EU legislation is written in all of the EU’s official languages. Each version is authoritative, and no version is privileged as “the original,” at least not as an official matter. The practice derives from the very first Regulation of the Council of the European Economic Community in 1958, which declared Dutch, French, German, and Italian as the official languages. As countries have entered the EU, the Regulation has been amended to expand the number of official languages to match the official languages of the Member States. Moreover, the accession treaties themselves contain provisions that show respect for the linguistic diversity of the EU. For example, the 1997 Treaty of Amsterdam says:

1. EEC Regulation 1, art. 4, 1958 (“Regulations and other documents of general application shall be drafted in the four official languages.”).
3. EEC Regulation 1, supra note 1, art. 1.
This Treaty, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

Pursuant to the Accession Treaty of 1994, the Finnish and Swedish versions of this Treaty shall also be authentic.6

Since then, others have joined the EU, which now has twenty-seven members and twenty-three official languages.7

The existence of a regime of multilingual legislation appears to create a daunting task for a court that must resolve disputes over a statute’s applicability in a particular situation. The opportunity for inconsistencies among the various language versions is so profound that it would not be surprising if the entire system collapsed under its own weight.

But that has not happened. Whatever problems Europe and the EU face, statutory interpretation is not high on the list. On the contrary, the European Court of Justice ("ECJ") resolves disputes among Member States in what appears to be a routine manner.8 In this Article, I argue

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8. Part of the explanation for the ECJ’s success is that it seeks out Member States’ policy views and legal and judicial expertise. See Francis G. Jacobs, Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice, 38 TEX. INT’L L.J. 547, 549 (2003) (“[O]n every reference to the ECJ, both the parties to the national court proceedings and the governments of the Member States and the Union Institutions are entitled to present written observations and to take part in the hearing. Moreover, the [c]ourt itself is comprised of judges and advocates general from different Member States and with experience of diverse legal systems. The [c]ourt also has a research department that can, for example, provide a survey on the national laws of the Member States.”). Nowadays, “all European judiciaries . . . accept [ECJ] decisions governing conflicts between Community law and Member State law.” Henry G. Schermers, Comment on Weiler’s “The Transformation of Europe,” 100 YALE L.J. 2525, 2530 (1991), quoted in LESLIE FRIEDMAN GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT 12 (2001); Martin Shapiro, The European
that the proliferation of languages actually assists the ECJ in its interpretation of statutes. To the extent that the goal of the court is to construe statutes to effectuate the intent of the legislature and to further the goals of the enacted directive or regulation, the existence of so many versions of the law makes this task easier. In other words, my argument is that the Babel of Europe facilitates communication.

Ideally, the linguistic practices of a supranational legal regime should meet three goals. The first, the value promoted most aggressively by the EU, is respect for the equality and sovereignty of the individual Member States. By treating each version of an EU law as an authoritative original, EU members are treated equally. Although the EU has three working languages—English, French, and German—the final forms of all laws are not limited to these three.9

The second goal concerning statutory interpretation in a supranational regime is that the laws should be construed in a manner that is faithful, in some meaningful way, to the intent of the drafters. Although fidelity to the legislative purpose is not the only goal of statutory interpretation,10 it is the principal goal in any legal regime. Yet it would appear to be more difficult to accomplish when laws are written in many languages, with each version, at least to some extent, reflecting the nuances of many legal cultures. If the laws mean very different things to the various members, whether because of legal, cultural, or linguistic differences among them, the project cannot succeed, since there will be no rule of law for the members to follow.

The third goal is efficiency. If the burden of maintaining a supranational legal order exceeds its benefits, it will lose influence over time and devolve into an obscure, costly burden on its members. The brochure of the Directorate-General for Translation of the European Commission indicates that it employs some 2350 people (1750 of whom are full-time

9. Europa, Languages—FAQ, http://europa.eu/languages/en/document/59 (last visited Feb. 28, 2009) (“The European Commission, for example, conducts its internal business in three languages, English, French and German, and goes fully multilingual only for public information and communication purposes.”). Note, however, that “[t]he European Parliament . . . has Members who need working documents in their own languages, so its document flow is fully multilingual from the outset.” Id.

likely at a cost of hundreds of millions of euros a year. Each time a new member joins the EU, tens of thousands of pages of documents must be translated into the language of the new member. To take a recent example, prior to the accession of Bulgaria and Romania, teams of sixteen Bulgarian and twenty Romanian translators arrived in Brussels to prepare for the addition of their languages to the group of official languages.

These three goals—equality, fidelity, and efficiency—are in tension with one another. It would surely be more efficient to legislate in a single language, or a small group of official languages, perhaps those that are now the working languages of the EU. Such a move, however, would reduce the degree to which the system respects the equality and sovereignty of the individual members, since those whose languages are not represented as official languages would play a somewhat diminished role in the legal process.

The concern of this Article is with the second goal: fidelity. The question explored is how faithful to the will of the legislative body can decision makers be in a system that produces legislation in many languages and gives equal status to each version. The question would seem difficult to answer in the abstract because there is no particular measure of fidelity. However, it is certainly possible to investigate the extent to which the proliferation of languages affects the ability to render decisions faithful to the legislature in comparison to other regimes, such as those where decision makers operate in a monolingual legal order. It is also possible to hypothesize an intermediate legal order limited to a few languages and compare the work of the ECJ with what might happen in such a system. An “intermediate system” might contain, for example, three official languages in which legislation is written. Disputes could be resolved with reference to (a) the three official versions; and (b) the versions of the parties to the dispute if they differ from the official versions. If, say, a dis-


pute arose between Finland and Sweden, the ECJ would look to the three official versions (likely, English, French, and German), plus the Swedish and Finnish versions, in rendering a decision. The three legal orders and their effects on the three goals discussed earlier are set out in Table 1:

Table 1

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No doubt, the current legal order, reflected in the rightmost column, is both respectful of the sovereignty of the members, and quite costly, in terms of time and personnel. The open question is whether this multilingual legal order makes it easier or harder for a judicial body to remain faithful to the will of the enacting legislative body.

The rest of this Article explores this issue. Part I briefly develops the notion of fidelity more generally. Part II introduces the concept of Augustinian interpretation: the use of multiple versions of the same law as an advantage in discovering its intended meaning. The term reflects the similarity between this approach to interpreting statutes and the same method, developed by St. Augustine in the fourth century, for interpreting scripture. Part III explores the ECJ’s use of Augustinian interpretation, including some recurrent situations in which it falls short.

I. FIDELITY TO LEGISLATIVE PURPOSE IN THE EU

Almost as a mantra, the ECJ looks to the legislative purpose in interpreting statutes. Sometimes called the “teleological approach” or “purposive approach” to statutory interpretation, the method is familiar to

15. See, e.g., Nial Fennelly, Legal Interpretation at the European Court of Justice, 20 FORDHAM INT’L L.J. 656, 656, 665 (1997) (observing the appropriateness of this kind of approach in a multilingual setting); Kenneth M. Lord, Note, Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European
those engaged in statutory interpretation in individual states. The court investigates the motivation for the legislation, including founding documents that set forth overarching legal goals, and resolves disputes in a manner that will further these goals.\textsuperscript{16} Thus, the court has said in a recent case, \textit{Schulte v. Deutsche Bausparkasse Bardenia AG}, “Where it is difficult to interpret legislation from its wording alone, an interpretation based on purpose becomes fundamental. That is the case where the provision in dispute is ambiguous.”\textsuperscript{17} Such references to legislative purpose are easy to find.\textsuperscript{18} Barak has noted that purposive legislation typically “reflects, at various levels of abstraction, but particularly at the highest levels of abstraction, the intention of the text’s creator(s).”\textsuperscript{19}

Just as easy to find are references to legislative intent, which is similar to legislative purpose, but focuses on somewhat narrower goals.\textsuperscript{20} In fact, sometimes the ECJ uses both terms in the same case. For example, \textit{Sonia Chacon Navas v. Eurest Colectividades SA}\textsuperscript{21} dealt with whether the dismissal of an employee for reasons of illness violated the EC Framework Employment Directive 2000/78, which makes it illegal to dismiss an employee because of a disability. In holding that the Directive does not encompass ordinary illness, the court noted that in construing the Directive, account must be taken of “the context of the provision and the objective pursued by the legislation in question.”\textsuperscript{22} But it also gave credence to the argument that it is important to enforce the protection “intended by the

\textit{Court of Justice, 29 Cornell Int’l L.J. 571, 597 (1996) (observing that the teleological method is used to harmonize local laws with EU directives).}


\textit{18. See, e.g., Case C-28/03, Epikouriko Kefalog v. Ipoegos Anaptixis, 2004 E.C.R. I-08533, ¶ 26.}

\textit{19. Aharon Barak, Purposive Interpretation in Law 87 (2005).}

\textit{20. See, e.g., Case C-54/07, Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV, 2008 ECJ CELEX 60730054, ¶ 12 (“Article 19 of that law is intended to transpose article 8 of Directive 2000/43 relating to the burden of proof.”); Case C-275/06, Productores de Musica de España (Promusicae) v. Telefonica de España SAU, 2008 ECJ CELEX 6060275, ¶ 43 (“It should be observed to begin with that the intention of the provisions of Community law thus referred to in the question is that the Member States should ensure, especially in the information society, effective protection of industrial property, in particular copyright, which Promusicae claims in the main proceedings.”).}


\textit{22. Id. ¶ 40.}
legislature,” 23 by not giving employers carte blanche to ignore the disabling effects of certain illnesses. Thus, whether following a law’s language, purpose, or intent, the court’s obligation is to be faithful, and to give primacy to the legislative body that enacted the law.

Sometimes these approaches are contrasted with the goal of ascertaining the intent of the legislature by reference to the language alone, as American textualists would prescribe. 24 However, this distinction can be overstated. In its effort to be faithful to the will of the legislature, the ECJ is perfectly comfortable relying on language as an important clue. For example, in Simutenkov v. Ministerio de Educación y Cultura, 25 decided in 2005, the Advocate General noted, “The starting point for assessing [Article] 23 of the Agreement in isolation must be its wording.” 26

Because each EU directive is written in all twenty-three languages, this task is not a straightforward one, as the Advocate General observed: “[I]t must be borne in mind that Community legislation is drafted in various languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.” 27 Much of this Article argues that this additional step adds value to the linguistic analysis that takes place in the interpretation of monolingual legislation. Here, my point is that the ECJ does not ignore language in favor of ascertaining the legislative purpose. Rather, language provides a somewhat unique kind of evidence of purpose, and the court regards language differently for that reason.

Articulating the goal of fidelity, however, is easier than determining exactly when a judicial body is faithful in any particular case. In monolingual settings, the following questions recur: What does the statute say (generally, the best evidence of legislative intent is the language used in the law itself)? Does applying the plain meaning of the statute appear to undermine the intent of the legislature? If the statute is vague or ambiguous, are procedures available for resolving the ambiguity in order to reach a decision? If so, should courts risk compromising the rule of law as reflected in applying the statute as written in order to further the legislative purpose?

23. Id. ¶ 23.
26. Id. ¶ 14.
27. Id.
These questions are not always easy to answer. To take an example from American law, the Food, Drug, and Cosmetics Act permits the federal Food and Drug Administration ("FDA") to regulate drugs and "devices" used for the delivery of drugs. At the time the law was enacted, it was clear that the legislature did not intend to permit the FDA to regulate tobacco or tobacco products. Since then, various efforts have been made to amend the statute to include tobacco, but these efforts have not succeeded. Nonetheless, during the Clinton administration, the FDA promulgated regulations that set limits on the distribution of tobacco products. One of the major tobacco companies, Brown & Williamson, sued, claiming that the federal agency had no right to do so. In response, the agency argued that cigarettes can reasonably be seen as devices for the delivery of nicotine, and therefore, come within the scope of the FDA’s regulatory authority. A principle of American law requires courts to defer to the interpretation of an agency to which regulatory authority has been delegated if any reasonable understanding of the statute would support the agency’s interpretation.

In a 5–4 decision, the U.S. Supreme Court agreed with the tobacco company and held the regulation to be invalid. At stake was whether the purpose of the statute should prevail over language—the word "device"—that seems to permit the agency to have taken the action it did. In this case, the Court held that the independent contextual evidence that the legislature did not intend to permit the regulation of tobacco should trump both the language of the statute and the principle calling for deference to administrative agencies.

29. See, e.g., S. 1468, 71st Cong. (1st Sess. 1929) (indicating that Congress considered and rejected a bill “[t]o amend the Food and Drug Act of June 30, 1906, by extending its provisions to tobacco and tobacco products”).
30. See, e.g., S. 2298, 102d Cong. (2d Sess. 1992) (trying to amend the Food, Drug, and Cosmetic Act to grant the FDA jurisdiction over tobacco products); S. 769, 101st Cong. (1st Sess. 1989) (trying to amend the Food, Drug, and Cosmetic Act to grant the FDA jurisdiction over tobacco products).
33. Id. at 127.
35. Brown & Williamson, 529 U.S. at 133.
36. Id. at 131–32.
37. Id. at 159–61.
On many other occasions, however, the Supreme Court has held that “the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'” This creates a dilemma for courts that wish to be loyal to the instructions of the legislature, but sensible in drawing inferences about what the enacting legislature intended. To make matters more difficult, in many cases the legislature had no discernable intent at all concerning situations that arise before courts. As Justice Scalia has put it, “[W]ith respect to 99.99 percent of the issues of construction reaching the courts, there is no legislative intent, so that any clues provided by the legislative history are bound to be false.” Strange things happen in this world, and legislatures cannot possibly predict each one of them. Dan Simon has argued that when faced with this problem, courts typically speak of purpose and intent, but really use arguments based on coherence to reach a conclusion about how the enacting legislature would have wanted the law to handle a particular situation.

European courts have traditionally been more comfortable than American courts in placing the purpose of a statute ahead of the language in the service of effectuating the legislature’s will. Professors Summers and Taruffo have described this approach:

The argument from ultimate purpose is today most often invoked in the USA when there is no credible argument from ordinary or technical meaning or when the argument from ultimate purpose merely reinforces the argument from ordinary or technical meaning; in other countries, such as Germany and Italy, the argument is invoked rather more widely. . . . The explanation for the declining repute of purposive argumentation in the USA, and for its relatively limited reception in the UK, is simply that it is often seen to conflict with arguments from ordinary or technical meaning which are taken to be the best evidence of purpose anyway.

But evidence is evidence, whether it is put before an American court or a European court, and it is undeniable that the language of a statute provides privileged evidence of what the legislature intended. To take a classic example from the philosophical literature, when a law says “no

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vehicles in the park,” one can argue about the law’s applicability to a child riding a tricycle, but no sane person would think that the law sets a minimum age for buying tobacco products or regulates the dumping of toxins in the sea. That is, language, while often not constraining the range of possible interpretations to one, surely is the principal vehicle through which legislative will is expressed, and this expression is largely successful.

When it comes to the multilingual legislation of the EU, the options for achieving fidelity are both broader and narrower than they are for the monolingual legislation of most individual States. On the one hand, the introduction of additional language versions creates more data from which inferences of fidelity can be drawn. On the other hand, the proliferation of authentic versions in different languages means that there will not be a coherent history leading from a statute’s purpose to its language, since a process of translation must intervene. Of course, individual States with legislation written in more than one language must make their own rules to deal with the status of the various legislative versions, as is the case in Belgium, Canada, and, to some extent, Spain. But in the typical situation in which a State’s laws are written in a single, authoritative version, courts may use the statute’s language as a fulcrum, deciding how much weight to give it in a particular dispute.

In contrast, when a dispute is over which of two fully authentic versions of a law should prevail, the status of the authoritative statutory language is itself contested. Courts may still endeavor to find the purpose of a law, but they must do so without the luxury of resort to a single, authoritative text. Thus, the option of being an American-style “textualist” is simply not available to interpreters of EU law. Also politically unattractive, but potentially useful, is the translation history of a law. It would be perfectly sensible, for example, for a court to begin with the French version, if that was the one with which the European Commission began during the drafting process. Then, the court could determine whether other versions reflect an error in translation. The ECJ, however,

42. This example is widely discussed in the literature. For a discussion from a linguistic perspective, see Steven L. Winter, A Clearing in the Forest: Law, Life, and Mind 197–222 (2001).


45. See id. at 2028.
typically does not engage in this method, although there are some early cases reflecting it, decided shortly after the Treaty of Rome, when there were six countries and four languages involved in EU legislation.46

*Stauder v. City of Ulm*47 provides an important illustration of this early method. This case involved an EU regulation that empowered members to subsidize the sale of butter to certain consumer groups as a means of assisting the dairy industry.48 A consumer from the city of Ulm complained when a retailer asked him to reveal his name in order to qualify for the benefit, asserting that it violated his constitutional right to dignity.49 The German and Dutch versions authorized the butter benefit to be given to consumers who had a coupon issued in their name.50 The French and Italian versions required only that the consumer present an individualized coupon.51 Who was right? The court noted that the European Commission, which had to approve the measure, had agreed to a draft written in French, wherein the buyer did not need to provide his or her identity.52 The court concluded that the divergences in the German and Dutch versions must have been translation errors that occurred when the text was prepared for adoption by the European Commission.53

More recently, however, this method has been used less frequently, for the same reason that the EU has not established an official language or given additional status to the three working languages. Reference to the translation history is the functional equivalent of selecting an official language. Doing so offends basic notions of sovereignty and equality among the members.

Yet, the ECJ does sometimes look at translation history as a last resort. Consider *Simutenkov v. Ministerio de Educacion y Cultura*,54 where the court construed an agreement made between the EU and Russia that required each Member State to “ensure” that Russian nationals would not be discriminated against when attempting to obtain employment.55 The complainant, a Russian national, was excluded from membership in a

48. Id. ¶ 1–2.
49. Id. ¶ 1.
50. Id. ¶ 2.
51. Id.
52. Id. ¶ 5.
53. Id. ¶ 3–7.
certain football club, as required under Spanish law, which limited membership in this club to Spanish nationals. The court first looked at the various language versions of the EU-Russia agreement, but found that some versions, such as the English version, used the word “ensure,” while others, such as the Spanish, used words akin to “endeavor.”56 As there was no consensus, the court considered using the narrowest reading (“endeavor”), but found it to be unjustifiable under any legitimate theory of statutory interpretation.57 By the same token, the court was unable to eliminate either language type as an outlier.58 The court also rejected the idea of making a decision based on which interpretation was reflected in more languages than the other interpretation.59 After disposing of all of these other approaches, the court turned to the translation history in order “to consider the intention of the parties and the object of the provision to be interpreted.”60 The agreement was originally drafted in English, which uses the stronger word “ensured.” The court found this to be consistent with the broader purposes of the agreement in question.

Whether used as a tool in statutory interpretation, or as a last resort, translation is surely relevant to the interpretation of EU law. The American legal scholar, Lawrence Lessig, proposed more generally that a useful way of characterizing the quest for fidelity to legislative purpose is to liken the judicial role to that of a translator.61 As Lessig put it, “The translator’s task is always to determine how to change one text into another text, while preserving the original text’s meaning. And by thinking of the problem faced by the originalist as a problem of translation, translation may teach something about what a practice of interpretive fidelity might be.”62 Lessig, whose goal it was to explain statutory and especially constitutional analysis within the American legal system, spoke of translation as a way of expressing the thought that one can be faithful to a text without being entirely literal.63 Translators routinely must decide how to balance the target text’s choice of words against the likelihood that readers will understand the translation as conveying the

57. Id. ¶ 16.
58. Id. ¶ 17 (noting that one “solution would be to determine the clearest text”).
59. Id. ¶ 18.
60. Id. ¶ 20.
62. Id. at 1173.
63. Id. at 1189–94.
same information as the original, which may require straying from a literal translation.64
Translation cannot paint a complete picture of statutory interpretation in the monolingual context, however. As Sanford Levinson has pointed out, the analogy between translation and monolingual legal interpretation is imperfect.65 Whereas translators bridge a knowledge gap between two groups of people separated by culture and language, the individual interpreting a monolingual statute is separated from the text only by time. How similar these gaps are is an empirical question.

When it comes to multilingual legal regimes like the EU, translation is more than a metaphor—it is a basic fact about the entire structure of the law. While translation history may not be used as extrinsic evidence of a law’s meaning or purpose, a comparison of the various versions of the law provides an important tool for the ECJ.66 It is of crucial importance to determine how effective this tool is, since it must both replace analysis of the plain language of a single statute and do the work of the translation history to which statutory interpreters may not refer. To the extent that reference to different language versions provides useful evidence of statutory purpose, it leads to a remarkable inference: the proliferation of languages in EU legislation actually aids interpreters in their quest for fidelity. In other words, Babel is not punishment, it is a gift.

II. AUGUSTINIAN INTERPRETATION IN THE EU

Among the methods of statutory interpretation that the ECJ employs is a comparison of various versions of the statute in question in different languages.67 The court looks not only at the versions written in the languages of the parties to the particular dispute before the court, but also at other versions. For example, in Commission of the European Commu-

64. See, e.g., CHRISTIANE NORD, TRANSLATING AS A PURPOSEFUL ACTIVITY: FUNCTIONALIST APPROACHES EXPLAINED (1997).
66. See, e.g., Case 283/31, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, 1982 E.C.R. 3415, ¶18 (“To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.”).
67. For a description and examples of cases using some of these comparative methods, see Geert Van Calster, The EU’S Tower of Babel—The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in More Than One Official Language, 17 Y.B. EUR. L. 363 (1998).
ties v. United Kingdom, the complainant challenged a domestic law written in English. Ultimately rejecting the English version, the ECJ compared the English, French, German, Italian, Spanish, Portuguese, and Dutch versions of the relevant provision, which concerned workers’ entitlement to minimum daily and weekly rest periods. EU Directive 93/104 required that workers be given eleven hours per day and a twenty-four-hour period per week off from work. While the English version also mandated that workers receive time off, it measured work by performance, rather than by time. Comparing the English version to those of other countries, the court determined that the British national legislation was too narrow to effectuate the objective of the relevant EU Directive.

The goals of this kind of multilingual inquiry are to determine consensus among the members as to the intended scope of the statute, and to discover whether a particular interpretation allowed (or not allowed) in the language of one of the members is a matter of linguistic happenstance rather than legislative deliberation. I call this multilingual approach to statutory interpretation the “Augustinian approach.”

In On Christian Doctrine, begun in the year 396, Augustine concerned himself with the question of how we can be sure that we understand, and therefore obey, the scriptures. He hypothesized, “Now there are two causes which prevent what is written from being understood: its being vailed either under unknown, or under ambiguous signs.” The solution, Augustine opined, was to look at the scriptures in both the original Hebrew and Greek, and in the various Latin translations:

The great remedy for ignorance of proper signs is knowledge of languages. And men who speak the Latin tongue, of whom are those I have undertaken to instruct, need two other languages for the knowledge of Scripture, Hebrew and Greek, that they may have recourse to the original texts if the endless diversity of the Latin translators throw them into doubt.

69. Id. ¶¶ 62–63.
70. Id. ¶ 5.
71. Id. ¶¶ 7–9.
72. Id. ¶¶ 63–64.
75. Id. ch. XI, ¶ 16.
Ambiguity in a text may remain unnoticed, especially if it results from bad translation. Even worse, an incorrect translation can lead to a mistake as to the actual content of the divine scripture, in turn causing even the faithful to err. The surest way to discover such problems is to place competing versions (both in Latin and in predecessor languages, Hebrew and Greek) side by side and look for differences. Examining the translation history can root out obvious errors in the Latin versions. Residual ambiguity should be resolved in favor of promoting core religious values, such as charity.76

What about those who do not know Hebrew or Greek? A comparison of Latin translations can also be helpful:

For either [an unknown word or an unknown expression may impede the reader.] Now if these belong to foreign [languages], we must either make inquiry about them from men who speak those [languages], or if we have leisure we must learn the [languages] ourselves, or we must consult and compare several translators.77

Again, comparing the Latin to the originals in Hebrew or Greek, whether directly or with the help of others learned in these languages, is Augustine’s first solution.78 As for comparing various Latin translations with each other, while this at first appears to be a third-best method for those not able to consult the originals, it has its own advantages. Studying the various translations can be an improvement over relying upon a single translation. For even when translation is straightforward, some of the Latin vocabulary may be unfamiliar, making it necessary to infer meaning from the surrounding linguistic context. Augustine noted, “In this matter too, the great number of the translators proves a very great assistance, if they are examined and discussed with a careful comparison of their texts.”79

Augustine’s reliance on a comparison of Latin translations was also a matter of necessity, as we now know. While he embraced whatever learning could be gleaned from studying the translation history of biblical text, he himself was not fluent in Greek and had even less control of Hebrew, at least early in his life. Frederick Van Fleteren notes,

Unlike contemporary exegetes, Augustine exegizes the Latin text, not the original Greek or Hebrew text; perhaps Augustine was thinking of

76. I only touch on Augustine’s philosophy here. For a much fuller and richer discussion, see Jaroslav Pelikan, *The Mystery of Continuity: Time and History, Memory and Eternity in the Thought of Saint Augustine* 123–39 (1986).
77. Augustine, supra note 74, ch. XIV, ¶ 21 (emphasis added).
78. Id.
79. Id.
priest-students in Carthage or Milan, or even his parishioners in Hippo. However, knowledge of foreign languages is necessary for the interpretation of unknown or ambiguous signs—sadly Augustine was not an example of his own principles.80

Others make similar observations.81

Of Augustine’s two methods—comparing translations to the original and comparing translations to each other—only the latter is readily available to the ECJ. The former method, as mentioned above, is used less frequently since it is inconsistent with the principle of equality.82 Conceptually, it is easy to see how resort to an original text can yield insight into the intent of the drafter of that document. In the absence of being able to draw such an inference, however, it is worth exploring just what makes the comparison of translations a valuable activity at all. Augustine provides some insight into this question as well. Not all translations are created equal. Again, in On Christian Doctrine, he complained: “[f]or in the early days of the faith every man who happened to get his hands upon a Greek manuscript, and who thought he had any knowledge, were it ever so little, of the two languages, ventured upon the work of translation.”83 It is only by placing a bad translation next to a good one that, through a chain of inferences, the essence of the passage becomes clear. Sometimes a particular translation has captured it, but at other times, reading the various translations suggests a common theme, expressed in different words by each translator.

Capturing this essence of a scriptural passage is the goal of the biblical scholar,84 and capturing the essence of EU legislation is the goal of the ECJ.85 Like Augustine, the ECJ may rely upon virtual consensus among


81. A. Bastiansen, Augustine’s Pauline Exegesis and Ambrosiaster, in AUGUSTINE: BIBLICAL EXEGETE, supra note 80, at 33–34 (“His command of Greek was a limited one, not sufficient for an easy assimilation of the contents of theological treatises.”); G. R. Evans, Augustine on Exegesis Against the Heretics, in AUGUSTINE: BIBLICAL EXEGETE, supra note 80, at 145–46 (comparing Augustine and Jerome as textual critics, and referring to Augustine as an “amateur” in comparison because Jerome was conscious of the Hebrew and Greek, whereas Augustine “was dealing with an Old Latin text which was locally variable”).

82. See infra Part I.

83. AUGUSTINE, supra note 74, ch. XI, ¶ 16.

84. Id. ch. XII.

85. Article 220 of the consolidated version Treaty Establishing the European Community provides that the ECJ is to “ensure that in the interpretation and application of this Treaty the law is observed.” EC Treaty, art. 220, Dec. 24, 2002. Article 234 grants the
the different versions to uncover outliers that probably have simply gotten the point wrong, or it may attempt to find various threads running through the different versions which, taken together, suggest an underlying purpose behind the legislation.

Thus, Augustine and the ECJ are essentialists. 86 Only if some deeper, underlying understanding exists in the first place can one justify an enterprise whose task is to uncover such an essence. For both Augustine and the ECJ, language provides strong evidence of this essence, but the essence cannot be reduced to any single version of the text. As discussed below, there is an imperfect relationship between thought (conceptualization) and language (words). When evidence of thought becomes frozen in a single linguistic act, whatever imperfections exist become permanent. The ability to compare different versions and then to triangulate, however, brings out nuances that can help the investigator gain additional insight into the thoughts of the original drafter. For this reason, one would predict that the proliferation of languages in the EU actually aids the task of statutory interpretation, making it more likely that the court will come upon the intended goals of the legislation before issuing a ruling.

But biblical studies have one big advantage over the project of discovering the purpose behind EU law. There really is an original. For our purposes, statutory interpretation in the EU is statutory interpretation without a single, authoritative text. 87 Moreover, biblical translation, at least in the time of Augustine, involved only one target language—Latin. 88 Whether the European endeavor will succeed, in contrast, must depend upon a variable not relevant to Augustine: how well Augustinian interpretation will succeed in the multilingual statutory context is a func-

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86. Essentialism is “a philosophic theory significantly concerned with and esp[ecially] based on a conception of essence or essential things.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 777 (3d ed. 1993).

87. See Cay Dollerup, The Vanishing Original, 32 HERMES 185, 197 (2004) (“In this way, there is no one target text which has an unambiguous relation to one specific ‘original.’”).

88. In 382 C.E., the dominant language of the Roman Empire was no longer Greek (the original language of the New Testament), and thus, Pope Damascus commissioned the translation of the Bible into Latin—a task that took twenty years. See United Methodist Women, Three Early Biblical Translations, http://gbgm-umc.org/umw/bible/translations.htm.
tion of what makes languages similar to each other and what makes languages different from each other.

In some respects, it seems likely that the proliferation of languages will help the statutory interpreter. To the extent that one language contains a syntactic ambiguity that allows multiple interpretations of a law, whereas other languages do not, the Augustinian approach will quickly unmask the outlier and make clear that the legislative body intended the meaning common to the other language versions. Far more difficult are the problems that arise from subtle differences in the meanings of words from language to language. The more people are designed to form similar concepts given similar experiences, the less it should matter which language they speak and the better a multilingual legal order should work. Divergence from one language version to another might be analyzed according to the following considerations: (a) people in different cultures speaking different languages have different experiences, reflected in words that appear to be translations of each other but really are not (e.g., consideración/consideration, causa/cause);89 (b) languages express concepts differently from each other in small ways, suggesting that there is some truth to the Whorfian hypothesis that the concepts a language makes available influence thought;90 and (c) people conceptualize idiosyncratically even when they share both experiences and cultural norms (for example, people vary as to whether they would say that a person who has deceived another person into believing something false has lied if the deception does not literally involve a false statement).91 If these sorts of conceptual issues did not arise, there would be no particular reason to engage in the Augustinian project because there would be no difference between one language and another. This is not to say that languages are internally crisp. But it does mean that looking at different languages to ascertain the purpose behind a law will only work if the different language versions are not exactly the same as one another, in both the intentional and extensional senses. Yet the languages must be close enough to each other to permit only a small set of possible interpretations. Otherwise, the amount of discretion available to a court would be so broad as to challenge the very notion of a supranational order governed by the rule of law.

89. See Enrique Alcaraz Varó, El Español Jurídico 216 (Ariel 2002) (discussing this classic problem regarding the translation between Spanish and English).
The solution to this problem lies in the nature of conceptualization. The concepts of people who speak different languages and live in different cultures will be most alike if people are designed to form the same or similar concepts from the same or similar experiences; and the experiences of people from the various Member States of the EU are similar enough. Using somewhat different vocabulary, Engberg nicely lays out this problem. Thus, the likelihood of identical concepts has both an innate component (our cognitive design) and a cultural one (how culture structures experience and represents it in that culture’s language).

As for the innate component, during the past three decades, considerable progress has been made in the study of how people form concepts and categories. Many now believe that our concepts are complex entities consisting in part of prototypes based on experience, and in part of definitional conditions, whether necessary or sufficient. Peter Tiersma and I have used the dictionary definition of the word “chair” to illustrate this point. Webster’s Third New International Dictionary, one of the leading dictionaries of American English, defines the word as follows: “[a] usu[ally] movable seat that is designed to accommodate one person and typically has four legs and a back and often has arms.” The only necessary (i.e., definitional) component is that the thing must be a seat designed for one person. All of the other features are prototypical in nature, expressed in the definition with the words “usually,” “typically,” and “often.”

Psychologists now believe that we conceptualize by forming mental models that contain both kinds of information, and perhaps even more complex elements, such as how a concept interacts causally with the world. No doubt people who speak different languages do not have precisely the same concepts. The fact that our concepts are in part comprised of experientially-based mental models would make such uniformity impossible. Moreover, work by the linguist Anna Wierzbicka shows that very few concepts are universally expressed in the languages of the world.

94. Solan & Tiersma, supra note 91, at 22.
96. See Murphy, supra note 93.
What is necessary for the success of the Augustinian method, then, is not the universality of concepts, but rather the universality of how our minds are designed. Similar experiences cause us to produce more or less the same concepts, whether considered individually or culturally. As the philosopher Jerry Fodor puts it, we conceptualize a “doorknob” as “the property that our kinds of minds lock to from experience with good examples of . . . doorknob[s] . . . [by] virtue of the properties that they have [as] typical doorknobs.” If German and French doorknobs differ from each other, then we may find some differences in the mental models of doorknobs that French and German people form in their minds. But given exposure to the same types of doorknobs, including a sense of what a prototypical doorknob looks like, people of all cultures will make more or less the same thing of their experience. This suggests that to explain the success of Augustinian interpretation, not only must we be Whorfians, but we must also be Chomskyan, in the sense that an explanation of our innate endowment is a prerequisite to justifying the approach.

III. MULTILINGUAL INTERPRETATION IN PRACTICE

Augustinian interpretation does not always succeed—but it often does. Before we get to what can go wrong, let us look at a few examples of what may go right. Much of the time, consensus among the various language versions is used as a means to confirm the ECJ’s sense of the law’s purpose, which had already been determined on other grounds. For example, Pretura unificata di Torino v. X involved a regulation permitting local authorities to exceed concentrations of foreign particles in the water supply under certain emergency circumstances. Criminal proceedings had been brought against an official of Torino for violating Italian law by permitting excessive amounts of a contaminant to enter the water supply. He defended by relying upon the EU regulation. Looking at various versions of the regulation, the court concluded that “it

98. Fodor, supra note 93, at 137.
99. See Benjamin L. Whorf, An American Indian Model of the Universe, 16 Int’l J. Am. Linguistics 67 (1950), reprinted in Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf 57–58 (John B. Carroll ed., 1964) (illustrating the assertion that for people of all cultures to understand concepts and experiences in the same way, despite linguistic differences, there must be mental universals).
100. See Noam Chomsky, Language and Problems of Knowledge 17 (1988) (arguing that knowledge of language is possible only via the interaction of language experience and our innate language faculty through which we interpret that experience).
102. Id. ¶ 2–4.
103. Id. ¶ 4.
appears from the different language versions of Article 10(1) that the term ‘emergencies’ must be construed as meaning urgent situations in which the competent authorities are required to cope suddenly with difficulties in the supply of water intended for human consumption.\(^\text{104}\) Since this was not the case, the EU regulation would not provide a defense to domestic environmental crime prosecution.\(^\text{105}\)

At other times, as Augustine noted, various language versions can be used to find and discard outliers. Sometimes, the issue concerns simple errors in translation. Recall that the court typically avoids referring to any particular translation history because of the principle of equality. A broad comparison among language versions, however, makes a historical account unnecessary, as long as there is relative consensus. Many of these cases involve word choice. Consider \textit{Lubella v. Hauptzollamt Cottbus}.\(^\text{106}\) A regulation adopted protective measures with respect to the import of certain cherries into the EU.\(^\text{107}\) Just about all of the versions of the regulation used the word for “sour cherries.”\(^\text{108}\) But the German version, for some reason, had used the word for sweet cherries (\textit{Suesskirschen}).\(^\text{109}\) This fact made the scope of the challenged regulation entirely beyond controversy.\(^\text{110}\)

\textit{Lubella} provides an excellent vehicle for comparing the Augustinian approach to discovering a statute’s purpose with a textualist approach to statutory interpretation. The latter approach risks ossifying drafting errors that result from legislation written in clear, but erroneous, language. The study and comparison of various versions, in contrast, permit inferences to be drawn based upon consensus and outlying language. Most interestingly, this Augustinian approach does not require courts to stray from official textual material to extrinsic evidence subject to manipulation. To the contrary, the absence of a single text and the presence of many official, authoritative documents together provide a great deal of information that monolingual legislation does not. Thus, Augustinian interpretation gives maximum evidentiary weight to documents that actually have official status, reducing the likelihood that judges will substitute their values for those of the legislative body by straying too far from the legislative process in their analyses.

\(^\text{104}\) \textit{Id.} ¶ 14.
\(^\text{105}\) \textit{Id.} ¶ 18–19.
\(^\text{107}\) \textit{Id.} ¶ 1.
\(^\text{108}\) \textit{Id.} ¶ 4.
\(^\text{109}\) \textit{Id.} ¶ 5.
\(^\text{110}\) \textit{See id.} ¶ 17–18.
Other cases involve grammatical nuances. For example, in Paterson v. W. Weddel & Co., the issue before the court was a criminal prosecution within the United Kingdom for violation of a regulation setting certain limitations on the operations of trucks. An EU regulation, however, allows members to exempt from this regulation “transport of animal carcasses or waste not intended for human consumption.” The United Kingdom had availed itself of this exemption, so if the shipper’s conduct was covered by the exemption, then no crime was committed. While it is clear that the exemption applies to waste not intended for human consumption, the question was whether it applies to all carcasses or only to those carcasses not intended for human consumption. The shipper being prosecuted was shipping, among other things, sides of beef intended for human consumption. The court looked at a number of versions of the regulation, finding most of them ambiguous. In the Dutch version, however, “the qualifying words ‘not intended for human consumption’ precede the term ‘carcasses’ and consequently can apply only to both waste and carcasses.” The unequivocal version was given a privileged status in this context and was used to reinforce arguments based upon the purpose of the regulation.

To those versed in American law, the problem resembles cases that consider the proper application of the last antecedent rule, which says that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” The problem with this rule, however, is that in situations like the one before the ECJ, it is not possible to determine in advance whether the last antecedent is the entire disjoined phrase or the last of the disjuncts. Augustinian methodology provides evidence that may help in resolving this question in particular cases.

In contrast, the Augustinian method does not always bear fruit. Jan Engberg writes about Commission of the EU v. United Kingdom, a

112. Id. ¶ 5.
113. Id. ¶ 6–7.
114. Id. ¶ 9.
115. Id. ¶ 2.
116. Id. ¶ 10.
117. Id. ¶ 11.
118. Id. ¶ 12–17.
case involving how we conceptualize fishing. British trawlers were engaged in joint fishing expeditions in the Baltic Sea with Polish trawlers.122 The British vessels would cast the nets; the Polish vessels would then trawl for fish; and the Polish vessels would then turn the nets over to British vessels, which would bring the fish on board.123 If these fish were deemed to have been caught by the Poles, then a tariff would be due.124 If caught by the British, there would be no tax.125

The English version of the regulation in question says first that “goods wholly obtained or produced in one country shall be considered as originating in that country”;126 and second that “the expression ‘goods wholly obtained or produced in one country’ means . . . products of sea-fishing and other products taken from the sea by vessels registered or recorded in that country and flying its flag.”127 The Commission claimed that the Poles had “obtained” the fish since they were the ones who separated the fish from their natural habitat.128 The British claimed that “taken from the sea” should be construed literally, and that the fish did not leave the sea until the British trawler lifted the nets containing the fish that were caught by the Poles.129

To resolve the dispute, the court looked at a number of different language versions, but learned nothing from them.130 The French extraits de la mer was subject to both interpretations: taken out of the sea and separated from the sea.131 Other versions, including the Greek, Italian, and Dutch, were just as ambiguous.132 The German word, gefangen, meaning caught, was more helpful to the Commission’s position.133 The court conceded that “a comparative examination of the various language versions of the Regulation does not enable a conclusion to be reached in favour of any of the arguments put forward and so no legal consequences can be based on the terminology used.”134 Anthony Arnull observed that this is the typical approach of the court in such situations.135 In this case,
the court determined, without the assistance of a comparative analysis of the various language versions, that holding the British vessel liable for the tariff was more consistent with the purpose of the regulation. The opposite result would have permitted members to “game” the regulation by doing with impunity just what the regulation sought to prohibit: importing fish caught by nonmembers into the EU without the imposition of a market penalty. Thus, the court relied on arguments based on coherence as a surrogate for legislative purpose.

What went wrong? Recall that multilingual statutory interpretation is essentialist in nature. Since there is no single text, there must be some message that the array of texts, taken as a body, has attempted to convey. The significant overlap in meaning implies that to a large extent, the communication is likely to have been successful. When I, as a native speaker of English, refer to fishing, however, I really do not know whether the essential element is pulling the fish out of the water or catching the fish on the line. It has never really mattered much to me. Perhaps they are both part of the essence, or perhaps they are alternatively part of the essence. If what is true for me is true for many people in my culture and for many people in very similar cultures where Germanic and Romance languages are spoken, then it should not be surprising to find confusion across the board, with only a few languages taking a position on the matter—perhaps as a matter of happenstance, perhaps for more interesting cultural and historical reasons.

What we can conclude from this case is that Augustinian reasoning does not work to clarify a concept when the dispute requires us to take a position on a subtle aspect of the concept that has been neither culturally nor individually resolved. If the essence of fishing is not a universal, and if our common experience permits us to focus on both aspects of the activity with more or less equal attention, then the comparison of different language versions will have taught us only that a particular version’s clear statement in one direction or the other is likely to be accidental and should be ignored. Thus, Augustinian methodology, even when it does not give us a single answer, may caution against drawing strong conclusions from the clarity of any particular version.

**CONCLUSION**

Let us return to the three values discussed at the beginning of this Article: equality, fidelity, and efficiency. In Table 1, the question of fidelity

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137. See id. ¶¶ 19–21.
138. See id. ¶¶ 16–22.
was an open issue. At this point, we can fill in some of the question marks as follows in Table 2:

Table 2

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<thead>
<tr>
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<th>Official Languages</th>
<th>Official Languages +</th>
<th>All Languages</th>
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<tbody>
<tr>
<td>Equality</td>
<td>-</td>
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<tr>
<td>Fidelity</td>
<td>-</td>
<td>?</td>
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<tr>
<td>Efficiency</td>
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That is, the proliferation of language versions appears to add to the likelihood that the court will get a case right, where getting it right means issuing a judgment that is more likely to further the purpose behind the law, and that is consistent with the intent of the enacting legislature. This is true when the method appears to succeed, and it is even true when the method appears to fail, in that the knowledge that the members’ versions lack consensus gives the court due warning that it should not pay too much attention to any particular version that appears clear on its face.

The conclusion that Babel actually serves to clarify communication is a surprising one, especially for an American academic who is accustomed to an environment in which at most two languages are spoken, and who comes from a culture in which textual analysis reigns, both in statutory interpretation and the law of contracts. Nonetheless, my happy conclusion is precisely this: Augustine had it right when he observed that the careful study of different translations of the same text is likely to lead to a deeper understanding of the text’s essential meaning.
THE FUTURE OF BILATERAL INVESTMENT TREATIES: A DE FACTO MULTILATERAL AGREEMENT?

Dr. Efraim Chalamish*

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INTRODUCTION

In the Doha trade negotiations round ("Doha Round") at the Fifth Session of the Ministerial Conference in Cancún ("Cancún Session"), the "Singapore Issues" were at the heart of the debate between developed and developing countries, revealing deep differences over the role of investment issues in trade negotiations and trade agreements. Hence, the Cancún Session intensified skepticism about the feasibility of achieving any compromise whatsoever in the near future. In fact, it was only several years ago that the countries of the Organisation for Economic Co-operation and Development ("OECD") failed to agree on the appropriate content of a multilateral agreement on investment ("MAI").

While the Doha Ministerial Declaration explicitly included the relationship between trade and investment in its agenda, reflecting optimism for a potential compromise in North-South economic disputes, the decision adopted by the World Trade Organization ("WTO") General Council on August 1, 2004 states that "investment issues will not form part of..."
the Work Programme set out in that Declaration and therefore no work
towards negotiations on any of these issues will take place within the
WTO during the Doha Round.”7 This political and diplomatic concession
was necessary to bring the developed, developing, and emerging econo-
mies back to the trade negotiation table.8 This moment was a turning
point that enhanced hope for better diplomatic prospects.

We must therefore confront this question: what could serve as an alter-
native forum to the WTO for international investment regulation? A
number of potential forums were found inappropriate for purposes of an
MAI, and these are discussed at some length in Part I of this Article.9
The recent failure of the Cancún Session has forced the international
community to deal with investment regulation on unilateral, bilateral,
and regional dimensions. This raises afresh the question whether bilateral
and regional forums are, in fact, suitable for international investment
regulation. Although many scholars have creatively theorized ways of
integrating investment regulation into a future multilateral framework,10
an exploration of the legal and political environment needed for such
integration is beyond the scope of this Article. Rather, this Article will
focus on recent trends in the bilateral sphere.

As a result of the failure of multilateral negotiations, the number of bi-
lateral investment treaties (“BITs”), free trade agreements (“FTAs”), and
regional trade agreements that include investment provisions has in-
creased dramatically.11 Through their inclusion of most-favored-nation
(“MFN”) clauses,12 these agreements form a complex network that re-
sembles a de facto multilateral agreement. Thanks to the MFN mechan-
ism, developing countries are now able to sign such agreements with in-

8. G8 RESEARCH GROUP, UNIV. OF TORONTO, SEA ISLAND FINAL COMPLIANCE
RESULTS: FINAL REPORT 56 (2005), available at http://www.g8.utoronto.ca/evaluations/
9. Several attempts to regulate international investment on the multilateral level
have failed. For a detailed discussion of these attempts in the International Trade Organiz-
ation, OECD, and WTO, as well as a discussion of a potential World Investment Organ-
ization, see Jurgen Kurtz, A General Investment Agreement in the WTO? Lessons from
Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment, 23 U. PA. J.
10. See, e.g., id. at 779–88.
11. The number of BITs today exceeds 2200. See U.N. Conf. on Trade &
Dev. [UNCTAD], World Investment Report 2004: The Shift Towards Services, 221–31,
UNCTAD, World Investment Report 2003: FDI Policies for Development: National and
World Investment Report 2003].
12. For an example of an MFN clause, see infra note 139 and accompanying text.
international consent, something that cannot currently be achieved through participation in the multilateral negotiation regime. Part II of this Article will examine this de facto multilateralism based on the content of BITs, the BIT signing mechanism, and the case law that has arisen from bilateral and regional agreements.

Furthermore, the new era of bilateralism brings formidable challenges for shaping economic relationships between international investors and developing countries, as the latter seek foreign investments that support sustainable development values. In Part III, this Article will examine if and how the new BITs should strike a balance between investment protection for multinational corporations (“MNCs”) and the enforcement of corporate responsibility. I will assess how to advance these two objectives, addressing the ways that human rights and labor provisions counterbalance a broad protection of corporate investment. This issue is highly sensitive; it has played a key role in developing countries’ decisions to reject investment agreements. It should be noted that the unprecedented power of MNCs in the multilateral arena may be mitigated at the bilateral level as a “humanized,” de facto MAI is developed. This Article concludes by analyzing various models for integrating corporate responsibility safeguards into BITs.

I. BILATERALISM: THE FORCE AGAINST MULTILATERALISM

Given its undeniable importance, foreign direct investment (“FDI”) would seem worthy of regulation by an international organization comparable to the WTO, which regulates international trade in goods. In
deed, some scholars have called for the establishment of just such an institution.20 However, host-investor agreements, a variety of national laws, and a range of international and regional regimes presently govern FDI.21 All of these regulatory structures create a competitive environment among States where FDI plays a crucial role.22 Moreover, such competition has been intensified by States’ concession of some of their domestic legislative power on account of trade blocks, multilateral agreements, and the mobility of capital.23 In light of the existing tensions among adverse regulatory powers, particularly between multilateral institutions and bilateral instruments in investment regulation, the role of BITs is essential.24

Globalization, specifically the constant growth in FDI inflows and outflows that began in the 1960s and gained momentum in the 1990s, has created a need for legal mechanisms that promote and protect foreign investment.25 While treaties have been developed to regulate areas of international economic law such as trade,26 evidently, no legal framework has addressed international investment regulation per se. There are several reasons for this phenomenon. First, most international economic activity has traditionally operated through trade rather than through investment, a state of affairs that existing legal instruments have perpetuated.27 However, recent developments (i.e., the increasingly pervasive

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21. For an overview of the different levels of investment regulation, see Alfred Escher, Current Developments, Legal Challenges and Definition of FDI, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 1, 3–8 (Daniel D. Bradlow & Alfred Escher eds., 1999).


role of FDI) have departed from the status quo.  

Second, economic, political, and cultural barriers have impeded an appreciable number of markets from opening up to foreign investment, especially when such investment would have involved intervening in domestic firms’ decision-making. Countries at various stages of economic development have been compelled to protect local economies, the domestic manufacturing sector, and employees from the risks of foreign investments. In addition, countries have taken defensive measures to protect their national currencies. Finally, with respect to investment promotion and protection, and dispute settlement issues, developed and developing countries have been guided by divergent underlying values and were consequently unable to develop legal tools based on mutual understanding.

Over the past three decades, this picture has changed, primarily during the 1990s, when foreign investment became a central aspect of the global economy and effectively the principal engine of sustainable growth and development. Eventually, developing countries enacted broad policy changes, deregulating local industries and opening up these emerging markets to foreign investors. Previous protective measures, such as performance requirements and limitations on transfers of currency, became less common. Perhaps most importantly, developed and developing countries began espousing similar values regarding core investment-related issues. An illustrative example of this confluence is the achieve-

28. See Escher, supra note 21, at 3.
30. See id.
31. For example, some of these measures impose restrictions on the transfer of investments’ principal funds and returns, and force conditions on the conversion of foreign exchange. See Duncan E. Williams, Note, Policy Perspectives on the Use of Capital Controls in Emerging Market Nations: Lessons From the Asian Financial Crisis and a Look at the International Legal Regime, 70 Fordham L. Rev. 561, 570–90 (2001).
32. See Kurtz, supra note 9, at 718–23.
33. Id.
34. Id.
35. Host countries employ such measures to increase the local benefits of the foreign investment in the host State, but their economic impact is questionable. However, the Trade-Related Investment Measures Agreement prohibits such measures when they are inconsistent with GATT provisions requiring national treatment and the elimination of quantitative restriction provisions. Many Canadian and U.S. BITs also prohibit the formerly-common local content requirement. U.N. Conference on Trade and Dev., World Investment Report 2007: Transnational Corporations, Extractive Industries and Development at 168, U.N. Sales No. E.07.II.D.9 (2007).
ment of a global consensus under customary international law on the formula used to determine compensation for expropriation.36

While it was too early for multilateral negotiations at the time, investment exporter countries, widely known as “home countries,” found it necessary to protect investors’ rights with BITs. “Host countries” were generally regarded as open but unsafe environments for investment.37 Home countries were concerned about potential prejudicial practices, such as arbitrary “access to markets,” discrimination among different investors, expropriation of assets, and devaluation of investment values due to regulatory changes.38 In contrast, host countries considered BITs a necessary tool to attract foreign investors, a tool that would send positive, reassuring signals to the markets.39

These concurrent considerations triggered negotiation between home and host countries with common economic interests, which led to the signing of BITs as part of their foreign economic policies.40 Whereas in theory BITs are reciprocal, they turned out to be rather single-sided. First, BITs are typically agreements between developed and developing countries, and the developed country usually initiates the negotiations.41 The economic disparity between the parties creates for the less developed country a stronger interest in signing such an agreement.42 Second, the developed country imposes the terms of the BIT on the developing country, usually in the form of a pre-structured draft known as a “model

37. Id.
41. Canada, for example, initiated BIT negotiations in 2008 with Tanzania, Madagascar, Indonesia, and other developing countries. See Foreign Affairs and International Trade Canada, Canada’s Foreign Investment and Protection Agreements (FIPAs), http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx (last visited Feb. 6, 2009).
Developing-country parties, in turn, have very limited, if any, negotiating power. Consequently, most of the provisions in a BIT are aligned with investors’ interests instead of the sovereignty of the developing country. Third, as will be discussed in Part II of this Article, the enforcement part of BITs is centered in the investor-state dispute settlement provision, which allows investors to bring claims directly against a host country in an international arbitral tribunal in response to a violation of BIT obligations. Again, this mechanism mainly focuses on investors’ rights and nearly ignores investors’ obligations, thereby preserving the dominance of investment interests in developed countries.

Although the proposed International Trade Organization (“ITO”) facilitated negotiations on economic relations at Bretton Woods in 1944, the United States Congress refused to ratify the ITO Charter in 1950, and the ITO was never established. Since the 1960s, when the BIT phenomenon began to develop steadily, international and multilateral forums have attempted to negotiate investment rules without much success. The OECD, a collective of industrialized States, failed to regulate MNCs both during the 1960s and in 1998, when MAI negotiations were held. In addition, the U.N. Commission on Transnational Corporations failed

45. Vandevelde, supra note 15, at 514 (discussing the investment liberalization effect of BITs).
46. See infra notes 265–75 and accompanying text.
47. See infra notes 288–90 and accompanying text.
50. See Lowenfeld, supra note 24, at 123–25.
to agree on a code of conduct for MNCs, following several controversial resolutions reflecting the adverse views of developed and developing countries.

In light of these failures, the OECD was probably not the appropriate forum for the development of an MAI. The breakdown of the negotiations begs the question: which alternative forum would be more suitable for a renewed effort to create an MAI? The WTO has emerged as the best-suited existing forum, mainly because it has addressed several issues the OECD was ineffective in handling. First, the WTO has offered an open stage for developed and developing countries, and even welcomed nongovernmental organizations (“NGOs”). Despite the harsh criticism directed at the WTO, it was and still is considered a diversified forum for international economic negotiations. It has facilitated an earnest North-South discussion on investment issues.

Second, in the WTO forum, investment has not been examined as a stand-alone, but rather in the context of trade negotiations. As with other economic issues, a more cohesive approach towards international investment regulation has been adopted. As previously mentioned, the


55. According to Maura Blue Jeffords, writing in 2003, “More than 1,490 NGOs have had some interaction with the WTO[,...] most of which are from Europe and North America.” See Maura Blue Jeffords, Turning the Protester into a Partner for Development: The Need for Effective Consultation Between the WTO and NGOs, 28 BROOK. J. INT’L L. 937, 951 (2003).

