Sriram, *ICC Hypocrisy Over War Crimes: Amnesty Has Called Article 124 of the Rome Statute a 'Licence to Kill', But Despite Support for its Deletion the Big Powers Won Out*, THE GUARDIAN, June 22, 2010, *available at* http://www.guardian.co.uk/commentisfree/2010/jun/22/icc-hypocrisy-article-124-war-crimes.

143. Rapp Speech, *supra* note 7 (remarking that, while the U.S. primarily intended to "listen and learn" at the November ASP meeting, the ambassador "would be remiss not to share" the U.S. concerns regarding the crime of aggression, including the U.S. position that "jurisdiction should [only] follow a Security Council determination that aggression has occurred"); *see also* Mike Corder, *Not a Member, US Envoy Attends International Court*, SEATTLE TIMES, Nov. 19, 2009, *available at* http://seattletimes.nwsource.com/html/nationworld/2010306874_apeuinternationalcourtus.html (attributing the US presence at the November ASP meeting to the fact that "Washington wants a role in drafting a definition of the crime of aggression for inclusion in the court's statute[]"). While American players were less forthcoming about the connection between their presence in Kampala and the crime of aggression, the U.S.'s strong interest in affecting the aggression discussion in Kampala was hardly a secret. *See* Afua Hirsch, *New Face at the International Criminal Court*, THE GUARDIAN, May 30, 2010, at 12. The U.S. participation in Kampala provides further evidence of the delegation's aggression-oriented focus *See also* William A. Schabas, *Kampala Diary 4/6/10*, THE ICC REV. CONF.: KAMPALA 2010 (June 5, 2010, 10:28 PM), http://iccreviewconference.blogspot.com/2010/06/kampala-diary-4610.html (describing US Legal Advisor Harold Koh's speech in Kampala as including "a very extensive list of arguments in

A. The Definition

The primary U.S. objective for the Review Conference was to avoid agreement on a definition of aggression.[144] Failing that, its aim was to alter the definition that had been finessed—without U.S. input—in the years leading up to Kampala.[145] Had the United States prevailed in its chief objective, the above noted concerns would have been delayed, if not averted. It also would have postponed the need to confront some additional issues inherent in the nature of the crime.

As the crime of aggression by its very nature implicates the related state,[146] it is particularly susceptible to use as a tool by which political battles might be waged through the forum of the ICC, an oft-noted U.S. concern.[147] Moreover, as the following discussion establishes, this aspect of the crime might be seen as one that renders it incompatible with the relevant state's ability to avail itself of the principle of complementarity.

Leaving concerns about a rogue prosecutor and a runaway judiciary aside,[148] the Court's principle of complementarity makes it feasible for any state, regardless of its membership status, to preclude the ICC from exercising jurisdiction over its nationals. In this respect, the principle of complementarity dictates that a genuine domestic investigation and a subsequent prosecution, if necessary, will serve to bar the matter from ever becoming a part of the Court's docket.[149] Consider, however, that a state's ability to institute internal prosecutions must realistically turn in part on the fact that the alleged crimes can be portrayed as aberrant acts of an individual or set of individuals—even if the person(s) charged enjoyed a leadership position—from which the prosecuting state can distance itself. Not so the crime of aggression, which wholly implicates the relevant state.[150] In such cases, the state would essentially have to put itself

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favour of deferring any discussion of aggression," such as a "lack of consensus," "the need for clarity in the definition," and "many other difficulties").

144. Conversation with Jennifer Trahan, Chair, American Branch, International Law Association, ICC Committee; Assistant Professor of Global Affairs, N.Y.U. (April 11, 2011).

145. *See id.; see also* Jennifer Trahan, *The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference,* 11 INT'L CRIM. L. REV. 49, 73 (2011).

146. Consider, for example, the definition of aggression adopted by the UN General Assembly in 1974, which provides in pertinent part: "Aggression is the use of armed force *by a state* . . . ." UN G.A. Res. 3314 (XXIX), 2319th plenary mtg., Dec. 14, 1974. The General Assembly definition was ultimately incorporated into the definition adopted in Kampala. Amendments to the Rome Statute, *supra* note 21, art. 8 *bis* (2).

147. Congressional Research Service Report, *supra* note 19, at 13 (expressing the concern of some U.S. officials that states with "anti-American sentiments," might attempt to use the Court to thwart "responsible U.S. military actions on their territory" or to "subvert U.S. diplomatic efforts").

148. *See, e.g.,* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 66 (2001).

149. Rome Statute, *supra* note 1, art. 17 (1)(a), (b).

150. "[T]he crime of aggression [] remains most profoundly a 'crime of state.'" SCHABAS,

on trial in order to preclude an ICC investigation or prosecution, an unlikely possibility even when there has been a subsequent change in power.[151]

The state condemnation facet is evident in the definition of aggression that was ultimately adopted in Kampala, which provides in relevant part:

> (1) For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, *by a person in a position effectively to exercise control over or to direct the political or military action of a State*, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
> (2) For the purpose of paragraph 1, "act of aggression" means the use of armed force *by a State* against the Sovereignty, territorial integrity or political independence of another State. . . .[152]

The American delegation was clearly dissatisfied with this definition.[153] Despite U.S. success in shaping the manner in which the Court's newest crime will be interpreted and applied through the creation of "understandings,"[154] the ICC definition of the crime of aggression has been described by the chief U.S. Legal Advisor as "flawed" and has been criticized by the present Ambassador-at-Large for War Crimes for being too vague.[155] In this respect, the general sentiment expressed by the American delegation seems rather the fulfillment of former Ambassador David Scheffer's prediction in the early days of the Bush administration.[156] The rest of the world, through a Special Working Group on

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supra note 41, at 139.

151. While there might be a political impetus post-regime change to implicate the prior administration in an internal aggression prosecution, this action may create problems for the newly empowered administration, such as providing a basis for a subsequent action in which reparations may be sought. "It is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act." Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. No. 116, ¶ 259 (Dec. 2006), http://www.icj-cij.org/docket/files/116/10455.pdf (finding that Uganda caused injury to the DRC and requiring Uganda to make reparations). Moreover, in order for the United States to institute such proceedings, the crime of aggression would have to be incorporated into U.S. law, an unlikely possibility for the foreseeable future. Padmanabhan, *supra* note 126, at 17.

152. Amendments to the Rome Statute, *supra* note 21, art. 8 *bis* (1) and 8 *bis* (2) (emphasis added).

153. *U.S. Engagement*, *supra* note 79, Comments of Koh and Rapp.

154. Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res.4, Annex III. The concept of adopting understandings at Kampala that would ultimately serve to facilitate the application of the aggression amendments was introduced by the United States. *U.S. Engagement*, *supra* note 79, Comments of Rapp. Seven such understandings were ultimately adopted, with understandings four through seven employing verbatim or near verbatim language to that which was included in the initial U.S. proposal. U.S. Understandings, First Proposal (Jun. 6, 2010) (on file with author). Only time will tell the true effect of these provisions which, unlike the Elements of Crimes, are not provided for in the Rome Statute. At a bare minimum, should the ICC judges need to discern the drafters' intent when applying the aggression amendments, the understandings will prove of significant assistance.

155. *U.S. Engagement*, *supra* note 79, Comments of Koh and Rapp.

156. Ambassador David J. Scheffer, *A Negotiator's Perspective on the International Criminal*

the Crime of Aggression (SWGCA),[157] had spent nearly a decade working on a suitable definition for the crime without U.S. input.[158] Years of work on the part of the SWGCA caused certain aspects of the aggression definition to become entrenched over time and, because of the U.S. absence in this process, the result for the Obama administration was that "some things ended up in [the drafting] process that . . . probably wouldn't have been there if [the United States had] been involved."[159]

B. The Court's Ability to Exercise Its Jurisdiction over the Crime

Yet whether these perceived definitional shortcomings create a fundamental problem for the United States remains to be seen. The pivotal issue is, of course, the Court's ability to exercise jurisdiction over the crime of aggression in the first place.[160] In this regard, it is first worth noting that it will be a number of years before the crime can be investigated or prosecuted at the ICC.[161] Of greater import to the United States, however, is the fact that the Kampala amendments make the possibility of one of its nationals being prosecuted for aggression at the ICC beyond unlikely.[162] This is true despite the

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Court, 167 MIL. L. REV. 1, 14 (2001) (predicting that "the rest of the world will not be impressed" with Bush's policy of very limited engagement with the Court and that it "will soldier on drafting documents of central importance to the operation of the Court").

157. The SWGCA was established by the ASP after the Rome Statute came into effect in July 2002. Troy Lavers, *(Pre)Determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court Its Freedom?*, 71 ALB. L. REV. 299, 302 (2008).

158. "[A]fter 'unsigning' the Rome Statute on May 6, 2002, the United States did not participate in the discussions of the SWGCA." Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 112 (2010).

159. *U.S. Engagement*, *supra* note 79, Comments of Rapp (concluding that, in Kampala, the U.S. delegation "had to play catch-up with that.").

160. Fittingly, "the conditions for the exercise of jurisdiction by the Court, as was well appreciated long before we all came to Kampala, proved to be the far more politically controversial and diplomatically vexed issue to resolve." Robbie Manson, *Smoothing Out the Rough Edges on the Kampala Compromise*, INST. L. ACCOUNTABILITY & PEACE, at 1 (June 18, 2010), http://blogs.ubc.ca/ligi/files/2010/06/Post-Kampala-Articlemanson.pdf.

161. The recent amendments delay the start of the Court's jurisdiction over the crime until at least Jan. 1, 2017. They also require that an additional vote then be taken, and that thirty states have ratified the aggression amendments for a period of one year, before the crime can be activated. Amendments to the Rome Statute, *supra* note 21, art. 15 *bis* (2) and (3); art. 15 *ter* (2) and (3). No one appears to doubt that these statutory hurdles will be overcome. *See e.g.* David Scheffer, *Adoption of the Amendments on Aggression to the Rome Statute of the International Criminal Court*, ASIL BLOG- INT'L CRIM. CT. REV. CONF. (June 13, 2010), http://iccreview.asil.org/ (remarking that he "would be surprised if, by January 1, 2017, the 30-State Party requirement will not have been met").

162. U.S. Legal Advisor Harold Koh's conclusion was, at least initially, slightly more conservative. Koh surmised that "the chances are extremely remote that a prosecution [of the crime of aggression] will, at some point in the distant future, affect [the U.S.] negatively." *U.S. Engagement*, *supra* note 79, Comments of Koh. One day later, however, Koh declared that the Kampala amendments "ensure total protection for U.S. armed forces and other nationals going forward." Harold Hongju Koh, Legal Advisor, U.S. Department of State, The U.S. and the

fact that the United States again did not achieve its primary objective pertaining to the exercise of jurisdiction over the crime. Joined by the four other permanent members of the Security Council,[163] the United States sought to condition the Court's ability to exercise jurisdiction over alleged acts of aggression on a Security Council referral.[164]

Instead, the role of the Security Council vis-à-vis the ICC's exercise of its aggression jurisdiction is far more limited. As with other crimes in the Court's subject matter jurisdiction, the Security Council may refer relevant situations to the ICC;[165] it may also call a halt to an aggression investigation or prosecution for one year[166] subject to renewal. For all state-referred or self-initiated investigations, the prosecutor is required to notify the Secretary-General about the situation.[167] If the Security Council then makes (or has made) a determination that the relevant act of aggression occurred, the prosecutor has the green light to immediately proceed with the investigation.[168] If, however, the Security Council fails to render a determination that an act of aggression has occurred within six months of the date of notice, the prosecutor may proceed with his investigation, provided that he receives requisite judicial approval.[169]

This template is, in one sense, a far cry from the long-standing U.S. objective. Had the ASP opted to make a Security Council resolution a prerequisite to the ICC's exercise of its aggression jurisdiction, the United States, along with the remaining four permanent members of the Security Council, would have been able to exercise marked control over the Court's aggression docket.[170] That arrangement would likely have provided an

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International Criminal Court: Report From the Kampala Review Conference 5 (June 16, 2010), *available at* http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf.

163. Conversation with Jennifer Trahan, *supra* note 144. *See also* Trahan, *supra* note 145, at 69; Padmanabhan, *supra* note 126, at 14 (noting that both the United Kingdom and France have maintained that the Security Council should have the last word regarding ICC aggression prosecutions); Koh, *supra* note 162, at 16.

164. Article 39 of the United Nations Charter dictates that the Security Council shall determine the existence of any act of aggression. The impact of the provision is subject to interpretation. The long-standing U.S. position is that aggression determinations are the exclusive bailiwick of the Security Council. *See, e.g.,* Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court (July 17, 1998) L/ROM/22. This view appears to have been shared by its fellow permanent member of the Security Council, the United Kingdom. *See* SCHABAS, *supra* note 41, at 136. However, article 39 does not expressly prohibit other bodies from determining that an act of aggression has occurred. *Id. at* 137.

165. Amendments to the Rome Statute, *supra* note 21, art. 15 *ter*. The Court, however, would then make an independent determination as to whether an act of aggression occurred. *Id.* art. 15 *ter* (4).

166. Rome Statute, *supra* note 1, art. 16.

167. Amendments to the Rome Statute, *supra* note 21, art. 15 *bis* (6) (requiring that the Prosecutor first find that there is a reasonable basis to proceed with the investigation).

168. *Id.* art. 15 *bis* (7).

169. *Id.* art. 15 *bis* (8) (dictating that the Pre-Trial Division, rather than just a Pre-Trial Chamber, must authorize the commencement of the investigation).

170. This point was made in the Court's early life, highlighting the shortcomings of a court that

intangible benefit to the United States. The ability to exert power over the Court's docket—even if only indirectly and in part—would have meant regaining a piece of what was lost in Rome, and may well have helped mitigate some of the existing domestic concerns about the Court. Its most practical benefit, however, would have been the assurance that neither nationals of the United States nor those of its allies would ever appear before the ICC on aggression charges.

This latter aspect was, predictably, a fundamental issue for the Obama administration. Prior to Kampala, the administration made clear that the Court's assertion of aggression jurisdiction over nationals of non-party states without prior Security Council approval remained a concern.[171] Notably, however, this worry is equally averted pursuant to the recent aggression amendments, as these also place the United States in a position to shield its citizens from ICC aggression prosecutions. Unlike the remaining crimes within the Court's subject matter jurisdiction, a national of a non-member state can only come before the Court on an aggression charge through a Security Council referral.[172] In light of the United States' ability to veto such referrals, U.S. vulnerability—and, arguably, that of its non-member state ally, Israel—is virtually non-existent.[173] Consequently, for so long as the United States remains a non-party to the Rome Statute, it is effectively guaranteed that its citizens will be shielded from such prosecutions. Moreover, should the current ICC-U.S. courtship advance to the point of the United States ratifying the Rome Statute, the United States could then choose to opt out of the Court's jurisdiction over crimes of aggression,[174] keeping intact the assurance that no U.S. national can be prosecuted for aggression at the ICC.[175]

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would need Security Council approval in order to prosecute any of the crimes in its jurisdiction. Mysak, *supra* note 41, at 280. "[S]ome would argue that the degree of US support for a tribunal directly corresponds to its degree of control over the mechanism." Cerone, *supra* note 51, at 314.

171. State Department Press Release, Ian Kelly, Daily Press Briefing (Nov. 16, 2009), *available at* http://www.state.gov/r/pa/prs/dpb/2009/nov/131982.htm; *see also* Padmanabhan, *supra* note 126, at 4 (noting with concern that "ICC jurisdiction over aggression also poses unique risks to the United States as a global superpower. It places U.S. and allied leaders at risk of prosecution for what they view as necessary and legitimate security actions"); *id.* at 17.

172. Amendments to the Rome Statute, *supra* note 21, art. 15 *bis* (4) and (5) (providing also that the ICC may not prosecute a national from a different state for an alleged act of aggression on the territory of a State that is not a party to the Rome Statute).

173. Indeed, Koh tellingly assumes the impossibility of a Security Council referral by concluding that, pursuant to the new articles, "No U.S. national can be prosecuted for aggression so long as the U.S. remains a non-state party." *U.S. Engagement*, *supra* note 79, Comments of Koh.

174. Amendments to the Rome Statute, *supra* note 21, art. 15 *bis* (4).

175. Koh's remarks appear to assume that the United States would opt out, should it ultimately ratify. Making specific note of the provision, he concludes "we now ensure total protection for our Armed Forces and other U.S. nationals going forward." *U.S. Engagement*, *supra* note 79, Comments of Koh. Should this situation come to pass, the United States could well attribute its decision to opt-out on the basis of the "flawed" ICC definition that was created without U.S. input. There are, of course, potential downsides to availing of an opt-out provision, such as being "named and shamed" by interested non-governmental organizations and being subject to political fallout. Shana Tabak,

IV.
POST-KAMPALA: WHITHER NOW THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT?

As a result, despite its failure to achieve its definitional and jurisdictional objectives with respect to the crime of aggression, it is not surprising that the American delegation has since been able to paint its work in Kampala as a qualified success.[176] These results form an important indicator of the United States' future with the Court. As Judge Wald rightly predicted, had the aggression amendments resulted in an added threat to the United States, the likelihood for ultimate ratification would have been quite bleak.[177] With this risk now averted and the United States on a settled path of cooperative engagement with the ICC, it seems both timely and appropriate to ask, "What next?"

A. The Possibility of U.S. Accession

In considering the future of the U.S.-ICC relationship post-Kampala, it is worthwhile to review some timely remarks made by U.S. Ambassador Rapp. While conceding that ICC membership was not under discussion for the United States "at this time," Rapp went on to note that U.S. ratification of international treaties has historically been a lengthy process.[178] Making the possibility of the United States joining the Court seem more likely than in any of his prior comments on the subject, the ambassador ultimately opined that, "over time, there's a possibility that we may gain confidence in this institution and that would enable us to move forward."[179] This would only happen, however, after the United States has the opportunity to evaluate whether the Court "develop[s] responsibly," which Rapp indicated would be assessed by whether the Court

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Article 124, War Crimes, and the Development of the Rome Statute, 40 GEO. J. INT'L L. 1069, 1095 (2009). It seems unlikely, however, that these potential consequences would affect a U.S. decision to opt-out. The United States seemed impervious to such concerns in Rome, where it advocated extensively, albeit unsuccessfully, for the inclusion of a 10 year opt-out provision for crimes against humanity and war crimes. Scheffer, *supra* note 30, at 19. In parallel, Ambassador Rapp attributes the inclusion of the opt-out provision to U.S. participation in Kampala. *U.S. Engagement*, *supra* note 79, Comments of Rapp (remarking that "provisions have gone into the statute that can't be changed . . . which will protect the nationals of non-party states like ourselves, or states that opt out . . . . I don't think that would have occurred were it not for us sort of raising the issues in this conference.").

176. For a contrary view, labeling the outcome in Kampala as a failure, *see* Brett D. Schaefer, *The U.S. Loses on Aggression in Kampala*, NAT'L REV. ONLINE, June 14, 2010, http://www.nationalreview.com/corner/231855/u-s-loses-aggression-kampala-brett-d-schaefer (asserting that the United States "failed in its main objectives" regarding the crime of aggression and that its successful efforts in qualifying the Court's exercise of jurisdiction over the crime represent a "less than ideal[] achievement").

177. Wald, *supra* note 74, at 24.

178. *U.S. Engagement*, *supra* note 79, Comments of Rapp.

179. *Id.*

exhibits an established focus on "crimes that involve truly massive intentional attacks on civilians."[180]

The logic in this regard is relatively straightforward when one considers U.S. concerns about the potential for politicized prosecutions at the ICC. Discussions on this issue tend to turn almost exclusively on the possibility of U.S. nationals appearing before the Court as a result of unintentional killings sustained in the context of an otherwise legitimate military undertaking (i.e., collateral damage).[181] Accordingly, an ICC with a vested and exclusive focus on the prosecution of acts that involve grave harm intentionally inflicted on civilians strikes at the very heart of this basis for U.S. opposition.[182]

Indeed, perhaps some American critics have already begun to question this basis for opposing ICC membership, as virtually every situation before the Court to date involves civilian victims who are alleged to have suffered grave, intended harm at the hands of those accused.[183] However, it would be a mistake

180. *Id.* (Noting that, in this regard, the United States would be evaluating "the decisions made by its prosecutor on where to open investigations and [the decisions rendered] by [the Court's] chambers . . . that have to decide whether, sometimes, to authorize those investigations or to issue arrest warrants.").

181. "Our concern was that a prosecutor who was not under any kind of accountability, who's elected for nine years, who doesn't answer to any kind of national system, could say, 'Well, over here, we've got someone who murdered 200,000 people. Over here, we have maybe some soldiers that came in to protect some of those people, and some folks died in collateral damage. We'll go ahead and prosecute both.'" George Lerner, *Ambassador: U.S. Moving to Support International Court*, CNN, Mar. 24, 2010, http://articles.cnn.com/2010-03-24/us/us.global.justice_1_icc-central-african-republic-war-crimes?_s=PM:US (quoting Ambassador Rapp). Rapp went on to note that this concern, to some extent, remains. *Id.*; *see also* Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing the International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 5 (2001-2002) (noting that U.S opposition to the ICC is based upon the Court's potential to exercise jurisdiction over U.S. nationals for the "inadvertent, unintended loss of civilian life").

182. *See, e.g.*, Richard John Galvin, *The ICC Prosecutor, Collateral Damage and NGOs: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT'L & COMP. L. REV. 1, 98 (2005) (averring that "the ICC Prosecutor would be justified to adopt a policy of generally not pursuing collateral damage cases because such a policy could help to slowly build a comfort level with the ICC in the U.S."). Of course, the Statute's threshold requirement for war crimes, its requisite mens rea of intent and knowledge, and its gravity requirement equally undermine the collateral damage argument. Rome Statute, *supra* note 1, arts. 8 (1), 30, and 17 (1)(d), respectively. Thus far, however, these provisions have not proved sufficient to thwart U.S. concerns.

183. *See, e.g.*, Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony issued on 8 July 2005 and amended on 27 September 2005, ¶ 5 (July 8, 2005) (alleging that the accused, along with fellow LRA members, "engaged in a cycle of violence and established a pattern of 'brutalization of civilians'"); Warrant of Arrest for Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, ¶ 12 (May 23, 2008) (implicating the accused in acts of rape, torture, pillaging and outrages on human dignity); Situation on Darfur, Sudan, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (April 27, 2007) (concluding that there are reasonable grounds to believe that the accused contributed to the commission of crimes against humanity). *But see* Situation in the Republic of Kenya in the Case of Francis Kirimi Muthaura, Uhuri Muigai Kenyatta & Muhammad Hussein, Case No. ICC-01/09-02/11-01, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuri Muigai Kenyatta & Muhammad Hussein, ¶ 37 (Mar. 8, 2011) (confirming, as this article goes to press, the Court's first charges based upon a theory of

to assume that this type of focus alone, even if it becomes part of the fabric of the ICC, will prove sufficient to prompt U.S. ratification. Ambassador Rapp certainly does not make this prediction,[184] and with good reason. If concerns regarding the potential for politicized prosecutions are at the core of U.S. opposition to the Court, eliminating this risk simply removes one (admittedly sizeable) hurdle to ratification; it does not incentivize it.[185]

Rather, as there is little to no inducement for the United States to join an institution that seems incapable of fulfilling its mandate, the potential for future U.S. membership is likely to turn upon whether the Court's operations evidence its potential for success. As such, once the ICC has had adequate time to develop, the relevant question will be whether the Court appears to be making strides towards becoming the institution it was intended to be. Specifically, this will involve an analysis of whether the work of the ICC demonstrates that it is truly a court of last resort[186] whose actions both legitimately fill the impunity gap[187] and create an adequate impetus for states to assume the primary responsibility for prosecuting international crimes.[188]

B. A Court of Last Resort? The Complementarity Connection

It is frequently maintained that the ICC is a "court of last resort,"[189] a description that implies that the Court acts only when there is no feasible

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indirect co-perpetration).

184. After acknowledging the pivotal importance of the Court's focus and noting that increased confidence may over time make it possible for the United States to "move forward," Rapp candidly asks "who knows what the future may hold?" *U.S. Engagement*, *supra* note 79, Comments of Rapp.

185. Rather, it has likely provided the impetus for the recent U.S. overtures of assistance. *See supra* note 87 and accompanying text. Indeed, at the press conference during which Ambassador Rapp noted that the ICC investigations have thus far been "appropriately focused," he also acknowledged that U.S. assistance presently serves U.S interests. *U.S. Engagement*, *supra* note 79, Comments of Rapp.

186. "Americans embrace the core vision of the ICC—a fair and effective court of last resort for victims of monstrous crimes." Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 432 (2004).

187. In this respect, the bar cannot be set too high, so as to demand that the ICC's actions alone eliminate impunity. Such expectations are simply unreasonable. *See, e.g.*, Knut Dormann & Robin Geiß, *The Implementation of Grave Breaches into Domestic Legal Orders*, 7 J. INT'L CRIM. JUST. 703, 717 (2009). Instead, the appropriate inquiry is whether the Court is investigating situations and prosecuting cases that would otherwise be inadequately addressed.

188. Rome Statute, *supra* note 1, preamb. ¶ 6.

189. *See, e.g.*, James L. Taubee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. REV. 105, 129 (2000) (noting that "the ICC is designed to be truly a court of last resort"); Eric Bales, *Torturing the Rome Statute: The Attempt to Bring Guantanamo's Detainees within the Jurisdiction of the International Criminal Court*, 16 TULSA J. INT'L & COMP. L. 173, 188 (2009); Ronli Sifris, *Weighing Judicial Independence Against Judicial Accountability: Do the Scales of the International Criminal Court Balance?*, 8 CHI.-KENT J. INT'L COMP. L. 88, 107 (2008).

alternative forum for investigation and prosecution.[190] This suggestion both reinforces the Court's role in "put[ting] an end to impunity,"[191] while concurrently mitigating sovereignty concerns regarding the Court's exercise of its jurisdiction. It is therefore no surprise that ICC actors have embraced the designation.[192] Indeed the Court's website,[193] prosecutor,[194] and first President[195] all refer to the ICC as a court of last resort. At the same time, it is commonplace for those operating outside the institution to describe the Court in the same fashion, including such high profile figures as former UN Secretary-General Kofi Annan,[196] present UN Secretary-General Ban Ki-moon,[197] former ICTY Prosecutor Richard Goldstone,[198] and numerous academics and journalists.[199]

When the term "court of last resort" is used in relation to the ICC, it is almost always linked with the Court's principle of complementarity, which precludes the ICC from proceeding with an investigation or prosecution when

190. Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice and the International Criminal Court*, 50 VA. J. INT'L L. 107, 122 (2009) (internal citation omitted).

191. Rome Statute, *supra* note 1, preamb. ¶ 5; *see also id.* art. 20(3)(a)-(b).

192. It has also been suggested that the Court has "embraced its place as a court of last resort." *Recent Publications*, 35 YALE J. INT'L L. 533, 546 (2010) (reviewing LEE FEINSTEIN & TOD LINDBERG , MEANS TO AN END: THE U.S. INTEREST IN THE INTERNATIONAL CRIMINAL COURT (2009)).

193. "The ICC is a court of last resort." ICC at a Glance, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/ (last visited Mar. 31, 2011).

194. "[T]he Court intervenes as a last resort . . . ." Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Address at Nuremberg: Building a Future on Peace and Justice (June 24-25, 2007), *available at* http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F005461711149/143825/LMO_nuremberg_20070625_English.pdf [hereinafter Moreno-Ocampo, Nuremberg Address]; *see also* Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo, to the UN Security Council Pursuant to UNSCR 1593 (2005).

195. "This is a fundamental point that has to be understood about the ICC. The ICC is a court of last resort." Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. INT'L L. REV. 539, 543 (2007); *see also* Philippe Kirsch, *Applying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOBAL STUD. L. REV. 501, 505 (2007) [hereinafter Kirsch, Applying].

196. *Analysis: Mixed Report Card for ICC*, INTEGRATED REGIONAL INFO. NETWORKS (June 10, 2010), http://www.irinnews.org/report.aspx?ReportId=89423.

197. Ban Ki-moon, *Ushering in a New Age of Accountability*, WASH. POST, May 29, 2010, at A19.

198. Justice Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Criminal Justice*, THE INT'L CRIM. CT. MONITOR, June 2002, at 3, *available at* http://www.thirdworldtraveler.com/International_War_Crimes/USWithdrawal_ICC_Goldstone.html.

199. *See, e.g.*, Charles H.B. Garraway, *Military Excesses? Is There a Right Way of Dealing?*, 2 J. INT'L CRIM. JUST. 981, 982 (2002); Lauren Fielder Redman, *United States Implementation of the International Criminal Court: Toward the Federalism of Free Nations*, 17 J. TRANSNAT'L L. & POL'Y 35, 40 (2007); Estanislao Oziewicz, *Court Seeks to Try Suspects for Atrocities in Darfur; International Tribunal Faces Obstacles in Prosecuting Politician, Militia Leader*, GLOBE & MAIL (CA), Feb. 28, 2007, at A15.

the matter is being dealt with properly on the national level.[200] For example, former ICC President Philippe Kirsch explains the ICC's role as a court of last resort:

> [That role] is reflected in the principle of complementarity . . . . A case is not admissible if it is being or has been investigated or prosecuted by a state with jurisdiction. The ICC will act only if a state is unwilling or unable to genuinely carry out an investigation or prosecution.[201]

Let us assume for now that Kirsch's conclusion is true, that is to say that under the complementarity principle the Court will act only if a state with jurisdiction is either unwilling or unable to initiate national proceedings. If this is so, the principle does indeed reflect that the ICC is a court of last resort and, as a consequence, that the cases it hears will automatically fill an impunity gap. Significantly, Kirsch's conclusion, and the consequences that come with it, appears to align with the understanding of the complementarity principle held by multiple States Parties with respect to this absolutely fundamental aspect of the Court.

For example, when opening the debate in the Dáil (the principal chamber of the Irish Parliament) on the constitutional amendment required for the country to ratify the Rome Statute, Ireland's then-Minister for Foreign Affairs explained: "The Court will be complementary to national legal systems. . . . Only where the State Party in question is unwilling or unable genuinely to investigate the crimes alleged or to prosecute the accused person may the Court exercise its jurisdiction."[202] The Minister of State of the United Kingdom (while acting on behalf of the European Union and the European Commission)[203] and an advisor to the New Zealand Ministry of Foreign Affairs and Trade[204] have espoused similar perceptions of the complementarity principle. Parallel interpretations appear on the websites of the Permanent Mission of Germany to the United

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200. See *supra* note 149 and accompanying text; Rome Statute, *supra* note 1, art. 17(1)(a)-(b).

201. Kirsch, *Applying*, *supra* note 195, at 505.

202. International Criminal Court: Statement to the Dáil by the Minister for Foreign Affairs, Mr. Brian Cowen T.D., on the 23rd Amendment to the Constitution Bill, Apr. 11, 2001, *available at* http://www.dfa.ie/uploads/documents/Legal%20Division%20Documents/international%20criminal%20court.pdf; *see also* Remarks by Mr. Brian Cowen T.D., Minister for Foreign Affairs on the Launch of the Government Campaign for the 23rd Amendment to the Constitution Enabling the Ratification of the Rome Statute of the International Criminal Court, May, 24 2001, *available at* http://www.dfa.ie/uploads/documents/Legal%20Division%20Documents/remarks%20by%20cowen.pdf (noting that "[t]he Court will be complementary to national legal systems, and will operate only where a State Party is unable or unwilling to investigate alleged crimes").

203. "The court will be complementary to national processes in the sense that it will act where national systems are unable or unwilling genuinely to investigate a crime, or to bring a prosecution if the results of the investigation warrant one." Press Release, Diplomatic Conference Begins Four Days of General Statements on the Establishment of International Criminal Court, UN Press Release L/ROM/7, Jun. 15, 1998 (quoting Tony Lloyd).

204. "Generally, a case is inadmissible if a state with jurisdiction wishes to investigate or prosecute. It becomes admissible if the state is 'unwilling or unable genuinely to carry out the investigation or prosecution.'" Juliet Hay, *Implementing the ICC Statute in New Zealand*, 2 J. INT'L CRIM. JUST. 191, 192 n.10 (2004).

Nations in New York[205] and Foreign Affairs and International Trade Canada.[206]

The principle of complementarity has been correspondingly interpreted and abbreviated by the International Commission of Inquiry on Darfur[207]and in numerous academic works. For example, scholars have noted that: "under [the complementary] regime, the ICC cannot proceed unless the local authorities 'cannot or will not' initiate a prosecution;"[208] "[the complementarity] principle provides that the court can accept cases only where national authorities are unwilling or unable to handle them;"[209] "[t]he ICC can only intervene if a state with jurisdiction is 'unwilling or unable genuinely to carry out the investigation or prosecution;'"[210] "[t]he ICC is only able to exercise jurisdiction over persons accused of crimes when States are unwilling or genuinely unable to carry out investigations or prosecutions;"[211] and so on.[212]

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205. The diplomatic website highlights what it deems "the most important principles for the work of the ICC" and places at the top of this list that "the Court can only prosecute if states are unwilling or unable genuinely to pursue a specific serious criminal offence (principle of complementarity, Article 17)." *The International Criminal Court*, FED. FOREIGN OFF., http://www.auswaertiges-amt.de/EN/Aussenpolitik/InternatRecht/IStGH/Hintergrund_node.html (last updated May 27, 2010).

206. "[The ICC] is also 'complementary' to national jurisdictions, which means it will only proceed with a case when a state is unable or unwilling genuinely to prosecute transgressors on its own." Significant Elements of the Rome Statute, FOREIGN AFFAIRS AND INT'L TRADE CANADA (Mar.13, 2010), http://www.international.gc.ca/court-cour/significant-elements-significatifs.aspx?lang=eng#com.

207. "[T]he principle of complementarity on which the ICC is based [provides that] the Court only steps in when the competent national courts prove to be unable or unwilling genuinely to try persons accused of serious international crimes." International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, U.N. Doc. S/2005/60, ¶ 606 (Jan. 25, 2005).

208. David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 38-39 (2006).

209. Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 6 (2005).

210. Garraway, *supra* note 199, at 981.

211. Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25 FORDHAM J. INT'L L.J. 767, 787 (2002).

212. Amongst far too many examples to exhaustively include here, *see, e.g.*, Hon. David Hunt, AO, *High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, 2 J. INT'L CRIM. JUST. 56, 63 (2004); Wedgwood, *supra* note 33, at 202; Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 136 (2007); Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement and Related Issues in the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 1069, 1080-81 (2008); Anne K. Heindel, *The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. FOR SOC. JUST. 345, 348-49 (2004); Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 197, nn.18-19 (2010); M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 287 (2010); Kathleen Maloney-Dunn, *Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects and Fundamental Human Rights at the ICC*, 8

1. The Prosecutor's Avowed Interpretation

For the purposes of the discussion that follows, however, the most significant comments about complementarity have come from the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo. Recognizing that the Rome Statute reflects the diligent efforts of its drafters, Moreno-Ocampo remarked upon the Court's system of complementarity in his comments about the work of the ICC in 2007: "[c]areful decisions were made [by the drafters in Rome] . . . . a system of complementarity was designed whereby the Court intervenes as a last resort, when States are unable or unwilling to act."[213] This conclusion more forcefully echoes an observation made by Moreno-Ocampo shortly after his appointment, when he noted that "[t]he ICC is not intended to replace national courts, but to operate when national structures or courts are unwilling or unable to conduct investigations and prosecutions."[214]

In light of Moreno-Ocampo's espoused interpretation of complementarity, it seems fair to anticipate that this understanding of the principle would be reflected in his practice of soliciting voluntary referrals.[215] In such cases, the very act of making a voluntary or self-referral may reasonably be considered evidence of the relevant state's willingness to have the situation investigated and relevant actors prosecuted.[216] Accordingly, one would then expect that the prosecutor would limit his solicitation of self-referrals to states that are in fact unable to conduct the relevant investigations and prosecutions. Yet, this has not consistently been the case.

2. The Voluntary Referral Rendered by Uganda

In fact, the first voluntary referral received by the ICC prosecutor was rendered by Uganda, a state arguably able to conduct its own investigations and prosecutions, albeit unable to effectuate the arrests of the relevant accused.[217]

SANTA CLARA J. INT'L L. 69, 81 n.54 (2010); Jennifer Trahan, *Reflections on the Difficulties of Enforcing International Justice*, 30 U. PA. J. INT'L L. 1187, 1203 n.64 (2009). Predictably, this interpretation of complementarity is also reflected in the media. *See, e.g.*, Jonathan Fanton, *Supporting the Court of Last Resort*, SAN DIEGO UNION TRIB., Apr. 21, 2008 (asserting that the ICC, "[t]he so-called 'court of last resort' is not meant to replace national courts but to have jurisdiction only when nations are unable or unwilling to act.").

213. Moreno-Ocampo, Nuremberg Address, *supra* note 194.

214. Moreno-Ocampo, 2003 Paper, *supra* note 105, at 4.

215. *See* Schabas, *Complementarity*, *supra* note 100 and accompanying text.

216. *Id.* at 17.

217. While a state's inability to "obtain the accused" is relevant to a determination of inability under Article 17, the accused must be elusive "due to a total or substantial collapse or unavailability of [the] national justice system." Rome Statute, *supra* note 1, art. 17(3). Moreover, because the ICC must rely on the cooperation of states to effect its arrest warrants, there is "some doubt as to whether the ICC would be in a better position to help capture the alleged perpetrators." EL ZEIDY, *supra* note 117, at 234 (noting in addition that the application of Article 17(3) would be dependent upon a showing that Uganda initiated relevant domestic proceedings "yet failed genuinely to carry them

According to Professor Schabas:

> It has never been suggested that the Ugandan courts are unable to conduct prosecutions. Indeed, Uganda's courts are among the best in sub-Saharan Africa. Nothing in the Court's discussion of the five arrest warrants [issued in relation to the Ugandan referral] suggests that the matter has arisen. Rather, the prosecutor and the Government of Uganda have simply decided it would be more convenient to hold trials in The Hague before the International Criminal Court.[218]

These circumstances prompt the question of how the prosecutor can so proceed if the principle of complementarity requires that a state either be unable or unwilling to investigate or prosecute before the ICC can exercise its jurisdiction. Until this point, we have assumed that this is what the principle in fact dictates, focusing in particular on the prosecutor's avowed interpretation of complementarity. Yet, at the same time that Moreno-Ocampo noted that the Court "is not intended to replace national courts, but to operate when national structures and courts are unwilling or unable to conduct investigations and prosecutions," he also noted that, under the Statute, "[t]here is no impediment to admissibility of a case before the Court where no State has initiated any investigation. . . . In such cases there will be no question of 'unwillingness' or 'inability' under [the Statute]."[219]

In so stating, the prosecutor endorsed the position advanced by a group of experts who had advised him on the "legal, policy and management challenges" he was likely to face "as a consequence of the complementarity regime."[220] The resultant informal expert paper counseled the prosecutor that "the most straightforward scenario [with respect to admissibility] is where no State has initiated an investigation (the inaction scenario)."[221] In fact, the report noted that "[t]here may be situations where the appropriate course of action is for a State concerned not to exercise jurisdiction in order to facilitate admissibility before the ICC."[222]

a. Interpreting the Rome Statute's Complementarity Provisions

To best understand this notion of "inaction admissibility," one must consult the relevant provisions in the Rome Statute. Article 17 provides in pertinent part that a case is inadmissible where:

> 1. (a) *The case is being investigated or prosecuted by a State which has jurisdiction over it*, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

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out").

218. Schabas, *Complementarity*, *supra* note 100, at 23.

219. Moreno-Ocampo, 2003 Paper, *supra* note 105, at 5.

220. Office of the Prosecutor Informal Expert Paper, *The Principle of Complementarity in Practice*, INTERNATIONAL CRIMINAL COURT, at 2 (2003), http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF.

221. *Id.* at 7.

222. *Id.* at 19.

> (b) *The case has been investigated by a State which has jurisdiction over it* and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. . .

According to Darryl Robinson, coordinator of the expert group consulted on behalf of the prosecutor, the conclusion that Article 17 precludes the Court from acting unless a state with jurisdiction is either unwilling or unable to investigate or prosecute represents a failure to recognize the above emphasized language in the provision.[223] Rejecting this construction as one that does not give equal weight to all terms in Article 17, Robinson explains that the provision in fact requires an initial determination of "whether a state is investigating or prosecuting a case (or has done so)."[224] Only if the answer to this preliminary question is "yes" does one then assess the relevant state's ability or willingness to investigate or prosecute.[225]

b. Applying the Rome Statute's Complementarity Provisions

When one applies this understanding of Article 17 to the ICC Uganda cases, the inquiry begins and ends with the first step of the articulated test. Because Uganda has neither investigated nor prosecuted the events it referred to the Court,[226] there is no complementarity question. Article 17 does not apply and the ICC cases are simply admissible. Accordingly, Uganda's willingness to see the prosecutions take place, as presumably evidenced by the referral it made, and its apparent ability to conduct these prosecutions domestically are in point

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223. Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L.F. 67, 71 (2010).

224. *Id.* at 68.

225. *Id.*

226. *See, e.g.*, Situation in Uganda, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005, ¶ 37 (Sept. 27, 2005) (noting that in its 2004 "Letter on Jurisdiction" the Ugandan government pronounced that it "has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible" for the crimes within the referred situation). This situation is, of course, subject to change. Uganda has since established a war crimes court as a special division of the Uganda High Court. *See, e.g.*, *Uganda sets up war crimes court*, BBC NEWS, May 26, 2008, http://news.bbc.co.uk/2/hi/africa/7420461.stm. This nascent court is perceived by some as part of a Ugandan plan to thwart ICC prosecutions because the pending ICC cases have impeded peace negotiations. *Id.* This development arguably adds credence to the conclusion that the Ugandan self- referral was rendered for illegitimate reasons. *See, e.g.*, Schabas, *Complementarity*, *supra* note 100, at 19-22 (noting that Ugandan President Museveni initially made the self referral in order to secure the leverage necessary to bring the country's rebel forces to the negotiating table). Indeed, more recent events make clear that the Ugandan president is hardly committed to the goals of international criminal justice. *Qaddafi Offered Refuge in Uganda,* CBS NEWS, Mar. 30, 2011, http://www.cbsnews.com/stories/2011/03/30/501364/main20048721.shtml, Despite this, it is difficult to take issue with the sentiment expressed by the head of the new war crimes division of the Uganda High Court who noted: "It is the duty of [ICC] member states to put in place mechanisms to try people who have committed atrocities . . . . The ICC has a responsibility to support us." Bill Oketch, *Uganda Set for First War Crimes Trial*, INSTITUTE FOR WAR & PEACE REPORTING, Jul. 14, 2010, http://iwpr.net/report-news/uganda-set-first-war-crimes-trial.

of fact immaterial. This disconnect between state inability/unwillingness and the question of complementarity, of course, seems counterintuitive in light of the preceding discussion. It also stands particularly at odds with the prosecutor's public acknowledgement that the principle of complementarity "was designed whereby the Court intervenes as a last resort, when States are unable or unwilling to act."[227]

Applying Robinson's conclusions, however, the Prosecutor's description of the principle represents nothing more than the "slogan version of complementarity [that] exercises a powerful grip on popular imagination,"[228] a deduction that equates to a strong, albeit inadvertent, indictment of Moreno-Ocampo.[229]The notion that the Court not act unless a state with jurisdiction is unwilling or unable to do so is not simply convenient political rhetoric; it was a fundamental consideration that drove the complementarity discussion at the Rome Conference and is also absolutely central to the ICC's ability to function as a court of last resort. Therefore, because inaction admissibility renders the relevant state's willingness and ability to prosecute of no consequence, it then ought to be the prosecutor's responsibility to ensure that his use of "admissibility by inaction" comports with the Court's intended role as an institution of last resort. This means going forward with inaction matters when (1) a state's decision not to act is "inconsistent with an intent to bring the person(s) concerned to justice"[230] or (2) is the result of some other barrier, such as when the state is comprised of "[g]roups bitterly divided by conflict [that] oppose prosecutions at each others' hands."[231] Above all, faithfulness to the intent behind the complementarity principle and the notion that the ICC is meant to function as a court of last resort requires that the prosecutor refrain from investigating or prosecuting matters whenever a state with jurisdiction is both supportive of and able to conduct the relevant investigations and prosecutions.

3. The Voluntary Referral Rendered by the Democratic Republic of Congo

Evidence that the prosecutor is not presently committed to ensuring that the ICC functions as a court of last resort is not limited to the Uganda situation, but can also be seen in some of the cases born of the second voluntary referral, that of the Democratic Republic of Congo (DRC). When the DRC first referred the situation on its territory to the ICC in 2006, the country asserted that it was not

227. Moreno-Ocampo, Nuremberg address, *supra* note 194.

228. Robinson, *supra* note 223, at 68. Ironically, Robinson elsewhere acknowledges that "ensur[ing] that serious international crimes do not go unpunished" is "the very *raison d'être* of the ICC." Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 484 (2003).

229. Robinson's article, while replete with examples of so-called "slogan complementarity," omits any references to statements made by the ICC prosecutor.

230. Rome Statute, *supra* note 1, art. 17(2)(a)-(c).

231. Moreno-Ocampo, 2003 Paper, *supra* note 105, at 5.

then in a position to conduct the necessary investigations without the Court's assistance.[232] Some two years later, however, ICC Pre-Trial Chamber I observed that the country's justice system had "undergone certain changes," such that "the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of [the Rome] Statute does not wholly correspond to the reality any longer."[233] This is arguably reflected in the fact that several of the ICC accused who are presently being tried in The Hague were being held in the DRC on domestic charges (that included crimes which fall within the jurisdiction of the Court) at the time that ICC arrest warrants were issued against them.

a. Complementarity and the Case of Thomas Lubanga Dyilo

With respect to the first accused to be tried at the ICC, Thomas Lubanga Dyilo, then-existing domestic charges caused the Pre-trial Chamber that considered the prosecutor's application for his warrant of arrest to engage in a complementarity/admissibility assessment. In accord with Robinson's interpretation set out above, the Pre-trial Chamber noted that "the first requirement for a case arising from the investigation of a situation to be declared inadmissible is that at least one State with jurisdiction over the case is investigating, prosecuting or trying that case, or has done so."[234] In this respect, the Chamber held it "is a conditio sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court."[235] Accordingly, as Lubanga was detained in the DRC with respect to charges that included genocide and crimes against humanity,[236] and his ICC case rather involved allegations of enlisting and conscripting child soldiers, the DRC proceedings did not encompass the conduct that formed the basis of the prosecutor's application for a warrant of arrest.[237] In effect, the DRC had been "inactive" with respect to the conduct that formed the basis of the ICC charges,[238] barring the need for the Pre-trial Chamber to address the state's

232. The referral letter is quoted in Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-129, Decision on the Appellant's Application for an Extension of the Time Limit for the Filing of the Document in Support of the Appeal and Order Pursuant to Regulation 28 of the Regulations of the Court (May 30, 2006). It provided in relevant part: "En raison de la situation particulière que connaît mon pays, les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus [crimes internationaux] ni d'engager les poursuites nécessaires sans la participation de la Cour pénale internationale. " Id. ¶ 3, n. 4.

233. Situation in Democratic Republic of the Congo, Case No. ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, ¶ 37 (Feb. 10, 2006).

234. Id. ¶ 30.

235. Id. ¶ 31.

236. Id. ¶ 33.

237. Id. ¶¶ 38-39.

238. Id. ¶ 41.

ability or willingness genuinely to carry out an investigation or prosecution.

In one respect, it is difficult to find fault with this narrow interpretation of the relevant statutory provision. Article 17 clearly states that "a case is inadmissible where the case is being investigated by a state which has jurisdiction over it,"[239] and there is little doubt that the disparate charges against Lubanga address different types of conduct. At the same time, the application of the "same conduct" test, which has been utilized repeatedly since the Lubanga arrest warrant decision,[240] is one that seems not to comport with the object and purpose of the Rome Statute,[241] setting too high a bar and showing inadequate deference to national proceedings. As applied, good faith domestic prosecutions of international crimes are insufficient to preclude an ICC prosecution unless the national charges are calibrated to address precisely the same conduct that is the focus of the ICC charges. This aspect of Court practice alone is likely to be used to argue against U.S. accession[242] despite the "appropriate focus" of the ICC's proceedings.[243]

Viewed more broadly, the test is one that lies at odds with the notion of the ICC acting as a court of last resort. If the International Criminal Court, with its finite resources, is meant to make any headway with respect to its anti-impunity mission, it should only be acting with respect to perpetrators who would otherwise not be held accountable for their international crimes.[244] At the same time, it is arguably incumbent upon the Court to encourage domestic proceedings, rather than to subvert or circumvent them, as national prosecutions are an indispensible aspect of the ICC anti-impunity objective. [245] In effect,

239. Rome Statute, supra note 1, art. 17(1)(a).

240. *See, e.g.*, Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-04, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest against Germain Katanga, ¶ 20 (July 6, 2007); Prosecutor v. Katanga & Chui, Case No. ICC-01/04-02/07-3, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest Against Mathieu Ngudjolo Chui, ¶ 21 (July 6, 2007); Prosecutor v. Harun & Kushayb, Case No. ICC-01/04-02/07-3, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 21 (Apr. 27, 2007).

241. VCLT, supra note 51, art. 31(1).

242. "[C]omplementarity or deference to national justice systems[] like so much else connected with the ICC [] is simply an assertion, utterly unproven and untested." John R. Bolton, The Risks and Weaknesses of the International Criminal Court from America's Perspective, 41 VA. J. INT'L L. 186, 200 (2000).

243. *See* supra note 119 and accompanying text.

244. Schabas likewise argues against the "mechanistic comparison of charges" asserting that the real assessment should be one that assesses the relative gravity of the domestic charges with respect to those of the ICC. SCHABAS, supra note 41, at 182. This, of course, would have resulted in a different outcome for Lubanga. For some compelling arguments against the same conduct test, see, for example, Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga Pursuant to Article 19(2)(a) of the Statute, ¶¶ 39-43 (Mar. 11, 2009).