56. This diversity of interests can be perceived as a representation of “cosmopolitics” in the WTO. See Steve Charnovitz, WTO Cosmopolitics, 34 N.Y.U. J. INT’L L. & POL. 299 (2002).


58. See, e.g., Doha Ministerial Declaration, supra note 2, ¶¶ 20–22.


60. See supra note 6 and accompanying text.
strong linkage between trade and investment in the global economy has created a rationale for adopting international investment rules under the umbrella of a new, post-World War II international trade regime. Consequently, and under the leadership of the United States, developed countries made several attempts to include investment rules in multilateral trade negotiations. Although efforts to incorporate comprehensive investment agreements in the Trade-Related Investment Measures Agreement ("TRIMs") and the General Agreement on Trade in Services ("GATS") have generally been unsuccessful, TRIMs and GATS do contain a limited number of investment rules. Similarly, the Doha Round brought the investment regulation agenda to the trade negotiation forum. The "golden age" of multinational investment, together with recent studies on the relationship between trends in investment and trade, have helped integrate negotiations on investment regulations with the Doha Ministerial Declaration and with negotiations on a range of other issues.

Additionally, insofar as the Doha Round was declared the "development round," investment regulation, an area that influences sustainable development in a large number of markets, became a necessary part of the Doha agenda. The trade and investment working group became busier than ever; unfortunately, though, this did not last for long.

61. See Lowenfeld, supra note 24, at 123–25. Despite several attempts to include investment rules under the GATT jurisdiction as part of the Havana Charter, the GATT did not include such rules. See Lowenfeld, supra note 36, at 103. Lowenfeld suggests that the failures of such attempts resulted in the GATT maintaining its stability and avoiding disagreements between East and West, South and North. See id.


63. The Doha Ministerial Declaration explicitly included investment in its agenda. Doha Ministerial Declaration, supra note 2, ¶¶ 20–22.

64. For a detailed discussion of this linkage between trade and investment trends, see generally World Investment Report 2004, supra note 11; World Investment Report 2003, supra note 11.

65. See supra note 6 and accompanying text.


In a dramatic shift, investment, along with agriculture, became the deal-breakers of the Doha Round. Most commentators describe the negotiation of international investment regulation within trade forums as a battle between developed and developing countries on the critical issue of host-economy independence. The failure in Cancún suggests a more complex picture. Hence, I will now briefly consider the new dynamic that revealed itself at the Cancún Session, which ultimately obscured the investment agenda and its potential implications.

First, the Cancún Session took place at a time when the political and economic power of some WTO Members—certain developing countries that have historically rejected MAIs—was on the rise. These States used their new political status to promote their interests, shifting the focus of the negotiations to the European and American subsidies of domestic industries. Second, the proliferation of bilateral and regional trade and investment agreements discussed above has encouraged developing countries to participate in this trend and negotiate bilaterally and regionally, as their interests are less likely to be promoted on the multilateral level, given the clout of the G-22 countries.

Moreover, as the distinction between “free trade” and “fair trade” has grown dramatically in recent years, developing countries have been successful in bringing real development concerns to the global arena. Yet, as trade negotiations became increasingly complex, requiring challenging adjustments by developing countries due to high levels of protective local legislation, simply renewing the entire WTO agenda seemed overwhelming; negotiation was thus restricted only to core traditional trade issues.

70. This mainly refers to the G-22 group, led by Brazil, China, and India, which insisted upon ending negotiations over the Singapore Issues because of a lack of concessions on agricultural subsidies and import barriers on agricultural products by the developed side. See Mario E. Carranza, MERCOSUR, the Free Trade Area of the Americas, and the Future of the U.S. Hegemony in Latin America, 27 FORDHAM INT’L L.J. 1029, 1052 (2004).
72. See supra note 11 and accompanying text.
73. Pruzin & Yerkey, supra note 71, at 1533.
74. Id.
75. In fact, the legal status of the Singapore Issues in the WTO was unclear from the beginning of the negotiations. See id.
II. THE NETWORK OF BILATERAL INVESTMENT TREATIES AS A DE FACTO MULTILATERAL AGREEMENT

A. Bilateral Agreements and the Need for Coordination

I considered above the reasons for the Cancún Session negotiations’ failure, especially with respect to investment issues. Although the WTO forum is more transparent and diversified than the OECD, and notwithstanding the fact that most disputes were resolved at the working-group level and through bilateral negotiations that produced numerous signed BITs, the delegations left Cancún without agreement on any issue, except perhaps the agreement to abandon investment regulation in the Doha Round.

As developing countries and other emerging markets used the negotiations as a platform for again raising fundamental questions about distributive justice in international economic agreements, the issue of international investment regulation became a negotiation leveraging tool: the United States and Europe were willing to consider reductions in agricultural subsidies in exchange for inaction on investment regulation. Thus, developed countries agreed to table investment regulation in order to keep alive the multilateral negotiations on trade.

Has the absence of multilateral action on investment regulation since the failure of the Doha Round encouraged countries to regulate investment unilaterally? Should it? Both questions can be answered in the negative. The pragmatic view, which was bolstered as a result of the Doha Round, holds that countries prefer to coordinate investment regulation on bilateral and regional levels. After the failure of the Cancún Session, even strong developed economies that have traditionally regulated foreign investment unilaterally expanded their efforts to negotiate many new BITs, the United States being a prime example. For a description of U.S. policy and a list of BITs signed by the United States, see Office of the U.S. Trade Representative, Trade Compliance Center, http://www.ustr.gov/Trade_Sectors/Investment/Section_Index.html [hereinafter List of U.S. BITs] (last visited Jan. 16, 2009).
negotiated. Moreover, even in the post-Cancún landscape, most arguments proposing regulation of FDI through multinational coordination are compelling. Although home and host countries are traditionally seen as having conflicting interests, globalization arguments suggest that these interests are actually convergent to some extent, and recent economic theories have reinforced this perspective. For instance, broad investment protection not only limits the power of the host government; it actually serves to enhance the availability of credit and the liquidity of assets in host markets. It is therefore in the host government’s interest to comply with wide investment protection. Accordingly, most BITs express the parties’ common goals in investment promotion and protection.

Second, whereas customary international law is regularly used to construe investment protection provisions in expropriation cases, developed and developing countries have had diverging views on related questions, such as what kinds of investment a BIT should protect. Moreover, MFN and national treatment have evolved into the main rights of foreign investors under most BITs, whereas it is unclear whether these rights apply to pre- and post-establishment of an investment in the same manner. Coordination on bilateral and regional levels, either through negotiations or regional centralization of the treaty interpretation process, could provide answers to such questions and could help elucidate these thorny legal concepts.

81. See UNCTAD, Quantitative Data on BITs and DTTs, http://www.unctad.org/Templates/WebFlyer.asp?intItemId=3150&lang=1 (last visited Jan. 16, 2009) (providing a chart and graph indicating that in 2002 there were 2181 BITs).
82. See Vandevelde, supra note 23, at 472–87.
83. See id. at 489–90.
85. For example, as a result of North American Free Trade Agreement case law, a more limited definition of “investment” was recently adopted in the U.S.-Chile FTA, which includes investment provisions in Chapter 10. Free Trade Agreement, U.S.-Chile, ch. 10, June 6, 2003, 117 Stat. 909, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter U.S-Chile FTA].
Finally, the dispute settlement mechanism of investment agreements makes coordination on the bilateral level necessary. This mechanism allows private investors, as individuals, to bring claims against host governments before international arbitral tribunals based on alleged violations of a BIT. Without such provisions for dispute settlement, a BIT would represent merely an abstract declaration of the importance of FDI and its protection. The nonexistence of a forum for multilateral investment disputes underscores the fact that enforcement of investors’ rights under international rules is not viable without the consent of both parties to a bilateral dispute settlement mechanism.

It is essential, though, to understand that a State’s enthusiasm for concluding bilateral agreements on the promotion and protection of international investments will never supersede the State’s will to regulate certain domestic industries unilaterally. Thus, most countries maintain their security industries and relations with foreign markets, for example, through unilateral regulation or through separate mutual understandings.

B. The Multilateral Aspect of Bilateralism

At first glance, the bilateral dynamic previously discussed has little, if anything, to do with multilateralism. In fact, bilateralism has been successful exactly where multilateralism has failed. Still, recent attempts to regulate investment have raised the possibility of a future MAI and have

88. Id. at 250.
reinforced the importance of investment regulation as a bargaining chip in international economic negotiations.91

We shall now examine what I describe as the “multilateral” aspect of BITs. This concept has tremendous implications for the future of international economic law. For example, it could foreclose the development of a multilateral agreement or render one redundant. Moreover, the multilateral dimension of bilateralism will enable arbitrators in investor-state disputes to turn to comparable BITs as interpretative tools. It will also justify the integration of corporate responsibility commitments into BITs, in response to potential arguments against integration based on the lack of a true MAI.

1. The Substance of BITs and Regulatory Competition

During the past century, political and economic movements have advanced through centralized structures, a national market in the United States, a Common Market in the European Union,92 and a “global marketplace.”93 These movements have relied upon the assumption that different standards for products or production processes can block market access for MNCs94 or constitute illegitimate comparative advantages95 (i.e., externalities or strategic choices), and thus, impede economic integration. Harmonization is considered the remedy for another undesirable implication of FDI: a surge of foreign investment to low-standard jurisdictions.96 Such a development, which would further loosen regulatory standards in many States, might create a so-called race to the bottom.97

91. See Kurtz, supra note 9, at 779–88.
92. The Common Market is the informal name for the European Economic Community (“EEC”), which was established in 1958 following the EEC treaty, signed in 1957. The Common Market’s goal was to create an economic union, and subsequently a political union, through united economic policies, such as liberalization of the movement of labor and capital. See generally Europa, SCADplus: Treaty Establishing the European Economy Community, http://europa.eu/scadplus/treaties/ec_en.htm (last visited Feb. 2, 2009).
94. But see ALAN O. SYKES, PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS AND MARKETS (1995) (contending that market pressures will produce an optimal degree of harmonization with respect to product standards).
95. Comparative advantages might be legitimate if diverging production standards were explained by different circumstances, such as geography or resources. Id.
97. For a description of this competition in the environmental law context, see DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE (1994).
Notably, competition theorists are more open to government intervention and harmonization of international regulation in scenarios that exhibit externalities or other market failures than in scenarios that involve a race to the bottom, as the latter tend to produce inconsistent empirical results and involve controversial normative arguments.

Harmonization is not always a net-positive phenomenon. Regulatory competition theory is concerned with government failure created by harmonization and intervention, which can be more severe than market failure. Thus, regulatory competition can establish a market in locational rights, allowing MNCs to quit inefficient or high-cost countries. Applying Tiebout’s classic model, competition among States provides an MNC decision-maker with a range of locational preferences reflecting different economic priorities. As a result, such competition also improves social welfare and encourages governmental efficiency.

To assist legislators in regulating dissimilar legal regimes more effectively, a number of scholars have developed models based on the advantages of competition versus harmonization in international regulation. Since governmental failures and market failures tend to exhibit different patterns in various legal disciplines, Professor Avi-Yonah, for example, has examined each discipline separately. He divides these disciplines based on two criteria: the consensus on the norms among States with a need for extraterritoriality, and the extent to which the MNC community supports or objects to the norms. The policy interests involved in applying extraterritorial regulations to MNCs—that is, comity or harmoni-
zation—should be determined using these criteria. Thus, when the MNC community cannot readily achieve the consensus voluntarily, multilateral legal tools should force similar norms. As mentioned above, the enforcement mechanisms of these legal tools are indispensable to the maintenance of a stable harmonization environment.

Bilateral treaties can play an important role in the evolution of international legal harmonization. Sometimes, however, BITs can have a disruptive effect, such as when regulatory competition results in a proliferation of bilateral agreements with a panoply of different arrangements, frustrating the realization of a truly harmonized regime. Such disruption is evident in international taxation, wherein harmful tax competition reduces tax rates and developing countries are forced to sacrifice tax revenues in order to join bilateral double-taxation treaties.

Having considered the potential role of BITs in fostering harmonization, we turn now to an examination of the specific competitiveness factor of BITs in shaping the international legal environment of FDI. Competitiveness in this context refers to how investors use a BIT as a legal tool to determine their preference for one legal regime at the expense of another. Although there is an array of studies about how signing BITs affects future potential inflows of investments, such scholarship has not adequately considered various elements of the treaties and the treaty-making process.

In short, the competitiveness factor of BITs is relatively insignificant. BITs differ based on two principal elements: the level of protection the host State affords to foreign investors, and the level of enforcement the host State undertakes. A host State can offer potential investors a more favorable investment environment by agreeing to a BIT that protects investors more extensively than other BITs. Including more investors un-

107. Id. at 13–31.
108. See supra notes 87–88 and accompanying text.
109. For example, as discussed later in this Article, the MFN principle has various incarnations in different BITs, which create some confusion as to how this principle is to be applied in a specific set of circumstances.
111. See Hallward-Driemeier, supra note 39.
112. Investors’ protection is executed through the substantive rights of the treaty, mainly MFN, national, and fair and equitable treatment. The procedural rights of the treaty provide investors with the opportunity to enforce their direct claims against the host State in the event of any violation of substantive rights. See PETROCHILOS, supra note 87, at 246–57.
nder the BIT’s protection, expanding the scope of protected investments, or granting more rights to investors can all help to provide broader protection. Yet, a close examination reveals that States do not actually use BITs to compete among themselves in investor protection.

Most model BITs use similar definitions to identify the investors or investments covered by the treaty.113 When new financial instruments (e.g., derivatives) are recognized as a common tool of FDI, all BIT models typically incorporate them uniformly.114 Similarly, model BITs also afford the same set of limited rights: MFN status, national treatment, fair and equitable treatment of investors, and compensation for expropriation based on the customary international law formula of “prompt, adequate, and effective compensation.”115

In recent legal and economic literature, some have called for the inclusion of investment incentive regulation within international legal agreements.116 The need for incentive regulation comes from the race to the bottom theory, which suggests that competition for FDI among States, especially among developing countries, causes a degradation of labor, environmental, and human rights standards.117 Hence, a significant reduction in tax rates by a developing country to attract foreign investors might damage the public fisc of the host State, making tax coordination among developing countries an absolute necessity.118 Nevertheless, most BITs have not yet incorporated incentive regulation, and it would be an ambitious goal at the bilateral level, considering States’ reluctance to bear the costs of high-standard regulation.119 As long as BITs continue to follow current models, it is difficult to understand how BITs will facilitate lawmaking competition that would create new rights or obligations.

114. See, e.g., 2004 U.S. Model BIT, supra note 43, art. 1 (including “futures, options, and other derivatives” in the definition of “investment”).
115. See, e.g., id. art. 6(1)(c).
117. See Andrew T. Guzman, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VA. J. INT’L L. 639, 688 (1998) (concluding, after a comprehensive analysis of the race to the bottom phenomenon, that the least developed countries should act as a group instead of competing against each other as individual States).
119. See id.
In terms of dispute settlement, BITs could differ—and therefore compete—by providing for various enforcement mechanisms, including the currently prevalent forum, the international arbitral tribunal. In theory, BITs could take divergent positions on core issues in investment arbitration, such as jurisdiction, privilege, confidentiality, and place of arbitration. Indeed, some model agreements already reflect such differences.\textsuperscript{120} For the most part, however, BITs take very similar positions on dispute settlement questions.\textsuperscript{121} This can be explained by an international consensus on dispute settlement norms, a proliferation of international agreements accompanied by reciprocal influences, and attempts to create an international jurisprudence for international investment law, notwithstanding that such jurisprudence is developed by numerous ad hoc international tribunals.\textsuperscript{122} This analysis reinforces the view that the substance of the treaties, along with their lack of differentiation and competitiveness, strengthens BITs’ role as an investment regulatory regime on a multilateral, not just a bilateral, level.

\textbf{2. The Signing Mechanism}

BITs have traditionally been negotiated between developed and developing countries, and this has an interesting impact on the design and signing mechanism of these treaties. It has been common for the developed country to require its developing-country counterpart to sign a BIT to protect its own investors’ interests as part of an attractive economic package,\textsuperscript{123} which usually includes other economic agreements that appeal to the developing country.\textsuperscript{124} In view of the marginal economic im-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{120} For example, the 2004 U.S. Model BIT offers the possibility of a bilateral appellate mechanism. 2004 U.S. Model BIT, supra note 43, Annex D (“Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.”).
\item \textsuperscript{122} For a discussion of the development of investor-state jurisprudence, see infra Part II.D.
\item \textsuperscript{123} See, e.g., Press Release, U.S. Trade Representative, United States, Uruguay Sign Bilateral Investment Treaty (Oct. 24, 2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2004/October/United_States_Uruguay_Sign_Bilateral_Investment_Treaty.html (“U.S. BITs . . . ensure that U.S. investors are protected when they establish businesses in other countries.”). This U.S.-Uruguay BIT was the first to be concluded based on the 2004 U.S. Model BIT. \textit{Id.}
\item \textsuperscript{124} These agreements can include double-taxation treaties, research and development treaties, and economic cooperation arrangements. \textit{See} UNCTAD, \textit{Quantitative Data on}
importance of some BITs, parties to such treaties use them mainly to enhance diplomatic relations.\textsuperscript{125} As a result, developing countries largely lack the ability to negotiate provisions of approved models, that is, models drafted and signed in advance by developed States.\textsuperscript{126}

Nowadays, intergovernmental institutions and international organizations play an important role in defining the need for BITs and in bringing parties to negotiate them. The United Nations Conference on Trade and Development (“UNCTAD”) and the World Bank, the main players in this field, actively initiate negotiations on BITs and then monitor the process from their inception to the signing stage.\textsuperscript{127} Both institutions envision a desirable form for the BIT text and its implementation, and thus work towards a consistent policy in all stages of the negotiations.\textsuperscript{128} Although they can recommend adjusting the text to the specific circumstances affecting the States involved, they tend to promote near-identical drafts. Therefore, they effectively function as centralized institutions that transform the network of BITs into a de facto multilateral agreement.

Thus far, these institutions have yet to receive the appropriate mandate to promote an MAI.\textsuperscript{129} However, they can currently promote supranational cooperation on BITs and Double Taxation Treaties, http://www.unctad.org/templates/WebFlyer.asp?intItemID=3150&lang=1 (last visited Feb. 2, 2009).

\textsuperscript{125} For example, Israel signed a BIT with Mongolia in 2003 as part of its efforts to begin active diplomatic relations. See Agreement for the Reciprocal Promotion and Protection of Investments, Isr.-Mong., Nov. 25, 2003, available at http://www.financeisrael.mof.gov.il/FinanceIsrael/Docs/En/InternationalAgreements/POI/MongoliaPoI.pdf.

\textsuperscript{126} The 2004 U.S. Model BIT, for example, was approved by the U.S. Department of State (“State Department”) and the Office of the U.S. Trade Representative (“USTR”), as they share responsibility for the BIT program. The State Department and the USTR “consulted their respective advisory committees and relevant congressional committees” in the process of developing the new model BIT. See Office of the U.S. Trade Representative, U.S. Model Bilateral Investment Treaty, http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html (last visited Jan. 16, 2009).


\textsuperscript{128} In response to the Bangkok mandate, UNCTAD developed a special technical cooperation program that seeks to help developing countries in this respect. This program was adapted and expanded to reflect the needs of member countries in light of the Doha mandate, and subsequently implemented in close collaboration with the WTO. The Work Programme on International Investment Agreements principally encompasses policy research and human resources capacity-building, with a view towards consensus-building. See UNCTAD, Progress Report on Work Undertaken on UNCTAD’s Work Programme on International Investment Agreement, 3–11, UNCTAD/ITE/Misc.58 (2002).

\textsuperscript{129} On the failure of the MAI, see supra note 5 and accompanying text.
The future of BITs through the network of BITs. UNCTAD, for example, facilitates BITs primarily for the developing world, balancing the interests of MNCs with principles of international law such as sovereignty. UNCTAD thereby furthers its mission to assure that the developing world receives its fair share in the economic benefits of globalization.

The World Bank also plays a key role in facilitating the enforcement of BITs by hosting a leading dispute settlement body, the International Centre for Settlement of Investment Disputes ("ICSID"). The primary purpose of the ICSID is to provide a forum for the conciliation and arbitration of international investment disputes. The World Bank offers loans to developing countries to encourage production and development, thereby fostering international investment by the private sector. Thus, investment protection is a natural and essential element of the World Bank’s agenda.

3. The Most-Favored-Nation Principle and Harmonization in BITs

As we have seen, international investment agreements tend to contain similar provisions on rights and obligations as a result of the extensive involvement of international organizations such as UNCTAD, and the power dynamics of negotiations between developed and developing countries. In fact, BITs signed by countries from the same region that frequently experience similar macroeconomic conditions often share...
identical texts. Moreover, developing countries’ new approach favoring investment liberalization has reshaped their views on investment promotion and protection. This approach has led to the adoption of similar investment protection provisions and international law formulas, which stipulate the extent and type of compensation in the event of expropriation. Next, I explore one such provision in investment agreements—the MFN principle and its role in harmonizing international investment regulation.

The MFN clause is one of the most salient provisions of investment protection agreements. Originally developed in trade agreements, the MFN principle prevents a host State from discriminating among different investors of different nationalities. Where a host country has signed a more favorable BIT with another country, an investor from a third country is entitled to an equal level of investment protection.

Since MFN treatment has become one of the most effective and popular legal tools for international investment protection, I examine the MFN case law of international arbitral tribunals as a law-harmonizing force. Recent case law in the international arbitration of investment agreement disputes, beginning with Maffezini v. Kingdom of Spain, highlights the attempt to harmonize investors’ rights and reaffirms the quasi-multilateral aspect of BITs. First, I analyze the Maffezini case and the reactions it provoked in the international economic law community, and then draw several conclusions about the future implications of the BIT regime.

139. A typical MFN clause reads: “[e]ach Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory . . . .” 2004 U.S Model BIT, supra note 43, art. 4.
140. See LOWENFELD, supra note 36, at 397–403 (discussing the role of the MFN rule in international economic law as an element of BITs).
On July 18, 1997, Emilio Agustín Maffezini, an Argentine investor and a national of the Argentine Republic, sent a request to the ICSID for arbitration against the Kingdom of Spain regarding his investment in an enterprise named EAMSA, which was to produce and distribute chemical products in the Spanish region of Galicia. Maffezini subscribed to seventy percent of the capital, while the Sociedad para el Desarrollo Industrial de Galicia (“SODIGA”), a Spanish entity, subscribed to the remaining thirty percent. Both Maffezini and SODIGA used private research to evaluate the project before investing in it. Nevertheless, roughly two years after the initial investment was made, EAMSA began experiencing financial difficulties, its construction stopped, and EAMSA’s employees were dismissed. Attempts were made to raise capital and to secure loans and subsidies in order to avoid financial failure, but most of these efforts were fruitless.

Consequently, Maffezini instituted an ICSID proceeding against the Spanish government. Maffezini based his claim on the provisions of the 1991 Agreement for the Reciprocal Promotion and Protection of Investment between the Kingdom of Spain and the Argentine Republic (“Argentina-Spain BIT”). I will now examine Maffezini’s arguments to understand his grounds for filing the ICSID claim.

Maffezini alleged that the project failed because of SODIGA’s poor advice regarding the costs of the project, as the costs turned out to be significantly greater than predicted. Furthermore, according to Maffezini, SODIGA forced EAMSA to start its operations before an environmental impact assessment had cleared, causing EAMSA to incur additional unforeseen costs. Maffezini asserted that SODIGA is, in fact, a Spanish public entity, and thus, all of SODIGA’s acts and omissions are attributable to Spain, thereby allowing him to sue Spain in an international arbitral tribunal under the Argentina-Spain BIT.
The ICSID tribunal sustained most of Maffezini’s claims, and on November 9, 2000, determined that the total amount of compensation, including interest, Spain must pay Maffezini is about 58 million Spanish pesetas. However, the January 25, 2000, preliminary decision of the tribunal on objections to jurisdiction received much more attention in the international economic law community, and indeed, constitutes the heart of this Article’s discussion of the Maffezini case.

Spain challenged the jurisdiction of the ICSID tribunal and its competence, among other defensive arguments, on the ground that Maffezini failed to comply with the requirements of Article X of the Argentina-Spain BIT, which deals with the exhaustion of domestic remedies. The Argentina-Spain BIT requires an eighteen-month waiting period before an investor can submit his or her claims to arbitration; during this period, domestic courts have the opportunity to dispose of a dispute. Maffezini submitted his claim before the expiration of this period.

While the tribunal found that Maffezini failed to comply with Article X of the Argentina-Spain BIT, this was not dispositive. Maffezini argued in the alternative that he has the right to rely on the MFN clause contained in the Argentina-Spain BIT. Like similar investment treaties, Article IV of the Argentina-Spain BIT states: “[i]n all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.” Using the MFN clause in the Argentina-Spain BIT, Maffezini invoked the provisions of a 1991 BIT between the Republic of Chile and Spain (“Chile-Spain BIT”). Article 10(2) of the Chile-Spain BIT allows an investor to opt for arbitration after a six-month negotiations
period has expired; it does not require an eighteen-month waiting period. Maffezini claimed that as Chilean investors in Spain are treated more favorably than Argentine investors, the Argentina-Spain BIT should be construed as giving Maffezini the option to submit the dispute to arbitration without prior referral to domestic courts.

Spain rebutted Maffezini’s arguments. It contended that, under international law principles, the MFN clause may only apply in respect to the same matter and may not be extended to matters different from those contemplated by the basic treaty. The MFN clause of the Argentina-Spain BIT does not encompass questions of jurisdiction and other procedural issues, unlike the material aspects of the treatment granted to investors, as discrimination cannot take place in connection with procedural matters. According to Spain, only if Maffezini showed that local courts in Spain are less favorable to the foreign investor than is ICSID arbitration would he be able to claim that the jurisdictional question has a material effect on FDI treatment.

Discussing the application of the MFN clause to the BIT dispute settlement mechanism, the Maffezini tribunal found that the clause did apply to procedural rights related to the mechanism, including jurisdictional rights. It based its decision on the language of the BIT, the policies that shaped the parties’ negotiation of the BIT, and the practice of the Spanish government in concluding its BITs. As a result, the tribunal held that Maffezini was entitled to the more favorable dispute settlement terms in the Chile-Spain BIT, permitting him to submit his claim to arbitration after only six months.

The Maffezini tribunal extended dispute settlement provisions in other BITs without a clear reference in the MFN provision, since it found that the parties did not intend to omit this reference based on their treatment of foreign investors as well as their own investors. However, the

162. Id. ¶ 39 (citing Agreement on the Reciprocal Protection and Promotion of Investments, Spa.-Chile, Oct. 2, 1991, art. 10(2)).
163. Maffezini Decision on Jurisdiction, supra note 141, ¶ 40.
164. Id. ¶ 41.
165. Id.
166. Id. ¶ 42.
167. Id. ¶ 64.
168. Id. ¶¶ 43–64.
169. Id. ¶ 64. The tribunal arrived at this conclusion despite rejecting Maffezini’s jurisdictional arguments based on the Argentina-Spain BIT. See id. ¶¶ 19–37.
170. See Argentina-Spain BIT, supra note 156, art. IV(2) (“In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.”).
171. See Maffezini Decision on Jurisdiction, supra note 141, ¶¶ 52–61.
Maffezini tribunal warned that investors should not “override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question.” Among the various examples referenced are replacing the arbitration forum chosen by the parties and exhausting local remedies.

I now analyze the tribunal’s decision and its importance to the creation of harmonization in international bilateral treaties. As mentioned above, foreign direct investors seeking to protect their investments have extensively relied upon BITs’ MFN clauses in international arbitrations. The MFN clause, originally one of the most important principles in international trade law, prevents a host State from discriminating among different investors from different nationalities by allowing investors to claim more favorable protection terms granted to other investors by, inter alia, legislation, practice, or other BITs.

Therefore, an international arbitral tribunal’s interpretation of an MFN clause is enormously important in defining the coverage of investment protection under BITs. Moreover, since most of the MFN clauses in BITs are drafted using the same language, as previously noted, each decision related to the MFN clause has a powerful impact on the interpretation and drafting of many other BITs. While international arbitrators are not bound by previous decisions made by other international tribunals, arbitral tribunals respect these decisions and integrate their reasoning into their own judgments and awards.

BITs also offer a limited number of investors’ rights, and these have been developed over the years by international economic law and practice and have been influenced by FDI trends. Accordingly, the MFN clause, which serves as the practical mechanism for investment protection, can be, in fact, a law-harmonizing tool. By forcing different

172. Id. ¶ 62.
173. See id. ¶ 63.
174. See Lowenfeld, supra note 36, at 397–403.
175. Most treaties extend the MFN treatment to a wide range of economic activities. See, e.g., 2004 U.S. Model BIT, supra note 43, art. 4.
176. See supra note 137 and accompanying text.
177. For a discussion on precedents in international arbitration law in the context of investment disputes, see Petrochilos, supra note 87.
179. See supra note 112 and accompanying text.
180. See Scott Vesel, Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties, 32
countries to converge on similar standards in international investment protection, the MFN clause, if widely applied, can increase the level of law-harmonization in the FDI realm.  

Following the Maffezini decision, one would expect to see international arbitral tribunals explicitly adopting or rejecting its broad interpretation of the MFN clause. Adoption of the Maffezini approach, like the decision itself, will signal the continued expansion and harmonization of protections for international investors against host States. Alternatively, highlighting the limitations of the Maffezini decision can suggest a balance between protection for international investors and the interests of host States.

It appears that current ICSID jurisprudence is endorsing the Maffezini decision, further harmonizing international investors’ protections. In Siemens, A.G. v. Argentine Republic, another ICSID decision, the tribunal followed Maffezini and concluded that it had jurisdiction over Siemens’ claims against Argentina, although the Germany-Argentina BIT required a waiting period of eighteen months. Like the claimant in Maffezini, Siemens invoked the MFN provision in this BIT to avoid waiting eighteen months and submitted the claim directly to the ICSID, as the Argentina-Chile BIT does not contain such a requirement. The Siemens tribunal was convinced that the dispute settlement mechanism—access to ICSID arbitration—is among investors’ protections under the Germany-Argentina BIT. The Siemens decision also cites the policy restrictions expounded in Maffezini.

Two other cases have followed the Maffezini and Siemens rationale, allowing investors from Luxembourg and Spain to immediately commence an ICSID arbitration against Argentina during the eighteen-month waiting period required by the respective BITs. The tribunals in both cases,

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181. See id.
183. Id. ¶¶ 79–110.
184. Id. ¶ 32.
185. Id. ¶¶ 94–103. The Siemens decision suggests an alternative to the classic view of the dispute-settlement mechanism as a procedural rights provider; the classical view is embodied by the Salini and Plama cases, which are discussed in detail later in this Article. See infra notes 201, 208.
186. Id. ¶¶ 75, 109, 120.
Camuzzi International S.A. v. Argentine Republic and Gas Natural SDG, S.A. v. Argentine Republic, emphasized the notion that procedural arbitration provisions in BITs are a significant substantive incentive and source of protection for foreign investors; thus, unless it appears that the parties agreed to another method of dispute resolution, the MFN principle should be broadly construed to embrace dispute resolution provisions. Camuzzi and Gas Natural reinforced the function that the MFN principle plays in the harmonization of international investment law.

Nevertheless, recent negotiations over the Central America-Dominican Republic Free Trade Agreement (“CAFTA-DR”) fascinatingly reveal the complex role of the Maffezini decision in international forums. The CAFTA-DR, based on the North American Free Trade Agreement (“NAFTA”), aims to promote trade liberalization among the United States, Costa Rica, El Salvador, Nicaragua, Honduras, Guatemala, and the Dominican Republic. This agreement is part of the current trend in international trade law: a proliferation of bilateral and regional trade agreements that contain a separate investment chapter. The U.S. government, for instance, has recently signed such agreements with Chile and Singapore.

The final draft of the CAFTA-DR sheds light on the parties’ ostensible intention to reject the Maffezini interpretation of the MFN clause. It limits the reach of the MFN clause to matters “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments,” excluding from the scope of the MFN clause procedural and jurisdictional questions related to the dispute resolution mechanism. In fact, a footnote in the CAFTA-DR draft expli-
citly states that the MFN clause “does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.”\textsuperscript{194} The parties agreed to include this footnote in the “negotiation history” of the Agreement, even though the footnote was to be deleted from the final text.\textsuperscript{195}

The CAFTA-DR is a notable example of a regional trade and investment agreement that does not follow the legal language of many similar agreements on some significant issues in the investment protection chapter.\textsuperscript{196} Among these variations are provisions for greater transparency in the investor-state dispute settlement mechanism, and for an appeal mechanism for investor-state arbitration.\textsuperscript{197} It will be interesting to see whether the CAFTA-DR represents the beginning of a new trend, and whether future BITs will offer a variety of investment protection models, thereby increasing the competitiveness of the BIT as an international legal instrument.\textsuperscript{197} Other arbitral tribunals might reject Maffezini, perhaps influenced by the CAFTA-DR approach\textsuperscript{199} as well as some host States’ criticism of Maffezini.\textsuperscript{200} If they do so, it might result in conflicting views on what qualifies as a case matter before a given tribunal.

In fact, several recent ICSID decisions have explicitly criticized the Maffezini decision, expressing an unwillingness to extend the MFN clause to dispute settlement mechanisms and other procedural elements of investment protection treaties. However, a careful review of these decisions suggests that they are exceptions to the general rationale of Maffezini, giving effect to the public policy caveat raised by the Maffezini tribunal. In the recent case of Salini Costruttori S.p.A. v. Hashemite

\begin{footnotes}
\footnote{194. Id. art. 10.4 n.1. This footnote was not included in the 2004 U.S. Model BIT; it is therefore unclear if the United States intends to integrate it into any future BIT. See Mark A. Cymrot, Investment Disputes with China, 61-Oct. Disp. Resol. J. 80, 83 n.20 (2006).}
\footnote{195. Id.}
\footnote{196. See David A. Gantz, Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement, 30 B.C. Int’l & Comp. L. Rev. 331, 344–86 (2007).}
\footnote{197. See id. at 379–80, 386.}
\footnote{198. As the investment chapter of the CAFTA Draft incorporates provisions similar to those of the 2004 U.S. Model BIT, we need to examine if other States will follow this model, which offers a more protective and limited version of investors’ regulations. Japan, for example, tends to focus on investment liberalization. See Japan Grows Positive on Bilateral Investment Treaties, supra note 116, at 3.}
\footnote{199. For a discussion of CAFTA-DR, see supra notes 189–98 and accompanying text.}
\end{footnotes}
Kingdom of Jordan, an ICSID tribunal considered an argument made by Salini, an Italian investor in Jordan, that the tribunal should have jurisdiction over contractual claims based on the MFN clause found in the Italy-Jordan BIT. Salini claimed that U.S. and U.K. investors in Jordan enjoyed a more favorable dispute settlement mechanism than did Salini, since the U.S.-Jordan and U.K.-Jordan BITs provide for ICSID jurisdiction over contractual claims, whereas Article IX of the Italy-Jordan BIT sends contractual claims to local Jordanian courts. According to this argument, the MFN provision should offer Italian investors the same procedural treatment available to U.S. and U.K. nationals.

However, the tribunal concluded that the Italy-Jordan BIT cannot be applied to the dispute settlement process, and distinguished MFN provisions that expressly include dispute settlement in their language from provisions that do not. The Salini tribunal was aware of the Maffezini caveat, which states that interpretations of MFN clauses should not overwhelm public policy concerns, such as honoring the intent of the parties that drafted the BIT or other existing principles of BIT interpretation. Nevertheless, the Salini tribunal was unconvinced that the public policy caveat of the Maffezini tribunal can prevent investors from exploiting varying MFN provisions by “treaty shopping,” as investors can operate in the country with the most favorable dispute settlement mechanism in its BIT.

Another recent ICSID case, Plama Consortium Ltd. v. Republic of Bulgaria, followed the rationale of the Salini decision, asserting that “the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration . . . .” In this case, Plama, a Cypriot investor, claimed that the MFN provision effectively permits replacement of the Bulgaria-Cyprus BIT’s dispute resolution mechanism—ad hoc interna-

202. Id. ¶ 17.
203. Id. ¶ 36.
204. Id.
205. The MFN clause in question was silent on its application to the dispute settlement mechanism. See id. ¶ 66 (quoting Agreement on the Promotion and Protection of Investments, Italy-Jord., July 21, 1999, art. 3).
206. Id. ¶ 113.
207. Id. ¶ 115.
208. Plama Consortium Ltd. v. Republic of Bulgaria, ICSID (W. Bank) No. ARB/03/24 (Feb. 8, 2005) [hereinafter Plama Decision on Jurisdiction].
209. Id. ¶ 184.
tional arbitration for compensation purposes only—with arbitration before the ICSID, as provided in the Bulgaria-Finland BIT. 210

The Plama tribunal pointed out that the circumstances in Maffezini were exceptional, as the Maffezini tribunal had to find a way to avoid applying a nonsensical provision requiring domestic remedies to be pursued in local courts during the first eighteen months before the dispute could be submitted to the ICSID. 211 The Plama tribunal criticized the Maffezini decision, along with two decisions that it considered to be incorrectly based on Maffezini, 212 for articulating a general rule and then qualifying it with multiple public policy exceptions. 213 The Plama tribunal recommended that the MFN provision be applied to the dispute settlement mechanism only when it is supported by the clear language of the BIT between the parties and their specific intent. 214 A treaty’s historical context or any other parol evidence is insufficient to authorize a broader interpretation of an MFN provision. 215

Further, the Plama tribunal questioned the way the Maffezini tribunal treated the harmonization of international standards: “[i]t failed to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision.” 216 The tribunal described as “chaotic” and counterproductive to harmonization the phenomenon where an investor can use an MFN provision to cherry-pick a dispute settlement provision from one of the other BITs to which the host State is party. 217 According to this analysis, host States might find themselves exposed to several dispute settlement mechanisms to which they have not necessarily agreed. 218

To summarize, some international arbitral decisions tend to follow the Maffezini wave, extending the MFN provision and harmonizing international arbitration law standards, 219 whereas a few others avoid this path, restricting MFN coverage of dispute resolution provisions to those cases where the parties’ intention to embrace this construction is made clear

210. Id. ¶ 183.
211. Id. ¶ 224.
212. Id. ¶ 226 (discussing Siemens A.G. v. The Argentine Republic, ICSID (W. Bank) No. ARB/02/08 (Aug. 3, 2004); Tecnicas Medioambientales Tecmed v. United Mexican States, ICSID (W. Bank) No. ARB(AF)/00/2 (May 29, 2003)).
213. See Plama Decision on Jurisdiction, supra note 208, ¶ 224.
214. Id. ¶¶ 204, 218.
215. See id. ¶ 223.
216. Id. ¶ 219.
217. Id.
218. See id.
219. See, e.g., Siemens Decision on Jurisdiction, supra note 182; Camuzzi Decision on Jurisdiction, supra note 187; Gas Natural Decision on Jurisdiction, supra note 187.
through express language.\(^{220}\) While acknowledging these different approaches to interpreting BIT provisions, several scholars have pointed out that the general principles of *Maffezini* are still widely accepted when parties give their basic consent to ICSID jurisdiction.\(^{221}\) This lively debate, which is taking place in several international arbitration forums,\(^{222}\) reveals how the MFN clause can be used as a law-harmonizing tool in international investment arbitration.

In this context, it is worth mentioning that commentators increasingly call for a more harmonized approach towards international arbitration, including its classical aspects such as advocacy.\(^{223}\) Arbitrators must be sensitive in the way they interpret rights and certain obligations, for their decisions contribute to the law of international investment arbitration.\(^{224}\) In any case, embodying “multilateralist bilateralism,” *Maffezini* and other decisions that followed it demonstrate the impact of international investment arbitration case law on the harmonization of investment regulation.

### C. The Need for a Future Multilateral Agreement: Implications

To this day, multilateral forums have failed to develop a common approach towards an MAI. The United Nations, the OECD, and now the WTO have struggled to separate investment issues from the general discussion on North-South economic integration,\(^{225}\) leaving countries to negotiate investment treaties on bilateral and regional levels. Any discussion on the prospects for a future MAI must take into account the foregoing analysis of the multilateral aspect of BITs, and the fundamental questions that arise: is a multilateral agreement even necessary when one can identify an effective network of more than 2200 BITs? And even if

\(^{220}\) See, e.g., *Salini* Decision on Jurisdiction, supra note 201; *Plama* Decision on Jurisdiction, supra note 208.

\(^{221}\) See, e.g., Egli, supra note 127, at 1077–78 (addressing the inconsistency in applying the MFN provision in international investment law); Vesel, supra note 180, at 169–81.

\(^{222}\) The ICSID is the leading institution where this discussion is occurring.


\(^{224}\) For example, note the dialogue between the *Siemens* tribunal and the *Maffezini* tribunal. See supra notes 182–86 and accompanying text.

\(^{225}\) Developed and developing countries have been negotiating several legal instruments that aim to increase the exchange of investment and trade inflows in both, while advancing sustainable development in the latter’s economies, especially during the transition period of this integration. See generally Ostry, supra note 57, at 285.
an MAI is still found necessary, how will the BIT network impact the development and evolution of an MAI?

Several commentators have called for the establishment of a World Investment Organization226 to serve as a platform for multilateral negotiations on investment issues, and as an enforcement forum similar to the Dispute Settlement Body (“DSB”) of the WTO.227 Avi-Yonah argues, for example, that the only suitable forum to discuss serious international investment dilemmas is a multilateral one where both developed and developing countries have legitimate representation.228 Both UNCTAD and the OECD suffer from a substantial bias towards various interest groups.229 Although the WTO could have been an appropriate forum, linking trade and investment would undermine the credibility of the WTO negotiation process as the principal forum for world trade issues, as well as the DSB.230 The proposed World Investment Organization would benefit from a narrower mission.

The development of the BIT network supports such an argument. As discussed above, BITs grant investors limited rights that focus mainly on antidiscrimination and compensation in the event of expropriation.231 The enforcers of BITs—international arbitral tribunals—can help promote investment liberalization without becoming implicated in distinct international economic principles such as trade.232 A future multilateral in-


227. The DSB was founded as part of the Uruguay Round of trade negotiations in order to institutionalize and expand the dispute settlement mechanism of the GATT. See Fatem Sabry, The Development and Effectiveness of the WTO’s Dispute Settlement Body, 10 Mich. St. J. Int’l L. 521, 523–28 (2001) (providing an overview of the development of the DSB).

228. See Avi-Yonah, supra note 20, at 31–34.

229. Traditionally, UNCTAD advances the interests of the developing world, while the OECD furthers the welfare of industrialized States. About UNCTAD, supra note 132; OECD, About OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Jan. 16, 2009).


investment forum, which would adopt such a disciplined approach to investment regulation and enforcement, is more likely to produce an MAI with the support of both investors and host States.233 While NGOs consistently fight against multilateral economic forums that seem to be dominated by industrialized countries or Western capitalist interests,234 the case of the extensive and evenly spread BIT network demonstrates an acceptable legal framework.

However, given the relatively harmonious character of this network, the added value of a future MAI to the process of refining an international investment regulatory framework remains an open question. Although any potential MAI will not necessarily threaten the BIT network, the limited, additional value of an MAI may not justify the utilization of precious resources and the foreseeable annulment or adaptation of existing bilateral treaties. The preservation of the current BIT network helps sustain the fine balance among the interests of multiple parties and reflects a consensus in state practice.

A multilateral agreement under the umbrella of a putative World Investment Organization would monitor States’ compliance with investment regulation more effectively.235 Similarly, a permanent investment tribunal would promote consistency in investment jurisprudence, offering a comprehensive, cohesive interpretation of the MAI, thereby preventing conflicting decisions by a multitude of investment tribunals.236 When a State faces a financial crisis that has a significant impact on several industries and many companies, numerous claims are concurrently submitted to numerous investor-state tribunals, but raise similar legal questions.237


Such scenarios can result in multiple inefficient decisions, inconsistent findings on similar financial facts, and a lack of political power to enforce these decisions separately. For instance, following the financial crisis in Argentina in 2001, investors simultaneously brought their claims against Argentina to the ICSID and other tribunals, pursuant to the relevant provisions in the BITs between Argentina and investors’ home States. The separate cases repeatedly scrutinized the same 2001 Argentine legislation enacted after the currency crisis in the local market.

A consolidation of claims arising from the same financial crisis or similar pattern of state behavior will help arbitrators gain a better understanding of the crisis or state conduct, its scope and implications, in addition to saving time and litigation costs. The decisions of investor-state arbitral tribunals in consolidated cases will have a stronger political power, which is still needed to enforce the award against the host government, despite the legally binding effect of arbitral judgments. In international law, it is generally difficult to enforce awards and other obligations against governments, and investor-state arbitration provides a useful illustration. Argentina, for example, constantly ignored international obligations, such as repaying International Monetary Fund (“IMF”)

238. Compare, e.g., Azurix Corp. v. Argentine Republic, ICSID (W. Bank) No. ARB/01/12 (Dec. 8, 2003) [hereinafter Azurix Decision on Jurisdiction], with CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) No. ARB/01/8 (July 17, 2003) [hereinafter CMS Decision on Jurisdiction]. In both cases, the tribunals, while upholding shareholders’ direct right of action, rejected Argentina’s argument that the investor lacked standing to pursue a claim under the U.S.-Argentina BIT, because Argentina was not a party to the contract that was the subject of the state action about which the investor complained. See Azurix Decision on Jurisdiction, supra, ¶ 57; CMS Decision on Jurisdiction, supra, ¶¶ 53–56.

239. For the significance of the claims against Argentina based on the Argentine financial crisis in 2001, see UNCTAD, International Investment Disputes On the Rise 1–2, UNCTAD/WEB/ITE/ITT/2004/2 (Nov. 29, 2004) (showing that of 106 investment cases pending in the ICSID in November 2004, thirty-four were such claims).


loans, though the loan agreements were absolutely valid.\textsuperscript{243} Although governments have, for the most part, respected the arbitral awards of international investor-state tribunals, this practice could change dramatically due to many governments’ growing protectionism and their increasing lack of trust in international tribunals.\textsuperscript{244} Of course, a consolidated procedure should not prevent the tribunal from granting different awards to different investors, based on variation in the extent of damages suffered. Moreover, if an MAI is ultimately unfeasible, the structural problem discussed above—multiple, fragmented arbitrations arising from common events—should be avoided through the negotiation and drafting of future BITs.\textsuperscript{245} The class action common in U.S. civil procedure might be a helpful model in this context as well.\textsuperscript{246}

Not every aspect of investment regulation can be analyzed solely on the bilateral level. Where unilateral or bilateral investment regulations have externalities and impact other countries, there is a need for coordination through multilateral agreement. For this reason, most commentators believe that multilateral agreements will regulate international anti-trust or international tax in a more effective way.\textsuperscript{247}

Of course, bilateral agreements do have distinct advantages for their signatories, which should be considered in the negotiation of future multilateral agreements. Bilateral forums can allow parties to tailor models to their own needs. Common variations include, \textit{inter alia}: protective conditions on foreign investment before it is accepted by the host State (the pre-admission model) versus protective conditions only after it has

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\begin{itemize}
\item \textsuperscript{243} See \textit{The Insouciant Debtor}, ECONOMIST, June 3, 2004, \textit{available at} \url{http://www.economist.com/surveys/displaystory.cfm?story_id=E1_NSDQVNS} (addressing the economic situation in Argentina following the declaration of default on IMF bank loans).
\item \textsuperscript{244} For example, following the tribunal’s award in the case of Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID (W. Bank) No. ARB/97/4 (Dec. 29, 2004), the Slovak Republic publicly refused to pay the record award, although it ultimately settled this award payment with the investor directly. See \textit{Slovak Republic Agrees to Pay 800 Million+ Claim}, INVESTMENT L. & POL’Y NEWS BULL. (Int’l Inst. for Sustainable Dev.), Feb. 22, 2005, at 5–6, \textit{available at} \url{http://www.iisd.org/pdf/2005/investment_investsd_feb22_2005.pdf}.
\item \textsuperscript{245} See Eloïse Obadia, \textit{ICSID, Investment Treaties and Arbitration: Current and Emerging Issues}, CEPMLP, Jan. 25, 2002, \textit{available at} \url{www.dundee.ac.uk/cepmlp/journal/html/vol10/article10-8.html} (recommending that all cases be sent to the same tribunal, as the current models do not allow joint claimants).
\item \textsuperscript{246} See Fed. R. Civ. P. 23.
\end{itemize}
been accepted by the host State (the post-admission model); exclusion of certain investors or industries from protection under the treaty; or even the inclusion of dispute settlement mechanisms that emulate certain legal traditions, usually those of the home country. For example, as a result of Israel’s security policy, which prevents foreign investors with hostile motives from entering the Israeli market, its model BIT bars foreign investors from State A who control entities in State B from bringing investor-state claims against Israel under a BIT between State B and State C. Similarly, France excludes foreign investors from obtaining controlling ownership in the French film industry in order to protect French hegemony over its culture. Recent U.S. BIT negotiations raised the possibility of including an appellate procedure in investor-state dispute settlement, in response to internal political pressures to pursue such an objective. Although some of these variations can be accommodated through restrictions in and reservations to a future MAI, most of them are essentially bilateral in nature, and therefore cannot be integrated into a multilateral instrument.

Moreover, negotiations on multilateral agreements tend to be conducted by political blocks that share common interests. The interests are definitely not identical, though. Disagreements among some developed countries during the negotiations on an MAI at the OECD in 1998 illustrate variation within what seemed at the time to be a homogeneous group. While the multilateral dynamic empowers unified groups and

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248. See, e.g., Japan Grows Positive on Bilateral Investment Treaties, supra note 116, at 3 (discussing the differences between the U.S. and Japanese approaches with respect to the pre-admission and post-admission models).


250. In fact, the disagreement between the French film industry and the Motion Picture Association of America was one of the factors behind the collapse of the Multilateral Agreement on Investment. See Joost Smiers, Artistic Expression in a Corporate World: Do We Need Monopolistic Control? 26 (2004), available at http://www.culturelink.org/news/members/2004/Smiers_Artistic_Expression.pdf.

251. See, e.g., 2004 U.S. Model BIT, supra note 43; U.S.-Uruguay BIT, supra note 86.

252. Thus, for example, the MAI negotiations in 1998 were mainly facilitated through negotiations between the block of developed countries and the block of developing countries, known as the G-22. See Muchlinski, supra note 5, at 1033 (describing the failure of the negotiations following rifts between these political blocks).

253. The United States, Canada, and EU Member States disagreed on several critical issues. For example, France and Canada wanted to include a general exception for culture in the MAI, while the United States challenged this proposal; similarly, the United States rejected the EU’s proposal to include a general exception for regional economic organizations. For a detailed analysis of these and other disagreements in the MAI negotiations, see Peter T. Muchlinski, The Rise and Fall of the Multilateral Agreement on Investment:
fosters international concessions, it can never completely address the needs of individual States within the blocks. Bilateral agreements can better reflect the unique interests of the various parties. In addition, enforcement mechanisms between States can sometimes be more effective, as the parties usually negotiate economic agreements on a repetitive basis.254

In sum, the current BIT movement maintains a unique, sensitive status quo between home and host States and serves as a de facto MAI. The BIT network can be a reliable long-term solution, while an MAI is unlikely to be signed in the near future. Nevertheless, as mentioned earlier, the implementation of BITs is fraught with several structural problems, including the inconsistent interpretation of treaty language and a multiplicity of arbitral decisions on similar fact patterns, and lacks a strong institutional element. Thus, the international community should act to establish a World Investment Organization to develop, execute, and monitor an MAI based on a credible, legal, and diplomatic consensus, and supported by the BIT network.

An intermediate solution is for BITs to be supervised by a multinational organization that includes a permanent arbitral or judicial tribunal255 and for all BITs to then select this institution to handle monitoring and dispute settlement. In the absence of a multilateral agreement, States prefer to keep the jurisdictional issue to themselves as part of their bilateral negotiation power, which makes such an arrangement unfeasible. However, most BITs already choose the ICSID as their arbitration tribunal, and UNCTAD functions as the main monitoring authority for BITs;256 thus, the intermediate regime is already, albeit informally, in action.257 The vital role that the ICSID mechanism plays in investment treaties and


254. For example, Israel and Vietnam signed an FTA in August 2004 and a double taxation treaty in April 2008, although BIT negotiations between these countries are still in an early stage. The application of their existing agreements will have an impact on negotiations for a BIT, as well as its adoption and enforcement. Israel Ministry of Industry, Trade and Labor, Israel-Vietnam Economic Relations, http://www.moital.gov.il/NR/exeres/84EF90FE-5BBC-4353-A2EA-C1649C05550F.htm (last visited Jan. 16, 2009).

255. A discussion of the advantages of having investor-state disputes in an arbitral, rather than a judicial, setting is beyond the scope of this Article.

256. See About UNCTAD, supra note 132 (describing UNCTAD’s essential role in the monitoring of BITs).

257. While there are significant differences among the various dispute settlement mechanisms, exploring such differences is beyond the scope of this Article. For an overview of international arbitration law procedures, see PETROCHILOS, supra note 87, at 246–57.
investment arbitration jurisprudence supports the view that the ICSID can become a leading forum in a centralized BIT-monitoring process.258

D. The Establishment of Investor-State Arbitration Jurisprudence

Over the past decades, investment arbitration has become one of the most prominent developments in international law. A strong recognition of nonstate actors, along with the need to make individual rights enforceable, have advanced the use of the investor-state dispute settlement mechanism.259 This mechanism allows private investors to sue States directly in international arbitral tribunals under BITs concluded between home and host States for violations of their rights.260 Alternative dispute resolution has flourished in international commerce, with investor-state arbitration existing as an integral part of this wave.261 While the new paradigm accepts investors or private companies as coequal newcomers to the international law community, the general principles of international arbitration, such as the requirement that the parties consent to the arbitration procedure, are still observed.262

I have thus far identified the multilateral aspect of the BIT network and made the case for de facto multilateral regulation through this network.263 Insofar as traditional international law draws a distinction between treaty law and customary law,264 this novel concept of a de facto multilateral agreement suggests that bilateral treaties are evolving into customary international law due to their multilateral character. Given the absence of

258. It is unclear what the legal status of current bilateral agreements that reflect a de facto multinational understanding will be once an MAI is signed. See Marie-France Houde & Katia Yannaca-Small, Relationships Between International Investment Agreements 8–9 (OECD Working Paper No. 2004/1, 2004). A similar question has been asked in the trade context, which can lead to a fascinating analysis. See, e.g., Paul R. Krugman, Is Bilateralism Bad?, in INTERNATIONAL TRADE AND TRADE POLICY (Elhanan Helpman & Assaf Razin eds., 1991). However, it should be noted that a trade perspective is inherently different from an investment framework and any analysis must carefully identify which features and concepts are, in fact, compatible between the two.
259. See Weiler & Wälde, supra note 232, ¶ 122.
260. See Investor-State Dispute Settlement, supra note 130.
261. See International Investment Disputes on the Rise, supra note 239 (demonstrating that investment disputes are growing and that these disputes involve all sectors of developed and developing countries, both at the re-establishment and operational stages).
262. As discussed earlier in this Article, the Salini and Plama tribunals, in the limitations they impose upon the Maffezini doctrine, emphasize the importance of the consent requirement to establishing the arbitral tribunal’s jurisdiction. See Salini Decision on Jurisdiction, supra note 201; Plama Decision on Jurisdiction, supra note 208.
263. See supra Part II.
264. See Lowenfeld, supra note 24, at 128 (referring to “the traditional classification of international law into two categories—customary law and treaty law”).
a de jure MAI, it is difficult to argue that comprehensive customary international law on investment would have otherwise developed. As illustrated below, this fact has a tremendous effect on the progression of investor-state arbitration jurisprudence.

The concept of investment multilateralism allows arbitral tribunals to interpret similar terms or provisions in different BITs in the same manner. This is true both for provisions setting forth substantive rights as well as for procedural provisions. Indeed, despite the fact that arbitrators are not obligated to follow other investment tribunals’ awards as precedents, they increasingly follow substantive and procedural trends in investment arbitration, and are influenced by the notions of investment liberalization and international economic law’s general code of conduct. In addition, recent BITs, including the 2004 U.S. Model BIT, have increased multilateral governmental intervention in this interpretation process.

Furthermore, obligations that are widespread throughout the BIT network can be used as a regulatory framework even when no such framework exists. As Andreas Lowenfeld has demonstrated, arbitrators may use the general BIT framework as a source of law when there is no BIT signed between the investor’s home State and the host State, provided that the host country has signed other BITs or has become a party to an investor-state arbitration convention, like the Washington Convention. The fact that BITs do not include a concrete set of international arbitration law rules supports this view. Even if the host State has not signed such bilateral treaties or conventions, the framework can still apply, pro-

265. Thus, ambiguous substantive concepts, such as the rapidly developing and important concept of a “national security” defense to the charge of breaching investors’ protection, can have a similar interpretation. This defense can also be applied to procedural rights, such as the jurisdictional requirements for admission to arbitration, yielding significant substantive implications.

266. See Weiler, supra note 178 (discussing these principles in the context of NAFTA’s requirement that the three NAFTA governments treat foreign investors in accordance with international law).

267. The U.S.-Chile FTA, for example, provides that both the U.S. and Chilean governments have the authority to issue interpretations of the investment provisions that are binding on arbitral tribunals. Moreover, both governments are to be involved in the ensuing litigation process. FTA partners that are not litigants in the dispute (amicus curiae) may submit comments during litigation on the interpretation of the investment provisions. The FTA also authorizes the tribunal to order “interim measure[s] of protection to preserve the rights of . . . disputing[] part[ies].” See U.S.-Chile FTA, supra note 85, art. 10.19.

268. See Lowenfeld, supra note 24, at 128–30 (showing that BITs can constitute a modern model of international customary law).

269. See PETROCHILOS, supra note 87, at 246–57.
vided that the State has never rejected the principles embodied in the BIT network.270 From this point of view, legal obligations that have been accepted by a large number of States for a long period of time will become part of customary international economic law and fill the multilateral regulation gap.271 However, it is important to note that the BIT framework cannot be used as a source of regulation when the host country has not given its consent to the particular arbitration procedure.272 In keeping with the fact that arbitrators can and do use other BITs as a source of substantive legal obligations and look to awards given by other arbitral tribunals interpreting a variety of BITs, what substantive and procedural trends can be identified?

When an investor-state arbitral tribunal examines the status of an investment, it must balance between the competing interests of investment protection and the legislative power of the host country. This is especially true when it comes to a host country’s need to protect domestic industries and promote national economic welfare. Arbitrators consistently feel the political tension between the obligation to comply with the BIT’s goals, on the one hand, and the interest in maintaining the host State’s acceptance of the tribunal’s procedure and decision, on the other.273 A tribunal’s efforts to remain within the scope of its jurisdiction based on the BIT’s language are crucial to the success of the process, especially given the need for state consent to both jurisdiction and enforcement.274 Consequently, arbitrators consider the multilateral effect of their decisions in order to preserve credibility in future claims brought by investors before the same or other tribunals.275

270. See Lowenfeld, supra note 24, at 129–30.
271. Lowenfeld himself is aware of the fact that most of the developing States do not accept these principles from a pure sense of legal obligation, a necessary condition for customary law; he calls for a rethinking of its traditional definition. See id.
272. Such consent is usually provided through the host State’s consent to the general jurisdictional framework in the specific treaty. Then, the host State responds to the claim against it when the foreign investor expresses his or her own consent and brings the case before the appropriate tribunal. But see Chung, supra note 44, at 969–75 (discussing defiance of investment arbitration by Indonesia, Pakistan, and other developing countries that act as host States in BITs).
273. See Kurtz, supra note 9, at 713.
275. For a discussion on the multilateral effect of tribunals’ decisions, see, for example, Plama Decision on Jurisdiction, supra note 208, ¶ 219 (discussing the consequences
Reviewing recent developments in investment arbitration law indicates that while tribunals do not provide investors with easy recoveries for unsound investments, investment tribunals have broadly interpreted procedural provisions in order to expand jurisdiction. Additionally, in terms of substantive law, the tribunal in *Mondev International Ltd. v. United States* recognized the need to protect investors beyond the minimum standards of customary international law, following the trend of higher standards expressed in the BIT network. In the *Mondev* case, the multilateral consensus caused the tribunal to suggest a higher level of protection.

Arbitral tribunals have loosened many procedural requirements that factor into jurisdictional issues in order to allow more investors to bring claims, as discussed below. The multilateral consensus among international arbitral tribunals has shifted the sensitive balance between the need to protect investors and the need to preserve state sovereignty towards a more investor-friendly regime. In *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, for example, the ICSID tribunal found that according to international law, actions of a political subdivision of a State are attributable to the central government, regardless of the State’s constitutional structure. This decision granted foreign investors standing for a claim against Argentina. The *Compañía de Aguas* tribunal followed the long-standing international principle of state responsibility and broadened the jurisdictional umbrella of the BIT. Moreover, it decided that the claim could be heard even though the dispute had already been

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276. *See supra* note 219 and accompanying text.

277. *See* *Mondev Int’l Ltd. v. United States*, ICSID (W. Bank) No. ARB(AF)/99/2 (Oct. 11, 2002), ¶ 125 [hereinafter *Mondev Award*] (integrating current investment law into the traditional standards in the NAFTA Article 1105(1) context). In this case, *Mondev*, a Canadian real estate developer, brought a NAFTA claim against the United States following a bank foreclosure on a shopping mall in Boston. *Id.* ¶¶ 1–2. The investor claimed, *inter alia*, a breach of contract by the City of Boston and the Boston Redevelopment Authority. *Id.* ¶ 1, 76.

278. *Id.* ¶¶ 151–53.


280. *Id.* ¶¶ 49–55.

brought to the national courts; the claims were not barred under collateral estoppel because the BIT did not fall under the exclusive jurisdiction of the national courts. As discussed earlier in the Maffezini case, the tribunal eased the exhaustion requirement, determining that the Argentina-Spain BIT, which calls for exhaustion of Spanish domestic remedies before submitting a claim to an arbitral tribunal, was inconsistent with the understanding of exhaustion under international law.

The Mihaly International Corp. v. Sri Lanka decision permitted an American company to proceed with its claim despite its partnership with a Canadian entity that was not covered by the scope of the tribunal’s jurisdiction. Finally, the Ceskoslovenska Obchodni Banka A.S. v. Slovakia case recognized the possibility of bringing a claim based on continuing state behavior that commenced before the treaty entered into force, even if the BIT’s jurisdiction is explicitly based only on behavior that started after the treaty went into effect. In this case, it was unclear if the Slovak Republic’s behavior followed the BIT’s entry into force, so the tribunal based its jurisdiction on an older BIT that had been incorporated by reference into an agreement between the parties.

III. INTEGRATING CORPORATE RESPONSIBILITY INTO THE BIT NETWORK

Thus far, this Article has examined how the BIT network has evolved as a “de facto” multilateral agreement, or as customary international economic law. This evolution has provided broader protection to foreign investors and, therefore, has led us to question the very necessity of a future MAI. However, developing countries and NGOs that have consistently objected to the multilateral negotiation of investment regulation without provisions on corporate responsibility are certainly unsatisfied

286. Id.
287. States have reacted differently to this new paradigm: while Brazil, for example, is trying to avoid international obligations following several recent investment arbitration decisions, Japan submitted an explanatory note regarding the accurate interpretation of its BITs. See Noah D. Rubins, Investment Arbitration in Brazil, 4 J. WORLD INVESTMENT & TRADE 1073, 1080–81, 1091 (2003).
with this temporary solution.\footnote{288} Indeed, drafts of BITs only include investors’ rights, while their responsibilities as nonstate actors in the international community are conspicuously absent,\footnote{289} a situation that may be traced to several factors. The inability to strike the fine balance between corporate rights and responsibilities has repeatedly led to failures in negotiations on an MAI.\footnote{290}

All BIT models follow this structure and have been well respected due to their limited objectives to promote and protect foreign investment based on acceptable international law principles.\footnote{291} Integrating corporate responsibilities into BITs has not been considered desirable under these circumstances. As a result of an industrialized country’s dominant position during the negotiation of a BIT, a developing country cannot negotiate the inclusion of provisions on corporate responsibility. Therefore, only collective action will allow developing countries to negotiate regulation of corporate responsibilities. Is the BIT network as a multilateral framework appropriate for such an endeavor? The answer appears to be positive. I now examine this proposition and suggest different ways of integrating corporate responsibilities into existing and future bilateral treaties.

A discussion of the potential integration of corporate responsibilities into the BIT network should be able to answer three core questions: First, despite failure on the multilateral level, is the BIT network the appropriate forum for institutionalizing corporate responsibility? Second, what responsibilities should be included in the BIT network? Third, what kind of enforcement mechanism, if any, should the BIT network adopt with regard to corporate responsibility?

While in the extensive scholarship on corporate responsibility there is debate over what MNCs should be accountable for\footnote{292} and how accountability can be instituted and enforced, there is also a strong normative voice in favor of MNCs’ accountability for violations of human rights

\footnote{288. See Muchlinski, supra note 5, at 1050.}
\footnote{290. On the other hand, the inclusion of several corporate responsibilities provisions in recent U.S. BITs has raised many developing countries’ level of confidence in the U.S. BIT program. As of this writing, Rwanda was the last developing country to sign a BIT with the United Sates, on February 19, 2008. See List of U.S. BITs, supra note 80.}
\footnote{291. But see Chung, supra note 44, at 969–75.}
and labor standards under international law.\textsuperscript{293} Since MNCs play an important role in the modern State, executing governmental functions either as business partners or government agents, or through outsourcing missions,\textsuperscript{294} the line between state and nonstate actions is increasingly vague. Several commentators have made the case for applying international human rights and international labor law obligations to MNCs and other nonstate actors, particularly when a corporation cooperates with local governments or performs governmental functions.\textsuperscript{295} Indeed, even when the host State only serves as a platform for private investment activities without jointly participating in the foreign investment or delegating governmental functions, some international legal instruments impose direct obligations on MNCs.\textsuperscript{296}

While imposing such obligations on States has raised many objections,\textsuperscript{297} regulation of foreign-investor responsibilities seems to be an easier case. First, developing countries are worried about harmonizing human rights and labor law, as they are afraid of losing their sovereignty and ability to implement local policies.\textsuperscript{298} When it comes to foreign investors, intervention in local policies is less effective, especially as MNCs can be regulated by standards other than those of the host State. If such standards are enforced only against foreign investors in a particular country, it might well reduce foreign investment in that country, or even provide for a discrimination claim.\textsuperscript{299}

Furthermore, the international community has traditionally punished States that violate human rights and labor laws through trade sanctions.


\textsuperscript{294} On the phenomenon of the outsourcing of services and the role of MNCs, see \textit{World Investment Report 2004}, supra note 11, at 221–33.

\textsuperscript{295} See, e.g., Ratner, supra note 293, at 497–506 (citing several cases in international tribunals and U.S. courts that apply this approach).

\textsuperscript{296} See id. at 504–06 (applying the doctrine of superior or command responsibilities to individual responsibility in the corporate context).


\textsuperscript{299} Since the foreign investors are exposed to higher standards of local regulation in comparison to local investors, the former can assert an MFN claim based on a BIT, and request the abolition of such regulation.
imposed by other States. These sanctions reduce the welfare of both States (i.e., home and host) and, in many cases, are ineffective, which tends to undermine the legitimacy of trade sanctions. Thus, Arie Reich, among other scholars, has called for promoting multilateral legal instruments and international cooperation in order to enforce international standards in a manner that raises fewer objections by the international community than do unilateral sanctions. The enforcement of corporate responsibilities in the sphere of international investment law is a desirable policy objective that should garner more of a consensus. Core international standards accepted by the majority of States would be imposed extraterritorially on MNCs actively involved in human rights or labor law violations, and only on these MNCs.

An MAI, developed either within the OECD or by WTO mandate, could be a proper venue for a binding codification of corporate responsibility provisions on four different levels: the MAI could express commitment to promoting investment in a way that is fully compatible with human rights obligations, ensure that implementation does not interfere with the protection of human rights, include human rights organizations among its constituency, and lastly, provide enforcement me-

300. See Cleveland, supra note 297 (examining the current model of using economic sanctions against States that violate human rights and international labor standards, with a special focus on the U.S. use of sanctions).

301. Barry Carter, for example, has shown that U.S. sanctions imposed on the basis of human rights violations have had a forty percent success rate. See BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 233 (1988).


303. See Avi-Yonah, supra note 20, at 25–26 (calling for extraterritorial enforcement in the case of child labor violations).

304. OECD members, for example, examined the possibility of integrating the OECD Guidelines for Multilateral Enterprises with the negotiated draft of the Multilateral Agreement on Investment. See Muchlinski, supra note 5, at 1050. See also OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), available at http://www.oecd.org/dataoecd/56/36/1922428.pdf.


306. The GATT’s agreements on the Application of Sanitary and Phytosanitary Measures and on Technical Barriers to Trade, which use international organizations as sources for standards and advice, could also be a model for an MAI. See Saman Zia-Zarifi, Protection Without Protectionism: Linking a Multilateral Investment Treaty and Human
chanisms to deal with human rights violations. The MAI could thereby gain wider political support from developing countries and the NGO community, which would enhance the legitimacy of the agreement. Additionally, States would likely accept regulation based on the NAFTA model to prevent a race to the bottom dynamic according to which competition for foreign investment would lower social standards.307

Yet, when several attempts were made to conclude an MAI, the developing world and the NGO community strongly objected to what, at the time, was called the “Charter of Multinational Corporations,” an agreement that aimed to serve the interests of the international business community and the industrialized countries.308 This opposition, together with disagreements among developed States,309 led to the systematic failure of the negotiations, leaving the world with merely general, nonbinding declarations on corporate responsibility.310

MNCs have encountered consistent criticism of their corporate practices in developing countries since the early 1990s, which has pushed many to adopt corporate codes of conduct.311 These codes are developed and exercised on a voluntary basis, with the strong participation of other non-state actors, and usually concentrate on core labor norms universally recognized by the international community.312 While some of these “codes” are general in nature, most are specific, covering particular corporations,
industries, or specific geographical areas, and as a result, they differ from each other in terms of substance, structure, and spirit.313

Such methods of self-regulation suffer from some significant disadvantages. First, an impartial international body does not monitor compliance with the codes,314 and third-party auditing mechanisms have often been recognized as corruptive measures.315 Secondly, corporate codes of conduct do not include an international enforcement mechanism of any kind, which often causes them to look merely like a public relations tool.316 The International Labor Organization (“ILO”) has been considered ineffective for the very same reason: it lacks enforcement powers.317 Furthermore, the codes’ diversity and the consistent objections they receive from business interest groups make the chances of adopting the codes on an international level and with legally binding effect very slim indeed.

Therefore, human rights activists, with support from various legal circles, have adopted a mixed-tools strategy: soft law regulation of corporate practices accompanied by hard law regulation, mainly through U.S. and European tort law, the enforcement of which has brought several high-profile MNCs to trial.318 In addition, media campaigns and consumer boycotts have led to several changes in corporate behavior.319 Legal scholars should continue to seek international regulation of corporate responsibility that is binding and enforceable.

The BIT network, conceptualized as a de facto multilateral agreement, provides a unique opportunity to establish, for the first time, an international enforcement mechanism of corporate responsibilities recognized by participating MNCs. Whereas traditional international law provides state-to-state dispute mechanisms based on the principle of mutual con-

313. Id.
314. Id.
315. See Dara O’Rourke, Monitoring the Monitors: A Critique of Corporate, Third-Party Labor Monitoring, in CORPORATE RESPONSIBILITY AND LABOR RIGHTS 196 (Rhys Jenkins et al. eds., 2002).
sent, the modern investor-state arbitration mechanism allows MNCs to bring claims against States in international arbitral tribunals for violations of their rights and to seek compensation for damages.\footnote{See Investor-State Dispute Settlement, supra note 130.} A mechanism that already allows nonstate actors such as MNCs to sue host States directly should be normatively justified in imposing responsibilities on the same MNCs, and, where appropriate, finding them accountable for human rights violations. Modern international law recognizes the need to grant nonstate actors rights and responsibilities, based on international economic law and international human rights law, and supplemented by individuals’ right to be compensated for their damages.\footnote{For example, in addition to the ICSID, nonstate parties may appear before the European Court of Justice, the Iran-United States Claims Tribunal, and the European Court of Human Rights, subject to certain conditions. See Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2360 n.71 (1991) (analyzing modern litigation in private and public international law).}

Along the same lines, individuals who suffer damages as a result of MNCs’ violations of corporate responsibilities recognized by both the home and host countries under the BIT will be able to bring claims directly against them before an arbitral tribunal. The plaintiff would give his or her consent to the procedure by submitting the claim to the tribunal, while the investor would manifest consent by bringing a counterclaim against a State pursuant to a BIT.

An investor entitled to sue the host State in an investor-state tribunal should be aware of the exposure, in the same proceeding, to a claim based on a breach of corporate responsibilities. However, this mechanism should not be limited to a “clean hands” requirement\footnote{The concept of “clean hands,” which sometimes appears in civil litigation in U.S. courts, requires the claimant, as a prerequisite to pursuing his or her remedies, to demonstrate that he or she was not at fault; otherwise, the court is required to balance the claimant’s faults and actions. Cf. Lisa J. Laplante, The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru’s Political Transition, 23 AM. U. INT’L L. REV. 51, 59–64 (2007) (discussing the development of the “clean hands” doctrine in public international law).} in an investor-state arbitration procedure, or even to claims brought against an investor only after the investor brought an investment claim under the BIT. BITs should explicitly state the jurisdictional ambit of such corporate responsibility claims. The scope of the corporate responsibility protection (i.e., a “clean hands” requirement, counterclaims asserted against investors bringing affirmative claims on the BIT, or independent claims against corporations) will be determined based on support from corporations, governments, and the legal community.
In addition, the latest trend, establishing corporate codes of conduct, demonstrates the importance of involving the companies in the very process of asserting claims for breaches of corporate responsibility. It was the concept of consent, along with the limited scope of the treaty, that earned the investor-state arbitration mechanism of BITs wide support among both the investment community and host States. In the same way, only core responsibilities that reflect international human rights and labor law principles, principles broadly recognized by the international community and MNCs, are likely to receive the support necessary to include them in future treaties.

As discussed above, several self-adopted corporate codes of conduct provide MNCs with certification of good behavior based on monitoring reviews, allowing them to insulate themselves against possible claims of bad practices. These codes can be annexed to existing BITs to reflect the norms on which future claims may be based. Associating BITs with certain corporate codes of conduct will also help investment arbitrators determine which international corporate responsibilities should be applied in a particular case, in light of the large number of international non-legally binding instruments. The recognition of the BIT network as a de facto multilateral agreement could transform the bilateral mechanism for FDI into a multilateral enforcement mechanism for corporate responsibilities. It will be fascinating to follow such jurisprudence as it evolves based on classical investor-state arbitration.

Several potential drawbacks should be addressed, though. First, investor-state arbitral tribunals have traditionally been comprised of experts in international economic law. It is necessary to include experts in international human rights law and international labor rights law to adjudicate future claims against MNCs. NGOs and other international organizations with relevant expertise can be part of the process, either during the tri-

323. For example, SA8000 is an international workplace standard with a built-in verification system. See Social Accountability International, Overview of SA8000, http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473 (last visited Feb. 2, 2009). SA8000 was developed by Social Accountability International and is based on international employment and workplace norms taken from the ILO Conventions, the Universal Declaration of Human Rights, and the U.N. Convention on the Rights of the Child. Id. Companies apply to be certified for compliance with SA8000 standards, a process that entails independent audits. Id.


325. The vast majority of these experts are academics or practitioners in the field of international economic law, with limited knowledge of international human rights law.
bunal selection or during the hearings, duplicating the NAFTA model of labor and environment side agreements. 326

Second, the process of integrating corporate responsibility provisions into investment treaties and implementing them is likely to be time consuming and sui generis. 327 Resultantly, it will be daunting to achieve harmonization of corporate responsibilities through the investor-state dispute mechanism. As previously noted, multiple inefficient decisions may result due to tribunals’ inconsistent interpretations of similar fact patterns, and a lack of political power to enforce each decision separately. Such a challenging path is inevitable, but worthwhile, as an enforcement mechanism for international corporate responsibility would be a seminal achievement.

CONCLUSION

The Cancún Session and the diplomatic negotiations that followed it herald the temporary disappearance of investment regulation in the multilateral trade forum. While the prospects for renegotiating a multilateral agreement in the near future are limited, the existing network of BITs can serve as an effective multilateral framework for investment regulation. Evolving beyond traditional concepts of international law, BITs can create a multilateral base through their unique MFN principle, signing patterns, and parallel content and concepts.

This innovative notion of multilateral bilateralism offers much more than a temporary solution for proponents of harmonization in international investment regulation. It affords arbitrators of investor-state cases a treaty interpretation tool, regulatory framework, and point of reference for BIT jurisprudence. While investment treaties have developed sporadically on the bilateral level for more than four decades, recent developments in international economic law call for a new multilateral regime. The current regime empowers foreign investors politically, legally, and economically, perpetuating inequality between developed and developing countries. Developing countries, which have thus far been extremely reluctant to negotiate a multilateral agreement on investment, find themselves confronting a new bilateral regime that reflects their concessions on investment protection and limits their own sovereign, legislative power.


327. As seen in the discussion of the investors’ rights mechanism, harmonization can develop out of a sustained dialogue between tribunals and BIT negotiators.
Looking ahead, and acknowledging that this new regime is unlikely to soon disappear, developing countries have a valuable opportunity to integrate corporate responsibilities into the current and future network of BITs. Since existing BITs are typically concluded for limited terms, many of them will be up for renewal in the coming years.\footnote{For example, Israel signed most of its BITs during the 1990s following the post-Soviet era of investment liberalization in Eastern Europe. Almost all of these BITs have been in force for ten or fifteen years and, thus, are up for renewal or amendment before the end of this decade. \textit{See, e.g.}, Agreement for the Reciprocal Promotion and Protection of Investments, Isr.-Alb., Jan. 29, 1996 (entered into force Feb. 18, 1997).} The investor-state arbitration mechanism constitutes a credible forum in which to balance investors’ rights with their own corporate responsibilities. Arbitral tribunals will be able to hold MNCs accountable and compensate individual victims for violations of corporate responsibilities; in turn, tribunals will award investors compensation for discrimination or expropriation by host States. The BIT network should go far beyond a general declaration of corporate responsibilities, or even a “clean hands” requirement for investment claims: it should bring about a new era of tribunals empowered not only to bring justice to investors, but also to bring investors to justice. The failures of the Doha Round can paradoxically spawn groundbreaking progress in international investment law based on the BIT network.
INTRODUCTION

Dawid is an asylum seeker from Eritrea who fled his country of nationality, the country where he was born and raised and in whose army he served.1 Dawid inarguably meets the definition of a refugee: a person outside of his or her country of origin who has a “well-founded fear of persecution” on account of his or her “nationality, race, religion, membership in a particular social group, or political opinion.”2 In Dawid’s case, he qualifies as a refugee based on evidence that he suffered extreme human rights abuse in Eritrea due to his membership in a religious minority group. Like most of the tens of thousands of Eritrean asylum seekers, Dawid migrated from Eritrea to Sudan.3 Conflict-stricken, impoverished Sudan is both a country of origin for many refugees and a country of asylum for others. In Sudan, Dawid can expect to gain refugee status, but it will be virtually meaningless, given that he will likely live impoverished in a refugee camp or elsewhere, or perhaps find undocumented employment. He will face restrictions preventing him from practicing his religious beliefs and eventually risk refoulement to

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1. Interview with Dawid, in Tel-Aviv, Isr. (June 26, 2008). Dawid eventually left Sudan for Egypt and then went to Israel, where he is now seeking asylum along with a few thousand other Eritreans who escaped political or religious persecution, or evaded the draft. I met Dawid in the course of my work with the Refugee Rights Clinic at Tel-Aviv University School of Law. Dawid’s situation is emblematic of many of the problems described and discussed in this Article.


Nearly 200,000 Eritrean asylum seekers have faced the difficult decision of where to flee. For many morally arbitrary, yet practical reasons, which have to do with geographical proximity and the fact that the Sudanese border is easier to cross, most Eritrean refugees flee to Sudan. Alternatively, other Eritrean asylum seekers escape to Ethiopia, a destitute neighboring country against which Eritrea has been waging an ethnic war. A small minority flees to Italy, the former colonizer of Eritrea and a far wealthier option. In other words, Dawid, like most asylum seekers, sought refuge in a neighboring country that is the least likely place for him to find substantive protection and the ability to exercise his human rights. Only a small percentage of refugees manage to reach countries that have the resources to provide them with adequate protection.


There are innumerable discussions of the nature and the source(s) of the duty of States toward refugees. Most are based on distributive justice theory, but some also adopt utilitarian, critical race theory, or feminist perspectives. See, e.g., THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS.
obligation to protect these rights. Despite this agreement, States generally prefer that refugees apply for asylum, rather than having refugees end up “in their backyard.” The disagreement begins when we ask the following questions: Which State will be responsible? Whose budget will bear the costs of protecting and assuring the socio-economic rights of refugees? And which State must divert resources traditionally dedicated to securing the rights of its nationals in order to secure the rights of refugees?

In a different context, David Miller discusses an analogous hypothetical in which a person has collapsed on the street.10 Miller argues that the victim is more likely to receive assistance if there is a single person, rather than several, passing by.11 This is true for several reasons, the most important of which, according to Miller, is that with several bystanders, there is no clear allocation of responsibility and no one is solely at fault should the victim die.12 The same phenomenon can be observed with the international community’s response to the challenge of refugee policy. Refugees from State B may seek asylum in State A, rather than in States C or D. While it is possible to provide explanations as to why State A has a moral responsibility to the refugees fleeing from State B, in a world of multiple States, it is more difficult to account for and allocate this responsibility. Where there are several state actors, why should State A have any more responsibility for the flight of the refugees from State B than would States C or D?

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11. Id. at 4–5.
12. Id.
There are three main reasons to consider the roles of States C and D, rather than just assuming that State A is responsible for providing for refugees.\textsuperscript{13} As Daniel Steinbock has noted:

First, refugees do not move evenly around the globe, both because refugee-producing events are concentrated in particular countries or regions, and because most refugees cannot seek sanctuary far from their countries of origin. Second, despite the benefits individual refugees might ultimately bring, refugee-receiving countries regard refugees as an unwanted burden in just about every way imaginable. Third, countries vary widely in their ability to cope with refugees in their territory.\textsuperscript{14}

This Article examines the roles that States A, B, C, and D should play in the refugee-protection scheme. I assume that each State’s legal\textsuperscript{15} and moral\textsuperscript{16} obligations to refugees are substantiated enough and do not require further elaboration. The term “refugee” will apply loosely, referring to both persons defined as refugees according to the 1951 Convention Relating to the Status of Refugees (“Convention”)\textsuperscript{17} and the 1967 Protocol Relating to the Status of Refugees (“Protocol”),\textsuperscript{18} as well as persons in refugee-like situations. Part I explains why the provision of assistance to and protection of refugees is a responsibility-sharing problem. Part II discusses the moral considerations that ground responsibility-sharing efforts in the context of refugee migration, and then Part III offers specific criteria to govern the allocation of responsibility among countries. Part IV attempts to explain the basis of responsibility sharing in international law and international relations. Part V suggests some theoretical models of how the policy of responsibility sharing can be conducted. Finally, Part VI explores the institutional aspect of responsibility sharing, examining which institutions are best equipped to regulate responsibility-sharing frameworks and outlining what their potential role could be.

\textsuperscript{14} \textit{Id.} at 985.
\textsuperscript{15} ICCPR, supra note 8.
\textsuperscript{16} See supra note 9.
\textsuperscript{17} Convention, supra note 2.
\textsuperscript{18} Protocol, supra note 8.
I. PROTECTING AND PROVIDING FOR REFUGEES: A PROBLEM OF INTERNATIONAL RESPONSIBILITY SHARING

The immigration of refugees imposes a responsibility on host societies. This type of immigration is uninvited and often unwelcome, and carries a high price. To ensure their assimilation and protection, States receiving refugees must expend resources by providing them with housing, jobs, education, etc.

The States from which refugees originate are essentially creating an externality borne by the States that allow the immigrants to enter their borders. When States fail or are unable to provide for their citizens, their citizens seek provision elsewhere. Therefore, the policies or natural conditions of the refugees’ home States create a cost not internalized by the States themselves, but rather assumed by others. Unlike other externalities produced by States, this externality has critical long-term social consequences for the countries bearing it. These consequences serve as a justification for the urgent need to resolve the externality or, at the very least, to minimize its burdens.

Usually, there is no particular moral justification as to why State A—and not States C or D—should bear the externality of the refugees from State B. However, more often than not, most refugees from State B will end up migrating to State A rather than States C or D for any number of reasons: State A is closer to State B, making it easier and less expensive to travel; there is already an existing community of State B’s immigrants in State A, which might assist in assimilation; or there are cultural, religious, and linguistic links between the populations of State B and State A.

In one sense, State A might often be forced to receive the refugees of State B due to an externality of States C and D. This will occur when these States implement a policy, either intentionally or unintentionally,

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19. In most current discussions on refugees or immigrants, the term “burden sharing” is used instead of “responsibility sharing.” This Article uses the latter term, though; the former is potentially offensive, as it reduces refugees and immigrants to an encumbrance. For a discussion of this term, see Gregor Noll, Risky Games?: A Theoretical Approach to Burden Sharing in the Asylum Field, 16 J. REFUGEE STUD. 236, 237 (2003).

20. Susan Martin et al., The Impact of Asylum on Receiving Countries, in POVERTY, INTERNATIONAL MIGRATION AND ASYLUM 99, 103–05 (George J. Borjas & Jeff Crisp eds., 2005).


22. For a detailed description of the different theoretical explanations of immigration patterns, see Douglas S. Massey et al., Theories of International Migration: A Review and Appraisal, 19 POPULATION & DEV. REV. 431 (1993).
that does not allow the entry of or does not attract immigrants from State B, thereby causing them to seek entry into State A alone.

Another way to frame the dynamics among States A, C, and D is to view them as a “chicken game.”23 As immigration occurs throughout the world, most States prefer that others accept and provide for refugees. The second best option is for all of them to cooperate and distribute responsibility for immigrants in a fair manner. And the least preferable option for most States is that the individual State alone has to bear responsibility for the immigrants. In this chicken game, State A, which is usually the immigrants’ preferred destination, is likely to restrict entry and withhold support and protection to signal to other States that it has no intention of providing for the immigrants.24 This could potentially lead to a race to the bottom and create incentives for States C and D to apply more restrictive measures.25

Interestingly, State A is often not much better off than State B and, even more likely, State A has less resources compared to States C or D. Most refugees immigrate to poor and unstable neighboring countries,26 imposing an additional burden on their politics and economies.27 This burden could be devastating to some countries, especially given the fact that refugee crises both arise suddenly and are vast in scope.28 For example, crises in Africa, Asia, and Latin America have resulted in a mass

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23. For additional perspectives on the “chicken game” in the context of international law and international relations, see, for example, Eyal Benvenisti, Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law, 90 AM. J. INT’L L. 384, 390 (1996).

24. For example, in an effort not to attract additional Eritrean asylum seekers, the Israeli government implemented a series of harsh policy measures, including arbitrary status changes, restrictions on freedom of movement, and imprisonment. See, e.g., Israel: Eritrean Asylum Seekers Told to Leave Tel Aviv Area, INTEGRATED REGIONAL INFO. NETWORKS, Aug. 11, 2008, available at http://www.unhcr.org/refworld/publisher,IRIN,,ISR,48a14919c,0.html. This has led neighboring governments like Egypt to take even harsher measures against Eritrean asylum seekers, such as deportation and barring access to the UNHCR. See, e.g., Press Release, Human Rights Watch, Egypt: Don’t Return Eritrean Asylum Seekers at Risk, Allow UNHCR Access to Detained Migrants (Dec. 19, 2008), available at http://www.hrw.org/en/news/2008/12/19/egypt-don-t-return-eritrean-asylum-seekers-risk.

25. It should be noted that, at least in theory, there may be circumstances where States do not have such incentives, for example, if States seek to achieve or maintain a strong track record for human rights.

26. However, this situation could change in the future as globalization is spreading and it becomes easier and less expensive to move from one place to another.


influx of immigrants from one poor country in turmoil to another poor country in turmoil. Consequentially, the least politically and economically capable countries are forced to provide for the neediest immigrants and to share the greatest part of the responsibility in caring for them. This phenomenon is coupled with the trend of Western countries toughening their immigration and asylum laws.

The immigration of refugees to impoverished countries carries a sociopolitical price. Uneasy feelings, which may amount to xenophobia, sometimes arise among the citizens of host States because of the uneven distribution of the responsibility. Additionally, the immigration of refugees may raise security concerns in host States as conflicts cross borders along with refugee movements. The economic impacts of refugee movements affect both the country’s nationals and refugees, who are unable to enjoy sufficient access to resources or to realize their rights. Perhaps one of the most striking examples is the immigration of hundreds of thousands of people from Rwanda to Tanzania, which has caused much political instability and additional poverty, and raised security concerns in Tanzania.

Under the current legal regime, it is almost impossible to “correct” the disproportionate allocation of responsibility imposed by initial and secondary refugee flight patterns. Refugees are expected to find safety and


30. Cook, supra note 29.

31. Suhrke, supra note 21, at 397. Suhrke argues that Western States that seek to minimize the number of refugees on their territory are actually “free-riders” in the collective effort to maintain global security. Id. at 400.


33. James Milner, Sharing the Security Burden: Towards the Convergence of Refugee Protection and State Security (Refugee Studies Cent., Working Paper No. 4, 2000), available at http://www.rsc.ox.ac.uk/PDFs/workingpaper4.pdf (detailing the burdens that Tanzania has assumed as a result of the forced migration of hundreds of thousands of Rwandans fleeing genocide). Another current example is the flight of Sudanese refugees to Chad, which resulted in the spillage of the conflict from Sudan into Chad and the devastation of Chad’s economy. See also UNHCR, Real-time Evaluation of UNHCR’s IDP Operation in Eastern Chad, PDES/2007/02 – RTE 1 (July 2007) (prepared by Khassim Diagne and Enda Savage), available at http://www.unhcr.org/publ/RESEARCH/46a4ad450.pdf.
settle in the first country to which they move. The motivation behind this policy is to prevent refugees from “asylum shopping,” the underlying assumption being that “shopping” for one’s favorite country is inconsistent with the concept of a refugee: a person fleeing for his or her life would apply for asylum in the first available State. Moreover, many wealthier nations employ policies preventing secondary flight in order to contain refugees in States neighboring their countries of origin, which are usually developing countries. In many cases, refugees who move to a third country must justify why they did not seek permanent refuge in the last country, and risk being denied asylum on this basis. Therefore, although immigrants initially seek refuge in State A for no morally compelling reason, States C and D are unlikely to assume responsibility in any way for the well-being of the immigrants flooding into State A.

I would argue that the responsibility of protecting and providing for refugees must be solved through cooperation rather than allowing it to become the problem of a few random States. Responsibility for the well-being of refugees must be shared internationally. Assuming a shared responsibility for refugee migration not only is fair and just, but also would be beneficial to world order and global security and help States to better plan their immigration policies. Moreover, this planning would benefit refugees, who could rely on a more organized and substantial system of protection. In the following sections, I will describe the relevant moral and legal bases for this argument.

37. For more on the “Safe Third Country” policy in Europe and elsewhere, see, for example, id.
38. Stephen H. Legomsky, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, 15 INT’L J. REFUGEE L. 567, 570–71 (2003) (explaining how, on the one hand, States C and D are unlikely to grant protection to immigrants from State A and, on the other hand, are unlikely to consider the scope of protection they receive in State A).
II. THE MORALITY OF RESPONSIBILITY SHARING AMONG STATES IN THE CONTEXT OF REFUGEE MIGRATION

Despite innumerable moral discussions about the duty of States towards immigrants, there are relatively few and only brief discussions about the morality of responsibility sharing with respect to immigration. Most scholars discuss responsibility sharing among States in economic terms, as a collective action problem or a public goods distribution problem. There seem to be two reasons for the lack of moral discussion on this issue. First, it is almost too obvious to assert that it is morally better and far fairer for States to cooperate and share responsibility instead of imposing costs on certain States in an arbitrary way. Second, States are disinclined to formalize a responsibility-sharing mechanism and, therefore, discussing the morality of responsibility sharing is seen as irrelevant. Consequently, most schools of thought and scholars theorizing about justice in immigration have not dealt with the question. Extrapolating scholars’ general position on this subject, however, we can develop a view of responsibility sharing that would conform to existing principles of migrant justice. In the following three Sections, I will explain the moral foundations of responsibility sharing according to several existing schools of thought.

A. The Feminist Critique of International Law and the Ethics of Care

The concepts of the feminist critique of international law shed light on the issue of responsibility sharing in refugee law. This school of thought argues that international legal concepts that appear gender neutral, such as States, boundaries, and sovereignty, are actually very male oriented and have a particularized impact on women. As Charlesworth, Chinkin, and Shelley Wright observe:

A feminist account of international law suggests that we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve male elites, while basic

Footnotes:


41. See, e.g., David Miller, Immigration: The Case for Limits, in CONTEMPORARY DEBATES IN APPLIED ETHICS 193, 203 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005) (“[T]he best we can hope for is that informal mechanisms will continue to evolve which make all refugees the special responsibility of one state or another . . . .”).

human, social and economic needs are not met. International institutions currently echo these same priorities.43

Although the feminist critique of international law encompasses a wide variety of views, I specifically examine the ethics of care approach, as it is the most relevant to our discussion. The ethics of care approach is based on the psychological research of Carol Gilligan,44 who analyzed the problem-solving attitudes of women and men in the hopes of determining whether women have a different “voice”—or approach—than men.45 Gilligan concluded that women apply an ethics of care approach and perceive things in terms of caring, context, communication, relationships, and responsibility.46 Men, however, apply an ethics of rights or an ethics of justice approach, which leads them to conceive of problems in binary terms of right and wrong, or winners and losers, while applying logic and rationality, without taking into account context and relationships.47

The ethics of care approach also serves as a basis for the promotion of women’s interests.48 This theory recognizes the validity and potential of that “different voice,” finding that the ethics of care approach, with its relational, flexible, and caring notions, is often more appropriate and more moral than the ethics of rights approach.49 In the context of international law, the promotion of the former has far-reaching consequences with respect to not only women, including refugee women, but also other subordinate groups, thereby revolutionizing international law and its fundamental concepts.50 Indeed, this approach has been used to critique and analyze various phenomena in international law and international relations: colonialism, international norms and the norm-making process, sovereignty, the treatment of Third World countries, and transnational institutions.51

43. Id. at 615.
45. Id. at 1–3.
46. Id.
47. Id. at 64–74, 164, 174.
48. See Charlesworth, supra note 42, at 618–19 (discussing this in terms of incorporating a feminist perspective into international law discourse).
49. Id. at 615–16
50. For example, the feminist theory was applied to the context of third world countries and their populations. Id. at 618–19.
51. For an overview of the “ethics of care” approach to international relations, see Fiona Robinson, Methods of Feminist Normative Theory: A Political Ethic of Care for International Relations, in Feminist Methodology for International Relations 221 (Brooke A. Ackerly et al. eds., 2006).
With respect to immigration, the ethics of care approach diminishes the binary distinction between citizens and aliens, between “us” and “them.” This approach rejects a strong understanding of sovereignty and nationalism and points to the fact that countries are interrelated and interconnected. Embracing a more humanist-oriented approach, the ethics of care model supports a “relational” attitude to immigrants that opposes criminalizing many categories immigrants and that offers them protection, especially those who are vulnerable, such as refugees. The ethics of care approach upholds these positions both as a general policy recommendation and in recognition that women constitute a large, and often unheard and undocumented, percentage of immigrants.

The ethics of care approach acknowledges that much like children in certain circumstances, some immigrants cannot survive without care. In so doing, this approach challenges myths of self-sufficiency. From this conclusion derives the responsibility of States to protect refugees and provide for them.

Feminist theorists adopting the ethics of care approach would perceive the responsibility-sharing debate in the context of refugees to be erroneous in that it maintains an “us” versus “them” distinction, rather than looking at the responsibilities of all States for all the world’s immigrants. Such theorists argue for a “softer” perception of States as units for the redistribution of wealth. In fact, they would claim that this discussion distances countries that receive immigrants, the North, from the immigrants’ countries of origin, the problematic South, without acknowledging the North’s complicity in the environmental, economic, and political

53. On the need for greater protection of women in refugee law, see, for example, Amy M. Lighter Steill, Incorporating the Realities of Gender and Power into U.S. Asylum Law Jurisprudence, 1 TENN. J.L. & POL’Y 445 (2005).
55. Virginia Held explores this issue further in the context of counterterrorism policy. Virginia Held, Morality in International Relations (Feb. 1, 2007) (unpublished manuscript, on file with the author).
56. For example, perhaps echoing this perspective, one theorist has argued for a “softer” perception of States as units for the redistribution of wealth. Robinson, supra note 51, at 236–39.
destabilization of the South. Responsibility, they would argue, need not be divided among States in a mathematical manner using set criteria, but rather should be shared by States in a more generous and flexible fashion.

B. Utilitarianism

Utilitarianism provides additional insights regarding the importance of responsibility sharing. The utilitarian point of view measures moral value according to whether it increases or decreases the total amount of benefit. Applying this school of thought, utility is likely to increase in the most significant manner if States cooperate with each other to share responsibility for protecting refugees. In other words, cooperation could lead to a regime under which responsibility for each refugee would be borne by the State whose utility declines the least as a result. Generally speaking, due to the principle of diminishing marginal utility, utility will, in fact, accumulate under a fairer regime of responsibility sharing in refugee protection. This is also, as Joseph Carens puts it, because “the utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated.” Thus, utilitarianism seems to support responsibility sharing in the context of refugee protection based on the relative costs different States potentially face and their impact on the overall utility.

From a utilitarian point of view, one potential problem with immigration is “the tragedy of the commons.” If responsibility for the protection of refugees is shared, it may discourage a country from improving

58. See generally JOHN STUART MILL, UTILITARIANISM (1895).
60. Thielemann, supra note 40.
61. Economic research has been inconclusive regarding the economic effects of immigration. See George J. Borjas, Introduction, in ISSUES IN THE ECONOMICS OF IMMIGRATION 2 (George J. Borjas ed., 2000). The same is likely true if we consider the marginal utility of noneconomic factors, such as culture and national identity.
62. Carens, Aliens and Citizens, supra note 9, at 263. This commitment to principles of equality has led Howard F. Chang to conclude that discrimination between noncitizens and citizens is as morally unjust as, for example, discrimination between African Americans and whites. Howard F. Chang, The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory, 40 CORNELL INT’L L.J. 11, 17 (2007) [hereinafter Chang, The Economics of International Labor].
63. For further reading on the concept of “tragedy of the commons,” see Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243, 1244 (1968).
its own economic situation; since such improvement may result in a more significant portion of the responsibility for refugees. This might affect the incentives of individuals to contribute to their State, which might, in turn, affect the utility. With respect to refugees, the most commonly expressed concern is that they cause a drop in national income, as they benefit from the good of a society to which they did not contribute. To some extent, national utility correlates with national income. It should be noted, though, that utility and income are not identical, since utility is comprised of nonfiscal parameters.

However, research has demonstrated that States will have incentives to increase their share of the responsibility because it may increase national income. Even without considering the income increase of new immigrants, there is reason to expect an income increase for the natives of the State to which these immigrants arrive. The only negative economic effects of immigration are on the incomes of low-wage native employees, but these can be corrected through distributive measures, such as taxation.

It should be noted that although maximizing utility is an important consideration in immigration debates, other political and moral consid-

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64. This is comparable to efficiency arguments made in the context of property law theory, particularly domestic takings law. With regard to takings law, it has been argued that full compensation is crucial in providing incentives for owners to invest in their property. The concern raised is that giving people a share of someone else’s property through a taking without fully compensating the property owner will discourage people from investing in their private property, as they will fear losing it to others, who did not invest. However, research shows that full compensation fails to provide as much of an incentive as a progressive compensation regime does. See Hanoch Dagan, Takings and Distributive Justice, 85 VA. L. REV. 741, 748–56 (1999).


67. A comprehensive discussion of the measures for redistributing income and other profits among high- and low-wage native employees and immigrants is beyond the scope of this Article. For such a discussion, see Chang, Liberalization Immigration, supra note 65. According to Chang, the concern sometimes raised that increasing the share of responsibility and admitting more immigrants will impose a greater burden of taxation can be refuted by the fact that immigrants will also be taxed on their income as soon as they are employed in their State of immigration. Additionally, the burden of taxation does not have to be increased if immigrants are not fully integrated into the State’s welfare system. Id. at 1155.

C. Distributive Justice Theory

Finally, distributive justice theory provides a more complex analysis of the significance of responsibility sharing with respect to refugees. Since there are countless discussions on immigration and distributive justice, I will focus on the analyses that are most substantially relevant to responsibility sharing.69

One interesting approach is that of “cosmopolitan egalitarianism,” the roots of which can be traced back to the writings of John Rawls.70 Rawls puts forth an original position on how to form just social institutions.71 These institutions are characterized by the fact that their decisions should be made using “a fair procedure so that any principles agreed to will be just.”72 According to Rawls, parties should shield themselves behind “the veil of ignorance” so that they are unaware of their own traits and are not biased by self-interest when deciding which option is fairer.73 The parties are to have no knowledge of morally arbitrary factors, such as ability, class, political situation, and social status.74 They should know, however, the key characteristics of their society and culture, though not about the implications of these factors for themselves.75 Rawls claims that these conditions would guarantee just resolutions.76 In Rawls’ hypothetical, parties choosing among options behind the “veil of ignorance” are expected to apply the “maximum rule for choice under uncertainty.”77 In other words, parties will adopt “the alternative . . . [according to which] the worst outcome . . . is superior to the worst outcome of others.”78 As posited by Rawls, two principles of justice are bound to the result. The first position is that “each person is to have an equal right to the most

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69. For additional discussions on distributive justice aspects of immigration, which coincidentally touch upon responsibility-sharing issues, see, for example, SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 9–12 (2004); WALZER, supra note 9, at 46–48; Coleman & Harding, supra note 9, at 38;
71. See generally RAWLS, JUSTICE, supra note 70, at 136.
72. Id.
73. Id.
74. Id. at 136–37.
75. Id. at 137
76. Id. at 136–37.
77. Id. at 152.
78. Id. at 152–53.
extensive basic liberty compatible with a similar liberty for others.”  

The second position is that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”

Although Rawls did not intend for this notion of justice to be applied internationally, his ideas were further developed by cosmopolitan egalitarians, who argue that since nationality is a morally arbitrary trait and therefore should remain behind “the veil of ignorance,” States have the same compelling duty towards noncitizens as they have towards their own citizens. This theoretical paradigm can also ground claims for open borders. Such theorists claim that States interact in the most significant ways, especially in terms of participation in institutions, economy, and commerce, and are not independent of each other or isolated. If, unlike Rawls seems to imply, States are not perceived as “self-contained,” then there is support for thinking of an international original

79. Id. at 60.
80. Id.
81. Rawls applies his principles of justice within a “self contained national community,” meaning a national community self-sufficient and territorially defined by borders. Id. at 457. Rawls attempts to distinguish States from peoples in a manner that I find rather unconvincing, though I will not dwell upon this issue. It should be noted that Rawls seems to think that “peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.” Id. at 37. Thus, “well-ordered societies have a duty to assist burdened societies in their attempt to” achieve order. Wilfried Hinsch, Global Distributive Justice, in Global Justice 54, 62 (Thomas W. Pogge ed., 2001). It does not appear, however, that Rawls believes wealth should be transferred from richer to poorer societies. For a detailed critique of Rawls’ position, see, for example, id. at 62–66. Other philosophers support Rawls’ conclusion stated above. Nevertheless, much like Rawls, his supporters maintain that this duty should not be interpreted to support “ethical egoism,” but rather assume the form of humanitarian assistance by governments or by international nongovernmental organizations to minimize global poverty, regardless of one’s conception of justice. See, e.g., Michael Blake, Distributive Justice, State Coercion, and Autonomy, 30 Phil. & Pub. Aff. 257 (2001); Stephen Macedo, What Self-Governing Peoples Owe to One Another: Universalism, Diversity and the Law of Peoples, 72 Fordham L. Rev. 1721, 1723 (2004); Thomas Nagel, The Problem of Global Justice, 33 Phil. & Pub. Aff. 113, 118–19, 128, 132 (2005).
82. I refer in the following paragraphs mostly to the ideas of the two most prominent scholars within this school of thought, Charles Beitz and Thomas Pogge. For others’ discussions of the application of distributive justice in the global sphere, see, for example, Carens, Aliens and Citizens, supra note 9; Joseph Carens, Immigration, Welfare and Justice, in Justice in Immigration, supra note 9, at 1.
83. Timothy King, Immigration from Developing Countries: Some Philosophical Issues, 93 Ethics 525, 527 (1983).
position similar to the one described by Rawls above, where the same principles of justice apply. In the international sphere, wealth would be distributed to maximize the benefit for the least well-off persons and States. As such, this point of view is a sophisticated twist on egalitarianism, protecting substantial, rather than formal, equality.

By extension of the theories outlined above, cosmopolitan egalitarians would support a responsibility-sharing regime that works to the advantage of the least prosperous countries and the least prosperous refugees. According to this school of thought, if States remain behind the hypothetical “veil of ignorance” and do not consider the risks that they will incur as a result of disasters in other States, they will likely promote and contribute to a responsibility-sharing regime.

David Miller offers a rather different take on responsibility sharing, presenting it as a distributive justice problem. Although his discussion is general and not specific to immigration, Miller offers rather concrete guidelines for responsibility sharing. Calling this a problem of “remedial responsibility” he argues that

agents should be held remediably responsible for situations when, and to the extent that they were responsible for bringing those situations about . . . . [W]e look to the past to see how the deprivation and suffering that concern us arose, and having established that, we are then able to assign remedial responsibility.

87. Compare this with the idea of insurance introduced by Dworkin. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 331–40 (2000). Dworkin addresses the possibility of insurance as a substitute for welfare policies, although his discussion is entirely unconnected to immigration. The decision to take out insurance is made without awareness of the actual risk to one’s employment, only with respect to one’s fears and willingness to take risks. The idea of insurance can be applied at the international level, with each country deciding how willing it is to risk a mass influx of immigrants, without knowing the likelihood that such an influx will occur. Japan, which values its social homogeneity, would likely be willing to pay more to insure itself against migrants. Israel, which values its Jewish character, might do the same. Other countries might not. For further discussion on the concept of insurance in the context of responsibility sharing, see, for example, Thielemann, supra note 40.
88. The rationales behind the principle of remedial responsibility are somewhat similar to those of tort law. David Miller, Distributing Responsibilities, 9 J. Pol. Phil. 453, 455 (2001).
Miller believes that moral responsibility, rather than merely causal responsibility, should affect the assignment of remedial responsibility.89 For example, a specific State should assist refugees if its policies contributed to their situation, either by acting affirmatively or by refraining from taking positive action.90

Furthermore, Miller maintains that remedial responsibility should be assigned to a specific agent based on its superior capacity to end a morally concerning situation.91 Miller would therefore argue that in the context of refugee policy, the most appropriate State to bear the responsibility of assisting refugees is the one that has the best capacity to do so. Since using State capacity as a criterion is both complex and problematic in creating disincentives,92 Miller would suggest applying this principle only after identifying those agents that have a special responsibility for causing refugee flight.93

Miller offers an additional principle according to which responsibility should be assigned to a particular State. Under the communitarian principle, Miller assumes that agents feel a greater sense of responsibility towards those with whom they share communal ties as compared to those with whom they do not.94 However, Miller recognizes that this principle cannot be used for all responsibility-distribution purposes because there may be circumstances where no specific agent has communal ties with the victim population and there may be occasions in which an agent with no communal ties is the only one in a position to assist.95 Additionally, this principle does not help to determine which State within a community is in the best position to be held responsible.96 So, in many occasions, applying the communitarian principle could prove to be not very useful. In order to determine which agent or agents should bear remedial responsibility, Miller suggests that, in any specific situation, we should weigh their capacity and their communal ties.97

As we can see, distributive justice literature contributes significantly to this discussion. While the principles of cosmopolitan egalitarianism provide general support for burden sharing, Miller’s writing offers more

89. Miller explains that the concept of moral responsibility is one of causal responsibility. See id. at 457.
90. Often it is difficult to draw the line as to what constitutes moral responsibility. See id. at 457–59.
91. Id. at 460–61.
92. Id. at 460–62.
93. Id. at 462.
94. Id.
95. Id. at 462–64.
96. Id. at 463.
97. Id. at 468.
concrete and specific factors. I will elaborate on these and other considerations in the following Part.