245. "There has never been any doubt that the ultimate aim of eliminating impunity for international crimes cannot be achieved by a single international institution, however effective it may turn out to be. From the outset, the ICC has been created to act as a catalyst for domestic

rather than functioning to facilitate "the two overarching purposes in the Rome Statute: to . . . end impunity . . . and to encourage national investigations and prosecutions of [atrocity] crimes before resorting, if necessary, to the ICC,"[246] the same conduct test actually serves to impede their attainment. This is an obvious cause for concern that is further compounded by a recent Appeals Chamber decision on complementarity rendered in the case of Germain Katanga.[247]

b. Complementarity and the Case of Germain Katanga

Like Lubanga, Germain Katanga was detained in the DRC on national charges of genocide and crimes against humanity[248] at the time that the ICC arrest warrant was issued against him.[249] These domestic charges formed the basis of Katanga's admissibility challenge in which he asserted that the principle of complementarity precluded the ICC from hearing the case against him. After Katanga was transferred to The Hague, however, the DRC closed its national proceedings with respect to him,[250] a fact that proved of some consequence to the subsequent Appeals Chamber determination of admissibility. According to the Appeals Chamber, the admissibility of a case must be determined "on the basis of the facts as they exist at the time of the admissibility challenge."[251] As such, the Appeals Chamber found that the DRC's termination of its proceedings against Katanga rendered the state inactive with respect to the accused at the time of his complementarity challenge.[252] This fact—coupled with what might be described as an unnatural interpretation of Article 17(1)(b)[253]—resulted in

prosecutions . . . ." Dormann & Geiß, supra note 187, at 717.

246. David J. Scheffer, Article 98(2) of the Rome Statute: America's Original Intent, 3 J. INT'L CRIM. JUST. 333, 335 (2005).

247. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 73 (Sept. 25, 2009) [hereinafter Katanga Appeal Decision].

248. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19 (2)(a) of the Statute, ¶ 11 (Mar. 11, 2009).

249. Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest for Germain Katanga (July 2, 2007).

250. The DRC case file was forwarded to the ICC Registrar; this included a letter from the DRC's General Auditor of the High Military Court which provided in pertinent part that the DRC proceedings had been closed "in order to facilitate the joinder of the proceedings at the level of the ICC." Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Motion Challenging the Admissibility of the Case, ¶ 11.

251. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Judgment on the Appeal, ¶ 80.

252. Id.

253. As noted above, Article 17(1)(b) requires the Court to declare a case inadmissible when a state has investigated the case "and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state not to prosecute."

the Appeals Chamber's conclusion that there was no bar to the ICC proceedings and, accordingly, that the DRC's willingness and ability to prosecute the accused were irrelevant considerations.

In other words, pursuant to the Katanga Appeals Chamber decision, the prosecutor is not only well placed to prosecute cases that realistically can be addressed on the national level, but he is also in a position to initiate investigations and cases despite the existence of relevant, on-going national proceedings in a state with jurisdiction. Indeed, the only limitation placed upon the prosecutor's ability to pursue such matters is the requirement that the state abandon its prosecutorial efforts prior to an admissibility challenge at the ICC. Given the expense associated with the prosecution of international crimes and the state willingness evidenced to date to cede jurisdiction to the ICC, the potential for this is something that cannot easily be dismissed. The bottom line is that the Appeals Chamber decision facilitates a practice that runs directly counter to that which was intended for the Court [254] and that is wholly inconsistent with the ICC's anti-impunity mission and its potential to function as a court of last resort.

4. Summary

In sum, the Court's interpretation of the Rome Statute's complementarity provisions does not limit the ICC's exercise of jurisdiction to situations in which a state with jurisdiction is unable or unwilling to prosecute. Rather, an entire range of cases falls outside any complementarity analysis pursuant to inaction admissibility. As such, the only stopgap to potentially unnecessary ICC investigations and prosecutions is the prosecutorial decision not to pursue such matters. In effect, then, the principle of complementarity alone cannot ensure that the ICC functions as a court of last resort. Rather, the Court can only attain this status when the principle is applied in conjunction with an appropriate prosecutorial policy.

To date, however, the prosecutor has not implemented this type of process but rather has, at times, pursued a seemingly opposite course of action, arguably undermining the Court's anti-impunity goal in the process. Moreover, the case law born of the prosecutor's policy sets the stage for this problem to be exacerbated and, possibly, institutionalized. In effect, the Court's jurisprudence facilitates the commencement of ICC prosecutions despite the existence of

According to the Appeals Chamber, however, this sub-article does not apply to Katanga's case, "because the DRC did not make any decision not to prosecute [Katanga]." It rather decided "that he should be prosecuted, albeit before the International Criminal Court." Id. ¶ 82. In the opinion of this author, this analysis is not one that comports with the sub-article's ordinary meaning. Rather, the Appeals Chambers unconvincingly interprets the phrase "the State has decided not to prosecute" to mean "the State has decided that the person should not be prosecuted."

254. *See, e.g.*, Press Release, Preparatory Committee on International Criminal Court Continues Considering Complementarity between National, International Jurisdictions, U.N. Press Release L/2773 (Apr. 2, 1996).

genuine, national proceedings, provided that the latter either fail to adequately conform to the charges subsequently brought by the Court's prosecutor or are subsequently terminated in favor of the ICC prosecution.

Quite simply, the result is that the ICC is not poised to fulfill its role as a court of last resort. In the absence of this status, its prosecutions may—but will not necessarily—contribute to the Court's anti-impunity mission. In this respect, despite claims to the contrary,[255] the actions of the prosecutor and the ICC's consequent jurisprudence wholly fail to emphasize the integral role that domestic proceedings must play with respect to ensuring widespread accountability for the commission of international crimes. When coupled with the long-standing preference of the United States for national proceedings,[256] these facts mean that, at least for the time being, there is no convincing impetus for the United Sates to move forward in its relationship with the International Criminal Court.

CONCLUSION

The United States has come a long way in its relationship with the International Criminal Court. The notion that the United States should isolate and ignore the Court[257] has dramatically fallen to the wayside for reasons both pragmatic and ideological. Mending rifts with the ICC aligns both with the Obama administration's mission to repair the international reputation of the United States and Obama's "personal[] commit[ment] to a new chapter in American engagement."[258] It is likewise a practical endeavor. The ICC does not appear to be going out of business any time soon. It currently operates with the

255. "A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes." Moreno-Ocampo, 2003 Paper, *supra* note 105, at 5. On the concept of positive complementarity, for example, William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 CRIM. L.F. 59 (2007).

256. *See supra* note 108 and accompanying text. For evidence of this with respect to each of the three relevant administrations, *see* Bleich, *supra* note 26, at 286 n.18 (detailing the Clinton position in the lead up to the Rome Conference); *supra* note 52 and accompanying text (with respect to the Bush Administration); and *U.S. Engagement*, *supra* note 79, Comments of Rapp (concluding, as a representative of the Obama Administration, that national prosecutions are the "best approach").

257. The concept was first introduced by John Bolton on the heels of the Rome Conference. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations*, United States Senate, 105th Cong., 2d Sess. 28-32 (July 23, 1998) (Statement of Hon John Bolton, Former Assistant Secretary of State for International Organization Affairs; Senior Vice President, American Enterprise Institute).

258. Mark Tran, *Barack Obama Defends America's Global Image*, THE GUARDIAN, Apr. 7, 2009, *available at* http://www.guardian.co.uk/world/2009/apr/07/obama-defends-us-image (quoting Obama and also asserting that Obama is "[s]eeking to repair the damage to America's international reputation by his predecessor, George Bush").

commitment of 114 states[259] and a docket spawned in part by UN Security Council referrals.

The present policy of engagement also appears a sensible course of action in light of some key facts about the early work of the ICC. Initial concerns regarding the Court's ability to ensure fair trials and discourage international crimes have not been borne out. Predictions that the ICC would maliciously interfere with state sovereignty and engage in a practice of politicized prosecutions have not come to pass. Rather, the nascent practice of the Court provides evidence that it is committed to protecting due process rights, even when doing so will undoubtedly contribute to criticism about the ICC's ability to perform efficiently and effectively. In addition, the international response to the Court's first prosecution suggests that the ICC's operation has already begun to have a deterrent effect. Moreover, the Court's prosecutor has not pursued cases of questionable magnitude, but instead has consistently focused on decidedly grave acts intentionally committed against civilians. Of comparable significance, with the prosecutor has made an effort to proceed with the cooperation of states with jurisdiction.

Longstanding U.S. concerns with respect to the Court's ability to exercise its jurisdiction over alleged acts of aggression have been even more decisively put to rest. While the United States did not walk away from the 2010 Review Conference in Kampala with its most desired outcome, the end result of the Uganda meeting is something it can easily live with. The United States received a virtual assurance that no U.S. national, or national of a non-State Party ally, will ever be prosecuted at the ICC for the crime of aggression. Thus, the U.S. delegation is right to view the outcome of the Review Conference as a qualified success. Indeed, the fact that there is no real prospect for the Court to consider an allegation of U.S. aggression may well help to pave the way towards U.S. accession to the Rome Statute.

Nevertheless, U.S. membership is unlikely to materialize any time soon. The United States was initially drawn to back the creation of the International Criminal Court because it identified the need for a forum in which to try perpetrators of international crimes when there is no effective national forum for prosecution.[260] Accordingly, it recognizes the Court in its role as an institution "where justice will be delivered if it can't be delivered at the national or regional level."[261] This suitably aligns with the notion that the ICC is meant to function as a court of last resort, a designation that implies that the work of the Court will, by necessity, contribute to its anti-impunity goal.

It is now clear, however, that the Rome Statute alone does not dictate this

259. *The State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited April 7, 2011) (listing 114 members).

260. *See supra* note 8 and accompanying text.

261. *U.S. Engagement*, *supra* note 79, Comments of Rapp.

outcome. Contrary to the belief held by numerous member states,[262] and as the 2009 Katanga Appeals Chamber decision makes clear, the application of the Statute's complementarity provision does not dictate that the ICC can intervene only when a state with jurisdiction is unwilling or genuinely unable to investigate or prosecute. Rather, these limitations do not come into effect unless and until a state with jurisdiction has initiated relevant national proceedings.

In cases of state inaction, the prosecutor is given a blank check to proceed as he wishes, free to go forward even in instances where a state with jurisdiction is able to institute national proceedings and is desirous of prosecution. While it is indisputable that the ICC should be able to act when states with jurisdiction blatantly refuse to do so, the absence of any limitations on inaction admissibility means that the Court may address—and perhaps is presently addressing—matters that could and, therefore, should, be prosecuted at the national level. This runs counter to the notion that the ICC is a court of last resort and means that ICC investigations and prosecutions may not actually contribute to the anti-impunity mission that fostered the Court's creation.

The prosecutor's decision to initiate an investigation at the behest of a state that is seemingly able to do so itself and to pursue cases despite the existence of national proceedings suggests that he is not committed in any real sense to the notion that the ICC is meant to operate as a court of last resort. This is a troubling conclusion in light of the fact that the prosecutor's discretion, coupled with the Statute's complementarity provisions, could ensure that the Court operates in this fashion. The matter is further complicated by the fact that the prosecutor's policy has engendered regrettable jurisprudence that is likely to discourage U.S. ratification.

This is not to suggest that all is lost, however, nor is it meant to imply that the United States will disregard the prospect of eventual accession. The pursuit of questionable investigations and cases may be an additional aspect of the ICC's "teething problems,"[263] the result of impulsive decisions designed to produce quick and demonstrable results.[264] In this respect it might be argued that the prosecutor's 2009 request for authorization to initiate an investigation into the situation in the Republic of Kenya, in which the territorial state proved unable to initiate national proceedings,[265] may be seen to indicate a change in

262. *See supra* notes 202-206 and accompanying text.

263. Including self-referrals on his list of possible "teething problems" for the ICC, Cassese notes that the practice "might lead to states using the Court as a means of exposing dangerous rebels internationally, so as to dispose of them through the judicial process of the ICC." Cassese, *supra* note 113, at 436.

264. SCHABAS, *supra* note 41, at 183-84 (noting that the Prosecutor and the Pre-trial Chamber that crafted the "same conduct" test in Lubanga may have acted impetuously owing to their desire to "have a real defendant before the Court").

265. While Kenya is not "unable" to investigate or prosecute in the terms of Article 17(3), its internal division essentially precluded national proceedings. *See supra* note 99.

policy. If this can be established,[266] it would indeed represent an important first step in demonstrating the Court's ability to perform as it was intended.

Under the Statute as presently drafted and interpreted, the most immediate fix would be for the prosecutor to exercise his discretion in a manner that ensures that the ICC functions as a court of last resort. In this respect, the prosecutor could initiate and make public a clear policy under which his office will only initiate *proprio motu* investigations when there is a substantial and verifiable impediment to national proceedings. The prosecutor could likewise put states on notice that self-referrals will be managed in the same way.[267] While it might be unrealistic to expect the current prosecutor to take these steps, this would be a good way for his successor[268] to openly avow her commitment to battling impunity for international crimes by facilitating the ICC's operation as a court of last resort.

For U.S. accession, however, this may prove insufficient. Avid opponents of the Court are likely to point out that the practice of investigating and prosecuting matters that are already the subject of national proceedings could well be revived when there is no legal impediment to prevent this from happening. Accordingly, the prospect of the United States joining the Court would be better enhanced if the matter were addressed by way of statutory amendment. While it is admittedly difficult for the Assembly of States Parties to effectuate such amendments,[269] member states may ultimately decide that this particular issue calls for action. Indeed, there may be sufficient political will for this in light of the fact that complementarity, as applied, does not align with numerous member states' understanding of the principle. The most significant impetus to effectuate change might well come in time, however, if the prosecutor's future efforts cause the ICC to be "used as a 'garbage can' into which national court systems [] dump criminals that they should be punishing at

266. There has been a recent and valid call for the Kenyan situation to "mark a change in prosecutorial policy" away from the near wholesale practice of self-referrals. Andreas T. Muller & Ignaz Stegmiller, *Self-Referrals on Trial*, 8 J. INT'L CRIM. JUST. 1267, 1271 (2010). At this stage, however, it is difficult to sustain the argument that the Kenyan investigation itself represents such a change. Indeed, one might credibly argue that the Prosecutor's use of his *proprio motu* investigatory powers is simply the result of the fact that it was not feasible for Kenya to self-refer. In this respect, consider the viewpoint of Hassan Omar Hassan, *supra* note 99.

267. The fact that a state is both able to investigate and prosecute and is desirous of prosecution could be cited as substantial reasons why the investigation would not be in the interests of justice. Rome Statute, *supra* note 1, art. 53(1)(c). In the alternative, the Prosecutor cold take his time in officially responding to the referral, while publicly noting his hope for the able and willing state to live up to its "duty . . . to exercise its criminal jurisdiction over those responsible for international crimes." *Id.* preamb. ¶ 6.

268. Moreno-Ocampo's term of office is due to conclude in 2012; pursuant to the Rome Statute, he is not eligible for re-election. *Id.* art. 42(4).

269. The amendment process is particularly onerous. *See* Rome Statute, *supra* note 1, art. 121. Indeed, former ICC President Philippe Kirsch noted the importance of drafting a strong statute as "later on it will be far easier to get governments to change their minds [about the Court] than it will to change the statute itself." Brown, *supra* note 17, at 61.

the national level."[270]

In the end, of course, it is impossible to predict with precision what the future holds for the United States and the International Criminal Court. Most observers would likely guess that U.S. accession is not to be. Then again, most observers—with good reason—doubted the possibility of a Security Council referral, and yet two such referrals have now been made. Likewise, most observers of the vitriolic campaign against the Court at the start of the decade would probably never have predicted the present state of cooperative engagement between the United States and the ICC. Whatever the future may reveal, however, it seems certain that the United States will not ratify the Rome Statute until it appears that the ICC is truly functioning as a court of last resort whose investigations and prosecutions are in fact contributing to its anti-impunity endeavor. In order for this to happen, changes will have to be made.

270. Press Release L/2773, *supra* note 254 (quoting the representative of Japan).

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The Past Decade of Regulatory Change in the U.S. and EU Capital Market Regimes: An Evolution from National Interests toward International Harmonization with Emerging G-20 Leadership

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INTRODUCTION

The worldwide impact of the economic crisis on capital markets has caused United States (U.S.) and European Union (EU) regulators and policymakers to adjust their role in the context of a more interconnected global arena. The decade from 1999-2009 illustrates the changes that the U.S. has endured in its evolution from U.S.-centric attitudes, reflected in its laws and regulations affecting capital markets, to a more integrated approach. During this period, an internal evolution also took place within the EU, as its sovereign Member States moved toward an increasingly integrated approach demonstrated by the ratification of the Lisbon Treaty in 2009, which created a more centralized EU entity.[1] The downturn in the global economy and its negative effect on capital markets has made it apparent that nations cannot act independently without regard to the impact of their actions on businesses and markets around the world.[2]

The U.S. has found it difficult to adjust its internal financial policies to the global arena because of its own geography, as well as its U.S.-centric attitudes as reflected in its interactions with interconnected capital markets. On the other hand, a global role is more familiar to Europe because of its geography and the colonization previously engaged in by many of its Member States. While the individual Member States in the EU have a clearer recognition of their external global role, they have not yet settled the nagging historical tensions that persist among them.[3] These cross-border issues have resulted in Members' resistance to a centralized EU political structure, which in turn has made it difficult for the EU to internally harmonize its capital market regime with global policies.

The years between 1999 and 2009 provide a pertinent time span to examine the developments in international capital markets in light of global economic pressures[4] and significant political events in the U.S.[5] and the EU.[6] The effect of

1. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

2. The U.S. embarkation on a new era of global consciousness was reflected in a speech given in February 2009 by Mary L. Schapiro – Chairperson of the U.S. Securities and Exchange Commission (SEC or Commission) – in which she remarked that, as a result of the recent economic challenges facing the U.S., we must "move with great urgency to . . . modernize our country's regulatory system to match the realities of today's global, interdependent markets." Mary L. Schapiro, Chairperson, U.S. Securities and Exchange Commission, Address to Practising Law Institute's "SEC Speaks in 2009" Program, Washington, D.C. (Feb. 6, 2009), *available at* http://www.sec.gov/news/speech/2009/spch020609mls.htm. The same tone appeared in an earlier statement from the Department of Treasury that "the increasing interconnectedness of the global capital markets poses new challenges: an event in one jurisdiction may ripple through to other jurisdictions." U.S. DEPT. OF TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 26 (March 2008), http://www.treas.gov/press/releases/reports/Blueprint.pdf [hereinafter DEPT. OF TREASURY BLUEPRINT REPORT].

3. NORMAN DAVIES, EUROPE, A HISTORY 897, 1068 (1996).

4. Markets around the world became destabilized in Fall 2008. Capital markets started freezing up in succession: the interbank lending market, money market funds, and the commercial

the economic crisis on capital markets worldwide has caused U.S. and EU policymakers to rethink their role in a more interconnected global arena. There is an emerging recognition that national interests can no longer dominate; rather, these interests must be harmonized with the global environment in which other regions, like Asia and South America, are becoming increasingly important economically.

Analyzing the legislation, regulation, and policy during 1999 through 2009, the U.S. evolution from a nationalistic to an enhanced international consciousness occurred in four stages:

STAGE I: Reinforcing U.S. National Interests through a U.S.-centric Approach to Laws and Regulations;
STAGE II: America's Global Wake-up Call: U.S. Faces Increased Competition and International Pressures in the Intertwined Capital Marketplace;

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paper market. Banks cut back on extending trade letters of credit, thereby slowing down shipping and the trade of raw materials around the world, and further pushing down commodity prices. Global trade declined for the first time since World War II. *See* David Fiderer, *Time Rewrote History With "25 People to Blame for the Financial Crisis,"* Feb. 20, 2009, http://www.huffingtonpost.com/david-fiderer/emtimeem-rewrote-history_b_168503.html; *see* Angelo Mozilo, *25 People to Blame for the Financial Crisis,* TIME, Feb. 11, 2009, http://www.time.com/time/specials/packages/article/0,28804,1877351_1877350,00.html. *See also* David Henry & Matthew Goldstein, *The Perils of Global Banking,* BUS. WEEK, May 6, 2009, at 38. A further demonstration of the interrelationship between the world markets can be found in the crisis that arose in Dubai in 2009 in which stocks in New York and throughout Asia endured sharp losses "responding to reports that Dubai World, the emirate's investment vehicle, was seeking to delay for six months payments on all or part of its $59 billion in debt." Javier C. Hernandez, *Dubai's Investment Fund Crisis Unnerves Investors for a Second Day,* N.Y. TIMES, Nov. 28, 2009, http://www.nytimes.com/2009/11/28/business/28markets.html.

5. Important changes to the U.S. political climate occurred between 1999 and 2009 that impacted the financial markets including: the end of Democratic President Bill Clinton's second term in which major legislation was passed deregulating critical aspects of the financial marketplace; eight years of a free-market era under Republican President George W. Bush, which incorporated the attack on the World Trade Center and the start of the controversial war in Iraq; and the first year of Democratic President Obama's term in which a more globally inclusive tone has been implemented. *See Obama's Speech to the United Nations General Assembly* (Text), N.Y. TIMES, Sept. 24, 2009, http://www.nytimes.com/2009/09/24/us/politics/24prexy.text.html.

6. Between 1999 and 2009, some important political events occurred in the status of the EU as it moved toward an integrated entity. This move towards unity affected the way in which the EU has dealt with its financial markets. These include the thwarted attempts and final ratification of the Lisbon Treaty, the enlargement of the EU from fifteen to twenty-seven Member States, and the adoption of the euro as the common currency replacing the national currencies in sixteen of the Member States. *See* Lisbon Treaty, *supra* note 1; *see also* Stephen C. Sieberson, *The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit,* 14 COLUM. J. EUR. L. 445, 446 (2008); *Enlargement - Ten New Member States Join the EU,* Jan. 1, 2007 CENTRE FOR ECONOMIC POLICY RESEARCH, http://www.cepr.org/enlargement.htm; *See Romania and Bulgaria join the EU,* BBC NEWS, Jan 1, 2007, http://news.bbc.co.uk/2/hi/europe/6220591.stm; *The Euro,* EUROPEAN COMMISSION – ECONOMIC AND FINANCIAL AFFAIRS, http://ec.europa.eu/economy_finance/the_euro/index_en.htm?cs_mid=2946 (last visited Sept. 10, 2010).

STAGE III: The U.S. Recognizes, Reacts, and Responds to Global Challenges: Shoring Up the Global Competitiveness of U.S. Financial Markets Prior to the Economic Meltdown;
STAGE IV: Efforts to Harmonize National Interests with Global and Multilateral Policies: An Integrative International Approach to Global Capital Markets Initiated by the Onset of the Worldwide Financial Turmoil.

Although the four designated stages are set against a U.S. backdrop, the events that occurred and the policies that are developed within each stage are interwoven with the global environment in which they took place. Particular attention is given to the EU, which combined with the U.S., "make[s] up 70% of the world's capital market."[7]

This paper analyzes the factors within each stage as they have been shaped by the global economic events and crises, as well as by increased international pressures that have served as a catalyst for the U.S. and EU to move more rapidly toward international cooperation and harmonization of regulations, standards, and policies.

In Part I, this paper examines the stage during which the U.S. continued to focus on reinforcing national economic interests without considering their external impact. Pivotal examples include the deregulation trend reflected by the 1999 repeal of the Glass-Steagall Act[8] and the enactment of the 2000 Commodities Futures Modernization Act (CFMA),[9] which played a role in creating the environment for the worldwide financial crisis a few years later. The rules-based Sarbanes Oxley Act (SOX)[10] followed in 2002. It was widely criticized for Section 404, which has a focus on the establishment of internal

7. *See* Press Release, Charlie McCreevy, European Commissioner for Internal Market and Services, Keynote Address at Financial Reporting in a Changing World Conference (May 7, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/223&format=HTML&aged=0&language=FR&guiLanguage=fr. As an example of the EU perspective on the EU-U.S. relationship, European Commissioner President Barroso, gave a lecture at Harvard University where he discussed the content of a hypothetical letter to the U.S. President to be elected that year. He expressed: "But in these times of uncertainty, the EU needs the U.S. and – yes – the U.S. needs the EU more than ever. This view is shaped by two inescapable trends. . . . The first, of course, is globalization . . . . A second key trend in international relations today is the emergence of new powers." Press Release, Europa, 2008 Paul-Henri Spaak Lecture, Harvard University, Jose Manuel Barroso, President of the European Commission, A Letter from Brussels to the Next President of the United States of America (Sept. 24, 2008), *available at* http://europa.eu/rapid/pressReleases Action.do?reference=SPEECH/08/455&guiLanguage=en.

8. The Glass-Steagall Act is comprised of four sections in the Banking Act of 1933. *See* §§ 16, 20, 21, and 32 of the Banking Act of 1933, Pub. L. 77-66, 48 Stat. 162 (codified as 12 U.S.C. §§ 24, 78, 377 and 378).

9. Commodity Futures Modernization Act, Pub. L. No. 106-554, 114 Stat. 2763 (codified as amended at 7 U.S.C. §§1 – 27(f)) (2000).

10. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7201) (2010) [hereinafter Sarbanes-Oxley or SOX].

control systems designed to detect financial fraud, and the expensive audit of those internal control systems. Corporations complained that Section 404 rules, and the burdens imposed on businesses by the SOX-created Public Companies Accounting Oversight Board (PCAOB), created oppressive financial and procedural burdens for domestic issuers, foreign issuers within and outside U.S. borders, and independent auditors.[11]

Parts II and III address the period prior to the financial crisis during which the U.S. received its wake-up call to the expanded viability of global securities markets. These Parts examine the U.S. reaction through Securities and Exchange Commission (SEC) initiatives related to SOX and through other steps taken by the SEC, the U.S. Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) toward convergence of the International Financial Reporting Standards (IFRS) and the U.S. Generally Accepted Accounting Principles (GAAP). In addition, this paper discusses other external factors, such as the rapid growth in emerging nations and the stock exchange consolidation and harmonization that increased the pressure for changes in U.S. financial market regulation.

In Part IV, this paper analyzes the reform efforts of the newly formalized G-20[12] and of other international groups. Driven by the onset of the worldwide financial turmoil, these groups developed a strategy for making necessary adjustments in capital market regimes. This paper will also evaluate the legislative actions on financial reform taken by the U.S. and EU, which reflected the recommendations of the G-20 to inject a comprehensive harmonization of national interests with global and multilateral policies. This paper will conclude by delineating recommendations for the G-20 in setting guidelines for establishing the necessary institutional structures and by addressing questions posed by former Soviet leader Mikhail Gorbachev[13] with regard to the role and function of the G-20. The recommendations are presented in the context of the progress and challenges ahead in the new world order in which harmonization is beginning to replace introspective national interests.

11. Sarbanes-Oxley §§ 101-109; Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 17 CFR §§ 210, 228, 240, 249, 270, and 274 (2003) SEC Release No. 33-8238 (June 2003); Exchange Act Release No. 34-47986 (June 2003).

12. *See About G-20*, G-20.ORG, http://www.g20.org/about_what_is_g20.aspx (last visited May 3, 2010) [hereinafter About G-20].

13. Mikhail Gorbachev, *What Role for the G-20?*, N.Y. TIMES, Apr. 27, 2009, http://www.nytimes.com/2009/04/28/opinion/28iht-edgorbachev.html.

I.
STAGE ONE: REINFORCING U.S. NATIONAL INTERESTS THROUGH A U.S.-CENTRIC APPROACH TO LAWS AND REGULATIONS

The repeal of the Glass-Steagall Act[14] in 1999 and the passage of the Commodities Futures Modernization Act of 2000 (CFMA)[15] set the U.S. backdrop for what ultimately precipitated the financial crisis of 2009: the risky financial instruments created by Wall Street and invested in worldwide. These legislative actions were followed by the enactment of SOX in 2002.[16] It was passed in quick reaction to the accounting fraud scandals. SOX is applicable to every publicly traded company, both domestic and foreign, along with their officers and directors.[17] A methodical analysis of the underlying problems that developed externally as a result of the legislators' U.S.-centric approach requires an examination of the requirements of SOX Section 404 and a review of the way in which the PCAOB, which SOX created, operates.

A. Important U.S. Statutes Deregulating Functions within Financial Institutions and Clarifying the Legitimacy of Derivative Instruments

In 1999, Congress repealed the depression-era Glass-Steagall Act, which had separated commercial banking from investment banks; the repeal was included as a small part of the Financial Modernization Act ("Gramm-Leach-Bliley").[18] The repeal had a significant impact on the way banks and Wall Street investment companies interacted. For more than 60 years, Glass-Steagall had prevented commercial banks from engaging in the business of underwriting corporate securities, but after its repeal the floodgates were then opened for banks to "re-enact the same kinds of structural conflicts of interest that were endemic in the 1920s."[19] The newly created interrelationship allowed banks to

14. The Glass-Steagall Act, 12 U.S.C. §§ 24, 78, 377 and 378.

15. Commodity Futures Modernization Act, Pub. L. No. 106-554, 114 Stat.2763 (codified as amended at 7 U.S.C. §§1 – 27(f)). Senator Phil Gramm (R-TX) successfully added it as a last-minute amendment of an omnibus appropriations bill. *A Bill That Was No Midnight Surprise,* WASH. POST, Oct. 10, 2008, *available at* http://www.washingtonpost.com/wpdyn/content/article/2008/10/09/AR2008100902695.html?nav=hcmodule.

16. Sarbanes-Oxley of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 7201) (2002).

17. *Testimony Concerning Implementation of the Sarbanes-Oxley Act of 2002 Before the S. Comm. on Banking, Housing and Urban Affairs*, 108th Cong. (2003) (statement of William H. Donaldson, Chairman, U.S. Securities and Exchange Commission) [hereinafter Testimony Concerning Implementation of SOX].

18. Financial Modernization Act (Gramm-Leach-Bliley Act), Pub. L. No. 106-102, 113, Stat.1338 (Nov. 12, 1999) (codified as amended in scattered sections of 12 and 15 U.S.C.). The Gramm-Leach-Bliley Act repealed the Glass-Steagall Act, 12 U.S.C. §§24, 78, 377 and 378.

19. Repeal of Glass-Steagall has caused the Subprime Crisis, Before the H. Comm. on Financial Services, 110th Cong. (Oct. 2, 2007) (Statement of Robert Kuttner, economics and financial journalist), *available at* http://www.electionnews2008.com/glass-steagall-repeal-caused-

get deeply into underwriting mortgage-backed securities and issuing exotic derivatives that were at the very heart of the credit crisis.[20]

Furthermore, in retrospect, the Commodities Futures Modernization Act of 2000 provided a boost toward a greater deregulated financial environment. [21] It was passed in December 1999, the last month of President Clinton's second term in office. The thrust of the CFMA was the specific exclusion from regulation of over-the-counter (OTC) derivatives – such as credit default swaps,[22] as long as the parties trading were large institutions or wealthy individuals. This specific exclusion encouraged the extensive use of innovative derivatives; the high risk, exotic financial instruments that created a fertile environment for the later worldwide economic upheaval.

B. Passage of the Sarbanes-Oxley Act

The passage of the rules-based[23] Sarbanes-Oxley Act (SOX) in 2002 arose from Congressional attempts to restore investor confidence in the securities markets in response to the devastating damage suffered from massive accounting frauds.[24] President George W. Bush characterized SOX as "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[25] It also had a profound effect on domestic public issuers, as

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subprime-disaster.htm.

20. *See Glass-Steagall Act 1933*, N.Y. TIMES, Nov. 12, 2008, http://topics.nytimes.com/top/reference/timestopics/subjects/g/glass_steagall_act_1933/index.html.

21. Commodity Futures Modernization Act, Pub. L. No. 106-554, 114 Stat.2763 (codified as amended at 7 U.S.C. §§1 – 27(f)). Senator Phil Gramm (R-TX) successfully added it as a last-minute amendment of an omnibus appropriations bill. Phil Gramm, *A Bill That Was No Midnight Surprise,* WASH. POST, Oct. 10, 2008, http://www.washingtonpost.com/wpdyn/content/article/2008/10/09/AR2008100902695.html?nav=hcmodule.

22. Credit default swaps are complex derivative instruments that act as an insurance policy where one party must pay another in the event the bonds lose value. Credit-default swaps played a major role in the failure of American International Group (AIG) in Fall 2008. *See AIG and the Trouble with 'Credit Default Swaps',* NPR, Sept. 18, 2008, http://www.npr.org/templates/story/story/php?storyId=94748529. *See U.S. Urges Against Derivatives Regulation*, L. A. TIMES, Nov. 10, 1999, at C4; *see also Greenspan Urges Congress to Fuel Growth of Derivatives,* N. Y. TIMES, Feb. 11, 2000, http://query.nytimes.com/gst/fullpage.html?res=990CEED7103EF932A25751C0A9669C8B63; Barbara Crutchfield George, Lynn V. Dymally & Maria K. Boss, *The Opaque and Under-Regulated Hedge Fund Industry: Victim or Culprit in the Subprime Mortgage Crisis*, 5 N.Y.U. J. LAW & BUS. 359, 388 (2009).

23. According to one author, "a rule generally entails an advance determination of what conduct is permissible leaving only factual issues to be determined by the frontline regulator. . ." while "a principle may entail leaving both specification of what conduct is permissible and factual issues to the frontline regulator." Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation,* 45 AM. BUS. L.J. 1 (2008).

24. Serious acts of accounting fraud, misconduct, and erosion of ethical standards were exposed in high-profile cases like Enron, WorldCom, Tyco, and Adelphia. *See* JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS FROM ENRON TO REFORM 13 (2006) (briefly explaining the legal problems arising in these cases).

25. *President Bush Signs Corporate Corruption Bill*, THE FEDERALIST SOCIETY, July 30,

well as a significant impact abroad. In the rush to pass SOX in 2002, Congress failed to fully recognize the ramifications that some of its stringent provisions might have beyond U.S. borders. This myopic vision resulted in complaints from foreign businesses and auditors about the negative extraterritorial effect[26] and complaints from EU officials that Congress had failed to confer with them.[27]

There were two sections that were particularly burdensome to U.S. and non-U.S. public issuers: (1) the internal control reporting requirements for all public companies in Section 404;[28] and (2) the establishment of the Public Company Accounting Oversight Board (PCAOB) and its original Auditing Standard No. 2 (AS2).[29]

1. Rules of SOX Section 404 Creating Burdens on Domestic and Foreign Businesses

One of the primary reasons for the SOX legislation was to protect investors from accounting fraud by mandating processes that would produce more reliable financial information.[30] To accomplish this, Congress included stringent rules, later implemented by the SEC, that require public companies to maintain an adequate internal control system, require an assessment of the effectiveness of the system, and require outside auditors to evaluate the internal control assessment, as well as a certification by the CEOs and CFOs that the reports are accurate.[31] Unfortunately, the legislation was passed with such haste that there was no solicitation of cooperation from other countries that would be affected by its cross-border application.[32]

2002, http://www.fed-soc.org/publications/id.302,css.print/default.asp.

26. Section 404 of SOX and the PCAOB former Auditing Standard 2 (AS2) were criticized because they created oppressive financial and procedural burdens for non-U.S. issuers and independent auditors trying to comply with the rules. *Id.* Public Company Accounting Oversight Board, Auditing Standard No. 2: An Audit of Internal Control over Financial Reporting Performed in Conjunction With an Audit of Financial Statements (superseded by Auditing Standard No. 5) (March 9, 2004), *available at* http://www.pcaobus.org/Standards/Standards_and_Related_Rules/Auditing_Standard_No.2.aspx [hereinafter PCAOB Auditing Standard No. 2].

27. David Wright, Director of Financial Services Policy and Financial Markets (2000-2007) of the European Commission complained that SOX was "passed without the slightest regard to third world countries and with no consultation." *See* Timon Molloy, *Half-Time and a Pause for Breath,* 16 COMPLIANCE MONITOR 1 (June 2004).

28. Sarbanes-Oxley § 404, 15 U.S.C. § 7201 (2002); *see also* SEC, *Final Rule: Management's Report Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Aug. 28, 2008, *available at* http://www.sec.gov/rules/final/33-8238.htm.

29. PCAOB Auditing Standard No. 2, *supra* note 26.

30. Roel C. Campos, Comm'r, SEC, *SEC Regulation Outside the United States*, Address at 11th Annual SEC Regulation Outside the United States Conference (March 8, 2007), *available at* http://www.sec.gov/news/speech/2007/spch030807rcc.htm.

31. Sarbanes-Oxley Act §§ 302, 404.

32. Molloy, *supra* note 27 (referring to the complaint by a European commissioner that there had been no consultation).

Section 404 is the most problematic of the mandates in SOX because the implementation of the internal control provisions proved to be very difficult, expensive, and time consuming for both domestic and foreign issuers, particularly for small public companies.[33] The purported benefits of Section 404, such as an end to many fraudulent accounting practices and the increased confidence of compliance, are difficult to measure, while the costs of compliance are immediate and easy to identify.[34] SOX critics were bolstered by former Treasury Secretary Henry Paulson's public stance that endorsed the broader approach of "whether U.S. corporate governance and listing requirements strike the right 'regulatory balance' between protecting investors and imposing undue restraints and cost on business."[35]

2. Establishment of the PCAOB in SOX Creating Burdens on Domestic and Foreign Businesses

The PCAOB is a private sector, non-profit corporation created in the SOX legislation to oversee the auditors of public companies, i.e., to audit the auditors.[36] The SEC is vested with the authority to appoint Board members, as well as oversight and enforcement authority. No rule of the Board becomes effective without prior approval of the SEC.[37] The Board's authority to inspect extends only to registered accounting firms, but the authority to inspect does not extend to public companies themselves.[38]

Congress established the PCAOB in Section101 of SOX for the purpose of engaging in a compulsory, independent oversight of auditors "in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports."[39] Auditors lost their right to self-regulation after it was demonstrated that they failed in their duty as gatekeepers when their role in the accounting scandals with Enron, WorldCom

33. *See The Trial of Sarbanes-Oxley, Regulating Business,* ECONOMIST, April 22, 2006 http://www.economist.com/node/6838442?story id=E1 GRPRQQN.

34. *See* Clyde Stoltenberg, Kathleen Lacey, Barbara Crutchfield George & Mike Cuthbert, *A Comparative Analysis of Post-Sarbanes-Oxley Corporate Governance Developments in the U.S. and European Union: The Impact of Tensions Created by Extraterritorial Application of Section 404*, 43 AM. J. COMP. L. 457, 462 (2006).

35. Krishna Guha & Jeremy Grant, *Paulson to Call for Rethink on US Rules*, FIN. TIMES, Nov. 20, 2006, at 1. As former Goldman Sachs chairman, Mr. Paulson had a broad business-oriented perspective. He understood the global competitive challenge to the U.S. capital markets if the U.S. persisted in its rules-based financial regulatory system. *Id.*

36. Sarbanes-Oxley Act §101; *see also* Sarbanes-Oxley at Four: Protecting Investors and Strengthening Markets Hearing before the House Committee on Financial Services, 109th Cong. (2006) (statement of Christopher Cox, SEC Chairman).

37. Sarbanes-Oxley Act §108.

38. Daniel L. Goelzer & Marilyn Weimer, *Inspecting the Watchdogs – An Overview of the PCAOB's Inspection Program,* REV. OF SEC & COMMODITIES REGULATION, Mar. 15, 2006, at 35.

39. Sarbanes-Oxley Act §101.

and others was revealed.[40] However, the creation of the PCAOB caused so much irritation in the business community that in 2007, a Nevada-based accounting firm and a number of groups, including the conservative Free Enterprise Fund, brought a lawsuit attacking the constitutionality of the Board.[41] If the lawsuit had been successful, it would have invalidated SOX.[42]

a. Problems Related to Foreign Audit Firms Inspections

SOX authorizes the PCAOB to inspect U.S. and non-U.S. registered firms "for the purpose of assessing compliance with certain laws, rules, and professional standards in connection with a firm's audit work for clients that are 'issuers' as that term is defined in the [Securities and Exchange] Act."[43] Section 106 of SOX includes a subsection titled "Inspections of Foreign Registered Public Accounting Firms", which was implemented through rules issued by the

40. John C. Coffee, Jr., *Understanding Enron: 'Its About the Gatekeepers, Stupid'*, 57 BUS. LAW. 1403 (2002).

41. Free Enterprise Fund v. Public Company Accounting Oversight Bd., No. 06-0217, 2007 WL 891675 (D.D.C. Mar. 21, 2007) (Robertson, J.); *see also* Adele Nicholas, *SOX Under Fire: Ken Starr Fires First Shot in War Against Sarbanes-Oxley,* INSIDE COUNSEL, Apr. 2006, at 20.

42. The argument by the plaintiffs in their lawsuit against the PCAOB rested on the fact that an administrative agency (the SEC), not the President, had been given comprehensive control over the exercise of the duties of the Board, which is considered an independent executive agency because its members are removable only for cause, not at will. *Free Enter. Fund*, 2007 WL 891675 (Robertson, J.). The lawsuit had broad implications because SOX does not contain a severability clause that ordinarily would allow Congress to change part of the law without affecting other provisions. *See* Theo Francis, *These Men Could Kill Sarbox,* BUS. WK., Nov. 30, 2009, at 40. Thus, a decision in which the PCAOB is found unconstitutional could have resulted in the invalidation of the entire Sarbanes-Oxley Act and required an ensuing reconsideration - and possibly a tedious reenactment - of the statute by Congress. *See* Stephen Taub, *Judge Throws Out Suit Challenging PCAOB,* CFO.COM, Mar. 22, 2007, http://securities.stanford.edu/news-archive/2007/20070322_Dismissal102805_Taub.html; David M. Katz, *PCAOB Counters Legal Attack on Sarbox*, CFO.COM, May 19, 2006, http://www.cfo.com/article.cfm/6965356/

c_6966781?f=home_todayinfinance. In March of 2007, a U.S. District Court judge dismissed the lawsuit and granted summary judgment in favor of the PCAOB. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008); *see also* Chad N. Eckhardt, *Free Enterprise Fund v. Public Company Accounting Oversight Board: The Decision that Corporate America May Forever be Waiting For,* 36 N. KY. L. REV. 143 (2009). The case was then taken to the U.S. Court of Appeals for the District of Columbia where, in a split decision, the court affirmed the lower court's support of the constitutionality of the PCAOB in August 2008. *Free Enter. Fund*, 537 F.3d 667. *See also* Michael R. Keefe, *The Constitutionality of the Double For-Cause Removal Restriction: Free Enterprise Fund v. Public Company Accounting Oversight Board,* 77 U. CIN. L. REV. 1653, 1666-67 (2009) (describing Judge Kavanaugh's originalist approach). Fueled by the supportive language in the dissent, the parties appealed the majority decision of the Court of Appeals in favor of the PCAOB to the Supreme Court and certiorari was granted in May 2009. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. et al., *cert. granted* (U.S. May 18, 2009) (No. 08-861). The decision issued by the Supreme Court on June 28, 2010 supports the constitutional validity of the PCAOB and, thus, SOX remains intact. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

43. *See Inspected Firms,* PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, http://pcaobus.org/Inspections/Pages/InspectedFirms.aspx (last viewed Aug. 22, 2010).

PCAOB.[44] Thus, any non-U.S. public accounting firm that prepares or furnishes an audit report with respect to any U.S.-listed public company, whether domestic or foreign, is subject to SOX and the rules of PCAOB. The extraterritorial application included in that section was a source of frustration in Europe.[45]

b. Early Problems Related to the PCAOB's Original Auditing Standard No. 2 (AS2)

SOX Section 103 provides that the PCAOB should establish rules governing auditing, quality control, and ethics standards. As directed, the PCAOB developed Auditing Standard No. 2 "to provide for an integrated audit of both internal control over financial reporting and the financial statements themselves."[46] There were bitter complaints about the vague and unnecessarily complex rules in AS2 during the four years of its application, before being substantially improved and replaced with AS5 in 2007.[47]

During the period of AS2 applicability, the PCAOB came under intense criticism from domestic and foreign companies and auditing firms in two areas. First, the lack of clarity in AS2 (a document over 180-pages) prompted auditors to require excessive internal control checks. Businesses and audit firms argued these checks were both unnecessary and costly[48] and were the cause for overkill by auditors in their quest to meet compliance requirements. Second, inspections of domestic and foreign registered public accounting firms were viewed as intrusive as they "audit[ed] the auditors."[49] The argument was that AS2's lack of clarity prompted auditing firms to overreact and require excessive checks to ensure compliance.[50] The Institute of Management Accountants blamed the SEC for not providing sufficient guidance on the scope of management's

44. Sarbanes-Oxley Act §106(a); PCAOB Rule 4012.

45. *See* Editorial, *Regulatory Creep from Across the Atlantic,* FT.COM, Sept. 20, 2006, http://www.ft.com/cms/s/0/db0d6f8a-4843-11db-a42e-0000779e2340.html#axzz1Hrrce8zd.

46. *Board to Consider Proposing a Revised Auditing Standard on Internal Control over Financial Reporting,* PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD (Dec. 5, 2006), http://www.pcaobus.org/News and Events/News/3006/12-05.aspx. The SEC approved the original A2 standard and it "serves as a companion to the SEC's rule implementing Section 404(a) of the Act, which requires companies annually to provide their managements' assessments of the effectiveness of internal control." *Id.*

47. *See* Jeremy Grant & Chrystia Freeland, *SEC Chairman Defends Sarbox*, FIN. TIMES, Aug. 2, 1006, at 20; Sarah Johnson, *How Old Are Ye, PCAOB?,* CFO.COM, April 25, 2008, http://www.cfo.com/article.cfm/11114524?f=related (listing 185 total pages dedicated to guidance for auditions in its facts and figures about PCAOB on its 5th birthday).

48. *Id.* It is interesting to note that public accounting firms that were targets of SOX ironically have ended up profiting from Section 404 by offering costly compliance services for internal controls. *See Ernst & Young Internal Controls,* ERNST & YOUNG, http://www.ey.com/US/en/Services/Advisory/Risk/Internal-Controls (last viewed May 1, 2010).

49. *Ernst & Young Internal Controls, supra* note 48.

50. *Id.*

internal control compliance checks, leaving the void to be inadequately filled by the PCAOB.[51]

As discussed later in this paper, most of the criticisms of AS2 have been addressed in the principles-based approach used in the PCAOB's adoption of AS5 as the replacement for AS2.

II.
STAGE TWO: AMERICA'S GLOBAL WAKE-UP CALL: U.S. FACES INCREASED COMPETITION AND INTERNATIONAL PRESSURES IN THE INTERTWINED CAPITAL MARKETPLACE

A. Period of Transition (from Stage One into Stage Two)

The U.S. received a firestorm of criticism from issuers mandated to meet SOX requirements, particularly small companies and the foreign issuers subject to the Act's extraterritorial application of Sarbanes-Oxley.[52] Significant negative press on SOX emanated from evidence that the largest international Initial Public Offerings (IPOs) were now taking place outside of the U.S. Foreign issuers complained that there was not enough time for them to comply with the SOX Section 404 management assessment requirement. Along with the vociferous criticisms about the flaws in Section 404, listed companies blamed the vague and confusing rules in the PCAOB guidelines in AS2 (which were used as a default framework to the SEC rule for preparation of audits) for the nitpicking and the unnecessary, expensive work by their independent auditors.[53]

The negative reaction from both foreign and domestic issuers jolted U.S. financial policymakers into recognizing that they had inadvertently ignored the way in which the financial world was changing. Policymakers began to realize that their actions had created stronger competition for Wall Street and caused the loss of a significant number of IPOs, as issuers turned to non-U.S. public markets that had grown stronger in the new global economy. It became clear that if some remedial action was not taken, the United States would no longer play the commanding role it did during the second half of the twentieth century as a source of global capital. While U.S. capital markets remained "the largest, most liquid, and efficient in the world, . . . in recent years . . . more companies have turned to overseas markets to raise capital."[54]

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51. *Id.*

52. Stoltenberg, et al., *supra* note 34.

53. In a survey of senior executives at 334 companies based in the U.S., U.K., Germany, France, India, China, and Japan, the Financial Services Forum found that the most important factor in a firm's decision to delist from a U.S. exchange was not availability of capital, but rather accounting standards, SOX, or the litigation environment in the United States. THE FINANCIAL SERVICES FORUM, 2007 GLOBAL CAPITAL MARKETS SURVEY (Dec. 11, 2007).

54. *Id.* In 2006, more capital was raised through initial public offerings on the Hong Kong

Not only has the share of capital raised through IPOs and secondary offerings on global public markets fallen since 2002, but more U.S. companies are choosing to list shares overseas than on U.S. capital markets.[55] Larger overseas capital markets make it "easier for foreign companies to raise investment capital closer to home," but even "when companies do decide to list outside their home country, they are increasingly looking to non-U.S. markets."[56] Professor Luigi Zingales, the distinguished University of Chicago economist, argues that most of the U.S. losses have nothing to do with regulation, but simply result from the fact that other capital markets are becoming better.[57] He asserts that Americans are good at playing the game the American way, but there is a need to recognize that the U.S. can no longer cling to the narrow perception that it has "the most competitive team in the world."[58] Thus, it can be argued that the two major sources of increased competition involve a combination of rising economic power and wealth in other markets, and negative perceptions regarding the burden of market regulation in the U.S.

B. Factors Involved in Declining U.S. Competitiveness Against Foreign Rivals

1. Opinions Regarding Reasons for the Decline

A number of varying opinions were expressed about the reasons for the declining competitiveness of U.S. capital markets. New York Mayor Michael Bloomberg and Senator Charles Schumer released a report in January 2007, citing problems posed by the threat of securities litigation and overly complex regulation as the main causes of the decline.[59] Others, however, suggested that the trend toward listing in London and Hong Kong "reflect[ed] the development of those markets, as well as advancements in technology."[60] Still others

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Exchange than on the New York Stock Exchange and NASDAQ combined. *Id.*

55. *Id.*

56. *Id.*

57. Luigi Zingales, Remarks at the Corporate Governance Standards and Capital Market Competitiveness Conference, Transatlantic Corporate Governance Dialogue: Is Wall Street Losing Its Competitive Edge? (Oct. 9, 2007), *available at* http://www.tcgd.org/2007/presentations.php; *see also* Philip Stephens, *America Is Still Indispensable but It Must Work With Others,* FIN. TIMES, Nov. 2, 2007, http://www.ft.com/cms/s/0/41c7b9e4-8897-11dc-84c9-0000779fd2ac.html#axzz1GYO29aiG.

58. Zingales, *supra* note 57.

59. Press Release, Senator Charles Schumer, Bloomberg Report: NY in Danger of Losing Status as World Financial Center within 10 Years Without Major Shift in Regulation and Policy (Jan. 22, 2007), *available at* http://schumer.senate.gov/new_website/record.cfm?id=267787.

60. Dan Andrews, *Move Away From New York A Natural Progression,* INT'L FINANCIAL L. REV., Jan. 1, 2007, *available at* http://www.iflr.com/Article/1983807/Search/Move-away-from-New-York-a-natural-progression.html?OrderType=1&Keywords=Move+Away+From+New+York+A+Natural+Progression. "Companies from Europe and Asia no longer need to list in New York, as a matter of necessity, and shares will trade in New York, London, Dubai, Hong Kong or Tokyo, depending on where the demand is." *Id.*

hypothesized that New York's comparative decline of market share in the global economy was "probably in large part a simple reflection of the growth of the rest of the world."[61] Furthermore, the weakening dollar could be seen as aggravating the apparent shift.[62] The shift toward Europe, in particular, could be attributed in part to the expansion of the "Eurozone", thereby increasing the appeal of the currency.[63] From a broader perspective, it has been suggested that "the fact that economies that were closed to outside investment a generation ago are now creating systems of market capitalism should be seen as a victory for the United States, not a defeat."[64]

2. U.S. Strict Regulatory Environment Cited as a Factor in Declining Competitiveness

a. The Impact of Regulation on Listings

Following the mid-term elections in 2006, Treasury Secretary Henry Paulson acknowledged in a speech to the Economic Club of New York that the requirements of SOX and the revamped accounting rules might discourage foreign companies from listing in the United States financial markets. He attributed the decline in foreign listings to "a complex and confusing regulatory structure and enforcement environment . . . and new accounting and governance rules which, while necessary, are being implemented in a way that may be creating unnecessary costs and introducing new risks to our economy."[65] While acknowledging that post-Enron legal and regulatory changes had improved transparency and accountability at companies and restored investor confidence, he also observed that lawmakers and regulators had gone too far and that it was time for a reassessment.[66] Contemporaneously, the accounting profession also issued reports calling both for relaxed standards of liability[67] and for

61. "According to Goldman Sachs, the United States' share of global gross domestic product fell to 27.7 percent in 2006 from 31 percent in 2000. In the same period, the share of Brazil, Russia, India and China—the rapidly growing emerging markets, referred to as the BRICs—rose to 11 percent from 7.8 percent. China alone accounts for 5.4 percent." Daniel Gross, *The U.S. Is Losing Market Share. So What?*, N.Y. TIMES, Jan. 28, 2007, http://www.nytimes.com/2007/01/28/business/yourmoney/28view.html.

62. "Even adjusting for the differential power of currencies in their home markets, growth in the United States has lagged global growth over the last 10 years." *Id.*

63. *Id.*

64. According to Jim O'Neill, head of global economic research in the London office of Goldman Sachs, "Many of the countries that are doing well are mimicking the best of what America has stood for—globalization and the export of the American capital markets culture. There's nothing that New York and U.S. policies can do about it unless they want to roll back globalization." *Id.*

65. Heidi Moore, *Paulson Attacks "Confusing" US Regulatory Structure*, FIN. NEWS ONLINE US, Nov. 21, 2006, http://www.financialnews-us.com/?page=ushome&contentid=1046681144.

66. *Id.*

67. The report, issued by the heads of the six largest auditing firms in the world, "did not offer

replacement of static quarterly financial statements with real-time, internet-based reporting encompassing a wider range of performance measures.[68]

Commentators suggested that events were confirming the initial concerns. The number of foreign companies listing on the New York Stock Exchange fell to an average of eighteen per year between 2003 and 2005 from an average of forty-eight per year between 2000 and 2002.[69] As a result, "exchanges in Brazil and India are attracting a healthier proportion of their domestic issues." [70] Furthermore, exchanges "perceived to have a lighter regulatory touch . . . are winning foreign listings that would traditionally have gone to New York. For [London], these have included notable Russian listings. For Hong Kong it is Chinese companies."[71] The chairman of the Cato Institute at the time noted, "the average 'listing premium'—the benefit that companies receive by listing their stocks on American exchanges—has declined by 19 percentage points since 2002."[72] He claimed that "[t]his explains why the percentage of worldwide initial public offerings on our exchanges dropped to 5 percent [in 2006], from 50 percent in 2000."[73]

b. Recommendations of the Committee on Capital Markets Regulation on SOX (2007)

In September 2006, a group of high-profile investment banking executives, hedge fund managers, corporate chiefs and professors formed a new independent committee ("The Committee on Capital Markets Regulation") to

specific proposals on how liability could be restricted while continuing to protect investors if auditors failed to do a conscientious job." *A Report by The World's Largest Auditors Urges Relaxed Standards for Liability,* FIN. NEWS ONLINE US, Nov. 8, 2006, http://www.financialnews-us.com/?page=uspressdigest&contentid=1046641948.

68. Barney Jopson, *Accountancy Firms Map Out New World,* FIN. TIMES, Nov. 8, 2006, at 19.

69. Michael Fosh, Herbert Smith & Teresa Ko, *Asian Equity: All Aboard,* INT'L FIN. L. REV. (Nov. 2006), http://www.iflr.com/default.asp?page=10&PUBID=33&ISS=22694&SID=659385&LS=EMS110214.

70. *Id.*

71. *Id.*

72. William Niskanen, *Enron's Last Victim: American Markets,* N.Y. TIMES, Jan. 3, 2007, *available at* http://www.select.nytimes.com/search/restricted/articlr?res=F30E1FFD3C540C708CDDA8089 4DF404482.

73. And the Chairman of the Cato Institute suggested that other costs associated with SOX might be even more important: "For example, more stringent financial regulations and increased penalties for accounting errors may make senior managers too risk-averse. Most chief executives are not accountants, so the requirement that they personally affirm tax reports – at the risk of jail time should anything be amiss – may make them reluctant to partake in perfectly legitimate activities." *Id.* With respect to venture-capital-backed companies, the National Venture Capital Association issued a report which included the finding that "57 percent of 200 investors surveyed say there will be a growing propensity in the industry to take American companies public in overseas markets in 2007." Matt Richtel, *Looking for Best Place to Take a Company Public, Some Look Overseas,* N.Y. TIMES, December 22, 2006, *available at* http://www.nytimes.com/2006/12/22/business.worldbusiness/22venture.html?ref=business.

evaluate "whether U.S. capital markets regulations [were] making American companies less competitive than their foreign rivals."[74] At the time, it was noted that European merger and acquisition activity was outpacing that of the U.S., and that the Asia Pacific region excluding Japan had also hit record levels, while the U.S. market was showing only modest growth.[75] Treasury Secretary Paulson endorsed the committee's mission, noting, "this issue is important to the future of the U.S. economy and a priority for me." [76] Similarly, John Thain, the then the New York Stock Exchange (NYSE) Chief Executive, echoed the concern about the flight of capital markets activities to foreign shores as the U.S. equity market limped along.[77]

At the end of November 2006, the Committee on Capital Markets Regulation issued its interim report, calling for a sweeping overhaul of securities market regulations.[78] It recommended raising the standard for indictments brought by the government or suits brought by private lawyers against companies, and urged the creation of policies to keep the SEC from adopting rules that impose high costs on business.[79] The report contained thirty-two recommendations over four major categories: shareholder rights;[80] the regulatory process;[81] public and private enforcement;[82] and the effect of SOX.

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74. Heidi Moore, *Industry Leaders Push To Ease US Regulations,* FIN. NEWS ONLINE US, Sept. 12, 2006, http://www.financialnews-us.com/?page=ushome&contentid=1045469358.

75. *Id.*

76. Press Release, Committee on Capital Markets Regulation New Independent Non-Partisan Committee to Study Capital Markets Regulation and Make Recommendations to Key Policy Makers (Sept. 12, 2006), http://www.capmktsreg.org/pastpress_releases.html#9_12; *see also id.*

77. Heidi Moore, *Committee Recommends Reform Of US Capital Markets,* FIN. NEWS ONLINE US, Nov. 30, 2006, http://www.financialnews-us.com/?page=ushome&contentid=1046712412.

78. Interim Report of The Committee on Capital Markets Regulation, Nov. 30, 2006, *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf [hereinafter CCMR Interim Report 2006].

79. Floyd Norris & Stephen Labaton, *Panel to Urge Rewriting Rules to Aid Companies,* N.Y.TIMES, Nov. 30, 2006, http://www.nytimes.com/2006/11/30/business/30regs.html.

80. "[T]he committee's report endorsed majority shareholder voting and requiring shareholder authorization for any poison pill takeover defenses." Heidi Moore, *Committee Recommends Reform of US Capital Markets,* FIN. NEWS ONLINE US, Nov. 30, 2006, http://www.financialnews-us.com/?page=ushome&contentid=1046712412.

81. "[T]he committee endorsed a move to regulation based on principles rather than specific laws, as favored by the UK's Financial Services Authority . . . and the importance of cooperation among federal regulators and state-specific efforts." *Id.*

82. "[T]he committee . . . pushed for reform of the tort system, which governs class-action law suits against companies." It also recommended "criminal enforcement against companies should be a last resort, reserved for companies that have become criminal enterprises from top to bottom. We should not hold outside directors responsible for corporate malfeasance that they cannot possibly detect." *Id.*

C. *International Pressures Impacting Position of the U.S. in the Intertwined Capital Marketplace*

1. Relatively Rapid Growth in Emerging Nations

While the emerging economies (such as Brazil, Russia, India and, China – collectively referred to as the BRIC countries – and the ASEAN countries) account for less than fifteen percent of global stock market capitalization, they produce over forty percent of global exports, contribute fifty percent of global GDP adjusted for purchasing power parity, and hold seventy percent of the world's foreign exchange reserves.[83] Their export growth and comparatively high savings rates have helped produce their high foreign exchange reserves, giving them a newfound level of economic power among the nations of the world. Emerging economies' critical position in global dispersed manufacturing and developed-country supply chains has given them leverage to go along with their power. Like Japan in the 1980s, China's rising prominence in the international monetary and financial system could be "linked to its sudden emergence as a major creditor country."[84] It has "suddenly emerged as a public authority with considerable clout in the international financial system because of its influence over very large international assets."[85]

With the BRIC economies growing and becoming more open, it is no wonder that they are becoming bigger players in the global economy and providing alternatives to the traditional Triad (Europe, North America, and Japan) markets as sources of capital. While economic reform in the big emerging economies can "improve global welfare, particularly if [the countries] are incorporated into multilateral institutions and are induced to play by their rules," it is also true that "more efficient nations become stronger economic competitors."[86]

In addition to their growing economic power and leverage, some of the big emerging economies' other traits are also important to the global competitive

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83. MIKE W. PENG, GLOBAL BUSINESS 5 (2009).

84. Gregory Chin & Eric Helleiner, *China as a Creditor: A Rising Financial Power?*, 62 J. OF INT'L AFF. 87, 88 (2008). Chin and Helleiner also explain:

> China became a net creditor only in 2003, but its net foreign assets have accumulated very rapidly since then, totaling US$1.022 trillion by the end of 2007. The most dramatic symbol of China's growing creditor position has been its foreign exchange reserves, which rose to a total of US$1.7 trillion by mid-2008. China's creditor status has emerged alongside the country's rapidly growing current account surplus, which is presently the largest in the world (and valued at approximately 11 percent of China's GNP).

Id.

85. *Id.* at 89.

86. Richard Feinberg, John Echeverri-Gent & Friedemann Muller, *The Giants and the West: From Threat to Opportunity, in* ECONOMIC REFORM IN THREE GIANTS 3, 21 (Richard Feinberg et al. eds., 1990).

dimension. In the case of emerging economies transitioning from a centralized planning process toward more market-oriented practices, it was widely assumed by the late 1990s that "private markets [had] triumphed over the state," and "countries that wanted to succeed had to embrace the policies favored by private capital."[87] However, more recent developments challenge the notion that private markets have completely triumphed over the interventionist state.[88] In what one commentator has characterized as a "neo-Westphalian" global market, two key developments have emerged: "First, large states are again key actors in financial markets,"[89] and "second, national governments have more financial firepower than do the multilateral institutions."[90]

The increased economic power and leverage of the emerging economies combined with the role of the state in some of them led to a "theory of decoupling centered on the belief that emerging markets had broken away from their western peers and so would be unaffected in the event of a downturn in the more developed economies, such as the U.S. and Europe."[91] Even as late as 2007, proponents of the decoupling theory "argued that emerging markets would separate from the U.S. and Europe and come out of the credit crisis stronger than developed economies."[92] Although the U.S. was the source of the 2008 financial crisis, its impact on developed *and* emerging economies belies the claim of

87. Brad Setser, *A Neo-Westphalian International Financial System?*, 62 J. OF INT'L AFF. 17 (2008).

88. Today's global economic system is marked both by increased trade—including greater trade in financial assets—and by a far larger state role in the financial markets. Martin Wolf, the *Financial Times'* influential columnist, recently wrote, "Globalization was supposed to mean the worldwide triumph of the market economy. Yet some of the most influential players are turning out to be states, not private actors." The reassertion of the state in the marketplace has come not from an expansion of the state's regulatory role, but rather from the growing role governments—particularly governments in the emerging world—play in key global markets. Global financial order once again depends heavily on the financial decisions of large states, not just on swings in private market flows. *Id.* at 17-18.

89. *Id.* at 18. While the total stock of privately held financial assets in the United States, Europe and Japan remains large relative to the stock of financial assets in government hands, the foreign assets of key emerging market governments are growing far faster than those of private intermediaries. The foreign portfolios of large emerging market states now exceed the foreign assets of even the largest private financial institutions.

90. *Id.* "While the IMF's lending capacity is $250 billion, by mid-2008, China held US$1800 billion at its central bank, with another US$500 billion or so in the hands of the state banks and in China's new sovereign wealth fund. . . . Through the increase in the dollar holdings of their central banks and sovereign funds, emerging market governments [were] likely to provide $1 trillion in financing to the United States in 2008. This dwarfs IMF lending to the emerging world in the 1990s. The largest IMF program topped out at around $30 billion. The Group of Seven (G-7) countries generally preferred to lend to troubled emerging economies in concert, often through the IMF. By contrast, today's emerging powers have financed the United States through a series of uncoordinated national decisions. No multilateral institutions that advocate for coordination on a level comparable to that of the G-7—let alone of the IMF—exist among today's new financial powers." *Id.*

91. Jennifer Bollen, *Emerging Markets Fail to Decouple from Downturn in US*, ONLINE FIN. NEWS, Nov. 17, 2008, http://www.efinancialnews.com/usedition/content/3352501729/24622.

92. *Id.*

decoupling. That is not to say, however, that the emerging economies' role has not become stronger. It is the G-20, not the G-6 or G-7, that has been at the forefront of articulating a more coordinated response to the crisis.[93] And it is the emerging economies that are driving the current recovery and, some argue, leading innovation and developing the new business models of the future.[94]

2. Stock Exchange Consolidation and Harmonization

The financial press provided considerable coverage of proposed link-ups between the New York Stock Exchange (NYSE) and Euronext (a pan-European operator running exchanges in Amsterdam, Brussels, Lisbon, Paris, and the futures market in Britain), which was consummated, and between NASDAQ and the London Stock Exchange (LSE), which failed. Yet these two high-profile negotiations were merely part of a larger scenario involving a dozen exchanges on three continents. At the end of 2006, one commentator wrote, "untangling the prospects for global exchange consolidation this year has been like trying to understand the plot of a Mexican soap opera. A dozen protagonists on three continents flirted, rejected and accepted advances, but there was little consummation."[95] From a U.S. perspective, the urgency reflected concern "about declining competitiveness of U.S. capital markets in the face of greater competition from capital markets in Europe and Asia."[96]

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93. G-20, Leaders' Statement, The Pittsburgh Summit Sept. 24-25, 2009, ¶ 19, http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf (last visited April 6, 2011).

94. All the elements of modern business, from supply-chain management to recruitment and retention, are being rejigged or reinvented in one emerging market or another. *The World Turned Upside Down: A Special Report on Innovation in Emerging Markets,* ECONOMIST, Apr. 17, 2010, at 1.

95. Luke Jeffs, *Stock Exchanges Lose The Plot In Global Soap Opera,* FIN. NEWS ONLINE US, Dec. 20, 2006, http://www.financialnews-us.com/?page=ustradingtechnology&contentid=1046766432.

96. Greg Ip, *Is a U.S. Listing Worth the Effort?*, WALL ST. J., Nov. 28, 2006, at C1. Of particular interest was empirical research demonstrating a reduction in the premium investors were willing to pay for shares of foreign companies listed in the U.S. A study by University of Chicago finance professor Luigi Zingales showed that the premium for listing on both U.S. and foreign exchanges, which had averaged 51 percentage points from 1997 to 2001, dropped to 31 percentage points between 2002 and 2005. *Id.* On the other hand, a study completed by University of Chicago accounting professor Christian Leuz suggested that the credibility gained when non-U.S. companies comply with U.S. corporate governance laws outweighs the resultant costs. His study indicated that foreign firms save money when they have shares traded both on U.S. and native country exchanges: "[r]esearch done by others shows that the market valuation of foreign firms goes up between 10 percent and 30 percent when their shares are listed in multiple countries." Andrzej Zwaniecki, *Benefits Often Outweigh Costs of Compliance With Sarbanes-Oxley Act*, U.S. STATE DEPT. WASH. FILE, July 19, 2006, http://usinfo.state.gove/xarchives/display.html?p=washfile-english&y=2006&m=July&x=2006071917232. Another contemporaneous study completed by Mazars, a Paris-based accounting firm, found that "more than 72 percent of Asian and 81 percent of Latin American firms surveyed said they believe the benefits will exceed the costs of compliance with Sarbanes-Oxley and none would consider delisting." *Id.* The same study, however, found that "only 43 percent of European companies think the law's benefits will outweigh its costs, and 17

a. Acquisition Efforts

Whatever the underlying reasons, U.S. stock exchanges recognized the trend and undertook their acquisition efforts as a result. There were, however, many twists and turns along the way. Even though the NYSE and Euronext solidified their relationship, there were efforts within Europe to avoid that result. Most notably, the German stock exchange made a competing effort to buy Euronext.[97] "Another factor . . . was that the proposed deal with Euronext likely faced the prospect of a lengthy review of the deal by European competition authorities in Brussels."[98] The collapse of negotiations between the German exchange and Borsa Italiana, which some viewed as an attempt to place pressure on Euronext to consider a three-way European merger instead of joining forces with the NYSE, also undercut the German exchange's Euronext strategy.[99]

A major concern that the NYSE overcame in its successful pursuit of Euronext was the fear by Euronext corporate users of being subject to SOX regulation. Euronext agreed, "to create an independent foundation for the tie-up, which could be dissolved in the case of regulatory overspill."[100] Declarations from both the SEC and Treasury Secretary Paulson vouching against regulatory spillover of SOX rules into Europe provided additional assurance.[101] To overcome fears that the U.S. exchange would be favored, the NYSE also agreed with Euronext to change the planned board composition so that each exchange would be equally represented.[102] Spillover regulatory issues were also an aspect of the NASDAQ-LSE negotiation, but it confronted additional issues that led to its perception in Europe as essentially a hostile takeover bid.[103]

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percent would consider delisting from U.S. stock exchanges." *Id.*

97. Chancellor Andrea Merkel of Germany, President Jacques Chirac of France, and the European Central Bank's President Jean-Claude Trichet each backed the idea of a pan-European market. As negotiations continued through Fall 2006, "the stronger rise in the share price of Euronext compared with the German exchange made the acquisition more expensive and therefore less attractive." James Kanter, *Deutsche Boerse Drops Euronext Bid, Clearing Way for Big Board,* N.Y. TIMES, Nov. 15, 2006, http://www.nytimes.com/2006/11/15/business/15cnd-exchange.html.

98. *Id.*

99. Dominic Elliott, *German Exchange Suspends Borsa Italiana Talks,* FIN. NEWS ONLINE US, Nov. 7, 2006, http://www.financialnews-us.com/?page=ushome&contentid=1046641444.

100. Hugo Wheelan, *Regulators Approve Euronext/NYSE Tie-up,* FIN. NEWS ONLINE US, Dec. 5, 2006, http://www.financialnews-us.com/?page=ustradingtechnology&contentid-1046724840.

101. *Id.; see also* Hugh Wheelan, *Dutch Blessing Paves Way for Euronext Deal,* FIN. NEWS ONLINE US, Dec. 18, 2006, http://www.financialnews-us.com/?page=ustradingtechnology&contentid=1046771028.

102. *Euronext and NYSE Agree to Balance Board,* FIN. NEWS ONLINE US, Nov. 22, 2006, http://www.financialnews-us.com/?page=uspressdigest&contentid-1046685296.

103. First, as the NASDAQ bid evolved (NASDAQ already had a 29.35% stake in the LSE), it came to appear more like a hostile takeover. Although the LSE had eluded a number of takeover bids since its first public offering in 2001, commentators gave NASDAQ's offer a reasonable chance of success. With trading costs in Europe as much as 80% higher than in the U.S., the LSE was under considerable pressure to reduce costs to avoid possible defection of key customers. Stanley Reed, *Up Against the Wall in the City,* BUS. WK. ONLINE, Dec. 4, 2006, http://www.businessweek.com/print/

b. Competitive Pressures

Both the NYSE-Euronext and NASDAQ-LSE negotiations were proceeding against the backdrop of yet another competitive development in Europe, which saw seven of the biggest banks (Morgan Stanley, Goldman Sachs, Citigroup, Credit Suisse, Merrill Lynch, UBS, and Deutsche Bank) unveil plans to build a share-trading platform in Europe that would rival other European stock markets. Although earlier bids to build alternative exchanges in Europe had failed, the banks felt that the situation had changed enough to make it worth another attempt.[104]

The NYSE also added competitive pressures on the NASDAQ by entering into a "broad, non-exclusive agreement" with the Tokyo Stock Exchange to "cooperate on joint developments such as financial products, mutual listings and technology."[105] For the NYSE, the alliance brought access to Asia's largest market amidst "rebounding stock and asset prices as Japan's economy finally recover[ed] from a long slump in the 1990s."[106] Furthering its Asian market

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magazine/content/06_49/b4012064.htm. However, in mid-December 2006, the LSE rejected the offer as inadequate on several grounds: "NASDAQ's offer fails to value the Exchange's unique strategic position, to share any of the synergy benefits or to pay a premium for control." NASDAQ responded by accusing the LSE of "failing to take account of 'new competitive threats' and withholding benefits from its users." Luke Jeffs and Dominic Elliott, *NASDAQ Strikes Back at LSE Defence,* FIN. NEWS ONLINE US, Dec. 19, 2006, http://www.financialnews-us.co/?page=ushome&contentid=1046778779. Things went downhill from there, with LSE's January 2007 assertions that NASDAQ was making "a large number of misleading assertions," and that NASDAQ's choice of comparable exchanges for valuation purposes was "self-serving" and "narrow" and failed to "reflect the appropriate value of the exchange sector and its growth potential." Vivek Ahuja, *LSE Strikes Back As NASDAQ Hostilities Escalate,* FIN. NEWS ONLINE US, Jan. 9, 2007, http://financialnews-us.com/?page=ustradingtechnology&contentid=1046924826. In February, LSE shareholders overwhelmingly rejected NASDAQ's bid, leaving NASDAQ "scrambling to lay out a European strategy that will appease its shareholders and ensure that it won't be left behind as other major exchanges consolidate." *Nasdaq Under Pressure To Cut Deal,* QUAD-CITY TIMES, Feb. 12, 2007, at A6.

104. First, an EU directive had been promulgated that permitted the creation of new trading platforms. Second, the technology for setting up an exchange had become readily available from Sweden's OMX bourse and elsewhere. The banks felt that their proposed integrated trading platform "would allow equities to be traded more cost effectively and allow users to obtain 'significant liquidity with greater efficiency.'" Kanter, *supra* note 97; SEC, Euronext Regulators Sign Regulatory Cooperation Arrangement, Press Release, SEC, Euronext Regulators Sign Cooperation Arrangement (Jan. 25, 2007), *available at* www.sec.gov/news/press/ 2007/2007-8.htm [hereinafter SEC, Euronext Regulators Sign Cooperation Arrangement].

105. *New York and Tokyo Stock Exchanges Announce Alliance,* N.Y. TIMES., Jan. 13, 2007, http://www.nytimes.com/aponline/business/AP-NYSE-Tokyo.html?ref.=business. Commentators interpreted the motivation for the Tokyo Stock Exchange to enter into this agreement as part of an effort "to restore its reputation after a series of embarrassing computer-related failures in late 2005 and early 2006 that paralyzed trading and resulted in huge losses for one brokerage firm." This alliance would thus help the Tokyo Stock Exchange "bolster its prestige and get outside help in improving its trading systems." Jenny Anderson and Martin Fackler, *NYSE Makes Alliance with Tokyo Exchange,* N.Y. TIMES, Feb. 1, 2007, http://www.nytimes.com/2007/02/01/business/worldbusiness/01exchange.html.

106. *Id.*

penetration goals, the NYSE also purchased a five percent stake in India's Mumbai-based National Stock Exchange.[107]

c. Evolving Harmonization Process

John Thain, then head of the NYSE, aptly summarized the situation of exchange consolidation as follows: "Globalization is both good and inevitable. In some ways we're lagging behind what has already happened in the marketplaces themselves. The marketplaces are already global."[108] The regulatory dimension of this phenomenon was aptly summarized by Benn Steil, senior fellow at the Council on Foreign Relations, when he observed, "Stock exchanges were always national institutions and were usually local institutions. The idea of an international stock exchange is quite revolutionary."[109]

The process of harmonization—represented most prominently in this context by the multilateral process of developing international accounting standards and their growing acceptability and utilization—provides at least some elements of a model for moving forward.[110] SEC Commissioner Annette Nazareth specifically addressed the issue of conflicts in international regulatory standards relative to transatlantic financial market consolidation in her keynote speech to the UCLA Law Third Annual Institute on Corporate Aspects of Mergers and Acquisitions in New York in October 2006:

> Consummation [of the NYSE/Euronext merger] would not necessarily mean that foreign companies listed on Euronext would become subject to U.S. law. The structure of the merger . . . would be such that non U.S. markets would not become U.S. registered exchanges, nor would Euronext offer its products directly in the United States. As a result, the merger would not result in the mandatory registration of the non U.S. markets' listed companies in the U.S., now would our federal securities laws necessarily apply to the non U.S. exchanges.[111]

A review of NYSE Euronext's first year as a transatlantic exchange provides an overview of the opportunities and pitfalls of exchange consolidation

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107. That stake was the maximum allowed and, although it did not give the NYSE a chance to share directly in the earnings gains of the Indian exchange, it was viewed as a "strategic investment" that might enhance Indian company listings on the NYSE. Joseph Weber, *NYSE Group Buys into India Market,* BUS. WK.COM, Jan. 10, 2007, http://www.businessweek.com/print/globalbiz/conten/jan2007/gb20070110_143431.htm.

108. Walter Hamilton and Tom Petruno, *N.Y. Stock Exchange is Going Global,* L.A. TIMES, Dec. 18, 2006, http://www.latimes.com/business/business/la-fi-nyse18dec18,1,1337126.story?coll=la-headlines-business.

109. *Id.*

110. Stoltenberg et al., *supra* note 34, at 488-89.

111. She referred to a meeting between then SEC Chairman Cox and the Chairman's Committee of the Euronext regulators at which the regulators affirmed that "joint ownership or affiliation of markets alone would not lead to regulation from one jurisdiction becoming applicable in the other." They also "affirmed their shared belief in the importance of local regulation of local markets." Annette Nazareth, Commissioner, SEC, Remarks before the UCLA Law Third Annual Institute on Corporate Aspects of Mergers and Acquisitions (Oct. 23, 2006), *available at* http://www.sec.gov/news/speech/2006/spch102306aln.htm.

in the current environment. After the merger, it "[grew] its trading businesses, . . . launched products and forged market links."[112] Although both U.S. and European equity trading volumes were up in 2007, the exchange worked to reduce its reliance on equity trading while expanding into derivatives. The group's U.S. equities trading franchise faced pressure from both new electronic trading systems and NASDAQ, which continued to take market share from the NYSE in 2007.[113] The NYSE's own electronic exchange, Arca, continued to grow and, by the middle of 2008, appeared set to surpass activity on the main exchange.[114] Promised cost cuts resulting from the merger were slower to materialize than anticipated.[115] Regulatory barriers also undercut some of the benefits of U.S. exchanges' efforts to form overseas ties,[116] increasing pressure on the SEC to accelerate its mutual recognition concept. With increased "pressure from other exchanges as well as alternative trading systems, and even broker-dealers, . . . market conditions [made] listings more difficult."[117] This, combined with increased competition on the execution side of the business and a lot of regulatory changes in process,[118] promised continued pressure on exchanges. Among other things, exchanges responded by "branching out into new businesses, including the supply of trading systems to potential rivals."[119] In the process, they were evolving into organizations somewhat different from those for which governing regulation was designed.[120]

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112. Luke Jeffs, *NYSE Euronext Marks First Year as a Transatlantic Exchange,* FIN. NEWS ONLINE US, Apr. 2, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2450217335.

113. *Id.*

114. Luke Jeffs, *NYSE Market Share Slips as Electronic Trading Surges*, FIN. NEWS ONLINE US, May 23, 2008, http://www.efinancialnews.com/usedition/index/content/2350752914.

115. "[T]he main challenge . . . has been delivering to users $275 [million] of cost savings, $250 [million] from the technology side, by the first quarter of 2010, a promise made before the merger." *Id.*

116. While "NASDAQ, OMX, NYSE Euronext, Eurex International Securities Exchange and CME Group have all been buying, building or taking shares in non-US destinations . . . in anticipation of an opening of the borders between countries that would allow cash equities and options to be freely traded . . . the volume is going one way—into the US. This is blamed on antiquated US regulation that prevents US institutions from trading directly in foreign markets." Melanie Wold, *US Exchanges Stumble In Rush To Form Overseas Ties,* FIN. NEWS ONLINE US, Apr. 14, 2008, http://www.financialnews-us.com/?page=ushome&contentid-235036031.

117. *Id.*

118. *Id.*

119. Luke Jeffs, *Exchanges Diversity into Trading Systems Supply,* FIN. NEWS ONLINE US, May 6, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2450560272.

120. Current NYSE Euronext chief executive Duncan Niederauer aptly characterizes the current situation as follows:

> We're no longer just a stock exchange. We're an exchange. We need to embrace technology to the fullest. A common technology platform is the enabler to get places like Asia, the Middle East, Latin America and Africa on our network. Some of our recent acquisitions are really technology acquisitions, not exchange acquisitions.

3. Attempts To Converge U.S. Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards (IFRS) Due to an Increased Global Emphasis on IFRS

It sounds like a reasonable and logical concept to converge the FASB's rules-based Generally Accepted Accounting Principles (GAAP) with the International Accounting Standard Board's (IASB's) principles-based[121] International Financial Reporting Standards (IFRS) so that all public corporations and their investors, regardless of geographic location, would function under the same set of global accounting principles. However, convergence is a daunting task. It involves compromises, adjustments, and intensive work by multiple public and private entities, made more difficult because of intervening political overtones produced by the financial crisis.

a. Developments at the SEC

i. SEC Rule on Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with IFRS Without Reconciliation to U.S. GAAP (December 21, 2007)[122]

A significant achievement for the SEC was the adoption of its Final Rule allowing foreign issuers to utilize IFRS without reconciliation to GAAP.[123] The effective date was March 4, 2008, and it was applicable to statements for financial years ending after Nov. 15, 2007. A commentator noted the essential role of this rule in the movement from GAAP to IFRS, describing it as the 'watershed' event that fueled the creation of the SEC's IFRS roadmap – "the proposal to move U.S. companies to IFRS by 2014."[124]

NYSE and Euronext Grapple With Integration In The First Year Of Merger, FIN. NEWS ONLINE US, Apr. 21, 2008, http://www.financialnews-us.com/?page=ustradingtechnology&contentid=2450432333.

121. The IFRS have been characterized as principles-based because they do not include the detailed guidance for accountants as to how to apply the standards to specific business transactions. *See* Sir David Tweedie, Chairman, Int'l Acct. Standards Board, Remarks at the Empire Club of Canada, Toronto, Canada (Apr. 21, 2008) [hereinafter Tweedie Remarks]. In its effort to keep the American markets competitive, the SEC has increasingly directed its attention toward the European model of a more principles-based approach to securities regulation. Ford, *supra* note 23. While a broad set of concept statements underlie GAAP, the individual standards include more specific guidance and examples about how to apply the rules.

122. Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards Without Reconciliation to U.S. GAAP, 17 C.F.R. §§ 210, 230, 239 & 249; Exchange Act Release Nos. 33-8879 & 34-57026 (Dec. 2007).

123. 17 C.F.R. §§ 210, 228, 229, 230, 239, 240 & 249 (2010); Exchange Act Release Nos. 33-8831 & 34-56217 (Aug. 7, 2007).

124. Marie Leone, *IFRS Returns to the Front Burner,* CFO.COM, Oct. 8, 2009, http://www.cfo.com/printable/article.cfm/14445960.

ii. SEC Concept Release on Allowing U.S. Issuers to Prepare Financial Statements in Accordance with IFRS (August 2007)[125]

In August 2007, the SEC issued a Concept Release regarding the possibility of allowing U.S. issuers to prepare financial statements in accordance with IFRS should they choose to do so.[126] This Concept Release ultimately resulted in the SEC Proposed Rule for a Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers.[127] This was a pivotal SEC Concept Release, but the voluntary use of IFRS by U.S. issuers must be distinguished from mandatory use. The mandatory use of IFRS standards by all U.S. issuers is pending in the proposed rule or "roadmap" discussed below.

iii. Roadmap for the Potential Use of Financial Statements Prepared in Accordance with IFRS by U.S. Issuers (November 2008)

In November 2008, the SEC proposed its Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers ("The Roadmap"). This would cover the potential use of financial statements prepared in accordance with International Financial Reporting Standards ("IFRS"), as issued by the International Accounting Standards Board, by U.S. issuers for purposes of their filings with the Commission.[128] The Roadmap outlines the modified role that the FASB would have in the future with respect to the development of accounting standards. The SEC envisioned the future role of FASB as follows:

> This release does not address the method the SEC would use to mandate IFRS for U.S. issuers. One option would be for the Financial Accounting Standards Board ("FASB") to continue to be the designated standard setter for purposes of establishing the financial reporting standards in issuer filings with the Commission. In this option our presumption would be that the FASB would incorporate all provisions under IFRS, all future changes to IFRS, directly into generally accepted accounting principles as used in the United States ("U.S. GAAP"). This type of approach has been adopted by a significant number of other jurisdictions when they adopted IFRS as the basis of financial reporting in

125. Concept Release on Allowing U.S. Issuers to Prepare Financial Statements in *id.*; *see also* Accordance with International Financial Reporting Standards, 17 C.F.R. §§ 210, 228, 229, 230, 239, 240 & 249; Exchange Act Release Nos. 33-8831, 34-56217 (Aug. 7, 2007) [hereinafter IFRS Concept Release].

126. 17 C.F.R. §§ 210, 228, 229, 230, 239, 240 & 249 (2010); Exchange Act Release Nos. 33-8831 & 34-56217 (Aug. 7, 2007).

127. Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers, 73 Fed. Reg. 70,816 (Nov. 21, 2008) (codified at 17 C.F.R. §§210, 229, 230, 239, 240, 244 & 249) (Release Nos. 33-8982; 34-58960 (Nov. 14, 2008)), *available at* http://www.sec.gov/rules/proposed/2008/33-8982.pdf [hereinafter Roadmap].

128. Securities Exchange Act, 17 C.F.R. §§ 210, 229-230, 239, 244 & 249 (Nov. 2008).

their capital markets.[129]

The Roadmap sets forth several milestones that, if achieved, could lead to the mandatory use of IFRS by U.S. issuers in 2015 should the Commission believe it to be in the public's interest and for the protection of investors.

The first step would be the SEC proposed amendments to the rules that would allow certain U.S. issuers that meet specific criteria to file financial statements in accordance with IFRS as issued by the IASB, rather than U.S. GAAP, for use in their annual and other reports.[130] As a step along this Roadmap, this release then describes proposed amendments that would permit a U.S. issuer that is among the largest companies worldwide within its industry, and whose industry uses IFRS as the basis of financial reporting more than any other set of standards, to elect to use IFRS beginning with filings for fiscal years ending on or after December 15, 2009. Permitting some U.S. issuers to report under IFRS may provide assistance in a transition to mandatory financial reporting in accordance with IFRS by creating additional, but manageable, demand for IFRS-related services at this time. Provisionally, under the transition, the Roadmap has a progression of mandatory compliance dates for IFRS filings that would begin for large accelerated filers for fiscal years ending on or after December 15, 2014.[131] Accelerated filers would begin IFRS filings for years ending on or after December 15, 2015 and in 2016 for all others. Non-accelerated filers, including smaller reporting companies, would begin IFRS filings for years ending on or after December 15, 2016.[132]

The SEC noted that "this Roadmap leans towards the mandatory, rather than elective, use of IFRS for U.S. issuers in order to promote fully a single set of high-quality globally accepted accounting standards to improve the comparability of financial information prepared by U.S. public companies and foreign companies."[133] This is a significant statement in the Roadmap, as the particular goal embodied in it has also been incorporated into the G-20 Action Plan covered later in this article.

The SEC established a February 2009 deadline for affected constituencies to submit comments on the proposed Roadmap to the SEC for evaluation. However, the change in presidential administrations in January 2009 and the credit crisis delayed evaluation and implementation.[134]

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129. 17 C.F.R. §§ 210, 229, 230, 244 & 249; Exchange Act Release Nos. 33-8982 &34-58960 (Nov. 2008). *See* Marie Leone, *Beginning of End of GAAP*, CFO.COM, May 2, 2008, http://www.cfo.com/article.cfm/11318747f=search.

130. 17 C.F.R §§ 210, 229, 230, 244 & 249; Exchange Act Release Nos. 33-8982; 34-58960 (Nov. 2008).

131. *Id.*

132. *Id.*

133. *Id.*

134. Wayne Carnall, Chief Accountant, Div. of Corp. Fin., Presentation at the American Accounting Association Annual Meeting (Aug. 3, 2009); *see also* Jeff Ellis, *SEC IFRS Roadmap Clear Roads or Delays Ahead?*, HURON CONSULTING GROUP,

b. Developments at the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) in the Attempt to Converge GAAP and IFRS

The IASB is an independent standard-setting body of the International Accounting Standards Committee Foundation,[135] while the FASB is the U.S. accounting standards-setting body that derives its authority from the SEC.[136] The SEC has historically delegated its authority for developing accounting rules to the FASB, focusing instead on enforcing them.[137] The FASB authored much of the current U.S. GAAP. The SEC has designated the FASB as a private sector standard setter since 1973, and reaffirmed this status in 2003, with the SEC providing regulatory oversight of the standard setting process.[138] A critical part of the "sea change"[139] in the U.S. regulatory structure has been the shift in power from the FASB to the SEC.

i. Steps Toward Convergence

The FASB and the IASB began working together to achieve the best standards.[140] One of the earlier steps toward collaboration was the Norwalk Agreement of 2005, which memorialized the agreement between the FASB and the IASB to work together to create one set of accounting standards. A

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http://www.huronconsultinggroup.com (last visited April 6, 2011).

135. The International Accounting Standards Board is the independent standard-setting body of the International Accounting Standards Committee Foundation (IASC Foundation). Facts About Us, IASB, http://www.iasb.org/About+Us/International+Accounting+Standards+Board+About+Us.htm (last visited Aug. 2, 2010); *see also* Rachel Sanderson, *Push For Accounting Convergence Threatened By EU Reform Drive,* FIN. TIMES, April 5, 2010, at 15 (indicating that the new EU Commissioner of Internal Markets, Michel Barnier has signaled that EU funding for the IASB may be dependent upon more direct control over the Board).

136. The FASB is composed of a panel of five accounting experts that has written much of the current U.S. GAAP. Members usually are appointed for five-year terms. A board of trustees serving in the public interest governs it. The Board has a mandate to "evaluate, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary, or appropriate in the public interest and to protect investors." Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release Nos. 33-8221; 34-47743; IC-26028; FR-70 (Apr. 25, 2003); Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release Nos. 33-8221; 34-47743; IC-26028; FR-70 (Apr. 25, 2003).

137. SEC Financial Reporting Release No. 1, Sec. 101 [47 FR 21028] (Apr. 15, 1982), reaffirmed in Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release Nos. 33-8221; 34-47743; IC-26028; FR-70 (Apr. 25, 2003); *see also* Accounting Series Release No. 150 (Dec. 20, 1973). The Commission "concluded that the expertise and resources that the private sector could offer to the process of setting accounting standards would be beneficial to investors." Accounting Series Release No. 150 (Dec. 20, 1973).

138. *Id.*

139. *See* Ford, *supra* note 23.

140. News Release, FASB, *FASB and IASB Agree to Work Together toward Convergence of Global Accounting Standards*, Oct. 29, 2002, http://www.fasb.org/news/nr102902.shtml.

memorandum of understanding between the FASB and the IASB in 2006 followed this agreement.

Part of the effort included a work program to create a converged Conceptual Framework.[141] Instead of trying to eliminate the myriad differences between the GAAP and the IFRS, the agencies sought to develop a conceptual framework that would be the foundation of "something better than either U.S. GAAP or IFRS alone."[142] The Conceptual Framework[143] states that such a framework is essential "to fulfilling the Board's goal of developing standards that are principles-based, internally consistent and internationally converged, and that lead to financial reporting that provides the information capital providers need to make decisions."[144] In order to harmonize GAAP and IFRS, the FASB and IASB undertook a multi-year (three to five year) agenda whereby they would seek public comment on existing standards, replace out-of-date standards, and achieve consensus on disparate rules.[145]

To advance the move toward convergence, the FASB held an open public forum on June 16, 2008 with two goals: (1) initiating dialogue with all affected stakeholders about whether and how to move the U.S. financial reporting system to IFRS; and (2) defining the next steps.[146] The forum was well attended and produced a plethora of comments and concerns from constituencies including U.S. companies, the accounting and finance professions, and educators.[147] The FASB has since directed its attention to topics such as lease-accounting, financial statement presentation, and revenue recognition.[148]

In October 2008, the IASB and the FASB announced the creation of a global advisory group comprising of regulators, preparers, auditors, investors,

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141. *Id.*

142. Leone, *supra* note 124.

143. FASB, Conceptual Framework-Joint Project of the IASB and FASB, Board Meeting Materials and Minutes, http://www.fasb.org/jsp/FASB/FASBContent_C/ProjectUpdatePage&cid=900000011077&pf=true#2009 [hereinafter Conceptual Framework] (last visited Sept. 1, 2010).

144. *Id.*

145. *Id.*

146. *Id.*

147. Many concerns remain. One concern is the greater latitude in reporting earnings that would be permitted if American companies shift to the international rules. Stephen Labaton, *Accounting Plan Would Allow Use of Foreign Rules,* N.Y. TIMES, July 5, 2008, http://www.nytimes.com/2008/07/05/business/05sec.html. Some accounting experts have argued, "Companies that have used both domestic and overseas rules have, on average, been able to report revenues and earnings that were 6 percent to 8 percent higher under the international standards." *Id.* Some have pointed out that the shift would allow companies to "provide fewer details about mortgage-backed securities, derivatives and other financial instruments at the center of today's housing crisis and that have troubled many Wall Street firms." *Id.* It has also been suggested that "the shift to international standards could . . . wind up eliminating the conflict-of-interest rules, adopted after the collapse of Arthur Andersen and Enron, that have limited auditors from performing both accounting work and consulting for the same client." *Id.*

148. Conceptual Framework, *supra* note 143.

and other users of financial statements.[149] This advisory group will help to ensure that reporting issues arising from the global economic crisis will be considered in an internationally coordinated manner.[150]

4. Impact of Private Equity and Sovereign Wealth Funds

Private equity transactions have assumed a higher profile as the U.S. regulatory environment imposed additional demands and economic power began to shift to the rapidly developing emerging economies. The most cited reasons for the proliferation of private equity investing include an abundance of cheap debt financing and companies with publicly traded securities seeking to escape the burdens of SOX.[151]

There are two main categories of private equity buyers: (1) private equity sponsors, which "seek to acquire companies that they can grow or improve (or both) with a view toward eventual sale or public offering"; and (2) strategic buyers, which are "companies that are already in the target company's industry or in a similar industry" that may seek to integrate the target into their own operations.[152] With more than $2 trillion of resources to buy companies, private equity funds' impact on the markets is significant.[153] The credit crunch of late 2007 and early 2008 slowed private equity transactions significantly,[154] and by mid-2008 signs about a pick-up in the volume of private equity activity remained mixed.[155]

The other significant development has been the increasing power of sovereign wealth funds. Indeed, the credit crunch has enhanced these funds' impact, as the amount invested by them in U.S. and European banks in the first two months of 2008 nearly matched half of the 2007 total.[156] While Middle

149. *IASB and FASB Announce Membership of Financial Crisis Advisory Group*, FINANCIAL ACCOUNTING STANDARDS BOARD (Dec. 30, 2008), http://www.fasb.org/news/nr123008.shtml.

150. *Id.* IASB and FASB created an advisory group to review reporting issues related to credit crisis on October 16, 2008.

151. Jeffrey Blomberg, *Private Equity Transactions—Understanding Some Fundamental Principles*, BUS. LAW TODAY, Jan./Feb. 2008, http://www.abanet.org/buslaw/blt/2008-01-02/blomberg.shtml.

152. *Id.*

153. James Mawson, *Private Equity Firepower Hits $2 Trillion*, FIN. NEWS ONLINE U.S., Jan. 24, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2449636755.

154. Tara Loader Wilkinson, *Companies Shun Private Equity Firms*, FIN. NEWS ONLINE US, Nov. 29, 2007, http://www.financialnews-us.com/?page=ushome&contentid=2449266292; Harry Wilson, *Withdrawn Deals Hit Private Equity M&A*, FIN. NEWS ONLINE US, Feb. 4, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2349721477. Private equity deals fell 51% between August 2007 and November 2007. *Id*

155. Rick Carew, *Big Private Equity Player Says Game Is Set To Restart*, FIN. NEWS ONLINE US, May 20, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2350700615; Nicolette Davey, *Private Equity Faces 'Saturation'*, FIN. NEWS ONLINE US, May 21, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2450714812.

156. *Credit Squeeze Accelerates Sovereign Fund Investments*, FINANCIAL NEWS ONLINE (Mar.

Eastern and Asian sovereign wealth fund investments have come under increasing scrutiny for their lack of transparency and regulation,[157] they represent an enormous pool of assets[158] providing significant liquidity during a credit crunch. Sovereign funds can process deals faster because they are "subject to fewer regulations and have a streamlined internal decision-making process."[159] The "rapid growth in the assets under management of sovereign wealth funds coupled with their emergence as players in the global mergers and acquisitions market have thrust them centre stage and invited the attentions of regulators, politicians and investments banks."[160]

III.
STAGE THREE: THE U.S. RECOGNIZES, REACTS, AND RESPONDS TO GLOBAL CHALLENGES: SHORING UP THE GLOBAL COMPETITIVENESS OF U.S. FINANCIAL MARKETS PRIOR TO THE ECONOMIC MELTDOWN

In the mid-2000s, the U.S. began to recognize that it was no longer alone as a front-line competitor in the financial markets. Therefore, the U.S. undertook a number of initiatives to ensure that it remained in a competitive position. These initiatives involved the active participation of the SEC in replacing AS2 with a more palatable AS5 and other steps to remedy the deteriorating competitiveness created by Section 404. Under the direction of then Secretary Paulson, the U.S. Department of the Treasury developed and released its Blueprint, which sets forth a series of short, intermediate, and long-term recommendations for reform of the U.S. regulatory structure. The important private group previously discussed, the Committee on Capital Markets Regulation, also made specific recommendations on the way in which small companies and foreign companies listed on U.S. exchanges could be relieved of some of the burdens of Section 404.

24, 2008), http://www.efinancialnews.com/usedition/index/content/2450141122.

157. Lyann Butkiewicz, *Sovereign Wealth Will Help Improve US Liquidity,* INT'L FIN. L. REV. (Jan. 1, 2008), http://www.iflr.com/includes/magazine/PRINT.asp?SID=701159&ISS=24472.

158. Sovereign wealth fund assets are projected to reach $15 trillion within the next five years. David Rothnie, *Sovereigns Have The World At Their Feet,* FIN. NEWS ONLINE US, Jan. 15, 2008, http://www.financialnews-us.com/?contentid=2449557014.

159. Butkiewicz, *supra* note 157.

160. Rothnie, *supra* note 158.

> Sovereign wealth funds more than doubled their global spending spree [in 2007] with acquisitions or companies and minority stakes of more than $60 billion. [In 2008] they are again expected to increase significantly their investments as their assets under management continue to grow from current estimates of up to $3 trillion.

Harry Wilson, *Sovereign Wealth Funds Start Flexing Their Financial Muscle,* FIN. NEWS ONLINE US, Jan. 7, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2449501693.