III. CRITERIA TO DETERMINE THE DIVISION OF THE RESPONSIBILITY

Given the above-mentioned moral considerations, in particular those discussed by David Miller, a critical question remains: how should responsibility be apportioned among States? Several criteria are relevant to this determination. This Part of the Article will review the main criteria, explaining why they should be the central considerations for responsibility sharing. Interestingly, these factors are very similar to those affecting the scope of States’ duty to accept immigrants, as discussed in Part I.98

Perhaps the most important factor in determining responsibility sharing is what I would like to call a country’s “absorption capacity,” which is, by and large, a socio-economic criterion.99 Here absorption capacity refers to a State’s ability to endure additional responsibility in a way that, from a functionalist point of view, will not dramatically affect the State or will not radically influence its economy. This is an umbrella term that can be measured by assessing several indicators, such as a country’s gross national product (“GNP”), average life expectancy, demand for employment, and land reserves.100 A country that lacks financial resources or suffers from low life expectancy, widespread unemployment, or scarcity of land resources is likely to be unable to provide for its own citizens, let alone for additional persons.101

In many cases, it is possible to draw a correlation between the general willingness of States to welcome immigration or to extend foreign aid, and their absorption capacity. Countries such as Canada or Australia, whose absorption capacities are high given their GNPs, strong demands

98. See Part I.
99. This consideration links well to David Miller’s capacity criterion, because a State’s capacity to take in immigrants is closely connected to its economic capabilities. See discussion supra Part II.C. In some cases, absorption capacity may also be connected to the moral responsibility criterion if a GNP has risen as a result of the exploitation of refugees’ States of origin and this exploitation caused their immigration. See discussion supra Part II.C.
100. These are the economic criteria scholars often mention when considering factors that should inform responsibility sharing. However, they are certainly not exclusive. Other examples of economic criteria include “population density and the quality of the environmental infrastructure.” See Jonathan Seglow, The Ethics of Immigration, 3 POL. STUD. REV. 317, 330 (2005).
101. Grahl-Madsen has referred to this as the “refugee per GNP” criterion, suggesting that there should be a correlation between a country’s economic situation and its share of responsibility for the protection of refugees. Atle Grahl-Madsen, Ways and Prospects, 21/30 AWR BULL. 278 (1983). See also Noll, supra note 19.
for labor, and vast land reserves, have demonstrated interest in receiving additional immigrants. Accordingly, they could be assigned a large share of the responsibility for the protection of refugees.

Geographic proximity is currently one of the dominant considerations for deciding which country should bear such responsibility. This is because a geographically proximate country is likely to be the first country of asylum and, as such, will likely have to provide for the refugees who arrive at its borders. This practice in itself is not sufficiently morally justifiable. Geographical proximity is only a viable consideration if we assume that neighboring countries generally tend to have some sort of special solidarity bonds among them or to be particularly responsible for each others' situation. This assumption is oftentimes true, since in many cases neighboring countries are members of regional organizations and parties to regional covenants. While proximity relates well to Miller's above-mentioned communitarian principle or remedial responsibility principle, this is not always the case.

The underlying logic behind this criterion is “special solidarity bonds.” Special solidarity bonds do not always exist among neighboring countries, but may exist among geographically distant States. For example, these bonds may exist between former colonial powers and former colonies, States with strong financial or cultural ties, and countries that are

102. For more on the connection between Australia's economic situation and resettlement program, see Glenn Nicholls, *Unsettling Admissions: Asylum Seekers in Australia*, 11 J. REFUGEE STUD. 61 (1998).

103. It should be noted that using a country’s absorption capacity as a factor for apportioning responsibility should follow the same logic as implementing a relative or progressive taxation system.

104. As I will demonstrate in the following sections, the issue of geographical proximity is central to the proposal made by Hathaway and Neve. See James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997). It is not the case that all States share bonds of solidarity with neighboring countries. For example, the State of Israel is surrounded by enemy countries and does not belong to any of the region’s bodies or covenants. In such cases, geographical proximity does not justify imposing responsibility on a State.

105. See discussion supra Part II.C.

106. Jürgen Habermas argues that First World States have an obligation to absorb Third World immigrants as a way of atoning for the evils of colonialism. Jürgen Habermas, *Struggles for Recognition in the Democratic and Constitutional State*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 107, 141 (Shierry Weber Nocholsen trans., Amy Gutmann ed., 1994). To the extent that colonial powers are morally responsible for the immigration of refugees, Habermas’ position corresponds with Miller’s moral responsibility criterion. See supra note 89 and accompanying text. The special connection of asylum seekers and former colonizers is also apparent from the example given in the introduction to this Article; many Eritreans flee to Italy, which colonized Eritrea.
otherwise in an alliance. This notion correlates with the ethics of care justification to responsibility sharing.\textsuperscript{107}

Responsibility may also be attributed to a State when it has an exploitative relationship with the refugee’s State of origin.\textsuperscript{108} For example, one State may exploit the natural resources or work power of another, resulting in the immigration of refugees. Such a case would comport with Miller’s argument on remedial responsibility’s connection to moral and causal responsibility.\textsuperscript{109} If a State is responsible in some other way for the immigration of refugees, then it should also bear the responsibility of providing for them. The exploiting State would also internalize the costs of its exploitation. For instance, a State could be responsible for negligently polluting the air, water, or land of another State, prompting the immigration of persons in a refugee-like situation due to ecological damages. Much like the case of exploitation, the State should bear the costs of its actions by providing for the refugees. It should be observed that this consideration could be applied to impose responsibility on States of origin, when their own harmful, negligent, or oppressive policies cause refugees to flee to other countries.

In this context, it is also important to consider the effect of a responsibility-sharing regime on the incentives of countries of origin. For example, more generous protection policies, which may result from a better responsibility-sharing regime, could, in some sociopolitical circumstances, discourage a State of origin from adopting more efficient policies or more just rules of resource distribution. Thus, it could be argued that policymakers should consider the effects of responsibility-sharing modalities among receiving States on the incentives and behavior of States of origin. For example, these modalities could try to incorporate the State of origin as one of the States shouldering part of the costs and burdens involved.\textsuperscript{110} We might consider a related scenario, in which, under a generous protection regime, a State of origin might create policies designed to cause mass flight as a means of putting pressure on the receiving State(s). Responsibility-sharing mechanisms should create incentives to prevent such behavior.

Other relevant criteria relate to cultural and ethnic considerations. Countries resisting immigration may claim that they are culturally distinct; maintain a certain demographic structure; are too homogenous, resulting in a low assimilation rate for foreigners; or have special cultural

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{107} See discussion \textit{supra} Part II.A.
\item\textsuperscript{108} See Miller, \textit{Justice and Global Inequality}, \textit{supra} note 9, at 204–09.
\item\textsuperscript{109} See discussion \textit{supra} Part II.C.
\item\textsuperscript{110} See \textit{infra} Part V.E.
\end{itemize}
\end{footnotesize}
or ethnic characteristics that should be protected from foreigners.111 These issues relate back to Miller’s capacity criterion,112 as the cultural and demographic profile of a State closely tracks its ability to assimilate incoming refugees. Comparing the capacities of different States is challenging, however, as capacity is a very abstract concept; accordingly, it is difficult to form policy recommendations based on this set of criteria. A theory should be developed to determine when a country’s cultural or ethnic claim is justified and when it should be rejected,113 though this is beyond the scope of my inquiry.114 On the other hand, if a specific group of refugees has some cultural or ethnic affinity or other type of a relationship with a particular State,115 then it might be justifiable to require that State to take a larger share of the responsibility.116 For example, it might make sense for Israel to take a larger share of the responsibility towards Jewish refugees, as it was designed to be a Jewish State and Jewish immigrant are most likely to fit into its society.

In sum, it seems that a fairer responsibility-sharing system using established criteria should replace the current, arbitrary distribution of responsibility. As mentioned above, in the majority of cases, the most important criterion according to which responsibility should be distributed is wealth related, since providing for refugees is mainly perceived as a serious economic burden. Yet, wealth is not the only consideration. I have attempted to offer a concise list of additional criteria that should be considered when forming a responsibility-sharing regime, elaborating on Miller’s use of capacity and solidarity. Overall, wealthier countries with stronger absorption abilities should bear more responsibility than poorer countries. In addition, countries that have a specific bond of solidarity with countries of origin should bear more responsibility than those that do not. Finally, countries responsible for the immigration should be required to internalize some, if not all, of the costs of providing for the immigrants. As Miller concludes, these different considerations should

111. See Schuck, supra note 28, at 280.
112. See discussion supra Part II.C.
113. This approach might contradict that of cosmopolitan egalitarianism, though. See supra Part II.C.
114. Schuck uses the example of Japan in his writing, without morally judging its tendency to close its borders to refugees. See Schuck, supra note 29, at 274–75. The immigration policy of Israel, which almost exclusively allows only Jewish people to immigrate, has been the subject of much theoretical debate. See, e.g., CHAIM GANS, THE LIMITS OF NATIONALISM (2004). See also DWORIN, supra note 87.
115. See discussion supra Part II.A.
116. Exploring cases where a State and immigrants share an ethnic affinity, Matthew Gibney argues that the State will not be as prone to barring immigrants to enter, even if it bears some economic price as a result. See Gibney, supra note 32, at 216–19.
be applied simultaneously and balanced against each other. Criteria should be applied in a flexible and generous manner, through negotiation and discussion, rather than imposition or mathematics.

IV. RESPONSIBILITY SHARING IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

This part of the Article moves beyond the moral issues raised by responsibility sharing to the more legal and practical aspects of the problem. While discussions on the moral issues of responsibility sharing are rare, international law does touch upon them, albeit in rather general terms. International law cites the need for responsibility sharing in addressing the problems of climate change, pollution, security, peacekeeping, and even immigration specifically. International legal norms establish general principles of responsibility sharing, but almost always refrain from providing specifics, leaving it to the States to determine the important considerations and responsibility-sharing mechanisms.

Responsibility sharing as a general, fundamental principle in international law is reflected in Articles 55 and 56 of the Charter of the United Nations. Article 55 commits Member States to promote “higher standards of living, full employment and conditions of economic and social progress and development.” In Article 56, Member States also pledge “to take joint and separate action in co-operation with the Organization” in order to achieve these ends. These principles are further elaborated in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, the 1966 International Convention on Economic, Social and Cultural Rights, and the 1986 Declaration on the Right to Development.

The Convention Relating to the Status of Refugees also emphasizes the importance of international responsibility sharing. In its preamble, the
Convention specifically recognizes the principle of responsibility sharing with respect to refugees. 125 Moreover, the key principle of the Convention, the principle of nonrefoulement, 126 prevents States from deporting persons to other countries where their lives, physical safety, or freedom would be at risk. This principle arguably forces States to negotiate responsibility sharing because it bars States from “dumping” refugees in other countries. 127

Since 1951, there have been some efforts to promote additional agreements on responsibility sharing for specific refugee crises, however they were unsuccessful, as there were insufficient incentives to cooperate and the agreements were not enforced. 128 This seems to have been the result of the fact that, instead of cooperating with other States and sharing the responsibility, some countries prefer to adopt stricter asylum laws, which lower their responsibility for assisting refugees, thereby shifting it to other countries. 129

Despite the rhetoric of many governments and international organizations, 130 and the general norms of international laws that display a prima facie commitment to responsibility sharing, 131 the responsibility of providing for refugees remains unevenly distributed. 132 Some countries avoid accepting refugees in the hopes that other countries will assist them instead. 133 Ad hoc international responsibility-sharing efforts have been undertaken in the past, but historically, they have only been sporad-

125. Convention, supra note 2, pmbl.
128. Suhrke offers the examples of the post-World War II resettlement program, the Vietnamese resettlement program, and burden sharing in Europe in the 1990s to illustrate ad hoc responsibility-sharing efforts. Suhrke, supra note 21, at 405. See also Schuck, supra note 28, at 272.
129. Cook, supra note 29, at 342–43.
130. Hathaway & Neve, supra note 104, at 117.
132. Schuck, supra note 28, at 246–47.
133. Cook, supra note 29, at 342–43.
ically successful because these efforts were not tied to a strong moral sense of duty. Regional instruments, while playing a significant role in the geographic area of their parties, fail to offer a comprehensive resolution to the problem of responsibility sharing. Therefore, international mechanisms based on the principles of need and equity must still be established.

V. MECHANISMS OF RESPONSIBILITY SHARING

Given that international law refrains from defining the specifics of responsibility sharing, this task is left to the States. The promise behind crafting responsibility-sharing mechanisms is that they will assist in allocating responsibility among the different States. Developing such mechanisms is difficult, mostly because the States that do not presently bear their share of responsibility have little incentive to participate. Moreover, countries currently bearing a lesser burden are the developed countries, which tend to have a significant influence on the establishment of international institutes and regimes.

Nevertheless, several types of international responsibility-sharing mechanisms are possible. Generally, these mechanisms should seek to promote a more just distribution of responsibility, according to the moral principles outlined in Parts II and III of this Article. Some mechanisms would also aim to decrease the burden on host States by decreasing the number of refugees. In the following Sections, I will first describe six possible responsibility-sharing mechanisms and illustrate the possible impacts on hypothetical States A, B, C, and D. Then, I will discuss how each of these options interrelates.

A. Quotas per Country

The first mechanism of responsibility sharing is for States to have quotas for refugees. This means that States C and D will have to absorb some of the refugees from State B who have reached State A. Under this regime, States A, C, and D will predetermine the specific percentage of refugees that they will each accept, irrespective of the tendency of the majority of immigrants to flee to State A. Essentially, this solution phys-

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134. See Cook, supra note 29, at 340–41; Suhrke, supra note 21, at 397.
136. See discussion supra Part II.C.
137. See discussion infra Part IV.E–F.
ically redistributes the immigrants among the different countries in a fairer way.\textsuperscript{138}

To some extent, this mechanism has already been implemented. Some countries allow the resettlement of refugees coming from a different first State of asylum.\textsuperscript{139} However, these countries are few and far between, and they do so merely due to their sense of responsibility or for self-interested reasons, and not due to any formal arrangement.\textsuperscript{140}

This proposed solution, though, is somewhat problematic, as it requires uprooting persons from the countries to which they fled and exposing them to the trauma of a second migration. In fact, when systematically and bureaucratically applied, this mechanism could result in additional human rights violations in the form of institutionalized, large-scale forced removal.\textsuperscript{141} According to James Hathaway, this approach could be dangerous; it allows governments to move persons from one State to another without regard to the quality of protection they might receive.\textsuperscript{142} Refuge quotas are likewise destructive to immigrant communities, which provide a huge source of comfort and assistance. These communities are shattered when the immigrants are distributed among different countries.\textsuperscript{143}

Additionally, it is unclear whether this proposed solution will eventually lead to an even distribution of responsibility. For example, although State C may receive a proportionate number of refugees from State B, depending on the education, skills, and wealth of the migrant population itself, the refugees may benefit and contribute to State C, rather than exhaust its resources. In this circumstance, State C absorbs a population that triggers fewer costs, while State A must still incur the costs of refugees unable to bring assets to the State. To the degree that it is possible, the distribution of immigrants should take into consideration the special characteristics of the persons and countries in a way that minimizes the responsibility and maximizes the efficiency. However, this optimization might be too complicated to actualize.

\begin{itemize}
\item \textsuperscript{138} See Grahl-Madsen, \textit{supra} note 101 (proposing a similar scheme for the European Community).
\item \textsuperscript{139} On the scope and limitations of the U.S. resettlement program, see, for example, David A. Martin, \textit{A New Era for U.S. Refugee Resettlement}, 36 \textit{Colum. Hum. Rights L. Rev.} 299 (2005).
\item \textsuperscript{140} Suhrke, \textit{supra} note 21, at 397–98.
\item \textsuperscript{142} Hathaway & Neve, \textit{supra} note 104, at 143–46.
\item \textsuperscript{143} Under this regime, special care should be taken to ensure that family members are not separated from each other.
\end{itemize}
B. Regional or Group Responsibility-Sharing Solutions

Hathaway and Neve argue that regional or group arrangements for responsibility sharing are the most effective solution.\textsuperscript{144} They believe that the pattern of cooperation should be “common but differentiated responsibility.”\textsuperscript{145} Under this mechanism, each group of States will agree in advance to contribute to protect refugees who arrive at the territory of any state member of the group. States will cooperate in a manner akin to participation in an insurance scheme . . . [and] minimize their particularized risks by joining with others to make protection feasible throughout the territories of all interest-convergence group member states.\textsuperscript{146}

Hathaway and Neve maintain that regional or group mechanisms would allow States to contribute honestly to the responsibility-sharing efforts according to each State’s particular constraints and resources.\textsuperscript{147} Cooperation within such groups could be achieved more easily through an international arrangement, mostly because smaller groups can better coordinate their efforts and have a greater incentive to do so, as the costs of refugee flight are felt more locally.\textsuperscript{148} Also, this mechanism is more efficient in dissociating the site of first arrival from the place of asylum, creating an incentive for States to take an interest in the treatment of refugees in other countries.\textsuperscript{149} This approach has been adopted in Europe, where, in 2000, the European Refugee Fund (“ERF”) was formed to assist responsibility-sharing efforts among the European States.\textsuperscript{150} Also, the

\begin{itemize}
  \item 144. Hathaway & Neve, supra note 104, at 143–46.
  \item 145. Id. at 144.
  \item 146. Id. at 145. This solution is offered by Hathaway and Neve with respect to the question of international responsibility sharing for temporary protection mechanisms, which they believe should be promoted. Id. However, regardless of the scheme of protection, this mechanism is worth considering. For a detailed explanation on the link between responsibility sharing and temporary protection, see Thorburn, supra note 141.
  \item 147. Hathaway & Neve, supra note 104, at 143–46.
  \item 148. Id. at 187–212.
  \item 149. Id. at 150–51.
Dublin Accord regulates responsibility sharing among members of the European Union.\textsuperscript{151} Although groups of States or neighboring States will sometimes have more incentive to cooperate regarding refugees, Hathaway and Neve are unable to explain why States would be willing to form these collective arrangements for responsibility sharing.\textsuperscript{152} Moreover, they themselves criticize this mechanism for imposing additional burdens on developing nations.\textsuperscript{153} It seems that this mechanism is, therefore, unlikely to redistribute the responsibility more fairly, and might even result in institutionalizing an unfair redistribution of responsibility.\textsuperscript{154} The European example cited above only illustrates the point that although some countries are willing to form group responsibility-sharing mechanisms, they do so with countries that have similar economic resources and encounter a similar risk in having to protect and provide for refugees. We can anticipate that most countries will be reluctant to join group mechanisms with countries that face a larger risk or have lesser socio-economic resources.

\textit{C. Funding Assistance or Global Taxation}

An alternative mechanism of international responsibility sharing simply accepts the fact that immigrants tend to favor certain countries. This mechanism seeks to facilitate a fairer division of the costs and responsibilities associated with refugees by transferring funds from one State to another. One way of implementing this idea is to have the States that bear a disproportionately small amount of the responsibility proportionally compensate the States that bear a disproportionately large percentage of the responsibility.\textsuperscript{155} This solution requires States to cover the costs of providing for refugees even if they did not receive any immigrants. Essentially, it is a mechanism for distributing the costs of providing for refugees through a system of global taxation.

Calculating these costs is somewhat difficult, as they should not only take into account the out-of-pocket money spent on needy migrants. The

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\textsuperscript{151} Essentially, the Dublin Convention prevents the submission of asylum applications in several countries. The morality of this goal, though, is objectionable. See \textit{Dublin Convention}, \textit{supra} note 135.


\textsuperscript{153} Hathaway & Neve, \textit{supra} note 104, at 145–46.

\textsuperscript{154} Anker et al., \textit{supra} note 152, at 304–10.

\textsuperscript{155} Noll, \textit{supra} note 19, at 239–40.
calculation should also consider the social costs and indirect burdens, which include long-term and short-term costs as well as the benefits the host country will enjoy as a result of the refugees’ immigration. Otherwise, over- or under-compensation might occur. Due to the complexity of a compensation regime, it seems somewhat impractical. An additional variation of this mechanism, as offered by Schuck, is that assistance to refugee-hosting countries should not be limited to monetary contribution, but rather should include political assistance, transference of commodities, and so on.

D. The Trading of Quotas

Schuck provides yet another possible mechanism for responsibility sharing, which, in one sense, is a combination of a few of the above-mentioned solutions. This mechanism seems to be inspired by the Coase Theorem. The principles of the mechanism, as described by Schuck, are as follows:

1. agreement by states in a region on a strong norm that all ought to bear a share of temporary protection and permanent resettlement needs proportionate to their burden-bearing capacity;
2. a process for determining the number of those who need such protection;
3. a set of criteria for allocating this burden among states in the form of quotas;
4. a market in which states can purchase and sell quota compliance obligations; and
5. an international authority to administer the quota system and regulate this market.

The idea is that countries will determine proportional refugee quotas among themselves, and if they are unable or unwilling to assume their share of the responsibility, they can then trade it to another country. Under this regime, countries that highly value cultural homogeneity, for example, might prefer not to accept refugees, but prefer to financially support refugee resettlement elsewhere. Schuck makes the point that some countries have already adopted this solution to some extent, since

156. See Cook, supra note 29, at 337–38.
158. Id.
160. Id. at 270–71.
161. Schuck, supra note 28, at 283–84.
162. Schuck cites to the case of Japan, which, in order to preserve its homogeneity, may prefer to sell its quotas to other countries less concerned about their composition and more willing to receive refugees. Id. at 284.
in certain refugee crises States that do not wish to accept refugees have instead supported the countries of first asylum.\textsuperscript{163}

The critics of this approach, namely, Anker, Fitzpatrick, and Shacknove, claim that this proposal is not feasible.\textsuperscript{164} Furthermore, critics argue that this is yet another way of confining refugees to the developing States, not a meaningful opportunity for responsibility sharing.\textsuperscript{165} The idea that States will be able to bargain effectively and equitably over quotas is unrealistic, given the imbalance of power among States.\textsuperscript{166} Finally, this solution can be criticized for treating refugees like commodities\textsuperscript{167} as well as for being derived from a utilitarian, rather than a distributive justice point of view.\textsuperscript{168} Although Schuck has rejected or addressed these critiques, he admits that his proposal is somewhat problematic and that it should be given more thought.\textsuperscript{169}

E. State of Origin Liability

Another approach of responsibility sharing proposes that the States of origin should be held liable for their externality, in the sense that refugees’ host countries could demand compensation from them.\textsuperscript{170} While hosting States provide only surrogate protection, this mechanism returns to the principle that a State’s primary responsibility is towards its own nationals, a fundamental idea in international law.\textsuperscript{171}

Scholars and experts in refugee law have previously recognized the need to hold States liable for the causes of refugees flight, arguing that refugees should receive compensation from their countries of origin.\textsuperscript{172} Unfortunately, this idea, while receiving some attention during the 1980s and early 1990s, has since received little scholarly attention. At first, it was linked exclusively to the idea of repatriating refugees.\textsuperscript{173} Eventually,
it was also understood to be a notion supported by human rights norms in domestic and international laws.\footnote{\textit{Id.} at 538–46.}

This proposal materialized when the International Law Association drafted the Cairo Declaration of Principles of International Law on Compensation to Refugees in 1992 ("Cairo Declaration").\footnote{\textsc{Luke T. Lee, The International Law Association: Report of the Sixty-Fifth Conference} 429 (1993).} The Cairo Declaration stipulates, \textit{inter alia}, that “[a] state is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated by international law to compensate an alien.”\footnote{Luke T. Lee, \textit{The Cairo Declaration of Principles}, 87 \textsc{Am. J. Int’l L.} 157, 158 (1993).} However, the framers were concerned that if refugees were given the right to seek compensation from their States of origin, then host Governments would be reluctant to assist them. Therefore, another principle of the Cairo Declaration specifies the following:

The possibility that refugees or UNHCR may one day successfully claim compensation from the country of origin should not serve as a pretext for withholding humanitarian assistance to refugees or refusing to join in international burden-sharing meant to meet the needs of refugees or otherwise to provide durable solutions, including mediation to facilitate voluntary repatriation in dignity and security, thereby removing or reducing the necessity to pay compensation.\footnote{\textit{Id.} at 159.}

The idea that a State is also liable to other States that provide for its nationals compliments the aims of the Cairo Declaration to protect all refugees and negates the aforementioned risk that host Governments will be disinclined to aid immigrants. According to the Declaration’s rationale, States of origin have a duty to refrain from acts that would cause injury or damage to persons or property situated in the territory of other States, in this case, host States.\footnote{\textit{Lee, Right to Compensation}, supra note 170, at 553–54.} Naturally, the States of origin should not be unfairly burdened; thus, governments should not be required to compensate both the host States and the refugees for the same damages. The concept of State of origin liability was implemented in the context of the Geneva Accord, a model peace agreement proposed to resolve the Israeli-Palestinian conflict.\footnote{\textit{See Geneva Accord: A Model Israeli-Palestinian Peace Agreement}, available at \url{http://www.geneva-accord.org/mainmenu/english} (last visited Mar. 25, 2009).} Article 7(3) of the Geneva Accord asserts that
“[t]he Parties recognize the right of states that have hosted Palestinian refugees to remuneration.”

Typically, in circumstances resulting in refugee flight, the State of origin is liable for the externality where the government fails to protect the refugee. However, some events causing refugee and refugee-like situations cannot be attributed to the State of origin, rather the immigration is the result of a force majeure. This is the case, for example, with natural disasters, outside coercion or aggression like war or occupation, or conditions the State is unable to protect against.

Generally speaking, though, the liability of the State of origin to the host State could be justified on several grounds. First, the country of origin has breached the sovereignty of the host State by forcing it, so to speak, to accept its nationals, as well as disrupting the “order” of nationality in the world. Second, one could argue that a “quasi-contractual” relationship exists between the host State and the State of origin, which establishes grounds for compensation.

Through a liability rule, the State of origin would internalize the cost of its externality, which cannot be accomplished through any of the other mechanisms proposed. It should be stressed that in this context a liability rule is necessary and that any other property allocation rules would be insufficient, since the transaction costs are immense and the parties are not necessarily rational.

State of origin liability has several positive and negative aspects. Regarding the former, State of origin liability creates incentives for both host States and States of origin, thereby optimizing the protection of the rights of refugees. In particular, it seems that this mechanism would create the proper ex ante incentives for States of origin to prevent the flight of refugees. This could positively translate into increased efforts by these States to achieve economic growth and promote the just distribution of resources in order to provide for and ensure the adequate living

180. See id. art. 7(3). “Refugees shall be entitled to compensation for their refugeehood and for loss of property. This shall not prejudice or be prejudiced by the refugee’s permanent place of residence.” Id. art 7(2).
181. This is accomplished in the Convention through the requirement of “well-founded fear of being persecuted.” See Convention, supra note 2, art 1.
182. Cf. ILC, Draft Articles on the Responsibility of States, supra note 171, art. 23 (relating to the responsibility for wrongful acts that are a result of force majeure).
183. See id. arts. 18, 20–27.
185. Id. at 556–58. Lee argues that “[s]ince refugees are, by definition, those forced to leave their countries by their own governments, a quasi-contractual relationship exists between their governments and those of the countries of asylum.” Id. at 557.
186. Coase, supra note 159.
conditions of their citizens, thereby discouraging immigration in a constructive manner. Hence, if applied correctly, the liability rule may not only distribute the responsibility of providing for refugees more fairly, but also decrease the number of refugees in the world. It is important to stress that, under this compensation regime, States of origin cannot excuse themselves from compensating host States by claiming that the host States could have applied stricter immigration policies. Such reasoning does not conform to the basic principles of human rights.187

While promising, the liability rule raises some questions. There is a risk that, in some cases, this mechanism could lead States to impose restrictions on the freedom of movement in order to prevent some individuals from emigrating. Consequently, this mechanism should be applied only if the right to exit a country is protected and there are serious sanctions for States that create such restrictions in an attempt to avoid liability.188

Enforcement could also be a difficult.189 States of origin may be reluctant to be held liable. The ability to collect compensation from impoverished, developing countries is problematic, although there may be ways around this.190

Additionally, this compensation system could, in fact, serve as a means of preserving the unjust distribution of wealth, as the countries of origin would have to pay money to the host countries, which are frequently

188. Although some of the totalitarian regimes in the early twentieth century infringed on this right, currently, the right to leave a country is relatively well recognized and protected. Many international treaties and declarations support the right to leave one’s state. For example, Article 13(2) of the Universal Declaration on Human Rights provides that “[e]veryone has a right to leave any country, including his own.” G.A. Res. 217A (III) art. 13(2), U.N. Doc A/810, at 71 (1948). This right is also included in the International Covenant on Civil and Political Rights. ICCPR, *supra* note 8, art. 12(2). Although it is subject to some restrictions, the right to leave a State is also considered a customary international norm. Yaffa Zilbershats, *The Right to Leave a Country* 17–26 (Jul. 7, 1991) (unpublished Ph.D. dissertation, on file with the Brooklyn Journal of International Law).
189. Lee proposes how this liability regime should be applied. First, he argues that the host country should protest the fact that it has to deal with the immigrants of the State of origin. If its protest does not lead to resolution of the problem, then peaceful solutions under Chapter VI of the U.N. Charter should be sought, including diplomatic negotiations or judicial proceedings at the International Court of Justice. Finally, if all else fails, sanctions should be applied. Lee, *Right to Compensation*, supra note 170, at 560–65.
190. For example, if a country of origin is unwilling to compensate the host State, its assets in foreign institutes could be confiscated or these institutes could withhold financial support.
wealthier. Imposing additional financial obligations on countries of origin could cause their domestic situations to deteriorate further, which, in turn, could cause another mass outpouring of refugees. Therefore, this compensation mechanism should only be applied with care and after close consideration of each country of origin’s situation and capabilities.

F. Addressing the Core of the Problem

The final responsibility-sharing proposal is to address problems in the countries causing the immigration of refugees and to offer assistance in resolving them. This could be accomplished in various ways, including offering financial aid, transferring knowledge, providing military assistance, or engaging in humanitarian intervention. Of course, some of these measures risk violating a State’s sovereignty, but at times they might be more effective than attempts to regain control over a deteriorated situation. As each of these measures can be costly, they should be borne by the different countries in a proportionate manner. Thielemann and Dewan suggest that this mechanism is most effective when it utilizes each country’s competitive advantage. For example, a country with a strong military force could undertake military intervention or peacekeeping, whereas a country with a great deal of vacant land and a small population could absorb many immigrants, while a country with many investment resources could assist the country of origin in furthering development. In sum, countries can shield themselves from the responsibility of providing for refugees by directly assisting the countries of origin.

Although desirable, it is often very difficult to address the root causes of immigration. While this discussion is complex and beyond the scope of this Article, it suffices to say that, unfortunately, States have been relatively reluctant to offer foreign aid to countries of origin and the aid that has been offered has seldom been helpful. Also, it is unclear whether improving conditions in the States of origin will have an impact

191. This is likely due to the fact that internalizing the costs of immigrants from a specific country is not inherently a mechanism of redistribution.


193. Id.; Schuck, supra note 28, at 261–63.


195. Suhrke, supra note 21, at 401–02.

196. Thielemann & Dewan, supra note 119, at 3.

197. On the limited ability of aid, in its various forms, to solve problems in States of origin, see AID IN PLACE OF MIGRATION? SELECTED CONTRIBUTIONS TO AN ILO-UNHCR MEETING, supra note 194.
on the migration figures, both in the short-term and long-term.\(^{198}\) Therefore, while foreign aid is generally morally commendable, it may not always efficiently serve as a means of sharing responsibility for refugees.

**G. Choosing Among Mechanisms**

The mechanisms of responsibility sharing detailed above each offer costs and benefits. Ideally, a number of factors should be considered when choosing among these approaches. The first, and most important, consideration should be which mechanisms States are more willing to accept and apply, with respect to their political constraints and preferences.\(^{199}\) Feasibility is particularly critical. A State’s ability to adopt one mechanism over another may change over time, depending on various constraints, including the preferences of its citizens. Therefore, there should be some flexibility allowing States to utilize different mechanisms at different times. Another consideration is the extent to which the chosen mechanism protects the human rights of the refugees. Finally, responsibility should be assigned in a manner that is sensitive to the different, and often contradicting, moral considerations discussed in Parts II and III of this Article.

**H. Applying Several Responsibility-Sharing Mechanisms**

It is possible to apply more than one responsibility-sharing mechanism simultaneously. For instance, in some parts of the world, one mechanism may provide the answer to the responsibility-sharing problem, whereas another mechanism may be preferable elsewhere. Mechanisms can also overlap to some extent. For example, state of origin liability could generally apply in conjunction with another mechanism of responsibility sharing serving as a backup in cases where the State of origin cannot be held liable. Again, the key in combining the different mechanisms should be feasibility as well as the human rights of the refugees.

Instead of establishing one mechanism to fit all immigration crises, it is advisable to develop a general understanding among States that there is an international responsibility to solve these crises through cooperation and to fit the particular responsibility-sharing mechanism(s) with the specific characteristics of a given refugee crisis. The need to foster such understanding is supported, for example, by the position of some scholars that States are wary of long-term cooperation regimes.\(^{200}\)

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There are several disadvantages to a policy of tailoring a responsibility-sharing mechanism to a specific immigration crisis. Defining the scope of responsibility and assigning it on an individual basis takes time and involves substantial transaction costs, as it requires studying the patterns of migration and their causes, and estimating the costs of protecting refugees. As mentioned above, the duty of nonrefoulement affords time to evaluate the situation and develop an appropriate burden-sharing mechanism.\textsuperscript{201} Nevertheless, due to the complexity of refugee crises, it is necessary to match a specific solution to a specific crisis, while taking into account the criteria discussed in Parts II and III. For example, with each new refugee crisis, responding States would have to determine which countries have sufficient wealth and solidarity with the State of origin, as well as which countries possibly bear moral responsibility for the crisis.

VI. COORDINATING THE EFFORTS OF INTERNATIONAL RESPONSIBILITY SHARING

An outstanding question is who should select and implement the chosen responsibility-sharing mechanism(s). Efforts to coordinate responsibility sharing tend to be complicated and costly. While States play an important role in negotiating and tailoring them, they are usually unwilling to assume further liabilities and responsibilities. As we cannot rely on individual States to switch voluntarily to a more just responsibility-sharing regime, it is important that this effort be coordinated by an international organization like the United Nations.

The United Nations and its subordinate organizations are the most appropriate bodies to determine which responsibility-sharing mechanisms best fulfill the above-mentioned moral obligations. The United Nations is comprised of many States, each with different constraints and priorities, and therefore, it constitutes the most suitable forum in which to make such decisions. In addition, the United Nations is the appropriate authority to monitor the application of burden-sharing mechanisms. This is true for a number of reasons, including, as stated above, the fact that, in several legal documents, the United Nations has embraced the principle of promoting and improving economic stability through international assistance.\textsuperscript{202} If the United Nations were in charge of coordinating responsibility sharing, then States would have a duty to comply with responsibility-sharing efforts as a part of their good-faith duty to cooperate and sup-

\textsuperscript{201} Neuman, \textit{supra} note 127, at 505.
\textsuperscript{202} See discussion \textit{supra} Part V.E.
port the actions of the United Nations. In fact, the UNHCR already facilitates responsibility-sharing mechanisms in the context of refugees and displaced persons. The UNHCR collects donations from States and private donors and uses these resources to provide for such persons around the world, thus implementing a model of responsibility sharing.

Defined according to its statute as a nonpolitical, humanitarian, and social body, the UNHCR has substantive expertise and an apolitical character that make it the most appropriate entity to oversee the distribution of responsibility. Some may be skeptical that the UNHCR, which is comprised of representatives from different States, would remain strictly apolitical and humanitarian. This concern is unfounded when one considers that all U.N. Member States are represented in the UNHCR, including those that have an interest in actualizing a fairer responsibility-sharing regime. Moreover, under some of the proposed mechanisms, the States would have incentives to cooperate and strengthen the UNHCR.

It should be noted, however, that presently the UNHCR system for distributing resources does not necessarily resolve the unfairness of the current responsibility-sharing situation. In fact, due to various financial constraints, resources are disproportionately used to assist refugees in the European countries, which are usually better off and receive fewer refugees than Africa and Asia. The UNHCR itself has expressed concern on several occasions that responsibility is currently not fairly distributed, and has made efforts to harmonize immigration norms in the hopes of increasing cooperation. Nonetheless, discussions within the UNHCR about responsibility sharing fail to account for moral considerations in a conscientious manner.

Some scholars have proposed increasing UNHCR involvement such that refugees could only seek protection in “international territories of asylum,” areas that do not belong to any specific country, but are leased

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203. Fonteyne, supra note 39, at 180.
204. For example, the UNHCR participated in responsibility-sharing efforts that responded to the refugee crisis during the civil war in the former Yugoslavia. See Suhrke, supra note 21, at 406–08.
207. See, e.g., UNHCR GLOBAL APPEAL 2006, WESTERN EUROPE: RECENT DEVELOPMENTS 332–35 (2006), available at http://www.unhcr.org/publ/PUBL/4371d19f0.pdf (revealing how a lot of the donations received by the UNHCR are earmarked to be spent on the Western-European region).
208. Legomsky, supra note 38, at 588.
209. Id. at 603–06.
by the UNHCR. Although this proposal may avoid the difficulty of assimilating refugees in specific States, it is a highly problematic approach. It is likely that the UNHCR would be unable to provide a territory of asylum accessible to all immigrants, and this scheme runs the risk of creating “ghettos” of refugees around the world. These problems demonstrate the consequences of ignoring the moral considerations that must be an element within any responsibility-sharing regime.

A detailed description of how the UNHCR should or could implement responsibility-sharing mechanisms to handle refugee crises is beyond the scope of this Article. However, it is nevertheless important to describe, in general terms, the main roles the UNHCR would have in applying the aforementioned responsibility-sharing mechanisms. Generally, with respect to any approach, the UNHCR would have to facilitate the process of weighing the different considerations outlined in Parts II and III to determine which responsibility-sharing mechanism is most appropriate, delineate its specifications, and enforce the agreement. For example, with respect to the option of setting quotas and establishing regional agreements or trading quotas, the UNHCR would oversee the process of establishing these options and see that countries fulfill their responsibility. If the options of trading quotas, taxation, or compensation were preferred, then the UNHCR would determine the appropriate amount of money that should be transferred. With respect to State of origin liability, the UNHCR would facilitate compensating the host countries. Efforts to claim the compensation could be made either directly by the host country or through the UNHCR.

Regardless of the particular role the UNHCR would play in a future responsibility-sharing regime, it would have to develop a stronger political presence in international relations to establish and enforce the mechanism(s). In order to be effective, the UNHCR would have to gather information about the needs of asylum seekers, state capacity, and compliance, all of which fall well within its province. Moreover, it would need to assume the authority to enforce the agreed-upon norms.

In addition to the UNHCR, international and domestic courts could play a significant role in coordinating and supervising responsibility sharing. When reviewing individual cases of asylum seekers or principle cases of asylum policy, courts could examine each States’ restrictive migration policies within the broader context of global migration trends,

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211. See also Lee, Right to Compensation, supra note 170, at 563–65.
212. Schuck, supra note 28, at 288–89.
213. Id. at 288.
rather than viewing the immigration of refugees to the country as an isolated event. Evidence of the willingness of some courts to take general migration patterns into consideration can be found in domestic court decisions already handed down. 214 Additionally, domestic and international courts could have jurisdiction to review responsibility-sharing agreements among States. Although these agreements are diplomatic in nature and courts often refrain from examining them, because they touch heavily upon human rights issues and constitutional questions, courts in jurisdictions well versed in these subjects may be well-equipped to consider them. 215

In addition, it is possible to expect some cooperation among courts in unifying protection standards and preventing government attempts to evade them by overburdening other States. As Eyal Benvenisti recently noted in a different context, domestic courts might be willing to “join forces to offer meaningful judicial review of government action, even intergovernmental action.” 216 In other words, courts could work together to provide coordinated judicial review over questions of responsibility sharing brought before them, considering each others’ decisions and creating a unified standard of protection. Despite the substantive difficulties in coordinating such actions, recent decisions in refugee law indicate that courts might be willing to resist their own States’ policies in favor of a unifying judicial principle. 217

CONCLUSION

Host countries must allocate resources to provide for refugees. There is no moral justification for these costs to be disproportionately borne by some countries and not others. Yet, there have not been enough incentives for States to create fair responsibility-sharing mechanisms. This is primarily the result of the fact that the countries that bear the majority of

214. See, e.g., HCJ 4542/02 Kav Laoved Workers Hotline v. Gov’t of Israel [2006] IsrLR 1 260 (considering general information on immigration patterns, costs, and risks, in deciding matters related to Israel’s immigration policy).


217. The importance of coordinating judicial policy on and promoting independent judicial review of refugee law matters was recognized with the founding of the International Association of Refugee Law Judges. For more on this subject and for examples of well-coordinated national court decisions on refugee law issues, see id. at 262–67.
the burden are not very politically influential, and cannot compel other
countries to assume some of the responsibility. In this Article, I have dis-
cussed several mechanisms of responsibility sharing. While there is no
one perfect solution for the problem, it seems that one or more of these
mechanisms should be applied, albeit with an awareness of the risks that
each carries. Since all of the responsibility-sharing mechanisms are im-
perfect, and no solution achieves just distribution in all potential refugee
crises, there is a need for additional research.

It should be noted, though, that in no time in our history has human-
kind been more technologically equipped than today to apply mechan-
isms of responsibility sharing. Given the moral duty and the ability to
carry out responsibility-sharing plans, at present, it is reasonable to aim
for a fairer system. However, without dismissing the significance of in-
ternational responsibility sharing and the urgent need to establish me-
chanisms for immigration crises, States are nevertheless obligated to re-
spend in circumstances where such mechanisms have yet to be formed:
States cannot excuse themselves from fulfilling their obligations towards
needy refugees merely because other States fail in their duties. Even in
today’s world, which lacks efficient responsibility-sharing mechanisms,
there is a morally compelling reason for all States to recognize their obli-
gation to protect refugees.
TAKEN TO THE CLEANERS:  
PANAMA’S FINANCIAL SECRECY LAWS  
FACILITATE THE LAUNDERING OF  
EVADED U.S. TAXES

It is estimated that as much as $1.5 trillion may be “laundered” every year worldwide, or about two to five percent of the global domestic product. Of this amount, $500 billion can be attributed to hiding the proceeds of tax evasion. Tax evasion and money laundering, although separate and distinct crimes, are intertwined in that all illegal proceeds, when laundered, effectively evade taxes, and all legitimate money that evades taxes becomes illegal and subsequently needs to be “laundered.”

Money laundering can have substantial negative economic consequences for a country on an international scale. Money laundering can disrupt a country’s financial integrity or even alter its economic policy.

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5. Id. (“Money laundering can also adversely affect currencies and interest rates, as launderers reinvest funds where their schemes are less likely to be detected, rather than where rates of return are higher. And money laundering can increase the threat of monetary instability due to the misallocation of resources from artificial distortions in asset and commodity prices. . . . There are [also] significant social costs and risks associated with money laundering. Money laundering is a process vital to making crime worthwhile. It allows drug traffickers, smugglers, and other criminals to expand their operations. This drives up the cost of government due to the need for increased law enforcement and health care expenditures (for example, for treatment of drug addicts) to combat the serious consequences that result. . . . [Financial] criminal activity has been associated with a number of bank failures around the globe . . . .”). See also Julia Layton, How Money Laundering Works, http://money.howstuffworks.com/money-laundering3.htm (last visited Dec. 12, 2008) (“Other major issues facing the world’s economies include errors in economic policy resulting from artificially inflated financial sectors. Massive influxes of dirty cash into particular areas of the economy that are desirable to money launderers..."
It corrupts government and banking officials, creates volatile international exchange rates, and produces unpredictable capital movements. Furthermore, money laundering helps fund terrorism and terrorist organizations, and undermines the national security of a country. But the effects of money laundering can also be felt on a local level. Loss of tax revenue is arguably one of the more significant socio-economic effects of money laundering. A government’s inability to raise money through the collection of taxes may restrict investments in social services. Basic social programs such as health, housing, and education may not be properly funded, or may even be discontinued, because the tax revenue required to subsidize such programs has evaded government collection through the money laundering process. All citizens feel the effects of tax evasion and money laundering, in that the loss of tax revenue forces the government to place the burden on honest taxpayers to cover such costs through higher tax rates.

One of the most common and increasingly used methods to evade taxes and to launder money is to place assets in a “tax haven country.” In general, a “tax haven” is simply a country that imposes few or no taxes. However, some tax havens provide financial mechanisms, such as confidential bank accounts and shell companies, the only purposes of which are to hide the identities of the true owners from tax authorities and law enforcement of other countries. These countries also tend to have strict financial secrecy laws that severely limit, if not prevent, the

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8. See McDowell & Novis, supra note 4. See also Layton, supra note 5.
exchange of tax-related information between governments, obstructing a government’s ability to find and prosecute tax cheats. The U.N. Office on Drugs and Crime states that such “financial havens and bank secrecy are a ‘tool kit’ for money launderers.” Furthermore, in the United States, $40 to $70 billion of tax revenue are believed to be hidden from the Internal Revenue Service (“IRS”) each year through the use of the tax haven system.

In February 2007, as part of the proposed Stop Tax Haven Abuse Act, Panama was listed as a “probable location for U.S. tax evasion.” In addition, the U.S. State Department currently considers Panama a “major money laundering country” for its allowance of financial transactions involving significant amounts of proceeds from serious crimes. Both tax evaders and money launderers are drawn to Panama because it has, arguably, the strictest financial secrecy laws in the world and has even been nicknamed the “New Switzerland.” This may be why Panama is second in the world, behind Hong Kong, in the number of foreign companies incorporated in its jurisdiction, companies believed to be used for the purpose of circumventing their local taxes. Moreover, the 2007 National Money Laundering Strategy has identified Panama as the backdrop for a wide range of money laundering schemes.

This is not to say that Panama necessarily condones or supports money laundering. In fact, the country has very strict anti-money laundering regulations.25 The problem, however, is that Panama only recognizes the crime of money laundering when it is directly related to a specified illegal activity such as drug trafficking, kidnapping, or extortion.26 Because the Panamanian Government does not rely on income taxes as an essential part of the tax revenue it collects, the evasion of income tax is not considered a crime.27 Therefore, tax evasion cannot be used as a predicate offense in prosecuting a money laundering violation in Panama.28 Furthermore, Panama’s legal structure follows the “dual criminality” principle, meaning that an offense must be a recognized crime in both Panama and the requesting country for Panama to comply with any financial information requests.29 Consequently, petitions by the United States for financial information in purely tax-related matters will generally not be honored.30

The dual criminality principle provides a safeguard against abuses by foreign jurisdictions attempting to discount the privacy rights afforded by Panama’s borders.31 A basic principle of international law is that one country generally does not enforce the tax laws of another.32 Thus, the Laundering Strategy was an interagency report released in May 2007 that incorporates information accumulated from the 2005 U.S. Money Laundering Threat Assessment, which identified various risks to the U.S. financial sector posed by money laundering.


26. Law No. 41, art. 389 (defining the crime of money laundering as the receipt, negotiation, conversion, or transfer of moneys, titles, securities, assets, and other financial resources with knowledge that they are the product of activities related to drug trafficking, qualified embezzlement, traffic of human beings, traffic of illegal weapons, kidnapping, extortion, embezzlement, corruption of civil servants, robbery, international vehicle contraband, and acts of terrorism).


28. Banjeree, supra note 27.


United States must work within the parameters of a county’s legal system to ensure that U.S. taxes are not evaded.

However, the obstacles to the U.S. prosecution of criminals, namely financial secrecy and dual criminality, could be circumvented very easily with a tax treaty between the United States and Panama. More specifically, a Tax Information Exchange Agreement (“TIEA”) would allow for the free exchange of financial tax information irrespective of differences in either country’s requirement or definition of a predicate crime to money laundering.

Tax treaties are valuable mechanisms enabling U.S. federal law enforcement agencies to track down tax evaders as well as other criminals. The advantage of tax information is that, even if the United States is unable to prosecute criminals for major money producing crimes, it can still prosecute them for the accompanying offense of tax evasion. For example, when the U.S. government could not convict Al Capone on any of his suspected crimes, the IRS was able to convict him of tax evasion. Bruno Richard Hauptmann, the man famed for kidnapping the Lindbergh baby, was initially arrested because of his failure to “launder the ransom money successfully.”

On an international level, tax treaties have led to the effective prosecution of those who have attempted to hide their assets from U.S. tax authorities. For example, an American taxpayer was recently convicted for tax evasion after he tried to hide his assets in off-shore tax havens such as Bermuda, the British Virgin Islands, and Panama. The fact that the IRS and the Department of Justice gathered enough evidence to prosecute this case through their TIEA with Bermuda demonstrates the im-

33. Panamalaw.org, supra note 31 (“This is an agreement whereby one country can request all financial investment information regarding [its] citizens and corporations. This most definitely includes bank account information and stock brokerage type investments. There is no probable cause requirement to get this information. There is no criminality or dual criminality required. There is not even a tax violation required. The terms used in these treaties run along the lines of the country requesting the information claiming that [it] believe[s] the information to be relevant to [its] tax investigation.”).


37. Harrington, supra note 34.

38. Id. (“[I]n 2004, Almon Glenn Braswell was sentenced to eighteen months in prison and ordered to pay over $10 million in back taxes, interest and penalties. Mr. Bras-
portance of such a tax treaty. Had the taxpayer hidden all of his money in Panama alone, the outcome would have been very different.

The key to prosecuting money laundering is simply to “follow the money trail.”39 The ability to recover tax and financial information is the most effective way to secure the evidence required to reach a conviction for money laundering.40 IRS investigations of illegal income are critical elements in assuring a money laundering conviction,41 and the agency values that “[t]he long hours of tracking and documenting financial leads allow an investigation to go right to the door of the money launderers and eventually to the leader of the illegal enterprise.”42 The laundering of money accomplishes two important purposes for the criminal. First, it covers the trail of evidence leading back to the crime that produced the illicit funds.43 Secondly, it conceals the money itself from forfeiture.44 For these reasons, obtaining tax information and implementing a tax treaty are of paramount importance. The United States has to be able to trace funds back to their original crime as well as recover lost tax revenue.

This Note argues that a TIEA with Panama would allow the United States to circumvent the strict financial secrecy laws that shield American tax evaders and money launderers from prosecution. Part I of this Note describes the mechanics and interrelation of money laundering, tax evasion, and Panamanian financial secrecy laws. Part II addresses the measures the United States has implemented to combat the money laundering problem and their ineffectiveness in dealing with tax evasion. Part III proposes how the United States could implement a TIEA with Panama to address the U.S. need for tax information, while at the same time, respecting Panama’s commitment to protecting its financial secrecy regime.

I. MONEY LAUNDERING AND TAX EVASION IN PANAMA

First, it must be understood that money laundering and tax evasion are separate and distinct offenses. In fact, the two processes actually have opposite effects on money. Money laundering is an attempt to hide the origin of illicit proceeds in order to make them appear legitimate, basi-
cally turning “dirty” money into “clean” money,\(^{45}\) whereas tax evasion involves hiding the profits from initially legal transactions, turning “clean” money “dirty.”\(^ {46}\) Yet there is a distinct similarity between the methods used for money laundering and the commission of tax offenses.\(^ {47}\) Both require dishonesty and concealment, and when money from illegal activity is shielded from tax officials, there is a direct overlap between the two.\(^ {48}\) Once money evades taxes, it needs to be laundered before it can be used again.\(^ {49}\) In the IRS’s view, “[m]oney laundering is in effect tax evasion in progress.”\(^ {50}\) As a result, almost all laundered money has evaded taxes and is therefore unlawful, irrespective of its legal or illegal origin.\(^ {51}\)

The money laundering process has three separate phases: placement, layering, and integration, also known as “wash, dry and fold.”\(^ {52}\) The first stage, placement, occurs when illicit funds are introduced into banking and financial systems, the primary goal of which is to remove the illicit funds from direct association with the precedent criminal activity.\(^ {53}\) Oth-

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46. Dean, supra note 3.


49. For example, if a person receives $1000 for work and is liable to pay a forty percent marginal rate of income tax on it and fails to declare the income, then $400 is considered as being stolen from the Treasury. Therefore, he does not launder the $1000, he launderers the $400, i.e., the tax-evaded money is laundered. The complication that makes this difficult to understand is that in order to retain the $400, he puts the whole amount of $1000 through the laundering process. He has to show that he received $1000 legitimately in order to evade a payment of $400. Banerjee, supra note 27 (for purposes of this Note, £ has been substituted by USD).

50. IRS Overview: Money Laundering, supra note 1.

51. Vaknin, supra note 6.


erwise, criminals would not be able to use the money because it would connect them to the initial crime. The second stage, layering, is more complex and attempts to further remove the connection between the funds and the original illegal activity. It usually involves multiple transactions among various financial institutions, accounts, and jurisdictions. The purpose is to leave a trail that is almost impossible to trace back to its origin, and if successful, the criminal evades pursuit. The final stage is integration. At this point in the process, the originally illicit funds are reintroduced or assimilated into the economy as seemingly legitimate funds or investments.

The banking system remains an attractive location for money launderers, because the system is susceptible to manipulation. Furthermore, because of the confidential financial instruments and strict bank secrecy regimes present in most offshore tax havens, including Panama, banks in those jurisdictions are involved in most money laundering schemes. Moreover, as Panama functions under a U.S. dollar economy, U.S. tax evaders and money launderers are drawn to the jurisdiction because capital can easily flow into the country without currency-exchange controls or restrictions. Once illegal money is successfully placed, or deposited,
in an offshore haven bank account, it is easily “layered” through various financial transactions and other tax haven jurisdictions.62 The combination of anonymity and secrecy provides a “tool kit” for money launderers63 and gives transactions in those jurisdictions a “cloak of confidentiality.”64 Once dirty money has been effectively “cleaned” offshore, banks provide the primary gateway for the money to re-enter the United States.65

Panama remains one of the best jurisdictions for financial anonymity.66 The U.S. State Department has listed Panama as a “country of primary concern” for money laundering because of the confidentiality and information protection it provides.67 Anonymity can be accomplished by several means with varying degrees of secrecy and complexity, from the simple use of a Panamanian debit or credit card account,68 to the opera-

62. NMLS 2007, supra note 24, at 27. See also John L. Evans, International Money Laundering: Enforcement Challenges and Opportunities, 3 SW. J. L. & TRADE AM. 1 (1996) (“Once the proceeds of crime are successfully deposited in the financial system many laundering operators take the precaution of moving money, not just offshore, but through more than one tax haven and through a maze of shell companies and respectable nominees.”).