A. SEC Responses to Criticisms by Domestic and Foreign Issuers

The SEC responded to the intense pressure from critical constituencies by implementing a three-step plan of review mechanisms to assess ongoing impact. In addition to (1) obtaining public comment, the SEC included in its three-step plan, (2) the issuance of guidance rules, and (3) working with the PCAOB on revising Auditing Standard No. 2.[161]

1. SEC-PCAOB Cooperation on Revising Auditing Standard No. 2 (AS2)

a. Replacement of AS2 with AS5

As described above, the SEC took the criticisms seriously and steps were taken to make Section 404 more efficient, cost-effective, and scaled to the size and complexity of each company. Not only did the SEC propose its own guidance rules; it also worked with the PCAOB to replace AS2 with standards more in sync with the guidance rules.[162]

Specifically, then SEC Chairman Christopher Cox announced at the end of November 2006 that he was seeking ways "to lighten the burden of [SOX] on smaller companies by addressing the focus and cost of audits of internal controls."[163] He said that his goal was to smooth the way for PCAOB to propose a new auditing standard in the area, and for the SEC to approve it[164] by spring 2007.[165] In an effort to meet Chairman Cox's announced goal, the PCAOB voted in December 2006 to have public comment on a proposed new standard for auditing internal control over financial reporting (referred to as AS5) to replace AS2.[166]

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161. Annette L. Nazareth, SEC Comm'r, Remarks Before the ALI-ABA Sarbanes-Oxley Institute (Oct. 12, 2006), *available at* www.sec.gov/news/speech/2006/spch101206aln.htm [hereinafter Nazareth Remarks Before the ALI-ABA].

162. Press Release, SEC, SEC Approves PCAOB Auditing Standard No. 5 Regarding Audits of Internal Control Over Financial Reporting; Adopts Definition of "Significant Deficiency" (July 25, 2007), *available at* http://www.sec.gov/news/press/2007/2007-144.htm [hereinafter PCAOB Auditing Standard No. 5].

See David Katz, *SEC Says Materiality Should Drive 404,* CFO.COM, Dec. 14, 2006, http://www.cfo.com/article.cfm/8433879?f=related. The revised standard emphasizes materiality as a guideline in choosing what audit work on which to focus, which mirrors the SEC's proposed revisions to §404. "The PCAOB wants auditors to use the same measure of materiality for the testing of internal controls that the SEC wants applied by corporate executives to the auditing of annual financial statements." Sarah Johnson, *PCAOB Proposes AS2 'Repeal,'* CFO.COM, Dec. 19, 2006, http://careers.cfo.com/article.cfm/8465177/c_2984368?f=singlepage.

163. Floyd Norris, *S.E.C. is Seeking to Help Small Companies on Audits,* N.Y. TIMES, Nov. 9, 2006, http://www.nytimes.com/2006/11/09/business/09sec.html.

164. SOX Section107 gives the SEC oversight and enforcement authority over the PCAOB. Thus, no rule of the Board becomes effective without prior approval of the SEC.

165. Norris, *supra* note 163.

166. *Board Proposes Revised Auditing Standard on Internal Control over Financial Reporting,*

The new standard called on auditors "to use a 'top-down' approach and identify the areas where fraud or errors are most likely."[167] The PCAOB's chief auditor claimed that adoption would "provide the auditor with flexibility to avoid unnecessary testing" by virtue of adopting a "risk-based" auditing approach.[168] The new AS5, in addition to the SEC's proposed guidance, made it easier and cheaper for companies to comply with Section 404. Its text reduced the length of AS2 by a third.[169]

Under AS5, the PCAOB uses a more principles-and-risk-based approach to audits to point the auditor toward the most important matters, "increasing the likelihood that material weaknesses will be found before they cause material misstatement of the financial statements."[170] Compared to AS2, AS5 (PCAOB Rule 3525, which became effective for integrated audits conducted for fiscal years ending on or after November 15, 2007) is:

- Less prescriptive;
- Makes the audit scalable – so it can change to fit the size and complexity of any company;
- Directs auditors to focus on what matters most, such as risk of fraud or misstatements – and eliminates unnecessary procedures from the audit;
- Includes a principles-based approach to determining when and to what extent the auditor can use the work of others.[171]

The tension over AS2 subsided with the adoption of AS5 as its replacement.[172]

2. Responding to Section 404 Problems

As noted earlier, Section 404 requires that public companies annually assess, and their auditors attest to, the effectives of internal control over financial reporting.[173] The provisions of Section 404 of Sarbanes-Oxley and their implementation by the PCAOB and the SEC have been blamed as one of

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PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD (Dec. 19, 2006), http://pcaobus.org/News/Releases/Pages/12192006_BoardProposesRevisedStandard.aspx.

167. Floyd Norris, *Board Proposes Lighter Auditing of Internal Controls*, N.Y. TIMES, Dec. 20, 2006, http://www.nytimes.com/2006/12/20/business/20audit.html.

168. *Id.* SEC Chairman Cox characterized "The PCAOB's proposal to repeal the unduly expensive and inefficient auditing standard under Section 404 . . . and to replace that standard with one that strengthens investor protection by refocusing resources on what truly maters to the integrity of financial statements [as] an exceptionally positive step for both investors and for America's capital markets." *Id.*

169. Johnson, *supra* note 47.

170. *Id.*

171. PCAOB Auditing Standard No. 5, *supra* note 162.

172. *Id.*

173. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 404, 116 Stat. 745, codified at 15 U.S.C. § 7201.

the major reasons for the U.S. having lost its first-place position among public equity capital markets in the world. In order to shore up the competitive position of the U.S., it became necessary to change some previously adhered to insular policies, and for the SEC to take action to remedy some of the Section 404-related costs and burdens on domestic issuers and foreign issuers trading their securities on U.S. exchanges.

a. Fine-Tuning Section 404 for Predominantly Domestic Issuers

In order to gain information to address the number of domestic issuers' complaints in regard to the expense and burden of compliance with Section 404, the SEC engaged in information gathering through two Section 404 Roundtables.[174] These Roundtables were composed of fifty participants each and solicited feedback from the public, including issuers, auditors, and investors.[175] When processed, the Roundtable of May 2006 highlighted both benefits and continuing concerns regarding Section 404. Benefits included "management's renewed sense of ownership of controls, newfound ways to make controls more efficient, and better financial reporting and the detection of problems before they become more serious."[176] The SEC focused on the burdens, expense, and compliance difficulties expressed by various entities, especially smaller domestic companies and foreign issuers. In addition, many participants in the May 2006 Roundtable expressed the need for greater guidance from management on how best to comply with Section 404.[177]

As a result of the May 2006 Roundtable, the SEC issued a press release announcing its intended strategy and guidance for Section 404.[178] This included a planned Concept Release Concerning Section 404, with the intention to issue interpretive guidance to those subject to that section.[179] A subsequent Concept Release Concerning Management's Reports on Internal Control over Financial

174. *Id.*

175. 2006 Roundtable on Second-year Experiences with Internal Control Reporting and Auditing Provisions (May 10, 2006); Press Release, SEC Commission and PCAOB Seek Feedback and Announce Date of Roundtable on Second-year Experiences with Sarbanes-Oxley Internal Control Provisions, No. 2006-22 (February 16, 2006), *available at* http://www.sec.gov/spotlight/soxcomp/.htm.

176. *Id.* SEC Commissioner Annette L. Nazareth noted a Lord and Benoit report indicating that stock performance of corporations complying with Section 404 was significantly better than it was for non-compliant companies. One possible explanation is that investors feel more confident in the financial statements released by compliant companies.

177. *Id.*

178. Press Release No. 2006-75, SEC, SEC Announces Next Steps for Sarbanes-Oxley Implementation (May 17, 2006), *available at* http://www.sec.gov/news/press/2006/2006-75.htm.

179. The SEC, to provide additional guidance from the Committee of Sponsoring Organizations (Treadway Commission), to revise Auditing Standard No. 2 with the PCAOB, and to extend compliance dates for small companies (non-accelerated filers) until December 15, 2007. Recently, the SEC further extended the compliance date for these non-accelerated filers until June 15, 2010

Reporting was issued in July 2006.[180] This Concept Release addressed critical issues related to the developing SEC guidance for management, such as assessing risks, identifying controls, evaluating the operating effectiveness of internal controls, and documenting assessment.

On December 13, 2006, the SEC voted to propose interpretive guidance for management to improve Section 404 implementation.[181] The SEC guidance described itself as principles-based, contrasted with the rules-based approach traditionally thought to guide U.S. accounting standards. The underlying principles are that "management should evaluate the design of the controls" and "should gather and analyze evidence about the operation of the controls being evaluated based on its assessment of the risk associated with those controls."[182]

b. Responding to Objections from Foreign Issuers

i. Issuance of SEC Releases Extending Section 404 Compliance Dates for Foreign Companies

On June 5, 2003, the SEC adopted rules in preparation for implementing Section 404 that became effective for most U.S. companies on November 15, 2004, and for foreign issuers on July 15, 2005. After an extraordinary number of complaints, the date for accelerated foreign issuers to comply with Section 404's management assessment requirement was moved forward to their first fiscal year ending on or after July 15, 2006.[183] These companies, however, did not have to prepare an auditor's attestation report until December 15, 2007.[184] For domestic and foreign non-accelerated filers the SEC postponed the compliance date for the first required management's assessment under Section 404 until their first fiscal year ending on or after Dec. 15, 2007.[185] The SEC also excused

180. Concept Release Concerning Management's Reports on Internal Control over Financial Reporting, 17 C.F.R. § 240 (2006).

181. Press Release, SEC, SEC Votes to Propose Interpretive Guidance for Management to Improve Sarbanes-Oxley 404 Implementation (Dec. 13, 2006), *available at* http://www.sec.gov/news/press/2006/2006/-206.htm.

182. *Id.* The guidance clarified four particular areas: (1) Identification of risks to reliable financial reporting and the related controls that management has implemented to address those risks; (2) Evaluation of the operating effectiveness of internal controls; (3) Reporting the overall results of management's evaluation; and (4) Documentation to support management's assessment.

183. Internal Control over Financial Reporting in Exchange Act Periodic Reports of Foreign Private Issuers, 17 C.F.R. §§ 210, 228, 229, 240 & 249 (Aug. 9. 2006); Exchange Act Release No. 33-8730A.

184. Press Release, SEC, Internal Control over Fin. Reporting in Exch. Act Periodic Reports of Non-Accelerated Filers; SEC Offers Further Relief from Section 404 Compliance for Smaller Pub. Cos. and Many Private Issuers (Aug. 9, 2006), *available at* http://www.sec.gov/news/press/2006/2006-136.htm.

185. *Id.*; Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 17 C.F.R. §§ 210, 228, 229, 240, 249, 270 & 274

these entities from complying with the more expensive auditor attestation requirements until December 2009.[186] Both of these concessions reflected the slowly-evolving approach of the SEC to compromise and coordinate with foreign issuers trading their securities on U.S. exchanges.

ii. Deregistration for Foreign Companies

The SEC announced a new deregistration proposal for foreign companies in December 2006. The key component of the proposal would allow delisting for foreign companies if their average daily U.S. trading volume was five percent or less than the average daily trading volume on its primary trading market.[187] In addition, the foreign issuer must (1) have been both registered with the SEC and listed on a foreign exchange as its primary trading market for at least one year, (2) have made all its required SEC filings on time, (3) not have made any SEC-registered public offerings in the United States for one year, (4) not have terminated its ADR program within the previous twelve months, and (5) post copies of home country reports in English on its website.[188]

In March 2007, the SEC approved new rules making it easier and faster for companies to withdraw their stocks from the U.S. markets, based on the December 2006 proposal.[189] In implementing the rule, the SEC refined its 2006 proposal in three respects:

> (1) The 5 percent threshold would be calculated by comparing a company's U.S. trading volume to its worldwide trading volume, rather than comparing it to

(2010); Exchange Act Release Nos. 33-8238, 34-47986 & IC-26068 (Aug. 14, 2003), http://www.sec.gov/rules/final/33-8238.htm) [hereinafter SEC Internal Control Rule].

186. 17 C.F.R. §§ 210, 228, 229 & 249. The SEC adopted amendments to temporary rules that were published on December 21, 2006, in Release No. 33-8760 [71 FR 76580]. Those temporary rules require companies that are non-accelerated filers to include in their annual reports, pursuant to rules implementing Section 404(b) of the Sarbanes-Oxley Act of 2002, an attestation report of their independent auditors on internal control over financial reporting for fiscal years ending on or after December 15, 2008. Under the amendments, a non-accelerated filer will be required to file the auditor's attestation report on internal control over financial reporting when it files an annual report for a fiscal year ending on or after December 15, 2009. The SEC noted that their data indicates that out of the approximately 1240 foreign private issuers that are subject to the Exchange Act reporting requirements, about 39% of these are large accelerated filers, 23% are accelerated filers, and the remaining 38% are non-accelerated filers. The estimated percentages of foreign private issuers within each accelerated filer category are based on market capitalization data from Datastream as of December 31, 2005. Christopher Cox, Chairman, SEC, Address Before the 34th Annual Securities Regulation Institute: Re-thinking Regulation in the Era of Global Securities Markets (Jan. 24, 2007), *available at* www.sec.gov/news/speech/2007/spch012407cc.htm [hereinafter Cox Address]

187. Margaret Tahyar, *A Brave New World: New Deregistration Proposals Suggest That European Issuers and Regulators Have a New Part To Play on the Crowded US Stage,* INT'L FINANCIAL L. REV. (Feb. 2007), http://www.iflr.com/includes/magazine/PRINT.asp?SID=673434&ISS=23342&PUBID=33.

188. *Id.; see also* Floyd Norris, *S.E.C. to Firms: Keep Money, Forget Rules,* N.Y.TIMES, Dec. 15, 2006, http://select.nytimes.com/2006/12/15/business/worldbusiness/15norris.html.

189. *SEC Liberalizes Foreign Issuer Deregistration,* INT'L FINANCIAL L. REV. (Mar. 1, 2007), http://www.iflr.com/includes/news/PRINT.asp?SID=681384&ISS=23556.

> trading volume in the company's one or two primary markets; (2) Off-market trading would be counted worldwide, and not only in the U.S., so long as the information source was reliable and not duplicative of exchange-reported trading; and (3) convertible and other equity-linked securities would no longer be counted in the threshold calculation.[190]

While twenty-nine percent of the approximately 1,200 foreign companies registered with the SEC qualified to leave under the new rules,[191] it remained to be seen just how many foreign issuers might use the new rules. "Many of the biggest European issuers . . . informally indicated that they intend[ed] to stay registered, at least for the time being."[192] Commentators suggested that they would likely "wait to see whether the SEC eliminate[d] the U.S. GAAP reconciliation of IFRS financial statements (targeted for 2009), a change that would substantially reduce the costs of a US listing."[193]

3. Reduction by the SEC of the Financial Statement Disclosure Requirements for Foreign Issuers

a. Amendment Streamlining Filing Requirements

The SEC also took additional steps to reduce the disclosure burden on U.S.-listed foreign issuers by streamlining their filing requirements. In February 2008, the Commission "unanimously voted to propose amendments to modernize its disclosure requirements for foreign companies, including eliminating all requirements for paper submissions."[194] SEC Chairman Cox characterized the proposed amendments as bringing "our foreign company

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190. "The rule also retains a number of other provisions from the December 2006 proposal, including a requirement that a deregistering company be listed in one or two foreign markets that together represent at least 55% of its worldwide trading for a year before deregistration; that it have at least a one-year SEC reporting history at the time of deregistration; and that it not have sold securities in an SEC-registered offering for a year before deregistration. Companies that deregister are automatically eligible for the registration exemption of Rule 12g3-2(b), meaning that their deregistration will be permanent so long as they publish English versions of their home country reports and financial statements on their web sites." *Id.*

191. *US Listing Rules*, FINANCIAL NEWS ONLINE US, Mar. 22, 2007, http://www.financialnews-us.com/?page=uspressdigest&contentid=2347429431.

192. *SEC Liberalizes Foreign Issuer Deregistration, supra* note 189.

193. *Id.* Andrew Bernstein, capital markets partner at Cleary Gottlieb in Paris, thought that "the most significant practical impact could come from a provision in the new rules that allows companies that use their shares to acquire foreign SEC registrants to avoid registering themselves as successor issuers . . . . This provision could facilitate cross-border M&A transactions that previously would have been blocked by the successor registration requirement." *Id.*

194. Lianna Brinded & Tara Loader Wilkinson, *SEC Unburdens Foreign Issuers*, FINANCIAL NEWS ONLINE US, Feb. 14, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2449810824. Currently, such firms must "provide a written submission to the SEC, including a list of its non-US disclosure obligations, information concerning US shareholders and paper copies of its non-US disclosure documents published since the beginning of the most recent fiscal year."

disclosure requirements into the 21st Century by eliminating any requirement for paper, and by giving investors access to foreign company disclosure documents electronically, in English, on the internet."[195] The proposed amendments coincided with implementation of U.S. Regulations, which relaxed restrictions on U.S. investors in U.S. companies listed on London's junior market Aim.[196]

b. Exemptions for Non-U.S. Broker-Dealers and Exchanges

Consistent with mutual recognition, the SEC also began exploring proposals to exempt non-U.S. broker dealers and exchanges from registration. Under this approach, "a foreign exchange would be allowed to install a trading facility on the desk of a U.S. broker, provided that the exchanges' home-country regulators' rules were deemed 'comparable' to the SEC's."[197] "Restrictions on the ability of foreign brokers to solicit U.S. investors could also be removed."[198] An SEC proposal to accelerate the reporting deadline for annual reports from foreign issuers, however, could discourage foreign company listings in the U.S.[199]

B. Treasury Department Blueprint for a Modernized Financial Regulatory Structure

In its response to the continuing problem of maintaining the competitiveness of U.S. capital markets, the U.S. Department of Treasury convened a conference addressing that issue in March 2007.[200] The Conference identified an outdated regulatory structure as an obstacle to global competitiveness. In June 2007, then Treasury Secretary Paulson announced "the next steps of his capital markets competitiveness action plan," which included, *inter alia*, the development by the Department of the Treasury of a blueprint for reforms to affect a modernized regulatory structure.

On March 31, 2008, the Treasury Department released its Blueprint for modernization containing a series of short, intermediate, and long-term recommendations for reform of the U.S. regulatory structure.[201] In his remarks

195. *Id.*

196. *Id.*

197. *SEC To Promote Cross-Border Trading*, FIN. NEWS ONLINE US, Jan. 3, 2008, http://www.financialnews-us.com/?page=uspressdigest&contentid=2349487083.

198. *Id.*

199. Shanny Basar, *Lawyers Give Warning on SEC Proposals*, FIN. NEWS ONLINE US, Apr. 21, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2450420064.

200. Press Release, U.S. Dep't of Treasury, Opening Remarks by Treasury Secretary Henry M. Paulson, Jr. at Treasury's Capital Markets Competitiveness Conference, Georgetown University (Mar. 13, 2007), *available at* http://www.treas.gov/press/releases/hp306.htm.

201. *Dept. of Treasury Blueprint Report*, *supra* note 2; *see also* Press Release, U.S. Dep't. of Treasury, Treasury Releases Blueprint for Stronger Regulatory Structure (Mar. 31, 2008), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp896.aspx.

announcing the release of the Blueprint, Secretary Paulson referred to both the global impetus for such reform, as well as hinting at his preference for an "objectives-based" or "principles-based" regulatory approach:

> We could and can have a structure that is designed for the world we live in, one that is more flexible, one that can better adapt to change . . . . The challenge is to evolve to a more flexible, efficient and effective regulatory framework – and that is the purpose of this Blueprint.[202]

C. *Specific Recommendations of the Committee on Capital Market Regulation on the Regulatory Implementation of Section 404*

The CCMR issued its interim report in 2006,[203] which was followed with a formal report, Competitive Position of the Public Equity Market, in late 2007.[204] Among its recommendations[205] in the interim report was a suggestion that "federal regulators and Congress should consider changing the [SOX] requirements for small companies, who are less able to afford the cost of keeping up with [SOX] and [should] periodically test existing rules to ensure they still meet reasonable cost/benefit standards."[206] While the SEC's Office of Economic Analysis conducts some cost/benefit analysis, the committee proposed making that process more formal by establishing "an internal staff group of qualified economists and business analysts to perform a systematic cost-benefit analysis as a regular part of the rule-writing process."[207]

The CCMR report specifically addressed foreign companies listed on U.S. exchanges, suggesting that they be exempt from Section 404 "if they have something similar in their home markets."[208] For American companies, the SEC and PCAOB "should provide guidance to make application of [Section 404] less

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202. *Dept. of Treasury Blueprint Report*, *supra* note 2; *see also* Press Release, U.S. Dep't. of Treasury, Treasury Releases Blueprint for Stronger Regulatory Structure (Mar. 31, 2008), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp896.aspx [hereinafter *Press Release, Treasury Releases Blueprint*].

203. CCMR Interim Report 2006, *supra* note 78.

204. *The Competitive Position of the U.S. Public Equity Market*, COMMITTEE ON CAPITAL MARKETS REGULATION (Dec. 4, 2007), www.capmktsreg.org/pdfs/The_Competitive_Position_of_the_US_Public_Equity_Market.pdf.

205. As might be expected, some (including Financial Executive International, a 15-000-member group of chief financial officers and other finance executives, and the National venture Capital Association) felt the report did not go far enough. Moore, *supra* note 80. On the other hand, Columbia law professor Harver Goldshmid, a former member and general counsel of the SEC, said that adopting the report's recommendations would replace "the recent drive for accountability and deterrence" with a "world in which almost everything goes." Floyd Norris & Stephen Labaton, *Panel to Urge Rewriting Rules to Aid Companies*, N.Y. TIMES, Nov. 30, 2006, http://www.nytimes.com/2006/11/30/business/30regs.html.

206. CCMR Interim Report 2006, *supra* note 78.

207. Norris & Labaton, *supra* note 205.

208. *Id.*

costly."[209] The other suggestions regarding Section 404 addressed in the report were the issue of deregistration and the impact of the current requirement that a company cannot delist unless the number of American shareholders falls below 300.[210] The Committee suggested making it easier to delist companies by "omitting institutional shareholders from the count, on the theory that it is individual investors who most need protection."[211] And for foreign companies not now registered in the United States, the report suggested that the SEC "abandon most restrictions on leaving, so long as American investors are warned before they invest that such a departure is possible."[212]

IV.
STAGE FOUR: EFFORTS TO HARMONIZE NATIONAL INTERESTS WITH GLOBAL AND MULTILATERAL POLICIES: AN INTEGRATIVE INTERNATIONAL APPROACH TO CAPITAL MARKETS INITIATED BY THE ONSET OF WORLDWIDE FINANCIAL TURMOIL

The final stage of analysis covers the last months of the Bush administration in 2008 and into the first year of the Obama administration. During this period, both administrations took significant steps to develop an international and coordinated response to the economic crisis. There were numerous pending proposals to be considered and action items marked for implementation, as well as the creation of new measures for internal regulatory restructuring as legislative bodies struggled to find ways to protect investors against future fiscal disasters.

A. Period of Transition (from Stage Three into Stage Four)

In 2007, there was a marked shift in the SEC's approach to interaction with foreign issuers and global regulators that potentially signaled a new era in the history of U.S. securities regulation and the focus of the SEC. As briefly mentioned earlier, several cooperative efforts emerged between the SEC and global regulators.

1. Mutual Recognition Concept

Generally, the U.S. is moving in the direction of removing barriers to cross-border access between U.S. and foreign markets in response to investor demands for wider market opportunities. In an attempt to reduce the burdens of regulatory

209. *Id.*

210. *Id.*

211. *Id.*

212. The rationale was that "if foreign companies know they can leave U.S. markets, they may be more willing to come in the first place." *Id.*

duplication, SEC Chairman Cox and Charlie McCreevy, the EU Commissioner for the Internal Market and Services, met in 2007 to discuss facilitating a mutual recognition policy based on substituted compliance.[213] They agreed that if a foreign regulator was found to be a "high-quality regulatory regime" the SEC, on a country-by-country basis, would grant "substituted compliance" status to foreign exchanges and broker-dealers.[214] This would give them access to the U.S. market without meeting the SEC registration requirements.[215] A determination of whether the foreign regulator met the standard of being a high-quality regulatory regime was to be based upon a comparability assessment by the SEC and by the foreign authority of one another's regulatory regimes.[216] Subsequently, the SEC began to implement the concept of mutual recognition.[217]

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213. Lianna Brinded, *EU and SEC Start Official Talks on Exchange Plans,* FIN. NEWS ONLINE US, Feb. 4, 2008, http://www.financialnews-us.com/?page=ustradingtechnology&contentid=2449722100. In its statement summarizing the outcome of their meeting, the SEC said "[a]n EU-US mutual recognition arrangement for securities would have the potential to facilitate access of EU and US investors to a broader and deeper transatlantic trading and transaction costs and increase oversight coordination among regulators." *See also* John C. Coffee, Jr., *SEC Diplomacy*, NAT. L. J., June 16, 2008, at 13.

214. *See SEC Mulls 'Mutual Recognition' For Transatlantic Trading*, FIN. NEWS ONLINE US, June 19, 2007, http://www.financialnews-us.com/?page=uspressdigest&contentid=2348064803. Under such a system, the SEC would allow foreign broker-dealers to provide products and services to US investors without having to register with the SEC. It would also allow foreign exchanges to place trading screens on the desks of US-based brokers without such registration. In both cases, the home country regulator's standards would have to be "substantively comparable" with that of the SEC. *Id.*

215. Jeremy Grant, *SEC Eyes Cross-Border Shake-Up*, WALL ST. J., Jan. 3, 2008, at 1. The foreign exchanges have traditionally assiduously avoided SEC registration because of the extra burden of dual regulation with their home country. *See* Coffee, Jr., *supra* note 213. The problem is that foreign issuers with more than 500 shareholders worldwide (of which at least 300 are U.S. investors) and $10 million in assets are required to register their equity securities with the SEC and, therefore, must make meet its disclosure rules by submission of annual and periodic reports. Exchange Act §12(b), (g), 15 U.S.C. §78(b), (g) (Supp IV 2004); Exchange Act § 13, 15 U.S.C. §78m (Supp II 2002); Exchange Act § 15(d), 15 U.S.C.S. §78o(d). Even though foreign issuers "can file for an exemption from such registration, they are required to file in their home jurisdiction in English translation, their securities cannot then [actively] trade on an exchange, but only on the pink sheets bulletin board." *See* Rule 12g3-2(b), 17 C.F.R. §240.12g3-2(b) (2007); *see also* Roberta S. Karmel, *The Once and Future New York Stock Exchange: The Regulation of Global Exchanges*, 1 BROOK. J. CORP. FIN. & COM. L. 355 (2007).

216. Press Release, U.S. Securities and Exchange Commission, SEC Announces Next Steps for Implementation of Mutual Recognition Concept (March 24, 2008), *available at* http://www.sec.gov/news/

press/2008/2008-49.htm.

217. *See* Coffee, Jr., *supra* note 213. The problem is that foreign issuers with more than 500 shareholders worldwide (of which at least 300 are U.S. investors) and $10 million in assets are required to register their equity securities with the SEC and, therefore, must make meet its disclosure rules by submission of annual and periodic reports. Exchange Act §12(b), (g), 15 U.S.C. §78(b), (g)(Supp IV 2004); Exchange Act § 13, 15 U.S.C. §78m (Supp II 2002); Exchange Act § 15(d), 15 U.S.C.S. §78o(d). Even though foreign issuers "can file for an exemption from such registration, they are required to file in their home jurisdiction in English translation, their securities cannot then

Market participants welcomed the new approach, but also raised questions about how cost effective it would be in reality and to which exchanges the mutual recognition framework would relate.[218] U.S. political forces also tried to put the brakes on any rapid move toward mutual recognition.[219] To keep the process of mutual recognition moving ahead, the Commission began exploring the idea specifically with counterparts in Australia, which reached fruition in August 2008. The agreement allowed U.S. and Australian securities regulators to brokers and exchanges to do business in each country while being regulated only by their home countries.[220]

At an earlier meeting of the Federation of European Securities Exchanges in Brussels, SEC Director of International Affairs Ethiopis Tafara had called for faster mutual recognition between U.S. and foreign regulators.[221] The specific actions taken by the SEC were consistent with the agreement made by the G-7 finance ministers at their February 2007 meeting to shed overlapping financial regulations and standards that burden companies doing business globally.[222] The goal, embodied in their official statement, was "to explore within the G-7 free trades in securities based on mutual recognition of regulatory regimes."[223]

[actively] trade on an exchange, but only on the pink sheets bulletin board." *See* Rule 12g3-2(b), 17 C.F.R. §240.12g3-2(b) (2007); *see also* Roberta S. Karmel, *The Once and Future New York Stock Exchange: The Regulation of Global Exchanges*, 1 BROOK. J. CORP. FIN. & COM. L. 355 (2007).

218. Brinded, *supra* note 213.

219. *SEC Urged to Go Slow on Mutual Recognition*, FIN. NEWS ONLINE US, Apr. 2, 2008, http://www.financialnews-us.com/?page=ushome&contentid=2350237760. Senator Jack Reed, chair of the Senate Banking Committee's securities subcommittee, called for a slower pace based on the need for "analysis of US regulatory breakdowns in the issuance of mortgage loans to risky subprime borrowers and the marketing of securities based on those mortgage payments." *Id.*

220. *Id. See* Judith Burns, *U.S., Australia Hail Securities Pact*, WALL ST. J., Aug. 26, 2008, at 19.

221. William Wright, *US And European Regulators Edge Closer To Co-Operation*, FIN. NEWS ONLINE US, July 3, 2007, http://www.financialnews-uscom/?page=ushome&contentid=2448220557. The article stated:

> In the long-term, international regulatory convergence is inevitable, but I think all the commissioners at the SEC agree that the time for mutual recognition has come. It is very important that we facilitate access to US markets for foreign exchanges, issuers and exchanges, based on how they are regulated at home. . . . If a foreign regulatory scheme is similar in its broad philosophy and aims to those of the SEC, we would recognize that and allow certain overseas market participants to conduct business in the US market under bilateral agreements or selective mutual recognition.
>
> . . . . Mutual recognition of regulation is hardly revolutionary, not least because it has been happening in the US derivatives markets for nearly a decade. But it is important to grasp the nature of the revolution at the SEC. It is important for the SEC to adapt to a globalizing market. US investors do not see foreign markets as mysterious or dangerous places any more.

Id.

222. Deborah Solomon, *G-7 Seeks to Shed Overlapping Regulations*, WALL ST. J., Feb. 12, 2007, at A2.

223. *Id.*

Treasury Secretary Paulson noted that "many countries have strong regulatory regimes and it should be possible for nations to recognize one another's rules and standards."[224] At the same time, though, he recognized that it is "something that will take a long time given that many countries . . . have multiple regulators and overseers."[225]

2. Framework for Advancing Transatlantic Economic Integration between the U.S. and EU: Transatlantic Economic Council (TEC)

a. Establishment of the Transatlantic Economic Council

Another important effort, particularly significant because it involves international cooperation at the powerful government-to-government level, occurred in April 2007 when leaders at the EU-U.S. Summit established the Transatlantic Economic Council (TEC) in the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union ("Framework").[226] The emphasis in the Framework was on a goal of transatlantic economic integration. To accelerate progress towards this goal, the TEC was established as a joint political-level body, co-chaired by representatives from the U.S. and the EU, to oversee the efforts outlined in the Framework.[227] One of the charges to the TEC included in Section IV of the Framework provides for support from expert advisers through the convening of "a group of individuals experienced in transatlantic issues" to provide "input and guidance" from existing transatlantic dialogues[228] – the Transatlantic Legislators Dialogue (TLD), Trans Atlantic Consumer Dialogue (TACD), and TransAtlantic Business Dialogue (TABD).[229]

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224. *Id.*

225. *Id.*

226. *See Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union (*April 2007), http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf (last visited April 6, 2011). The Framework document was signed by President George W. Bush, Commission President José Manuel Barroso, and German Chancellor Andrea Merkel.

227. *Id.*

228. *Id.*

229. *EU-USA – Transatlantic Economic Council (TEC)*, EUROPEAN COMMISSION, http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/transatlantic-economic-council/index_en.htm (last visited April 6, 2011). The TransAtlantic Business Dialogue, comprised of chief executives of leading American and European companies, commended the Summit Leaders for jointly taking steps "to forge a constructive and cooperative relationship between the U.S. and the EU and looked upon the TEC as "an important innovation for decision making on transatlantic issues." Driving Forward Transatlantic Economic Integration, TABD Recommendations to the 2008 US-EU Summit Leaders (May 2008), http://www.tabd.com/storage/tabd/documents/tabd_2008_report_to_summit_leaders.pdf.

b. The Work of the Transatlantic Economic Council

The agenda given to the TEC by the EU-U.S. summit leaders includes a number of areas (e.g., Intellectual Property Rights Enforcement), but among the more relevant areas are investments, accounting standards, and securities regulatory regimes.[230] The Framework requires the TEC to meet at least once a year, but in 2008 an additional meeting was held in response to the financial crisis and "to help provide momentum and secure the continuity of the TEC after changes in leadership in both the United States and the European Union in 2009."[231]

The work of the TEC became more pressing with the need for a coordinated global response to the global financial crisis. As James Quigley, Co-Chair of the TABD, asserted, "[w]hat we do know is that this crisis has highlighted the high degree of transatlantic economic interdependence – and the marked need for coordinated responses.[232] The TEC has exerted an extra effort towards crafting responses to the worldwide fiscal crisis.[233] A report from the 2009 meeting indicated that there was a discussion of the ongoing financial regulatory cooperation with an emphasis on the importance of compatible approaches and the avoidance of financial mercantilism between the EU and the U.S.[234]

Generally, the reaction to the organization has been favorable. [235] The

230. *Transatlantic Economic Council Review of Progress under the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union*, Third meeting of the Transatlantic Economic Council of the European Comm'n (Dec. 12, 2008), http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/transatlantic-economic-council/index_en.htm.

231. *Id.*

232. Press Release, TransAtlantic Business Dialogue, TABD Co-Chairs James Quigley and Jurgen Thumann urge TEC to enhance political ambition and avoid over-regulation in the face of the global financial and economic crisis (Dec. 12, 2008), http://www.tabd.com/storage/tabd/documents/tabd_tec_press_release_12_12_08.pdf. Co-Chair Quigley further commented that "[t]he TEC presents a unique opportunity for the US and EU to inspire confidence in the transatlantic marketplace and build on the collective resolve of the G-20 Leaders to maintain open investment and trade policies globally."

233. *See* Press Release, Europa, Preparation for the Competitiveness Council of Ministers, Brussels (March 4, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/93&format=HTML&aged=0&language=EN&guiLanguage=en.

234. Delegation of the European Union to the USA, Message to the EU-US Summit (TEC Statement) (Oct. 27, 2009), *available at* http://www.eurunion.org/eu/Content-Items/Transatlantic-Economic-Council-Joint-Statement-October-27-2009.html.

235. Although the TEC does not have an extensive history because its first meeting was in late 2007, both the EU and U.S. have deemed each meeting successful. TEC Vice-President, Günter Verheugen's comments on the second meeting in May 2008 reflect this view from his European perspective:

> The European Union and the United States have already committed themselves to reach the common objective of economic integration and a barrier free economic area. The Transatlantic Economic Council (TEC) is of key importance to achieve this objective. Within a short time the TEC has delivered steady progress towards

status conferred on the TEC in the Framework as a government-to-government body places it in a unique position to advance the integration of capital markets and help to maintain a strong and stable transatlantic commercial and business relationship.

3. Movement Toward the Middle: Increased Use of European Principles-Based Approach to Regulation

One major difference between Europe and the U.S. is that Europe has primarily followed a general principles-based[236] approach, focused on achieving desired policy goals or outcomes, while the traditional U.S. approach to regulation has been rules-based,[237] with an emphasis on specifically prescribed requirements that must be met.[238] The U.K. Financial Services Authority, the regulatory body comparable to the SEC in the U.K., adopted a principles-based approach in 2003. The U.K.'s shift to a principles-based approach provided a strong impetus for its adoption in the U.S., given Treasury Secretary Paulson's complaint that the U.S.'s rules-based regulatory system was prescriptive, and led to a greater focus on compliance with specific rules. Treasury Secretary Paulson pointed out the advantages of moving "toward a structure that gives regulators more flexibility to work with entities on compliance within the spirit of regulatory principles."[239]

> a better regulatory environment and has dealt with issues of concern of both sides. Mutual confidence and trust in each others' commitment to remove barriers remains crucial for succeeding in the transatlantic economic cooperation.

See Press Release, Europa, EU-US Summit in Slovenia to discuss further strengthening of strategic partnership (June 9, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/903&format=HTML&aged=0&language=EN&guiLanguage=en.

236. Perhaps because of its geographic location, Europe has been better than the U.S. at taking a more global perspective. It has been quick to acknowledge the growing strength of markets on other continents and its adoption of an approach to regulation based on broad principles rather than specific rules has allowed an easier transition into the world marketplace. *See* Ford, *supra* note 23.

237. Several reasons given for U.S. bias towards the rules-based system of financial regulation are that:

> This bias has developed in response to our complex regulatory structure, an ever-growing body of national and state laws and implementing regulations that address financial activities and practices in great detail, and the felt need for certainty in the face of an ever present risk of litigation and enforcement actions.

See Richard M. Kovacevich, James Dimon, Thomas A. James, and Thomas A. Renyi, *The Blueprint for U.S. Financial Competitiveness,* THE FINANCIAL SERVICES ROUNDTABLE 17 (2007), http://www.fsround.org/cec/pdfs/FINALCompetitivenessReport.pdf [hereinafter Fin. Services Roundtable Blueprint for U.S. Financial Competitiveness].

238. A simple example that has been given to differentiate between a principles based approach and a rules based approach is that a rule will say, "Do not drive faster than 55 mph" where a principle will say, "Do not drive faster than is reasonable and prudent in all circumstances." *See* Ford, *supra* note 23.

239. Press Release, U.S. Dep't of Treasury, Remarks by Treasury Secretary Henry M Paulson on the Competitiveness of U.S. Capital Markets Economic Club of New York (Nov. 20, 2006), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp174.aspx.

The rules-based approach is demonstrated in SOX and the regulatory actions taken by the SEC to enforce SOX. The PCAOB's AS2 exemplified a rules-based approach with its complex and detailed regulations.[240] The Financial Services Roundtable[241] expressed its preference for a more principles-based or "top-down" approach to the SEC implementation of SOX in "The Blueprint for U.S. Financial Competitiveness":

> Regulatory burden could have been ameliorated by more principles-based requirements that emphasized the use of a "top-down" approach, and afforded both management and auditors the discretion to concentrate on the most significant aspects of a company's internal control framework.[242]

Not surprisingly, when AS2 was replaced in 2007 with AS5, it was heralded as a principles-based approach that "allows auditors to apply professional judgment in determining the extent to which they'll use the work of others."[243] Both the Commission's new standards for conducting audits and its new SOX management guidance for complying with the internal control requirements have been described as principles-based.[244] Also, as discussed earlier, U.S. movement toward reconciling its GAAP with the IFRS is a tangible example of adjusting its rules-based GAAP to a more principles-based IFRS.[245]

While there is movement by the U.S. towards accepting, and even encouraging, a more principles-based regulatory system, the result will likely be a hybrid model that combines the two systems.[246] The U.S. has moved in the direction of the principles-based approach "to ensure that U.S. financial services firms are competitive, consumers of financial services are protected, and financial markets are stable and secure."[247] However, substantial differences exist between the U.S. and Europe in their regulatory and legal structures which preclude outright U.S. adoption of a primarily principles-approach. The U.S.'s complex system of multiple national and state regulators and our reliance on private litigation, with remedies such as class actions, are all reasons why the

240. *See* Johnson, *supra,* note 47.

241. The Financial Services Roundtable is to provide legislative and regulatory advocacy. Its predecessor group was comprised of bankers, but in 1999 the mission was broadened to represent integrated financial service providers and accepted members from the securities, investment and insurance sectors. *See* History of the Roundtable, THE FINANCIAL SERVICES ROUNDTABLE, http://www.fsround.org/about/index.htm (last visited April 6, 2011).

242. *Id.*

243. Press Release, SEC, SEC Approves PCAOB Auditing Standard No. 5 Regarding Audits of Internal Control Over Financial Reporting; Adopts Definition of "Significant Deficiency" (July 25, 2007), *available at* http://www.sec.gov/news/press/2007/2007-144.htm.

244. *Id.*

245. Tweedie Remarks, *supra* note 121.

246. *See* James D. Cox & Edward F. Greene, *Duke Global Capital Market Roundtable: Financial Regulation in a Global Marketplace: Report of the Duke Global Capital Markets Roundtable*, 18 DUKE J. COMP. & INT'L L. 239, 244 (2007) (arguing that the choice is not between principles or rules but rather how to achieve a better balance than presently exists, with rules as the dominant norm).

247. Fin. Services Roundtable Blueprint for U.S. Financial Competitiveness, *supra* note 262.

U.S. could not replicate the 2003 shift in the U.K. by the Financial Services Authority to a principles-based regime.[248]

4. Additional Recommendations by the Committee on Capital Market Regulation (2009)

In the wake of the financial crisis, the CCMR observed, "the U.S. employs more financial regulators and expends a higher percentage of its gross domestic product on financial oversight than any other major country."[249] Noting that recent events suggested "the far larger staffs and greater funding in the U.S. have not resulted in a correspondingly higher quality of supervision," the CCMR saw the financial crisis as an "opportunity to bring U.S. financial regulatory structure into the 21st century, ensuring our role as a global leader in financial markets."[250]

Following its January 2009 recommendations, the CCMR issued its May 2009 report titled The Global Financial Crisis: A Plan for Regulatory Reform.[251] In this report, the CCMR identified four critical objectives for improving the U.S. financial system: (1) reduced systemic risk through more sensible and effective regulation;[252] (2) increased disclosure to protect investors and stabilize the market;[253] (3) a unified regulatory system where lines of accountability are clear and transparency is improved;[254] and (4) international regulatory harmonization and cooperation.[255] The two factors common to all the CCMR's fifty-seven recommendations were the importance of (1) "*principles-based* regulation focused on effectiveness";[256] and (2) a "*coordinated*

248. *Id.; see also* Ford *supra* note 23.

249. Press Release, Committee on Capital Markets Regulation, Committee on Capital Markets Regulation Releases Recommendations for Reorganizing U.S. Regulatory Structure (Jan. 14, 2009).

> There are approximately 38,700 financial regulatory staff in the U.S., versus some 3,100 in the United Kingdom. Meanwhile, financial regulatory costs in the U.S. total $497,984 per billion dollars of GDP versus $276, 655 in the United Kingdom.

Id.

250. The CCMR opined that reform done properly could "restore market confidence, increase consumer and investor protection, improve regulatory quality, stimulate capital formation, enhance our ability to manage systemic risk and facilitate global policy coordination." *Id.*

251. The Global Financial Crisis: A Plan for Regulatory Reform, Committee on Capital Markets Regulation, May 2009, *available at* http://www.capmktsreg.org [hereinafter The Global Financial Crisis].

252. Recommendations under this category included: 1) revision of capital requirements; 2) resolution procedures; 3) regulation of non-bank financial institutions; and 4) clearinghouses and exchanges for derivatives. *Id.* at ii-iv.

253. Recommendations under this category included: 1) reform of the securitization process; and 2) improvements in accounting for fair value and consolidation. *Id.* at iv-v.

254. *Id.* at v.

255. *Id.* at vi.

256. *Id.* at i (emphasis added).

international approach . . . in all areas of reform."[257]

B. *Updates on International Pressures Impacting the U.S. Financial Market Regulation*

1. *Financial Crisis Impact on Emerging Nations*

While the global impact of the financial crisis undercut notions that emerging economies had decoupled from the developed economies, former World Bank economist Uri Dadush said that "any recovery in growth must emerge in countries outside the epicenter of the financial crisis."[258] In this connection, he noted, "roughly two-thirds of the world's $50 trillion gross domestic product is produced in countries such as Brazil and South Korea, which did not have highflying banks but are suffering from the downturn in global trade."[259] Analysts have suggested that while the U.S. economy has previously led the world back to growth after bruising global downturns, "developing countries could be the engine that powers the next recovery."[260]

> Despite fears just months ago that they would be among the biggest victims of the financial crisis, emerging giants like China, India and Brazil are set to rebound strongly next year . . . as Europe, the United States and Japan lag. . . . The divergence between the emerging and the developed countries suggests that the once-popular theory of decoupling—the notion that the emerging markets could be moving independently of the developed economies—may make a comeback . . . . "Decoupling is back as a thesis," said Adam Posen, deputy director of the Peterson Institute for International Economics in Washington. "And we should recognize how different the current situation is from past crises." . . . [W]ith China and other emerging countries seemingly leading the way, the idea that countries like China, India and Brazil are going to play a far bigger role in global economic expansion is coming back in vogue.[261]

Decoupling could have both positive and negative implications for

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257. *Id.* at vi (emphasis added).

> A global financial system demands globally coordinated rules . . . . Failures of international coordination can lead to the duplication of requirements and set the stage for regulatory arbitrage. . . .. Additionally, there obviously needs to be coordination and convergence between U.S. Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards (IFRS) as we contemplate a single standard. While the world is not yet ready for a global regulator, the time has come to ensure greater global coordination.

Id.

258. David Lynch, *Not Every Nation Can Export Its Way To Economic Recovery,* USA TODAY, Sept. 2, 2009, http://www.usatoday.com/money/economy/2009-09-02-export-way-to-recovery_N.htm.

259. *Id.*

260. Nelson Schwartz & Matthew Saltmarsh, *Developing World Seen as Engine for Recovery*, N.Y. TIMES, June 25, 2009, http://www.nytimes.com/2009/06/25/business/global/25oecd.html.

261. *Id.*

developed economy countries. On the positive side, there is the possibility that "growing wealth in China and India could, in theory, increase demand for goods made in recession-battered countries like Japan, Germany and the United States."[262] However, "emerging market-centered growth could spur higher interest rates in the West and Japan, and push up prices for oil and other commodities when the developed world could least afford it. Another potential downside of decoupling could be a tsunami of capital from developed markets washing over emerging economies and inflating values."[263]

The first half of 2009 witnessed two fundamental changes in the architecture of the international financial system: First, based on a concern about systemic risk, detailed proposals in the April 2008 Financial Stability Forum Report for more intensive, systemic, international regulatory cooperation have been adopted by the G-20. Second, there has been a shift in power from the G-7 to a broader group of countries, the G-20, which includes Argentina, Brazil, China, India, Indonesia, Mexico, and South Africa.[264] Given the likelihood that "this new international regulatory framework and shift in power will outlast the present crisis," the question then becomes: "after the storm has subsided, what will be the impact on capital markets and international finance of these two fundamental changes?"[265]

Two responses emerge: "First, the new framework confirms that regulatory arbitrage, seeking the least regulated, most favorable jurisdiction, is not systemically healthy. This will encourage international cooperation on several financial law issues that were not directly related to the crisis, but which could benefit from cross-border cooperation."[266] "Second, and more important, the shift in power to a broader group of countries will bring into question the west's hegemony on regulation."[267]

One commentator articulated the shift in power as follows:

> Owning up to the geopolitical implications will be as painful for the rich nations as paying the domestic price for the profligacy. When American and European diplomats talk about the rising powers becoming responsible stakeholders in the global system, what they really mean is that China, India and the rest must not be allowed to challenge the existing standards and norms. Yet the big lesson is that the west can no longer assume the global order will be remade in its own

262. *Id.*

263. *Id.*

264. David Spencer, *Watch for Emerging Nations*, 28 INT'L FIN. L. REV. 45 (2009).

265. *Id.*

266. This would include issues such as insolvency, corporate law and corporate governance, securities regulation, commodities regulation, codes of conduct for multinational companies, money laundering and illicit financial flows including corruption. "At present they do not seem to be a high priority, but they will receive close attention in the future. Finance and trade have become globalize, and the new international regulatory framework will permit regulatory cooperation to catch up. *Id.*

267. "If the US, UK and international financial organizations . . . could not prevent the crisis, why should they determine the response?" *Id.*

image.[268]

Events during the second half of 2009 supported the notion of a significant shift in power toward Asia, with the Hong Kong Stock Exchange predicted to finish 2009 as the world's largest IPO market[269] and Chinese banks dominating IPO rankings for the first time.[270] While stock markets around the world essentially fell and rose together during 2008-09[271] may refute the notion of decoupling, the fact that the best performances were turned in by emerging markets[272] indicates some shift of relative power.

2. Evolving Status of Exchange Consolidation

The year 2008 has been described as the "end of the honeymoon" period for merged exchanges.[273] NYSE Euronext took charges of $1.6 billion for reduction in goodwill and other intangible assets related to their merger due to falls in equity markets in 2008.[274] The London Stock Exchange, facing competition from its new alternative trading rivals (Chi-X Europe, and, more

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268. *Id.* (quoting Philip Stephens in the *Financial Times*).

269. *Roaring Bull,* HONG KONG TRADER, Sept. 30, 2009, http://www.hktdc.com/info/mi/a/hkti/en/1X069XDW/1/Hong-Kong-Trader---International-Edition/A-Roaring-Bull-.htm?P=Y.

> As many as 100 IPOs are believed to be in the pipeline, among them several multi-billion-dollar deals . . . . Even in the slower months earlier this year, activity has been quietly simmering at the Hong Kong Stock Exchange. Total market capitalization rose 36.37per cent in the first half of 2009. Capital-raised initial share stakes alone amounted to US $2.3 billion. While this was 65 per cent lower than a year earlier, it still amounted to the lion's share for the region. According to data compiled by Bloomberg, companies in Asia, excluding Japan, raised a total of $US 3.59 billion through IPOs in the same period.

Id.

270. Radi Khasawneh, *Chinese Banks Dominate IPO Rankings For First Time,* FIN. NEWS ONLINE US, Oct. 2, 2009, http://www.efinancialnews.com/investmentbanking/content/1055327905/28197.

271. Floyd Norris, *Around the World, Stock Markets Fell and Rose, Together,* N.Y. TIMES, Sept. 12, 2009, http://www.nytimes.com/2009/09/12/business/12charts.html.

272. *Id.*

273. Tom Fairless, *Writedowns Signal End Of Honeymoon Period For Merged Exchanges,* FIN. NEWS ONLINE US, Feb. 16, 2009, at 26, http://www.efinancialnews.com/tradingandtechnolgycontent/1053355723/25543.

274. Tom Fairless & Shanny Basar, *NYSE Euronext Loses $738 Million On European Writedown,* FIN. NEWS ONLINE US, Feb. 9, 2009, http://www.efinancialnews.com/usedition/content/1053283656/25481.

> After stripping out costs associated with the Euronext merger, NYSE Euronext said gross revenues rose 19% for the year to $4.5 billion, as volatility following the collapse of Lehman Brothers boosted trading volumes across the company's US stock and derivative exchanges. However, profits fell as the higher volumes resulted in increased rebates to customers following the introduction of new pricing structures to attract high frequency traders.

Id.

recently, Turquoise, Bats Trading, and, to a lesser extent, NASDAQ OMX Europe), "reported a 13% fall in trading revenue for the last three months of 2008 following a 38% slump in trading value."[275] "Shares in exchanges around the world plunged by around two-thirds [in 2008], as optimism generated by a wave of mergers gave way to fears over failing hedge funds, tumbling equity markets and the threat of competition from new trading systems."[276] The "magnitude of the write-down and the value destruction implicit in the lower share prices" caused some to question "whether the mergers were a good idea in the first place."[277]

These results had an immediate impact on stock market operations. The NYSE temporarily lowered its market capitalization requirement for listed companies because of "difficult market conditions."[278] NYSE Euronext implemented a worldwide salary freeze and reduced incentives for 2009.[279] NYSE Euronext also slowed its Middle East push following "an increase of the involvement of Western exchanges in the Middle East in recent years."[280]

A thoughtful analysis of exchange consolidation in light of the financial crisis considered results relative to the four key considerations that drove the mergers. The first consideration focused on efficiency.[281] On this component, "the ability of NYSE Euronext, NASDAQ, OMX, and the LSE to achieve [their] goals has varied."[282] The second consideration involved the goal of diversifying

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275. *Id.* The LSE had traditionally dominated trading on the flagship FTSE 100 index, but by early 2009 its competitor "multilateral trading facilities' collective marketshare hit a high of almost 26.3%, with Chi-X Europe and Turquoise the main beneficiaries." Luke Jeffs, *Competition drags LSE to record low,* FIN. NEWS ONLINE US, Feb. 18, 2009, http://www.efinancialnews.com/tradingandtechnologhy/content/1053371022/25591.

276. Fairless & Basar, *supra* note 274.

277. *Writedowns Signal End Of Honeymoon Period, supra* note 273 at 26.

278. Eugene Grygo, *NSYE Lowers Market Cap for Listing*, FIN. NEWS ONLINE US, Jan. 26, 2009, http://www.efinancialnews.com/tradingandtechnology/content/1053117225/25339. The NYSE asked the SEC for a temporary reduction in the minimum requirement for market capitalization from $25 million to $15 million. The requirement had just been raised from $15 million to $25 million in 2004, "when stock prices and the overall market were far higher than they are currently." *Id.* The temporary reduction was sought to "enable companies of suitable size and quality to remain listed during current difficult market conditions." *Id.*

279. Fairless & Basar, *supra* note 274.

280. Tom Fairless, *NYSE Euronext Slows Middle East Push,* FIN. NEWS ONLINE US, Feb. 10, 2009, http://www.efinancialnews.com/tradingandtechnology/content/1053293642/25513. These deals had resulted in "NASDAQ OMX becoming a one-third shareholder in NASDAQ Dubai, the exchange previously known as the Dubai International Financial Exchange, while the Qatar Investment Authority took a 15% stake in the LSE and Dubai bought 20% of the London exchange." *Id.* NYSE Euronext sought to "trim its planned investment in the Doha Securities Market, Qatar's stock exchange, to $200 million from $250 million and its stake in the exchange to 20% from 25%." *Id.*

281. *Writedowns Signal End of Honeymoon Period, supra* note 273, at 26. "Exchanges thought they could save money by shifting trading to a single platform, reducing headcount and moving staff into shared premises." *Id.*

282. Because the process of integrating three separate platforms took longer than anticipated,

their businesses, "either geographically or by branching into new products such as clearing."[283] There were successful examples of such diversification for all three exchanges.[284] Third, exchanges hoped their deeper liquidity pools would attract investors. "At least two academic studies indicate that mergers improve exchanges' liquidity and attract market share."[285] Fourth, exchanges hoped that their great presence would encourage companies to list on their markets. The ability to attract capital is an important consideration, and commentators suggested that a fresh wave of consolidation might be approaching. However, they predicted that, "mergers will have a different flavour this time," and urged that exchanges "consider ways of partnering with one another that do not involve acquisitions."[286] In any event, with some recovery in sight, signs began to emerge (e.g., LSE's talks to acquire Turquoise) that the exchanges' acquisitive streak might not be entirely a thing of the past.[287]

3. Private Equity and Sovereign Wealth Funds

While the private equity market may have seemed invincible during the years before the current financial crisis, the upheaval in the financial markets changed the assumptions underlying such strength. No longer could it be assumed that "values would forever increase, investors would always clamor to get a piece of a fund, and investors would never default on future commitments."[288] Private equity returns fell throughout 2008 "after the first two quarters showed a consecutive decline for the first time in more than five years."[289] When leaders of the industry met in Berlin in February 2009 to assess

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NYSE Euronext achieved only $120 million of the $250 million in planned technology savings by the end of 2008. NASDAQ OMX and LSE beat their cost-saving targets. *Id.* at 26-27.

283. *Id.*

284. "The LSE . . . reduced its exposure to cash equities and acquired derivatives and clearing businesses through its tie-up with Borsa Italiana. . . . NYSE's acquisition enabled it to move into several large European markets, a feat that would have been difficult to accomplish alone. . . . NASDAQ's motives in the OMX deal were centered on diversification. . . . First was to establish a strong presence in Europe in order to grow [the] combined business through a streamlined infrastructure in the Nordics and pan-European initiative. Second was to gain a global footprint, operation and exchange relationships through OMX's highly successful global technology business." *Id.*

285. Arnold et al.'s study in 1999, which analyzed the effect of three US regional mergers on liquidity and market share, found that merged exchanges provided narrower bid-ask spreads and drew market share from rivals. Another study, by Padilla and Pagano in 2005, which looked at the harmonization of clearing systems in the Euronext exchanges, found that liquidity among the largest 100 stocks rose substantially. *Id.*

286. *Id.*

287. Luke Jeffs, *LSE Shows Its Acquisitive Streak,* FIN. NEWS ONLINE US, Oct. 2, 2009, http://www.efinancialnews.com/privateequity/content/1055319552/28197.

288. Thomas Beaudoin, Jennifer Berrent, Stephanie Evans & Sarah Rothermal, *Trends in the Private Equity Secondary Market—A Response to Today's Financial Markets,* BUS. L. TODAY, Mar.-Apr. 2009, at 41.

289. Shanny Basar, *Private Equity Returns Continue Their Slide,* FIN. NEWS ONLINE US, Feb.

the situation, Henry Kravis, founding partner of Kohlberg Kravis Roberts, urged private equity firms to "adapt to the new realities of the global recession or become irrelevant."[290] David Rubenstein, co-founder of the Carlyle Group, predicated that 2009 "would see relatively few completed buyouts, a higher percentage of non-control investments, a lower number of funds raised and the collapse of some major investments made at the market's peak."[291]

Nonetheless, there were also reasons to be optimistic about the role of private equity. Rubenstein identified "15 reasons why the industry would benefit from the economic turmoil."[292] Other commentators also noted positive characteristics of the industry.[293] The CCMR May 2009 report concurred that private equity firms "have several important advantages relative to their public (or non-private equity) competitors"[294] and saw no need for further regulation of the industry.

As part of the industry's effort to improve its image, the Private Equity Council, a Washington-based organization created in 2007 by thirteen of the world's largest buyout firms, embraced the United Nations Principles for

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13, 2009, *at* http://www.efinancialnews.com/privateequity/content/1053338052/25532.

290. Paul Hodkinson & Duncan Wood, *Not Such Super Returns: Industry Faces Up To The New World,* FIN. NEWS ONLINE US, Feb. 9, 2009, http://www.efinancialnews.com/investmentbanking/mergersandacquisitions/content/.

291. *Id.*

292. *Id.* The fifteen reasons are as follows: 1) the need for private equity is greater than ever; 2) lower prices improve returns; 3) many deals now do not need new debt, or even any debt; 4) resumption of normal patterns affords time to improve companies; 5) pressure on banks to lend will mean by late 2009 or 2010 there will be more leverage available; 6) co-investment opportunities will be greater than before; 7) debt will be on tougher terms; 8) less pressure to invest quickly; 9) the number of less-disciplined buyers will be reduced; 10) governments will see private equity as a solution to problems; 11) there will be an enhanced recognition that private equity caused neither systemic risk nor the economic decline; 12) the expectations of what private equity can achieve will return to more normal levels; 13) firms will stabilize, then grow; 14) the industry's image will improve; and 15) private equity will become the preferred alternative investment. *Id.*

293. Oliver Smiddy and Scott Austin, *Private Equity Annual Review: Ray Of Hope As Lessons Of Dotcom Crash Are Learnt,* FIN. NEWS ONLINE US, Feb. 2, 2009, http://www/efinancialnews.com/privateequity/buyouts/content/1053196175/25381; James Mawson, *Companies Benefit From Private Equity Productivity Boost,* FIN. NEWS ONLINE US, Feb. 17, 2009, http://www.efinancialnews.com/privateequity/content/1053365640/25565.

294. First, Moody's Investors Service has found that troubled firms "backed by private equity have access to capital sources unavailable to strategic operators facing similar market constraints." Second, recent research completed by the World Economic Forum found that during periods of acute financial stress, productivity growth at PE-sponsored companies was 13.5 percentage points higher than productivity growth at comparable non-PE businesses. PE-owned companies also have flexibility provided by heavily involved boards that can act decisively to avoid a crisis. Finally, it is important to recognize that the failure of a portfolio company is unlikely to have knock-on effects to the larger financial system. Portfolio companies are broadly diversified across industries and neither PE funds nor portfolio companies are cross-collateralized. These factors, taken as a whole, demonstrate that PE firms pose little in the way of systemic risk. *The Global Financial Crisis: A Plan for Regulatory Reform, Committee on Capital Markets Regulation*, May 2009, at ES-14, http://www.capmktsreg.org [hereinafter The Global Financial Crisis].

Responsible Investment, which cover environmental, health, safety, labor, governance, and social issues.[295] The industry group composing a code of conduct for European private equity decided against adopting the UN Principles, but said that it would acknowledge them in the process of drawing up a voluntary code.[296]

C. *The New Integrative Role of the Group of Twenty (G-20): 2008 and 2009 Summits Tackling the Financial Crisis*

The G-20[297] is uniquely qualified to play a significant role in formulating an international plan for tackling the emergency situation created by the worldwide economic breakdown.[298] Almost a decade since its inception, it has now emerged as the designated premier forum [299] in attacking the root causes of the crisis and giving direction to the member countries, particularly with regard to its Declaration,[300] and Action Plan,[301] and the Communiqué[302] issued at its London meeting[303] in 2009. The emerging importance of the G-20

295. *Top Private Equity Firms Embrace UN Principles,* FIN. NEWS ONLINE US, Feb. 11, 2009, http://www.efinancialnews.com/usedition/pressdigest/content/1053308331/25500.

296. Paul Hodkinson, *Industry Shuns PRI for European Code,* FIN. NEWS ONLINE US, Feb. 17, 2009, http://www.efinancialnews.com/privateequity/content/1053362477/25565.

297. The G-20 members include Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States, and the EU. *See* About G-20, *supra* note 12. It was initially founded in 1999 as a roundtable of the finance ministers from the major economies, and from the major international development banks. It serves as an opportunity for those ministers to cooperate and consult and "bring together major advanced and emerging economies to stabilize the global financial market and," to achieve a sustainable economic growth and development". *See About G-20,* www.g20.org (last visited Mar. 20, 2011). The structure is a revolving one (to prevent domination by any one country) and consists of a three-member management group from the past, present and future chairs, known as the Troika. *See id.*

298. "The G-20's economic weight and broad membership gives it a high degree of legitimacy and influence over the management of the global economy and financial system." *Id.*

299. G-20, Leaders' Statement, The Pittsburgh Summit Sept. 24-25, 2009, ¶ 19, http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf (last visited April 6, 2011). *See also G20 becomes main world economic forum,* TIMES OF INDIA, Sept. 25, 2008, http://timesofindia.indiatimes.com/news/business/international-business/G20-becomes-main-world-economic-forum/articleshow/5054665.cms.

300. Declaration of the Summit on Financial Markets and the World Economy (Nov. 15, 2008) *available at* www.g20.org/Documents/g20_summit_declaration.pdf [hereinafter Washington Declaration].

See About G-20, *supra* note 12.

301. G-20, Summit on Financial Markets and the World Economy, Action Plan (Nov. 15, 2008), *available at* http://www.g20.org/Documents/g20_summit_declaration.pdf [hereinafter Action Plan].

302. Statement issued by the G20 Leaders, *Global Plan for Recovery and Reform,* ¶ 13 (Apr. 2, 2009), *available at http://www.g20.utoronto.ca/2009/2009communique0402.html* [hereinafter Communiqué].

303. The London Summit 2009 *at* http://www.londonsummit.gov.uk/en/ [hereinafter London Summit].

and the necessity for cooperation among the Leaders of its member nations is self evident: collectively the twenty members represent around ninety percent of the global gross national product, eighty percent of world trade, and two-thirds of the world's population.[304] In an acknowledgment of the need to have a broad body of both developed and developing nations to deal with the global economic crisis, the G-20 was formalized as the "premier forum for international economic cooperation" [305] at the 2009 meeting in Pittsburgh.[306] The emergence of a formal G-20 body represents an expansion of vision beyond that of the powerful industrialized countries of the G-7 and G-8.

1. Financial Market Action Plan Developed at the Washington G-20 Summit (November 15, 2008)

At the meeting in Washington D.C., the G-20 Leaders published a Declaration of the Summit on Financial Markets and the World Economy (Washington Declaration) in which it expressed a determination "to enhance our cooperation and work together to restore global growth and achieve needed reforms in the world's financial systems."[307]

a. Common Principles for Reform of Financial Markets

The Washington Declaration includes a list of Common Principles for Reform of Financial Markets (Common Principles) that contains conceptual objectives for stabilizing markets. Their goal was to "implement reforms that will strengthen financial markets and regulatory regimes so as to avoid future crises."[308] The separate responses from the U.S. and the EU in regard to the call for an implementation of financial reforms are discussed in later sections of this paper. The Common Principles consist of: 1) strengthening transparency and accountability; 2) enhancing sound regulation; 3) promoting integrity in financial markets; 4) reinforcing international cooperation; and 5) reforming international financial institutions. The principles were founded on the notion that international cooperation and coordination among regulators was essential

304. *See About G-20*, *supra* note 12. "The G-20's economic weight and broad membership gives it a high degree of legitimacy and influence over the management of the global economy and financial system." *Id.*

305. G-20, Leaders' Statement, *supra* note 299. The G-8 started as the G-6 in 1975, initially only including the wealthy nations of France, Germany, Italy, Japan, United Kingdom and the United States, but later expanded to include Canada in 1996 (G-7), and Russia in 1997 (G-8). *See* Glen Levy, *A Brief History of The G-8*, TIME, Jul. 8, 2009, http://www.time.com/time/world/article/0,8599,1909008,00.html; *see also About G-20*, *supra* note 12.

306. Pittsburg Summit 2009, http://www.pittsburghsummit.gov/ (last visited Mar. 20, 2011) [hereinafter Pittsburgh Summit].

307. Washington Declaration, *supra* note 300.

308. *Id.*

for successful and consistent implementation for reform of financial markets.[309]

b. Action Plan

Using the Common Principles as a basis, the G-20 Leaders created a very specific Action Plan outlining mutually agreed upon goals and including some target dates.[310] The Action Plan included immediate, medium, and long-term goals under each of the five Common Principles. Progress on implementation of the immediate goals was expected to occur by the time of the London summit in April 2009.[311] The G-20 Leaders emphasized the need for intensified international cooperation among regulators and strengthening of international standards with consistent implementation.[312] Therefore, integrated throughout the Action Plan are actions to be taken by the International Monetary Fund (IMF), the expanded Financial Stability Board (FSB), World Bank, and other multilateral development banks (MDBs),[313] a recommendation that there should be work by key global accounting standards bodies toward the objective of creating a single high-quality accounting standard,[314] and concerns with the governance of the international accounting standard setting body (IASB).[315] The Action Plan also underscored the need to comprehensively reform the Bretton Woods institutions and to support emerging market economies and developing countries.[316] In a press release following the meeting, European Commission President José Manuel Barroso made two very relevant points: there is no national road out of the financial crisis and there is a need to adjust global economic institutions and rules.[317]

309. Washington Declaration, *supra* note 300, ¶ 8.

310. Action Plan, *supra* note 301.

311. *Id. See* Washington Declaration, *supra* note 300.

312. Washington Declaration, *supra* note 300, ¶ 8.

313. Action Plan, *supra* note 301, Enhancing Sound Regulation, *Regulatory Regimes, Immediate Actions by March 31, 2009.*

314. Action Plan, *supra* note 301, Strengthening Transparency and Accountability, *Medium-term actions.*

315. *Id.*

316. Washington Declaration, *supra* note 300, ¶ 9, Reforming International Financial Institutions. The international monetary system was established by the International Monetary Fund and World Bank in 1944 at Bretton Woods, New Hampshire to provide stable and adjustable exchange rates.

317. José Manuel Durão Barroso, President, European Comm'n, Karamanlis Foundation International Conference: The European Union in the 21st Century and the Role of the Commission (Nov. 4, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/585&format=HTML&aged=0&language=EN&guiLanguage=en.

2. Financial Market Recommendations Developed at London G-20 Summit (April 2, 2009)

On April 2, 2009 the Leaders of the G-20 met in London.[318] They were fully aware of the extent of the financial crisis and the resulting economic chaos, so a great deal of time was spent trying to reach consensus on an appropriate response to the crisis.[319] The most important outcome of the London Summit was the Global Plan for Recovery and Reform: the Communiqué from the London Summit (Communiqué).[320] In addition to the Communiqué, the Leaders issued a detailed forty-seven-item Progress Report on the Washington Action Plan goals (Progress Report). [321]

a. The London Summit Communiqué

The Communiqué outlined a system of international financial regulation in recognition that the fundamental causes of the crisis were major failures in the financial sector and in financial regulation and supervision.[322] In line with their commitment to international cooperation and adoption of a more global perspective, the G-20 Leaders agreed, in rather broad language, "to build a stronger, more globally consistent supervisory and regulatory framework for the future financial sector, which will support sustainable growth and serve the needs of business and citizens,"[323] and will integrate its financial policy and regulation with the EU and the rapidly evolving financial systems.[324]

The G-20 initiatives and agenda within the scope of this article were directed toward harmonization of member capital markets in a swiftly changing global economy, particularly those items related to strengthening transparency and accountability and promoting integrity in the global financial marketplace. Attention was given in the Communiqué to goals related to international cooperation, prudential regulation, and the scope of regulation of hedge funds.[325] It called on the credit derivatives industry to develop an action plan on

318. London Summit 2009, *supra* note 302.

319. Meeting of Finance Ministers and Central Bank Governors, London, 4-5 September 2009, Declaration on Further Steps to Strengthen the Financial System (Sept. 4-5, 2009), http://www.g20.org/Documents/FM_CBG_Declaration_Final.pdf.

320. *See* Communiqué, *supra* note 302.

321. Progress Report on the Actions of the Washington Action Plan (Apr. 2, 2009), http://www.g20.org/Documents/FINAL_Annex_on_Action_Plan.pdf.

322. *See* Communiqué, *supra* note 302.

323. *Id.* ¶ 13.

324. The London Communiqué pledged to accomplish six goals: 1) restore confidence, growth and jobs; 2) repair the financial system to restore lending; 3) strengthen financial regulation to rebuild trust; 4) fund and reform international financial institutions to overcome this crisis and prevent future ones; 5) promote global trade and investment and reject protectionism, to underpin prosperity; and 6) build an inclusive, green and sustainable recovery. *Id.* at ¶ 4.

325. Communiqué, *supra* note 302, ¶ 15; *see also* Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives

standardization and establishment of central clearing counterparties subject to effective regulation and supervision.[326] The Communiqué also outlined reforms to be undertaken relevant to executive compensation, tax havens, non-cooperative jurisdictions, and credit rating agencies.[327]

The G-20 Leaders agreed that national accounting standard setters should improve standards for the valuation of financial instruments, and make significant progress towards a single set of high quality global accounting standards.[328] In regard to strengthening financial regulation, the Communiqué pledged that the Leaders would implement the Action Plan through specific actions, and issued a Declaration, Strengthening the Financial System (London Declaration). [329] Some provisions of the agreement refer to international commitments to establish a new Financial Stability Board (replacing the former Financial Stability Forum), including all G-20 countries, and to reinforce the stability of, and collaborate with, the IMF in order to provide early notification of macroeconomic and financial risks, and the actions necessary to resolve them.[330]

3. Financial Market Reform Plans Developed at the Pittsburgh G-20 Summit (Sept. 24. 2009) [331]

It was at the Pittsburgh Summit that the G-20, rather than the G-7 or G-8, became designated as the premier forum for international economic cooperation.[332] With governments and international organizations hard at work

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3004/39/EC and 2009/.../EC, April 30, 2009, http://ec.europa.eu/internal_market/investment/alternative_investments_en.htm#proposal [hereinafter Proposal for Directive on Alternative Investment Fund Managers].

326. Communiqué, *supra* note 302, ¶ 15.

327. *Id.* ¶ 15.

328. *Id.* The Global Plan for Recovery and Reform 2April 2009, ¶15 (Apr. 2, 2009), http://www.g20.org/Documents/final-communique.pdf.

329. London Declaration, G-20, Declaration on Strengthening the Financial System (April 2, 2009), *available at* http://www.londonsummit.gov.uk/en/summit-aims/summit-communique/.

330. *Id.* at 1.

331. *About the Summit*, G-20, www.pittsburghsummit.gov/about/index.htm (last visited Mar. 20, 2011).

332. G-20, Leaders' Statement, *supra* note 299, pmbl. ¶ 19. Edmund L. Andrews, Global Economic Forum to Expand Permanently, N.Y. TIMES, Sept. 24, 2009, http://www.nytimes.com/2009/09/25/world/25summit.html?_r=1 (giving information about President Obama's announcement that the G-7 and G-8 will be replaced formally with the G-20 – having the effect of reducing the status of the global forum of rich industrial nations known as the G-7 and G-8 through the introduction of a much broader-based body that now includes countries like China, Brazil, and India); Leader's Statement: The Pittsburgh Summit (Sept. 24-25, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-G-20-Summit-in-Pittsburgh [hereinafter Leaders' Statement: Pittsburgh G-20 Summit]. In his "Statement by the President on G-20 Summit in Pittsburgh" President Obama noted, "to avoid being trapped in the cycle of bubble and bust, we must set a path for sustainable growth while steering clear of the imbalances of the past. That will be a key part of the G20 agenda going forward and the Pittsburgh

to meet the objectives set out at the Washington and London Summits, a top agenda item in Pittsburgh was to make the Leaders accountable by a review of the progress made since the prior two summits and a discussion of further actions to assure a sound and sustainable recovery from the global financial and economic crisis.[333] The Leaders committed to the swift implementation of financial market reform, considering the improvement of financial markets' functioning as essential to avoiding a repetition of the fiscal crisis.[334] Specifically there was an agreement that all major G-20 centers must adopt the Basel II Capital Framework, as strengthened by the Basel Committee (the organization responsible for establishing international banking standards) by 2011.[335]

4. U.S. Financial Reform in Line with the G-20 Action Plan

a. Regulatory and Accounting Standard-Setting Changes

The G-20's call for convergence of the relevant accounting standard-setters to "achieve a single set of high quality global accounting standards, within the context of their independent standard setting process, and complete their convergence by 2011"[336] is a powerful mandate. As the G-20 Leaders pledge to fulfill obligations to dramatically revise the international securities marketplace and achieve the goal of a single set of global accounting standards, the U.S. standard-setting agents include the SEC and the FASB. Both entities participate in the regulatory and standard-setting process in the U.S.

Summit can be an important milestone in our efforts." Statement by the President on G-20 Summit in Pittsburgh, www.pittsburgh.gov/press/129285.htm (last visited Sept. 10, 2010).

333. G-20, Leaders' Statement, *supra* note 299, pmbl. ¶ 7.

334. *Id.*

335. *Id.* ¶ 13. The Basel Committee on Banking Supervision sets international banking standards. In Dec. 2009, the Basel Committee on banking supervision issues a set of new capital adequacy proposals – Basel II – Which have become the centerpiece of the G-20's financial reform efforts. They included an overall leverage ratio, tighter definitions of capital, countercyclical capital buffers and short-term liquidity buffers to cover temporary cash shortfalls. This forces banks to hold much larger capital reserves, thus increases their ability to absorb losses. *See Consultative Proposals to Strengthen the Resilience of the Banking Sector Announced by the Basel Committee*, BANK FOR INTERNATIONAL SETTLEMENTS (Dec. 17, 2009), http://www.bis.org/press/p091217.htm. The new framework was presented to the G-20 leaders in 2010. Report to the G20 on Response to the Financial Crisis Released by the Basel Committee (Oct. 19, 2010), *available at* http://www.bis.org/press/p101019.htm; *see also* Damian Paleta & David Enrich, *Banks Get New Restraints*, WALL ST. J., Sept. 13, 2010, at A1.

336. G-20 Leaders' Statement, *supra* note 299, pmbl. ¶ 14. As long as the EU follows the IFRS and the U.S. applies the GAAP standards, the comparison of capital requirements between EU and U.S. banks are not comparable for the purposes of the Basel II capital adequacy rules. The commitment by the G-20 Leaders at their 2009 Pittsburgh Summit that they would implement the Basel II Capital Framework by 2011 has thus created an immense problem.

i. SEC Roadmap Update

There has been a delay in completing the SEC Roadmap project for achieving GAAP/IFRS convergence while the government is staving off the effects of the economic crisis.[337] However, SEC Chief Accountant James Kroeker gave some encouragement in 2009 that, "turning back to the roadmap will be an important priority for us this fall."[338] Kroeker mentioned that from the two hundred comment letters the SEC had received, it was "resoundingly clear" that the commentators agreed that there should be a single set of accounting standards; however, they disagreed on how to accomplish that goal.[339] The SEC staff, Kroeker stated, would be working to establish the "pillars and milestones" to achieve convergence with IFRS, while attempting to avoid a "race to the bottom."[340] However, he assumed a cautionary tone when he addressed the issue of the timing of the SEC Roadmap in December 2009 at a conference on IFRS, and emphasized that the accounting standard-setting boards should not wait for the SEC to make its decision on the final Roadmap.[341]

Current SEC Chairman Mary Schapiro previously seemed determined to move ahead with the Roadmap. In September 2009, she confirmed the SEC's determination to complete the Roadmap and indicated her intent to again turn the SEC's attention back to actively moving forward on it.[342] Further support for this position was provided by a Commission vote to issue a statement making clear its continued belief in convergence and setting a due date of October 2010 for a status report from the SEC staff on the FASB and IASB convergence projects.[343] Although the SEC has been pursuing the goals of

337. Defelice, *supra* note 336. More than 110 countries, including most of Europe and Asia, use the IFRS drawn up by the IASB while most U.S. companies use the GAAP standards drawn up by FASB. Sanderson, *supra* note 127.

338. *See* Emily Chasan, *SEC to Refocus on IFRS Roadmap-official*, REUTERS, Sept. 17, 2009, http://www.reuters.com/article/ousivMolt/idSTRE58G4BJ20090917.

339. *Id.*

340. *Id.*

341. Michael Cohn, *Kroeker: Don't Wait For The Roadmap,* WEB CPA, Dec. 14, 2009, http://www.webcpa.com/ato_issues/23_19/kroeker-dont-wait-for-the-roadmap-52625-1.html; James L. Kroeker, Chief Accountant, Office of the Chief Accountant, SEC, Remarks Before the 2009 AICPA National Conference on Current SEC and PCAOB Developments (Dec. 7, 2009), *available at* http://www.sec.gov/news/speech/2009/spch120709jlk.htm.

342. SEC Chairman Mary Shapiro has been quoted from a speech at Georgetown University as saying, "I expect we will speak a little later this fall about what our expectations are with respect to IFRS." *See IFRS on Schapiro's Agenda*, AICPA, Sept. 18, 2009, http://www.ifrs.com; *see also* Emily Chasan, *SEC to Refocus on IFRS roadmap-official*, REUTERS, Sept. 17, 2009, http://www.reuters.com/article/ousivMolt/idSTRE58G4BJ20090917. Subsequently, however, "[i]n Feb. 2010, the SEC [changed position and] unanimously approved a timeline that envisions 2015 as the earliest possible date for the required use of IFRS by U.S. public companies. Alexandra Defelice & Matthew G. Lamoreaux, *No IFRS Requirement Until 2015 or Later Under New SEC Timeline,* J. ACCOUNTANCY, Feb. 24, 2010 http://www.journalofaccountancy.com/Web/20102656.htm. The SEC statement has been met with mixed reactions, ranging from supportive to disappointed.

343. Press Release, SEC, SEC Approves Statement on Global Accounting Standards (Feb. 24,

convergence in its Roadmap efforts, it has made no direct reference to the G-20 emphasis on creating a single set of high quality accounting standards.

ii. Progress between Financial Accounting Standards Board and International Accounting Standards Board on Convergence of Accounting Standards

The FASB and IASB also feel the pressure from the G-20 to proceed more rapidly on the convergence of accounting standards. As a result of the worldwide financial turmoil, the IASB and FASB created a Financial Crisis Advisory Group (FCAG) in the fall of 2008. [344] The FCAG's mandate was to review financial reporting issues arising from the global crisis.[345] Among the decisions of the FASB and the IASB, "partly in response to G-20 recommendations, and partly in response to other recommendations[,] such as those from the Financial Crisis Advisory Group," are proposals relating to financial instruments, fair value, financing receivables, and the allowance for credit losses.[346] The two standard-setters are hosting three joint roundtables on financial instruments accounting. Additionally, the IASB recently released an updated table summarizing its response to G-20 recommendations.[347]

The IASB and FASB have organized the three joint projects on which they are working simultaneously: 1) Financial Crisis related projects; 2) Memorandum of understanding projects; and 3) the Conceptual Framework.[348] Despite all these efforts, Sir David Tweedie,[349] Chairman of the IASB, and an influential figure in both the EU and the world of international financial regulation, remains concerned with the U.S. advancement toward IFRS. In a speech to the American Accounting Association, he noted, "My view is that the U.S. needs to commit by 2011, one way or the other."[350] Tweedie expressed his frustration by asking, "Where is the USA? That is a question that I am asked all

2010), *available at* http://www.sec.gov/news/press/2010/2010-27.htm.

344. The membership of the Financial Advisory Group is comprised of representatives and recognized leaders from business and government, with expertise in international financial markets. *See* FASB, *IASB and FASB Announce Membership of Financial Crisis Advisory Group* (Dec. 30, 2008), http://www.fasb.org/news/nr123008.shtml.

345. *Id.*

346. *IASB Updates G-20; FASB, IASB Seek Comment on Proposals*, FEI FINANCIAL REPORTING BLOG: AUGUST 2009, Aug. 30, 2009, http://financialexecutives.blogspot.com/2009_08_01_ archive.html.

347. IASB, Work Plan-projected timetable, http://www.iasb.org/Current+Projects/IASB+Work+Plan.htm (last visited August 1, 2009).

348. *Id.*

349. Sir Tweedie's term of office expires in June 2011 and his replacement has not been announced. Sir Tweedie has been criticized for making a priority his effort "to get the U.S. to adopt international rules at the expense of European interests." Rachel Sanderson & Nikki Tait, *Hunt for IASB Head Hits Hurdle,* FIN. TIMES, Aug. 16, 2010, at 1.

350. *IASB Wants US IFRS Commitment By 2011,* OHIO SOCIETY OF CPAS, Aug. 6, 2009, http://ohioscpa.com/Content/44847.aspx (last visited Sept. 10, 2010).

over the world. . . . If you're going to have global standards, we need the U.S., but it can't go on indefinitely."[351]

Feeding into Sir Tweedie's frustrations is the latest announcement from the SEC that the commissioners unanimously approved a new timeline envisioning 2015 as the earliest possible date for the required use of IFRS by the U.S.[352]Although it may seem obvious to some that the U.S. should accept that new, single, and quality accounting standards are essential to the interdependent global economy, delays seem to be the order of the day, with an increasing risk of the U.S. being bypassed by the world's capital and financial markets.

b. Ongoing SEC Review of Section 404: The September 2009 Survey

In September 2009, the SEC issued its survey results on the ramifications of its expensive internal control requirements, delineated in Section 404, for foreign and domestic issuers.[353] The survey was fueled by concerns that were covered earlier in this article, such as the expense and burden of compliance and the potential of de-listings (77 percent of small foreign firms considered delisting from the U.S. exchanges, it turns out). Overall the "evidence from the survey response data shows that the cost of Section 404 compliance decreased following the Commission's reforms introduced in 2007; this evidence may prove useful in understanding the effects of the 2007 reforms as well as guiding any subsequent regulatory efforts."[354] This quotation from the SEC survey, emphasizing the U.S. response and reforms to Section 404 complaints from foreign issuers, manifests awareness that the U.S. must consider its place in the global securities marketplace when evaluating regulatory changes.

c. U.S. Developments in Statutory Implementation Related to G-20 Financial Recommendations

The U.S., as a key member of the G-20, is obligated to realign its accounting standard-setting to converge with the international accounting standards. Similarly, it needs to review regulation of hedge funds, derivatives, and regulation of banks and other financial institutions to ensure that its regulatory systems are consistent with those of the rest of the financial world.

In June 2009, President Obama unveiled a plan that would create a new agency tentatively called the Consumer Financial Protection Agency and which would "reshape the ways financial institutions do business in the United States

351. *Id.*

352. Defelice & Lamoreaux, supra note 342.

353. SEC, Office of Economic Analysis, Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements (Sept. 2009), http://www.sec.gov/news/studies/2009/sox-404_study.pdf.

354. *Id.* at 96-97.

and the way government supervises that business."[355] The proposal immediately caused friction among regulators and criticism from a multitude of sources.[356] It took Congress just about a year to finalize a bill, during the course of which the SEC sued Goldman, Sachs & Co. for fraud in the structuring and marketing of a collateralized debt obligation (CDO) tied to subprime mortgages, just as the U.S. housing market was beginning to falter.[357] The litigation, which may have had some impact in moving the legislation along, was ultimately settled for $550 million. While the settlement ranked among the largest in the SEC's history, it was characterized as "only a small financial dent for Goldman, which reported $13.39 billion in profit last year."[358]

The final legislation addressed key areas of limiting some of the riskiest activities of banks, regulating the multitrillion-dollar market in over-the-counter derivatives, giving federal regulators the tools to shut failing banks and financial firms instead of bailing them out, protecting consumers from abusive and predatory lending, and giving investors more power to influence corporate boards.[359] While the bill received considerable criticism for not moving reform along enough,[360] it did signal a shift on deregulation.[361] The precise impact, however, will depend on how regulators exercise the considerable discretion the legislation grants them when drafting the detailed regulations for implementation.[362]

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355. Andrzej Zwaniecki, *Obama Envisions Sweeping Reform of Financial Regulation,* AMERICA.GOV, June 17, 2009, http://www.america.gov/st/business-english/2009/June/20090617182403saikceinawz0.6571772.html.

356. *Id.*; *see also Financial Regulatory Reform,* N.Y. TIMES, Oct. 8, 2009, updated Nov. 4, 2010, http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit_crisis/financial_regulatory_reform/index.html.

357. Press Release, SEC, SEC Charges Goldman Sachs with Fraud in Structuring and Marketing of CDO Tied to Subprime Mortgages (April 16, 2010), *available at* http://www.sec.gov/news/press/2010/2010-59.htm; *see also* Susanne Craig, Kara Scannell & Gregory Zuckerman, *Firm Contends It was Blindsided by Lawsuit,* WALL ST. J., April 19, 2010, at 1.

358. Sewell Chan & Louise Story, *S.E.C. Settling Its Complaints With Goldman*, N.Y. TIMES, July 15, 2010, http://www.nytimes.com/2010/07/16/business/16goldman.html.

359. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173, 111th Cong. (2010).

360. Robert Reich described the bill as "a mountain of legislation, a molehill of reform." Robert Reich, *The New Finance Bill: A Mountain of Legislative Paper, A Molehill of Reform,* ROBERT REICH, July 16, 2010, *available at* http://robertreich.org/post/818142564; *see, e.g.,* Matt Taibbi, *Wall Street's War,* ROLLING STONE, June 10, 2010, at 51; Editorial, *Financial Regulation,* N.Y. TIMES, June 26, 2010, http://www.nytimes.com/2010/06/27/opinion/27sun1.html.

361. Binyamin Appelbaum & David Herszenhorn, *Financial Overhaul Signals Shift on Deregulation,* N.Y. TIMES, July 15, 2010, http://www.nytimes.com/2010/07/16/business/16regulate.html.

362. *See* Binyamin Appelbaum, *On Finance Reform Bill, Lobbying Shifts to Regulations,* N.Y. TIMES, June 26, 2010, http://www.nytimes.com/2010/06/27/business/27regulate.html; *see also* Editorial, *Now, the Rules,* N.Y. TIMES, Aug. 22, 2010, http://www.nytimes.com/2010/08/23/opinion/23mon2.html.

5. EU Financial Reform in Line with G-20 Action Plan

a. EU Developments in Statutory Implementation Related to G-20 Financial Recommendations

The final ratification of the Lisbon Treaty has created a shift in the structure of the EU,[363] but the new Treaty is unlikely to have any direct effect on the outcome of attempts at a centralized financial reform. Unlike the U.S., the EU had no central agency for securities regulation until 2009,[364] with each of the twenty-seven Member States within the EU solely responsible for its own regulation and fiercely protective of national sovereignty.[365] In the case of a

363. The final full ratification of the Lisbon Treaty resulted in some changes in the EU leadership at the end of 2009, although the revolving six months presidency of the European Council (formally the Council of Ministers made up of representatives from the Member States) was retained. Lisbon Treaty, *supra* note 1. The new positions of President of the European Council and High Representative of the Union for Foreign Affairs and Security (chief of foreign policy) were created. Herman Van Rompuy of Belgium was elected President of the European Council (and usually referred to as EU President, perhaps because of the central leadership role of the European Council within the EU structure) for a term of two and a half years (renewable once). Press Release, General Secretariat of the Council of the EU, Background, President of the European Council (Nov. 2009), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111298.pdf. Lady Catherine Ashton of Great Britain was elected head of foreign policy. Press Release, European Parliament, Summary of the hearing of Catherine Aston-Foreign Affairs (Jan. 11, 2010), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20100108IPR66978&language=EN. The position of President of the European Commission remained untouched by the Lisbon Treaty and Jose Barroso was reelected and he named Michael Barnier of France as the Commissioner of Internal Market and Services, replacing Charlie McCreevy. *See also The Members of the Barroso Commission (2010-2014)*, EUROPEAN COMMISSION, http://ec.europa.eu/commission_2010-2014/index_en.htm (last visited April 6, 2011). Commissioner Barroso's office within the EU speaks externally for the Member States in dealing with the fiscal crisis with international entities.

364. *See* Proposal For A Regulation Of The European Parliament And Of The Council On Community Macro Prudential Oversight Of The Financial System And Establishing A European Systemic Risk Board (Sept. 23, 2009), http://ec.europa.eu/internal_market/finances/docs/committees/supervision/20090923/com2009_503_en.pdf [hereinafter Proposed Regulation on Financial Supervision Reforms]; Press Release, Europa, Commission adopts legislative proposals to strengthen financial supervision in Europe (Sept. 23, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1347&format=HTML&aged=0&language=EN&guiLanguage=en [hereinafter Press Release, Commission adopts legislative proposals, Sept. 23, 2009].

365. *See* Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 INT'L LAWYER 1121 (2007). At the EU level, the existing situation is that there are three advisory committees in the financial services sector: These are: the Committee of European Banking Supervisors (CEB), the Committee of Insurance and Occupational Pensions Committee (CEIOPS) and the Committee of European Securities Regulators (CESR). These are referred to as the "Lamfalussy level 3 Committees" because of the "role they play in the EU framework for financial services legislation" created in a 2001 report by a group chaired by Alexandre Lamfalussy. *See Financial Services Supervision and Committee Architecture, Overview*, EUROPEAN COMMISSION, http://ec.europa.eu/internal_market/finances/committees/index_en.htm (last visited April 17, 2011).

global fiscal crisis, the EU central body is entirely dependent on its Commissioner of Internal Markets and Services and on the issuance of Directives by the European Commission, which are to be adopted by each Member State.[366] The EU response was propelled by the severity of the worldwide economic downturn and the assault on the Eurozone[367] by significant levels of debt in Greece, Portugal, and Spain.[368]

i. Background

A bloc-wide regulatory regime is not a new idea for the EU. Early in the 2000s, the EU turned its attention to developing an approach to the general financial service industry regulations. In 2001, an EU advisory committee chaired by Alexandre Lamfalussy, a leading central banker and general manager of the Bank for International Settlements spearheaded this project, which came to be known as the "Lamfalussy process."[369] Lamfalussy's aim was to allow the EU to respond rapidly and flexibly to developments in financial markets to achieve greater market integration and improve competitiveness.[370]

366. When it becomes necessary to respond internally, for instance, to G-20 mandates for fiscal regulatory reform, this is handled mainly by the issuance of Directives (although sometimes by Regulations) that involve a harmonization process. A deadline is set by which each Member State must implement the Directive by either passing new national laws or by changing existing national legislation that does not comply. The Treaty section applicable to effect of Directives is carefully worded to preserve semi-autonomous Member States: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Treaty Establishing the European Community, art. 249 (2), Nov. 10, 1997, 1997 O.J. (C 340) 03.

367. "Eurozone" is defined as the geographic and economic region that consists of, to date, 17 EU countries that have fully incorporated the euro as their national currency. *See Eurozone,* INVESTOPEDIA, http://www.investopedia.com/terms/e/eurozone.asp (last viewed May 6, 2010).

368. *See* Brian Blackstone, *Greece's Debt Crisis Poses a Risk to ECB Balance Sheet,* WALL ST. J., April 28, 2010, at A 12; *see also* Matthew Karnitschnig, Stephen Fidler & Tom Lauricella, *Crisis Spreads in Europe,* WALL ST. J., April 28, 2010, at A1.

369. Alexandre Lamfalussy was also the first President of the European Monetary Institute and one of the main proponents for the single capital market within the European Union. The approach to the development of financial service industry regulations was named after Alexandre Lamfalussy, chair of the Committee of Wise Men, the EU advisory committee that created the process. *See* Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels (Feb. 15, 2001), http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf. The first aim of the Lamfalussy Report was to set up the adoption of EU financial services law. This approach consisted of four levels: Level 1 consists of framework Directives or Regulations; at Level 2, four regulatory Committees assist the Commission in adopting implementing measures, ensuring that technical provisions can be kept up to date with market developments; Committees of national supervisors are responsible for Level 3 measures, which aim to improve the implementation of Level 1 and 2 acts in the Member States and at Level 4, the Commission will strengthen the enforcement of EU law. *Id.*

370. Press Release, Europa, Inter-institutional Monitoring Group propose improvements to the development of financial services regulation markets (Jan. 30, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/108&format=HTML&aged=0&language=EN&guiLanguage=en. In October 2008, the situation in the financial markets caused EC

ii. High-Level Group on Financial Supervision

In October 2008, European Commission President Barroso established The High-Level Group on Financial Supervision ("High Level Group" or "Group") in the EU, chaired by Jacques de Larosière, to give advice on the future of European financial regulation and supervision.[371] The Group drew on the work contained in the Lamfalussy process.

In the report presented by the High-Level Group in February 2009, [372] a distinction was made between financial regulation and financial supervision,[373] but it was recognized that the two were intertwined. The High Level Group Report ("Report") pointed out Europe's special situation requiring bloc-wide attention,[374] including the need for EU cohesiveness that could be achieved if there was a set of regulations and directives that would strive for maximum harmonization among the Member States.[375]

Commissioner McCreevy to commend the Economic and Monetary Affairs Committee on the contents of its follow-up report on the Lamfalussy process pertaining to the future structure of [financial regulatory] supervision and to comment that "[i]t is heartening to see that so many of the issues you highlight are those that the Commission is also prioritizing." Press Release, Europa, Charlie McCreevy, European Commissioner for Internal Market and Services, Lamfalussy follow up: future structure of supervision, speech at the European Parliament Plenary Session, Brussels (Oct. 8, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/513&format=HTML&aged=0&language=EN&guiLanguage=EN.

371. Press Release, Jose Manuel Durao Barroso, Results of the European Council (Oct. 21, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/544.

372. Report of The High-Level Group on Financial Supervision in the EU, Brussels (Feb. 25, 2009), http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf [hereinafter Larosière Report]. One of the problems identified in a list that appeared at the foreword to its Report: "Financial regulation and supervision have been too weak or have provided the wrong incentives. Global markets have fanned the contagion. Opacity, complexity have made things much worse." *Id.* at 3. The solution was to be a new framework of regulation to reduce risk and improve risk management; to provide stronger coordinated supervision and to build confidence among supervisors. *Id.* at 4.

373. The definition of "financial regulation" is the set of rules and standards that govern financial institutions; the main objective of "financial regulation" is to foster financial stability and to protect the customers of financial services. On the other hand, "financial supervision" is the process designed to oversee financial institutions in order to ensure that rules and standards are properly applied. *Id.* at 13. There needs to be a judgment at the EU level as well as in the Member States and a greater role for the European Central Bank (ECB). *Id.* at 42.

374. *Id.* at 27, 29, 39.

375. *Id.* at 29. The European Central Bank (ECB under the Larosière proposals would have a macro-prudential oversight but not a micro-prudential supervision which would remain with the individual Member State who would work towards a European System of Financial Supervision (ESFS). *See id.* at 46. The current Banking Supervision Committee (BSC) of the ECB would be replaced by the European Systemic Risk Council (ESRC) chaired by the President of the ECB. *See id.* at 44. The ESFS would be composed of existing national supervisors who would carry out day-to-day supervision. *See id.* at 47. However, the overall aim would be the creation of a European system of financial supervision. This would be achieved by the transformation of level three committees into three European Authorities: a European Banking Authority, a European Insurance Authority and a European Securities Authority. *See id.* at 49. The time span suggested by Larosière was a phased change so that immediate action would be taken to strengthen national supervisory

The High-Level Group Report indicated that it welcomed the work of the G-20 in promoting integrity in financial markets and reinforcing international cooperation. Also, it supported the continuing role of the newly renamed Financial Stability Board and the strengthening of the IMF.[376] When the Report was presented on February 25, 2009, the European Commission readily accepted the recommendations.[377]

iii. Progress Toward Pan-European Financial Reform

The global credit crisis, the G-20 commitments, and the market turmoil triggered by the fallout from the Eurozone crisis are a few of the factors creating incentives for the EU to move more quickly towards a central, bloc-wide regulatory scheme. In September 2009, the European Commission put forward a regulation engineering a new pan-European financial supervision architecture.[378] The focus fell on three regulatory proposals covering: 1) alternative investment funds, including hedge funds and equity funds;[379] 2) capital requirements for banks and the bonuses these financial institutions pay out based on Basel-II, with similar objectives agreed to by leaders of the G-20 meeting in London;[380] and 3) the supervision of the financial sector, both at the micro and the macro level.[381] The last of the three proposals was the most

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authorities with a view to upgrading the quality of supervision in the EU. *See id.* at 51.

376. Larosière Report, *supra* note 372 at 61, 64.

377. "...[S]wift decisions in Europe, based on the conclusions of the report which I asked the de Larosière group to present, can help us drive the global effort on supervision. The Commission will make detailed proposals to the June European Council. I am happy with the good overall reaction that was given to the de Larosière report." Press Conference, Remarks by President Barroso (Mar. 31, 2009), *available at* http://ec.europa.eu/cyprus/news/20090401_g20_barroso_en.htm.

378. Proposed Regulation on Financial Supervision Reforms, *supra* note 364; *see also Commission Adopts Legislative Proposals*, *supra* note 364.

379. *See* Proposal for a Directive on Alternative Investment Fund Managers, *supra* note 325; Press Release, Europa, Financial Services: Commission proposes EU framework for managers of alternative investment funds (April 29, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/669&format=HTML&aged=0&language=EN&guiLanguage=fr.

380. Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies, COMM'N OF THE EUR. COMM.,
http://ec.europa.eu/internal_market/bank/docs/regcapital/com2009/Leg_Proposal_Adopted_1307.pdf . (last viewed May 6, 2010); *see* Press Release, Europa, Capital Requirements Directive-Frequently Asked Questions (July 13, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/335&format=HTML&aged=0&language=EN&guiLanguage=en.

381. Directive of the European Parliament and of the Council Amending Directives 1998/26EC, 2002/87EC, 2003/6EC2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (Oct. 26, 2009), http://ec.europa.eu/internal_market/finances/docs/committees/supervision/20091026_576_en.pdf [hereinafter Directive on powers of the Banking

controversial because it brought to the fore fears that the powers of national authorities will be eroded.[382]

It appeared that the European Commission sought to impose bloc-wide/pan-European regulatory bodies to supervise banks and detect systemic risks that threaten the financial system.[383] The new legislation proposed the creation of a European Systemic Risk Board, [384] and a European System of Financial Supervisors[385] consisting of a network of national financial supervisors working in tandem with three new European Supervisory Authorities: the European Banking Authority, the European Insurance and Occupational Pensions Authority, and the European Securities and Markets Authority. [386]

The pending threat of bloc-wide regulation caused the Germans to argue that the Commission had overstepped its mandate by pushing for the creation of three new authorities with supra-national powers that would conflict with those of national bodies.[387] The U.K. also viewed the pan-European regulatory scheme with great concern.[388] There were complaints that what had been left to "local enforcers" would be centralized and "London could end up with stricter

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Authority, Insurance Authority and EMSA]. Proposed Regulation on Financial Supervision Reforms, *supra* note 378; *see also* Press Release, European Parliament, Economic reform and stability for a new economy: The European Parliament's work (March 3, 2010), *available at* http://www.europarl.europa.eu/news/expert/background_page/042-68823-039-02-07-907-20100210BKG68822-08-02-2010-2010-false/default_p001c001_en.htm.