63. UNODC, Report, supra note 16.

64. Spencer, supra note 15, at 89.

65. NMLS 2007, supra note 24, at v. (stating this was a key finding of the U.S Money Laundering Assessment). See also Vaknin, supra note 6 (“It is important to realize that money laundering takes place within the banking system. Big amounts of cash are spread among numerous accounts, (sometimes in free economic zones, financial off shore centers, and tax havens), converted to bearer financial instruments (money orders, bonds), or placed with trusts and charities. The money is then transferred to other locations, sometimes as bogus payments for ‘goods and services’ against fake or inflated invoices issued by holding companies owned by lawyers or accountants on behalf of unnamed beneficiaries. The transferred funds are re-assembled in their destination and often ‘shipped’ back to the point of origin under a new identity. The laundered funds are then invested in the legitimate economy. It is a simple procedure—yet an effective one. It results in either no paper trail—or too much of it. The accounts are invariably liquidated and all traces erased.”)


67. For a complete index of “vulnerability factors” used to list countries, see INCSR vol. 2, supra note 20, at 41.

68. See Robert L. Sommers, Tax Amnesty for Offshore Accounts: The Program and Results, May 2003, http://www.taxprophet.com/hot_topic/May03.shtml (“Typically, taxpayers deposit funds in foreign ‘tax-haven’ banks and then access their funds with debit or credit cards issued by the banks. The taxpayer’s identity is protected under secrecy laws in the tax haven jurisdiction, so the IRS cannot compel the offshore banks to divulge this information.”). See also Complete Offshore Privacy, supra note 66 (describing how a
tion of bearer shares and shell corporations in conjunction with nominee directors. Both individuals and corporations may use these financial tools, and the more complex the financial arrangements are, the more secret (hidden) the information becomes. The origin of any illicit money becomes even more difficult to identify once the money is placed in a Panamanian bank account and “layered” through subsequent bank transfers and commingled with legitimate money. The laundered funds are then generally reintroduced to the U.S. market through bank wire transfers using “correspondent” and “payable through” accounts, which can further protect against detection.

69. Int’l Ctr. for Political Violence and Terrorism Research, Old Laundering Methods Hold Fast, Mar. 2007, at 3, http://pvtr.org/pdf/Financial-Response/BulkCash-Trade(ICP VTR).pdf. See also NMLS 2007, supra note 24, at 63 (describing “Bearer Shares” as a financial device that permits ownership to be attributed to the person in possession of the shares, rather than the true beneficial owner of the corporation and provides for a “high level of anonymity”) (emphasis added); IRS, Abusive Offshore Tax Avoidance Schemes—Glossary of Offshore Terms, http://www.irs.gov/businesses/small/article/0,,id=106572,00.html [hereinafter IRS Glossary of Offshore Terms] (A “beneficial owner” is defined as “the true owner of an entity, asset, or transaction as opposed to any stated ownership provided in documents or oral representations. The beneficial owner is the one that receives or has the right to receive proceeds or other advantages as a result of the ownership.”); NMLS 2007, supra note 24, at 63 (“Shell Corporations generally have no employees or physical assets and are nothing more than a mailing address.”). See also Elizabeth MacDonald, Shell Games: With No Federal Oversight, the States are Helping to Shelter Crooks, Money Launderers and, Possibly, Terrorists, FORBES.COM, Feb. 12, 2007, http://www.forbes.com/forbes/2007/0212/096.html (noting that generally, shell corporations are being increasingly associated with criminal activity); IRS Glossary of Offshore Terms, supra (Furthermore, to preserve the anonymity of true beneficial owners of such corporations, “nominee directors” are employed to “provide a veil of secrecy as to the beneficial owner’s involvement.”).


71. IRS Glossary of Offshore Terms, supra note 69.


73. USA PATRIOT Act, H.R. 3162, 107th Cong. § 312 (2001) [hereinafter USA PATRIOT Act] (defining a “correspondent account” as “any account established for a foreign financial institution to receive deposits from, or to make payments or other disbursements on behalf of, the foreign financial institution [in the United States]”). See also id.; NMLS 2007, supra note 24, at 21–22, app. A; (An example of a “payable through” account is one where a foreign bank maintains a checking account at a U.S. bank. “The foreign bank could then issue checks to its customers, allowing them to write checks on the U.S. account. A foreign bank may have several hundred customers writing checks on one ‘payable through account’ . . . .”); Buchanan, Ingersoll & Rooney P.C., Potential Tax Implications of the Enhanced Money Laundering Provision of H.R. 3162, 2001, http://www.buchananingersoll.com/news.php?NewsID=1251 (“The term ‘payable-
Yet, Panama’s most important asset protection mechanism remains its financial privacy laws; more specifically, its bank secrecy laws.\textsuperscript{74} Although the financial instruments for hiding identities, origins of money, and bank transactions can be effective in evading the scrutiny of tax or law enforcement officials, they do not alone grant absolute anonymity or secrecy.\textsuperscript{75} Regardless of subsequent attempts to layer, or hide, the origin of funds, in order to make use of Panama’s banking system, one must initially provide his or her identification to the bank he or she wishes to use.\textsuperscript{76} Generally, U.S. tax officials have the expertise to trace illicit money to its source, even if the “trail” is complicated and purposely confused.\textsuperscript{77} However, what Panama’s secrecy laws provide is, in effect, a barrier to U.S. tax officials following the financial trail back into Panama.\textsuperscript{78}

Under Panamanian Decree-Law No. 9 of February 26, 1998, Panama established the “Superintendency of Banks” in order to “oversee the preservation of the soundness and efficiency of the banking system” and “[t]o punish violations.”\textsuperscript{79} The Superintendent of Banks can inquire, retrieve, and record any financial information he or she deems important in upholding the integrity of the Panamanian banking system.\textsuperscript{80} Further-
more, all banks are obligated to maintain due diligence\textsuperscript{81} and care in dealing with clients or potential clients,\textsuperscript{82} and must release any information requested by the superintendent to that office.\textsuperscript{83} However, the secrecy laws currently in place act as “blocking statutes” and create a legal regime against the disclosure of that financial information to any authorities outside the country.\textsuperscript{84}

The term “bank secrecy” does not address the privacy of a bank’s own activities, but rather those of the bank’s patrons.\textsuperscript{85} A duty of discretion regarding disclosure of patrons’ information binds all bank employees, representatives of the bank, and government officials who are in any way involved with banking.\textsuperscript{86} Panama’s bank secrecy laws are predominantly regulated by Articles 84, 85, and 86 of the Banking Act of 1998.\textsuperscript{87} Article 84 of the statute prohibits the Superintendency of Banks to reveal to a third party, such as a U.S. tax official, any information obtained from bank records, acquired through any inquiry or investigation.\textsuperscript{88} The requirement for confidentiality extends to any staff members, external auditors, or experts who may be employed or utilized by the superintendent’s office.\textsuperscript{89} Article 85 forbids Panamanian banks from disclosing

\textsuperscript{81} BLACK’S LAW DICTIONARY, supra note 14, at 203 (defining “due diligence” as “such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man”).

\textsuperscript{82} Law No. 42 (2000) (Pan.) (The law provides in pertinent part, “The persons, natural or juridical, here mentioned, are under the following obligation: to adequately identify their clients. To that effect they shall require from their customers all due references or recommendations, as well as the corresponding certifications that attest the incorporation and effectiveness of societies, and also the identification of officials, directors, proxies and legal representatives of those societies, in a manner that enables them to adequately document and determine the real owner or direct or indirect beneficiary.”).

\textsuperscript{83} Id. art. 2.

\textsuperscript{84} RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 rpts. n.4 (1987) (“Blocking statutes are designed to take advantage of the foreign government compulsion defense, § 441, by prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities. Some statutes cover all documents, some only certain categories. . . . All blocking statutes appear to carry some penal sanction.”).


\textsuperscript{86} Id.


\textsuperscript{88} Law No. 9 (1998) (Pan.), art. 84 (Information Regarding Bank’s Clients, reaffirmed in Pan. G.R. S.B. No. 02-2002 (Norms That Impose Restrictions on the Use of Available Information)).

\textsuperscript{89} Id. art. 84.
their client’s identity or transactions, absent the client’s consent,\footnote{Id. art. 85 (Confidentiality of Banks).} while Article 86 proscribes penalties of up to $100,000, in addition to any other “civil or criminal sanctions that may apply” for violating the provisions of the statute.\footnote{Id. art. 86 (Penalties).} Additional penalties can include imprisonment of up to six months for certain violations.\footnote{Foundations and Trusts, 2008 PANAMA L. DIG. § 2.06 (stating that under Panama Law No. 25 of June 12, 1995, art. 35, violations of the secrecy and confidentiality provisions of this law “shall be punished with imprisonment for six months and [a] fine of U.S. $50,000”).}

In addition, the attorney-client privilege supplies a final layer of security.\footnote{Sullivan, supra note 30.} By law, the use of a licensed Panamanian attorney is required to establish a corporation, and the attorney is bound to maintain his or her client’s confidentiality.\footnote{Corporations: Incorporation, 2008 PANAMA L. DIG. § 2.03 [hereinafter LAW DIGEST, Corporations] (Under Panama Decree 147 of May, 1966, art. 1, a Panamanian corporation’s registered agent must be an attorney admitted to practice in Panama, and such agents are under a duty to know their clients and maintain proper information about their clients. However, such information is only disclosed upon petition filed by the Public Prosecutor or member of a judicial organ, relating to narcotics trafficking or “of money laundering arising therefrom.”).} The attorney-client privilege bars the release of all information relating to the client’s personal affairs, as well as any financial dealings or transactions.\footnote{Ronald Edwards, Why Use a Law Firm?, Nov. 17, 2006, http://www.goinglegal.com/article_97775_86.html.} Therefore, because it is a lawyer who initiates a corporation, and in many circumstances, sets up its bank account and provides the required nominee directors, a tax evader using such an arrangement is practically shielded from all tax scrutiny.\footnote{Sullivan, supra note 30.}

As if these formidable obstacles to a foreign government’s intrusion were not sufficient, recently, Panama sought to further fortify its privacy protection by proposing amendments to Articles 187 and 188-A of its Criminal Code.\footnote{Press Release, Article 19, Panama: Proposed Criminal Code Severely Restricts Freedom of Expression and Information (Feb. 22, 2007) (“Article 19 is an independent human rights organization that works globally to protect and promote the right to freedom of expression.”).} The amendments include imprisonment for simply publishing information regarding a third party without that party’s express permission, or for even inquiring into a third party’s personal affairs without official state authorization.\footnote{Id.} Although these laws were initially implemented to protect the privacy of public officials from the media,
anyone wishing to protect his or her privacy can hide behind this legislation.99

Nevertheless, the constraints on disclosure are not unrestricted. There remain limited situations where privileged information can and is turned over to Panamanian authorities.100 Panama’s main bank secrecy laws have provisions that allow for the disclosure of information to third parties if requested “within the course of criminal proceedings,”101 and this exception extends to the attorney-client privilege as well.102 However, information the Superintendency of Banks receives or records is not authorized to be disclosed to U.S. authorities, unless that information can be proven to be specifically related to laundering proceeds from the drug trade or other serious crimes.103 Tax-related misconduct is only a civil matter in Panama, and therefore does not rise to the level of an exception to the restriction on disclosure of information to third parties.104 For an American tax evader whose only illegal act is to have hidden his or her profits from U.S. tax officials, this legal system provides maximum protection with little cause for fear of prosecution.

In addition, the Panamanian tax code allows for certain foreign investors to be exempt from paying any income taxes at all.105 These exempt foreign investors tend to be those who implement the types of financial mechanisms mentioned earlier in order to execute the types of transactions required for tax exemption status.106 Therefore, because these taxpayers are not required to pay taxes to Panama, they cannot be guilty of any Panamanian tax offense, irrespective of whether such violations are treated as civil or criminal matters. There can be no crime of money laundering if the funds allegedly laundered are legal on all levels in Panama.

The dual criminality principle107 is a significant restriction to U.S. tax officials seeking to prosecute tax cheats for money laundering or tax eva-

99. Id.
100. Law No. 9 (1998) (Pan.), arts. 84–85.
101. Id.
102. LAW DIGEST, Corporations, supra note 94.
104. Panamalaw.org, supra note 31. See also Banerjee, supra note 27.
107. For a discussion on dual criminality, see supra Intro.
Because Panama adheres to the dual criminality principle, without a tax treaty in place to compel the government to release requested financial information, tax officials must pursue the information via the long and cumbersome process compelling disclosure through the judicial process. A U.S. agency must either secure a federal court order, or a "letter rogatory," to compel a foreign jurisdiction to provide requested information. Although foreign courts generally honor such inquiries, because a request of judicial assistance is based on the principle of "comity," between countries, Panama is not obligated to comply with such requests. In fact, compliance with a letter rogatory for information in purely financial matters is a rare event in Panama. Even putting the issue of comity aside, the slow process of compelling information from a foreign government can hinder a U.S. agency’s investigation of suspected tax evasion. While the process drags on, tax evaders can continue to layer and hide their money, making it very difficult for authorities to detect the funds once, or if, a request is honored. The U.S. State Department has acknowledged the deficiency; because “letters rogatory are a time consuming cumbersome process,” it recommends that they only be used as a last resort, when “there are no other options availa-

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110. Id. (“A letter rogatory is a formal request from a court in one country to the appropriate judicial authorities in another country requesting compulsion of testimony or documentary or other evidence. . . . In some countries which do not permit the taking of depositions of willing witnesses, letters rogatory are the only method of obtaining evidence.”).
111. Restatement (Third) of Foreign Relations Law of the United States, § 101 cmt. e (quoting Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)) (“Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.”).
113. Sullivan, supra note 30.
115. UNDOC, Report, supra note 16.
ble.”117 Without a current TIEA, this burdensome process is the method that must be used to investigate tax evasion. This being the case, IRS officials are abandoning audits of off-shore accounts, and in some cases, not even starting an investigation.118

It is clear that “significant restrictions on access to bank information for tax purposes remain in . . . Panama.”119 The Organization for Economic Cooperation and Development (“OECD”) states that a “[l]ack of transparency and a failure to co-operate internationally create conditions [in Panama] that can be exploited by dishonest taxpayers to evade their tax obligations.”120 Unless tax officials can “tease the information they need out of bank records,” their law enforcement efforts “come to a dead end.”121 To demonstrate the importance of being able to follow the money trail back to Panama, both Saddam Hussein and Osama bin Laden used money laundering schemes that implemented Panamanian shell corporations and bank accounts to help fund their respective Iraqi and al-Qaeda military operations.122

II. U.S. MEASURES TO COMBAT MONEY LAUNDERING AND THEIR INEFFECTIVENESS IN DEALING WITH TAX EVASION

In 1970, the U.S. Congress enacted the Bank Secrecy Act (“BSA”), acknowledging that U.S. banks were being used to hide money from criminal activity and tax evasion.123 The Bank Secrecy Act does not shield or hide financial information. Rather, its regulations create a financial transparency in the banking industry that allows law enforcement and other agencies to track the laundering of evaded taxes and other criminal activities.124 Although the BSA itself does not criminalize mon-
ey laundering, it requires financial institutions to maintain records for certain transactions, effectively creating a “paper trail” that is used to prosecute such cases. Money laundering was not criminalized in the United States until the 1986 enactment of the Money Laundering Control Act, which recognizes tax evasion as a predicate offense. Yet, the BSA remains the essential anti-money laundering regulatory system for U.S. law enforcement agencies and is administered by the Financial Crimes Enforcement Network (“FinCEN”), the Financial Intelligence Division of the U.S. Treasury Department.

FinCEN has also acknowledged that financial crimes extend beyond U.S. borders and broadened its intelligence network to include international anti-money laundering support. FinCEN now assists other countries in improving their efforts to combat financial crimes, with the agency’s Office of International Programs being its second largest department behind the domestic component. International law enforcement agencies rely on information obtained through the BSA’s reporting requirements to detect global money laundering schemes. FinCEN freely shares this information with the goal of using international efforts to ultimately protect the U.S. financial system from such financial crimes.

After the September 11th attacks on the World Trade Center and the Pentagon in 2001, Congress passed the “Uniting and Strengthening

June 4, 2002) (defining “financial transparency” as “timely, meaningful and reliable disclosures about a company’s financial performance”).
127. Id.
128. Freis, Jr., FinCEN Dir. Remarks, supra note 125.
129. INCSR vol. 2, supra note 20, at 15.
131. INCSR vol. 2, supra note 20, at 15.
134. Freis, Jr. FinCEN Dir. Remarks, supra note 125.
America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,” the Patriot Act.\textsuperscript{135} Title III of the Act specifically addresses money laundering\textsuperscript{136} and presents amendments to the Bank Secrecy Act.\textsuperscript{137} The amendments generally increase the level of specificity required of financial institutions in the gathering and reporting of their information.\textsuperscript{138} The most recent amendment is FinCEN’s final rule for § 312 of the Patriot Act, which went into effect September 10, 2007, and increases the level of due diligence required by U.S. banks when transacting with certain foreign accounts.\textsuperscript{139}

However, what both the BSA’s and the Patriot Act’s requirements for self-regulation have done is essentially transform civilian bank employees into law enforcement agents with the responsibility of monitoring and maintaining specific financial information.\textsuperscript{140} Complications can arise when individuals in the private sector do not have the same level of interest in meticulously maintaining the due diligence that the statutes require or that law enforcement intended.\textsuperscript{141} The effectiveness of the statutes in producing an essential “money trail” for the prosecution of tax evasion and other financial crimes can be undermined by those in the industry whose primary interest is financial performance, not prosecutorial assistance.\textsuperscript{142} Although the BSA is considered an integral part of protecting the American financial system from the movement of illicit funds, and a majority of the private sector have complied with its requisites in good faith, clear failures to conform, and even straightforward decisions not to comply, with the statute demonstrate the pitfalls of pri-

\textsuperscript{135} USA PATRIOT Act, supra note 73.

\textsuperscript{136} Id.

\textsuperscript{137} See 31 C.F.R. § 103 (providing updated regulations relating to money and finance).


\textsuperscript{139} FDIC, Fin. Inst. Letter, USA Patriot Act, Final Regulation Implementing Section 312—Special Due Diligence Programs for Certain Foreign Accounts (Dec. 21, 2007). See 31 U.S.C.A. 5318(i)(2)(A)(i)-(ii) (West 2008) (describing three specific types of foreign bank accounts to which the rules apply, more specifically, those banks operating under an offshore banking license, a license issued by a country designated as being non-cooperative with international anti-money laundering principles, or a license issued by a country designated by the Secretary of the Treasury as warranting special measures due to money laundering concerns).

\textsuperscript{140} Vaknin, supra note 6.

\textsuperscript{141} Id.

\textsuperscript{142} Id.
vate self-regulation. Two current examples are Bank of America being fined $3 million in January 2007 for “failure to comply with anti-money laundering rules relating to ‘high risk’ accounts,” and American Express agreeing to pay $65 million for similar BSA violations. These lapses fundamentally defeat the purpose of any anti-money laundering legislation and demonstrate a weakness in the system. However, “the continued safeguarding of the [U.S.] banking system” from the threat of money laundering remains the U.S. government’s primary goal. The 2007 National Money Laundering Strategy identifies areas vulnerable to money laundering for the purpose of adjusting and strengthening current federal laws in the area. Yet, even with full and proper compliance with current or improved statutory regulations on the part of all participants in the banking industry, the requirements for the collection of information do not extend into Panama. FinCEN’s increased international effort to combat money laundering and the heightened reporting conditions put in place after September 11th do not overcome the BSA’s limitations in appropriating information from Panamanian financial institutions or officials. As discussed above, although Panamanian officials collect financial information as per their anti-money laundering regulations, this information cannot be exchanged with U.S. officials unless the United States can demonstrate that such information is directly related to a criminal investigation. Notwithstanding the U.S. government’s increased ability under the Patriot Act to requisition documents from foreign banks, Panama’s dual criminality requirement effectively

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143. Zarate Remarks to the Florida Bankers Ass’n, supra note 7. For further commentary on the subject of self-regulation, see Christian Brütsch & Dirk Lehmkuhl, Introduction, in LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS, supra note 141, at 1–8.


146. McGlasson, supra note 1.


148. See discussion supra Part I.

149. See 31 U.S.C.A. § 5318(k)(3)(A)(i) (West 2008) (“In general, the Secretary of the Treasury or the Attorney General may issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank.”).
negates any legislatively expanded authority and allows evaded taxes to be shielded from U.S. agency inquiries.

Internationally, the United States combats money laundering through the Financial Action Task Force (“FATF”), a thirty-three member organization established in 1989 by the G-7 Summit in Paris, whose primary focus is on promoting anti-money laundering policies.150 The United States, through FinCEN, was an essential part in the FATF’s development and aided the agency in its initial policy considerations.151 Although Panama is not one of the FATF’s thirty-three members, it is a member of the Caribbean Financial Action Task Force (“CFATF”).152 The CFATF was established in 1992 and is one of many “FATF-style regional bodies, which, in conjunction with the FATF, constitute an affiliated global network to combat money laundering and the financing of terrorism.”153 These task forces were implemented as a way to get around the burdensome process of using letters rogatory to compel foreign jurisdictions to provide information.154

To facilitate the exchange of information, two of the FATF’s most significant recommendations were that countries criminalize money laundering beyond drug-related offenses and that banks report suspicious transactions to domestic authorities.155 Although Panama has complied with both proposals, it has not extended its list of predicate offenses to include tax-evasion156 or made any specific references to tax matters in its Suspicious Activity Reporting Agreement.157 Therefore, Panama’s dual criminality constraint hinders the FATF’s power to obtain informa-

150. IMF Factsheet, supra note 7.
152. INCSR vol. 2, supra note 20, at 33.
153. Id.
154. Pieth, supra note 142, at 81 (“[T]he traditional instruments of international law are frequently considered too cumbersome and slow. Increasingly, international law is created by unconventional means: ‘task forces’ prove to be far more expedient . . . .”).
156. See Law No. 41 (2000) (Pan.), art. 389 (amending the Penal code to expand the predicate offenses for money laundering beyond narcotics trafficking to include “qualified embezzlement, illegal weapons traffic, human traffic, kidnapping, extortion, embezzlement, corruption of civil servants, terrorism, robbery or international vehicle contraband established in the Panamanian Law”) (Superintendencia de Bancos trans.).
tion through the CFATF relating purely to tax evasion. In addition, Panama’s secrecy laws prohibit the Unidad de Analisis Financiero, the country’s financial intelligence unit, from disclosing such tax-related information to its foreign counterparts.\footnote{FinCen Advisory, Advisory Issue 23, Transactions Involving Panama, (July 2000), http://www.fincen.gov/news_room/rp/advisory/html/advis23.html.} This lack of transparency is why Panama is perpetually labeled by the U.S. Department of State a “jurisdiction of primary concern” as a “major money laundering country.”\footnote{DEP’T OF ST. BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, MAJOR MONEY LAUNDERING COUNTRIES 2005 (2006), http://www.state.gov/p/inl/rls/nrcrpt/2006/vol2/html/62131.htm.}

Furthermore, the exclusion of tax-related violations as a predicate offense for money laundering in Panama’s legal system even impedes U.S. agencies’ ability to acquire financial documents directly through the U.S. Mutual Legal Assistance Treaty (“MLAT”)\footnote{INCSR vol. 2, supra note 20, at 31 (MLATs, “which are negotiated by the Department of State in cooperation with the Department of Justice[,] . . . allow generally for the exchange of evidence and information in criminal and ancillary matters. In money laundering [and asset forfeiture] cases, they can be extremely useful as a means of exchanging banking and other financial records with treaty partners.”).} with Panama.\footnote{Sullivan, supra note 30.} This is because “the MLAT is used primarily to fight narcotics trafficking, related money laundering, and other serious crimes. ‘Pure tax’ matters are not covered.”\footnote{Sullivan, supra note 30.} Therefore, the ability to request information through the MLAT, relating to a money laundering probe, may not necessarily be used in a tax investigation scenario.\footnote{ORG. FOR ECON. COOPERATION & DEV., ACCESS FOR TAX AUTHORITIES TO INFORMATION GATHERED BY ANTI-MONEY LAUNDERING AUTHORITIES: COUNTRY PRACTICES (2002), available at http://www.oecd.org/dataoecd/16/5/2389989.pdf.} Panama’s classification of tax evasion as only a civil violation seriously impedes the United States’ ability to find and prosecute American tax evaders.

The Stop Tax Haven Abuse Act,\footnote{Stop Tax Haven Abuse Act, S. 681, 110th Cong. (2007) [hereinafter Stop Tax Haven Abuse Act] (Title I: Deterring the Use of Tax Havens for Tax Evasion).} introduced to the Senate in February 2007, has attempted to narrow the scope of legislation to target tax evasion specifically through alleged tax haven countries. If adopted, the bill would put in place presumptions of tax evasion for certain transactions completed through specified off-shore jurisdictions, such as Panama.\footnote{Id. § 101 (establishing presumptions for entities and transactions in offshore secrecy jurisdictions).} The summary of the bill explains that the need for such presump-

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160. INCSR vol. 2, supra note 20, at 31 (MLATs, “which are negotiated by the Department of State in cooperation with the Department of Justice[,] . . . allow generally for the exchange of evidence and information in criminal and ancillary matters. In money laundering [and asset forfeiture] cases, they can be extremely useful as a means of exchanging banking and other financial records with treaty partners.”).
162. Sullivan, supra note 30.
165. Id. § 101 (establishing presumptions for entities and transactions in offshore secrecy jurisdictions).
tions stems from the tax and secrecy laws of these jurisdictions, which effectively prevent U.S. authorities from accessing the necessary information. Section 205 clarifies that U.S. investigators may access Suspicious Activity Reports gathered in tax haven territories for civil tax matters, and not strictly for criminal proceedings. Yet, the most significant provision of the proposed Act attempts to circumvent the dual-criminality provision by expanding the Treasury Secretary’s authority under § 311 of the Bank Secrecy Act, allowing him to impose financial penalties on jurisdictions and financial institutions determined to be “impeding U.S. tax enforcement.” The Treasury Secretary would also have the power to limit such institutions’ abilities to operate and conduct business within the United States. The bill essentially requires that a jurisdiction have a tax treaty, or similar agreement, in place to provide for timely and mandatory exchanges of tax information. However, the bill is not yet law, and while there is some congressional support for its underlying challenges to the fundamental structure of tax haven jurisdictions, there are those who believe the Stop Tax Haven Abuse Act has little chance of becoming legislation. In fact, even those who support the bill recognize that congressional backing is weak. Therefore, until Congress decides the fate of the bill, the United States remains in its current position of relative ineffectiveness in appropriating information from Panama relating to the evasion of U.S. taxes and possible underlying illegal activity.

III. A PROPOSAL TO IMPLEMENT A TAX INFORMATION EXCHANGE AGREEMENT

Every country has the right to implement and enforce both tax and legal systems that best suit its needs and promote competition for

166. Tax Haven Abuse Act Summary, supra note 18.
168. Id. § 102 (authorizing “Special Measures against Foreign Jurisdictions, Financial Institutions, and Others That Impede United States Tax Enforcement”).
169. Id.
170. Id. § 7492(b)(F)(D)(i) (“[A] treaty or other information exchange agreement with the United States that provides for the prompt, obligatory, and automatic exchange of such information as is foreseeably relevant for carrying out the provisions of the treaty or agreement or the administration or enforcement of this title.”).
171. Komisar, supra note 2.
173. Komisar, supra note 2.
Countries often create tax regimes that will assure a certain amount of revenue for the government, while rarely accounting for the laws of other jurisdictions or the potentially harmful impact they may have on surrounding regions. As the current situation illustrates, conflicts can emerge when a country must access information that may be protected by a foreign legal system, in order to enforce its own laws. A government’s inability to investigate potential tax violations that transcend its borders facilitates the evasion of domestic taxes by encouraging taxpayers to transfer assets to foreign jurisdictions. There is a traditional rule that one nation will not assist another nation in enforcing its tax collection procedures. This causes a tension between the sovereign power of one nation to “enforce its laws and protect its borders,” and the sovereign power of another jurisdiction to enforce its secrecy laws and keep private any information within its territorial boundaries. Yet, these types of conflicts have generally been resolved through the execution of collaborative tax treaties.

This Note argues that the best approach for the United States to reconcile its need for tax information with Panama’s right to its tax and bank secrecy systems is to negotiate a TIEA with Panama. The government of Panama has demonstrated in recent years that it is not unconditionally opposed to the exchange of tax information. Although Panama has not

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175. Dean, supra note 3, at 924.
177. Dean, supra note 3, at 925.
179. U.S. CONG., OFFICE OF TECH. ASSESSMENT, supra note 3, at 117. See also BLACK’S LAW DICTIONARY, supra note 14, at 654–55 (defining “Sovereignty” as “the supreme political authority of an independent state,” and “Sovereign Power” as “the power to make and enforce laws”).
180. Dean, supra note 3, at 924.
181. See Letter by Norberto Delgado Duran, Minister of Econ. & Fin. for the Rep. of Pan., to the Sec’y Gen. of the OECD (Apr. 15, 2002) [hereinafter Letter by Minister of Econ. & Fin. for the Rep. of Pan.]. See OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Feb. 13, 2009) (describing the organization as an intergovernmental body that “monitors trends, analyses and forecasts economic developments and researches social changes or evolving patterns in trade, environment, agriculture, technology, taxation and more. [The OECD] provides a setting where governments compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies.”).
signed any such treaty with another country, and has refused to approach the issue with the United States, a treaty better tailored to accommodate Panamanian concerns may be able to overcome this hurdle.

In April 2002, Panama sent a commitment letter to the OECD, agreeing to respect the Organization’s principles of “effective exchange of tax information.” The government expressly agreed to exchange bank and financial information with other countries investigating tax matters that may only rise to the level of civil offenses in Panama, and would normally be barred from disclosure. However, in December of that year, Panama’s government expressed concern to the OECD about the organization’s lack of “non-discriminatory treatment.” The government believed that the OECD was not committed to creating a “level playing field” and favored certain European OECD members by exempting them from the same exchange obligations as were imposed on Panama. Concerned by the OECD’s double standard and inaction to ameliorate the disparity, Panama withdrew from its earlier commitment. The OECD’s policy was viewed as a threat to Panama’s sovereignty by trying to impose restrictions, unfairly and inequitably, on its ability to compete in the financial services market.

Nevertheless, by negotiating a TIEA solely with Panama, where information exchange commitments would be equal between both countries, the United States could resolve the “level playing field” issue. A narrow jurisdictional scope with equally binding terms would indicate a dedication to fairness and a respect for Panama’s sovereignty. Panama has a legitimate concern that it may lose its competitive edge in the region if it relaxes its secrecy laws. Due to the fact that other notorious

185. Id.
187. Id.
188. Daniel J. Mitchell, Strategic Memorandum from the Ctr. for Freedom & Prosperity (Jan. 6, 2003), http://www.freedomandprosperity.org/memos/m01-06-03/m01-06-03.shtml.
189. See Dean, supra note 3, at 935 (Panama, as a recognized tax haven jurisdiction, would perceive the OECD initiative as a threat to its sovereignty).
191. Dean, supra note 3, at 958.
“tax havens” such as the Bahamas and the Cayman Islands have signed TIEAs, the value to Panama in maintaining its secrecy laws and not entering into a similar agreement increases. Yet, through diligent negotiations, both countries could circumvent this concern by narrowly tailoring the conditions that would trigger the requirement to exchange information, and restricting the categories of data that would have to be transferred.

Conceivably, both countries would be able to define specific circumstances that would elicit the exchange of information, but that do not infringe on Panama’s general assurance of secrecy. For example, by limiting a situation to defined asset amounts transferred through specific types of financial instruments or transactions that originate from U.S. banks, U.S. investigators could gain access to information customized to tax evasion, while Panama could retain its overall international commitment to secrecy. Although such a limited scope may exclude many instances of tax evasion and money laundering from scrutiny, it would at least be a step in the right direction. Collaboration on a small scale would allow authorities in both nations to familiarize themselves with an increased volume of information exchanges, without getting overwhelmed by a flood of requests that may accompany a broader treaty. As the process becomes more customary, it may be easier to slowly expand the treaty’s reach.

In addition, a narrow scope would mean that only very specific transactions, those purposely instigated to evade U.S. taxes, would be deterred from going through Panama. Therefore, the country could retain its lucrative bank secrecy regime with little financial loss from legitimate business. Additionally, the United States could offset any minimal loss to Panama by implementing an asset sharing program. The countries could share not only the revenue from recovered taxes, but also any punitive damages U.S. authorities impose for tax violations. Regardless of the specific provisions of a U.S.-Panamanian TIEA, a treaty would require a careful balancing of both countries’ right to administer their respective laws. This will only be possible through diligent diplomacy and the willingness of each government to accommodate and respect the other’s necessities.

193. Dean, supra note 3, at 958.
CONCLUSION

The loss of tax revenue to the U.S. Treasury is a significant side effect of money laundering with a substantial impact on the U.S. economy. Evaded taxes are typically funneled through tax haven countries because of the anonymity and strict secrecy laws those jurisdictions provide. The lack of economic transparency in these offshore havens permits the origin of illicit funds to remain hidden from U.S. investigators, and aids the money’s re-entry into the U.S. banking system as seemingly legal money. Although tax evasion and money laundering are inherently similar, they are separate and distinct violations. While both can be criminal matters in the United States, the evasion of taxes is not a criminal issue in Panama unless the tax evasion directly implicates a more serious crime usually relating to drugs. Only in those situations do Panama’s secrecy laws authorize disclosure of tax and financial information. Therefore, requests for information in purely U.S. tax evasion investigations will generally not be honored. This creates a safe haven for tax cheats to hide their money and subsequently launder it back to the United States.

The U.S. government has made a cogent effort to strengthen its domestic laws regarding money laundering and financial crimes. However, reinforced domestic legislation can neither overcome the principle of dual criminality, nor compel Panama to breach its own secrecy regime. Furthermore, international financial task forces, put in place to combat money laundering, have also not been able to reach purely economic matters such as tax evasion. Consequently, evaded taxes remain protected in Panama.

Nevertheless, the signing of a TIEA could circumvent the barriers established by secrecy laws. Although Panama does not currently have such an agreement in place, it may be possible through diplomatic channels to tailor an agreement that would accommodate both the United States’ need for access to financial information and Panama’s insistence that its secrecy laws not be compromised. However, until such a TIEA is effectuated, Panama’s bank secrecy laws will continue to facilitate the laundering of evaded U.S. taxes.

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SUING THE HIRED GUNS: AN ANALYSIS OF TWO FEDERAL DEFENSES TO TORT LAWSUITS AGAINST MILITARY CONTRACTORS

Andrew Finkelman*

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INTRODUCTION

As the U.S. military decreased in size following the Cold War, the role of government contractors in combat zones grew ever larger. The military-contractor phenomenon has mushroomed in recent years, and private contractors now play pivotal roles in U.S. military and reconstruction operations in Iraq and Afghanistan. The government’s use of contractors to perform military and foreign affairs-related functions raises a host of political, moral, and legal questions. While the U.S. intervention in Iraq and Afghanistan continues with no apparent end in sight, these questions justifiably remain at the forefront of the national debate.

1. Lisa L. Turner & Lynn G. Norton, Civilians at the Tip of the Spear, 51 A.F. L. REV. 1, 3 (2001) (“Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement . . . .”) (citing Colonel Steven J. Zamparelli, Competitive Sourcing and Privatization: Contractors on the Battlefield—What Have We Signed up for?, A.F. J. LOGISTICS 9, 10 (1999)). By 2007, nearly 50,000 contractors provided security services in Iraq, with many more engaged in other facets of the U.S. effort there. JENNIFER K. ELSEA & NINA M. SERAFINO, CRS REPORT FOR CONGRESS, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS AND OTHER ISSUES 3 (2007). The number of defense contractors worldwide is far greater. Id. (noting that as of 2007 the Department of Defense employed 127,000 contractors).

This Article addresses a narrow aspect of the nation’s use of private contractors in Iraq and Afghanistan. While the lack of criminal accountability for contractors has received much critical commentary, scholars have paid comparatively little attention to the possible civil liabilities they face. This Article attempts to shine some light on this topic by addressing the defenses and immunities that might protect private military contractors from civil liability.

To an unprecedented degree, contractors now fill roles that, in the past, U.S. soldiers performed exclusively. Their rights and duties, however, are not well settled. The U.S. Supreme Court has weighed in, creating what is known as the “government-contractor defense.” But as formulated by the Court, this defense applies only to the subset of private contractors that manufactures goods and equipment for the federal government according to precise specifications. The contractors currently operating in Iraq are generally not of this sort. Most are service contractors, who provide personal services, rather than manufacture goods. For example, these contractors offer air and land transportation for the military, food for the troops, and help in rebuilding Iraq’s damaged infrastructure. Service contractors also include “hired guns,” whose deeds and misdeeds have made front-page news in recent months. They are the contractors with whom the State and Defense Departments have contracted to supply


6. See for a discussion of the scope and limits of the Boyle government-contractor defense, see infra Part II.B. Although the Court did not limit the government-contractor defense in Boyle to manufacturers of weapons technology for military use, in practice, these are the contractors most likely to invoke the defense. Christopher R. Christensen & Anthony U. Battista, Brief, Framing the Government Contractor Defense, 38-WTR BRIEF 12, 17 (2009).


9. Id.
vital security for diplomats and officials in Iraq and Afghanistan. These are the individuals responsible for the much-publicized shooting deaths of Iraqi civilians in Baghdad in September of 2007.10

The presence of service contractors on the battlefield presents new legal challenges. This is evident from the recent flurry of cases in which plaintiffs have brought tort claims against contractors for injuries suffered in the conflicts in Iraq or Afghanistan. In each case, the defendant contractors have pushed for an expansion of contractor defenses to include personal services contracts for combat support. Such an expansion would take the defense beyond where the Supreme Court has heretofore permitted it to reach. The judicial opinions responding to the invocation of various contractor defenses are not consistent and evince confusion as to the source and nature of such defenses and immunities.11

Part I of this Article assesses the extent of the contractor presence on foreign battlefields and the various roles contractors play in assisting (and in some cases supplanting) the U.S. military. Part II briefly explores the line of cases that gave rise to the government-contractor defense, and then provides an overview of the more recent cases in the lower courts where contractors have advocated broadening the government-contractor defense. Part III addresses one particular defense available to service contractors, the government-agency defense, and examines its potential to protect contractors from suit. It concludes that the government-agency defense should be available to private contractors acting as agents of the U.S. government and can be a powerful weapon in shielding them from suit. However, because its applicability hinges on establishing the requisite agency relationship, it is likely to be available to service contractors in very few situations.

Part IV considers the combatant-activities exception to the waiver of sovereign immunity in the Federal Tort Claims Act (“FTCA”).12 Discussion of this exemption reveals that, as articulated by the Ninth Circuit, the defense may logically be expanded to protect service contractors, but countervailing interests, including ensuring the accountability of contractors, weigh against such expansion in the vast majority of cases.13 This

11. For cases evincing confusion about the government-contractor defense, see infra note 74 and accompanying text.
13. W. PAGE KEATON, PROSSER AND KEATON ON THE LAW OF TORTS 5–6 (1984) (“There remains a body of law which is directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests . . . . This is the law of torts.”).
Article concludes by arguing that the interests in protecting contractors from civil suit are strong where the government exercises effective control over contractors, and where the defense is necessary to protect military decision making and military discipline.

I. THE MILITARY CONTRACTOR

While mercenaries date back millennia, the rise to prominence of U.S. private military contractors (“PMCs”) can be traced to the end of the Cold War. During this period, there was a sharp reduction in the size of the U.S. military and an increase in the number of military deployments abroad. With a smaller group of soldiers from which to draw, the U.S. Department of Defense relied on private contractors to fill the gap.

The outsourcing of military functions increased markedly following the attacks of 9/11, with the U.S. military response in Afghanistan in the winter of 2001, and the invasion of Iraq in March of 2003. Contractors

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14. The Protocol Additional to the Geneva Conventions defines a mercenary as one who is recruited to fight, fights abroad in combat hostilities for private gain, and is not a national of the parties to the conflict (or of the country in which the conflict takes place). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 47, June 8, 1977, 1125 U.N.T.S. 3. Because the contractors discussed in this Article are generally not hired to fight for a nation of which they are not a national, they are not properly viewed as mercenaries. Id.

15. Although one could distinguish among them, this Article uses the terms “private military company,” “military contractor,” and “security contractor” interchangeably.


17. The United States became involved in the former Yugoslavia, Somalia, and other locations during the 1990s. See William R. Casto, Regulating the New Privateers of the Twenty-First Century, 37 RUTGERS L.J. 671, 675–80 (2006) (discussing the history of mercenaries and privateers, particularly during the era of the founders of the U.S. Constitution); Turner & Norton, supra note 1, at 8 (addressing the causes of the “rapid and significant growth of [Department of Defense] dependence on contractor support”).

18. For example, the United States has employed DynCorp contractors as mercenary-type operators to man armed helicopters in the State Department’s antidrug efforts in Colombia. Nicki Boldt, Outsourcing War—Private Military Companies and International Humanitarian Law, 47 GERMANY Y.B. INT’L L. 502, 511–12 (2004). DynCorp helicopters participated in search and rescue missions, and were involved in combat with Colombian rebels. Id.

19. See Memorandum from the Majority Staff of Committee on Oversight and Government Reform to Members of the Committee on Oversight and Government Reform 3 (Feb. 7, 2007) (“[B]y many measures, the role of private security contractors in Iraq is unprecedented in its size and scope.”).
are currently present in these combat zones in huge numbers. More than 100,000 contractors operate alongside U.S. forces in Iraq, at least half of them providing private security services.  

Military contractors no longer simply assist in domestic construction projects or do the soldiers’ laundry. Contractors have handled up to thirty percent of the military’s services in Iraq. The integration of contractors into the U.S. effort in Iraq has been comprehensive. Contractors have served as interrogators—most notably in Abu Ghraib prison—and as intelligence gatherers. They have provided personal security for high-ranking U.S. officials, guarded important fixed installations, in-

20. Congressional Budget Office, Contractor’s Support of U.S. Operations in Iraq (2008), http://www.cbo.gov/fpdocs/96xx/doc/9688/MainText.3.1.shtml. This figure is striking, particularly because it is nearly as large as the number of U.S. soldiers in Iraq. In February of 2007, the United States had over 130,000 soldiers in Iraq. Alan Cowell, Britain to Trim Iraq Force by 1,600 in Coming Months, N.Y. Times, Feb. 22, 2007, at A8 (chart showing troop levels for the various nations with soldiers in Iraq). See Elsea & Serafini, supra note 1 (discussing the size of the contractor force in Iraq). The number of contractors in Iraq represents the largest deployment of contractors in wartime, and is ten times larger than the number in theater during the 1991 Gulf War. One in ten persons deployed to the war zone during the Gulf War was a private contractor. Jeremy Scahill, Blackwater: The Rise of the World’s Most Powerful Mercenary Army, at xv (2007). Kellogg, Brown & Root alone has had over 50,000 personnel in Iraq, Afghanistan, and Kuwait. Id. Although violence in Iraq has at times reduced the contractor presence in the country, the number has remained high. James Glanz, Contractors Return to Iraq, but Numbers Are Still Down, N.Y. Times, May 8, 2004, at A10. 


23. See Brinkley, supra note 2. 


25. For example, contractors replaced the teams of U.S. special forces that protected President Hamid Karzai in Afghanistan, as well as members of the Coalition Provisional
Including the Baghdad airport and Iraq’s oil-production facilities, and escorted myriad personnel and supply convoys.\textsuperscript{26} Blackwater USA, one of the most prominent contractors operating in Iraq, enjoys a number of aviation contracts with the military to transport troops and supplies to combat zones.\textsuperscript{27} This company is also purportedly involved in the U.S. government’s secret rendition program, in which politically sensitive prisoners are transported overseas for interrogation by nations with questionable human-rights records.\textsuperscript{28} Reports have also implicated contractors in the Central Intelligence Agency’s (“CIA”) formerly secret interrogation program, which included the waterboarding of terrorist suspects.\textsuperscript{29}

Although military regulations prohibit contractors from performing inherently governmental functions,\textsuperscript{30} including combat operations,\textsuperscript{31} reality


\textsuperscript{28} Scahill, supra note 20, at 253.

\textsuperscript{29} Siobhan Gorman, Cia Likely Let Contractors Perform Waterboarding— Interrogation Work Outsourced Heavily; Legality Uncertain, WALL ST. J., Feb. 8, 2008, at A3 (citing two unnamed current and former intelligence officials who stated that contractors were used because the CIA lacked experience with detention and interrogation).

\textsuperscript{30} See Antenor Hallo De Wolf, Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law, 13 IND. J. GLOBAL LEGAL STUD. 315, 346 (2006) (noting that under army regulations, inherently government functions are those most closely associated with the public interest).

\textsuperscript{31} J OINT CHIEFS OF STAFF, JOINT PUBLICATION 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 (Apr. 6, 2000), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp4_0.pdf (“In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants.”); Jeffrey F. Addicott, Con-
has not conformed to this rule. Contractors have been in the thick of combat, and the distinction between military and nonmilitary functions has broken down. At one point in 2005, the number of U.S. contractor fatalities exceeded the number of troop deaths for all non-U.S. and -U.K. coalition members.

The U.S. military’s reliance on the private sector has hardly been inadvertent. The federal government has long emphasized the importance of privatizing functions that the private sector could perform more efficiently. Under Office of Management and Budget ("OMB") Circular A-76, for example, federal agencies are periodically required to compare the cost of performing an activity in-house and the cost of contracting it out. In recent years, the Bush administration’s ideological bent and fo-


citator on the “Battlefield”: Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations, 28 Hous. J. Int’l L. 323, 347 (2006) (discussing the restrictions on contractors, and noting that while they are discouraged from carrying firearms for self-defense and are prohibited from using them in direct support of combat operations, “the dangers of the battlefield and the limitations of the military to provide adequate force protection may subject contractors to bodily harm, necessitating the contractors’ possession of fire-arms for self defense”).

32. C. Douglas Goins, Jr., Gregory L. Fowler & Taavi Annus, Regulating Contractors in War Zones: A Preemptive Strike on Problems in Government Contracts, BRIEFING PAPERS 8–9 (2007) (“Given the nature of the circumstances under which they must operate, Government contractors . . . may be called upon to perform functions that could be characterized as direct participation in hostilities.”) (citation omitted).

33. See Barstow, supra note 25 (noting that “security companies “fought to defend coalition authority employees and buildings from major assaults in Kut and Najaf,” and indicating elsewhere that private contractors are on occasion mistaken for enemy units and are fired upon) (“With thousands of private security employees now guarding supply lines, buildings and reconstruction projects—and with thousands more on the way—they are increasingly being drawn into firefight and other combat situations that traditionally have been left to the military.”); Clayton Collins, War-Zone Security Is a Job for . . . Private Contractors?, CHRISTIAN SCI. MONITOR, May 3, 2004 (“Private firms—even ones with well credentialed staff—have already stepped well beyond the job of guarding facilities and conducting other protective services . . . .”). Scahill describes an incident in which Blackwater security guards fired on a taxicab that had crossed paths with a State Department official they were transporting, killing a passenger. SCAHILL, supra note 20, at 72.


35. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). However, the
cus on reformulating the military placed increased emphasis on outsourcing. As part of the “Total Force,” contractors would replace soldiers in “nation building” and other tasks, freeing troops to focus on warfare.38

Outsourcing military and military-support functions to civilians places many actors beyond the chain of command and allows politicians to conceal the true costs of war.39 Nevertheless, without the sizeable contractor corps currently in Iraq, and absent substantial troop increases, the Bush


36. Steven L. Schooner, Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government, 16 STAN. L. & POL’Y REV. 549, 551–54 (2005) (discussing the Bush administration’s “rush to outsource”). See Addicott, supra note 31, at 328 (“Without question, civilian contractors will continue to be integral participants in the ongoing War on Terror.”); Gordon L. Campbell, Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm’s Way and Requiring Soldiers to Depend on Them, Joint Services Conference on Professional Ethics (Jan. 27–28, 2000) (on file with Brooklyn Journal of International Law) (“The use of contractors to support military operations is no longer a ‘nice to have.’ Their support is no longer an adjunct, ad hoc add-on to supplement a capability. Contractor support is an essential, vital part of our force projection capability—and increasing in its importance.”). It is also worth noting that longstanding government policy has focused on privatizing government activities, where possible, to increase efficiency and to avoid competing with private business. See SCAHILL, supra note 20, at xvii (noting that “[t]he often-overlooked subplot of the wars of the post-9/11 period is the outsourcing and privatization they have entailed” and that ideologues such as Paul Wolfowitz and Douglas Feith came to power with two major goals—regime change in Iraq and other countries, and carrying out “the most sweeping privatization and outsourcing operation in U.S. military history”).


39. See SCAHILL, supra note 20, at xx (“With almost no public debate, the Bush administration has outsourced to the private sector many of the functions historically handled by the military. In turn, these private companies are largely unaccountable to the U.S. taxpayers from whom they draw their profits.”). One seldom hears of contractor deaths on the evening news, but over 770 civilian contractors have died in Iraq since the beginning of the war. Howard Witt, America’s Hidden War Dead, CHICAGO TRIB., Mar. 26, 2007, at A1. The combined death toll from the conflict in Iraq rises twenty percent when contractor deaths are added to the over 4000 U.S. soldiers killed. Iraq Coalition Casualty Count, http://icasualties.org/oif/ (last visited Dec. 5, 2008).
administration’s widely publicized goals for reconstruction would probably have been beyond reach. Given the likelihood that a peaceful, democratic Iraq cannot be won by force of arms, the contractor presence in Iraq has been critical to U.S. success there. To perform their duties effectively, military contractors may require legal protection against civil liability. However, the law should also protect vital American interests in holding tortfeasors accountable. Having substituted contractors for soldiers, what level of civil legal protection do contractors enjoy in their new role? In this new kind of war, in which humanitarian reconstruction goes hand in hand with combat, is protecting the nation’s contractors as essential as protecting its soldiers? This Article queries what legal protections do and should apply to service contractors in the current conflicts in Iraq and Afghanistan. The following section briefly addresses the development of contractor defenses, providing a framework for evaluating and criticizing the current model.

II. THE GOVERNMENT-CONTRACTOR DEFENSES: A BACKGROUND

A. Sovereign Immunity, the FTCA, and Its Exceptions

Sovereign immunity in the United States derives from the English common law principle, developed during the Tudor reign and cemented by the time of Blackstone, that “no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.” While sovereign immunity bars suits against the United States, it is not without exception. Individuals aggrieved by government action may circumvent sovereign immunity where the government has waived it. These statutory waivers include the FTCA, which permits suits against the government for the tortious acts of its employees.

“Mark[ing] the culmination of a long effort to mitigate unjust consequences of sovereign immunity,” the FTCA subjects the United States

40. DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW 74 (2005) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765)). Since the earliest days of our nation, courts have upheld the view that the federal government may not be sued without its consent. See United States v. Lee, 106 U.S. 196, 205 (1882); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 610–11 (4th ed. 2003). Under the Eleventh Amendment of the U.S. Constitution, the states also enjoy immunity from suit. U.S. CONST. amend. 11. Because suits against government contractors implicate federal employees or federal contractors exclusively, state sovereign immunity will not be addressed here.

41. CHEMERINSKY, supra note 40.


43. WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT 1 (1957). The legislation created a damages remedy against the United States whereas previously a plaintiff would
to liability in cases where injury is caused by the “negligence or wrongful act or omission of any employee of the Government” while acting in the scope of his or her employment in circumstances under which a private person would be liable.44

The FTCA includes a variety of key exceptions to the general waiver of immunity. These exceptions reflect unique federal interests that justify retaining sovereign immunity in particular contexts. There are two important exceptions at the heart of the military contractor’s efforts to invoke federal sovereign immunity. The first exception is the “discretionary-function” exception, which preserves federal sovereign immunity in suits arising from “the exercise or performance or the failure to exercise or perform a discretionary function” by the federal government or its employees.45 Essentially, the discretionary-function exception prevents courts from second-guessing legislative and administrative conduct that implements policy goals.46 The discretionary-function exception forms the basis for the government-contractor defense as developed and ratified by the Supreme Court in Boyle v. United Technologies Corp., discussed below. The second exception is the “combatant-activities” exception, which excepts suits against the federal government “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”47 This exception is intended to restrict interference with decisions of federal agents regarding military affairs.48 It forms the basis for a separate contractor defense, explored in Part IV.


Yearsley v. W.A. Ross Construction Co., decided in 1940, is the first important U.S. Supreme Court opinion addressing a contractor’s defense from civil liability for performing a government contract.49 The case in-

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45. Id. § 2680(a).
47. 28 U.S.C. § 2680(j).
48. See Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948).
volved the construction by a contractor of a dike along the Missouri River. When the construction of the dike caused a diversion of the river that washed away a portion of the plaintiff’s land, the landowner sued both the government and the contractor. The Court held the contractor immune from suit based on the basic principles of agency: “if . . . authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.” In other words, when an agency relationship exists, the contractor can avoid liability where the U.S. government itself would not be liable.