382. *See* Adam Cohen & Charles Forelle, *EU's Watchdog Plan Faces Uphill Battle,* WALL ST. J., Sept. 24, 2009, at C2.

383. *Id. See also* Proposed Regulation on Financial Supervision Reforms, *supra* note 364; Commission Adopts Legislative Proposals, *supra* note 364.

384. *Id.*

385. *Id.*

386. *Id.*; Directive on Powers of the Banking Authority, Insurance Authority and EMSA, *supra* note 381.

387. *See* Ambrose Evans-Pritchard, *Germany Wants To Rein in EU Financial Regulation Plans,* TELEGRAPH, Sept. 22, 2009, *available at* http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/6219945/Germany-wants-to-rein-in-EU-financial-regulation-plans.html.

388. Lord Woolmer, who chaired the House of Lords Committee looking at '*The future of EU financial regulation and supervision*', said: "But there are concerns. Financial services are a key, strategic industry for the UK. London operates in a global market place as well as in Europe. Many other EU member states do not share this perspective. The UK government must ensure these national interests are properly reflected in new regulations or in structural reforms. There are some worrying signs. The timing and pace of Commission proposals appeared dictated by the timetable of the European Parliament elections and the twilight days of the old Commission." Press Release, House of Lords Committee, The Future of EU Financial Regulation and Supervision (June 17, 2009), *available at* http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/106/10602.htm. A comment from French Finance Minister Christine Lagarde impacts the U.K. when she suggests that the EU should set up its own commodity future trading commission similar to the U.S. Commodity derivatives are currently regulated by the relevant authorities in each European country. But with London as the primary European trading center, the UK's Financial Services Authority (FSA) would absorb the bulk of the work. The FSA will view Finance Minister Lagarde's comments as trespassing on its turf. *The Lex Column, Derivatives Trading*, FIN. TIMES, Apr. 15, 2010, at 12.

rules than New York and lose business to laxer jurisdictions."[389] Other Member States worried that the EU was moving too fast and that this could change the way in which financial institutions operate.[390] In sorting this conflict out, the specter of long-held underlying fears of EU Member States that the central European body will infringe on their carefully guarded national sovereignty has again been raised.

RECOMMENDATIONS AND CONCLUSIONS

The adverse reaction of capital markets worldwide to the fiscal crisis that started in the U.S. in 2008 persuasively suggests that the era of national containment of financial market problems has ended.[391] Technology has ushered into the globalized economy and has initiated a financial era where securities markets are inextricably intertwined. As made clear in the Communiqué issued by the G-20 Leaders in London, "a global crisis requires a global solution."[392]

After a slow evolution over a ten-year period,[393] the U.S. has begun to shift to a more external perspective in its attitudes and governmental actions. During the same period, perhaps motivated by their background and experience in international relations, EU Member States have also begun to shift away from their historic internal tensions. They have instead moved in the direction of an understanding of the advantages of a unified approach to external issues.

In light of the preceding factors, recommendations based on G-20 initiatives for which the history of GATT/WTO provides a supporting framework are discussed below.

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389. Tracy Corrigan. *EU: The City Holds its Breath as Europe Rewrites the Rules*, TELEGRAPH, Sept. 22, 2009, *available at* http://www.telegraph.co.uk/news/worldnews/europe/6217609/EU-The-City-holds-its-breath-as-Europe-rewrites-the-rules.html.

390. "The desire for speedy action must not come at the expense of thorough consultation, impact assessment and risk analysis by the Commission in line with their own Better Regulations principles." European Union Committee 14th Report of Session 2008–09, *The Future of EU Financial Regulation and Supervision*, ¶ 41 (June 17, 2009), http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/106/10602.htm.

391. Tom Hamburger, *Financial System in Crises: In D.C., Few Evade Blame for Calamity,* L.A. TIMES, Oct. 6, 2008, at C1. The out of control debt in Greece, which is mirrored in Spain and Portugal to a lesser extent, has not only created problems within the eurozone but has affected markets globally. *See* Stephen Fidler & Charles Forelle, *World Races to Avert Crisis in Europe,* WALL ST. J., May 10, 2010, at 1. *See also* Nelson D. Schwartz & Eric Dash, *Greek Debt Woes Ripple Outward from Asia to U.S.,* N.Y. TIMES, May 9, 2010, at 1.

392. *Id.*

393. In October 2008 at a meeting between former President Bush and European heads of state "with European leaders favoring greater international oversight of markets and U.S. officials preferring the current model of national regulation." John D. McKinnon, *Rethinking Capitalism's Contours,* WALL ST. J., Oct. 20, 2008, at A4.

Recommendation #1: Utilize lessons from the institutional evolution of the GATT/WTO to strengthen the impact of the G-20.

As the G-20's global leadership role is developing, the world is slowly entering a new era of international cooperation. On a broader scale, it may not be unreasonable to suggest that the emergence of the G-20 as the primary catalyst for global financial policy-making bears some resemblance to the establishment of the General Agreement on Tariffs and Trade (GATT) after World War II. Just as GATT recognized the need for a multilateral, reciprocal mechanism for reducing tariffs on manufactured goods,[394] the G-20 creates a mechanism for coordinating and harmonizing financial, securities, and accounting regulation. Indeed, the depth and breadth of our recent global financial crisis and the steps we are taking to recover from it are akin to the significance of the Bretton Woods institutions,[395] which was developed to restore a functioning global financial and trade framework after the ravages of the Great Depression and the conflagration of World War II.

Mikhail Gorbachev, no stranger to momentous institutional change, has characterized the emergence of the G-20 as a recognition that "the world has changed and that the old institutions have not kept pace with rapidly evolving needs."[396] Yet, he has pointed out that, "already there are questions about the substance and functioning of this new body—questions that need to be answered without delay."[397]

Recommendation #2: The G-20 must strategically focus on achievable targets by reaching closure in a timely manner on the most critical substantive securities and accounting regulatory reforms upon which agreement can be attained.

The first question Gorbachev articulates is "whether the decisions adopted in London can resolve the global financial and economic crises, setting the world economy on track to sustainable growth."[398] If the G-20's role follows the GATT model, we can be hopeful about the substantive outcomes it may achieve. As noted above, the framework that the G-20 has developed to address key areas of financial, securities, and accounting regulatory reform has yielded impressive short- and long-term goals and a mechanism for assessing results. Similarly, GATT's focus on achieving lower import duties globally on manufactured goods was achieved through a methodical, focused series of tariff reduction rounds.[399] The Basel Committee on Banking Supervision, already linked to the

394. PENG, *supra* note 83.

395. *Id.* at 190.

396. Gorbachev, *supra* note 13.

397. *Id.* No G-20 agency has been created with enforcement authority and moral suasion appears to be the primary tool for the member nations' adoption of G-20 dictates.

398. *Id.*

399. PENG, *supra* note 83.

G-20, is providing another building block model.[400]

Recommendation #3: Where international agreement cannot be achieved in the short run, efforts should be made to at least reduce the incompatibility of domestic policies.

As we have pointed out, two recent developments are undercutting the consensus toward global financial integration. The first development concerns the undertaking by developed economies of "financial reregulation . . . guided by domestic political realities that make international consensus more elusive."[401] The second development is espoused by "financial institutions from emerging countries [which] are beginning to overtake their western peers" and are "increasingly resist[ing] standards proposed by members of the old north Atlantic consensus."[402] These forces require global leaders to prioritize their efforts: "A new principle of *subsidiarity* . . . in which only those policy aims that cannot be addressed locally should be tackled globally. This might seem like a step back from integration but, in truth, many reforms are not best pursued at the global level."[403] Again, the GATT experience is relevant. In 1947, essentially all that could be agreed upon (the "low-hanging fruit") was the desirability of reducing tariffs on manufactured goods, so that is what the GATT focused on for its first several decades. Only when that goal was achieved did the GATT tackle new areas, such as trade in services and intellectual property issues.

Recommendation #4: The G-20 needs to develop a workable form of dispute resolution to achieve a realistic mechanism for enforcement and policy accommodation.

The second, and more difficult, question Gorbachev raises is regarding the "concerns the G-20's place within the system of global institutions."[404] He suggested that the G-20 "could claim collective leadership in world affairs if it acts with due respect for the opinions of non-members."[405] In this regard, he describes "the presence in the G-20 of countries representing different geographic regions, different levels of development and different cultures" as a "hopeful sign."[406] However, he also notes that the G-20 is "an improvised affair,

400. The new Basel III rules will be on the agenda of the G-20 in November. Jack Ewing & Sewell Chan, *Regulators Back New Bank Rules to Avert Crises,* N.Y. TIMES, Sept. 12, 2010, http://www.nytimes.com/2010/09/13/business/global/13bank.html.

401. Stephane Rottier & Nicolas Veron, *The New Disintegration of Finance,* FT.COM, Sept. 9, 2010, http://www.ft.com/cms/s/0/938e7228-bc55-11df-a42b-00144feab49a.html.

402. *Id.*

403. *Id.* (emphasis added).

404. Gorbachev, *supra* note 13.

405. *Id.*

406. *Id.*

put together under duress in the extreme conditions of an unexpected global upheaval."[407] This suggests the difficulty of enforcing outcomes agreed upon by the G-20 in the future if members' interests are contrary or a lack of urgency results in reluctance to go to the effort of changing the status quo. Here, GATT provides another useful parallel. As originally adopted, and until the creation of the WTO, the GATT was a "provisional treaty served by an ad hoc secretariat."[408] It wasn't until the WTO was created that adequate trade dispute settlement mechanisms were adopted, allowing the WTO to "adjudicate trade disputes among countries in a more effective and less time-consuming way."[409]

A Context for Progress and the Challenges Ahead

U.S. and EU domestic adherence to existing and evolving G-20 proposals is a pivotal component for the successful implementation of the above recommendations. Therefore, the U.S. and EU must set aside their separate sets of sovereignty issues and recognize that the new order of globalization requires taking heed of the call of the G-20. This new order is referred to by EU Internal Market Commissioner Charlie McCreevy in a speech in May 2009 as the need "to take action to build a more globally consistent, regulatory and supervisory system for the future of financial services." [410] History teaches us that if we do not act now, when the threat of global economic collapse is still fresh in our minds,[411] the underlying problems will remain to be dealt with later, perhaps in even less desirable circumstances.[412]

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407. *Id.*

408. PENG, *supra* note 83, at 211.

409. *Id.*

410. Press Release, Europa, Financial Services: Commission Proposes Stronger Financial Supervision in Europe (May 27, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/836&format=HTML&aged=1&language=EN&guiLanguage=en.

411. In November 2008, a survey found that "four-fifths of business leaders around the world [wanted] to see consolidation or restructuring of financial regulators on a national level," with a preference "for better regulation, not more regulation." Matt Turner & Vivek Ahuja, *Business Leaders Approve Of Regulatory Revamp,* FIN. NEWS ONLINE, http://www.efinancialnews.com/story/2008-11-12/business-leaders-approve-of-regulatory-revamp-1.

412. One might see a parallel in the inadequate armistice ending World War I ("The War to End All Wars"), which left the most serious underlying problems for later resolution by World War II. Much attention has been given recently to the 80th anniversary of the Great Crash of 1929. As we have pointed out in our earlier work, although the October 1929 crash was traumatic to those affected by it, it "was hardly the first time in history that losses were incurred as the result of market abuses." Kathleen Lacey, Barbara Crutchfield George & Clyde Stoltenberg, *Assessing the Deterrent Effect of the Sarbanes-Oxley Act's Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act,* 38 VANDERBILT J. TRANSNAT'L L. 405 (2005). Ralph deBedts' cautionary observations based on history bear repeating now:

> In the history of man's attempts to preserve integrity in the realm of financial transactions, some continuity in the insurance of such honesty can be seen from century to century. The passage of laws and the accretion of custom have aided; occasionally government itself operated a medieval bank of exchange. However,

At this point the analogy to GATT again becomes pertinent. The evolution of the GATT into the WTO occurred over a period of some fifty years in what was, structurally, a relatively stable post-war global environment. Today's world is quite different. Joseph Stiglitz, Nobel Laureate in economic sciences, has pointed out how economic globalization continues to outpace both the political structures and the moral sensitivity required to ensure a just and sustainable world.[413] As Yale law professor Amy Chua has pointed out, we now know that the combination of free markets and democracy alone is not transforming the world into a community of modern, peace-loving nations full of civic-minded citizens and consumers.[414]

Competing forces are bringing the planet together and driving its pieces apart at the same time,[415] and we are constantly surprised by the new world disorder.[416] Increasing complexity and interdependence, in combination, make problem solving more difficult.[417] We have also seen the difficulty, in both the U.S. and the EU, of overcoming national interests in times of broader financial distress, at the same time that the emerging world is rivaling rich countries for business innovation.[418] Again, Stiglitz has articulated the need to think and act globally, even in the absence of a supporting institutional infrastructure.[419] The world can best meet the challenges ahead with the existing structure of the G-20 serving as an interim framework for developing the institutions fundamental to achieving global financial stability and visionary regulation.

> in that area of financial honesty concerned with protecting the unwary investor from the fraudulent activities of the dishonest stockbroker or issuer of securities, no faintest semblance of orderly progression can be found. The actions and experience of one century seemingly have no connection with the legislative flurries in a subsequent period, and the observer is acutely aware of an utter lack of continuity. Only one thing remains in common in several centuries of legislative efforts to regulate the exploiter of the investor. Inevitably such attempts come about only when the disastrous results are seen in retrospect. Calamity must befall those who have ventured their funds before protective measures may be launched.

RALPH F. DEBEDTS, THE NEW DEAL'S SEC: THE FORMATIVE YEARS 1 (1964).

413. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

414. AMY CHUA, WORLD ON FIRE (2003).

415. BENJAMIN R. BARBER, JIHAD VS. MCWORLD (1995).

416. JOSHUA COOPER RAMO, THE AGE OF THE UNTHINKABLE (2009).

417. *Id.*

418. *The World Turned Upside Down—A Special Report on Innovation in Emerging Markets,* ECONOMIST, April 17-23, 2010.

419. JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK (2006).

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The Board of Immigration Appeals's New Social Visibility Test for Determining Membership of a Particular Social Group in Asylum Claims and Its Legal Policy Implications

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The Board of Immigration Appeals's New "Social Visibility" Test for Determining "Membership of a Particular Social Group" in Asylum Claims and its Legal and Policy Implications

By
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INTRODUCTION

Within the area of asylum law, there has been a great deal of confusion and debate over the past several years surrounding the meaning of one of the five protected grounds for receiving asylum: membership of a particular social group. The debate focuses on how that vague phrase can and should be interpreted in order to stay true to the 1951 Refugee Convention.[1] Little to no analytical clarity on the meaning of membership of a particular social group existed upon the adoption of the phrasing in the Refugee Convention. None truly came until the United States Board of Immigration Appeals' ("BIA") decision in *Matter of Acosta*[2] in 1985 and the Australian High Court's decision in *Applicant A. v. Minister for Immigration and Ethnic Affairs*[3] in 1997. Although they came to two very different conclusions, the BIA and the Australian High Court provided the only two frames of reference in this confusing area of law.

These two tests dominated the determination of membership of a particular social group in asylum proceedings after they were formulated. In the United

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1. United Nations Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"].

2. 19 I. & N. Dec. 211 (B.I.A. 1985).

3. Applicant A. v. Minister for Immigration and Ethnic Affairs (1997) 190 C.L.R. 225 (Austl.) [hereinafter "*Applicant A.*"].

States, for the two decades after *Acosta* was decided, the BIA applied a singular test in order to determine whether or not an asylum applicant qualified as a member of a particular social group.[4] In *Acosta*, the BIA set forth a test that granted protection based on the existence of an immutable characteristic, an approach now known as the "protected characteristic" approach. On the other hand, since 1997, the Australian High Court has applied a test based on the "social perception" of the purported social group in order to determine whether the group qualifies for asylum under the Refugee Convention.[5] This inquiry focuses on the external factors of the purported group, such as whether the group is identified as distinct in society.[6]

In 2001, the United Nations High Commissioner for Refugees ("UNHCR"), in conjunction with the International Institute of Humanitarian Law, convened a roundtable in San Remo, Italy, which included experts drawn from various governments, non-governmental organizations, academia, the judiciary and the legal profession, in an attempt to streamline and clarify the meaning of membership of a particular social group.[7] The result of that meeting was an announcement via the UNHCR Guidelines on International Protection that either the protected characteristic approach or the social perception approach could be used to determine membership of a particular social group depending on the context of the case.[8] The publication of these Guidelines seemed to settle the applicable standards in this previously murky area of asylum law.

Despite the finding put forth in the UNHCR Guidelines, the BIA continued to apply only the protected characteristic test as set out in *Acosta* for the next five years. However, the clarity that the *Acosta* standard provided within the United States lasted only until 2006, when the BIA decided *In re C-A-*.[9] In that case, the BIA emphasized for the first time the importance of the "social visibility" of the members of the purported particular social group in determining whether the asylum applicant should be protected on that ground.[10]

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4. *See Acosta*, 19 I. & N. Dec. 211.

5. *See Applicant A.*, 190 C.L.R. 225, 241.

6. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 312 (Erika Fuller, Volker Turk & Frances Nicholson, eds., 2003).

7. *See* U.N. High Commissioner for Refugees [UNHCR], *Refugee Protection in International Law, List of Participants, Expert Roundtable, San Remo, Italy, 6-8 September 2001*, *available at* http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=419cbf094&query=san%20remo,%20italy (last visited 11/29/10).

8. UNHCR, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter "UNHCR Guidelines"].

9. *In re* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).

10. *Id.* at 961.

In re C-A- was followed by another BIA decision, *In re A-M-E-*, which placed even more emphasis on the importance of social visibility.[11]

As a result of the BIA's sudden and unexplained application of a dispositive social visibility test, the confusion surrounding the meaning of membership of a particular social group is now more acute than ever. This paper argues that the social visibility standard used today by the BIA in determining membership of a particular social group in asylum cases is legally misguided and creates undesirable public policy. Adopting an alternative test that incorporates both the protected characteristic and social perception approaches will ensure that the United States honors its obligations under the Refugee Convention and addresses the legal and policy problems associated with a dispositive social visibility standard.

Part I of this paper describes the various methods used today to define membership of a particular social group. These methods include: the protected characteristic approach, the social perception approach, the UNHCR's Guidelines, and the BIA's social visibility test.

Part II of this paper argues that the use of the social visibility test as a requirement to finding membership of a particular social group is both legally misguided and promotes undesirable public policy. Section A focuses on the *Chevron* deference that immigration judges and Courts of Appeal give to the BIA's decisions in *C-A-* and *A-M-E-* and why, in the context of the social visibility test, this deference should not apply. Section B will concentrate on the policy concerns raised by the arbitrary and inconsistent results that stem from the BIA's social visibility test, and focuses on the groups that are at risk of being excluded from qualifying for asylum in the United States despite the fact that they were previously covered by the protected characteristic standard. Section B also grapples with an oft-discussed policy concern in the arena of asylum law: that a more flexible definition of membership of a particular social group will open the "floodgates" to far too many asylum-seekers.

Part III focuses on solutions to the confusion that has taken hold in asylum law. It argues that adoption of the alternative test put forth by the UNHCR Guidelines, which includes an inquiry into both the protected characteristic approach and the social perception approach, would state a clearer standard and would result in the fewest protection gaps.

I.
DETERMINING MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

There are several different approaches discussed and used in defining membership of a particular social group in the world today. These approaches include the protected characteristic test, the social perception test, the BIA's new

11. *In re* A-M-E-, 24 I. & N. Dec. 69 (B.I.A. 2007).

social visibility test, and the UNHCR's recommended approach, which includes use of both the protected characteristic and social perception tests.[12]

A. The Protected Characteristic Test

The BIA set forth its seminal definition of a particular social group in *Acosta*[13] when it held that members of a taxi cooperative were not members of a particular social group because they could change jobs; that is, the members of that cooperative did not have a "common immutable characteristic" that they "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[14] The BIA relied on the canon of statutory construction known as *ejusdem generis* to give meaning to "particular social group" within the Immigration and Nationality Act (the "INA").[15] This doctrine is used to give meaning to groups of words when one of the words is ambiguous or unclear. The BIA stated that *ejusdem generis* "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[16]

In the refugee definition, the phrase "membership of a particular social group" is listed alongside the other grounds for asylum: "race," "religion," "nationality," and "political opinion."[17] The BIA determined that each of the more specific grounds described "an immutable characteristic," that is, "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed."[18] Therefore, it defined membership of a particular social group in the same way, stating that "the shared characteristic might be an innate one, such as sex, color or kinship ties, or in some circumstances, it might be a shared past experience such as former military leadership or land ownership."[19] The key is that the trait is permanent to the identity or conscience of the individual.

The holding in *Acosta* has been widely praised, adopted and upheld in

12. The Ninth Circuit also used what was called a "voluntary association test" to determine membership of a particular social group. *See* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding that of "central concern" to determining membership of a particular social group was "the existence of a voluntary associational relationship among the purported members . . . ."). The Ninth Circuit has since clarified that the voluntary association test is to be used only as an alternative to the protected characteristic test. *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 1999).

13. *Acosta*, 19 I. & N. Dec. 211.

14. *Id.* at 233.

15. *Id.*

16. *Id.*

17. Immigration and Nationality Act [hereinafter "INA"] § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000); 1967 Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter "Protocol"]; Refugee Convention, *supra* note 1.

18. *Acosta*, 19 I. & N. Dec. at 233.

19. *Id.*

defining what it means to be a member of a particular social group. According to scholars in this field, the definition put forth in *Acosta* "not only engages in a serious textual analysis of the Convention and its Protocol,"[20] but also respects "the specific situation known to the drafters – concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories, as well as 'the more general commitment to ground refugee claims in civil or political status.'"[21] These scholars maintain that the *Acosta* standard "is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claims to international protection."[22]

The reasoning in *Acosta* has also been recognized and adopted in a number of foreign jurisdictions. In *Ward v. Attorney General of Canada*,[23] the Supreme Court of Canada approved of *Acosta*'s application of *ejusdem generis* and reasoned that "the manner in which groups are distinguished for the purposes of discrimination law can . . . appropriately be imported into this area of refugee law."[24] Furthermore, both New Zealand and the United Kingdom have adopted the *Ward/Acosta* protected characteristic approach to defining a particular social group. Both of these countries "apply fundamental human rights norms to determining which characteristics are fundamental to identity of conscience."[25] The New Zealand Refugee Authority stated that "the Acosta *ejusdem generis* interpretation of 'particular social group' firmly weds the social group category to the principle of the avoidance of civil and political discrimination."[26] In the United Kingdom, the seminal case that defines membership of a particular social group is the House of Lords' decision in *Islam*,[27] which relied on *Acosta* and the framework of anti-discrimination law.

As can be gleaned from the above cases and examples, the protected characteristic approach has several major strengths relative to other standards for defining membership of a particular social group. Its objectivity provides a firm and principled framework because "the same kinds of non-discrimination concerns that underpin the other four Convention grounds"[28] form the basis for

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20. Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 52 (2008).

21. *Id.* (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 161 (1991)).

22. *Id.*

23. [1993] 2 S.C.R. 689 (Can.).

24. *Id.* at 735.

25. Marouf, *supra* note 20, at 56. *See, e.g.*, MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS 300 (2007); Aleinikoff, *supra* note 6.

26. *Re* GJ [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/ref_19950830_1312.pdf (last visited 11/29/10).

27. Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.).

28. James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*,

determining whether a group qualifies as a particular social group. Such a framework promotes consistency by relying on "clear external standards of reference which are of universal applicability."[29]

However, some believe that the framework is difficult to apply "since it requires a knowledge of non-discrimination and related areas of human rights law."[30] Most critically, the approach excludes groups that are "perceived by many to be deserving of protection" but lack a common permanent characteristic ("examples raised in recent cases and commentaries being street children, students, professionals, and refugee camp workers.").[31] In response to the English courts' application of the protected characteristic approach, an English Court of Appeal judge warned that "to add the requirement of some distinguishing civil or political status would narrow the types of persecuted minority capable of being recognised as entitled to asylum without, in my view, sufficient justification."[32] Therefore, while the protected characteristic approach offers some great advantages in it ability to draw a clear line between those that qualify as a member of a particular social group and those that do not, it falls short of protecting many individuals who are perceived as deserving of protection.

B. The Social Perception Test

The social perception test, unlike the protected characteristic test, is not "based on an analogy to anti-discrimination principles," but instead "looks to external factors – namely, whether the group is perceived as distinct in society – rather than identifying some protected characteristic that defines the group . . . ."[33]

Australia is the only common law country that emphasizes social perception in analyzing asylum claims based on membership of a particular social group. In its seminal decision defining membership of a particular social group, *Applicant A.*,[34] the High Court of Australia held that "a group must share a common, uniting characteristic that sets its members apart in the society" [35] in order for its membership to constitute a particular social group. The Court stated that the "existence of such a group depends in most, perhaps all, cases on

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Discussion Paper No. 4, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, Oct. 2002, 15 INT'L J. REFUGEE L. 477, 481-82.

29. *Id.* at 482. *See also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (discussing the amount of disparity that exists between grants of asylum depending on the judge who is deciding the case).

30. Hathaway & Foster, *supra* note 28, at 484.

31. *Id.*

32. Quijano v. SSHD, [1997] Imm. AR 227, at 233 (U.K.C.A.).

33. *Id.*

34. 190 C.L.R. 225; 142 ALR 331.

35. Aleinikoff, *supra* note 6, at 271.

external perceptions of the group . . . [The term "particular social group"] connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them."[36]

The High Court's decision in *Applicant A.* demonstrated that the social perception standard was not as inclusive as the "safety net" approach that some scholars have advocated.[37] For example, the *Applicant A.* standard would not reach "'statistical groups' that may share a demographic factor but neither recognize themselves as a group nor are perceived as a group in society."[38] Another limiting principle identified by the High Court is that the group "could not be defined solely by the persecution inflicted; that is, the 'uniting factor' could not be 'a common fear of persecution.'"[39]

In the 2004 case of *Applicant S.*, the High Court of Australia clarified its application of the social perception approach by adopting an objective third-party perspective for determining membership of a particular social group.[40] The Court explained that the "general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society."[41] The Court reasoned:

> Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community. Those communities do not recognize or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.[42]

In so holding, the Court determined that the characteristic that defines a particular social group is not necessarily visible; rather, it must, by an objective standard, set the group apart from other members of society.[43]

Frequently, the protected characteristic approach and the social perception approach will overlap in the types of groups they recognize as a particular social group. For example, both tests are likely to conclude that homosexuals, prior large landowners in communist states, and China's so-called "black children"—children born outside the family planning policies—constitute a particular social group.[44] However, the two standards may reach different results in other cases.

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36. *Applicant A.*, 190 C.L.R. at 264.

37. Aleinikoff, *supra* note 6, at 271. The "safety net" interpretation of particular social group reads the Convention as essentially listing four grounds, and then adding a fifth "such as 'and all other grounds that are frequently a basis for persecution'." *Id.* at 289.

38. *Id.*

39. *Id.* (citing *Applicant A.*, 190 C.L.R. at 242).

40. Applicant S. v. Minister of Immigration and Multicultural Affairs (2004) 217 C.L.R. 387 (Austl.).

41. *Id.* at 397-98.

42. *Id.* at 400.

43. *Id.* at 410-11.

44. *See* Chen Shi Hai v. Minister for Immigration and Multicultural Affairs (2000) 170 A.L.R. 553 (Austl.).

For example, claims asserted by "private entrepreneurs in a socialist State, wealthy landowners targeted by guerilla groups, or members of a labor union"[45] have, depending on the facts of the particular case or society, a good chance of qualifying as a particular social group under the social perception approach, but not the protected characteristic approach.

These different outcomes bring to light some of the advantages of using the social perception approach rather than the protected characteristic approach. First, the social perception approach is more fluid than the protected characteristic approach because it is a "pragmatic recognition of the absence of a completely settled and authoritative set of external standards of reference."[46] Furthermore, the judges applying the social perception approach will have more discretion than they would under the protected characteristic approach, permitting them to take more of the political and cultural factors of the applicant's home country into account.[47] Finally, as the examples above demonstrate, the social perception approach is likely to recognize more groups as particular social groups than the protected characteristic approach, "especially groups in which membership is voluntary and the purpose of which cannot be readily linked to non-discrimination or other human rights principles."[48]

However, some judges and scholars criticize the social perception approach for being overly broad and failing to put a meaningful limit on the class of persons that qualifies for protection under the Convention. For example, the New Zealand Refugee Status Appeals Authority rejected the social perception approach, stating:

> The difficulty with the 'objective observer' approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group.[49]

Finally, adjudicators faced with determining if a given group qualifies as a particular social group may have difficulty in assessing the social perceptions of other societies. It is unclear whose perceptions should matter in making this determination: the views of the alleged persecutors, those of a majority of the society, those of the ruling elites, or those of other groups?[50] While the High Court of Australia has attempted to answer this question by determining that an objective version of the social perception test is best, some of these evidentiary problems may still be at issue even when using an objective test.

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45. Aleinikoff, *supra* note 6, at 272.

46. Hathaway & Foster, *supra* note 28, at 484.

47. *Id. But see* Ramji-Nogales et al., *supra* note 29 (discussing the negative impact of wide judicial discretion in asylum law).

48. *Id.*

49. Re GJ [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/ref_19950830_1312.pdf (last visited 11/29/10).

50. Aleinikoff, *supra* note 6, at 298.

C. *The UNHCR Guidelines on Membership of a Particular Social Group*

In 2002, the UNHCR issued Guidelines on Membership of a Particular Social Group. The Guidelines recommend that States adopt an approach that utilizes both the protected characteristic and social perception approaches.[51] These Guidelines are a product of the Global Consultations on the International Protection of Refugees, which the UNHCR launched in 2000.[52] In September of 2001, the UNCHR convened a roundtable of experts from various governments, non-governmental organizations, academia, the judiciary and the legal profession in San Remo, Italy, in order to address the topic of membership of a particular social group.[53] The purpose of the meeting was "to take stock of the state of the law and practice in these areas, to consolidate the various positions taken and to develop concrete recommendations to achieve more consistent understandings of these various interpretive issues."[54]

The Guidelines recognize that the protected characteristic and social perception approaches represent the two main approaches to interpreting membership of a particular social group. They recommend "adopting a single standard" that incorporates both the protected characteristic and social perception approaches as alternative, sequential tests in order to avoid "gap[s]" in protection.[55] The Guidelines set forth the following definition:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[56]

The Guidelines make clear that the existence of a protected characteristic is sufficient to establish a particular social group. However, if there is not a protected characteristic at issue, the social perception test should be used. They state that only "if a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental" should "further analysis . . . be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[57] Adopting this alternative approach thereby closes the protection gaps inherent in both the protected characteristic approach and the social perception approach when either stands alone. While the Guidelines are explicit in setting out this

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51. UNHCR Guidelines, *supra* note 8.

52. *See Refugee Protection in International Law, List of Participants*, *supra* note 7.

53. *Id.*

54. Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Claimants at 4-5, Thomas, No. A75-597-0331-034/-034/-036 (B.I.A. Dec. 27, 2007).

55. UNHCR Guidelines, *supra* note 8, para. 11.

56. *Id.* (emphasis added).

57. *Id.* at ¶ 13; *see also* Aleinikoff, *supra* note 6, at 294-301 (recommending this alternative test).

recommendation, the BIA has taken a sharp turn away from implementing this test, misinterpreting the UNHCR's recommendation and creating a new test unique to the United States, as discussed below.

D. The BIA's Social Visibility Test

Between 1985 and 2006, the BIA used *Acosta*'s protected characteristic approach as its test for deciding asylum claims based on membership of a particular social group. However, in its recent decisions in *In re C-A-*[58] and *In re A-M-E-*,[59] the BIA purportedly relied on the UNCHR Guidelines when it emphasized the importance of social visibility in defining membership of a particular social group. Although neither the BIA nor the federal courts used this concept of social visibility prior to these decisions as part of the particular social group analysis, the BIA has never recognized a departure from precedent.[60] Furthermore, the BIA referenced the UNHCR Guidelines in a way inconsistent with their intended meaning. The BIA did not properly apply the UNHCR's recommendation of an alternative test, and its use of social visibility did not adhere to the principles of the social perception test.

1. In re C-A-

In *C-A-*, the BIA held that a group defined as "noncriminal drug informants working against the Cali drug cartel" did not qualify as a particular social group because of "the voluntary nature of the decision to serve as a government informant, the lack of 'social visibility' of the members of the purported social group, and the indications in the record that the Cali cartel retaliates against anyone perceived to have interfered with its operations."[61]

In reaching its decision, the BIA surveyed the various approaches that federal circuit courts have taken in determining membership of a particular social group.[62] It recognized the *Acosta* approach as the most widely adopted, and pointed out that the Second Circuit "requires that the members of a social group must be externally distinguishable."[63] The BIA also noted that the UNHCR Guidelines combine the elements of the *Acosta* framework with those of the social perception approach.[64] However, after reviewing the "range of approaches to defining particular social group," the BIA concluded that it would "continue to adhere to the *Acosta* formulation."[65]

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58. *In re* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).
59. *In re* A-M-E, 24 I. & N. Dec. 69 (B.I.A. 2007).
60. Marouf, *supra* note 20, at 63.
61. *In re* C-A-, 23 I. & N. Dec. at 961 (B.I.A. 2006).
62. *Id.* at 955-957.
63. *Id.* at 956 (citing Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991)).
64. *Id.* at 956.
65. *Id.*

The BIA then proceeded to apply the *Acosta* formulation to the applicant group under two subheadings of analysis: 1) Immutability Based on Past Experiences and 2) Visibility.[66] The BIA fails to explain why it broke its analysis into these two parts. Other than the references to (and subsequent rejections of) the Second Circuits use of "externally distinguishable" and the UNHCR Guidelines' inclusion of the social perception test, there is no indication of why application of the *Acosta* framework now requires a separate "visibility" inquiry. In fact, the first sentence of the "visibility" inquiry simply states, "Our decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question."[67]

To justify this statement, the BIA lists a series of cases that it believes demonstrates that particular social groups possess characteristics that are "highly visible" and "recognizable" by others in the country at issue.[68] Specifically, the BIA cited to cases involving "Filipinos of mixed Filipino-Chinese ancestry,"[69] "young women of the Tchamba-Kunsuntu tribe of northern Togo who did not undergo female genital mutilation as practiced by that tribe and who opposed the practice,"[70] "persons listed by the [Cuban] government as having the status of homosexual,"[71] and "former members of the national police" of El Salvador.[72] According to the BIA, all of these groups were "highly visible," and therefore members of these groups were entitled to asylum based on membership of a particular social group.

The BIA fails to acknowledge that the decisions in all of the listed cases turned on an *Acosta* analysis based on protected characteristics or immutable traits, not social perception or visibility. That these groups are easily identifiable or recognizable in society does not support the BIA's assertion that it consistently evaluated social visibility or perception when determining membership of a particular social group.[73] By claiming that its decisions have considered "recognizability" and "social visibility" in the past, the BIA failed to recognize that it was departing from precedent.[74]

Moreover, the cases cited by the BIA as examples of "recognizability" do not involve "highly visible" traits.[75] An amicus brief filed by the UNHCR in opposition to the use of social visibility in defining particular social groups highlights that "the general population of Cuba would not recognize

66. *Id.* at 958-961.

67. *Id.* at 959.

68. *Id.* at 960.

69. *Id.* (citing Matter of V-T-S-, 21 I. & N. Dec. 792, 798 (B.I.A. 1997)).

70. *Id.* at 955 (citing *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996)).

71. *Id.* at 960 (citing Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990)).

72. *Id.* (citing Matter of Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988)).

73. Marouf, *supra* note 20, at 65.

74. *See In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006).

75. *Id.* at 960.

homosexuals, nor would average Salvadorans necessarily recognize former members of the national police, nor would a typical Togolese tribal member inevitably be aware of women who opposed female genital mutilation but had not been subjected to the practice."[76] The group characteristics in these instances as listed by the BIA, instead of being "highly visible," actually seem to be immutable.

Furthermore, in concluding that the confidential informants were not a cognizable social group, the BIA set the bar very high for the level of visibility groups must show in order to be considered socially visible. The BIA stated that, "the very nature of [acting as a confidential informant] is such that it is generally out of the public view."[77] The BIA also stressed that "informants against the Cali cartel intend[] to remain unknown and undiscovered," and "recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members."[78] This analysis suggests that under the social visibility test, "the group *members* must be recognizable by the general public; it is not enough for the group itself to be recognized."[79] The BIA's reasoning also seems to imply that the visibility of some group members is not sufficient to satisfy the social visibility test. "By focusing on the visibility of group members and examining only the subjective perceptions of the relevant society to determine whether a group is recognizable, the BIA's 'social visibility' test departs from the 'social perception' approach,"[80] and therefore does not comport with the UNHCR's Guidelines.

2. In re A-M-E-

In *A-M-E-*, decided in 2007, the BIA again stressed the importance of social visibility.[81] There, the BIA held that "wealthy Guatemalans" did not constitute a particular social group.[82] The BIA began its analysis by repeating the *Acosta* standard, and agreeing with the Immigration Judge below that "wealth" is not an immutable characteristic.[83] However, the BIA did not answer whether "wealth" qualified as a "shared characteristic" so "fundamental to identity or conscience that it should not be expected to be changed."[84] Rather, the BIA stated that it "would not expect divestiture when considering wealth as

76. Brief for U.N. High Comm'r for Refugees as Amicus Curiae, Thomas, *supra* note 54, at 8.

77. *In re C-A-*, 23 I. & N. Dec. at 960.

78. *Id.*

79. Marouf, *supra* note 20, at 64 (emphasis added).

80. *Id.*

81. *In re* A-M-E-, 24 I. & N. Dec. 69, 73-75 (B.I.A. 2007), *aff'd*, Ucelo-Gomez v. Mukasey, 509 F.3d 70, 72-73 (2d Cir. 2007).

82. *Id.* at 73-76.

83. *Id.*

84. *Id.* at 73.

a characteristic on which a social group might be based."[85] Instead of explaining whether "wealth" qualified as a protected characteristic, the BIA began analysis of the group based on its visibility, rejecting it on those grounds.[86]

The internal inconsistency of the BIA's discussion of the social visibility standard in *A-M-E-* is noteworthy. First, the BIA stated that it "recently reaffirmed the importance of social visibility as a *factor* in the particular social group determination in *Matter of C-A-*. . . ."[87] One sentence later, the BIA stated that it was "reaffirming the *requirement* that the shared characteristic of the group should generally be recognizable by others in the community . . . ."[88] Ultimately, the BIA found that the proposed group of "wealthy Guatemalans" failed the social visibility test because it found "little" evidence that "wealthy Guatemalans would be recognized as a group that is at a greater risk of crime in general or of extortion or robbery in particular" because crime in Guatemala is "pervasive at all social-economic levels."[89]

The BIA's application of the social visibility test in *A-M-E-* "strongly suggests that the BIA is now applying the traditional 'protected characteristic' test and its new 'social visibility' test . . . as dual requirements instead of alternative tests."[90] Regardless of whether the BIA intended such a radical change, appellate courts have applied a requirement of social visibility as a result of the BIA's decision.[91] The BIA and appellate courts' continued use of this test will result in major gaps in protection for individuals seeking asylum in the United States. Furthermore, from both a legal and policy standpoint, the implementation of a social visibility test is problematic.

II.
THE USE OF SOCIAL VISIBILITY AS A DISPOSITIVE TEST TO DETERMINE MEMBERSHIP OF A PARTICULAR SOCIAL GROUP AND ITS IMPLICATIONS IN LAW AND POLICY

Requiring social visibility as a factor in determining membership of a particular social group does not conform to well-established law in the United States, or to desirable policy aims. In this section, Part A will explore how the BIA's departure from precedent in *C-A-* and *A-M-E-*, and the circuit courts' tendency to give deference to the BIA's required use of social visibility both fail

85. *Id.* at 73-74.

86. *Id.*

87. *Id.* at 74 (emphasis added).

88. *Id.* (emphasis added).

89. *Id.* at 74-75.

90. Marouf, *supra* note 20, at 67.

91. *See, e.g.*, Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007); Santos-Lemus v. Mukasey, 542 F.3d 738, 746 (9th Cir. 2008) (holding that a group of young men in El Salvador resisting gang violence "fails to qualify as a particular social group because it lacks social visibility.").

to reach sound legal results. Part B will explain why requiring social visibility in all claims on the basis of membership of a particular social group contravenes the policy goal of providing clear and consistent standards that also conform to the United States' international legal obligations.

A. Legal Analysis: Chevron Deference and its Application to the BIA's Requirement of Social Visibility

Very few areas of U.S. law are as thoroughly international as asylum law. The United States has ratified the core international refugee law treaty,[92] and Congress adopted the Refugee Act of 1980 with the intent to bring U.S. law into conformity with its international obligations under the treaty.[93] Furthermore, the United States was a founding member of the Executive Committee of the UNHCR.[94] Given the strong international foundation of U.S. asylum law, courts in the United States have been "surprisingly willing to discount international law governing domestic asylum statutes, by deferring to expansive Executive agency statutory interpretations that do not conform – and in many cases, have made no effort to conform – with limitations created by U.S. international treaty obligations."[95]

For example, the circuit courts' widespread deference to the BIA's social visibility requirement under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[96] is surprising, given the BIA's faulty reasoning for adopting the test. The *Chevron* doctrine instructs courts that, where Congress does not express a clear intent regarding the interpretation of statutory language, courts should defer to any "reasonable" interpretation made by the agency charged

92. The United States ratified the Protocol Relating to the Status of Refugees, ("Protocol") Oct. 4, 1967, 606 U.N.T.S. 267, obligating the United States to comply with the substantive provisions of the Refugee Convention, *supra* note 1.

93. Pub.L. 96-212, 94 Stat. 107 (codified at 8 U.S.C. § 1521, et seq.). Congress passed this legislation so that U.S. law would be in conformity with its obligations under the Protocol. The House Judiciary Committee stated that the amendments ensured that "U.S. statutory law clearly reflects our legal obligations under international agreements." H.R. REP. NO. 96-608, at 17-18 (1979).

94. *EXCOM Membership by Admission of Members*, UNHCR, http://www.unhcr.org/40112e984.html (last visited April 6, 2011).

95. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1062-63 (2011).

96. 467 U.S. 837, 842-43 (1984). The *Chevron* Court put forth a two-step approach in reviewing agency interpretations of acts of Congress in order to determine whether deference is owed: first, courts must determine, "employing traditional tools of statutory construction," whether Congress expressed a clear intent as to the meaning of a statutory term. *Id.* at 843 n.9. In such cases, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* However, if the statute is silent or ambiguous with respect to the specific issue, the reviewing court proceeds to the second step, in which "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

with administering the given statute.[97]

In *I.N.S. v. Aguirre-Aguirre*, the Supreme Court held that *Chevron* deference applies to the BIA's interpretation of the asylum provisions of the INA.[98] In that case, which dealt with the statute's definition of "serious nonpolitical crime[s],"[99] the Supreme Court held that the Ninth Circuit erred in failing to apply *Chevron* deference to the BIA's construction of the statutory language.[100] The Court explicitly stated that the principles of *Chevron* deference are applicable to the INA.[101] Therefore, as long as "'the statute is silent or ambiguous with respect to the specific issue' before it . . . 'the question for the court [is] whether the agency's answer is based on a permissible construction of the statute.'"[102]

This section argues that there are two main reasons why the Supreme Court's holding that courts should grant *Chevron* deference to the BIA's interpretation of the INA does not apply to the BIA's use of a social visibility test in asylum claims. First, applying such deference in the context of social visibility would thwart Congress's intent that courts apply the 1969 Vienna Convention on the Law of Treaties[103] to interpret seemingly "ambiguous" language. Second, *Chevron* deference to the BIA on the issue of social visibility is not merited under *National Cable and Telecommunications Association v. Brand X Internet Services* because the BIA's imposition of the requirement was "arbitrary and capricious."[104]

1. U.S. Obligations Under the Protocol and Congressional Intent

Since the adoption of the *Chevron* doctrine, U.S. courts have been operating "under the mistaken perception that they are bound . . . to defer to the BIA's construction of U.S. refugee statutes, regardless of whether that construction is consistent with international law."[105] However, such "reflexive"[106] deference is not appropriate in the context of asylum law, where Congress's passage of the Refugee Act of 1980 clearly and unambiguously

97. *Id.* at 843.

98. I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424-425 (1999).

99. *Id.* at 417.

100. *Id.* at 424.

101. *Id.*

102. *Id.*

103. Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

104. 545 U.S. 967, 972 (2005).

105. Farbenblum, *supra* note 95, at 1064. Because of this mistaken perception, anytime a U.S. court references international law, it does so by treating it as a "persuasive, nonbinding guide that is trumped by *Chevron* deference . . . even if that interpretation is inconsistent with international law." *Id.*

106. *Id.*

stated its desire to conform domestic asylum law to the United States' international obligations.[107] As a result, congressional intent is thwarted when U.S. courts give *Chevron* deference to BIA decisions that do not conform to the Protocol's provisions.

U.S. courts that interpret and apply the Refugee Act of 1980, including those hearing and deciding asylum cases, should base their decisions and interpretations on law that is consistent with the Protocol, and therefore, the Convention. They should not blindly defer to BIA decisions. While the text of the Convention provisions may not always lead to a single, clear interpretation, such ambiguity "does not mean courts cannot authoritatively determine a provision's meaning."[108]

The Vienna Convention codified an established methodology for the interpretation of treaties, which has been recognized by courts in the United States[109] and by the International Court of Justice[110] as customary international law.[111] However, judges in the United States often overlook the principle of treaty interpretation that treaty language has "no 'ordinary meaning' in the absolute or abstract."[112] Indeed, Article 31(1) of the Vienna Convention highlights that the "ordinary meaning" of a treaty provision is determined in context and in light of a treaty's "object and purpose."[113] A court can determine the "object and purpose" of a treaty by considering its preamble,[114] the

107. *Id.* at 1062. "[T]he Refugee Act is one of a small number of 'incorporative statutes' that directly incorporate international treaty language and concepts into U.S. domestic law." *Id.* Furthermore, the Supreme Court has held that there is a strong relationship between the United States' obligations under the Protocol and the provisions in the Refugee Act related to asylum and withholding of removal. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (affirming that it is "clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]."). The BIA has also recognized congressional intent to conform domestic refugee law to U.S. obligations under the Protocol, and to "give 'statutory meaning to our national commitment to human rights and humanitarian concerns.'" *In re* S-P-, 21 I. & N. Dec. 486, 492 (1996) (citing S. REP. NO. 96-256 at 4, 9 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144).

108. Farbenblum, *supra* note 95, at 1073.

109. While the United States is not a party to the Vienna Convention, courts in the United States have "treated the Vienna Convention as an authoritative guide to the customary international law of treaties." Chubb & Son, Inc. v. Alaska Airlines, 214 F.3d 301, 309 (2d Cir. 2000).

110. *See, e.g.*, Oil Platforms (Islamic Rep. of Iran v. U.S.), 1996 I.C.J. 803, 812 (Dec. 12) (Preliminary Objection).

111. IAN SINCLAIR, THE VIENNA CONVENTION AND THE LAW OF TREATIES 153 (1984) ("There is no doubt that articles 31 to 33 of the [Vienna] Convention constitute a general expression of the principles of customary international law relating to treaty interpretation.").

112. Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), 1992 I.C.J. 351, 719 (Sept. 11).

113. Vienna Convention, *supra* note 103, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

114. Guinea-Bissau v. Senegal, 1991 I.C.J. 53, 142 (Nov. 12) (J. Weeramantry, dissenting on another point) (regarding the preamble to a treaty as "a principle and natural source from which

historical drafting records or *travaux préparatoires*,[115] the interpretation of the treaty by other State Parties,[116] scholarly work on the treaty,[117] and, in the case of the Refugee Convention, the views of the UNHCR.[118]

Since the passage of the Refugee Act in 1980, federal courts have routinely granted *Chevron* deference to the BIA's interpretation of INA refugee provisions, even though the agency's interpretations often conflict with corresponding Refugee Convention provisions.[119] The social visibility requirement that the BIA imposed in *C-A-* and *A-M-E-* is an example of a standard that contravenes both the United States' obligations under international law and the congressional intent of the Refugee Act of 1980. Appellate courts may and should reject the BIA's requirement of this standard when applying social visibility in particular social group cases.

The Supreme Court has held that Congress expressed clear intent that INA asylum provisions be interpreted consistently with the United States' obligations under the Protocol.[120] Applying this holding, "courts may treat many apparent textual ambiguities in the Refugee Act as pure issues of statutory construction that may be resolved by reference to the Convention instead of by delegation to the BIA."[121] As stated by the *Chevron* Court: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[122]

The BIA's creation of a social visibility requirement is contrary to congressional intent. The Protocol and UNHCR do not create such a limited standard, and the BIA misinterpreted the UNHCR Guidelines' meaning of "visibility" when it concluded that the Guidelines supported the imposition of a

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indications can be gathered of a treaty's objects and purposes").

115. Vienna Convention, *supra* note 103, art. 32. Unlike other treaties, the *travaux préparatoires* of the Refugee Convention are precisely written, ratified by states, and published.

116. *Id.* art. 3.

117. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179, art. 38(d).

118. Article 35 of the Convention states that the "Contracting States undertake to co-operate with the Office of the [UNHCR] . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of th[e] Convention." Refugee Convention, *supra* note 1, art. 35. Protocol, *supra* note 17, art. 2. Some scholars argue that U.S. courts have a legal obligation under the Protocol to consider UNHCR sources in interpreting the relevant laws. *See* Walter Kalin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 613, 627 (Erika Feller, Volker Turk & Frances Nicholson eds., 2003) (arguing that while domestic courts are not obligated to consider UNHCR sources to be legally binding, they should regard them as authoritative sources, which may not be dismissed without justification).

119. Farbenblum, *supra* note 95, at 1080.

120. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432-33 & n.12 (1987).

121. Farbenblum, *supra* note 95, at 1097.

122. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843 n.9.

social visibility requirement.[123] For all of these reasons, the BIA's social visibility standard does not deserve *Chevron* deference as a matter of law. Instead of deferring to a standard that conflicts with congressional intent, appellate courts should turn to the Protocol to interpret ambiguous language in the INA's asylum provisions.[124]

2. The "Arbitrary and Capricious" Standard

Chevron deference is not warranted when an agency's interpretation of a statutory term conflicts with positions that the agency has taken in the past absent an explanation of that change.[125] In *Brand X*, the Supreme Court held that an "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[126]

a. "Unexplained Inconsistency": A Sudden and Unexplained Departure from Precedent

As it stands today, all of the circuit courts that have addressed the application of the social visibility test to the analysis of membership of a particular social group, with the exception of the Seventh Circuit, have accepted the BIA's social visibility requirement as a qualification for withholding of removal[127] or asylum.[128]

However, the BIA has offered little to no justification for its conclusion that social visibility is the appropriate narrowing principle in social group

123. UNHCR Guidelines, *supra* note 8.

124. *Chevron*, 467 U.S. at 862.

125. *See* Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 981 (2005).

126. *Id*; *see also* Lal v. I.N.S., 255 F.3d 998, 1006-07 (9th Cir. 2001), *as amended on reh'g*, 268 F.3d 1148 (9th Cir. 2001) (finding that the BIA's interpretation of its own regulation should be overturned because the BIA committed an "arbitrary and capricious act" by suddenly changing its interpretation). *But see* Ucelo-Gomez v. Mukasey, 509 F.3d 70, 72-73 (2d Cir. 2007) (granting *Chevron* deference to *A-M-E-* based on its finding that the BIA's construction of membership of a particular social group was a reasonable interpretation of the statute). For detailed reasoning as to why this decision is unpersuasive in regards to granting *Chevron* deference, *see* Marouf, *supra* note 20, at 68-71.

127. "Withholding of removal" is a status similar to asylum. However, while asylees have the right to apply for legal permanent residence, people with a "withholding" status do not. Individuals who win "withholding" actually have a final order of removal against them, and therefore if they ever travel outside of the United States, they may not be permitted to return. 8 C.F.R. § 1208.16.

128. It is not clear that the Sixth Circuit has expressly accepted or rejected the BIA's requirement of "social visibility" to qualify for asylum under the category of "membership in a particular social group." *See* Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010) (granting a petition for review, while citing favorably to the Seventh Circuit decisions in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) and *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009), to examine the BIA's holding that expressed opposition to gang activity constituted neither a political opinion nor membership in a particular social group).

claims. In *In re C-A-*, the BIA reasoned that:

> [t]he recent *Guidelines* issued by the [UNHCR] confirm that 'visibility' is an important element in identifying the existence of a particular social group . . . [T]he *Guidelines* state that 'a social group cannot be defined *exclusively* by the fact that it is targeted for persecution.' However, 'persecutory action toward a group may be a relevant factor in determining *visibility* of a group in a particular society.'[129]

The BIA's construction of the UNHCR Guidelines in *C-A-* is improperly stretched. The BIA correctly notes that the UNHCR Guidelines discuss the concept of "visibility."[130] However, the text of the Guidelines does not, as the BIA claims, establish social perception or social visibility as a requirement that must be met in order to determine membership of a particular social group. Rather, the Guidelines discuss "visibility" in relation to the role of persecution in defining a particular social group.[131] This "is meant to illustrate how being targeted can, under some circumstances, lead to the identification or even the creation of a social group by its members having been set apart in some way that has rendered them subject to persecution."[132] Thus, the Guidelines use the word "visibility" to describe "the potential relationship between persecution and social group and nothing more."[133] The BIA's reliance on the language from the UNHCR Guidelines in *C-A-* demonstrates that the imposition of a social visibility requirement does not draw textual support from the Guidelines.

The BIA has provided only one additional explanation for its drastic change of imposing a visibility requirement. [134] In *Matter of S-E-G*, the BIA acknowledged that it had refined the *Acosta* framework, stating that "'particularity' and 'social visibility' give greater specificity to the definition of a social group . . . ."[135] The BIA has not clearly defined social visibility in any of the cases in which it imposed the requirement, nor has it offered an explanation for what necessitated a break from the *Acosta* framework.

For many years the BIA, most circuit courts, and many courts around the world viewed the *Acosta* framework as a "best practice" for construing membership of a particular social group because it was clear, led to largely predictable results, and set forth a burden of proof that was high but not insurmountable.[136] While the *Acosta* framework is not the ideal standard for defining membership of a particular social group, see *infra* Section III, the

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129. *In re* C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (emphasis in the original).

130. UNHCR Guidelines, *supra* note 8, para. 14.

131. *Id.*

132. Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Petitioner at 13, Valdiviezo-Galdamez v. Holder, No. 08-4564 (A97-447-286) (B.I.A. Apr. 14, 2009).

133. *Id.*

134. 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

135. *Id.*

136. *See, e.g.*, *Acosta*, 19 I. & N. Dec. 211; *Ward*, [1993] 2 S.C.R. 689 (Can.); *Islam*, [1999] 2 A.C. 629 (H.L.) (U.K.).

BIA's imposition of a social visibility requirement, in addition to the protected characteristic requirement, heightens the burden on the asylum applicant substantially by requiring them to expend additional resources to establish this "external" factor.

This heightened burden, along with the BIA's failure to clearly define social visibility, imposes unduly stringent requirements on asylum seekers to demonstrate that they are members of a particular social group. This burden makes U.S. law regarding particular social group inconsistent with the standard set by the Refugee Convention and the UNHCR. In failing to clearly define social visibility, or to reconcile this new standard with previously recognized particular social groups,[137] the BIA falls short of its duty to issue precedential decisions that provide "clear and uniform guidance . . . on the proper interpretation and administration of the [INA]."[138]

Furthermore, when determining whether an individual asylum applicant has been persecuted, or has a "well-founded fear of persecution,"[139] courts should consider not whether society recognizes the individual's alleged group, but rather whether the persecutor can identify and recognize the social group.[140] Persecutors, especially non-state actors such as gangs, target groups and individuals for a variety of reasons other than visibility. For example, "family members of those who oppose the gang are not socially visible to society at large but are distinctly visible to the gang members seeking them for persecution."[141] The gang seeks them out because of their familial association, despite their attempts at hiding or avoiding visibility within society.[142] The BIA has not explained why social visibility, which fails to account for "visibility to the persecutor," should be the proper standard for judging cases brought based on membership of a particular social group.

The BIA's sudden and unexplained requirement of social visibility was both unwarranted and unexpected. While seemingly misconstruing the UNHCR Guidelines, and offering no further explanation other than improved

137. *See, e.g.*, Gomez-Zuluaga v. Attorney Gen., 527 F.3d 330 (3d Cir. 2008) (escape from involuntary servitude); Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (homosexuals); Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003) (escaped child soldiers); In re Kasinga, 21 I. & N. Dec. 357 (BIA 1996) (opposition to female genital mutilation); Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990) (homosexuals).

138. 8 C.F.R. § 1003.1(d)(1) (2008).

139. INA, *supra* note 17.

140. This approach is more in line with "social perception" analysis, which examines if the social group is cognizable in the society in question, not visibility of the group to the society at large. *See* UNHCR Guidelines, *supra* note 8. For more discussion of the "social perception" approach, *see infra* Section III.

141. Elyse Wilkinson, *Comment: Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 415 (2010).

142. *See* Marouf, *supra* note 20, at 91-92 & nn. 204-205.

"specificity,"[143] the BIA altered the state of the law with regards to particular social group claims for asylum. Furthermore, the BIA did not justify this change, but rather merely cited precedents to artificially piece together a "visibility" requirement in previous cases.[144]

In making such comparisons, the BIA makes a conclusory assertion that certain traits, such as "young women of a particular tribe who were opposed to female genital mutilation" and "former military leadership or land ownership,"[145] are "easily recognizable." There is no obvious reason to conclude that any of these traits is determinatively socially visible in the literal sense in which the BIA uses the term. Who is the "society" that the BIA refers to in this standard?[146] How literally is the word "visibility" being used? The BIA's social visibility requirement leaves too many questions unanswered. For all of these reasons, courts should reject the BIA's unexplained departure from *Acosta* as arbitrary and capricious.

b. Inconsistent Application of the Law

In its application of social visibility as a criterion for determining particular social group, the BIA has been inconsistent at best. It has found groups to be particular social groups without any reference to social visibility,[147] as well as refused "to classify socially invisible groups as particular social groups but without repudiating the other line of cases."[148]

Again, *Chevron* deference does not apply when an agency's interpretation of a statutory term conflicts with positions that the agency has previously taken absent further explanation and clarification of the change.[149] Furthermore, the BIA's failure to offer a reasonable justification or explanation for why its new interpretation "distinguishes the situation at hand from cases where courts have granted substantial deference despite a revised agency interpretation because of a 'well-considered basis for the change.'"[150]

In his opinion in *Gatimi v. Holder* rejecting the BIA's use of the social

143. Matter of S-E-G-, 24 I. & N. Dec. 579, 582 (BIA 2008).

144. *In re* C-A-, 23 I. & N. Dec. 951, 959-960 (B.I.A. 2006) ("Our other decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question.").

145. *Id.* at 960.

146. *See* Marouf, *supra* note 20, at 71-75 (identifying "The Inherent Difficulty in Assessing Public Perceptions").

147. *See, e.g.*, In re Kasinga, 21 I. & N. Dec. 357 (BIA 1996) (opposition to female genital mutilation); Matter of Toboso-Alfonso; 20 I. & N. Dec. 819 (B.I.A. 1990) (homosexuals); Matter of Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (former members of the national police).

148. Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009).

149. *See* Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 981 (2005).

150. Marouf, *supra* note 20, at 68 (citing Robertson v. Methow Valley Citizens' Council, 490 U.S. 332, 356 (1989)).

visibility requirement, Judge Richard Posner stated that "[w]hen an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one . . . . Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities."[151] Due to the inconsistent application of the social visibility standard, lower courts should not give *Chevron* deference to the BIA on this issue.

The BIA's social visibility requirement is not legally sound because of its lack of foundation in precedent, because it contradicts United States' obligations under the Protocol and congressional intent, and because it lacks clarity and consistency. The social visibility requirement does not merit *Chevron* deference as a matter of law, and lower courts should refrain from deferring to the BIA in their assessments of particular social group cases.

B. Policy Concerns With the BIA's Requirement of Social Visibility

The BIA's imposition of a social visibility requirement is not consistent with desirable policy aims. Sound public policy demands that the BIA put forth standards that bring clarity and consistency to the circuit courts in interpreting statutory language.[152] It further demands that U.S. law conform to international law, and that people who qualify for asylum find protection within U.S. borders.[153] The BIA's requirement of social visibility in particular social group claims puts both of these policy aims at risk.

1. Arbitrary and Inconsistent Results

First, the BIA's lack of explanation or justification, along with its conclusory language in its introduction of the social visibility requirement, will inevitably lead to arbitrary and inconsistent results as various judges and courts apply the test. For example, it is unclear whether the BIA's use of social visibility is meant to be taken literally or if it merely refers to some external criterion to identify a social group.[154] A certain group of people may not share similar visible characteristics, but still share common external criteria that is not necessarily visible, but would nonetheless expose them to differential treatment.[155] As Judge Posner observed: "In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be."[156] Applied literally—as the BIA has sometimes applied the standard—"visibility" may be relevant to the likelihood of

151. 578 F.3d 611, 616. *See also* AT&T Inc. v. FCC, 452 F.3d 830, 839 (D.C. Cir. 2006); Idaho Power Co. v. FERC, 312 F.3d 454, 461-62 (D.C. Cir. 2002).

152. This includes language from the Protocol. *See also* 8 C.F.R. § 1003.1(d)(1).

153. Protocol, *supra* note 17.

154. *See* Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

155. *See id.*

156. *Id.*

persecution, "but it is irrelevant to whether if there is persecution it will be on the ground of group membership."[157] For instance, if understood literally, persecuted LBGT individuals in a homophobic environment may not constitute a socially visible group; however, if understood in the "external criterion" sense, they might. Whether the BIA means for the term social visibility to be used in the literal sense, in the "external criterion" sense, "or even whether it understands the difference" is unclear.[158]

As a policy matter, it is important that administrative agencies and circuit courts across the country are able to apply the standards for a particular social group claim consistently.[159] In order to do so, judges must be able to understand the standard they are applying, and why they are applying it. The requirement of social visibility within particular social group claims does not meet those criteria. As illustrated by Judge Posner's pointed remarks, the standard falls far short of reaching the necessary clarity and consistency.

Allowing for more standards that are neither clear nor justified piles on more uncertainty in an area of law that has become infamous for judges having inappropriately wide discretion and the resulting inconsistencies.[160] Social visibility is a fact-based analysis rather than a legal analysis. This gives the immigration judge an enormous amount of discretion in determining whether or not a group is socially visible. Putting forth an opaque standard that does not have an explanation or justification will not improve consistency across the courts.

2. Improper Exclusion of Groups Previously Recognized as Particular Social Groups

The second major policy issue this section addresses is the concern that individuals and groups who deserve protection under U.S. asylum law will be improperly excluded based on the social visibility requirement. The groups that are likely to suffer most from this new standard, given the "invisibility" of the traits at issue, are those that bring claims based on sexual orientation, as well as gender-related claims such as those based on domestic violence. In addition, claims brought by those targeted by gang violence will be all but impossible under the required social visibility standard. In order to fulfill its obligations under the Protocol, the United States must adopt standards and policies that will allow for deserving claims to be granted.

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157. *Id.*

158. *Id.*

159. *See, e.g.*, Ramji-Nogales, *supra* note 29.

160. *See id. See also* Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (explaining that federal courts of appeal have "repeatedly excoriated immigration judges" for "a pattern of biased and incoherent decisions in asylum cases."). Judge Posner of the Seventh Circuit commented that "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Id.*

a. Claims Based on Sexual Orientation or Identity

Despite that fact that "homosexuals,"[161] "gay men,"[162] "gay men with female sexual identities,"[163] and "lesbians"[164] have all been recognized as particular social groups in the United States, the requirement of social visibility will likely make it more difficult for individuals with claims based on sexual orientation or identity to prevail on asylum claims. Unlike other characteristics such as skin color, sexual orientation or identity is not externally visible, "and sexual minorities often feel compelled to hide their orientation for various reasons."[165] In Latin America:

> The social stigma associated with homosexuality forces the majority of lesbians and gay men to hide their sexual orientation . . . . Secrecy, silence and invisibility are themselves contributing factors to the human rights violations suffered by lesbians and gay men . . . . With a few exceptions, most of the abuses committed against lesbians and gay men in Latin America remain shrouded in silence, misinformation, and misunderstanding.[166]

"These observations, which apply to gay men and lesbians in many countries around the world, stress the link between invisibility and persecution."[167] The BIA, by requiring social visibility in particular social group cases, completely neglects to recognize that invisibility "forms a core part of the experience of oppression."[168]

The BIA's social visibility requirement is problematic because it suggests that being socially visible is black or white, without accounting for the shades of gray in between. It also operates without any "awareness that the same group may be able to move between visibility and invisibility depending on time and context."[169] Furthermore, a literal application of the social visibility requirement may have the discriminatory effect of rendering only effeminate men or masculine women eligible for asylum because only they are visibly perceived as homosexual by their societies.[170] Encouraging such arbitrary distinctions creates bad public policy, and these examples show how the application of the social

161. Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990) (recognizing "homosexuals" as members of a particular social group in a case involving a gay man from Cuba).

162. Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that "all alien homosexuals are members of a 'particular social group'").

163. Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000) (recognizing a "gay man with a female sexual identity" as a member of a particular social group).

164. Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (finding, implicitly, that a Ugandan lesbian was a member of a particular social group).

165. Marouf, *supra* note 20, at 79.

166. Bill Fairbairn, *Gay Rights are Human Rights: Gay Asylum Seekers in Canada*, in PASSING LINES 237, 243-44 (Brad Epps et al. eds., 2005).

167. Marouf, *supra* note 20, at 79.

168. *Id.*

169. *Id.* at 83.

170. *Id.* at 87.

visibility requirement could produce undesirable results.

b. Claims Based on Domestic Violence

Claims based on domestic violence are also threatened by the social visibility requirement. Domestic violence, by definition, occurs in the private sphere of the home. It is rarely a phenomenon that is socially visible. Over the past two decades, great strides have been made in bringing asylum claims on the basis of domestic violence.[171] The social visibility requirement will likely inhibit this progress.

Application of the social visibility test in all particular social group cases would seem to effectively end the possibility for victims of domestic violence to qualify because they lack any visible shared characteristic. However, in some cases, immigration judges have continued to grant asylum to victims of domestic violence on the basis of membership of a particular social group, despite the BIA's adoption of the social visibility requirement.[172] While it is certainly positive that some judges are still granting asylum on the basis of domestic violence, it begs the question of whether or not these judges are applying the social visibility requirement at all in such cases. Given the inherently invisible nature of domestic violence, it is likely they are not. This emphasizes the inconsistency of application in the immigration and circuit courts since the adoption of the social visibility requirement, and highlights the fact that even judges realize the limits of the doctrine and that it is inapplicable to some necessary situations.[173] Again, good public policy demands a reform of this requirement in order for U.S. law to stay faithful to its obligations under the Protocol and to afford protection to those who need it most.

c. Claims Based on Gang Membership or Potential Targets of Gang Violence

The majority of case law that deals explicitly with the social visibility requirement focuses on asylum applicants that were targets or potential targets of gang violence. The social visibility requirement has been used to deny asylum (or petitions for review) in a growing number of cases based on this issue.[174] In *Matter of S-E-G-*, the BIA determined that that the proposed social group of "young men resisting criminal gang recruitment" was insufficiently socially

171. *See generally* Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391 (2001).

172. *See, e.g.*, IJ Decision DV Honduras (San Antonio, TX, 4/2/08); IJ Decision LGBT, Activist, Honduras (Newark, NJ, 11/26/07); IJ Decision, Honduras, DV, Gang (Portland, OR, 2/15/08), *available at* http://cgrs.uchastings.edu/law/detail.php.

173. *See Matter of* R-A-, 24 I. & N. Dec. 629, 631 (B.I.A. 2008) (recognizing that "providing a consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration law is one of the key duties of the Board" and its failure to do so).

174. *See generally* Wilkinson, *supra* note 141.

visible to constitute a particular social group.[175] The BIA reasoned that there was little evidence that "Salvadoran youth who are recruited by gangs but refuse to join . . . would be 'perceived as a group' by society, or that these individuals suffer from higher incidence of crime than the rest of the population."[176]

This decision and reasoning resounded through the courts and has been subsequently cited in a large number of cases involving victims or potential victims of gang violence.[177] As in cases based on sexual orientation and domestic violence, the BIA's social visibility requirement has the potential to eliminate eligibility for asylum based on membership of a particular social group for victims of gang violence. As a policy matter, this is an undesirable outcome, and one that the BIA does not explicitly state as a goal. The BIA and circuit courts should consider that:

> Individuals, especially youth, who fundamentally oppose the violent and coercive tactics of the Mara [gang] are worthy of asylum protection. They live in countries plagued by gang violence, with police forces that are also victims of the gang's wrath or engage in persecutory tactics. Citizens targeted for recruitment by the gang are repeatedly persecuted and often killed. Their choice to live without violence is not just brave but a fundamental human right that they should not have to relinquish. Further, individuals who stand up to the gang in such circumstances are the type of people the United States should embrace.[178]

Furthermore, the BIA's adherence to the *Matter of S-E-G-* reasoning – based on the social visibility requirement – in *all* gang cases can produce absurd results. For example, in *Arteaga v. Mukasey,*[179] the Ninth Circuit denied a petition for review of a withholding of removal claim[180] based on the fact that a tattooed former gang member was not a member of a particular social group because he was not socially visible.[181] In its reasoning, the Court admitted that the BIA's decision in *In re A-M-E-*[182] stated that a shared characteristic of a group must generally be recognizable to others.[183] It is common knowledge, and thus the court was aware, that gang tattoos are used to mark a person and classify which gang he or she is a member of. Further, the Court stated that in "assessing visibility, we must consider the persecution feared in the context of the country concerned."[184]

The Court's decision went on to state that "Arteaga's tattoos might make

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175. 24 I. & N. Dec. 579, 587 (B.I.A. 2008).

176. *Id.*

177. *See, e.g.*, Santos-Lemus v. Mukasey, 542 F.3d 738 (9th Cir. 2008); Soriano v. Holder, 569 F.3d 1162 (9th Cir. 2009); Ramos-Lopez v. Holder, 563 F.3d 855 (9th Cir. 2009).

178. Wilkinson, *supra* note 141, at 416.

179. 511 F.3d 940 (9th Cir. 2007).

180. The standard for granting withholding of removal in this context is the same as that for the granting of asylum. *See* 8 C.F.R. § 1208.16.

181. Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007).

182. *In re* A-M-E-, 24 I. & N. Dec. 69 (B.I.A. 2007).

183. *Arteaga*, 511 F.3d at 945.

184. *Id.*

him visible to the police and other gang members as a gang member."[185] From this statement, the reasonable inference expected to follow would be that as a result, Arteaga was a socially visible member of society, regardless of whether or not the Court felt that he was eligible for asylum. However, the Court goes on to say that it did not believe "that the BIA's requirement of social visibility intended to include members or former members of violent street gangs under the definition of 'particular social group' merely because they could be readily identifiable."[186] This decision is clearly mistaken. In order to come to such a strange conclusion, the Court draws on no direct evidence from any BIA opinion or statement that the BIA intended any such result.

This decision makes obvious the courts' inconsistent and confused application of the social visibility standard. While there are many reasons that a former gang member would not be granted asylum in the United States, it is difficult to justify the idea that visible gang tattoos on someone's body do not qualify that individual as socially visible.[187] This example demonstrates another reason why the BIA's social visibility requirement does not reach desirable policy aims.

3. The "Floodgates"

One of the policy concerns that must be addressed when dealing with access to asylum is that of the opening of the floodgates. The fear is that granting asylum cases based on broad social group definitions will open the floodgates, allowing every person that is a member of that widely defined group to be eligible for asylum in the United States.[188] This concern, while a valid one given the benefits of protecting asylum law and shielding it from anti-immigration politics, is somewhat misplaced.

Qualifying as a member of a particular social group does not automatically qualify an individual for asylum. Upon meeting that standard, asylum-seekers must prove that the persecution they have experienced, or that they fear experiencing, is "on account of" that membership (often called the "nexus" requirement).[189] In addition, there are bars to asylum, such as the persecutor's bar,[190] the material support bar,[191] and in the gang-related cases, a bar for those

185. *Id.*

186. *Id.*

187. Regarding tattoos as immutable characteristics, *see* Matter of Anon., IJ Decision, York, PA (September 28, 2005), *available at* www.nationalimmigrationproject.org ("A tattoo is not an immutable characteristic. It can be removed . . . Just as a hair cut can be changed, just as clothing can be changed, a tattoo can in fact be removed.").

188. David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES 34 (Howard Adelman ed., 1991) (stating that asylum is a "scarce resource").

189. INA, *supra* note 17.

190. *Id.* ("The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality,

who have been involved in criminal activities.[192] The asylum applicant must also be able to prove that his or her home country is unwilling or unable to protect that individual, that there are not changed circumstances making it safe for that individual to return to that country, and that there is nowhere else in their home country that the applicant could go to find safety.[193]

A good example can be drawn from the United Kingdom, where particular social groups are defined broadly and the floodgates have not burst open. In the case of *Islam and Shah*,[194] the House of Lords considered the claims of two married Pakistani women who were subjected to serious physical abuse by their husbands and hence forced to leave their homes.[195] A majority of the House of Lords concluded that the relevant social group in the case could appropriately be defined as "Pakistani women."[196]

In naming "Pakistani women" as the relevant social group, the House of Lords did not take issue with the fact that not every member of the group would be eligible for asylum; rather, it relied on the additional elements of the definition within the law (such as the "nexus" requirement) to separate out undeserving claims.[197] The BIA and circuit courts should take a similar approach, granting asylum where it is deserved instead of creating opaque and confusing standards out of fear that the floodgates will open and the number of asylum claims will rise. The Convention does not have a footnote saying that the courts or the BIA can stop granting asylum to refugees once the United States reaches a certain capacity. Rather, the United States is obligated to conform to the treaty and grant deserving claims; the floodgates concern does not change that obligation.

The social visibility requirement imposed by the BIA does not lead to desirable policy outcomes. Not only is it inconsistently applied and understood, but it also puts many groups of people who were previously eligible for asylum under the particular social group category at risk of being denied protection despite their deserving claims. The BIA should revoke its social visibility requirement and instead adopt the alternate test for membership of a particular social group as put forth by UNHCR.

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membership in a particular social group, or political opinion.").

191. INA, *supra* note 17, at § 212(a)(3)(B).

192. INA, 18 U.S.C. § 1182(a)(2)(A)(i) (2000).

193. INA, *supra* note 17, at §208(a)(2)(D).

194. Islam v. Secretary of State for the Home Department and R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah, UK House of Lords, [1999] 2 WLR 1015; [1999] INLR 144, *reprinted in* 11 INT'L J. OF REFUGEE L. at 496 (1999).

195. *Id.*

196. *Id.*

197. Aleinikoff, *supra* note 6, at 271-74.

III.
SOLUTIONS: THE UNHCR'S RECOMMENDATION TO USE BOTH THE PROTECTED CHARACTERISTIC AND SOCIAL PERCEPTION APPROACHES TO DEFINE MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

Courts around the world, including courts in the United States, have attempted to collapse the qualifications for membership of a particular social group to one test that encompasses every possible applicant that is deserving of asylum. While many of these courts have settled on the protected characteristic approach as set forth in *Acosta*, others have relied on social perception or social visibility alone. This paper contends that each of these tests in isolation fails to bring about this goal.

Asylum is a complex area of the law, and people across the globe experience persecution for innumerable reasons, not all of which can be captured by any one of those tests. In the wake of the BIA's decisions that rely on social visibility as a dispositive test, there has been an outcry to return to the protected characteristic approach of *Acosta*.[198] While this paper agrees that the use of social visibility in the context of the *Acosta* framework is misguided, it argues that the *Acosta* standard could be improved by adding a social cognizability/perception analysis. Without some inquiry into social cognizability, groups of people who have experienced or feared persecution based on membership in a group that is not based on an immutable characteristic will not be eligible for asylum in the United States.

This paper argues that there are many weaknesses of social visibility as a dispositive test for determining membership of a particular social group. In now advocating for the addition of a social perception/cognizability analysis to the test, it is important to return to the differences between a dispositive "social *visibility*" test and a secondary, or alternative, "social *perception*" inquiry. The idea of social perception as put forth by the UNHCR is distinct from the social visibility requirement that was created by the BIA. The High Court of Australia established the social perception approach that is referenced in the UNHCR's Guidelines. In *Applicant A.*,[199] the High Court emphasized that the social perception approach "examines whether or not a group shares a common characteristic which makes them a *cognizable* group *or* sets them apart from society at large."[200] Under the social perception analysis, the question is whether the members:

> [S]hare a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from the society at large .... It does not require that the common attribute be visible to the naked eye in a literal sense of the term nor that it be one that is easily recognizable to the general

198. 19 I. & N. Dec. 211 (B.I.A. 1985).

199. Applicant A. v. Minister for Immigration and Ethnic Affairs (1997] 190 C.L.R. 225 (Austl.).

200. UNHCR Guidelines, *supra* note 8, para. 7 (emphasis added).

public.[201]

This understanding is very different from the approach taken by the BIA's social visibility requirement. Social perception analysis does not rely on a literal application of visibility. Rather, it works to identify any social groups that are not based on an immutable characteristic, but instead share a common attribute or attributes that set them apart from society in some way. In adopting the UNHCR alternate test approach, the United States would improve its application of membership of a particular social group in asylum cases by closing this gap in protection that exists under the protected characteristic framework.

The UNHCR's recommended approach to determining membership of a particular social group will close the protection gaps that result from the use of either the protected characteristic approach or the social perception approach alone. The former fails to include groups that deserve protection for a reason other than an immutable characteristic; the latter fails to include people who are forced to hide or who are invisible due to their identity within their home country. Neither of these outcomes comports with the United States' obligations under the Protocol, nor to the range of groups that have been considered particular social groups in the past within U.S. asylum law.

The current lack of cohesion and uniformity across immigration judges and circuit courts with regard to particular social group claims is cause for concern. The social visibility test lacks clarity and has little legal basis or justification, which makes it difficult for judges to apply consistently. The lack of consistency in asylum law in the United States today is a widely recognized and well documented,[202] especially in a legal system that generally has a great distaste for the inconsistent application of any law. This problem could be solved by a more satisfying and fair test when it comes to particular social group claims within asylum law.

CONCLUSION

When it was passed, the Refugee Act of 1980 was regarded as "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress."[203] The BIA's unexplained imposition of the social visibility requirement has potentially jeopardized the Refugee Act's ability to protect those who need it most. Such a requirement greatly narrows the particular social group definition, which even before the imposition of the social visibility requirement necessitated a very high burden of proof. A dispositive social visibility requirement raises that burden too high for asylum applicants whose claims are based on sexual orientation or identity, for domestic violence victims,

201. Brief for U.N. High Comm'r for Refugees as Amicus Curiae, Valdiviezo-Galdamez v. Holder, *supra* note 132, at 11.

202. *See* Ramji-Nogales, *supra* note 29.

203. 126 CONG. REC. H 4501, 1500 (daily ed. Mar. 4, 1980) (statement of Rep. Rodino).

for victims of gang violence, and many others.[204]

Immigration and circuit court judges should not grant *Chevron* deference to the BIA's social visibility requirement. The Seventh Circuit has already explicitly rejected the requirement,[205] and other circuits should follow suit. Not only does granting *Chevron* deference to the social visibility requirement thwart congressional intent and the United States' obligations under the Protocol,[206] but it also falls within the "arbitrary and capricious" exception set forth by the U.S. Supreme Court in *Brand X*.[207]

However, while the BIA's language, and the manner in which the social visibility requirement was implemented in the adjudication of membership of a particular social group claims went too far, the idea of creating some sort of inquiry into social perception/cognizability in determining claims based on membership of a particular social group is not without merit. In fact, this paper argues that including such an inquiry as an alternative test to the protected characteristic approach would be beneficial, aligning U.S. asylum law more closely to that of the Protocol and the UNHCR's recommendations. Including an alternative test would close protection gaps and ensure that all applicants who should qualify for asylum are able to satisfy the requirement by qualifying as a member of one of the five protected classes of individuals.

At risk if the BIA does not reform its new social visibility requirement, or if immigration judges and circuit courts do not choose to reject it, are important policy goals that will not be achieved by such an unclear and subjective standard. The social visibility test will further compound the problem of inconsistent, incoherent and biased decisions by immigration judges, rather than promote consistent and easy-to-understand principles. Furthermore, the United States will fall short of its obligations under the 1980 Refugee Act and the Protocol by denying asylum to those refugees that should qualify for protection based on a dispositive and subjective test that is difficult to apply. Adopting the alternative test put forth by the UNHCR is a solution to this problem, and it will not leave judges with unclear guidelines and unfettered discretion when formulating their decisions. The result of the implementation of this alternative test will be a more just and consistent application of membership of a particular social group within asylum claims.

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204. *See* Hathaway & Foster, *supra* note 28, at 482.

205. *See* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009); Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009).

206. *See supra* section II.A.1.

207. Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 972 (2005); *see supra* section II.A.2.

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European Union Lobbying Post-Lisbon: An Economic Analysis

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European Union Lobbying Post-Lisbon: An Economic Analysis

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INTRODUCTION

Over the last decade, academics, politicians, civil servants, business elites, and the European public have become concerned that lobbying in the European Union (EU) exacerbates issues of unequal access to political institutions and asymmetrical information provision. Applying general theories of lobbying to the EU magnifies these worries for three reasons.

First, the EU, as a primarily regulatory body with a relatively small budget and sparse staff, relies heavily on lobbyists for technical information.[1] Second, great geographic distances separate Brussels from most national capitals, which are the traditional centers of citizen and interest group organization. Third, the EU is a structurally complex political system, and actors seeking access to its institutions must possess political sophistication and expansive resources.[2]

Perhaps contemporary fascination with EU lobbying also stems from the diversity and complexity of EU interest representation, which renders definitive, positive conclusions highly elusive.[3] Although many scholars have made valuable contributions in mapping the labyrinthine landscape of EU interest representation,[4] such literature presently lacks an investigation of the ways in

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1. RINUS VAN SCHENDELEN, MACHIAVELLI IN BRUSSELS: THE ART OF LOBBYING THE EU 91 (2d ed. 2006).

2. David Coen, *The European Business Interest and the Nation State: Large-firm Lobbying in the European Union and Member States*, 18 J. PUB. POL'Y 75, 76 (1998).

3. JUSTIN GREENWOOD ET AL. EDS., ORGANIZED INTERESTS AND THE EUROPEAN COMMUNITY 3 (1992).

4. Peiter Bouwen, *Corporate Lobbying in the European Union: the Logic of Access*, 9 J. EUR. PUB. POL'Y 365, 368 (2002) (relationship between lobbyists and EU institutions represents

which the recently approved Treaty of Lisbon ("Lisbon") will impact lobbying and the market for access to EU institutions.[5] In this paper, I begin such an investigation through employing a positivist approach grounded upon economic principles.

I argue that Lisbon has several implications for EU lobbying, the most important of which is that expansion of Qualified Majority Voting will increase legislative output and thus enhance the rewards of lobbying as interests groups vie to influence a larger portfolio of regulations and directives. I predict that Lisbon will drive an increase in demand for access to the EU policy process by precipitating an increase in EU legislative output across a more expansive range of policy areas. Moreover, the assumption of new competencies by EU governmental bodies will exacerbate the strain on its institutional resources and compel policymakers to rely more heavily on lobbyists for technical information and representative input. In the aggregate, these shifts will result in a higher quantity of EU lobbying. Whether EU institutions will be able to secure a greater "price" for access to the policymaking process will depend on whether the shift in demand for access to EU institutions or shift in supply of access to Europe's institutions dominates.

In Section I, I will explore the critical importance of lobbying to Europe's democratic deficit debate. I also highlight the key arguments for and against the proposition that lobbying is necessary to representative democracy. Section II contains a discussion of the Lisbon provisions that could affect Europe's lobbying landscape. In Section III, I focus on the history of interest representation in the EU by exploring the early history of Brussels lobbying, identifying causal factors that may explain the explosion in EU lobbying, and surveying the current landscape of Brussels' interest representation. In Section IV, I lay out a proposed theoretical model to describe the market for EU interest representation. Then, in Section V, I discuss the EU Commission, Parliament, and Council as the three most important EU organs and highlight the institutional, regulatory, and legislative powers of each body. I explore why each organ is an attractive target for interest representatives and evaluate the ways in which interacting with lobbyists ameliorates each institution's democratic and resource-based deficiencies. Section VI discusses EU lobbyists. Here, I analyze the various strategic mechanisms and structural forms utilized by lobbyists to gain access to EU institutions and steer policy, highlighting key differences between public and private interest groups. Finally, Section VII employs the

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"exchange relation between two groups of interdependent organizations"); *see also* David Coen, *Empirical and Theoretical Studies in EU lobbying*, 14 J. EUR. PUB. POL'Y 333, 333 (2007) (noting the growing political sophistication of lobbyists within the EU's "complex multi-level venue environment"); Directorate General Internal Policies of the Union, *Lobbying in the European Union*, PE 393.226 (Nov. 2007), *available at* http://www.europarl.europa.eu/activities/committees/studies/download.do?file=18208.

5. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306).

theoretical model set forth out in Section IV to predict the impact of Lisbon on EU lobbying.

Before further exploring EU lobbying, I will establish clear definitions of the key terms upon which this article relies. Lobbying is generally defined as the attempted or successful influencing of legislative-administrative decisions made by public authorities through the use of interested representatives.[6] The terms "lobbying," and "interest representation" will be used interchangeably. A lobbyist, or interest representative, is an individual or organization that seeks to influence policy, but does not seek to be elected.[7] Whereas positive lobbying describes efforts to steer policymakers toward enacting favorable regulations or directives, negative lobbying refers to efforts to derail or block unfavorable legislation.

I divide "legitimacy" into two components: output legitimacy and input legitimacy. Output legitimacy of EU policy concerns the "supply of information, ideas and expert resources for the technical quality" of EU policies,[8] and is closely associated with leveraging expert knowledge to produce effective legislation.[9] However, legitimacy stems from more than the achievement of effective results; it is also rooted in the opportunities for citizens to help shape these results.[10] For the purposes of this paper, I define input legitimacy as the capacity of a diverse range of citizens and organizations to influence EU policy, which is measured as the proportion of EU citizens whose interests a lobbyist can credibly allege to represent.

I.
LOBBYING AND THE DEMOCRATIC DEFICIT

Interest representation is a central theme in contemporary debates concerning Europe's "democratic deficit." Lobbying exists at all governance levels, substantially impacting local, regional, national, European, and global policy outcomes.[11] Its impact can be observed across all stages of the European policy process, as interest groups influence agenda setting in the European Commission, policy reformation in the Parliament, ratification of regulations and directives in the Council, and the application of law in nation-states.[12] Many

6. Peter Koeppl, *The Acceptance, Relevance and Dominance of Lobbying in the EU Commission*, 1 J. PUB. AFF. 69, 71 (2001).

7. SONIA MAZEY & JEREMY RICHARDSON, ENVIRONMENTAL POLICY IN THE EUROPEAN UNION: ACTORS, INSTITUTIONS AND PROCESSES 141 (Andrew Jordan ed., 2d ed. 2002).

8. JEREMY GREENWOOD, INTEREST REPRESENTATION IN THE EUROPEAN UNION 1 (2d ed. 2007).

9. GREENWOOD, *supra* note 3, at 366

10. *See generally* GREENWOOD, *supra* note 8.

11. *See generally* Bouwen, *supra* note 4.

12. *See* Directorate General Internal Policies, *supra* note 4.

scholars contend that the EU relies more heavily on civil society actors than any other government in the world.[13]

Some commentators argue that Europe suffers from a "democratic deficit," brought on by EU political institutions' lack of responsiveness to the demands of European citizens and weak turnout in elections to European Parliament.[14] Thus, according to this view, Europe's democratic deficit stems from a lack of institutional legitimacy of EU organs and low degree of citizens' influence upon these institutions.[15]

Pluralist[16] democratic systems of governance require balanced interest participation.[17] As such, the EU must "combine and reinforce" diverse forms of representation and participation.[18] In accord, the "group theory" of politics holds that democratic societies must employ a group process to make decisions, encouraging citizens groups, individual businesses, law firms, and trade federations to influence policymakers.[19] Input from elite interest representatives is insufficient to establish legitimacy of governmental institutions.[20] In practice, however, some citizens and interests tend to enjoy "superior representation and disproportionate power."[21] Indeed, the "pluralist choir," Schattschneider colorfully argues, "sings with a heavily upper-class accent."[22]

Reconciling the "demands of self-interested private interests with the interests of wider civil society" represents the "central problem of democratic life."[23] The criticisms of pluralist theory are magnified when a system proves incapable of prioritizing relevant interests and when better organized and more

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13. GREENWOOD, *supra* note 8, at 1.

14. *Glossary—Democratic Deficit*, EUROPA—OFFICIAL WEBSITE OF THE EUROPEAN UNION, http://europa.eu/scadplus/glossary/democratic_deficit_en.htm (last visited Jan. 8, 2010).

15. *The First Use of the Term "Democratic Deficit,"* FEDERAL UNION—DEMOCRACY AND ACCOUNTABILITY AT ALL LEVELS OF GOVERNANCE, http://www.federalunion.org.uk/the-first-use-of-the-term-democratic-deficit/ (last visited Jan. 8, 2010).

16. Pluralism is the political theory that various segments of society organize successfully to bargain with each other and influence politics, which, in turn results in higher quality information flow between policymakers and citizens.

17. Christine Mahoney, *The Power of Institutions: State and Interest Group Activity in the European Union*, 5 EUR. UNION POL. 441, 442 (2004).

18. REBEKKA GOEHRING, *Interest Representation and Legitimacy in the European Union: The New Quest for Civil Society Formation*, *in* INFLUENCE AND INTERESTS IN THE EUROPEAN UNION: THE NEW POLITICS OF PERSUASION AND ADVOCACY 118, 134 (Alex Warleigh & Jenny Fairbrass eds., 2002).

19. G. DAVID GARSON, GROUP THEORIES OF POLITICS 206 (1978).

20. IRINA MICHALOWITZ, EU LOBBYING PRINCIPALS, AGENTS AND TARGETS: STRATEGIC INTEREST INTERMEDIATION IN EU POLICY-MAKING 62 (4th ed. 2004).

21. ROBERT COOTER, THE STRATEGIC CONSTITUTION 63 (2d ed. 2002).

22. MICHALOWITZ, *supra* note 20, at 26.

23. Jeremy Greenwood & Clive Thomas, *Regulating Lobbying in the Western World*, 51 PARLIAMENTARY AFF. 487, 487 (1998).

highly funded groups have superior access to political resources.[24] Elite interest groups enjoy unparalleled access to EU governing bodies, placing a strain on openness, transparency, and democracy.[25] Over five decades ago, Oxford Professor Sammy Finer asserted that the "world of pressure politics [is] obscured from public view," and in order to remedy this ill, Finer demanded "more light!"[26]

Political scientists differ greatly in their perspectives on lobbying. Many recognize the legitimate and important role that public and private interests can play in the public policy process.[27] These commentators see EU lobbyists as driving a "mutual[ly] beneficial exchange of information," as opposed to being brokers of "undue influence."[28] Viewed through this lens, interest groups are representatives of organized civil society with the capacity to contribute to EU democratic legitimacy. As the European Commission itself has declared, "lobbying is a legitimate part of the democratic system, regardless of whether it is carried out by citizens, companies, or firms working on behalf of third parities, think tanks, lawyers, [or] public affairs professionals."[29]

Interest representatives can bridge the democratic gap between Europe's institutions and its citizens by enhancing the legitimacy of EU legislation. Interest groups contribute crucial resources such as factual data to support the policy formulation, implementation, and monitoring functions of EU institutions.[30] Lobbyists also use their resources to provide EU institutions with the expertise necessary to efficiently address European issues.[31]

Lobbying opens the complex EU policy process to a diverse range of citizens and organizations. In interacting with lobbyists, EU institutions seek to integrate comprehensive and diverse input into legislation. Such interactions enhance popular identification with EU policies, which bolsters EU legitimacy.[32] Further, "investment in political influence provides voters with a way of

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24. Directorate General for Research, *Lobbying in the European Union: Current Rules and Practices* (April 2004), *available at* http://ec.europa.eu/civil_society/interest_groups/docs/workingdocparl.pdf.

25. *Id.*

26. SAMMY FINER, ANONYMOUS EMPIRE: A STUDY OF THE LOBBY IN GREAT BRITAIN 12 (1958).

27. Jeremy Richardson, *Government, Interest and Policy Change*, 48 POL. STUD. 1006, *cited in* David Coen, *Empirical and theoretical studies in EU lobbying*, 14 J. EUR. PUB. POL'Y. 333, 340 (2007).

28. Margaret McCown, *Interest Groups and the European Court of Justice*, *in* LOBBYING THE EUROPEAN UNION 91 (David Coen, & Jeremy Richardson 2d ed., 2009).

29. Directorate General for Research, *supra* note 24.

30. Justin Greenwood, *The Search for Input Legitimacy Through Organised Civil Society in the European Union*, 2 TRANSNAT'L ASS'NS, 145, 145 (2002); Koeppl, *supra* note 6, at 70 (lobbying is more than mere persuasion; in addition, lobbyists must provide factual and relevant information).

31. BOUWEN, *supra* note 4, at 377.

32. GREENWOOD, *supra* note 8, at 116-17.

expressing the intensity of their preferences, which, in turn, increases the efficiency of politicians."[33] Lobbyists perform the critical function of informing citizens about laws and regulations and can increase the average quantity of citizens' political knowledge.[34] However, lobbyists only provide information to those who are able to pay for it. Because different groups have varying abilities to bear this cost, lobbying also increases the variance in political information known to citizens.[35]

Although concern exists as to whether lobbyists do in fact exert undue influence, the potential for lobbyists to "capture" policymakers is mitigated by the diversity and complexity of EU governance.[36] Former Commission Vice President Siim Kallas points out that there has been "no smoking evidence, no burning scandals and no known cases of corruption of European decision-makers involved in lobbying."[37] Many even tout lobbyists as serving the important function of scrutinizing Brussels' civil servants and politicians that evade media and public attention.[38]

Despite the many arguments in favor of granting organized interests access to Europe's public policymaking process, several convincing arguments stand in opposition to this proposition. First, lobbying is not an entirely productive activity. Although investments in manufacturing facilities, labor, and research are entirely productive, lobbying may result in laws that "redistribute government money or restrict competition." Such wasteful political activities are known as "rent-seeking," which refers to the pursuit of gains via "passive ownership, as opposed to profits from productive activity."[39] Thus, investment in political influence can be costly and unproductive because it merely seeks to transfer wealth between groups.[40]

Second, lobbying can detract from legitimacy. Europe is rife with public suspicion that policy decisions reflect the influence of private interests over the common European interest.[41] Perceptions of "sinister influence pedaling"[42] by interest groups with reckless disregard for the general welfare have fed allegations of dishonesty and corruption in Europe's policymaking processes.

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33. COOTER, *supra* note 21, at 72.

34. Coen, *supra* note 2, at 79.

35. *Id.*

36. Coen, *supra* note 2, at 79 ("Changing institutional balance, expansion of policy areas, and technical nature of functionaries reduce chance of bureaucratic capture").

37. GREENWOOD, *supra* note 8.

38. *See id.*

39. *Id.* at 80.

40. *Id.* at 81.

41. *Euractiv Report on Launch of Bursting the Brussels Bubble*, CORPORATE EUROPEAN OBSERVATORY (Apr. 27, 2010), http://www.euractiv.com/en/pa/eu-transparency-talks-resume-next-month-news-485734.

42. *See* LESTER MILBRATH, THE WASHINGTON LOBBYISTS 14 (1963).

Third, lobbying "confers an unfair advantage on those that can afford to carry it out and therefore runs counter to the notion of democracy."[43] Business groups possess organizational capacity, financial resources, and technical expertise that citizens' organization cannot match.[44] The dominance of business interests is a great concern to pluralist theorists.[45] Business and professional organizations comprise over 75% of EU lobbyists but citizens' organizations are represented by merely 20% of interest groups.[46] The European Parliament, in accord, states that 3,500 of an estimated 5,000 EU interest groups are business oriented, while just 20% are citizens'/public organizations.[47] However, it is not entirely clear that business interests have as much sway as the numbers suggest. The numerical majority of business interests alone should not necessarily be automatically equated with disproportionate influence over EU policy.[48]

Generally, though, business interests are quite successful in capturing EU regulators via corporate dominance of the advisory groups that the Commission consults when drawing up legislation.[49] Members of European Parliament ("MEP") recently criticized the Commission for the close proximity between financial and the Commission's political elites.[50] Because of the power imbalance between financial interests and those representing civil society, as well as intensive lobbying efforts of banking interests, policymakers tend to afford disproportionate attention to the positions of financial interests. MEPs contend that the Commission actively bolsters the influence of financial interests by selecting banking lobbyists to participate in its advisory groups.[51] MEPs, however, cannot themselves escape blame for contributing to this asymmetry of influence.[52]

Thus, while interest representation is of great significance to contemporary debates concerning Europe's democratic deficit, commentators' perspectives

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43. ALEX WARLEIGH & JENNY FAIRBRASS, INFLUENCE AND INTERESTS IN THE EUROPEAN UNION: THE NEW POLITICS OF PERSUASION AND ADVOCACY 2 (2002).

44. Coen, *supra* note 4, at 335 (European chemical industry federation lobbyists in Brussels outnumber those of all environmental groups combined).

45. Garson, *supra* note 19, at 444 (Resource rich groups such as businesses and industrial federations "compose a larger proportion of the interest group community and therefore have stronger influence on policy-making").

46. Coen, *supra* note 4, at 335.

47. *Id.*

48. *See, e.g.*, GREENWOOD, *supra* note 8, at 16 (Noting that the EU landscape is highly specialized, which creates a high degree of competition between various business lobbies).

49. *Id.* at 15.

50. *MEPs Ring Alarm Bells Over Financial Industry's Excessive Lobbying Power*, BRUSSELS SUNSHINE BLOG (June 29, 2010), http://blog.brusselssunshine.eu/.

51. *Id.*

52. Directorate General for Research, *supra* note 24 (Although MEPs publicly champion Parliament's amending power as a mechanism by which it channels interests of citizens' and NGOs, evidence indicates that the majority of these amendments are actually written by industry lobbyists and merely passed on members of Parliament).

vary widely regarding the nature of this impact. While some commentators see EU lobbyists as driving a mutually beneficial exchange of information that alleviates Europe's democratic deficit, others criticize lobbying as detrimental to the democracy and legitimacy of EU governance.

II.
THE TREATY OF LISBON

The Treaty of Lisbon represents yet another step in Europe's march toward the creation of "an ever closer union among the peoples of Europe."[53] Among the most controversial elements of the Lisbon Treaty is its extension of Qualified Majority Voting ("QMV") within the Council to new policy domains. Pursuant to QMV, member states' votes are weighted roughly according to population size. While QMV "provides necessary efficiencies in EU lawmaking," critics fear it "threatens Member State sovereignty that unanimous voting would protect."[54] In subsection A, I will discuss the new strategic opportunities for lobbyists under Lisbon. In subsection B, I highlight the ways in which Lisbon provides new incentives for EU political institutions to grant access to interest representatives.

A. Enhanced Rewards for Lobbying

Lisbon extends QMV to a plethora of new policy areas, including structural and cohesion funds, freedom of movement for workers, social security, common defense policy, intellectual property, sport, professional licensing, energy, tourism, and budgeting.[55] Scholars point to the introduction of QMV in the Council as a casual factor to explain the explosion of EU lobbying in the final decade of the 20th century. Thus, it is not unreasonable to hypothesize that expanding of QMV will drive a similar increase in demand for access to Europe's institutions.[56]

Significantly, Lisbon also introduces a new voting system in the Council, "double majority voting," which scholars label the most sensitive political issue of Lisbon.[57] Double majority voting requires the support of 55% of EU member

53. Stephen Siberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 VA. J. INT'L L. 920, 922 (2010).

54. *Id.*

55. *Id.*

56. Certain fields remain subject to unanimous voting including: harmonization of certain tax matters, harmonization in the field of social security and social protection, common foreign and security policy, citizenship, restrictions on capital flow to or from third countries, and membership in the Union. I predict that lobbying in these policy areas will either remain constant or decrease as the returns to investment in lobbying decline relative to other policy domains.