The Court later decided Feres v. United States, which examined whether soldiers are permitted to sue the U.S. government for injuries they suffered in the course of duty. The Court concluded that the FTCA does not create a cause of action for soldiers suing the military for service-related injuries, stating that the “federal character of military service and the need for uniformity in the system of compensation,” along with the ample compensation afforded service members through veter-

50. Id. at 19.
51. Id.
52. Id. at 20–21.
53. See Boyle v. United Technologies Corp., 487 U.S. 500, 524–26 (1988) (Brennan, J. dissenting) (discussing Yearsley); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1343 (11th Cir. 2007) (discussing Yearsley); Charles E. Cantu & Randy W. Young, The Government Contractor Defense: Breaking the Boyle Barrier, 62 ALB. L. REV. 403, 408-09 n.27 (1998) (discussing the “agency” principle at issue it Yearsley). Of course, to the extent that the contractor’s immunity derives from the United States’ sovereign immunity, the FTCA circumscribes it. 28 U.S.C. § 1346(b)(1). So, for example, a contractor-agent might not enjoy Yearsley’s protection where the discretionary-function exception or other FTCA exception would not protect the government. Cantu & Young, supra at 407–08.
54. Feres v. United States, 340 U.S. 135 (1950). Feres actually involved three consolidated cases. The plaintiffs (and their decedents) contended that they had suffered injuries, not in combat, but from the malpractice of military physicians in two of the cases, and from a barracks fire in the other. Id. at 136–37 (describing the Feres case, involving a negligence action arising from a fire in barracks that “should have been known to be unsafe because of a defective heating plant,” the Jefferson case, in which a physician allegedly left an army towel inside a patient following an operation, and the Griggs case, another malpractice case).
55. Id. at 146.
ans’ benefits,\textsuperscript{57} justified its ruling. In this interpretation, couched as an interpretation of the FTCA, the Court effectively added another exception to the statute.\textsuperscript{58} Subsequent cases supplied another rationale for what emerged as the \textit{Feres} “doctrine”—that permitting suits by soldiers against the military would undermine military discipline and morale.\textsuperscript{59}

Lower courts later drew upon \textit{Feres} to craft a defense for government contractors. Courts found that where the government mandated and approved specifications for a product, and had special knowledge of the dangers of the product, a contractor manufacturing it would share in the government’s \textit{Feres} immunity.\textsuperscript{60} Holding a contractor liable in tort for executing the will of the military, the courts reasoned, would permit the very type of interference with military decision making that \textit{Feres} sought to prevent.\textsuperscript{61}

In \textit{Boyle v. United Technologies Corp.}, the Supreme Court rejected this line of cases and found that \textit{Feres} could not be the basis for a government-contractor defense. In \textit{Boyle}, the estate of a marine who died in a helicopter crash sued the maker of the military helicopter, alleging design defects in the escape hatch.\textsuperscript{62} The Court reasoned that applying the \textit{Feres} principle to protect military contractors would produce “results that are in some respects too broad and in some respects too narrow.”\textsuperscript{63} That is, the result would be to immunize contractors from all tort claims by soldiers while sanctioning virtually all civilian claims.\textsuperscript{64}

Instead of applying \textit{Feres}, the Court focused on the unique federal interests at stake in the military’s contracts with manufacturers of military

\textsuperscript{57} See Turley, supra note 56.

\textsuperscript{58} CHEMERINSKY, supra note 40, at 624–26.

\textsuperscript{59} See United States v. Johnson, 481 U.S. 681, 691 (1987) (“Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.”).

\textsuperscript{60} See, e.g., Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597–98 (7th Cir. 1985); McKay v. Rockwell Int’l Corp., 704 F.2d 444, 451 (9th Cir. 1983).

\textsuperscript{61} See Jonathan Glasser, Note, The Government Contract Defense: Is Sovereign Immunity a Necessary Prerequisite?, 52 BROOK. L. REV. 495, 521 (1986) (“The court focused on fairness to contractors who are unable to obtain indemnification under \textit{Feres} and Stencel . . . and the necessity of preventing the judiciary from interfering with military decisions . . . .”).


\textsuperscript{63} Id. at 510.

\textsuperscript{64} Id. at 510–11. The “narrow” aspect of applying \textit{Feres} would be compelled by the fact that \textit{Feres} only addresses suits against the federal government by military personnel. \textit{Feres} v. United States, 340 U.S. 135 (1950).
equipment, identifying two such interests: the obligations and rights of the United States under its contracts, and the civil liability of federal officials for actions undertaken in the course of their duties. The Court recognized that it “makes little sense to insulate the Government against financial liability . . . when the Government produces equipment itself, but not when it contracts for the production.” The ultimate financial burden would pass through to the government, as contractors would raise their prices “to cover, or to insure against, contingent liability for the Government-ordered designs.” Contracting with private entities for the production of military equipment involves discretionary decisions that balance competing military, technical, and cost considerations. Accordingly, the discretionary-function exception to the FTCA authorizes a defense for contractors in these cases.

The Court set forth a three-part test to identify cases in which the “policy of the ‘discretionary function’ would be frustrated.” Contractors are not liable for design defects in military equipment where (i) the government approved “precise specifications”; (ii) “the equipment conformed to those specifications”; and (iii) the contractor “warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.” Therefore, Boyle bars only those suits in which the government balanced the pros and cons of a particular action (be it the design and production of a fighter jet or the design and construction of a levy), contracted with the private sector, furnished precise specifications to the contractor, and supervised the execution of his or her work.

The immunity Yearsley provides to contractors is derived from the immunity of the government itself. However, the “government-
contractor defense” described in Boyle does not require a strict agency relationship between the contractor and the government. 73 The defense is rooted in federal preemption,74 which displaces state law in cases where it would interfere with unique federal interests.75 While a successful defense of sovereign immunity ousts the court’s jurisdiction to hear the case, federal preemption of state law arises by operation of federal common law and represents an affirmative defense that the contractor must raise and prove.76

Boyle is the wellspring of the modern government-contractor defense. Lower courts have consistently applied the Boyle test in product-liability suits against weapons manufacturers.77 At least one lower court has expanded Boyle to cover nonmilitary equipment,78 while another has applied the Boyle test for a services contract for the maintenance of military

and its principle that “a common law agent may sometimes share in the sovereign immunity of the United States”).

73. Boyle, 487 U.S. at 507 (describing when preemption would require dismissal of suits against contractors).

74. This is the case despite some confusion in judicial opinions about the source of the government-contractor defense. See, e.g., Burgess v. Colo. Serum Co., 772 F.2d 844, 846 (11th Cir. 1985) (“If a contractor has acted in the sovereign’s stead and can prove the elements of the defense, then he should not be denied the extension of sovereign immunity that is the government contract defense.”); Zinck v. ITT Corp., 690 F. Supp. 1331, 1333 (S.D.N.Y. 1988) (“The government contractor defense grew out of the historic principle of sovereign immunity. When a contractor acts under the authority and direction of the United States, it shares in the immunity enjoyed by the Government.”).

75. Implied preemption may be contrasted with other types of preemption, including express preemption, in which Congress, by statute, expressly displaces state law. See, e.g., Employment Retirement Income Security Act, 29 U.S.C. § 1144(a) (2006) (specifying that ERISA legislation expressly preempts state laws affecting employee benefit plans).

76. See Rogers v. Tyson Foods, Inc., 308 F.3d 785, 791 (7th Cir. 2002) (describing the preemption defense as an affirmative defense); Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744, 747 (9th Cir. 1997) (“The military contractor defense is an affirmative defense; Bell has the burden of establishing it.”); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 18 n.5 (D.D.C. 2005) (“Immunity involves not an affirmative defense that may ultimately be put to the jury, but a decision by the court at an early stage that the defendant is entitled to freedom from suit in the first place.”).


78. See Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993) (extending contractor liability to a manufacturer of an ambulance); In re Haw. Federal Asbestos Cases, 960 F.2d 806 (9th Cir. 1992) (refusing to do the same).
equipment. Few contractors assisting the U.S. government in Iraq and Afghanistan, though, are likely to meet the Boyle criteria. Contractors providing food for an army mess tent, transporting fuel across the Iraqi desert, or supplying an armed escort for a high-profile official will in most cases lack the requisite direction and control by the military. The Supreme Court has given no indication of a willingness to expand Boyle to cover such situations.

The courts in Koohi v. United States and Bentzlin v. Hughes Aircraft Co. took a different approach to contractor defenses. These courts created a defense for contractors grounded not in the discretion-function exception to the FTCA, but rather, in the combatant-activities exception. The next Section discusses these two cases. It then surveys the recent litigation in which courts have been asked to expand the existing frontiers of contractor defenses.

C. Preemption as a Defense Rooted in the Combatant-Activities Exception to the FTCA: Koohi v. United States, and Bentzlin v. Hughes Aircraft Co.

Not long after the Supreme Court’s ruling in Boyle, the Ninth Circuit confronted a claim arising from a U.S. Navy cruiser’s mistaken attack on an Iranian airliner during the “Tanker Wars” between the United States and Iran in the 1980s. In Koohi v. United States, the family of passengers on Iran Air Flight 655 sued the United States and the private manufacturers of the Aegis air-defense system allegedly responsible for mis-

79. Hudgens v. Bell Helicopters/ Textron, 328 F.3d 1329 (11th Cir. 2003). Note that this application of the test is significant because it comes from the Eleventh Circuit, where a court recently issued an opinion in McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

80. This is not to say that contractors would not, in those cases, be following some sort of military-prescribed protocol. However, specifications will often be insufficiently precise to conform to the Boyle government-contractor defense. Nor will it generally be the case, in transporting fuel, for example, that the contractor could not do it according to military protocol and in conformity with the applicable standard of care. See Boyle v. United Technologies Corp., 487 U.S. 500, 509 (1988) (“The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.”).


82. The “Tanker Wars” describe the small-scale skirmishes between the United States and Iran in the Persian Gulf during Iran’s war with Iraq. Koohi, 976 F.2d at 1330–31. The U.S. military adopted a policy of reflagging Kuwaiti oil tankers under the American banner to further protect them. Steve Liewer, Teamwork Saved Stricken Warship: Navy Frigate Hit Iranian Mine in Persian Gulf 20 Years Ago, SAN DIEGO UNION-TRIB., Apr. 19, 2008.
dentifying the plane. The Ninth Circuit based its ruling of contractor nonliability on the combatant-activities exception to the FTCA. The court found that because the ship was engaged in combatant activities at the time of the accident, the plaintiffs could not seek relief from the United States.

The court articulated three reasons for immunizing the military from tort liability. First, although a central premise of tort theory is deterrence, Congress did not intend military personnel to exercise caution in combat situations. Second, while tort liability seeks “to provide a remedy for the innocent victim,” it would make little sense to provide remedies for civilians injured as a result of negligence as opposed to those who suffered from the “overwhelming and pervasive violence which each side intentionally inflicts on the other.” Finally, even though tort theory posits that tortfeasors should be punished, Congress could not have intended this principle to apply to U.S. combat personnel. According to the Ninth Circuit, one purpose of the combatant-activities exception “is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.” Thus, the court concluded that the plaintiffs could not proceed against the United States. And on the basis of the same factors, it immunized the makers of the Aegis missile system from these claims.

One year later, the Central District of California heard Bentzlin v. Hughes Aircraft Co., a case in which the family members of six marines sued a weapons manufacturer. The marines were killed when a misdirected missile struck their jeep near the Kuwait-Saudi border. The court determined that the claims against the contractors were preempted, after reviewing Koohi’s description of the three principles animating the combatant-activities exception. Recognizing the national interest in decisive

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84. Id. at 1333 (citing 28 U.S.C. § 2680(j)). The combatant-activities exception encompasses federal sovereign immunity injuries that arise “out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” Id.
85. Id. at 1332–36.
86. Id. at 1134–35.
87. Id. at 1335.
88. Id.
89. Id. at 1337.
90. Id.
91. Id.
93. Id. at 1487. The complaint alleged that the defendant contractors had negligently manufactured, tested, inspected, and distributed the missile. Id.
94. Id. at 1492–93.
action in combat situations, the Bentzlin court observed that permitting suits to proceed against contractors may endanger the lives of soldiers because it would encourage contractors to act with undue caution, thereby delaying the delivery of weapons to the front.95 Although tort law is a means to punish tortfeasors, punishment is not as important in the military-contractor context because the U.S. government is “in the best position to monitor the wrongful activity by contractors, either by terminating their contracts or through criminal prosecution.”96 In order to protect the dignity of soldiers, victims of contractor negligence should not be compensated differently from those injured or killed by enemy fire.97

The Bentzlin court took Koohi a step further. Koohi adopts the principle that no duty of care is applicable to those against whom the military was directing force.98 Bentzlin supports a more expansive view of combatant-activities preemption, identifying a federal interest in protecting contractors’ decisive acts even where their negligent actions cause harm to fellow soldiers. Decided in the early 1990s, Koohi and Bentzlin stand virtually alone in justifying the preemption of state law tort claims against private companies on the basis of the combatant-activities exception in the FTCA. Although private military companies have recently sought to revive combatant-activities preemption, several courts have rejected this defense by distinguishing Koohi and Bentzlin on the facts.99

95. Id. at 1493.
96. Id. at 1493–94. The court notes that the government may monitor the contractors’ quality of work and may terminate the business relationship. Id. at 1494.
97. Id.
98. Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992).
99. In Fisher v. Halliburton, family members of Halliburton employees sued the company on the grounds that it had used the decedents’ truck convoy as a “decoy” knowing that it would be attacked by anti-American forces. Fisher v. Halliburton, 390 F. Supp. 2d 610, 612 (S.D. Tex. 2005). The court in Fisher rejected defendants’ preemption argument by distinguishing the facts from those in Koohi. Id. at 615–16. The court held that the combatant-activities defense applies only where the defective products cause the injury, not where injury results from a contractor’s negligent performance of a service contract. Id. at 616 (“The narrow ‘combatant activity’ exception to the waiver of sovereign immunity in the [FTCA] does not bar the claims in this case.”). See also Fisher v. Halliburton, No. H-05-1731, 2005 WL 2001351, at *1 (S.D. Tex. Aug. 18, 2005) (denying a rehearing, and noting that Koohi’s holding confined combatant-activities preemption to claims alleging defective products and refusing to expand it beyond its “current boundaries”).

Two cases are of particular interest: McMahon v. Presidential Airways, Inc.100 and Ibrahim v. Titan Corp.101 McMahon involved U.S. serviceman in Afghanistan who died when pilots employed by a military contractor caused a plane to crash into a mountain.102 The defendants sought to dismiss the claims by relying on the Feres doctrine, the government-agency defense, and combatant-activities preemption.103 In McMahon, the district court emphatically rejected the defendant’s claim that it was acting as an agent of the government and therefore could qualify for derivative Feres immunity.104 Unpersuaded by the defendant’s argument that the Defense Department’s widespread use of contractors in lieu of soldiers now mandates expanding Feres to cover private parties, the court ruled that the Feres defense is only available where the United States is the defendant.105 The Eleventh Circuit, on appeal, did recognize a policy justification for enlarging Feres immunity to cover private contractors—immunity might be necessary to protect the making and execution of “sensitive military judgments.”106 Yet, the Eleventh Circuit refrained from actually extending Feres immunity for the same reason the Supreme Court in Boyle jettisoned it as a basis for the government-contractor defense—it would prevent soldiers, but not civilians from bringing claims against contractors.107


102. McMahon, 460 F. Supp. 2d at 1318.
103. Id. at 1315.
104. Id. at 1327. The court also pointed out that “[s]tate law tort suits by service members against contractors for injuries incident to service have been permitted to go forward by numerous courts in other contexts.” Id. at 1328.
105. Id. at 1325–27. Presidential argued that Boyle’s rejection of Feres as the basis for the government-contractor defense is inapplicable in the current situation because the Department of Defense had so integrated contractors into its battle plans. Id. Apart from highlighting the changing face of the U.S. approach to warfare, the defendants offered little to show that this situation had so undermined Justice Scalia’s analysis in Boyle so as to abandon it. Id. at 1328.
107. Id. at 1354–55.
The district court also rejected the defendant’s’ reliance on the combatant-activities exception. It found that while the government-contractor defense is available solely to military procurement contracts in which the government “dictates design specifications,” the combatant-activities exception is a legislative preservation of sovereign immunity applicable only to the government itself. Even if the combatant-activities exception were theoretically available to private parties, the court continued, it is available only for “alleged defects in complex military machinery,” not for “negligent provision of services.” On appeal, the Eleventh Circuit did not address the contractor’s combatant-activities preemption claim.

In Ibrahim v. Titan Corp., Iraqi detainees and their families sued contractors, including employees of Titan Corp., for abuses the detainees allegedly suffered at Abu Ghraib prison. In contrast to McMahon, the District Court for the District of Columbia revived combatant-activities preemption. Ibrahim noted that the exemption seeks to protect against suits that would interfere with the effective execution of war; suits against contractors would inevitably lead them to pass on the costs to the government. The court recognized that Boyle permits preemption of suits against contractors where a suit would create a significant conflict between unique federal interests and tort liability. The court concluded that the existence of a unique federal interest in the detention and interrogation of prisoners depends on whether the contractors were “essentially acting as soldiers” or were “soldiers in all but name.” Satisfied that Titan had met its burden of showing that its employees were “under the direct command and exclusive operational control of the military chain of command,” the court granted summary judgment in favor of the de-
The viability of a combatant-activities defense does not hinge on the type of the contract—procurement or services.118 The purpose of the exception is to “shield military combat decisions from state law regulation.”119 Preemption of claims against contractors may thus be necessary to protect the efficient functioning of the military itself:

Where contract employees are under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers, preemption ensures that they need not weigh the consequences of obeying military orders against the possibility of exposure to state law liability. It is the military chain of command that the FTCA’s combatant activities exception serves to safeguard . . . .120

The above cases demonstrate that private military contractors, when faced with civil claims arising from their actions in support of the U.S military missions in Iraq and Afghanistan, have attempted to employ defenses generally available to the federal government itself. These defenses are by and large of two varieties. The first seeks to invoke the sovereign immunity of the government directly under a claim of agency. The government-agency defense is such an example. The second type of defense argues that interference with a unique federal interest requires preemption. Preemption under the combatant-activities exception to the FTCA falls under this category. With few exceptions, courts have not been willing to oblige these contractor defenses. The Supreme Court has provided very little guidance regarding government-contractor liability, and the scope of the government-agency defense and the combatant-activities exception remains unclear. Given the ubiquitous presence of contractors in recent U.S. military efforts, the stakes are high. The McMahon court appropriately acknowledged this fact, noting that “[r]amifications may flow from allowing U.S. service personnel to sue private military contractors who operate on or near the battlefield, especially considering the extent to which our military forces now use private

118. The court cited to the Eleventh Circuit’s decision in Hudgens v. Bell Helicopters/Textron, which articulated the view that the controlling consideration is whether a contractor’s liability under state law would create a “significant conflict with a unique federal interest.” Ibrahim, 556 F. Supp. 2d at 4 n.3 (citing Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1345 (11th Cir. 2003)).
119. Id. at 5 (emphasis added).
120. Id. By contrast, the court ruled that Titan’s co-defendant, CACI Corporation, had not satisfied the “soldier in all but name” test. Id. at 10. Accordingly, plaintiff’s claims against CACI survived summary judgment. Id.
The next Part of this Article addresses the first of these possible defenses, the government-agency defense. The discussion offers a perspective on the limitations of an agency-based defense for service providers and a baseline for comparing it with the combatant-activities defense.

III. THE GOVERNMENT-AGENCY DEFENSE

Since the Supreme Court’s controversial decision, the Feres doctrine remains an insurmountable barrier to soldiers seeking monetary damages from the United States for injuries they have sustained incident to military service. No court has yet applied Feres directly to a private party. 122 But where a contractor proves the agency relationship necessary to establish the government-agency defense, the contractor, as a government agent, might then share in the government’s own Feres immunity. 123

The government-agency defense cloaks a contractor who performs a task under government supervision and direction with the government’s own immunity from suit. 124 Despite the defense’s seeming simplicity, courts have struggled with its application. Particularly troublesome has been identifying how close the relationship between the contractor and the government must be before the defense will apply. 125 Although de-

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122. Id. at 1325 (“Defendants cite no case in which the Feres doctrine has been held applicable to private contractors.”). See also Defendants’ Memorandum of Points and Authorities in Support of Motion to Dismiss at 3–7, McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315 (M.D. Fla. 2006) [hereinafter McMahon Motion to Dismiss] (arguing for the expansion of Feres to cover military contractors).
123. A contractor who convinces a court to accord him or her derivative Feres immunity would enjoy an immunity defense. Feres v. United States, 340 U.S. 135, 146 (1950). A government contractor who can successfully plead a defense under the factors the Supreme Court laid out in Boyle will have successfully pleaded the affirmative defense of preemption. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). The government-agency defense is a defense of derivative sovereign immunity, and thus ousts the court of jurisdiction to hear the case. Feres, 340 U.S. at 138. The Boyle contractor defense is an affirmative defense the contractor must plead and prove. Boyle, 487 U.S. at 512.
125. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985) (“This defense is rarely invoked, and its elements are nowhere clearly stated.”).
fendants rarely succeed in winning dismissal of claims under the government-agency defense, the cases are not uniformly bleak.126

Courts have not been consistent in explaining the agency principles at issue in the government-agency defense.127 When plaintiffs seek to hold the government liable through the acts of private parties, courts have required that the government “control the detailed physical performance of the contractor.”128 This standard presents a high bar for those contractors seeking to establish an agency relationship.129 However, in *Butters v. Vance International, Inc.*, the Fourth Circuit found a contractor to be derivatively immune from suit.130 Citing *Yearsley*, the court held that “con-

126. *See* Cantu & Young, *supra* note 53, at 408 (“This agency version of the government contractor defense has proved difficult to apply because the defendant contractor must show that an agency relationship existed between it and the government. Manufacturers who contract with the military are not hired as employees; rather, the basis of the relationship is contractual. Thus, for many military contractors, this defense is ill-suited.”) (internal citations omitted).

127. For example, an independent contractor may be an agent where the contractor is the fiduciary of the principal. *Shaw*, 778 F.2d at 740 n.5 (overruled on other grounds) (“[A]t least in manufacturing defect cases arising in a military setting, a firm must be more than simply an independent contractor to be regarded as the government’s agent.”); *Restatement (Second) of Agency* § 14(N) (1958) (“One who contracts to act on behalf of another and subject to the other’s control except with respect to his physical conduct is an agent and also an independent contractor.”). In the context of the current conflict in Afghanistan, the military has imposed duties of loyalty and obedience to the United States approximating those owed by a fiduciary. *Afghanistan General Order Number One*, cited in Brief of Defendants-Appellants at 10–11, McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007) (No. 06-15303) [hereinafter *McMahon Appellate Brief*].

Several circuits have held that an independent contractor may be an agent where the government exercises “overall control” of the contractor’s performance. *Restatement (Second) of Agency* § 14(N) (1958). For example, the Ninth Circuit found that an independent contractor operating a boat as a charter for the Navy was an agent where the government exercised “overall” but not “day to day” control over the vessel. *Dearborn v. Mar Ship Operations, Inc.*, 113 F.3d 995, 997–98 (9th Cir. 1997). *See also* *Favorite v. Marine Pers. & Provisioning, Inc.*, 955 F.2d 382, 388 (5th Cir. 1992) (deeming the tanker serving the Department of Defense an agent); Petition of the United States, 367 F.2d 505, 510–11 (3d Cir. 1966) (considering the tanker serving the Department of Defense an agent).

128. *Logue v. United States*, 412 U.S. 521, 527–28 (1973) (“[T]he distinction between the servant or agent relationship and that of independent contractor turn[s] on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract.”).

129. *See* Williams v. United States, 50 F.3d 299, 307 (4th Cir. 1995) (“[H]ere, the United States neither supervised nor controlled the day-to-day operations or the custodial duties.”).

tractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity.”

In *Yearsley*, the contractor invoked derivative sovereign immunity in a situation in which the government was clearly immune. That the *Butters* court did not similarly analyze how the government exercised control over the “detailed physical performance of the contractor” suggests that a less rigorous analysis prevails where the government treasury is not vulnerable.

Although the case law on the government-agency defense is sparse and inconsistent in places, the defense presents a viable means by which service contractors may avoid liability. *McMahon v. Presidential Airways, Inc.*, though, demonstrates how elusive the defense can be in practice. The government contracted with Presidential Airways to provide troop and ammunition transports between military installations in Afghanistan and neighboring countries. The government selected the type of plane, the general routes the company was to use in Afghanistan, the timing of the flights, as well as what to carry. It also asked the company to fly at lower altitudes to decrease its vulnerability to anti-aircraft fire. Although the facts suggest that the government had a substantial role in dictating the terms of the flights, the contractor admitted that the government did not exercise control during the performance of its mission.

Had the court in *McMahon* adopted a less restrictive approach to agency, the pilot and other Presidential Airways employees might well have been

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131. *Butters*, 225 F.3d at 466 (citing *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21–22 (1940)). The *Butters* court referenced the government’s need to delegate functions, and added that “sovereigns need flexibility to hire private agents to aid them in conducting their governmental functions.” *Id.*

132. Citing *City of Worcester v. HCA Mgmt. Co.*, 753 F. Supp. 31, 37–38 (D. Mass. 1990), the *Butters* court asserted that “[p]ursuant to sovereign immunity, a private company which contracts with the federal government to perform the duties of the government will not be held liable for its actions on behalf of the government.”). *Butters*, 225 F.3d at 466.


134. *Id.* at 11.

135. *Id.* at 13–14.

136. *Id.* at 32 (“Presidential was completely subject to the military’s control, except as to the physical performance of the mission.”).
deemed agents because the military retained “overall control” of their conduct.137

Defendants may also invoke a separate line of cases that has extended “official immunity” to contractors. Official immunity differs from sovereign immunity in that the former generally protects individuals from liability, while the latter protects the government and its agencies.138 In Mangold v. Analytic Services, Inc., the Fourth Circuit granted official immunity to contractors for their assistance as part of an Air Force investigation.139 The court cited two Supreme Court opinions, Barr v. Matteo140 and Westfall v. Erwin,141 where the Court articulated the dimensions of official immunity for acts of federal employees. These cases held that a federal official who performs a discretionary act in the scope of his or her employment is absolutely immune from a state law tort lawsuit where the benefits of such immunity outweigh its costs.142 Although the test for official immunity has been replaced by statute, this common-law approach remains the standard when considering whether contractors may enjoy official immunity.143 In Mangold, the Fourth Circuit broadly concluded that “[i]f absolute immunity protects a particular governmental function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government’s unquestioned need to delegate governmental functions.”144 The court relied on Boyle as a rationale for extending immunity to a contractor to whom the government delegated a discretionary function.145 Of course, reliance on Boyle is inappropriate, as the case cannot be read to support such a cavalier extension of immunity.146 Numerous cases, though, have followed Man-

138. 63C Am. Jur. 2d Public Officers and Employees § 305.
142. Id. at 296 n.3.
144. Mangold, 77 F.3d at 1447–48.
145. Id. at 1448.
gold’s extension of immunity to contractors based on the delegation of a discretionary function to a private contractor. These cases, applying the principle of immunity for discretionary acts enunciated in Westfall to private individuals and entities, have generally been confined to situations where private actors have cooperated with government investigations or have served as financial intermediaries. Courts have not yet applied official immunity in the context of suits against military procurement or service contractors.

Regardless of which type of immunity the service contractor operating in Iraq or Afghanistan invokes—the government-agency defense or official immunity under Mangold—courts have concluded that a showing of agency or the performance of a delegated, discretionary function is not alone sufficient to justify immunity. In both cases, a defendant must affirmatively justify immunity by showing that the benefits of immunity outweigh its costs. The private contractor must establish how and why the immunity doctrines that developed to protect the government also apply to private contractors.

For example, the court in McMahon considered how a service contractor could uphold its claim of derivative sovereign immunity under the Feres doctrine. Merely establishing an agency relationship was not enough. After considering the various rationales for Feres immunity and whether they could logically be expanded to cover private contractors, the court found the final rationale for Feres—the desire to prevent courts from second-guessing military decisions—to be a compelling justification for extending derivative sovereign immunity to contractors.


148. Research discloses no case that has so extended the principle announced in Mangold outside of the government investigation or financial intermediary context.


150. See McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1344 (11th Cir. 2007).

151. Mangold, 77 F.3d at 1447.

152. The court reviewed the law of qualified immunity for government officers, concluding that while the United States is immune from suit “by default,” an officer’s immunity must be “affirmatively justified.” McMahon, 502 F.3d at 1344. The court concludes that by analogy to qualified immunity, which applies as necessary to protect the government functions the private party is exercising, it must consider how extending Feres immunity is justifiable in the case of military contractors. Id. at 1345–51.

153. Id. at 1346 (“It is thus not enough for Presidential to point to its (alleged) status as a common law agent and the government’s (alleged) Feres immunity.”).

154. Id. at 1348.
According to the court, allowing a plaintiff’s suit to proceed against a military contractor would threaten the separation of powers principle. Immunity would necessarily apply in order to avoid the trial of “suits involving quintessential or peculiarly military judgments that courts should not hear as a matter of prudence, rather than a matter of constitutional law.” The court, in such cases, would lack the competence to appropriately evaluate the “proper tradeoff between military effectiveness and the risk of harm to the soldiers.” Although the court in McMahon recognized a policy justification for extending the government’s immunity from suit to private contractors, it declined to do so.

The McMahon court’s concern for insulating sensitive military decisions from judicial scrutiny is sensible. For example, private contractors have been implicated in the transportation of alleged enemy combatants in the “war on terror.” In a suit against such a contractor, information regarding U.S. activities associated with the transportation of terrorist suspects is closely held, as nondisclosure is considered critical to U.S. national security. Permitting a suit to proceed against a contractor in these circumstances would necessitate discovery into the adequacy of interrogation procedures and other internal controls. Although restrictions on judicial interference with such activities pose a risk that an individual injured by unlawful government conduct will be left without a remedy, the law has nonetheless insulated such matters from judicial inquiry.

155. Id. at 1350.
156. Id. In its allusion to constitutional law, the court refers to the constitutional principle of nonjusticiability, particularly the political question doctrine, under which courts are constitutionally prohibited from hearing a case. Id. at 1350–51.
157. Id. at 1350.
158. Id. at 1353.
159. See Scahill, supra note 20, at 253 (describing contractors’ role in rendition and interrogation programs); Gorman, supra note 29 (describing how contractors have been involved in waterboarding terror suspects).
160. See, e.g., El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). In El-Masri, the court affirmed the dismissal of a suit by a German citizen of Lebanese descent alleging torture at the hands of the CIA and private contractors as part of the war on terror. It concluded that the state-secrets doctrine precluded discovery in his case, and that the suit could not be maintained absent the very information placed beyond his reach by the court. Id. at 308–12.
161. Courts have said that in other circumstances inquiries into military decision making may impermissibly threaten military discipline. See, e.g., McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007) (finding, in the Feres context, that a suit by a deceased soldier’s family arising from his death in a recreational boating accident was barred, as military discipline would be threatened should an inquiry be made into the military’s maintenance of boats and the adequacy of instructions concerning their use).
While the McMahon court agreed that the Feres doctrine, insofar as it protects military decision making from judicial inquiry, is applicable to military contractors, it refused to extend the military-discipline rationale to private contractors. Unlike soldiers, contractors are not in the military chain of command. Thus, the court reasoned that the deleterious effects on military discipline spawned by permitting soldiers to challenge military orders in court do not apply in the case of defendant contractors.

However, in light of Supreme Court precedent, the focus on the defendant’s status in the chain of command is arguably misplaced. In United States v. Johnson, the Supreme Court held that the Feres doctrine prevented a serviceman’s suit against the government where the alleged tortfeasor was a civilian employee of a government agency. The plaintiff in the case argued that a civilian air traffic controller in the Federal Aviation Agency (“FAA”) acted negligently when he provided a Coast Guard helicopter pilot with incorrect coordinate information, causing him to crash. The Court noted that “[c]ivilian employees . . . play an integral role in military activities” and that “the FAA and the United States Armed Services have an established working relationship that provides for FAA participation in numerous military activities.” Johnson illustrates two points. First, it shows that the application of the Feres doctrine depends more on the military status of the plaintiff (whose relationship to the government is of unique federal interest) than on the identity of the tortfeasor. The Court held that since “Johnson went on the rescue mission specifically because of his military status,” the case fell “within the heart of the Feres [doctrine].” Second, Johnson suggests that the prospect of a lawsuit need not interfere directly with the military chain of command. As the Court stated, “[A]n inquiry into the civilian

162. McMahon, 502 F.3d at 1348.
164. United States v. Johnson, 481 U.S. 681 (1987). In this case, the civilian was an employee of the Federal Aviation Agency. Id. at 683.
165. Id. at 682–83.
166. Id. at 691 n.11.
167. The Supreme Court’s opinion in Johnson recognized that its prior opinions addressing the Feres doctrine had not treated the status of the tortfeasor as critical. Id. at 685. See Courtney W. Howland, The Hands-Off Policy and Intramilitary Torts, 71 Iowa L. Rev. 93, 102 (1985) (“The key to the Feres holding was the plaintiff’s identity: he was an active serviceman. The defendant’s military status was not dispositive, for civilians may sue the military under the FTCA.”) (citations omitted).
168. Johnson, 481 U.S. at 692.
activities would have the same effect on military discipline as a direct inquiry into military judgments."\(^{169}\)

The principles of *Johnson* apply to military contractors. Like the civilian air-traffic controller in *Johnson*, private military companies work closely with military authorities although they operate outside of the chain of command.\(^{170}\) *Johnson* demonstrates that the United States will be immune where a soldier sues the government in connection with orders or information negligently furnished that causes his or her injury. As contractors are part of the “Total Force,”\(^{171}\) it is difficult to conclude that the outcome should change on the basis that a contractor provided the erroneous flight information rather than a civilian in the FAA. *Johnson* makes the tortfeasor’s identity functionally irrelevant. The threat to military discipline and the goal of preventing the second-guessing of orders are of equal magnitude in both cases. In light of *Johnson*, the court in *McMahon* should not have so readily dismissed the applicability of *Feres*’s military-discipline rationale in support of contractors’ derivative sovereign-immunity defense. Indeed, the military-discipline and military-decision making rationales support the expansion of the *Feres* immunity defense to private contractors acting as agents of the government. That it did not do so suggests that the Eleventh Circuit’s true objection was to *Feres* itself.\(^{172}\)

Nevertheless, even if the principles underlying *Feres* might be extended to protect military contractors via the government-agency defense, courts should do so with caution. Courts confronting the government-agency defense should adopt a restrictive approach to agency. Otherwise, contractors would be immune from suit even in situations where the gov-

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\(^{169}\) Id. at 691 n.11.


\(^{171}\) In 1973, the Department of Defense adopted the “Total Force Policy,” which recognized the contribution reservists, civilian government workers, and contractors could “add to the active forces in ensuring the national defense.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO NO. 95-5, DOD FORCE MIX ISSUES: GREATER RELIANCE ON CIVILIANS IN SUPPORT ROLES COULD PROVIDE SIGNIFICANT BENEFITS 10 (1994).

\(^{172}\) Reflecting the Supreme Court’s rejection of *Feres* as the basis for the government-contractor defense, the Eleventh Circuit in *McMahon* declined to extend *Feres* immunity due to the inequity it would create for military plaintiffs. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1353 (11th Cir. 2007) (“Even if such an immunity is warranted, however, we do not believe that the *Feres* doctrine is an appropriate ground upon which to build it. The reason is that an immunity built on *Feres* would only prevent soldiers—and would not prevent civilians—from bringing suit against private military contractors making or executing sensitive military judgments.”). Effectively announcing its view that *Feres* was wrongly decided, the court chose to contain the damage by refusing to expand it. Its criticism of *Feres* is indirect but unmistakable.
ernment exerts little control over contractor discretion and where critical federal interests are not implicated. However, if a contractor successfully demonstrates a bona fide agency relationship, courts should assess the principles underlying the Feres doctrine and, in appropriate cases, extend immunity to private contractors.

The narrow government-agency defense is not the only defense available to service contractors. In certain areas critical to the national interest, contractors may raise the combatant-activities exception as an affirmative defense without demonstrating agency. Judicial opinions differ on the meaning and scope of the exception, though. And courts are undecided about its potential for preempting tort suits against service contractors involved in combat operations. However, the ubiquitous presence of contractors on the battlefield in the global war on terror has thrust this defense back into the legal limelight. Substituting for soldiers, contractors have argued that their status justifies protecting them against civil claims arising from their participation in combat and combat-support activities. Whether this protection is warranted and which circumstances make it so are two questions addressed in the following section.

IV. APPLYING THE COMBATANT-ACTIVITIES EXCEPTION TO TORT CLAIMS AGAINST SERVICE CONTRACTORS: SOUND DEFENSE OR FLAWED REASONING?

As service contractors have faced civil claims arising from their conduct in Iraq and Afghanistan, many have turned to combatant-activities preemption as a defense.¹⁷³ Judges are now addressing the combatant-activities exception on virtually a blank slate.¹⁷⁴ The following discussion

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¹⁷³ See, e.g., Defendant Kellogg, Brown & Root, Inc.’s Motion to Dismiss, Lessin v. Kellogg, Brown & Root, 2006 WL 3940556 (S.D. Tex. June 12, 2006) (No. H-05-1853); Defendants’ Reply in Support of Motion to Dismiss, Smith v. Halliburton Co., 2006 WL 1342823 (S.D. Tex. May 16, 2006) (No. H-06-0462); Reply in Support of Motion to Dismiss by Defendants Kellogg, Brown & Root Services, Inc. and Halliburton Energy Services, Inc., Carmichael v. Kellogg, 450 F. Supp. 2d 1373 (N.D. Ga. Apr. 10, 2006) (No. 1:06-cv-0507); Defendants’ Memorandum in Support of Motion to Reconsider and/or Clarify Order Denying Motion to Dismiss with Respect to Combatant Activities Exception, Fisher v. Halliburton, 390 F. Supp. 2d 610 (S.D. Tex. 2005) (No. H-05-1731) [hereinafter Fisher Motion]. For example, in Fisher, defendants argued that the court had confused the combat-activities exception with the government-contractor defense, which it argued had not been raised. Id. at 1. (“Defendants move for reconsideration of the Order with respect to the combatant activities exception because it appears that the application of that exception became confused with the government contractor defense based on the separate discretionary function exception, which Defendants did not raise or brief.”).

critically evaluates this exception. It first defines its scope and suggests how it may apply to military contractors. After exploring why increasing criminal jurisdiction over military contractors is an insufficient substitute for tort liability, this section identifies a federal interest supporting combatant-activities preemption, namely, fostering bold, decisive action by military contractors. It then examines competing interests, focusing on contractor discretion as the critical variable, and concludes by arguing that combatant-activities preemption may be appropriate, but only where contractor discretion falls below a critical threshold.

A. The Scope of the Combatant-Activities Exception

The combatant-activities exception to the FTCA reflects the Congressional policy that the United States should not be subject to suit in cases concerning its armed forces’ combatant activities during wartime. The legislative history interpreting the exception is conspicuously sparse. The Ninth Circuit in Johnson v. United States, though, concluded that the exception must have been intended to cover those combatant activities “which by their very nature should be free from the hindrance of a possible damage suit.”

The statute leaves the terms “war,” “arising out of,” and “combatant activities” undefined, so courts have been left to clarify their meanings. Broadly defining “war,” courts have noted that a declared state of war need not exist to trigger the combatant-activities exception.

Id. § 1346(b)(1).

175. Federal Tort Claims Act, 28 U.S.C. § 2680(j) (2008). The FTCA waiver of liability provides that the district courts shall have jurisdiction over suits for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b)(1).

176. The Ninth Circuit in Johnson v. United States—an early case addressing the exception—noted that the record was “singularly barren” of evidence that would assist in interpreting the exception. Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1949). See also Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 18 (D.D.C. 2005).

177. Johnson, 170 F.2d at 769.


“[S]ignificant armed conflict” short of war is sufficient.180 The Ninth Circuit offered this definition of “war” when considering the combatant-activities exception in the context of the Tanker Wars.181

The term “arising out of” has also been construed expansively. Johnson involved the destruction of clam farms by a U.S. Navy vessel returning from duty in the Pacific Ocean following World War II.182 The owner of the farms sued the government for damages.183 The court interpreted “arising out of” broadly, finding that an activity at least incidentally related to combat could qualify.184 Accordingly, the court held that the delivery of ammunition to combatants in a “fighting area” met the “arising out of” requirement.185

Courts have struggled when defining the term “combatant activities.” Considering the types of activities service contractors perform demonstrates how slippery the concept of combatant activities can be. For example, in McMahon, the military hired the defendant contractor to transport troops and material from one military base in Afghanistan to another.186 Since the President declared Iraq and Afghanistan, along with the skies above these countries, combat zones,187 by analogy to Johnson v. (holding that the combatant-activities exception was potentially applicable during the Second World War even though the incident occurred in the United States).

180. *See Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992). When construing the phrase “in light of contemporary realities,” the court found it significant that “in modern times hostilities have occurred without a formal declaration of war far more frequently than following a formal pronouncement.” *Id.* at 1334. In arguing that congressional authorization for the use of force need not take the form of a declaration of war, Jack Goldsmith and Curtis Bradley observe this trend. Curtis A. Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2059–60 (2005) (“[T]he United States has been involved in hundreds of military conflicts that have not involved declarations of war . . . . [T]he United States has not declared war in *any* of its many post-World War II conflicts, even though some of them have been significant and prolonged.”). *See also* Morrison v. United States, 316 F. Supp. 78, 79 (M.D. Ga. 1970) (“[A] war is no less a war because it is undeclared.”). Note also that the district court in the *McMahon* case found that combat activities in Afghanistan in 2004 were sufficient to implicate the combatant-activities exception. McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

181. *Koohi*, 976 F.2d at 1334.
182. *Johnson*, 170 F.2d at 768.
183. *Id.*
184. *Id.* at 770.
185. *Id.* (noting that the exception would encompass “activities both necessary to and in direct connection with actual hostilities”).


United States this would likely qualify as a combatant activity, \(^{188}\) particularly because the flight apparently contained munitions as well as military personnel.\(^ {189}\)

Skeels v. United States involved a fisherman who was injured by falling debris from a plane engaging in military exercises in the United States during the Second World War.\(^ {190}\) Concluding that the combatant-activities exception did not bar the suit, the court in Skeels held that combatant activities means only those activities that are connected to engaging the enemy or engaging in physical force with the enemy.\(^ {191}\) The court in Koohi adopted Johnson's slightly different definition of combatant activities. It found that combatant activities are those "activities both necessary to and in direct connection with actual hostilities."\(^ {192}\) Similarly, in Vogelaar v. United States, a case in which a plaintiff alleged that the military had acted negligently in failing to timely identify the remains of a deceased soldier, the court considered identifying and accounting for soldiers in a combat zone as constituting a combatant activity under the FTCA.\(^ {193}\) Transportation of troops in a combat zone would not qualify as a combat activity under Skeels, but would likely suffice under the less restrictive Koohi and Vogelaar formulations.

Even under a generous definition of combatant activities, many services performed by contractors do not qualify. In Smith v. Halliburton, the relatives of deceased service members sued Halliburton under a theory of premises liability for negligently permitting a suicide bomber to infiltrate a mess tent the company ran in northern Iraq.\(^ {194}\) Although the court dis-

\(^{188}\) See Johnson, 170 F.2d 767.

\(^{189}\) See McMahon Appellate Brief, supra note 127, at 10–11 (describing munitions transportation).


\(^{192}\) Koohi v. United States, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992) (quoting Johnson, 170 F.2d at 770).

\(^{193}\) Vogelaar v. United States, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987). A case from the Middle District of Pennsylvania held that the exception applied when a Veterans Administration official was accused of negligently injuring a soldier who suffered a combat injury during World War II. Perucki v. United States, 80 F. Supp. 959 (M.D. Pa. 1948). Because the injury suffered during the medical examination would not have arisen but for the original injury suffered in combat, the exception applied. Id. at 961.

missed the plaintiffs’ complaint on political-question grounds, the court described how the military itself remained in control of security arrangements, with the contractor merely in charge of food service. In Lessin v. Kellogg, Brown & Root, the court found the combatant-activities exception inapplicable where the ramp-assist arm of a contractor’s truck injured a soldier while the contractors were accompanying a supply convoy in Iraq.

In defining combatant activities, one may distinguish between providing food for soldiers and transporting troops and military supplies between bases, the former simply being too remote from actual combat. The latter, essential to any military operation, clearly has a direct connection to hostilities. Such missions are vulnerable to ground attacks by insurgents and threats associated with flying according to riskier military flight plans.

Transporting civilian reconstruction supplies, like in Lessin, is a closer case. In Iraq, the overtly military and civilian reconstruction tasks must

195. Id. at *2–3.
197. See Smith, 2006 WL 2521326, at *3. Transportation of troops and food service are, admittedly, both important to any military effort. They are distinguishable, however. Troop transport is an activity inextricably linked to combat, whereas food service is not. The latter occurs regardless of deployment, but this is not true of the former.
198. The possibly apocryphal quip by General Omar Bradley, Field Commander in North Africa and Europe during the Second World War and later Chairman of the Joint Chief of Staff, comes to mind in this context: “[a]mateur study tactics; professionals talk about logistics.” Richard Hornstein, Protecting Civilian Logisticians on the Battlefield, 38 ARMY LOGISTICIAN 14 (2006). Winston Churchill also said that “in total war it is quite impossible to draw any precise line between military and non-military problems.” Gregory Cantwell, Nation Building: A Joint Enterprise, 37 PARAMETERS 54 (2007). The court in Bentzlin noted, however, that the first Koohi principle might even apply in the case of the transportation of military material. Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1493 (C.D. Cal. 1993) (“During wartime, manufacturers similarly should not be overly cautious in the production and transportation of weapons, since delay may lead to missed strategic opportunities and deaths of American soldiers.”). Although the primary mission of Presidential’s troop airlift in McMahon was apparently to transport troops from one part of Afghanistan to another, the fact that the plane carried ammunition suggests that it might fall within this Bentzlin dictum. See McMahon Appellate Brief, supra note 127, at 10–11 (describing munitions transportation). Defendants might draw support from Johnson in this regard. Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1949) (noting that the delivery of weapons might qualify as “combatant activities” under the FTCA).
199. McMahon Appellate Brief, supra note 127, at 13 (“One of the risks that the military and Presidential agreed to was to fly below the peaks of mountains in order to reduce risk of antiaircraft fire.”).
be combined in order to defeat the vicious cycle of violence. Soldiers and contractors have cooperated to combat insurgents, quell sectarian strife, rebuild the country, and defend against suicide bombers. To derail these efforts, insurgents have targeted civilian reconstruction workers, and as reconstruction contractors have been embroiled in violence, conventional activities have taken on the characteristics of combatant activities.

200. See Chia Lehnardt, Private Military Companies and State Responsibility, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 139, 147–48 (Simon Chesterman & Chia Lehnardt eds., 2007) (“Contractors guarding reconstruction projects or escorting supply convoys through hostile territory are as much in the battlefield as [U.S.] troops. Even providing security for food delivery can result in being drawn into combat situations . . . . The distinction between security and military, defensive and offensive military operations appears, therefore, rather artificial.”) (citations omitted). According to a 2005 report of the Special Inspector General for Iraq Reconstruction, terrorist attacks caused 117 of the 147 U.S. civilian deaths (including contractors') since March 11, 2003. SPECIAL INSPECTOR GEN. FOR IRAQ, REPORT TO CONGRESS 12 (2005). See also Daniel Bergner, The Other Army, N.Y. TIMES, Aug. 14, 2005 (quoting General Jay Garner, former head of the Office of Reconstruction and Humanitarian Assistance in Iraq (a precursor to the CPA), as saying that security contractors were “performing a military role”).

201. See LEXINGTON INST., CONTRACTORS ON THE BATTLEFIELD 12 (2007) (noting that contractors drove virtually all supply convoys in the early years of the Iraq war, and that “nearly every [Kellog, Brown & Root] convoy was attacked in one way or another”) (citing CHRISTIAN T. MILLER, BLOOD MONEY 137 (2006)); Robert F. Worth, Al Jazeera Shows Kidnapped U.S. Journalist, N.Y. TIMES, Jan. 18, 2006 (“Insurgents attack Iraqi police and army forces almost daily, and foreign contractors are also frequent targets.”). Minow raises the point that regular activities may blur with combatant activities, querying when one function “move[s] from civilian support to core military activity” and observing that the Defense Department has not adopted a policy on this matter. Minow, supra note 2, at 1015. See also FRED SCHREIER & MARINA CAPARINI, PRIVATIZING SECURITY: LAW, PRACTICE AND GOVERNANCE OF PRIVATE MILITARY AND SECURITY COMPANIES 31 (2005) (“In Iraq, insurgents ignore distinctions between security guards and combat troops. What is more, they have made convoys, headquarters, and buildings housing state authorities prime targets. As a result, security contractors have increasingly found themselves in pitched battles, supplying services which are difficult to distinguish from what soldiers of regular armed forces do.”). But see Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 19 (D.D.C. 2005). In Ibrahim, the District Court for the District of Columbia indicated that combatant-activities preemption might apply where the contractors were “essentially acting as soldiers.” Id. The court thus implicitly rejected the view that their mere presence in Iraq during the height of insurgency was sufficient to implicate the exception. See also The Federal Tort Claims Act, 56 YALE L.J. 534, 549 (1947) (noting that in view of army and judge advocate regulations, “combatant activities” has been construed narrowly). It is worth mentioning that the distinction between soldier and contractor is not the only one being blurred. The nature of combat in Iraq and Afghanistan, in which troops in the rear are as vulnerable to attack as troops on the frontline, has prompted commentators to reassess the U.S. prohibition on women’s service in certain combat
Admittedly, international law does not treat the military contractor as a “combatant” under the traditional meaning of the term.\textsuperscript{202} The drafters of the FTCA, however, could not foresee that contractors would serve in such a broad range of combat-support roles. Given the current situations in Iraq and Afghanistan, the support that contractors provide is essential to military success. Filling in where the military lacks capability,\textsuperscript{203} contractors have both augmented and replaced existing force capacity.\textsuperscript{204} As roles. \textit{See} ELSEA & SERAFINO, \textit{supra} note 1, at 5 (“Like soldiers, private security contractors incur the risk of death and injury from insurgents in Iraq.”); Valorie K. Vojdik, \textit{Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat}, 57 ALA. L. REV. 303, 331 n.272 (2005).


\textsuperscript{203} DAVID ISENBERG, A FISTFUL OF CONTRACTORS: THE CASE FOR A PRAGMATIC ASSESSMENT OF PRIVATE MILITARY COMPANIES IN IRAQ 21 (2004) (noting that when the Army’s “technology-heavy 4th Infantry Division deployed to Iraq in 2003, about [sixty] contractors accompanied the division to operate its digital command and control systems,” which the Division did not yet know how to operate).

\textsuperscript{204} Peter Singer describes the contractor force as an “enabler,” adding that the war would not be possible without it. \textit{PETER SINGER, CAN’T WIN WITH ‘EM, CAN’T GO TO WAR WITHOUT ‘EM: PRIVATE MILITARY CONTRACTORS AND COUNTERINSURGENCY} 3 (2007). Singer’s argument is that without the presence of contractors, the U.S. government could not engage the military in conflicts that garner the necessary public support, on account of the number of troops that would otherwise be required. \textit{Id}.

For example, General Petraeus recently testified to the Senate Armed Services Committee that he considers contract security forces among the assets available to defeat the insurgency. \textit{Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report Before the H. Comm. on Oversight and Government Reform} 121, 125, 110th Cong. (2007) (statement of Andrew Howell, General Counsel of Blackwater USA). In Howell’s prepared remarks, he quoted U.S. Ambassador to Iraq, Zalmay Khalilzad, as saying, in response to the deaths of Blackwater security guards while protecting a U.S. diplomat, that “[t]hese five citizens were our colleagues and worked on behalf of the United States government to protect American diplomats and missions in Iraq.” \textit{Id}. at 123. Contractors have operated Predator drones and the guided missile defense system on the Navy’s ships, targeting precision weapons systems. SCHREIER & CAPARINI, \textit{supra} note 201, at 22. Although contractors ceased operating Predator drones during the war in Afghanistan once they were mounted with hellfire missiles, contractors from Northrup Grumman operate Global Hawk surveillance drones. Boldt, \textit{supra} note 18, at 507. Boldt adds that although not armed, “the operation of those drones could be of crucial importance for the outcome of battles, for example by locating fleeing targets in Afghanistan.” \textit{Id}. See also Ian Traynor, \textit{The Privatization of War}, GUARDIAN, Dec. 10, 2003, http://www.guardian.co.uk/world/2003/dec/10/politics.iraq/print (“When America launched its invasion in March, the battleships in the Gulf were manned by [U.S. Navy] personnel. But alongside them sat civilians from four companies operating some of the world’s most sophisticated weapons systems.”). Following 9/11, contractors formed part of the earliest teams deployed in the borderlands of Afghanistan and Pakistan to capture and/or kill Osama bin Laden. \textit{ROBERT YOUNG PELTON, LICENSED TO KILL} 30–33, 42 (2006) (discuss-
one report by the British House of Commons concluded, “The distinction between combat and non-combat operations is often artificial. The people who fly soldiers and equipment to the battlefield are as much a part of the military operation as those who do the shooting.” Thus, the delivery of necessary supplies to the front, or the operation or maintenance of weapons systems is no less a combatant activity merely because a contractor performs it. Although the military’s field manual provides that contractors are not to engage in combat operations, contractors are performing functions that courts have characterized as “combatant activities.” The fact that a contractor is not technically a “combatant” under applicable international legal principles does not obscure the reality: theoretical distinctions no longer mirror the conditions of insurgent warfare and the critical role that contractors have played.

B. Legislative Background and the (Non)Effect of Expanding Criminal Jurisdiction

While the vast majority of the 160,000 military contractors currently operating in Iraq have performed satisfactorily, contractors have come under increasing scrutiny from the press and Congress as the U.S. military interventions in Iraq and Afghanistan have dragged on. Committees of the House of Representatives and Senate have held multiple hearings to address the challenges of regulating military contractors abroad. 

ing the deployment of CIA contractor Bill Waugh and others to Afghanistan to hunt bin Laden, and contractors’ presence there between 2005 and 2006).


207. SINGER, supra note 204, at 11 (noting the number of military contractors in Iraq in September 2007).

208. See, e.g., Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (2007); War Profiteering and
Congress has also taken action to expand criminal accountability over contractors in Iraq. The reach of U.S. and Iraqi criminal laws over U.S. citizens serving as contractors in Iraq was initially thwarted by Coalition Provisional Authority (“CPA”) Order No. 17, which provided presumptive immunity from Iraqi law for all international private contractors operating in Iraq.\(^{209}\) Order No. 17 did not preempt the law of the contractor’s sending state, but jurisdictional gaps complicated extending the reach of U.S. law over American contractors in Iraq.\(^{210}\) Congress has recently acted to fill those gaps.

The Military Extraterritorial Jurisdiction Act (“MEJA”) broadens the scope of federal courts’ jurisdiction to punish certain classes of persons for acts committed abroad that would constitute crimes had they been committed in the United States.\(^{211}\) The statute in its original form permitted prosecution of civilians under contract with the Department of Defense, but not with other agencies.\(^{212}\) Accordingly, the law did not cover many of the security contractors in Iraq and Afghanistan. Congress updated the law in 2004 to apply to civilians who have contracted with any federal agency to the extent that the employment “relates to supporting the mission of the Department of Defense overseas.”\(^{213}\) Because the service of most contractors in Iraq arguably supports the mission of the Department of Defense, the 2004 revision of the MEJA might encompass the criminal conduct of nearly every contractor in Iraq or Afghanistan—

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\(^{209}\) Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 § 4(3) (June 17, 2004).

\(^{210}\) Human rights groups have also attributed the lack of prosecutions to executive indifference. E.g., Human Rights First, Private Security Contractors at War: Ending the Culture of Impunity 19 (2008), available at http://www.humanrightsfirst.org/pubs/pubs.asp#privcon. This report points to the multitude of allegations of wrongful conduct by contractors, and the sparse prosecutions by the U.S. Department of Justice. Id. at 19–20.


\(^{212}\) 18 U.S.C. § 3261(a).

\(^{213}\) Id. § 3267(1)(A).
but this result is not clear. However, another amendment has passed the House (with equivalent legislation having been introduced in the Senate) that would apply the MEJA to all persons employed under contract outside the United States, whether or not the contract supports the mission of the Department of Defense. In addition, the USA Patriot Act is potentially applicable to prosecute contractor crimes abroad; it has already been used to prosecute a military contractor for acts committed in Afghanistan. Certain abuses by contractors may also be prosecuted under the War Crimes Act and Torture Act. Finally, Congress expanded the Uniform Code of Military Justice ("UCMJ") to cover contractors supporting the military abroad.

Nonetheless, there have been few prosecutions of contractors in Iraq or Afghanistan. The Department of Justice ("DOJ") enjoys wide discretion. Although it has been inactive, the stage is set for the DOJ to play a more constructive role in monitoring contractors. Given the radical changes to the criminal-law landscape, might criminal prosecutions of contractors be sufficient to create the proper balance between deterring bad acts and incentivizing appropriate, bold action? Blackwater seems to think so. The company has argued that derivative sovereign immunity and combatant-activities preemption should protect it, while simulta-
neously supporting increased criminal accountability. In his testimony before the House Committee on Oversight and Government Reform, Chairman and CEO Erik Prince indicated in response to the prospect of a DOJ investigation of Blackwater’s actions that he would “welcome[,] . . . encourage[,] . . . [and] want that accountability . . . . We hold ourselves entirely accountable.”222

In response to the spate of bad press, Blackwater and other private military companies have trumpeted their adherence to criminal laws and the code of conduct promulgated by the trade association of which they are members.223 Contractors have an interest in playing by the rules: rule breaking is bad for business. It invites congressional scrutiny and jeopardizes future contracts. But the industry’s self-regulation is no substitute for law. Indeed, even if the criminal prohibitions affecting contractors overseas were being enforced—and generally they are not224—criminal law is not an effective deterrent against a broad range of legally disfavored acts.225 Tort law protects the public from a range of harms that are sufficiently serious to warrant the imposition of civil liability, though not deemed worthy of criminal punishment. Contractors should not be immune from the reach of civil law merely because there is a net of criminal laws ready to ensnare them. That Congress has provided a statutory mechanism to curb the worst contractor abuses does not mean that states

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225. See Morissette v. United States, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”); Commonwealth v. Heck, 491 A.2d 212, 224 (Pa. Super. Ct. 1985) (“In a fundamental sense the harshness of criminal punishment is fitting only for these types of consciously inflicted wrongs, and so traditionally the criminal law has concerned itself exclusively with conscious wrongdoing.”); McElwain v. Georgia-Pacific Corp., 421 P.2d 957, 963 (Or. 1966) (distinguishing civil and criminal law by pointing to the fact that criminal law and the punitive damages of civil law, which service a criminal-law-type deterrent function, are not intended to deter civil negligence).
have no interest in protecting against others. Holding an individual tortfeasor accountable for the breach of a duty not only compensates victims who have suffered invasions of their legally recognized rights, but also serves as a deterrent to those who would act against them.\footnote{226. In re “Agent Orange” Prod. Liab. Litig., 506 F. Supp. 762, 794 (E.D.N.Y. 1980) (“Before any societal benefit can be derived from the deterrent effects of tort liability, however, the party in a position to correct the tortious act or omission must be held accountable for the damages caused and thus motivated to prevent future torts.”); Roberts v. Williamson, 111 S.W.3d 113, 118 (Tex. 2003) (“The fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims.”); Merten v. Nathan, 321 N.W.2d 173, 177 (Wis. 1982) (“Tort law also serves the ‘prophylactic’ purpose of preventing future harm; payment of damages provides a strong incentive to prevent the occurrence of harm.”). See also DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS 212 (2005) (addressing how cost internalization will deter the commission of inefficient torts).}

In summary, despite the arguments of companies like Blackwater, the potential for increased criminal accountability over military contractors in Iraq and Afghanistan does not obviate the need for an effective tort regime. Accepting combatant-activities preemption or derivative sovereign immunity on the grounds that criminal law protects against the threat of greater public injury is nonsensical. Can such preemption be justified, though, in the interest of furthering a federal interest?

\section*{C. The Principles Underlying Combatant-Activities Preemption}

Courts are understandably cautious in preempting tort claims against contractors because preemption displaces “large chunks” of state law.\footnote{227. Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 224 (1993); Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 247 (5th Cir. 1990) (noting that caution must be taken when conducting a preemption analysis).} Nonetheless, courts have long recognized that in areas where state and federal legislative jurisdictions overlap, federal law may preempt state law where state law interferes with a federal interest.\footnote{228. Northern States Power Co. v. State, 447 F.2d 1143, 1145–46 (8th Cir. 1971).} Even where a federal statute is silent as to its effect on state law, courts have found that certain areas “are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law.’”\footnote{229. Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988).} Although there is a presumption against preemption, courts may intercede to prevent state law from interfering with the federal interest.\footnote{230. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Although the Court will generally find preemption in cases where it is explicitly written into a congressional.
the case of civil liability for military service contractors, Congress has not passed any statute to immunize service contractors. Thus, before a court may preempt a tort claim against them, it must identify a unique federal interest warranting preemption. The Ninth Circuit’s opinion in *Koohi v. United States* provides a starting point for considering the principles underlying combatant-activities preemption.

*Koohi* is the only case that discusses the policies underlying it. According to *Koohi*, there are two principles grounding the combatant-activities exception. The first such principle is the federal interest in fostering bold action, such as direct attacks on the enemy. At first glance, this federal interest does not seem to be applicable to service contractors, as the Department of Defense Federal Acquisitions Regulations ("DFARS") specifically prohibits private military companies from engaging in offensive combat operations. However, DFARS permits con-

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statute, a statutory scheme may also impliedly preempt state law. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (asserting that Congress may preempt state law where Congress has evidenced an intent to displace a field or, even when it has not done so, there exists a conflict between state and federal law that stands as an obstacle to the accomplishment of the congressional purpose).

231. Nor had Congress provided immunity for procurement contractors—prompting the Supreme Court in *Boyle* to develop the federal common-law-based government contractor defense. *Boyle*, 487 U.S. at 500.

232. The Eleventh Circuit in *McMahon v. Presidential Airways, Inc.* deliberately avoided the issue. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1366 (11th Cir. 2007) (observing that combatant-activities preemption appears separate from *Feres* and declining to exercise discretion to entertain the appeal on this question).

233. *See* Koohi v. United States, 976 F.2d 1328, 1334–35 (9th Cir. 1992). While the court applied these principles to preempt claims against the United States, it reasoned that they could extend equally to service contractors. *Id.* at 1336. The court in *Bentzlin v. Hughes Aircraft Co.* reaffirmed these principles, even where contractor negligence injured U.S. service members, not “enemy” civilians as in *Koohi*. *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1494 (C.D. Cal. 1993). The *Bentzlin* court added to the Ninth Circuit’s reasoning on this last point: “nothing in the *Koohi* court’s decision suggests that its reasoning was intended to be narrowly construed” so as to apply only to enemy civilians. *Id.*

234. Recall that the *Koohi* court applied combatant-activities preemption in favor of a weapons manufacturer, not a contractor performing services. *Koohi*, 976 F.2d at 1330.

235. 48 C.F.R. §§ 34.826–27 (noting that combat commanders cannot authorize contractors to participate in “preemptive attacks, or any other types of attacks” and that civilians accompanying the U.S. Armed Forces lose their protection under the laws of war “for such time as they take a direct part in hostilities”); *Id.* § 16.764 (in discussing the difference between combat operations and self-defense, stating that “the rule does not authorize preemptive measures”); *Air Force Gen. Counsel*, supra note 21, at 1–2 (noting that commanders must ensure that contractors not be assigned or allowed to perform “military combat activities” and that they are generally forbidden from using weapons in
tractors to use deadly force in self-defense or “when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.” Given security contractors’ multifarious role in Iraq and Afghanistan—defending high-value targets, escorting convoys, or protecting the Baghdad airport, U.S. embassies, or CPA installations—and the conditions under which they operate, the opportunities for using deadly force in fulfillment of their missions are innumerable. Indeed, contractors could be characterized as participating directly in hostilities. Thus, although the choice to deploy contractors self-defense in case of attack). See also Scahill, supra note 20, at 129 (noting that a Blackwater official described his men as having been involved in “a security operation”).


237. See Michael N. Schmitt, Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees, 5 CHI. J. INT’L L. 511, 538 (2005) (“A civilian government employee or private contractor defending military personnel or military objectives from enemy attack directly participates in hostilities. His or her actions are indistinguishable from the quintessential duties of combat personnel.”).


The Ukrainian coalition troops stationed nearby did little to assist while CPA headquarters all but ignored the incident at the time. See Pelton, supra note 204, at 145–65; Jamie Wilson, Private Security Firms Call for More Firepower in Combat Zone: Coalition Forces Do Little to Help as Bodyguards Protecting Foreign Workers Are Targeted by Deadly Insurgents, GUARDIAN, Apr. 17, 2004, http://www.guardian.co.uk/world/2004/apr/17/iraq.jamiewilson (noting that Ukrainian troops helped to evacuate other buildings in al Kut, leaving Hart contractors to fend for themselves). Contractors have played similar defensive roles, generally to the exclusion of U.S. soldiers, in defending against attacks (real or hypothetical) on U.S. congressmen visiting Iraq, foreign politicians such as Hamid Karzai, and even Paul Bremer. Craig S. Smith, Letters from Asia: The Intimidating Face of America, N.Y. TIMES, Oct. 13, 2004 (describing DynCorp’s
on hazardous, but essential, security missions in lieu of U.S. forces is certainly debatable, once it has been made, the federal interest in ensuring that such contractors take the appropriately bold protective steps in an emergency is beyond question.

The second principle informing combatant-activities preemption is based in tort policy. According to Koohi, the punitive aspect of tort law makes it an inappropriate remedy against service members who negligently injure others in combat: the imperative to force U.S. soldiers to compensate persons injured by their negligence is reduced if one considers that scores of others are similarly injured by the inherently violent nature of war. The court’s second justification for preemption is ill-conceived. Although tort law provides for punishment of the tortfeasor in certain cases, its primary function is to compensate the victim. In addition, the fact that some victims who suffer injuries in war are left without a remedy does not mean that others should be denied recourse.


240. Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992). The Ninth Circuit indicated that no duty of care existed in respect of “enemy civilians,” but is ambiguous as to whether a different result might obtain in cases of equipment malfunctions causing collateral damage among U.S. soldiers. *Id.* The Bentzlin court answered that question, finding that the exception foreclosed suit against the manufacturers of military equipment that malfunctioned and killed several Marines. Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1494 (C.D. Cal. 1993).

241. *Id.* The Ninth Circuit indicated that no duty of care existed in respect of “enemy civilians,” but is ambiguous as to whether a different result might obtain in cases of equipment malfunctions causing collateral damage among U.S. soldiers. *Id.* The Bentzlin court answered that question, finding that the exception foreclosed suit against the manufacturers of military equipment that malfunctioned and killed several Marines. Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1494 (C.D. Cal. 1993).

242. See, e.g., Folz v. State, 797 P.2d 246, 261 (N.M. 1990) (“The whole theory of our tort law is to compensate the victim for his or her losses, not (unless punitive damages are awarded) to punish the tortfeasor.”). Punitive damages are generally not available for negligence. *E.g.*, Grynberg v. Citation Oil & Gas Corp., 573 N.W.2d 493, 506 n.10 (S.D. 1997).

243. Would the court’s statement imply that in the case of the National Security Agency wiretapping scandal, the fact that thousands of potential plaintiffs will not get their day in court for lack of standing also mean that those who can show standing should not be heard? See Tony Mauro, *High Court Declines Review of NSA Wiretapping Program*, LEGAL INTELLIGENCER, Feb. 21, 2008, at 4.
While it is unclear whether Koohi’s second rationale for preemption should apply to service contractors, the federal interest in encouraging bold, decisive action in the national defense should apply. Nevertheless, other federal interests may cut against preemption. The next Section discusses these countervailing interests. It highlights contractor discretion as the key element on which a court’s analysis should turn. Depending on the value a court sees in protecting a private military contractor’s acts of discretion, the combatant-activities defense might take on radically different proportions.

D. Combatant-Activities Preemption: The Problem of Contractor Discretion

A soldier is entitled to immunity for actions taken in good faith in the scope of employment. Having substituted private employees for soldiers in key roles, it might be argued that the law should similarly protect contractors, especially since the prospect of civil liability for con-

244. To the extent that the second principle justifies preemption of tort claims against procurement contractors (those who manufacture weapons in the safety of the home front), it applies a fortiori in the case of service contractors. Unlike procurement contractors, service contractors in a combat setting will act under conditions of exigency. Arguably, were the Blackwater contractors who were involved in the defense of the government post in Najaf to have injured their U.S. Army or Marine counterparts by friendly fire, a reasonable person would find such conduct less deserving of punishment than the procurement contractor who produces a fatally defective missile. Koohi’s reasoning would presumably apply in cases where contractors participate in combat activities but are not vulnerable to live fire. For example, contractors operated a guided missile system for the U.S. Navy in Iraq, while sixty contract employees were deployed with the Army’s 4th Infantry Division to operate its digital command and control systems. David Isenberg, A Government in Search of Cover: Private Military Companies in Iraq, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, supra note 200, at 82, 85–88.

245. See In re Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 108–09 (D.D.C. 2007) (finding that officials accused of torture were potentially entitled to qualified immunity if the rights alleged to have been violated were not clearly established at the time of suit). Federal officials are also protected under the Westfall Act, 28 U.S.C. § 2679(b)(1), which “affords federal employees absolute immunity from tort liability for negligent or wrongful acts or omissions they commit while acting within the scope of their employment.” Id. at 110.

246. McMahon Motion to Dismiss, supra note 122, at 2–3 (arguing that identity as part of Total Force makes them akin to soldiers, requiring dismissal of claims). Service contractors providing security services for key U.S. officials in Iraq may thus be distinguished from manufacturers of military equipment on the home front. The Supreme Court in Boyle v. United Technologies Corp. indicated that the government-contractor defense would protect contractors only where they followed government orders. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988).
tractors may thwart effective decision making in risky circumstances.\textsuperscript{247} Although proponents of such a defense might concede that the discretion of private, independent contractors is not worthy of protection at the expense of tort plaintiffs, they would maintain that their role in providing vital combat-support services changes the calculus.

Nevertheless, a variety of factors weigh against protecting contractor discretion. First, the text of the FTCA suggests that the exception was intended to protect military decision making. Second, contractor discretion does not deserve protection because unlike government employees, contractors are economic actors and will optimize their conduct even if immunity is unavailable. Third, under the principles of tort law, the contractor is in the best position to avoid tortious behavior and thus immunity from negligence liability is inappropriate. Finally, the unique federal interest in combat situations is not applicable where the government lacks oversight and control. The incidents at Najaf and al Kut present cases in which private military contractors defended CPA positions with negligible outside aid.\textsuperscript{248} In certain cases, objective commentators have even characterized them as more reliable than the U.S. military or its coalition partners.\textsuperscript{249} It might seem unfair in such cases to refuse to pro-

\textsuperscript{247} In his analysis of sovereign immunity, Peter Schuck has argued that because the law forces plaintiffs aggrieved by government action to seek redress against an individual federal employee rather than against the United States, it creates perverse and risk-adverse effects. Peter H. Schuck, Suing the Government: Citizen Remedies for Official Wrongs 75 (1983). For fear of liability, government officials substitute relatively riskless action for appropriate action in order to minimize risk. Id. at 68–72. Schuck discusses these effects for “street-level officials,” not higher ranking individuals whose interactions with the public are more limited. Id. A “defect[] of official liability” is its “propensity to chill vigorous decisionmaking.” Id. at 100. Although Schuck’s attack is directed elsewhere, it is applicable in the case of service contractors.

\textsuperscript{248} In al Kut, Hart Security battled insurgents for fourteen hours before a cease-fire permitted them to evacuate. Miller, supra note 201, at 165. See also supra note 238.

\textsuperscript{249} Having substituted contractors to protect top U.S. officials, the contractors are essentially acting as soldiers but do not benefit from similar legal protections. It is not for the courts to second-guess the inclusion of contractors in the mix. In combat conditions where critical U.S. interests are at stake, should the law recognize that contractors often function as soldiers?

Robert Young Pelton, who imbedded himself with Blackwater contractors for a month in Iraq in early 2004, describes the siege of al Kut. He reports that when word reached Paul Bremer that one of his CPA offices was on high alert he cautioned that whoever was sending the communications should “tone down” the wording. Pelton, supra note 204, at 156. Reviewing the inaction of the sizeable contingent of Ukrainian soldiers stationed near the office in response to the attack by Shiite militiamen, Pelton concludes that “[a]lthough the incidents in [a]n Najaf and [a]l Kut were downplayed by Bremer and never fully reported in the media, it was clear that Blackwater and other private teams were a far better and more willing partner than many in the war in Iraq.” Id. at
tect contractors where the task they performed with pluck was manifestly one for the military. Yet, having considered the argument for protecting a contractor’s discretion in such circumstances, a variety of factors cut against such a result. These factors compel the conclusion that when a contractor is subject to civil liability for actions taken in a combat context, even if the contractor retains significant discretion, combatant-activities preemption is unwarranted.

1. The Text of the FTCA

The first objection to shielding security contractors for their discretionary actions via combatant-activities preemption is the lack of a critical government nexus. The combatant-activities exception waives the government’s immunity except for claims “arising out of the combatant activities of the military or naval forces.”\(^\text{250}\) Arguably, Congress intended the exception to apply only to the U.S. military. That the U.S. military uses contractors as an instrumentality of war in lieu of soldiers does not undermine the essential requirement that combatant-activities preemption serve to protect military decision making.\(^\text{251}\) Under the textual view, preemption is inappropriate because it does not protect a military decision \emph{per se}; it would have no prophylactic effect on military decision making.\(^\text{252}\)
2. Incentivizing Contractor Conduct

Congress and the courts have sheltered the discretion of federal employees from state tort liability by creating statutory and common-law immunity defenses. In determining the value of a contractor’s discretionary act, it is useful to compare the government contractor to the government employee. In their analysis of the Supreme Court’s Boyle decision, Michael Green and Richard Matasar identify two salient differences between the two. Unlike the government officer, they argue, the government contractor is in a position to earn profits from its association with the government, and in a position to withdraw from the market for provision of security services. Because the contractor “stands to enjoy the benefits” of the contract, Green and Matasar suggest that a form of immunity is improper: “one would expect the contractor to engage in cost-benefit optimizing behavior without the benefit of immunity.” In contrast to public officers, who in theory act in the public interest and seek to maximize social welfare, private contractors “are assumed to maximize personal welfare, or profits, rather than public welfare, and to be staffed by self-interested individuals.”

There is evidence that this argument is applicable to military contractors because they stand to benefit personally from the contract and, as rational actors, have weighed the costs and benefits of assuming liability. The salary for private military contractors is much higher than the salary

The extent necessary to insulate military decisions from state law regulation."); Green & Matasar, supra note 77, at 652. To the extent that the law carves out an exception from the general waiver of sovereign immunity, it is only to protect military decisions, not those of nongovernmental actors. Id.

253. See, e.g., 28 U.S.C. § 2679 (1988) (providing that whenever an individual U.S. employee is sued in common law tort for acts committed within the scope of employment, the exclusive remedy is against the United States); Westfall v. Erwin, 484 U.S. 292, 297–98 (1988) (holding that federal officials are absolutely immune from state tort-law actions where conduct falls within the scope of official duties and is discretionary in nature).

254. Green & Matasar, supra note 77, at 652–53. Green and Matasar distinguish the two on a variety of grounds, only two of which are discussed above.

255. Id. at 652–53, 717.

256. Id. at 652–53.

for regular members of the U.S. military. Moreover, applicable provisions of DFARS specifically state that a contractor must accept all risks associated with supporting the military abroad, and that all liability in connection with a contractor’s use of a weapon rests solely with the contractor. Indeed, in response to a comment to its proposed rule that Boyle does not apply to service contractors and that contractors may be liable for their torts, the Department of Defense stated in a recent revision of DFARS that

[t]he public policy rationale behind Boyle does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors. . . . [T]o the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties. The language in the clause is intended to encourage contractors to properly assess the risks involved and take proper precautions.

Faced with such an explicit contractual and regulatory ex ante allocation of risk, the contractor has logically built the cost of potential tort liability into its rates. Even if this is not the case for all contractors, the law should presume it. Therefore, immunity for contractors would be redundant.

258. T. Christian Miller, Arrested Contractors Allege Abuse by Marines, S. FLA. SUN-SENTINEL, June 12, 2005, at 15A (“Private contractors routinely make three or four times the salary that U.S. soldiers do, upward of $100,000 a year.”).
260. Id. § 252.225-7040(b)(2). Although military regulations may provide that the military does not exercise control over contractors, the facts on the ground, as courts have justifiably found, may dictate a different answer. See supra Part III.
261. For example, when considering defenses of commercial impracticability, frustration, and force majeure in contract law, courts will generally interpret the contract to allocate risk to the party that could have most efficiently foreseen the cause of the impracticability or frustration and have taken measures to guard against it. See, e.g., Sparotech Corp. v. Opp, 890 F.2d 949, 955 (7th Cir. 1989) (“A principle purpose of contracts . . . is to allocate the risk of the unexpected[,] . . . not to place it always on the promi- see.”); N. Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 275–79 (7th Cir. 1986) (describing doctrines of frustration as “doctrines for shifting risk to the party better able to bear it, either because he is in a better position to prevent the risk from materializing or because he can better reduce the disutility of the risk (as by insuring) if the risk does occur”). In that case, a court uses default norms to assign liability, deciding the issue of risk allocation in a manner akin to how the parties would have decided it had they considered the question.
It may be argued that failing to provide service contractors with an affirmative defense will increase the cost of liability so much that contractors will withdraw from the market of providing military services. However, given the critical role contractors have played in Iraq and Afghanistan, their withdrawal from combat-support services is unlikely. First, contractors entered the market to provide military services with no clearly established affirmative defense on which to rely. Therefore, a court’s refusal to create an affirmative defense should not measurably affect the behavior of contractors in this market. Second, if a contractor receives an adverse jury award for tort liability, it can raise the rates it charges the federal government for its military services. Admittedly, the Supreme Court in Boyle recognized a federal interest in avoiding such a result, but courts should not treat the impact on the federal treasury as a justification for preempting tort claims against contractors. Green and Matasar point out that “[p]rotection of the federal fisc is a virtually unmanageable justification” for the government-contractor defense, noting that almost every case touching on federal law has a potential impact on the “monetary interests of the United States.” They identify a number of cases in which courts have refused to employ federal common law to assuage the impact of a tort judgment on the federal treasury. As Justice Brennan’s dissent in Boyle observes, the Supreme Court has declined to create a federal common law rule displacing state law where litigation between private parties would have the effect of raising contract prices for the government. The Boyle majority recognized that pass-through costs are not alone sufficient to justify preemption.

263. See, e.g., Brief of Amici Curiae, Professional Services Council and International Peace Operations Ass’n at *14, Nordan v. Blackwater Security Consulting, LLC (In re Blackwater Sec. Consulting, LLC), 460 F.3d 576 (4th Cir. 2005) (arguing that permitting a remedy, in addition to that of the Defense Base Act, against a contractor in a suit brought by employees threatens to burden the federal government by imposing higher costs on the government).
264. Green & Matasar, supra note 77, at 663.
265. Id. (citing United States v. Gilman, 347 U.S. 507 (1954); United States v. Standard Oil Co., 332 U.S. 301 (1947)).
267. Green & Matasar, supra note 77, at 664 (citing Boyle, 487 U.S. at 510–11). The Supreme Court identified protecting the discretionary judgments of the government about military designs and specifications as the primary justification for the government-contractor defense. Boyle, 487 U.S. at 512.
The factual circumstances the Supreme Court addressed in Boyle differ fundamentally from those confronting the provider of security services in Iraq or Afghanistan. The Court in Boyle stated that fashioning a federal common law affirmative defense would be appropriate in situations where the contractor could not comply with its contractual obligations and the applicable duty of care under state law.\(^{268}\) Boyle concerned a contractor that breached its duty of care in crafting the manufacturing specifications for a product.\(^{269}\) Because Boyle speaks to the case in which the government effectively allows the contractor to violate the duty of care, a tort suit is a virtual guarantee. Accordingly, the threat of tort liability, including the threat to the federal fisc, for contracts meeting the Boyle test is much greater than for service contracts.

The relevant service contracts contain no hint that a military contractor in Iraq or Afghanistan cannot simultaneously discharge its contractual responsibilities and act with the appropriate duty of care.\(^{270}\) Section 252.225 of DFARS permits contractors to use deadly force in “self-defense” and when “necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.”\(^{271}\) The regulatory language does not oblige a contractor to breach applicable duties. By sanctioning the use of such force in a broader context, the regulations allow contractors to accomplish their contractual missions even in difficult circumstances. These regulations will not per se absolve a contractor of liability for breaching the standard of care. They help define that duty. And in any event, they empower the contrac-

\(^{268}\) Boyle, 487 U.S. at 509 (“If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.”). See also Adams v. Alliant Techsystems, Inc., 201 F. Supp. 2d 700, 707 (W.D. Va. 2002) (distinguishing the facts of the case from Boyle and finding that the contractor was not entitled to governmental immunity on grounds that the duty of care owed under state law did not “conflict[] with or even burden[]” contractual or regulatory duties).

\(^{269}\) Boyle, 487 U.S. at 509 (“Here the state-imposed duty of care that is the asserted basis of the contractor’s liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).”).


tor to act decisively without fear of losing its current or future contracts, and provide some incentive to act aggressively without fear of tort liability. In cases of exigency, where self-defense is appropriate, the contractor is held to a comparatively lower standard of care, giving the reasonable person wider latitude for error. For example, a contractor will not be liable in tort to a bystander whom he or she accidentally injures while exercising his or her right to self-defense. In summary, the threat to the federal treasury is not as acute in the case of service contractors because, in contrast to contractors who might qualify for protection under the Boyle factors, they will more often be able to comply with the applicable standard of care.

A court should step in to override state law only when there is a threat of “major damage” to “clear and substantial” federal interests. The previous discussion of the principles animating the Koohi decision demonstrates that the federal government has an interest in motivating contractors to act boldly and decisively to protect U.S. interests. However, on further reflection, it is unclear that combatant-activities preemption is necessary to effectuate these interests. Unlike government employees, who act in the public interest, military service contractors personally benefit from their contract and have weighed the costs and benefits of assuming liability. Moreover, mass contractor withdrawal from the military services market is unlikely, and the threat of injury to the federal treasury associated with higher rates is an insufficient reason to protect the discretion of service contractors. Because they may fulfill their contractual obligations without breaching the applicable standard of care,

272. Although the standard of care, that of a “reasonable person,” does not change, society’s expectation about how a reasonable person would act in a given set of circumstances does. Dan B. Dobbs, The Law of Torts 302 (2000). See also Restatement (Second) of Torts § 75 cmt. b, illus. 1 (2006) (“In determining whether the actor as a reasonable man should be aware that his act creates an unreasonable risk of causing an invasion of any of the third person’s interests of personality . . . [t]he exigency in which the actor is placed, though not due to the third person’s conduct, with its attendant necessity of an almost instantaneous choice of a means of self-defense, is here a factor of great importance.”). The concept of the reasonable actor necessarily changes in a combat situation. See Mark J. Osiel, Obeying Orders: Atrocity, Military Discipline and the Law of War, 86 CAL. L. REV. 939, 959 (1998) (“The capacity of the human mind to process complex information in situations of extreme adversity, such as those on the battlefield, is quite limited.”).
275. Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992) (“[O]ne purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.”).
preemption is unwarranted in these situations. Thus, it is doubtful that preemption is necessary to incentivize service contractors to take bold, decisive action in combat zones.

3. Efficiency, Equity, and Indemnification

In its preemption analysis, a court should also consider questions of economic efficiency and equity, which suggest that contractors should not be protected where they act as functionally autonomous actors. A core principle of modern tort law is that liability for negligence should be borne by the party that is the cheapest cost avoider. In other words, liability is efficient where the burden of precaution is less than the probability of the harm times the magnitude of the harm. As between a U.S. soldier and an Iraqi or Afghan civilian, the contractor is in the better position to evaluate the likelihood and magnitude of the harm. This is because a security contractor may discharge his or her contractual responsibilities in conformity with the applicable duty of care. The contractor is also able, and in many cases will be required, to purchase insurance in connection with his or her performance of a military contract. Thus, in this situation, the service contractor should be the party responsible for insuring against the risk and bearing the cost of any resulting harm.

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276. Elam v. Alcolac, Inc., 765 S.W.2d 42, 176 (Mo. 1988) (“Cognate principles of equity and economic efficiency also inform” the goals of compensation and deterrence in tort law.).

277. The military contractor in Iraq and Afghanistan will never be fully autonomous, of course, as he or she is subject to the terms of the contract, as well as default statutory and administrative rules.

278. Rankin v. City of Wichita Falls, 762 F.2d 444, 448 (5th Cir. 1985); Elam, 765 S.W.2d at 176 (“[C]osts of the pervasive injury which result from mass exposure to toxic chemicals shall be borne by those who can control the danger and make equitable distribution of the losses, rather than by those who are powerless to protect themselves.”).

279. See Mesman v. Crane Pro Servs., 409 F.3d 846, 850 (7th Cir. 2005) (“The cheaper the precaution, the greater the risk of accident, and the greater the harm caused by the accident, the likelier it is that the failure to take the precaution was negligent.”). For a description of the Hand test, developed by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), see Richard A. Posner, Economic Analysis of Law 168 (2007). Posner engages in extensive criticism and reformulation of the traditional Hand test. Id.

280. 48 C.F.R. § 52.228-7 (2007) (requiring a contractor to carry some minimum amount of general liability insurance.)

Against this backdrop, the effect of providing a federal common law affirmative defense for service contractors in this situation would shift the loss to the innocent victim. A defense intended to protect contractor discretion is unjustifiable because the contractor is in the better position to avoid the loss in the first place, and because the national security interest in incentivizing risk taking is not present.\(^{282}\) If the government had considered ensuring that contractors act with fearless discretion in combat scenarios to be sufficiently important to national security interests, it would have indemnified these contractors. When Congress has determined that such a strong interest exists, it has not been hesitant to provide legislative solutions. The same is true for the executive.

Congress has authorized indemnification in cases where it “was necessary to encourage contractors to undertake activities for the government [that] would expose them to greater risks than would ordinary commercial or industrial activities, which could be protected by private insurance.”\(^{283}\) Under the authority of the National Defense Contracts Act,\(^{284}\) in conjunction with Executive Order 10,789,\(^{285}\) the president may authorize the Department of Defense to modify a contract, which includes providing for indemnification, whenever such action would facilitate the national defense. Contractual indemnification may apply to losses not compensable by insurance, including litigation and settlement fees.\(^{286}\) Subject to restrictions, contractors may also obtain indemnification under existing federal acquisition regulations for defined liabilities not covered by insurance, including loss or damage to property, and death or bodily injury.\(^{287}\) The post-9/11 legal landscape demonstrates that Congress can act

\(^{282}\) See, e.g., Holland v. Buckley, 305 So. 2d 113, 119 (La. 1974) (“[A]s between him who created the risk of harm and the innocent victim thereby injured, the risk-creator should bear the loss.”).


\(^{286}\) Id.

quickly when it wants to, and Congress is in the best position to strike a balance between the states’ interest in enforcing their tort laws and the federal interest in protecting military service contractors.

Contracts Act is an exception to the prohibition on open-ended indemnification agreements. Dover & McGovern, supra note 284, at 2. In fact, industry groups have lobbied for third-party indemnification under FAR § 52.228-7, Insurance—Liability to Third Persons, for fixed-price contracts. Bar Group Identifies Barriers to Contractor Support of Defense Missions, 47 No. 39 GOV’T CONTRACTOR ¶ 439, Oct. 19, 2005 (noting that the Professional Services Council, an industry group for private contractors such as Blackwater and others, had pushed for the expansion of the regulation).


To the extent that legislation only reaches contractors who manufacture products, consider the proposed Gulf Coast Recovery Act (“GCRA”). Gulf Coast Recovery Act, S. 1761, 109th Cong. (2005). Senator Jim Thune (South Dakota) sponsored the legislation, with senators James Inhofe (Oklahoma), Trent Lott (Mississippi), Lisa Murkowski (Arkansas), and David Vitter (Louisiana) as cosponsors. The bill seeks to clarify (and reduce) the liability of contractors participating in the reconstruction of areas affected by Hurricane Katrina. If the Army Corps of Engineers certifies the contractor, in the event of a lawsuit, the GCRA entitles the contractor to a “rebuttable presumption” that the elements of the government-contractor defense were satisfied. Id. §§ 5(d)(1)–(2). See also Schooner & Siuda-Pfeffer, supra note 281, at 301–03. By deploying contractors presumptively shielded by the government-contractor defense, the government would effectively place beyond a plaintiff’s challenge a range of acts of contractor discretion. Id. at 304 (In the context of emergency contracting, “the government essentially delegates any exercise of discretion to contractors” and “[s]uch open ended arrangements fail to provide the specific direction or approval historically required for application of the government contractor defense.”). See also Mark Gleason, Note, In the Name of Boyle: Congress’s Overexpansion of the Government Contractor Defense, 36 PUB. CONT. L.J. 249 (2007) (arguing that the GCRA does not honor the limitations of the government contractor defense). The GCRA is flawed legislation. It radically overextends the government-contractor defense without the necessary safeguards to prevent abuses. Fortunately it is not yet law. The GCRA demonstrates that Congress, if it saw fit, could act to protect service contractors in narrow circumstances where commercial insurance is unavailable. Schooner & Siuda-Pfeffer, supra note 281, at 321 (observing that Congress has typically indemnified contractors when insurance has been unavailable). Insurance for contractors that operate in and around the battlefield may be unavailable in many cases. See Goins, supra note 32, at 17, 22 (noting that insurance may be denied where a contractor carries
4. Government Oversight and Control

The United States also has a strong federal interest in ensuring the appropriate integration of and control over private military companies. It goes without saying that a unique federal interest exists in ensuring military effectiveness. This interest bears on government accountability and should also figure into a court’s determination as to whether preemption is warranted with respect to service contractors. First, current military doctrine presupposes that to form an effective component of the armed forces’ Total Force, contractors must be incorporated into the military’s command and control structures. Second, particularly in Iraq, the lack of government control over contractors has lowered foreign confidence in the United States and its mission.
Integrating contractors with the military has been a challenge for the U.S. military for over 200 years. Indeed, the value of the contractor as a force multiplier assumes that there are structures in place that allow combatant commanders to augment active duty forces without sacrificing overall efficiency. While full assimilation of contractors into the for-

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293. John Calhoun, as Secretary of War, complained of the problem in 1818. B UTKUS, supra note at 291, at 18 (describing the challenge of the “integration of civilian contractors within a rigid military chain of command”). Modern military doctrine emphasizes integrating contractors into the Total Force.

294. SCHREIER & CAPARINI, supra note 201, at 47 (“Maintaining visibility of contractors and coordinating their movements are vital if the commander is to manage his available assets and capabilities efficiently and effectively.”). See also Urey, supra note 290, at 7 (noting that according to relevant military doctrines, “[c]ontracted support must be integrated into the overall support plan”); Colonel George G. Akin, Joint Implications for Contracted Logistics (Mar. 30, 2007) (unpublished thesis, U.S. Army War College) (on file with the Brooklyn Journal of International Law) (“To fight as a joint team the combatant commander must force synchronization and standardization of contractor operations across Service components . . . to optimize contractors support.”). Apart from the tactical and efficiency losses from the failure to effectively integrate contractors with active and reserve forces, such failure has caused myriad friendly-fire incidents that have taken the lives of scores of contractors and soldiers alike. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO NO. 05-737, REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 27 (2005); DOD FORCE MIX ISSUES: GREATER RELIANCE ON CIVILIANS IN SUPPORT ROLES COULD PROVIDE SIGNIFICANT BENEFITS 10 (1994) (describing incidences of friendly fire between contractors and military, and noting that they occur primarily at military checkpoints, and that between January and May 2005, twenty reports of friendly fire were received). The Bush administration took steps to address coordination problems, subjecting all security firms contracting with the State Department to the supervision and control of the Department of Defense. See John M. Broder & David Johnston, U.S. Military Will Supervise Security Firms, N.Y. TIMES, Oct. 31, 2007.

U.S. emphasis on contractor integration finds a parallel in the approach of the United Kingdom, which has forcefully privatized combat-support functions. A fundamental assumption of U.K. military doctrine is that contractors can be integrated with regular military forces. See Matthew Uttley, CONTRACTORS ON DEPLOYED MILITARY OPERATIONS: UNITED KINGDOM POLICY AND DOCTRINE 15 (2005) (describing the United Kingdom’s assumptions underlying the privatization of military operations, including that “[c]ontractors providing deployed support can be integrated into military operational planning, and command and control . . . arrangements without disruption.”). The Royal Military has taken a further step towards integration through the development of the “Sponsored Reserves”; the military draws on members of a contractor’s staff who qualify as reservists, and these members perform functions appropriate for contractors during peacetime but inappropriate during war. See Matthew R.H. Uttley, Private Contractors on Deployed Operations: The United Kingdom Experience, 4 DEF. STUD. 145, 160 (2004). The Sponsored Reserves are deployed to perform contractor functions, but are subject to
mal military chain of command is not likely to be achieved, the value of contractors as a force multiplier will be defeated if they are involved in combat-support roles that operate wholly independently from military command. Functioning as a parallel force decreases contractors’ effectiveness, undermining the value of their presence in the combat zone. Coordination and communication between contractors and the military increases the overall effectiveness of the civil-military effort. Since the true value of the private military contractor in a combat zone is derived from the appropriate coordination and integration of contractors with regular forces, protecting the independent discretion of contractors does little to further the critical federal interest in integrating the military.

Contractor accountability also matters in the crucial battle for the “hearts and minds” of the citizens of Iraq and Afghanistan. Contractors are essential to the war effort, and most have acted honorably. But their aggressive tactics and lawless behavior have caused them to be “one of the most visible and hated aspects of the American presence in Iraq.” Accountability is crucial where the aim of the counterinsurgency is to create a vested interest in the success of democracy, an effort that depends on persuading Iraqis and Afghans to support the invasion. Observers agree that the culture of impunity among contractors has severely damaged the U.S. war effort, particularly in Iraq. If courts preempt tort

295. See Joe A. Fortner, Institutionalizing Contractor Support on the Battlefield, 32 ARMY LOGISTICIANT 12 (2000) (noting that one of the basic principles of contractor support is that “[it] must be integrated into the overall support plan”).

296. For example, soldiers and contractors are vulnerable to friendly fire and other accidents when the two forces function independently. See MILLER, supra note 201, at 168 (describing the prevalence and incidences of friendly fire between the military and contractors).

297. See SCHUMACHER, supra note 249, at 52.

298. As can be imagined from the Johnson case, a contractor may participate in a “combatant activity” while functionally integrated in a civilian agency, such as the FAA, Department of the Interior, or State Department. See Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948).

299. SINGER, supra note 204, at 5. See also id. at 9 (“Contractors have proven to be a drag on efforts to explain the highly unpopular U.S. effort in Iraq . . . .”). But see SCHUMACHER, supra note 249, at 170 (noting that one of the tasks of security contractors in Iraq is to intimidate).

300. See Evan Thomas & John Berry, The Fight over How to Fight, NEWSWK., Mar. 24, 2008 (explaining how theorists of war in a “world of failing states” argue that “firepower is not enough,” that “it is necessary to win hearts and minds”).

301. There is no serious disagreement among scholars that the United States fostered such a culture. For example, CPA Order 17 provided that Iraqi law would be inapplicable to contractors. The CPA was unable to account for ten percent of contractor staff at one
suits in cases where contractors are acting with measured discretion, it will add to the debilitating culture of impunity that has undermined U.S. military and civil efforts in Iraq from the beginning.

E. Effective Control: A Case for Limited Combatant-Activities Preemption

This Article has argued that unique federal interests are absent in civil negligence claims arising from the discretionary acts of contractors. However, it has not yet addressed whether a preemption defense might be appropriate in other circumstances. This Section answers this question in the affirmative. It first examines a threshold question—how should a court evaluate whether preemption is appropriate when the government exercises considerable control over contractors? This Section then reviews the various judicial doctrines that seek to insulate military decision making from scrutiny and concludes that combatant-activities preemption may be justified under these doctrines. Although the scope of preemption should be narrow, it may be invoked in circumstances where the contractor is under the direct supervision and control of the government.302

point in the war, and the government outsourced the contractor monitoring function to a contractor. See Isenberg, supra note 244, at 85–88; Lehnardt, supra note 200, at 140. Describing private military contractors in Iraq, Lehnardt notes that “there appears to be little effort to maintain effective control over their activities.” Id. Lehnardt also points out that the contractors identified as being involved in the abuses at Abu Ghraib have not been charged with a crime, whereas army and marine soldiers have been. Id. at 141. See also Office of the Inspector Gen., Dep’t of Def., Acquisition: Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command—Washington, Rep. No. D-2004-057, at 24 (2004) (noting that in a study of twenty-four contracts issued between February 2003 and August 2005, valued in total at $122.5 million, “[thirteen] did not have adequate surveillance of contractors”).

302. Cases may, of course, arise in which the government exercises sufficient control over the day-to-day activities of a contractor so as to make the contractor an agent of the government for purposes of the government-agency defense. In such circumstances, combatant-activities preemption and the government-agency defense will both be available to the contractor. However, as the Eleventh Circuit articulated in McMahon v. Presidential Airways, Inc., even where a contractor is deemed to be an agent, the court may still require the contractor to justify the grant of immunity affirmatively. 502 F.3d 1331, 1345–46 (11th Cir. 2007). Given the courts’ hostility to Feres, a contractor, whether an agent or not, might make a more compelling argument for protection under the principles animating combatant-activities preemption than under a theory of derivative sovereign immunity.
1. Evidence and the Supervision Inquiry

Assuming arguendo that combatant-activities preemption is a viable defense, and that control and supervision form a necessary element, how is a court to determine when preemption is applicable? To which evidentiary sources should a court look? A court’s analysis might turn on the scope of the contractor’s authority under the applicable regulations or the facts on the ground. These inquiries may provide different answers as to whether preemption is appropriate.

This tension is evident in Ibrahim v. Titan Corp.303 In Ibrahim, plaintiffs rejected the defendants’ attempt to rely on combatant-activities preemption.304 They argued that the district court reached the wrong conclusion when applying its own preemption test—whether the contractors were under “exclusive operational control” of the military.305 They also maintained that a finding of exclusive operational control was inappropriate because it was contrary to Army regulations,306 pointing to Army Regulation 715-9, which prescribes policies for managing contractors accompanying the force.307 This regulation specifies that the commercial firm(s) providing the battlefield support services will “perform the necessary supervisory and management functions of their employees since [c]ontractor employees are not under the direct supervision of military personnel in the chain of command.”308 The military could not have exercised exclusive control over the defendants in this situation, asserted the plaintiffs, because the contractor supervisors controlled contractor employees,309 and therefore, preemption was not fitting.310

In response, defendants argued that courts assessing the application of the combatant-activities exception have “always grounded their decisions on the facts as they occurred,” and that this analysis is what matters when considering interference with unique federal interests.311 Moreover, ap-
proaching the question otherwise would place the court in the “untenable position” of deciding what the military “should do in a combat situation when faced with an exigent need for civilian interrogators.”

The plaintiffs’ argument in *Ibrahim* is peculiar because it offered law—the regulations—to prove a fact. This approach is faulty. There is no dispute that the legal restrictions on contractors are not actually observed. The military or another agency will demonstrate operational control or supervision through actual interaction with contractors. Contractual terms and regulations inform the question of control, but they themselves are not determinative. The district court in *Ibrahim* justifiably adopted the “facts on the ground” perspective: if the record demonstrates that the military exercised control in fact, then contrary regulations do not alter this conclusion.

However, the regulations and the contract under which the contractors operated are relevant as part of a court’s legal evaluation of the federal interest(s) at issue. The fact that regulations place an activity beyond the power of the contractor provides important evidence that no federal interest is at stake in protecting the contractor. With this in mind, the facts on the ground should prevail against inconsistent regulations.

2. Cases of Narrowly Defined Contractor Discretion and Effective Government Control: The Federal Interests That Preemption Serves

This Article has argued that combatant-activities preemption of claims arising from a contractor’s tortious conduct undertaken in the exercise of

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312. See supra note 311 and accompanying text.
313. See *Kidwell*, supra note 205 (noting that intelligence gathering is characterized as an inherently governmental function, but contractors are performing it anyway).
315. *See Kidwell*, supra note 205, at 53 (quoting Assistant Secretary of the Army Patrick T. Henry for the proposition that intelligence gathering at the tactical level is an intrinsically governmental function). Indeed, the law in other contexts imposes liability against corporations and other entities for violations by their agents even where their internal rules expressly prohibit the conduct in question. *See N.Y. Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481, 491–95 (1909) (upholding the constitutionality of the Elkins Act, which made corporations liable for the acts of their officers, even where the officers were acting contrary to instructions); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (addressing criminal antitrust liability).
316. In other words, to the extent that regulations specify that contractors should not engage in a particularly activity, this at least suggests that the federal government might have little interest in protecting contracts when they injure someone while performing the contract.
his or her broad discretion is inappropriate. Furnishing a preemption defense in such cases will do little to meaningfully encourage action that serves U.S. interests, and would come at too great a cost to other stakeholders. Circumstances might arise, however, in which the military’s control over a contractor is high and the contractor’s discretion is minimal.

Contractors do not form a *de jure* part of the military chain of command.317 They may form a *de facto* component, however. Consider the facts of *Titan v. Ibrahim Corp.* and *Saleh v. Titan Corp.*318 In both of these cases, the district court concluded that Titan linguists and interrogators were subject to the control of their military unit commander at all relevant times, and Titan employees were wholly excluded from supervisory roles.319 When translating or interrogating alongside military personnel, Titan contractors were not to second-guess or disagree with their military counterparts.320 Although internal Army investigations suggest that a lack of supervision at Army interrogation centers contributed to the abuses, the district judge found that the military exercised strict control over Titan personnel.321

In cases of tight military-contractor integration, a civil suit against contractors would likely reveal highly sensitive military information such as interrogation tactics, military operational orders, and secret counter-terrorism activities.322 The primary focus of a court’s inquiry would no longer be the contractor’s discretion in taking certain allegedly tortious actions. Rather, the government’s own conduct would be relevant. Accordingly, the military’s own procedures, the adequacy and propriety of instructions, cautionary statements, and orders to contractors and to other soldiers would be scrutinized. Truly, the government can state no unique federal interest in the abuse of prisoners or derogation from international

317. McMahon v. Presidential Airways, Inc., 502 F.2d 1331, 1348 (11th Cir. 2007) ("[A] private contractor is not in the chain of command.").
320. Id.
322. The author recognizes, as courts have, that the United States has an interest in insulating military decisions from judicial scrutiny. See Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (detention as an “important incident[] of war”) (internal quotes removed). This should not be confused, however, with the view that the United States has an interest in promoting torture or mistreatment of prisoners.
human rights norms. But beyond detainee treatment, preemption has a far more relevant role where the military has integrated contractors in intelligence gathering or surveillance activities.323

Courts have recognized the unique federal interest in insulating military decisions from judicial inquiry, finding that even tangential intrusions into military decision making may pose a threat to military discipline.324 This extra-cautious approach can be appropriate because judges are not well positioned to understand and evaluate the effects of such intrusion.325 The court in McMahon v. Presidential Airways, Inc. ac-

323. One could also imagine a case in which the contractors accompanying Special Forces units along the Afghan border assist in capturing an alleged terrorist. Following instructions from the military, they subject the detainee to what he or she later alleges was rough treatment. Imagine that he or she sues the military and the contractor. Discovery would likely yield facts analogous to those in Titan—that the military effectively directed the contractor’s conduct. Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005). Recall that contractors have also maintained and operated weapons systems on-board warships during combat operations. Schreir & Caparini, supra note 201, at 22, 25. What would the result be where a contractor negligently calibrates a weapons system causing a missile to strike a civilian or U.S. military target? On board the vessel, the contractors are likely to be under close supervision and to be following detailed instructions.

324. Under this rationale, courts have upheld the dismissal of a plaintiff-soldier’s suit against the military in connection with a recreational boating accident. McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007). The court found that dismissal was appropriate because the suit would require discovery into the military’s maintenance of the boat and the adequacy of the instructions concerning its use. Id. In another case, fears of an adverse impact on discipline prompted the court to dismiss a claim arising from the drowning of soldiers in a military-sponsored rafting trip, even where civilian guides were the alleged tortfeasors. Costa v. United States, 248 F.3d 863 (9th Cir. 2001). Many circuits have found military discipline to be threatened in the Feres context in a wide variety of recreation-based accidents. See, e.g., Rayner v. United States, 760 F.2d 1217 (11th Cir. 1985) (finding that Feres barred a malpractice suit where the soldier sought elective medical care from the military provider); Hass v. United States, 518 F.2d 1138, 1141 (4th Cir. 1975) (concerning a serviceman injured in an accident involving a horse rented from a Marine Corps-operated stable).

325. Chappell v. Wallace, 462 U.S. 296, 300 (1983) (“Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers . . . .”); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (“The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”); Fisher v. United States, 402 F.3d 1167, 1177 (Fed. Cir. 2005); Holzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1973). Nor will courts hear cases that threaten to significantly impede combat effectiveness. Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (“It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call
knowledged these concerns and identified a class of suits involving “sensitive military judgments” that courts should not hear as a matter of prudence. Combatant-activities preemption also recognizes such a class of suits, vindicating the federal interest in avoiding inquiries into sensitive military decisions.

The recognition of these federal interests—which are not present in cases where contractors enjoy broad discretion—does not negate the powerful arguments against preemption that this Article has addressed. The preferred method for protecting contractors is by congressional action or executive indemnification. However, in cases where contractor discretion is minimal and the contractor is subject to extensive government control, preemption is appropriate. This should be the case so long as courts continue to recognize the interest preemption protects—the U.S. interest in avoiding interference with sensitive decision making—as sufficiently important to trump the nation’s interest in permitting plaintiffs to use the courts to obtain redress for wrongs. Boyle’s holding, that a suit against contractors may be preempted where tort liability would be inconsistent with a unique federal interest (deriving from either the discretionary-function exception or the combatant-activities exception), may be understood to sanction this outcome. The scope of a preemption defense rooted in contractors’ participation in the combatant activities of the United States hinges on the meaning of “control” and the amount of permissible contractor discretion.

Preemption is proper where contractor discretion is so narrow that a decision, order, or instruction of the military or other government agency becomes the true fact of interest. This occurs where contractor actions

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327. See Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 5 (D.D.C. 2007) (“It is the military chain of command that the FTCA’s combatant activities exception serves to safeguard, however, and common law claims against private contractors will be preempted only to the extent necessary to insulate military decisions from state law regulation.”).
329. See Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1334 (11th Cir. 2003) (“Although Boyle referred specifically to procurement contracts, the analysis it requires is not designed to promote all-or-nothing rules regarding different classes of contract. Rather, the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest.”) (citing Glassco v. Miller Equip. Co., 966 F.2d 641, 642 (11th Cir.1992)).
330. Titan Corporation made this argument in its brief to the D.C. Circuit. Corrected Final Brief of Defendant-Appellee Titan Corp. at 27, Ibrahim v. Titan Corp., Nos. 08-
are necessarily bound up with military action. Although this Article has primarily addressed the case of negligent conduct by a contractor, the end combatant-activities preemption can serve, protecting military decisions, can be achieved even where the contractor acts intentionally. The key element remains whether the conduct resulted from government direction rather than an exercise of contractor discretion.

Determining whether the discretion of a contractor has exceeded the critical threshold is a fact-sensitive analysis, and the amount of permissible discretion will vary from case to case. A court should permit a comparatively greater degree of discretion—within a range of reasonableness—where the conduct at issue is particularly sensitive. The polar star of the court’s inquiry must be to protect military decision making and military discipline, not a contractor’s discretionary act.331

3. The Breadth of Combatant-Activities Preemption and the Meaning of “Control”

A court may approach measuring and defining “control” in various ways.332 One approach would be to adopt the Boyle criteria explicitly, for which there is precedent.333 But applying the Boyle factors mechanically is inappropriate in cases involving contractor torts arising from participation in combatant activities. The Boyle government-contractor defense, as the Supreme Court described it, does not shield contractor negligence.334 Of course, contractors should generally not be immune, from

7008, 08-7009 (D.C. Cir. Dec. 3, 2008) (“To put it another way, where contractor employees are placed under the military’s operational control on the battlefield, the employees’ actions in a meaningful sense constitute the actions of the military.”).