57. STEFAN GRILLER & JACQUES ZILLER, THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY? 57 (2008).

countries and endorsement of states representing 65% of the EU population to enact legislation.

Under the now superseded Treaty of Nice voting procedure, proposed legislation required 74% of weighted votes, the support of states representing 62% of the EU population, and a simple majority of member states. In virtually every scenario, satisfaction of the condition on voting weights implied that the population requirement would be satisfied.[58] Thus, the 74% voting weight requirement was arguably the greatest impediment to the Council's enactment of legislation.[59]

I therefore hypothesize that the elimination of the 74% weighted vote requirement under Lisbon, by enabling the Council to approve legislation more easily, will drive an increase in EU legislative output.[60] Greater legislative output, in turn, may enhance rewards of lobbying and drive an increase in demand for access to the policymaking process as interests groups vie to influence a larger portfolio of regulations and directives.[61] In addition, by affording greater weight to population, double majority voting may shift the focus of lobbying toward Member States with more citizens.[62]

Several other provisions of the Lisbon Treaty, though less controversial, also have the potential to drive critical shifts in EU lobbying. First, Lisbon extends "co-decision" to several new fields, allocating greater powers to Parliament in policy areas such as immigration, penal judicial cooperation, police cooperation, trade policy, and agriculture. Under Lisbon, a majority of Parliament must assent to all international agreements in fields governed by co-decision.

Second, Lisbon further bolsters the power of Parliament by abolishing the distinction between "compulsory" expenditures and "non-compulsory" expenditures. This change makes Parliament an equal partner with the Council

58. The only exception occurs when a proposal is rejected by Germany and supported by exactly three of France, United Kingdom, Italy, Spain and Poland, along with nearly all of the remaining 21 member states.

59. Axel Moberg, *The Voting System in the European Union: The Balance Between Large and Small Countries*, 21 SCANDINAVIAN POL. STUD. 347, 352 (1998). For example, under Nice, a proposed regulation could be derailed at the Council stage despite the support of the dozen most populous member states representing ~86.5% of the EU population because the combined weighted votes of these dozen states fails to exceed 74% weighted vote threshold.

60. On the other hand, it must be noted that Lisbon increases in the number of member states required to support legislation from fourteen to fifteen, thus making it somewhat more difficult to pass legislation and possibly counteracting the increase in demand for access.

61. However, the true effects of double majority voting reform may not be felt for several years, as any member state may request that the Nice Treaty rules be used for a particular vote until 2017. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

62. For instance, Germany's share of Council votes nearly doubles from 8.4% under the Nice Treaty to 16.4% pursuant to Lisbon.

of Ministers in deciding EU expenditures.[63] I hypothesize that allocating greater powers to Parliament will result in more lobbying of that body.

Third, Lisbon creates the position of High Representative for the Union in Foreign Affairs and Security Policy ("Vice-President of the Commission"). I hypothesize that the Commission Vice-President will emerge as a new target for interest representatives. Finally, Lisbon strengthens the powers of the Commission President by granting him authority to dismiss fellow Commissioners. A stronger Commission President may drive an increase in demand for access to the Commission, as lobbyists vie to persuade the President to oust Commissioners unfavorable to their respective causes.

B. New Incentives to Grant Access

The assumption of new competencies by EU organs under Lisbon will exacerbate the present strain on its institutional resources and compel policymakers to rely more heavily on lobbyists for technical information. Under Lisbon, the EU has enhanced responsibility over security, home affairs, fundamental rights, and justice. Scholars have long recognized that the Commission is overstressed and under staffed, and that the complexity of issues on the agenda of Parliament exceeds the technical expertise of its members. Because EU institutions interact with lobbyists partly to mitigate internal resource and staffing deficiencies, I suggest that the expansion of EU functions and competencies under Lisbon may compel policymakers to supply more access to interest groups.

III.
HISTORICAL DEVELOPMENT OF EU LOBBYING

A. National Route (1957-1987)

In the first three decades following the 1957 Treaty establishing the European Community ("TEC"), European interests lobbied Brussels primarily by targeting Member State governments, leveraging unions, trade organizations and professional associations to access national representatives.[64] This national focus flowed naturally from the European Community's weak political mandate and the ability of Member States to veto legislation in the Council of Ministers pursuant to the requirement of unanimous assent.[65] Recognizing this participatory deficiency, the Commission's 1988 Cecchini Report demanded

63. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

64. VAN SCHENDELEN, *supra* note 1, at 91.

65. *See generally* SONIA MAZEY & JEREMY RICHARDSON, LOBBYING IN THE EUROPEAN COMMUNITY (1993).

more active participation from business interests in EU governance.[66]

B. Brussels Lobbying Explosion (1987-1999)

The 1987 Single European Act ("SEA") represented the first major revision of the TEC, and established Europe's goal of establishing a single market by the conclusion of 1992. Thereafter, the locus of lobbying activity shifted from national to European channels.[67] The Commission estimates that by 1992 there were more than three thousand public and economic lobbies active in Brussels.[68]

"Where power rests," contends eminent political scientist Key, "influence is brought to bear."[69] Europeanization of lobbying was partly driven by economic integration and the growing role of the EU.[70] Under the SEA and 1993 Maastricht Treaty ("Maastricht"), national governments delegated vast regulatory functions to European institutions, expanding EU competencies over the single market, product quality, health, safety, employment, competition law, environmental standards, industrial policy, and consumer protection.[71] Demand for access to Europe's policymaking process increased as EU institutions assumed more significant competencies. Maastricht also extended the policy domains over which the Council could make decisions via QMV. As a result of the shift from unanimous voting in the Council to QMV on issues involving the single market, lobbyist activity increased dramatically.[72]

Concurrently, EU institutions grew increasingly reliant on interest representatives for technical information, signaling that the Commission and the Parliament lacked the resources to deal with their expanded legislative competencies absent the active participation of technical experts.[73] Spikes in the sheer volume of information to be absorbed, along with increasing specialization within a particular body of knowledge, placed great strain on the EU's internal resources.[74] As a result, the increasing need for information on complex issues

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66. Commission of the European Communities, *The Overall Challenge*, SEC 88(524) final, Brussels (1998) ("[b]usiness cannot afford to sit passively by...[t]here is a need of more active political involvement, in the sense of constructive input to policy").

67. Directorate General Internal Policies, *supra* note 4 (Watson charts moderate growth from 400 EU interests groups in 1970 to 800 in 1991, but doubling to over 1600 in 1994. Similarly, Porter reports a steady growth from 300 groups in 1960 to 750 in 1990, dramatically increasing to 1200 in 1997.).

68. *Id.*

69. VLADIMIR ORLANDO KEY, AMERICAN STATE POLITICS 168 (1956).

70. Coen, *supra* note 4, at 334.

71. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1. Maastricht also contained Articles on cooperation regarding education, health and culture, the development of EU citizenship rights, expand economic aid to the least developed members, and authorization of the court of justice to sanction delinquent member state governments by fines and penalties.

72. Coen, *supra* note 4, at 334.

73. *See generally* VAN SCHENDELEN, *supra* note 1.

74. CHRISTIAN DE FOULOY, THE PROFESSIONAL LOBBYIST'S DESK REFERENCE 135 (2001).

offered interest groups greater opportunities to influence EU legislation.

C. EU Lobbying in the 21st Century

Given the relatively small size of the budget, the EU has developed into a primarily regulatory authority. Consequently, the impact of legislation is often highly concentrated upon a narrow class of actors, rendering interest groups a natural outlet for private and civil society actors to pursue their respective goals.[75] Business is seen as dominant numerically and politically in the EU policymaking process,[76] and business groups comprise approximately 72% of those holding a position in Commission consultative committees.[77] Therefore, EU lobbying has become a key mechanism by which business interests guarantee a favorable regulatory environment for their activities.[78]

IV.
MARKET FOR ACCESS TO EU INSTITUTIONS

"Political institutions are not mere arenas accepting citizen pleas," but "government officials are themselves participants in the process."[79] Indeed, EU lobbying is not characterized by "unidirectional activity" of lobbyists hassling EU institutions."[80] For example, the Commission attempts to forge long term relationships with interest groups that consistently supply valuable information by developing networks of relevant actors and subsequently "massaging" the way these networks operate.[81] This results in the formation of long-term, trust-based relationships between elite interest groups and Commission officials.[82]

Interest groups demand access to EU institutions because governments, empowered with the legal right to make binding decisions, enjoy a virtual monopoly on political influence. However, influence is very difficult to measure. Although access does not necessarily translate into influence, the two

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75. Erik Wesselius, *High Time to Regulate EU Lobbying*, 15 CONSUMER POL. REV. 1, 13 (2005) (Arguing that Brussels provides "fertile ground" for cultivating political influence, thus attracting "public relations and political affairs consultants, think tanks, and a diverse range of political entrepreneurs").

76. Grant Jordan, *What Drives Associability at the European Level? The Limits of the Utilitarian Explanation, in* COLLECTIVE ACTION IN THE EUROPEAN UNION 31, 31-32 (Mark Aspinwall & Justin Greenwood eds., 1998).

77. Mahoney, *supra* note 17, at 450.

78. Peiter Bouwen, *The Logic of Access to the European Parliament: Business Lobbying in the Committee on Economic and Monetary Affairs*, 42 J. COMM. MKR. STUD. 473, 475 (2004).

79. Mahoney, *supra* note 17, at 446; *see also* Bouwen, *supra* note 4, at 336 (explaining that allegations of aggressive, pushy interests representatives nagging policymakers are unfounded).

80. Bouwen, *supra* note 4, at 368.

81. JEREMY RICHARDSON, POLICY-MAKING IN THE EU: INTERESTS, IDEAS AND GARBAGE CANS OF PRIMEVAL SOUP 14 (1996).

82. Coen, *supra* note 4, at 335.

are closely intertwined.[83] Lobbyists cannot obtain influence absent access to the critical points of political decision-making.[84] As such, access to political institutions becomes the "facilitating intermediate objective" of interest groups.[85] In the EU, businesses demand access to the Commission, the Parliament, and the Council with the ultimate objective of securing favorable legislation and blocking adversative regulations. Citizens' organizations, on the other hand, demand access with ultimate collective goals such as the protection of public health and the environment.

As noted above, EU institutions are themselves key players in creating a distinct EU lobbying system.[86] While trust and credibility remain strong lobbying currencies in Brussels,[87] successfully lobbyists must provide technical information to bolster the output legitimacy of EU legislation and develop pan-European credentials to support input legitimacy of EU policies. Technical information and representation – input and output legitimacy – in the aggregate represent the "price" that EU institutions obtain in exchange for granting lobbyists access to the EU policymaking process. As such, EU institutions come to depend on lobbyists for expertise, information, and reputation in the European public policy process.[88]

Figure 1 illustrates graphically the market for access to EU institutions. Legitimacy price is the aggregate of input and output legitimacy, and represents the "price" that the European Union obtains from interest representatives in exchange for granting access to its institutions. Quantity of access measures the extent of access to EU institutions granted to lobbyists. Demand is the aggregate quantity of access demanded by lobbyists at a given legitimacy price, while supply is the aggregate amount of access supplied by EU institutions at a given legitimacy price.

83. Bouwen, *supra* note 78, at 474.

84. DAVID TRUMAN, THE GOVERNMENTAL PROCESS, POLITICAL INTERESTS AND PUBLIC OPINION 334 (1951).

85. *Id.*

86. DAVID COEN & JEREMY RICHARDSON, LOBBYING THE EUROPEAN UNION 91 (2009).

87. *Id.*

88. Coen, *supra* note 4, at 334.

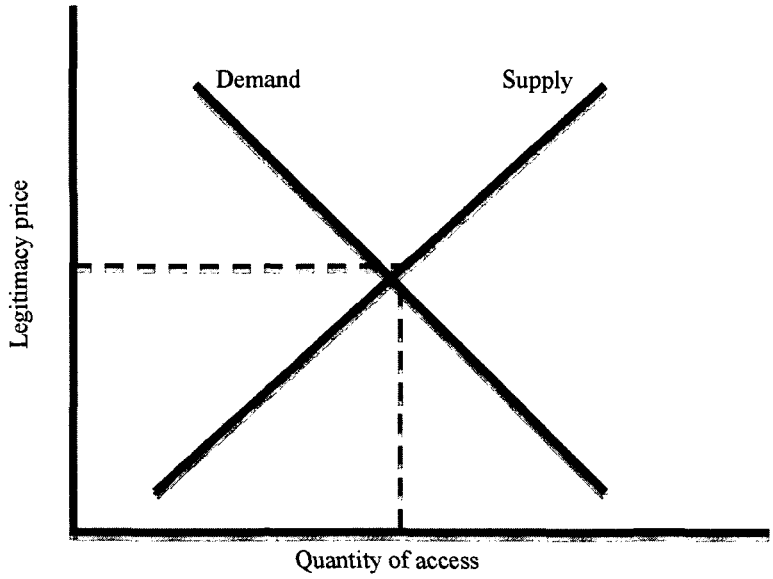

Figure 1: Market for access to EU institutions

Regarding input legitimacy, actors must develop a broad political profile across a number of issues and participate in the creation of collective political strategies to develop widely representative credentials.[89] Concerning output legitimacy, resource dependency theory holds that organizations require "resources from the environment and therefore . . . [must] interact with those organizations or groups in the environment who control the resources they need.[90] EU institutions, dependent on lobbyists for resources that are critical for their own functioning, are subject to pressures from interest groups that possess expertise and technical information.[91] Institutions grant the highest degree of access to the actors that can best satisfy their most problematic resource deficits.[92] For EU institutions this deficit consists of insufficient expert resources along with limited government and democratic legitimacy.

89. GREENWOOD, *supra* note 8, at 133.

90. JEFFREY PFEFFER & GERALD SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE 258 (1978).

91. Coen, *supra* note 4, at 334.

92. JEFFREY PFEFFER, ORGANIZATIONS AND ORGANIZATION THEORY 183 (1982).

V.
INSTITUTIONAL ACTORS: POWERS AND DEPENDENCIES

EU interest representatives must be cautious of treating the EU as a "monolith, behaving and acting as one."[93] This statement applies not only to the EU as a whole, but also to each of its institutions, where the perspectives of different departments vary widely.[94] Indeed, the very structure of a political institution influences the nature of interest representation.[95]

In this Section, I will discuss the Commission, the Parliament, and the Council as the EU's three most vital organs and highlight the institutional, regulatory, and legislative powers of each body. I then explore why each organ is an attractive target for interest representatives, and proceed to evaluate the ways in which interacting with lobbyists ameliorates each institution's democratic and resource deficiencies.

A. European Commission: Foremost Venue for Interest Representation

The European Commission is perhaps the most widely traveled EU lobbying channel. As the initiator of legislation, the Commission is the central actor in the early stages of the EU policymaking process. Commission officials recognize the importance of lobbyists as fundamental, legitimate, and effective players in its policy development process.[96] Because of its central function in the EU policymaking process, the Commission is an attractive target for lobbying. The incipient stages of policy formulation involve the defining and framing of issues,[97] and therefore afford lobbyists ample opportunity to shape and steer proposals.

Further, the Commission is empowered to bring matters against member states for failing to fulfill an obligation under the Treaty before the European Court of Justice ("ECJ").[98] Member States' noncompliance with obligations may come to the attention of the Commission via interactions with private interests or citizens' organizations. Individuals and organizations harmed by a member

93. GREENWOOD, *supra* note 8, at 22.

94. *Id.*

95. Thomas Riss-Kappan, *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and Internatioanl Institutions*, *in* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 3, 5 (Thomas Risse-Kappan ed., 1995) (explaining that fragmented structures "afford ease of access but dilute the impact of any given constituency of civil society actors," while centralized structures create difficulty of access but can result in high policy impact); van Schendelen, *supra* note 1, at 89.

96. COEN & RICHARDSON, *supra* note 86 at 8 (explaining that 67% of survey respondents believe lobbyists were "necessary and initiated contact with them").

97. GREENWOOD, *supra* note 8, at 24.

98. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1957 O.J. (C 340) 226.

state's failure to comply with Treaty obligations will rationally demand access to the Commission with the goal of alerting it to the violation.

As a magnet for interest group activity, the Commission satisfies its own needs by exchanging access for technical information and input legitimacy. For example, to secure information regarding highly technical regulatory areas where Commission staffing numbers are low, the Commission creates consultative committees to manage lobbying activity.[99] These forums provide interest groups with early opportunities to access and influence the EU policymaking process.[100]

Despite the substantial amount of technical and political information required to draft policy proposals, the Commission's staff of 17,000 is much smaller than most national bureaucracies.[101] Indeed, the Commission is "understaffed and overstressed"[102] and relies heavily on private interests, citizens' organization, and technical experts to effectively initiate legislation.[103] Because of its human capital deficiency, the Commission supplies access to interest representatives that consistently provide valuable technical information to enhance the output legitimacy of its proposals. Actors with privileged access are routinely consulted, invited to workshops, and selected to sit on consultative bodies, and can thus influence policy more effectively.[104]

Whereas EU citizens elect the Parliament, the Commission must actively seek input of organized civil society and European organizations to support the input legitimacy of its policies. Its desire to see its proposals become law further drives the Commission to supply access to interests representatives.[105] Interest groups provide the Commission, with a means of "test[ing] the waters" among stakeholders, thus enhancing input legitimacy.[106]

Lobbyists also give the Commission greater autonomy from national governments. By involving a range of public and private interests in discussions

99. GREENWOOD, *supra* note 8, at 10.

100. Consultative committees allow interest representatives to articulate their positions and provide valuable technical information on policy initiatives. By reducing the transaction costs of bargaining, consultative committees increase the probability that interest representatives and EU institutions will cooperate with exchange legitimacy for access.

101. Anthony Broscheid & David Coen, *Lobbying Activity and Fora Creation in the EU: Empirically Exploring the Nature of the Policy Good,* 14 J. EUROPEAN PUB. POL'Y 346, 350 (2007) (politicians and academics agree that the Commission's staffing levels are low compared to the extent of its functions and responsibilities).

102. GREENWOOD, *supra* note 8, at 7.

103. *See generally* VAN SCHENDELEN, *supra* note 1.

104. Broscheid, *supra* note 101, at 250.

105. MICHALOWITZ, *supra* note 20, at 64 (to ensure that the Council or Parliament do not reject Commission proposals, the Commission integrates into its proposals information concerning the "practical implications for individual actors in the member states").

106. GREENWOOD, *supra* note 8, at 34 (consulting with private and public interests provides an indication of how regulations and directives will be perceived at the national level).

concerning policy initiatives, the Commission circumvents "obstruction of national governments."[107] Indeed, organized civil society enables the Commission to bypass national governments and thereby build a consensus among stakeholders.[108]

B. From Phantom Parliament to Critical Lobbying Venue

For the first three decades of EU history, the conventional wisdom was that the Parliament was an inherently weak institution.[109] It is unsurprising that interest representatives focused their activities more heavily on the Commission, the Council, and national governments relative to Europe's "phantom Parliament."[110] However, the Parliament has become a key EU lobbying venue as its powers and functions have expanded under Maastricht and successive treaties.[111] Successive EU Treaties have shifted internal decision making from consultation to co-decision procedure. Figure 2 illustrates graphically the importance of Parliament as a venue for interest representation under various legislative procedures.

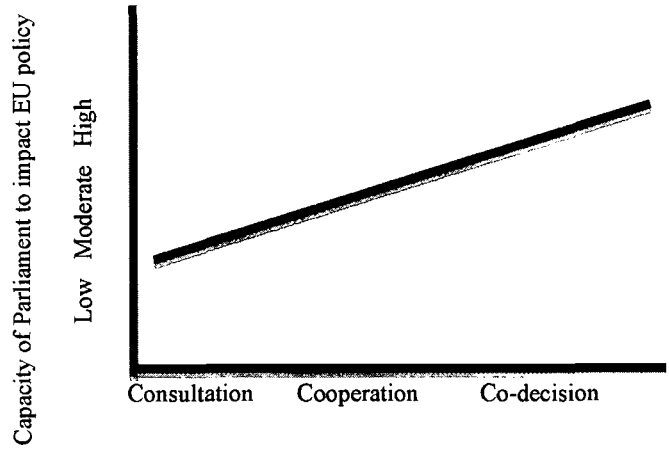

Figure 2: Importance of Parliament as an interest representation venue under various legislative procedures

107. Thomas Christiansen, *The European Commission: the European executive Between Continuity and Change*, *in* EUROPEAN UNION: POWER AND POLICY-MAKING 103 (Jeremy Richardson ed., 2001).

108. MICHALOWITZ, *supra* note 20, at 64.

109. Bouwen, *supra* note 4, at 475.

110. MICHAEL SHANKS & JOHN LAMBERT, BRITAIN AND THE NEW EUROPE – THE FUTURE OF THE COMMON MARKET (1962)

111. COEN & RICHARDSON, *supra* note 86, at 9.

The absence of a built-in majority in Parliament results in an orientation toward coalition building and consensus, which further heightens its importance as a lobbying venue as "each majority is built afresh."[112] An estimated 70,000 individuals make contact with the European Parliament each year.[113] Though quantitative data on lobbying Parliament is scarce because many contacts between MEPS and lobbyists are informal and confidential, Parliament issued 4,435 annual passes to accredited lobbyists in 2006.[114]

Parliament's most significant power is its ability to veto legislation vis-à-vis the Council under "co-decision," originally introduced by Maastricht in 1993.[115] Under co-decision, approval of both the Council and the Parliament is required for Commission proposals to obtain the force of law. Between 1994 and 2005, direct lobbying of the Parliament doubled, with the greatest interest representation activity occurring in policy domains where co-decision applies.[116] Further expansion of co-decision under Lisbon affords Parliament greater powers in fields such as agriculture and energy policy,[117] which could drive an increase in demand for access to Parliament.

Parliament supplies access to interest representatives to enhance its output legitimacy because lobbyists constitute a critical source of information that bolsters the autonomy of Parliament relative to the Commission, the Council, and national governments. As a result, compensating for the perceived bias of the Commission toward private interests in policy proposals becomes a critical access point for lobbyists.[118]

The complexity of issues on the agenda of the European Parliament compels MEPs to seek specific industry expertise. An Italian MEP noted that lobbyists supply information in "clear fashion so that the [MEP] doesn't have to be an expert in the field."[119] In particular, intergroups – subject specific committees within Parliament, represent an important lobbying venue that facilitates early contacts between MEPs and outside interest groups.[120]

C. The European Council and Council of Ministers

Structurally, the Council is divided into the Council of Ministers and the

112. GREENWOOD, *supra* note 8, at 36.

113. COEN & RICHARDSON, *supra* note 86, at 9 (business spends approximately one-fifth of its lobbying resources in targeting legislative committees and individual Members of European Parliament).

114. GREENWOOD, *supra* note 8, at 11.

115. Treaty Establishing the European Economic Community, *supra* note 98, art. 251.

116. Directorate General Internal Policies, *supra* note 4, at 10.

117. COEN & RICHARDSON, *supra* note 86, at 40.

118. *Id.* at 48.

119. David Earnshaw & David Judge, *No Simple Dichotomies: Lobbyists and the European Parliament*, 8 J. LEGIS. STUD. 61, 63 (2006).

120. *Id* at 66.

European Council. The Council of Ministers is an intergovernmental body that brings together national ministers of Member States and provides a forum for them to articulate and defend their respective interests.[121]

The European Council, on the other hand, is comprised of the heads of state of EU Member States. It acts as the final arbiter of disputes and makes strategic decisions that shape Europe's future.[122] Along with Parliament, the Council holds veto power over all legislation through co-decision and holds authority to determine the EU budget.[123]

These vast intergovernmental powers make the Council an appealing target for interest representatives. In turn, the Council requires information from lobbyists concerning the "domestic encompassing interest,"[124] which pertains to whether a given proposal is acceptable to the relevant member state stakeholders.[125] Since each country is typically divided over every piece of legislation, lobbyists can mobilize domestic pressure groups to influence the position of a national minister in the Council.[126] However, access to the Council itself is severely limited.[127] Indeed, scholars describe the Council as opaque, closed, elusive, and inscrutable because it holds meetings behind closed doors and refuses to release papers relating to its deliberations.[128]

The Council's minimal dependence on interest representatives for technical information limits the supply of access for private actors. Compared with the Commission and Parliament, the Council requires less information from private actors because it has greater opportunities to obtain information from national and local governments. In addition, the difficulty of changing entrenched positions and integrating fresh input at the end of the policy cycle reduces the importance of the Council as a lobbying venue.[129] By the time most proposals reach the most visible stages of the Council, only a small fraction of highly politicized issues are up for debate.[130]

Further, because the Council is in a constant state of flux due to national elections and cabinet reshuffles, Council members are temporary. Effective lobbying requires interest representatives to earn the trust of policymakers over

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121. Fiona Hayes-Renshaw, *Least Accessible but Not Inaccessible: Lobbying the Council and the European Council*, *in* Coen *supra* note 4 (Council of Ministers is the EU's "chief decision-making body on day-to-day issues").

122. *Id* at 70.

123. *See supra* Section IV.

124. Bouwen, *supra* note 4, at 369.

125. COEN & RICHARDSON, *supra* note 86, at 77.

126. VAN SCHENDELEN, *supra* note 1, at 97-98.

127. KATRINA CHARRAD, LOBBYING THE EUROPEAN UNION 48 (2005).

128. COEN & RICHARDSON, *supra* note 86, at 73 (The Council has a well-established reputation as the least accessible and most secretive EU institution).

129. GREENWOOD, *supra* note 8, at 24.

130. McCown, *supra* note 28, at 85.

an extended period of time. The relatively rapid turnover of Council members makes it difficult to cultivate sustained relationships. This is exacerbated by the fact that Council members are based in their respective national capitals, and may only visit Brussels for brief periods of time.[131]

VI.
INTEREST REPRESENTATIVES

European interest groups employ various strategic mechanisms and structural forms to gain access to EU institutions and steer policy. For instance, lobbyists must select which institution, officials, and policy domains to target.[132] While the optimal strategy varies widely across dossier, procedure, setting, and time,[133] legislation involving concentrated costs and benefits is most attractive to interest group politics. Subsection A explores the various strategic options and structural forms available to lobbyists. Subsequently, subsection B will discuss the inherent differences in capacity to access EU institutions between business lobbyists and citizens' organizations.

A. Strategic Options

Private and public interests build their lobbying strategies from a wide range of options.[134] First, they must choose between targeting distributive policies that have concrete and specific impacts on individual firms, and regulatory policies, which may affect an entire sector.[135] Numerically, distributive policy domains contain fewer lobby groups than regulatory policy domains.[136] Subsidies can attract new firms and therefore dissipate profits, while regulatory quotas restrict competition and may enable monopoly profits. Because the EU is primarily a regulatory authority, I predict interest representation will focus on regulatory restrictions on competition and price.[137]

Second, interest representatives must decide whether to devote resources toward pushing its own agenda or blocking opportunities for competing interests.[138] The blocking strategy is typically easier, involves less cost, and

131. *Id.* at 75.

132. VAN SCHENDELEN, *supra* note 1, at 94 ("pushing the wrong button can result in lost momentum, new competitors in the policymaking field, or irritation of officials").

133. *Id.*

134. Alex Warleigh, *The Hustle: Citizenship Practice, NGOs and "Policy Coalitions" in the European Union — the Cases of Auto Oil, Drinking Water and Unit Pricing*, 7 J. EUR. PUB. POL. 229, 230 (2000) (EU lobbying involves a "scramble for influence").

135. MICHALOWITZ, *supra* note 20, at 74.

136. GREENWOOD, *supra* note 8, at 7.

137. COOTER, *supra* note 21, at 66.

138. VAN SCHENDELEN, *supra* note 1, at 152.

carries less risk.[139] Although EU lobbyists exhibit a bias toward ease and low risk strategies, no pressure group can only play the negative game.[140]

Third, lobbyists must decide which EU officials to target. Lobbying is primarily directed at the lowest possible level.[141] This is because less senior officials undertake most of the preparatory work in drafting legislation, and final commission proposals usually reproduce around 80% of the first draft.[142] Furthermore, low-level officials constitute the majority of the EU's civil service and are relatively easy to access. The most senior officials, in contrast, are difficult to access, numerically scarce, and mainly involved during the later stages of the policy formation process.[143] When a proposal reaches top officials, higher degrees of formality hamper lobbyists' attempt to push their respective interests.

Fourth, lobbyists must make strategic choices regarding policy domain. Most EU lobbying activity clusters around committees that have the greatest regulatory output and competencies.[144] Not surprisingly, the Directorate Generals facing the greatest number of lobby groups are those with the greatest regulatory competencies: Enterprise, Environments, and Agriculture. Lobbying is limited in domains where member states retain higher levels of sovereignty.[145]

Fifth, interest representatives must decide when to lobby because timing is considered essential for successful interest representation.[146] As discussed above, it becomes increasingly difficult to influence legislation as the policy process unfolds. Early access to EU institutions drives greater opportunities to influence the final laws by enabling groups to identify opportunities for networking, coalition formation, and bargaining.[147]

Perhaps the most important strategic choice, however, is between direct and collective action. Each interest must find the "optimal form of a European collectivity or flock."[148] Small groups and individual actors tout lower consensus building costs because they are selective in their membership and target specific goals. These benefits are clearly attractive, as 40% of all interest representatives

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139. VAN SCHENDELEN, *supra* note 1, at 93 (explaining that it is "easier to block than to push . . . and it is more prudent to play defensively than offensively" since lobbyists inherently have greater "nuisance value than pushing power").

140. VAN SCHENDELEN, *supra* note 1, at 93.

141. Koeppl, *supra* note 6, at 69-80.

142. VAN SCHENDELEN, *supra* note 1, at 94 (explaining that those who draft legislation are more important than those who sign it).

143. COEN & RICHARDSON, *supra* note 86, at 25-26.

144. GREENWOOD, *supra* note 8, at 152 (positing that interest representatives "shoot where the ducks are").

145. *See generally* VAN SCHENDELEN, *supra* note 1 (explaining that less EU lobbying occurs where interlocutors are primarily national governments).

146. Earnshaw & Judge, *supra* note 119, at 63.

147. VAN SCHENDELEN, *supra* note 1, at 164.

148. *Id.*

lobbying at the Commission and Parliament are individual actors.[149] Figure 3 illustrates graphically the tradeoff between group size and cost of building a consensus. Despite the growth of direct action by individual lobbyists over the past decade, formal collective entities remain the dominant actors in EU lobbying.[150]

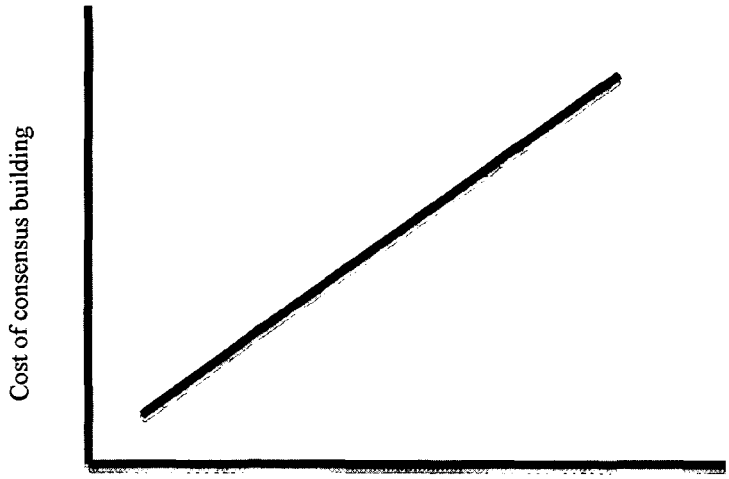

Figure 3: Relationship between EU interest group size and cost of consensus building

Since participation in European associations enhances an actor's opportunities to influence EU policy, the prevalence of collective action in EU lobbying is not surprising for several reasons. First, collective action enables firms to increase their capacity to supply input legitimacy because EU institutions perceive collective associations as more representative of Europe's citizens.[151] Leveraging natural alliances that enhance and refine reputation, as well as developing a broad political profile across diverse issues, are highly effective mechanisms to supply input legitimacy. Second, given the great number of actors lobbying the EU, interests must possess mass and weight to attract the attention of policymakers.[152] Finally, collective associations save on the cost of lobbying because these expenses are distributed across several

149. MAZEY & RICHARDSON, *supra* note 7, at 147.

150. GREENWOOD, *supra* note 8, at 36

151. *See generally* Coen, *supra* note 2.

152. *Id.*

actors.[153]

B. Resource Allocation Tradeoffs

Of great concern to pluralist theorists is the disparity between public and private interest groups' abilities to supply EU institutions with technical information (output legitimacy), access the policymaking process, and ultimately the groups' impact EU policy.[154] However, before diving into this resource asymmetry issue, it will first be helpful to examine how businesses allocate scare resources between lobbying and productive activities. Businesses depend on market stability and certainty, and it is thus rational that businesses invest in lobbying to influence EU regulatory policy.[155] Since businesses have finite resources, they must choose between investing in productive activities and lobbying.[156] Figure 4 illustrates graphically the budget constraint curve for a typical EU business. As the business invests greater resources in lobbying, fewer resources are available for investment in productive activities such as labor, capital, and research. For example, an increase in lobbying investment from I(L) to I(L)' will force the firm to decrease investment in productive activities from I(P) to 1(P)'. Though normative judgments are beyond the focus of this paper, chilling investment in productive activities appears undesirable from an economic standpoint.

153. VAN SCHENDELEN, *supra* note 1, at 45 ("Concerning heterogeneous groups, it is difficult to build a common position because preliminary efforts to build a common agenda result in endless warfare.").

154. *But cf.* CHARRAD, *supra* note 127, at 16 (explaining that public interest groups may be able to secure access to Parliament by virtue of their democratic credentials).

155. MICHALOWITZ, *supra* note 20, at 73.

156. Broscheid, *supra* note 101, at 164 (Political affairs teams compete with strategic divisions for resources).

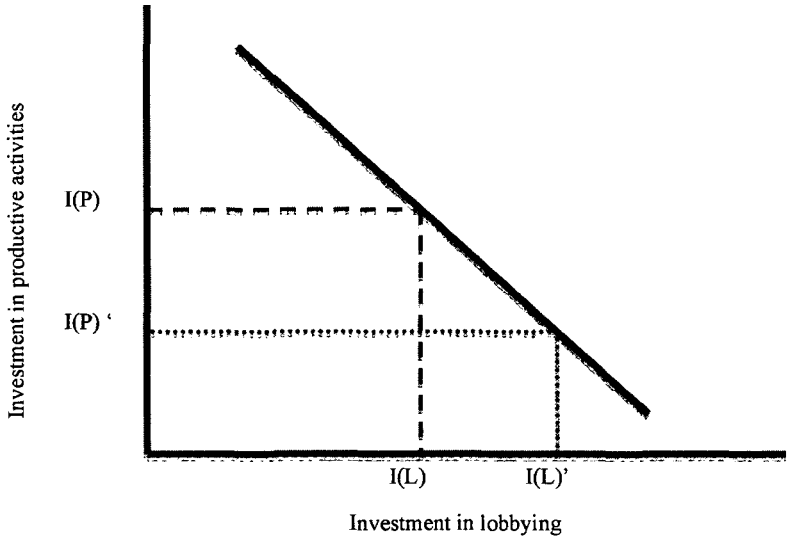

Figure 4: Business budget constraint

Assuming rational business behavior, it may be possible to predict how a firm will allocate resources between lobbying and productive activities. In the following equation, let u-i(lobby) signify the utility that a business expects to gain by spending an additional "i" dollars on lobbying,[157] and allow utility u-i(production) to stand for the utility a given actor expects to enjoy by spending an additional "i" dollars on labor, capital, and other productive activities.

Where u-i(lobby) > u-i(production), the business shifts its scarce resources from productive activities to lobbying EU institutions.

Where u-i(production) > u-i(lobby), the business shifts its scarce resources from lobbying to productive activities.

I predict that expansion of QMV under Lisbon may increase the utility a business expects to gain by spending an additional dollar on lobbying by enabling firms to obtain favorable regulations despite securing less access to EU policymakers. Under Lisbon, firms need only secure support of a qualified majority of Council ministers. In contrast, under the superseded unanimity rules, lobbyists hoping to secure friendly legislation faced the daunting challenge of

157. I assume that lobbying investment will be allocated to generate an efficient combination of technical information and representative credentials.

winning support of all Council ministers. Thus, the cost of obtaining favorable regulations decreases under Lisbon. Accordingly, I hypothesize that businesses will transfer resources from productive activities to positive lobbying, resulting in an outward shift in demand for access to the EU policymaking process.

A probability-based economic model supports my hypothesis. In the equation below, let p(a) denote the subjective probability that investing in interest representation will yield enactment of favorable legislation, allow B to stand for the expected benefit of this legislation, and allow C(P) to indicate the costs of interest representation.[158]

> Where p(a)B > C(P) a firm can be expected to increase investment in lobbying.

Lisbon may increase the subjective probability that investing in interest representation will yield enactment of favorable legislation by enabling lobbyists to secure favorable legislation by winning the support of fewer Council members. Further, by expanding EU competencies to new policy domains, B, the expected benefit from lobbying EU institutions may also increase. Thus, assuming the costs of lobbying remain constant, Lisbon may drive an increase in demand for access to EU institutions.

Private interest groups hold a comparative resource advantage over public groups, which is important because vast resources increase the probability of influencing policy by funding research and broadening an interest group's "tactical repertoire."[159] Public interests are at an inherent resource disadvantage because internal questions about the ethicality of using public donations to fund lobbying chills their ability to invest in interest representation. Further, while private firms can recoup lobbying expenses by derailing costly legislation and pushing favorable regulations, successful lobbying by public interest groups eludes financial measure.[160]

In addition, public interests are less able than businesses to solve problems of collective action. Rational behavior dictates that potential members of a group will prefer to "free ride" absent selective incentives to join.[161] Small, specific groups like individual businesses are better able than large, public oriented groups, to provide such incentives,[162] and thus enjoy an advantage in

158. Broscheid, *supra* note 103, at 220 (Costs include establishing an office in Brussels, mobilizing members, generating information, and developing pan-European credentials).

159. Mahoney, *supra* note 17, at 451.

160. For example, environmental protection regulations do not necessarily allow citizens' organizations to recoup the costs of lobbying, whereas restrictions on competition enable businesses to generate cognizable financial returns.

161. MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 48 (1965).

162. MICHALOWITZ, *supra* note 20, at 26.

overcoming free riding problems relative to public interest groups that represent large classes of citizens.[163]

Lobbying expenditure, in turn, is a function of ability to overcome free rider dilemmas. Nongovernmental and civil society interest groups, with no means to tax their members, must rely on idealism to finance lobbying activities.[164] In short, the free-rider theory predicts that lobbying will be strong in highly concentrated industries and weak by consumers across all markets.[165]

To compensate for these inherent resource asymmetries, the Commission actively funds societal and environmental interest groups.[166] Of the sixty-four groups funded by the Commission in 2004, twenty-eight were citizens' organizations and eleven were youth and educational organizations. In contrast, the Commission funded just nine business, industry, professional, and trade organizations combined.[167] The disproportionate funding of public interests groups suggests a conscious attempt by the Commission to manipulate the composition of Europe's interest group environment.

VII.
IMPACT OF LISBON ON THE MARKET FOR ACCESS

I argue that the Treaty of Lisbon will drive transformations in the market for access to EU institutions. First, Lisbon will increases demand for access to EU institutions. Second, assumption of new competencies by EU organs will exacerbate the strain on its institutional resources, compelling policymakers to rely more heavily on lobbyists for technical information and representative input.[168]

A. Demand Side Shifts

As discussed in Section II, the number of EU interest groups skyrocketed after the introduction of QMV in the Council. QMV allows the Council to enact legislation more efficiently relative to unanimous voting procedure. Further, QMV enables lobbyists to win favorable regulations despite securing access to fewer Council ministers, lowering the costs of interest representation. Thus, it is not unreasonable to hypothesize that the expansion of QMV under Lisbon will drive a spike in either the number of interests seeking access to EU institutions

163. COOTER, *supra* note 21, at 66.

164. *Id.*

165. *Id.*

166. Broscheid, *supra* note 103, at 8.

167. Mahoney, *supra* note 17, 446.

168. I assume zero transaction costs of bargaining between EU institutions and interest representatives, which means that the supply of access to EU institutions is efficient relative to the preference of policymakers and interest groups.

or the amount of resources existing interest groups allocate to lobbying activities. Rational economic behavior supports this claim. As shown in Section VI, firms will shift resources from productive activities to lobbying where

u-i(lobby) > u-i(production). Expansion of QMV under Lisbon may increase the expected utility of lobbying relative to productive activities by enabling firms to more easily secure favorable regulations by purchasing access to fewer Council ministers. Also shown in Section VI, expansion of QMV may drive an increase in demand for access to the policy process by increasing p(a), the subjective probability that an investment in lobbying will yield favorable legislation.

Demand for access to the Commission will be bolstered by the creation of a new target for lobbyists, High Representative for the Union in Foreign Affairs and Security Policy, as well as the Vice-President of the Commission. In addition, Lisbon strengthens the powers of the Commission President by granting him authority to dismiss fellow Commissioners. A stronger Commission President will drive an increase in demand for access, as interests vie to persuade the President to dismiss undesirable Commissioners.

Concerning Parliament, expansion of co-decision voting and abolition of the distinction between compulsory and non-compulsory expenditures will enhance its powers. Greater powers for Parliament will drive an increase in demand for access, as lobbyists target the institutions where power is concentrated.[169]

B. Supply Side Shift

The assumption of new competencies by EU organs pursuant to Lisbon, absent increased resources and staff, will exacerbate the present strain on its institutional resources and compel policymakers to rely more heavily on lobbyists for technical information. Under Lisbon, the EU is tasked with controlling issues surrounding security, home affairs, fundamental rights, and justice. Scholars recognize that the Commission is overstressed and under staffed, and the complexity of issues on the agenda of Parliament far exceeds the technical expertise of MEPs. Since EU institutions supply access to interest groups to acquire output legitimacy (expert and technical information), I hypothesize that the expansion of EU competencies will drive policymakers to supply more access to interest groups in an effort to mitigate institutional information, resource, and expertise deficits.

C. Aggregate Effect on Market for Access

In aggregate, I believe that Lisbon will result in a higher quantity of EU lobbying. However, whether EU institutions will secure a greater "price" for

169. VAN SCHENDELEN, *supra* note 1, at 168.

access post-Lisbon depends on whether the demand or supply-shift dominates. Figure 5 illustrates graphically the effect of Lisbon on the market for access to EU institutions if the demand side shift dominates the supply side shift.

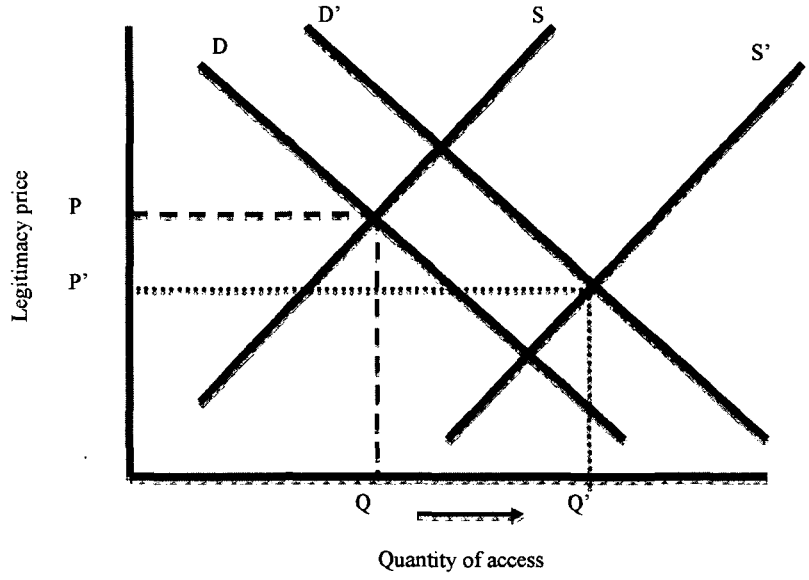

Figure 5: Shift in supply of access dominates demand shift

In the above figure, D represents demand for access to EU institutions prior to Lisbon, while the aggregate supply of access to the policymaking process provided by all EU institutions is S. In equilibrium, the quantity of access to EU institutions enjoyed by interests groups is Q. In exchange, the EU obtains an equilibrium price of P for this access in the form of output and input legitimacy. As I have argued, Lisbon will drive outward shifts in S and D. Assuming that the supply shift dominates, demand shifts D to D', while supply shifts from S to S'. As can be seen, the equilibrium quantity of "access," will increase from Q to Q'. The "price" EU institutions secure in exchange for this access, in turn, decreases from P to P' in equilibrium. This indicates that in exchange for granting more access to lobbyists, EU organs will receive less technical information (output legitimacy) from groups that are less representative of EU citizens (input legitimacy). Though normative judgments are beyond the scope of this paper, at first glance this appears undesirable as it fails to cure democratic deficit ills.

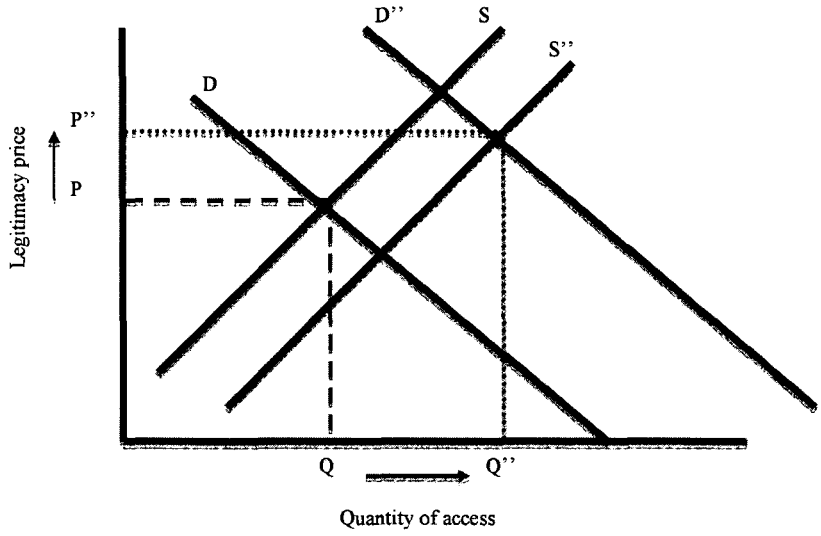

Figure 6: Shift in demand for access dominants supply shift

However, I believe the more likely scenario is that the shift in demand for access will dominate the shift in supply of access. This is because Lisbon increases the probability that investments in lobbying will yield favorable results for businesses by enhancing Council's ability to pass legislation. Greater powers for Parliament and new lobbying avenues within the Commission may further drive demand for access that could outpace EU institutional dependencies on interest representatives. Figure 6 illustrates graphically the effect of Lisbon on the market for access to EU institutions if the demand side shift dominates the supply shift.

Assuming that the demand shift dominates, equilibrium demand moves from D to D'', while supply shifts from S to S''. As can be seen, the quantity of access increases from Q to Q''. The "price" EU institutions can secure in exchange for access, in turn, increases from P to P''. This means that in exchange for granting access to interest groups, EU organs will receive more technical information (output legitimacy) from groups that are more representative of EU citizens' (input legitimacy).

CONCLUSION

While theoretical issues regarding lobbying, legitimacy, and democracy are likely to arise in any political system, concerns of unequal access to political institutions and asymmetrical provision of information are magnified when applying general theories of lobbying of the EU. This is because of the EU's complex structure, strong reliance on lobbyists for technical information, and

geographic distance between Brussels and traditional centers of citizen and interest group activity. Despite valuable contributions of European scholars, literature on EU interest representation lacks an investigation of the ways in which the Treaty of Lisbon will impact lobbying and the market for access to EU institutions.

In this paper, I have argued that Lisbon has several important implications for EU lobbying. The economic models employed above indicate that Lisbon will increase the quantity of EU lobbying. The price EU institutions secure for granting access to such interest representatives, however, is dependent on which of the following effects dominates: (1) shift in demand for access (driven by the expansion of QMV, increased legislative output, and enhanced the rewards of lobbying) or (2) shift in supply of access (driven by the assumption of new competencies and functions by already over burdened, understaffed and under funded institutions).

Those seeking to ensure that the EU can continue to extract a high legitimacy price from lobbyists should consider increasing the EU budget in light of newly assumed competencies and functions under Lisbon. Such budgetary reform could rein in the shift in supply of access to EU institutions by mitigating EU institutional resource dependencies. Negotiations between the Council and Parliament over EU's 2011 budget, unsurprisingly, reveal the intergovernmental Council, which seldom interacts with lobbyists, as the primary actor opposing such a reform, while the interest representative dependant European Parliament has positioned itself as a key advocate for augmenting the EU's budget.[170] Though the result of future EU budget negotiations remains uncertain, it is reasonable to assume that Parliament's enhanced powers under Lisbon will afford it greater leverage vis-à-vis the Council, increasing the probability of EU budgetary expansion.

The Treaty of Lisbon shakes loose the ingrained institutional forums, power dynamics, and transactional variables of European Union interest representation. This shift not only creates critical challenges and strategic opportunities for both lobbyists and policymakers, but may also usher a new wave of academic and political discourse concerning the legitimacy of EU governance, its perceived democratic deficit and pluralism in general.

170. Press Release, Council of the European Union, Conciliation Committee (Nov. 10, 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/117695.pdf (Council seeks to limit 2011 EU budget increases to 0.2% for commitments and 2.9% for payments as compared to 2010, whereas the European Parliament is pushing for increases of 1.1% and 6.2% in commitments and payments, respectively).