331. The court in Ibrahim articulated this view. Ibrahim, 556 F. Supp. 2d at 3.
333. Rakowsky also contemplates this idea. Rakowsky, supra note 332. In Hudgens v. Bell Helicopter/Textron, for example, the Eleventh Circuit found the Boyle defense applicable where contractor DynCorp, which had contracted to maintain military helicopters, negligently caused the crash of an Army pilot. Hudgens v. Bell Helicopter/Textron, 328 F.3d 1329 (11th Cir. 2003). The court determined that because DynCorp followed a reasonably precise, comprehensive maintenance regime, it was not expected to supplement its own procedures. Id. at 1334–35.
civil or criminal liability, for illegal or tortious acts. Yet, this is not the appropriate result in a combat situation. A contractor’s good faith but negligent execution of military instructions in a combat context should not forfeit the defense. The federal interests present where contractor discretion is minimal do not disappear. Indeed, these interests require vindication in spite of the contractor’s tort.335

Ibrahim v. Titan Corp presents another option for defining and measuring control in this context. In Ibrahim, the court articulated a “soldier in all but name” test, under which defendants would succeed in their preemption argument where they could show that they were under the “exclusive operational control” of the military.336 This test is itself subject to varying interpretations, as it leaves open questions as to whether contractors must be following direct orders, or merely operating under the guidance and instruction of the military.337 The court’s formulation in Ibrahim appropriately sacrifices the advantages of a bright-line rule for a fact-specific inquiry. However, even the fact-specific “soldier in all but name” test may be too narrow. This test purports to confine combatant-activities preemption to cases in which the contractor works alongside the military. Although this is normally the case, preemption may also be warranted even where the contractor is not acting as a soldier.338

A suitable formulation of control might also be derived from the language of the International Court of Justice (“ICJ”) in Nicaragua v. Unit-
In this case, the ICJ examined whether the United States could be held liable for the acts of the paramilitary forces it sponsored in Nicaragua, and what level of control the U.S. government must exert over those forces in order to incur liability. The court found that the United States was not liable because it failed to exercise “effective control” over those forces. The flexibility of the court’s “effective control” test is both necessary and dangerous in the context of combatant-activities preemption.

Contractors, such as those responsible for the abuses at Abu Ghraib, should not be able to avoid civil liability by demonstrating nominal supervision by the military. The Supreme Court in Boyle recognized that when the government dictates, monitors, and approves manufacturing specifications and the manufacturing process, the conduct in question is really the government’s. Courts should view the applicability of the combatant-activities exception to private actors in a similar manner. Combatant-activities preemption can protect vital government interests, but it is only appropriate when government conduct substantially circumscribes contractor discretion.

340. Id.
341. Id. at 64.
342. For example, in Carmichael v. Kellogg, Brown & Root Services, Inc., the Northern District of Georgia concluded that the plaintiff’s negligence action against the contractor was nonjusticiable on political question grounds. Carmichael v. Kellogg, Brown & Root Servs., Inc., 564 F. Supp. 2d 1363, 1372 (N.D. Ga. 2008). As part of its ruling, the court found that “the army controlled the conduct of Carmichael’s convoy at the most granular level” because the military determined the convoy’s route, speed, and following distance to the exclusion of Kellogg, Brown & Root’s own supervisors. Id. at 1369. Unlike McMahon, where the Presidential pilots had wide discretion (and apparently used it), the army in Carmichael appeared to have exercised control sufficient to virtually eliminate Kellogg, Brown & Root’s discretion—at least sufficient to call into question its orders in a lawsuit. Id. at 1368–69. Similar to Titan, this case presents an example of the type of control courts should require before applying the combatant-activities exception to private actors.

One can apply the effective-control analysis to the facts of McMahon v. Presidential Airways, Inc., for example. In McMahon, the contractor was engaged in combatant activity at the time of the accident. McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1318, 1328 (M.D. Fla. 2006) Although the contractor was subject to certain restrictions, such as what routes to fly and at what altitude, the pilots caused the plane to veer off course, crashing into a box canyon eighty miles off the designated route. NAT’L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT BRIEF, ACCIDENT NUMBER IAD05FA023, at 19, Nov. 8, 2006, available at http://www.ntsb.gov/ntsb/query.asp. The National Transportation Safety Board’s postcrash analysis concluded that the pilot had decided to use an alternate route “for fun” and his failure to use the oxygen system contributed to his impaired judgment while flying. Id. at 19–20. The contractor’s own negligence caused the
Having explored the disadvantages of protecting a contractor’s discretionary acts, the courts’ application of the preemption defense that draws on the combatant-activities exception must be flexible. Regarding this exception, the courts’ determination of effective control cannot be formulaic and should not depend on whether the contractor functioned as a soldier. It must also consider the extent of the contractor’s discretion, if any, within the precise context in which he or she exercised it. If the contractor’s conduct involves activities, such as intelligence gathering or military maneuvers, in which the nation’s interest in protecting military decision making and execution from judicial second-guessing is at its apex, the ends of preemption are served, even where the contractor exercises slightly more discretion than he or she would in a context more remote from core military interests. The courts’ inquiry, accordingly, should be about “effective” control, judged with regard to the role preemption plays in protecting a unique federal interest, the amount of discretion (if any) the contractor exercises, and the context in which the contractor acts.

CONCLUSION

This Article has explored the defenses and immunities that may protect private military service contractors from civil liability. It has argued that the government-agency defense, while potentially applicable to service contractors, should be narrowly drawn. In addition, the principles recognized by courts to underlie the combatant-activities exception as applied

\[\text{crash. Id.}\]

The NTSB blamed Presidential Airways for the accident, but also noted that the Department of Defense did not provide adequate oversight of the contractor’s operations in Afghanistan in what was “clearly a military operation subject to [Department of Defense] control.” Id. at 22–23, 25; \text{SCAHILL, supra note 20, at 248. The company admitted that the military lacked supervision and control over the performance of the mission. McMahon Appellate Brief, supra note 127, at 32 (“Presidential was completely subject to the military’s control, except as to the physical performance of the mission.”). The scope of the contractor’s discretion in this case is sufficiently broad to preclude combatant-activities preemption. Even if a court could find that the government controlled the contractor’s freedom of action, permitting the suit to proceed would not jeopardize critical federal interests. Although the contractor could contend that a failure to preempt would negatively affect military discipline by questioning the military’s orders, this claim should fail. The plaintiff’s claim does not have anything to do with the military’s practice of employing contractor pilots. Instead, the plaintiff’s claim hinges on the contractor’s own negligence. Thus, this case is distinguishable from cases such as \text{McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007), where the allegations of negligence went to maintenance of and instructions concerning the use of military recreational boats.}}\]

343. \text{See Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (describing the nation’s interest in forcing military officials to testify to sensitive decisions at trials in the United States).}
to the federal government, namely, avoiding interference with sensitive military decision making, can similarly justify the preemption of civil claims against service contractors. However, preemption of a wronged plaintiff’s claims under the combatant-activities exception can wreak a clear injustice. Therefore, courts must frame combatant-activities preemption as narrowly as possible while still protecting critical federal interests. This balance is arguably achieved by only allowing preemption in cases where the contractor was under the supervision and control of the military.

The wisdom of the military’s widespread use of contractors remains a decision for the political branches. This Article’s conclusion that preemption may apply to service contractors does not mean that the impunity of contractors should be tolerated. Success in Iraq and Afghanistan demands that the United States foster a culture of accountability, and it should start by enforcing criminal sanctions against its soldiers and contractors who break the law. Agencies employing contractors should integrate clear guidelines and limitations into contracts with PMCs, with particular regard to their duty to respect the rights of civilians in zones of armed conflict.\footnote{For a discussion of how the contract might be used to foster greater accountability among contractors, see Laura A. Dickinson, \textit{Contract as a Tool for Regulating Private Military Companies}, in \textit{From Mercenaries to Market: The Rise and Regulation of Private Military Companies}, supra note 200, at 217. See generally Kevin O’Brien, \textit{What Should and Should Not Be Regulated?}, in \textit{From Mercenaries to Market: The Rise and Regulation of Private Military Companies}, supra note 200, at 29.} On a broader scale, the United States needs a coherent national policy on private military contractors. Congress should take up this policy challenge in earnest.
INTRODUCTION

In one of the Bush administration’s final acts before leaving office, the United States concluded an agreement with China that banned the import of Chinese antiquities into the United States.¹ This agreement, known as a Memorandum of Understanding (“MOU”), was the most recent of fourteen bilateral accords the United States has signed with other countries for the avowed purpose of protecting cultural heritage.² One important aspect of the new agreement with China is the inclusion of a number of ancient coin-types among the protected materials.³ This is significant because it is only the second time that an MOU has included coins and demonstrates the increasing breadth of these agreements as the United States attempts to use cultural heritage protection for political gain.

Another example of the United States’ use of antiquities protection for political motives, and the focus of this Note, is the first MOU to include coins: the agreement concluded between the United States and Cyprus on July 16, 2007.⁴ The accord extended a pre-existing MOU between the

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⁴ Memorandum of Understanding Concerning the Imposition of Import Restrictions on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Material, U.S.-Cyprus, July 16, 2007, 46 I.L.M. 86 (2007), available at http://culturalheritage.state.gov/CyprusExt2007AmendedAgreement.pdf [hereinafter 2007 MOU]. A former British colony that gained its independence in 1960, Cyprus has struggled with tensions between its ethnic Greek majority and ethnic Turkish minority since its founding. In 1974, these tensions came to a head with a Greek-sponsored attempt to seize control of the government. In response, the Turkish government intervened militarily and soon gained control of one-third of the island. In 1983, the Turkish-controlled area declared its independence as the Turkish Republic of Northern Cyprus, but, to date, only Turkey has recognized it. Despite several attempts at reconciliation sponsored by the United Nations and European Union (of which the entire island is officially a member) the island remains divided. Central Intelligence Agency, World Fact Book: Cyprus, https://www.cia.gov/library/publications/the-world-factbook/geos/cy.html [hereinafter Fact Book] (last visited Dec. 21, 2007). For the purposes of this Note, the Cypriot government is the generally recognized Greek majority government of the Re-
two countries that imposed import restrictions on pre-classical and classical archaeological objects and Byzantine ecclesiastical and ritual ethnological material from the island nation. In effect for five years, the new MOU extends the previous agreement that the two countries signed in 2002. There is, however, one notable addition in the 2007 agreement: “[w]e note that the subcategory Coins of Cypriot Types has been added to the category entitled Metal . . . .”

The inclusion of coins among the other restricted objects, such as statuary and architectural elements, was unprecedented and, as this Note will argue, has wide-ranging ramifications for the protection of cultural heritage both above and below the ground. In particular, this Note will suggest that political, rather than archaeological, concerns are the driving force behind the MOU and its inclusion of coinage.

One of the primary purposes behind restrictions on the trade of culturally significant objects is the prevention of the destruction of archaeological sites and the protection of source countries’ cultural heritage. According to the Federal Register Notice, coins, in particular, were included in the restriction because they “constitute an inseparable part of the archaeological record of [Cyprus], and . . . are vulnerable to pillage and illicit export.” The new restriction applies to “[c]oins of Cypriot types made of gold, silver, and bronze” dating from the sixth century public of Cyprus. The bilateral agreement with the United States was signed with this government, but its terms apply to antiquities from throughout the island.

6. Id.
7. Id.
8. Three previous requests to include coins in MOUs were rejected by the Cultural Property Advisory Committee (“CPAC”), the group charged with advising the U.S. State Department regarding cultural object import restrictions. Interestingly, among these was a request made by Cyprus five years ago. The other two requests were from Italy. Wayne G. Sayles, IAPN Questions State Department Actions, July 30, 2007, http://www.accg.us/issues/news/iapn-questions-state-department-actions. On April 30, 2008, the Department of Homeland Security included coinage in new import restrictions on Iraqi archaeological and ethnological materials. Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq, 73 Fed Reg. 23,338 (Apr. 30, 2008).
10. Extension of Import Restrictions, supra note 5, at 38,471.
BCE to 235 CE\textsuperscript{11} and prohibits their importation into the United States unless they have an export permit issued by the Cypriot government or “verifiable documentation that they left Cyprus prior to the effective date of the restriction.”\textsuperscript{12} Due to the past practice of coin collecting, especially the lack of documentation that accompanies coins and their wide geographic dispersal in antiquity,\textsuperscript{13} the restriction will make most Cypriot-types coins vulnerable to seizure by the government or restitution lawsuits.

Interested parties have both praised and vilified the new MOU’s inclusion of Cypriot-type coins.\textsuperscript{14} Cypriot politicians have praised the new agreement because it strengthens the protection of their nation’s cultural patrimony.\textsuperscript{15} Archaeologists and proponents of strong export/import laws, which are designed to eliminate the market for antiquities, also strongly support the new MOU, seeing it as an important step in stemming the looting of archaeological sites.\textsuperscript{16} Alternatively, a number of individuals, particularly American coin collectors and dealers, are vehement in their opposition to the inclusion of coins in the new agreement.

Arguments as diverse as due process violations during the decision-making process,\textsuperscript{17} violations of EU law in allowing Cyprus to impose such restrictions,\textsuperscript{18} civil servant misconduct,\textsuperscript{19} and the operation of a secretive “anticollection cabal”\textsuperscript{20} have been raised.

\textsuperscript{11}. Id. at 38,473.
\textsuperscript{13}. See infra Part I.C.
\textsuperscript{15}. Nicholas Burns, Under Sec’y, U.S. Dep’t of State & Andreas Kakouris, Ambassador of Cyprus, Remarks at the Signing Ceremony: Preserving the Cultural, Archaeological, and Religious Heritage of Cyprus (July 19, 2007) (on file with Brooklyn Journal of International Law).
\textsuperscript{18}. Letter from Dr. Hubert Lanz, President, Fed’n of European Numismatic Trade Ass’ns, to U.S. State Dep’t (July 25, 2007), http://www.accg.us/issues/news/tenap-expresses-concern-to-us-state-department/.
\textsuperscript{19}. Sayles, supra note 8.
Though some of these critiques of the new MOU are somewhat exaggerated, there are legitimate objections to the restriction on coins and the policies that the United States and Cyprus are employing in the fight against looting. On a practical level, these objects very rarely carry the same kind of provenance documentation as other archaeological material. As a result, it will be very difficult to establish which coins can be properly imported and which cannot. Furthermore, customs officials will find it difficult to identify “Cypriot-types” coins properly without extensive training. There are even suggestions that the images that the State Department posted to instruct customs agents on how to identify Cypriot-types coins contain important errors, further compromising the enforcement of the legislation. These objections, however, only address the practicality of the restriction rather than the more fundamental question: are export and import restrictions the most effective means of curbing the looting of archaeological sites?

Many archaeologists and politicians from source nations favor strict laws that prohibit the export, import, and even ownership of antiquities. There are two primary reasons they cite. First is the prevention of the illicit removal of antiquities (promoted by archaeologists), and second is the retention of cultural materials for nationalistic and political reasons.

state-departments-war.html (“If this unholy cabal of narrow academic interests, entrenched bureaucrats and cultural officials in a few foreign nations can secretly and successfully hijack U.S. cultural policy in such a manner, the implications may reach far beyond what happens to coin collecting, . . . . This development should concern not only coin collectors, but also every American citizen who values his or her personal freedom.”).

21. For a discussion of the meaning of “provenance,” see infra Part II.C.
23. Though imperfect, the terms “source” nation and “market” nation, coined by John Henry Merryman, are helpful and often used in the cultural property debate. As Merryman defines them:

[T]he world divides itself into source nations and market nations. In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples. Demand in the market nation encourages export from the source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.

(favored by politicians in source countries). Of the two, the protection of archaeological sites from pillaging is the more compelling justification. Looting is incredibly destructive and is responsible for the irretrievable loss of precious contextual information fundamental to archaeological research. It is undisputed that the value of an archaeological object is far greater than its inherent beauty. As Renfrew and Bahn state, “A looted vase may be an attractive object for a collector, but far more could have been learnt about the society that produced it had archaeologists been able to record where it was found . . . and in association with what other artifacts or organic remains.” Each time an object is looted, this context is destroyed, not only for the object looted, but also for all those around it and possibly for the entire site. Because archaeological objects and context are finite resources, even the smallest degree of destruction can lead to an irreplaceable loss.

All concerned agree that the prevention of looting and its consequent destruction is a worthwhile goal. Many source nations and archaeologists are the strongest supporters of export and import restrictions as a means of preserving antiquities in context. They consider themselves “at war” with the market and argue that collecting antiquities is the equivalent of looting. They believe that the only way to stop the pillaging of archaeological sites is to create a legal system and moral consensus that the trade in antiquities is akin to the trade in ivory or rare birds’ eggs.

24. COLIN RENFREW, LOOT, LEGITIMACY AND OWNERSHIP 20 (2000) (“While some national governments may still take the rather chauvinist view that ownership and possession of significant artefacts (within their territorial borders) is of primary importance, most now realise that the true disaster is the illicit excavation.”).

25. In archaeology, “context consists of its immediate matrix (the material surrounding it, usually some sort of sediment such as gravel, sand, or clay), its provenience (horizontal and vertical position within the matrix), and its association with other finds (occurrence together with other archaeological remains, usually in the same matrix).” COLIN RENFREW & PAUL BAHN, ARCHAEOLOGY: THEORIES METHODS AND PRACTICE 50 (3rd ed. 2000) (emphasis omitted).


27. RENFREW & BAHN, supra note 25, at 50. For an example of the importance of context, see RENFREW, supra note 18, at 22–26.

28. See, e.g., Sayles, supra note 8 (citing the International Association of Professional Numismatists Code of Ethics, which states that Members will “never knowingly deal in any numismatic item that has been illegally removed from an official excavation site”); ANCIENT COIN COLLECTORS GUILD, CODE OF ETHICS (2005), available at http://www.accg.us/issues/news/code (“Coin Collectors and Sellers will not knowingly purchase coins illegally removed from scheduled archaeological sites . . . and will comply with all cultural property laws of their own country.”).

It appears unlikely, however, that the trade in antiquities will ever become as stigmatized as the exploitation of endangered species. Objects that are now antiquities were always intended by their makers as items of exchange and, therefore, entail less flouting of moral impulses. Also, although the destruction of an archaeological site is lamentable, it is reasonable to elevate the protection of endangered species (which entails the protection of life) over the protection of archaeological sites. Therefore, for the time being, it appears that the antiquities market will continue.\(^{31}\)

It is unclear, however, whether export and import restrictions are actually effective in deterring the looting of archaeological sites. As Professor Bator has suggested, “Most current export control systems are self-destructive. The international black market thrives because no alternative is allowed to exist for either buyers or sellers, so that all economic incentives are pushed in favor of the illegal trade.”\(^{32}\)

Several alternative solutions to export and import restrictions have been suggested, most based on the premise that restrictions on the licit trade in antiquities creates a greater incentive for an illicit market, which, in turn, is fed by looting. Among these alternatives are suggestions for a more liberalized antiquities market,\(^ {33}\) increased direct regulation of the market through antiquities registration, greater criminal penalties for looters and smugglers,\(^ {34}\) increased indirect regulation of the market through instruments like museum taxation,\(^ {35}\) and a return to the partage system.\(^ {36}\)

1996). This argument, however, is somewhat weakened by the recent U.N.-approved international ivory sale in Namibia. Alan Cowell, Ivory for Sale, Legally (and Controversially), N.Y. TIMES, Oct. 28, 2008. This demonstrates that even objects that appear to have stronger moral support for their protection, a legal, though admittedly controversial, market still exists.

30. See RENFREW, supra note 24, at 20.

31. For example, a recent Time Magazine article’s title proclaims “Antiquities: The Hottest Investment.” The article suggests that antiquities are an excellent investment and for under $10,000 a year, collectors can acquire a few quality pieces with an average increase in value of eight to nine percent annually. Maria Baugh, Antiquities: The Hottest Investment, Time, Dec. 12, 2007, http://www.time.com/time/business/article/0,8599,1693792,00.html.


Ancient coinage is particularly important to this debate because of coinage’s unique nature compared to other antiquities. Coins’ archaeological value, such as their use in dating archeological sites,\(^{37}\) compels authorities to do their utmost to protect their archaeological context. On the other hand, unlike many other prized objects, coins differ conceptually, as they were created to be items of exchange. Furthermore, coins have a long history as collectables, but rarely bear provenance information. Accordingly, there are innumerable ancient coins in private and public collections for which the owners cannot prove their provenance. Finally, import restrictions on coins are difficult to enforce, because of their portability and size, which make them easy to smuggle or mail. These factors make coins unique among antiquities and suggest that their regulation is more problematic, both practically and philosophically, than that of other objects. Accordingly, the question is whether or not the current rigid restriction on Cypriot coins is the most effective means of deterring illegal looting.

Much of the debate regarding import and export restrictions has been highly polarized, with the media portraying the debate as a question between stopping looters versus infringing on the rights of U.S. citizens.\(^{38}\) The dangerous mixture of nationalism, scholarly interest, the admiration of beauty, and the awe and respect for our shared history acts as a catalyst for the clash of passionate points of view.

This Note argues that strict restrictions on the importation of Cypriot coins is less than ideal and may, in fact, be counterproductive. Until there is greater regulation of the antiquities market, particularly through strict requirements regarding the recording of provenance, import restrictions will be easily flouted and may drive a greater proportion of the market towards illicit antiquities, which, in turn, will foster increased looting. More balanced solutions are required to combat the illicit antiquities trade and the looting of archaeological sites.

Finally, there needs to be a shift in the debate regarding antiquities protection. The politicized discourse only serves to cloud the primary purpose of antiquities legislation: the protection of archaeological context. Moreover, there are suggestions that the United States may be using antiquities legislation to garner favor with source countries.\(^{39}\) Cyprus, in

\(^{37}\) See infra Part II.A.

\(^{38}\) See Jeremy Kahn, Is the U.S. Protecting Foreign Artifacts? Don’t Ask., N.Y. TIMES, Apr. 8, 2007 ("[A]rchaeologists . . . say the art market fosters the looting of historic sites, and dealers . . . say that broad import restrictions threaten collecting by private individuals and museums in the United States.").

\(^{39}\) CUNO, supra note 36, at 35–36.
particular, may be a target because of its important role in the “War on Terror,” the Iraq invasion, and Turkey’s entry into the European Union. This Note advocates an increased focus on realistic, nuanced approaches to the protection of archaeological context and a shift away from politically driven regulatory regimes towards ones that focus on the actual protection of antiquities. Part I summarizes the importance of coinage in the archaeological context, the long history of coin collecting, and the difficulty of regulating the trade in coins. Part II reviews the existing U.S. and Cypriot legislative regimes used in the fight against looting. Part III analyzes the effectiveness or ineffectiveness of the current legislation in protecting archaeological sites from looting. Part IV examines alternative solutions to the looting problem and assesses whether their adoption is worth considering. Part V questions whether political motivations are affecting the U.S. and Cypriot anti-looting approaches.

I. COINS IN THE ARCHAEOLOGICAL AND COLLECTING CONTEXTS

A. The Archaeological Importance of Coins

Ancient coins are not only inherently valuable but also critically important to archaeological research. First struck in western Turkey in the late seventh century BCE and minted in vast quantities ever since, coins have long been an essential part of organized society and, therefore, serve as an essential piece of the historical record. Ancient coins are found in a variety of different contexts, each of which serves as a valuable source of information on ancient cultures. This is particularly true when they are found in situ. Coins discovered in context can help archaeologists research trade and travel networks, locations of heavily trafficked areas of a given site, and social organization—particularly those of the issuing authority, and important terminus post quem information. In fact, coins are so critical to archaeological research that they are among the few key artifacts that have their find spot recorded with three-dimensional precision.

42. Latin for “in place,” the term is used in archaeology to refer to objects that are in their original place of deposition. Barbara Ann Kipfer, Encyclopedic Dictionary of Archaeology 255 (2000).
43. Latin for “date after which,” the term is used in archaeology to denote the earliest possible absolute date for a given strata. See Renfrew & Bahn, supra note 25, at 131.
44. Id. at 107–08.
The illicit search for coins also damages an archaeological site as a whole and causes the destruction of other important artifacts. Looters’ digging invariably destroys important stratigraphic information, which is critical to archaeologists’ understanding of a given site. Furthermore, in a desire to find valuable coins, plunderers frequently destroy objects that they perceive as having less value in the market.

Despite arguments to the contrary, even when found in isolated hoards outside of settlements sites, as are a significant number, coins have considerable archaeological value. For example, these hoards help archaeologists determine which coins were in circulation at a given place and period. Also, the location of the hoard in relation to other sites is archaeologically valuable. Moreover, researchers can derive important archaeological information from the relationship among coins in a given hoard. Furthermore, even for numismatists, the richness of the information that can be extracted from an ancient coin increases when its context is known. For example, frequently found coin types, which add little to our store of knowledge without provenance, can, when found in context, be a crucial piece of evidence in unraveling the economic and social history of the ancient world. As a consequence, even if one is unconcerned with archaeological context, a hoard’s integrity comes into question when it appears on the market without provenance, and even the infor-

45. Stratigraphy “is the study and validating of stratification—the analysis in the vertical, time dimension of a series of layers in the horizontal space dimension (although in practice few layers are precisely horizontal).” Id. at 106.

46. Id.


49. Id. Though, Rose points out that a great number of hoards are found within settlement site habitation levels. Rose, supra note 16.

50. Rose, supra note 16.


53. Elkin, supra note 42.

54. Coins and Archaeology, supra note 41.
mation that one can glean from the composition of the hoard itself comes into question.55

When looting occurs, all of this information becomes irretrievably lost. Therefore, regardless of one’s opinion of the ethics of antiquities collecting, the importance of preserving the archaeological context and coinage’s key place within it cannot be denied.56

B. Coin Collecting

Coin collecting has a long and rich history. Both Emperors Caesar (100–44 BCE) and Augustus (63 BCE–14 CE) were documented collectors, and passages from Pliny the Elder suggest that there was a widespread interest in coins and a marketplace for their sale during the Roman era.57 Also, the common practice by Greek, Roman, and Medieval rulers of reusing designs from earlier coin types suggests that earlier coins were held in high esteem during these times.58 In the following centuries, coins were collected and studied by the likes of Petrarch, Louis XIV, Charles VI,59 Napoleon, and the American Founding Fathers.60

Over time, coin collecting has become more sophisticated and widespread, which, in turn, has led to an ever increasing market for coins.61 Both the opening of Eastern Europe after the Cold War and the increasingly frequent use of metal detectors62 have expanded the number of

55. Id.
56. RENFREW, supra note 24, at 22 (“[Looted objects] do not contribute to our knowledge of the past; indeed they are parasitic upon that knowledge, for they themselves can only be dated, authenticated and given any kind of interpretation by comparison with similar artefacts that have indeed been found within a coherent context.”).
57. Elkins, supra note 51.
58. Tompa & Brose, supra note 48, at 209.
59. The Habsburg Emperor, Charles VI, was such an avid collector that, in order to take his collection when he travelled, he had a special case constructed for his coins. He also placed coins he considered meaningful in the foundations of important churches he founded, such as Karlskirche in Vienna. W. Oechslin, Fischer von Erlachs „Entwurf einer Historischen Architektur”: die Intergration einer erweiterten Geschichtsauffassung die Architektur im Zeichen des erstarkten Kaisertums in Wien, in WIEN UND DER EUROPÄISCHE BAROCK. 7 XXV. INTERNATIONALER KONGRESS FÜR KUNSTGESCHICHTE. 4-10. 9. 1983, 77, 80 (E. Lisker ed., 1986) (Austria).
60. Tompa & Brose, supra note 48, at 209.
61. Elkins, supra note 51.
62. Metal detectorists, as they are often known, are hobbyists who utilize metal detectors to hunt for archaeological materials for fun or profit, using metal detectors. The activities of metal detectorists are controversial as they lead to the destruction of the archaeological record. For a full discussion, see Heritage Action, Metal Detecting: Calling Time on Erosion, http://www.heritageaction.org/?page=heritagealerts_metaldetecting (last visited Dec. 20, 2007).
coins on the market. The Internet, however, is perhaps the innovation with the greatest consequences to the trade in ancient coins. The Internet has revolutionized the way ancient coinage is bought and sold. First, there has been an explosion in the number of coins available for purchase in an instant. For example, on September 30, 2007, there were 5534 items for sale within eBay’s “Coins: Ancient” category, ranging in “buy-it-now” prices from $5 to $800,000. On the same day, a coin-centric competitor of eBay, VCoins, advertised that 116 dealers were selling 72,669 items with an approximate value of $14,400,000. Second, the Internet has allowed unscrupulous collectors to easily purchase coins in an instant from dealers and looters across the world. There are even instances of online sellers boasting of coins for sale with the dirt still attached. There is no way for buyers to vet these sellers, and it is difficult to regulate the market as it reaches across international borders.

The scale of the illicit antiquities market is difficult to quantify, let alone the market for ancient coinage, and accounts of its value vary. Even harder to quantify is the number and value of coins exported out of Cyprus. Two recent arrests, however, give some indication of the scale of some looting operations. In 2002, the Italian Carabinieri discovered and arrested a criminal group operating a multimillion-Euro business selling illicit coinage over the Internet. During a raid, the Carabinieri discovered 10,000 coins, of which approximately 150 were valuable silver coins from Cyprus. Subsequent raids uncovered 19,000 more coins as well as

63. Elkins, supra note 51.
67. See EBay, supra note 64.
68. See Kate Fitz Gibbon, Editor’s Note: The Illicit Trade—Fact or Fiction?, in WHO OWNS THE PAST?, supra note 48, at 179, 179 (noting that there are no accurate calculations of the scale of the antiquities market); Malcolm Moore, Tomb Raiders Strip Bulgaria of its Treasures, DAILY TELEGRAPH, Aug. 8, 2007 (citing a Bulgarian police official’s estimate that tomb-raiding in Bulgaria earns crime syndicates $4 billion a year); Miliken Inst., Financial Innovations for Developing Archaeological Discovery and Conservation, 7 FINANCIAL INNOVATIONS LAB REPORT (prepared by Caitlin MacLean & Glenn Yago) (Nov. 2008), available at http://www.milkeninstitute.org/pdf/FIArchaeologyLab.pdf.
70. Id.
another 650 archaeological objects. More recently, in October 2007, five men were arrested in connection with an antiquities smuggling ring in Cyprus. Police found that the men had hundreds of gold and bronze coins, as well as other antiquities, in their possession, with a total estimated value of over EUR 280,000.

Another piece of anecdotal evidence on the Cypriot trade in coins is a 2008 interview with a Cypriot metal detectorist in the Cyprus Mail. In the interview, the metal detectorist, alias “Achilleas,” claims that there is a thriving black market on the island and that looters can easily make a good living. He refers to one acquaintance that uses a tomb he discovered “as a sort of bank” that he “visits whenever he wants cash.” Achilleas goes so far as to imply that found objects turned over to the government are purposefully “mislaid” and then sold on the international black market. Though unsubstantiated, the account suggests the prevalence of sophisticated, educated looters on the island. As this example indicates, despite the growing concern of the international community, “the trade in undocumented ancient coins continues to grow and remains a serious problem for those wishing to preserve valuable information about the past and protect our common cultural heritage.”

C. Coins and Provenance

Provenance (or sometimes provenience) can have two meanings depending on one’s perspective. In the art historical terminology, the term generally refers to the past ownership of an item. Alternatively, archaeologists use the term provenance to refer to the precise location of an object during excavation, and it serves as one of the key factors in determining the context of any given archaeological object. Because looting destroys the archaeological provenance of a coin, it is the latter use of the term that this Note will favor.

71. Id.
73. Id.
75. Id.
76. Id.
77. Id.
78. Elkins, supra note 51.
79. See RENFREW & BAIN, supra note 25, at 107.
The vast majority of coins, both in collections and on the market, lack provenance information (both for prior ownership and location) and when any indication of a coin’s origin is given, it is often only for a city or region.\(^8\) It is this widespread lack of provenance for coinage that is the central problem facing those who seek to prevent a market in looted coins and antiquities. If a coin lacks provenance, many, if not most, collectors and dealers will assume that it is licit, i.e., not looted. This allows collectors to turn a blind eye to the problems of looting.\(^9\) Therefore, it is instructive to analyze why coins in particular have little or no provenance information.

Coinage seems to lack good provenance because of three factors. First, unlike modern currency, ancient coins moved more freely across sovereign borders in antiquity because their value was tied to the metal’s intrinsic value. This led to a far wider geographic dispersal of coins in comparison to contemporary money, which is generally limited to specific countries or economic zones.\(^8\) Therefore, a Cypriot coin might be found in Egypt, England, or Rome. Second, coins have been collected for centuries, indeed, since antiquity, and some coins have traded hands innumerable times.\(^3\) This has resulted in the loss of provenance. Third, the very nature of coinage as a standardized means of exchange requires that sovereigns repeatedly reproduce near exact copies. This means that for many coins there are several duplicates, which can make attributing a coin to a particular find spot exceedingly difficult.\(^4\) As an advocate for a free market in ancient coins has noted, “The very nature of this trade—added to the original wide dispersion of the coins themselves—makes determining the provenance of any particular coin virtually impossi-

\(^8\) Elkins, supra note 51. See also Mackenzie, supra note 34, at 34–35 (“No provenance is still the norm today even for objects of considerable worth . . . . Further down the financial scale [where coins are generally located], the notion that provenience might be passed with an object is seen as a ludicrous proposition.”).

\(^9\) Mackenzie, supra note 34, at 35 (“Many [dealers] adopt a strong opposition to the idea that unprovenanced objects should be viewed with suspicion. To them, this is tantamount to condemning most of the goods in the market to be off-limits to trade . . . . [They] dismiss the more sensible and balanced view that some unprovenanced objects on the market are probably looted and therefore all objects without provenance should be treated with at least a base level of suspicion . . . .”).

\(^3\) For example, Roman imperial coins have been found as far west as England and as far east as Sri Lanka. Tompa & Brose, supra note 48, at 206–07.

\(^4\) Elkins, supra note 51.

\(^4\) Id. (citing M.M. Kersel, From the Ground to the Buyer: A Market Analysis of the Trade in Illegal Antiquities, in Archaeology, Cultural Heritage, and the Antiquities Trade 188–205 (N. Brodie et al. eds., 2006)).
ble.” Without provenance information, a dealer or collector cannot ensure whether a coin is licit or not and, if the law assumes such coin is not licit, many coins will become untouchable.

II. EXISTING LEGAL INSTRUMENTS

A. The 1970 UNESCO Convention

The most important international instrument addressing the antiquities trade is the United Nations Educational, Scientific, and Cultural Organization’s (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention”). The Convention’s stated mission is as follows:

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country’s cultural property against all the dangers resulting therefrom.

2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

One of the Convention’s important features is that it provides a customary legal definition of “cultural property.” Thus, among the items that Article 1 identifies as cultural property are “products of archaeological excavations (including regular and clandestine) or of archaeological discoveries” and “antiquities more than one hundred years old, such as inscriptions, coins and engraved seals.” It also establishes that any item that is imported, exported, or traded in contravention of the laws of a

85. Tompa & Brose, supra note 48, at 209.
87. 1970 UNESCO Convention, supra note 9, art. 2.
88. Id. art. 1(c).
89. Id. art. 1(e).
State Party in accordance with the articles of the convention will be considered illicit.90

Another significant aspect of the Convention is Article 9:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.91

This establishes a system through which States Parties can enter into bilateral agreements to protect a State’s threatened cultural property. It is on this Article that the United States bases its implementing legislation.

Though the treaty entered into force in 1972, the effect of the UNESCO Convention was limited because no market countries (with the notable exception of the United States) ratified the Convention until recently.92 In fact, the United States was the only market nation to participate in the Convention’s drafting and the first to ratify it.93 However, as issues of cultural property have gained prominence and public opinion has shifted towards favoring protection, important source nations like France, Japan, Switzerland, and the United Kingdom have joined the Convention.94 Also, the treaty’s 1970 effective date has served as a widely recognized bright-line cut-off date for many museum collection policies.95 Still, commentators have continued to critique the Convention for

90. Id. art. 3.
91. Id. art. 9.
94. States Parties List, supra note 92.
95. For example, see the Association of Art Museum Director’s (“AAMD”) recently promulgated and widely adopted Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art, which states that “[m]ember museums normally should not acquire a work unless provenance research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970.” ASS’N OF ART MUSEUM DIR., REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEO-
favoring source nations’ retentionist goals. Despite these critiques, there is no denying the Convention’s significance as a catalyst for changing attitudes towards the antiquities trade and a increasing the general recognition that the protection of antiquities is critically important.

B. The Convention on Cultural Property Implementation Act

Though an original party to the 1970 UNESCO Convention, the United States did not implement the treaty domestically until 1983. The enacting legislation, the Convention on Cultural Property Implementation Act ("CPIA"), specifically implemented Articles 7(b) and 9 of the 1970 Convention. In essence, however, the CPIA reduces the 1970 UNESCO Convention to an “agreement to agree.” The CPIA grants the president the power to enter into bilateral agreements—MOUs—at the request of
States Parties to the Convention, so long as certain criteria are satisfied.

The president must determine

(A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;

(B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;

(C) that—

(i) the application of the import restrictions set forth in section 2606 of this title with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and

(ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and

(D) that the application of the import restrictions set forth in section 2606 of this title in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.

After an MOU enters into force, the parties must create “a list of archaeological or ethnological material of the State Party covered by the agreement . . . .” Known as a “Designated List,” it must be “sufficiently specific and precise to insure that (1) the import restrictions . . . are applied only to the archeological and ethnological material covered by the agreement . . . and (2) fair notice is given to importers and other persons as to what material is subject to such restrictions.”

Once an item is listed it may not be imported into the United States without certification or other documentation from the State Party that the object was legally exported or proof that it was exported from the State Party prior to the date such material was designated under Section

102. Id. § 2602(a)(1).
103. Id. § 2604.
104. See, e.g., Extension of Import Restrictions, supra note 5, at 38,470 (referring to the list of object subject to the import ban as the “Designated List”).
If an item is imported in violation of Section 2606, it is subject to seizure and forfeiture. If an object is forfeited, the United States will first offer it to the source country. If the object is not returned to the source country, the United States will return the object to the claimant so long as the claimant establishes that he or she is the bona fide purchaser of the item with valid title. Significantly, the CPIA only allows for civil enforcement, including the forfeiture of the cultural item in question.

The maximum period an MOU can be in effect is five years. They are, however, renewable for additional five-year periods if the government determines that the factors that justified entering into the initial agreement are still in effect. The CPIA also allows the president to implement emergency import restrictions when certain conditions are satisfied. These are also limited to a five-year maximum and are only renewable for a further three-year period if the president determines that the emergency conditions still exist.

To aid in its execution, the CPIA created an advisory committee to evaluate requests from States Parties. Known as the Cultural Property Advisory Committee ("CPAC"), this body is composed of eleven members: two representing museum interests; three experts in archaeology, anthropology, ethnology, or related areas; three experts in the international sale of archaeological, ethnological, and other cultural property; and three representing the general public. During the evaluation process, the CPAC invites public comment on MOU requests, but the original petitions for import restrictions and the recommendations that the CPAC make to the State Department are all classified. This practice has led many to criticize the CPAC’s decision-making process as too secretive. There are also allegations that the State Department has filled the

106. Id. §§ 2606(a)–(b).
107. Id. § 2609(a).
108. Id. § 2609(b)(1).
109. Id. § 2609(b)(2).
110. Id. § 2609.
111. Id. § 2602(b).
112. Id. § 2602(e).
113. Id. § 2603.
114. Id. § 2603(c).
115. Id. § 2605.
116. Id.
117. Kahn, supra note 38.
118. Id.
CPAC with members who are sympathetic to the archaeologists’ point of view—to the detriment of dealers and collectors.\textsuperscript{119}

The United States’ first action regarding Cyprus under the CPIA was the imposition of an emergency import restriction on Byzantine ecclesiastical and ritual ethnological material on April 12, 1999. This made Cyprus the first State that the United States protected under the CPIA in the Eastern Hemisphere.\textsuperscript{120} But it was not until July 19, 2002, that the United States and Cyprus executed an MOU regarding import restrictions on pre-classical and classical archaeological material.\textsuperscript{121} This MOU applied to certain designated classes of archaeological material dating from approximately the eighth millennium BCE to 330 CE. The designated archaeological material list included ceramic vessels, sculpture, inscriptions, stone vessels, architectural elements, seals, amulets, stelae, mosaics, metal vessels, stands sculpture, and personal objects.\textsuperscript{122} Then, on August 17, 2006, the U.S. and Cypriot governments amended the MOU to include the Byzantine ecclesiastical and ritual ethnological material that were protected in the 1999 emergency import restriction, effectively extending the protection of this type of material until July 16, 2007.\textsuperscript{123}

The most recent MOU between the United States and Cyprus, effective July 16, 2007, extended the agreement for a further five years. The only amendment to the MOU was the addition of “[c]oins of Cypriot-types made of gold, silver, and bronze” to the archaeological material.\textsuperscript{124} The new restriction includes a non-exhaustive list of common types of Cypriot coins that date from the sixth century BCE to 235 CE to illustrate the type of coins protected.\textsuperscript{125} These coins include currency from ancient Cypriot and Hellenistic kingdoms, as well as from the Roman Empire.\textsuperscript{126}

Cyprus also has obligations under the MOU. Under the agreement, the Cypriot government “will expand its efforts to discourage pillage of cultural resources, and the unauthorized export of such material” through a

\textsuperscript{119} Id. (citing as an example the appointment of the CPAC’s last two museum representatives from the Chicago Field Museum, a traditionally archaeologist-friendly institution).

\textsuperscript{120} Import Restrictions Imposed On Byzantine Ecclesiastical and Ritual Ethnological Material from Cyprus, 64 Fed. Reg. 17,529 (Apr. 12, 1999).

\textsuperscript{121} Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Material from Cyprus, 67 Fed. Reg. 47,447 (July 19, 2002).

\textsuperscript{122} Id.

\textsuperscript{123} Cyprus Archaeological Materials Information Page, supra note 12.

\textsuperscript{124} Extension of Import Restrictions, supra note 5, at 38,473.

\textsuperscript{125} Id.

\textsuperscript{126} Id.
number of initiatives intended to satisfy Section 2602(a)(1). The MOU further specifies that the Cypriot government will seek to expand the exchange of archaeological material where there is no threat to its cultural heritage, such as temporary and long-term loans. The agreement also requires the United States to use its “best efforts” to expand exchanges between the two countries that promote greater understanding and preservation of Cypriot cultural heritage. Finally, the MOU contains the caveat that the obligations and activities the governments are responsible for under the MOU are “subject to the laws and regulations of each Government, as applicable, including the availability of funds." There is no regulation of antiquities once they have entered into the United States.

C. Cypriot Antiquities Legislation

A brief survey of Cypriot antiquities laws related to the issue of looted coinage is also necessary because, as previously noted, the CPIA requires that in order for the United States to conclude an MOU with a requesting State it must take internal measures to protect its cultural property. Furthermore, Cypriot antiquities laws are relevant because of their influence on the country’s looting problem.

As is common in many source countries, the Cypriot Antiquities Law vests ownership of all undiscovered antiquities as of the date the legislation entered into force in the State. Under the Law, if an individual accidentally finds an antiquity and does not possess an excavation license, he or she must report the find to the local authorities. If the antiquity is movable, the individual must bring the object with him or her to the local authorities and identify where the antiquity was found. Provided that the find was not the result of illegal excavation, the Minister of

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127. These include the following: expanding education programs regarding the importance of protecting and preserving cultural heritage, concluding similar agreements with other source countries, increasing enforcement of its own cultural heritage laws, completing a comprehensive inventory of “cultural resources” within Cyprus, developing management plans for the effective protection of archaeological sites, restricting metal detectors, using private cultural resource management entities for salvage archaeological projects, and studying means of preventing illegal exports. 2007 MOU, supra note 4, art. II(B)-(I).
128. Id art. II(J)-(K).
129. Id.
130. Id. art. III.
133. Id. § 4(1).
134. Id.
Communications and Works has the discretion to grant the finder a license to own the antiquity. If the object is movable and the Minister decides that a national collection should acquire the antiquity, the government will pay the finder a gratuity that it deems appropriate under the circumstances. Violators of this provision face criminal penalties and confiscation of the antiquity.

To address the problem of looting, the Cypriot government has also enacted legislation that makes it a criminal offense to possess or use metal detectors at or near archaeological sites and ancient monuments or to use them to find or detect antiquities. The legislation further requires that antiquities dealers apply for a dealer’s license from the Director of Antiquities. The law also states that parties can only purchase antiquities from the Cyprus Museum, licensed antiquities dealers, or legal possessors of the objects. Again, violations of these provisions carry criminal penalties.

Finally, no individual can export antiquities out of Cyprus without first gaining an export license from a committee consisting of the Director, the Curator of Archaeological Museums and Surveys, and the Curator of Monuments. Licenses can only be granted for antiquities exported for the purpose of temporary exhibition, long-term loan to a cultural institution, or the scientific study of excavation material. Importantly, a license cannot be granted for the export of an antiquity into a private collection. Violators of this export scheme face the same penalties as those who engage in illegal excavations.

135. Id.
136. Id. § 5.
137. Id. § 4(3) (“Any person who fails to comply with any of the provisions of subsection (1) of this section shall be guilty of an offence and shall be liable to imprisonment not exceeding one year or to a fine not exceeding one thousand pounds or to both, and any antiquity in respect of which the offence has been committed shall be delivered to the Director and the finder shall not be entitled to any payment therefor.”).
138. Id. § 10(4).
139. Id. § 26(1).
140. Id. § 26(2).
141. Id. § 26(3).
142. Id. § 27(1).
143. Id. § 27(2).
144. Id. § 27(3).
145. Id. § 27(4).
III. ANTIQUITIES LAWS IN ACTION

A. General Effectiveness of Antiquities Laws

In light of the 1970 UNESCO Convention and the CPIA, the question remains: will these regimes effectively help prevent the looting of archaeological sites? The most obvious result of the 1970 UNESCO Convention and its legislative progeny is the increasing public awareness of the problem of looting and the public’s changing attitudes towards antiquities issues. In fact, this may be the only meaningful result of the legislation regarding coin-related looting. As noted above, the CPIA, which implements the 1970 UNESCO Convention, only provides for civil enforcement. Therefore, without criminal enforcement, source nations generally must commence civil litigation in order to vindicate their rights.

Though there have been some high profile restitutions to source countries in recent years, for the most part, claims for antiquities have been for important, museum-quality works. There are several reasons why source countries have only brought claims for major works, but the most significant reason is the cost. Of these, the greatest expense is the price of an attorney licensed in the United States. Added to this are the costs of proving complex evidentiary issues, such as proving the antiquity’s country of origin, as well as issues regarding the statute of limitations and whether or not the antiquity was on the market prior to the entry into force of the relevant legislation. Though restitution of a major work or collection of works is often worth this outlay, will it be so for coins, which are rarely valued at more than ten thousand dollars? Most likely not. Furthermore, the CPIA restrictions are rarely, if ever, relied upon for making restitution claims. Instead, these litigations tend to rely upon the

146. See supra note 97 and accompanying text.
147. MACKENZIE, supra note 34, at 117.
148. For example, in the shadow of the 1970 UNESCO Convention, the Metropolitan Museum of Art, J. Paul Getty Museum, Museum of Fine Arts in Boston, and Princeton University Art Museum have all recently agreed to return antiquities to Italy. Elisabetta Povoledo, Progress Seen in Talks on Antiquities, N.Y. TIMES, Dec. 1, 2007.
149. O’KEEFE, supra note 97, at 120.
150. For example three countries, Croatia, Hungary, and, Lebanon, all claimed the Sevso Treasure, a collection of late Roman silver valued at $187 million. Alan Riding, 14 Roman Treasures, on View and Debated, N.Y. TIMES, Oct. 25, 2006. For more on the Sevso Treasure, see RENFREW, supra note 24, at 46–51.
National Stolen Property Act\textsuperscript{151} and basic violations like falsification of customs forms.\textsuperscript{152}

Even if successful, it is not clear that these restitution claims and export/import restrictions have any effect on the initial looting of archaeological sites, which should be the primary goal of any regulation on antiquities. As Mackenzie notes:

Returns to source countries will ameliorate the destruction of context caused by looting only if they discourage prospective purchasers from buying illicit antiquities, thereby providing a disincentive to looters before the objects are taken from the ground. . . . \textsuperscript{153} [D]ata suggest[s] that currently market buyers feel no such deterrence.

Indeed, some argue that rather than protecting archaeological sites, export and import restrictions make matters worse. Merryman summarizes this position:

\textit{[E]xport controls are difficult and expensive to enforce and in many nations are easily evaded. By denying the opportunity for licit export such laws drive the trade underground, assuring the existence of an active, profitable and corrupting black market. In practice, there is a lively trade in objects smuggled out of the territories of source nations whose laws prohibit export. . . . Such laws assure undocumented decontextualization, resulting in irretrievable loss of information and the proliferation of orphaned objects about whose precise source and context nothing is known. . . . [I]f one set out to harm the cultural heritage of all mankind it would be difficult to devise a more effective way of doing so.}\textsuperscript{154}

This is particularly true when looters, dealers, and collectors see the import and export controls as unfair and unduly restrictive, and therefore, not worthy of adherence. There is evidence to suggest that many looters realize that their activities are illegal, but do not think that they are morally wrong, believing that it is their right to exploit their own cultural heritage.\textsuperscript{155} As for chance finders, unless there are greater incentives to do so, it is unlikely that they will report their discoveries to the proper authorities.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{151} National Stolen Property Act, 18 U.S.C. § 2314 (2000) (providing for criminal penalties for those who possess stolen property).
\item \textsuperscript{152} See William G. Pearlstein, \textit{Cultural Property, Congress, the Courts, and Customs}, in \textit{WHO OWNS THE PAST?}, supra note 48, at 9.
\item \textsuperscript{153} Mackenzie, \textit{supra} note 34, at 118.
\item \textsuperscript{154} Merryman, \textit{supra} note 29, at 13–14 (citations omitted).
\item \textsuperscript{155} Id. at 33.
\item \textsuperscript{156} Peter T. Wendel, \textit{Protecting Newly Discovered Antiquities: Thinking Outside the Fee Simple Box}, 76 Fordham L. Rev. 1015, 1018 (2007).
\end{itemize}
Dealers and collectors also find export and import restrictions disproportionately restrictive. In interviews, Mackenzie found that antiquities dealers see blanket export restrictions by source countries as so grossly unfair to the free trade goals of the market that not only do they show a lack of respect for these laws in discourse, they go so far as to hold these restrictive pieces of legislation responsible for the outflow of material. . . . Far from trying to abide by the export restrictions of source nations in practice . . . and endeavouring to avoid the purchase of an illegally exported antiquity, the dealers . . . saw these export restrictions as so unfair that they deserved to be ignored . . . .

From these findings, it can be extrapolated that similar attitudes exist regarding U.S. import restrictions. At the very least, the existence of import and export restrictions is not a successful deterrent to the looting of archaeological sites and, at worst, may help foster a thriving black market that feeds on looted antiquities.

B. The Effect of Antiquities Laws on the Protection of Cypriot Coinage

The CPIA regime, however, remains ineffective and restrictions on Cypriot coinage will be no exception. Coin collecting has a longstanding tradition, and there are hundreds of thousands, if not millions, of ancient coins in circulation. Of these, very few have provenance information and, for those that do, this information is often incomplete.

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157. Mackenzie, supra note 34, at 86 (emphasis omitted).
158. For example, Kremer and Wilkening, two Harvard economists, found that in poorer countries (which most source nations are) export restrictions “may lead to inadequate maintenance, black markets, and the permanent loss of art . . . .” Michael Kremer & Tom Wilkening, Antiquities: Long-Term Leases as an Alternative to Export Restrictions 3 (Sept. 11, 2007) (unpublished manuscript, available at http://www.economics.harvard.edu/faculty/kremer/files/Antiquities%2011Sept2007cToSend.pdf). The illegal market in antiquities not only harms the archaeological sites, it also has effects on the market. The Milken Institute found that

[i]n economic terms, the antiquities trade represents a classic case of market failure: illegally looted archaeological assets are un-priced, existing outside established markets. Distribution may occur under unlawful, inefficient, and often destructive circumstances, inflating prices and creating increased incentives to manipulate the market. The result is a distorted economic value and proliferation of an informal trade that inhibits the growth of a healthy legal market able to support proper discovery, development, and conservation initiatives.

159. Even former members of the CPAC criticize the CPIA regime. Kahn, supra note 38.
160. Tompa & Brose, supra note 48, at 205.
This creates a situation whereby collectors and dealers will readily be able to rationalize that a lack of provenance does not make any given coin illicitly excavated. Furthermore, collectors and dealers have vehemently criticized the recent import restriction on Cypriot coins. Looters will also find it simple to import illicit coins into the United States because of their small size and the ability to market and trade coins via the Internet.161

Repatriation claims, once coins have entered the United States, will also prove to be a poor means of deterring looting. For instance, because of the relatively small value of any given coin, it is doubtful that Cyprus will pursue a repatriation claim.162 Even if a repatriation claim is successfully pursued, it is unlikely that this will have an effect on looters because the claim will only punish the collector. To be sure, this will remove the incentive for some to collect, but only for U.S. collectors and only those who fear prosecution. In fact, in most cases the only effect a repatriation claim will have on a collector or dealer who does not actually smuggle the item will be the loss of the coin in question. Without criminal penalties attached to the possession of these items through the CPIA, the import restrictions appear to have little teeth.163 Even if the restriction serves to reduce the market for Cypriot coins in the United States, without the participation of other source countries, the looters and middleman can simply sell their ill-gotten objects elsewhere.

As a result, until there are greater international restrictions on the antiquities market, local law is the only way to truly deter Cypriot looters. However, the fact that Cyprus’ archaeological record “continues to be in jeopardy from pillage,”164 despite having strongly worded antiquities laws since 1967, suggests that looters have little to fear at home. One factor undermining Cypriot antiquities protection is its perceived unfairness. Because it is somewhat draconian, market actors feel that it is illegitimate. For example, in a recent interview, a Cypriot metal detectorist referred to Cypriot antiquities legislation illegalizing unlicensed excava-


162. MACKENZIE, supra note 34, at 117. It is probable that Cyprus would pursue a claim regarding a large coin hoard, but hoards are rare and may have little archaeological value.

163. It is for this reason that, when pursuing dealers and collectors in a criminal or civil suit, litigants rely on the use of the National Stolen Property Act.

164. Extension of Import Restrictions, supra note 5, at 38,471.
tions as “sheer nonsense.” The metal detectorist went on to assert that he began to sell the antiquities he finds on the black market only after he discovered the administration of the Cypriot antiquities scheme to be corrupt. Whether or not this allegation is true, that it is believed and publicized only serves to undermine the legitimacy and effectiveness of the legislation.

IV. ALTERNATIVE SOLUTIONS

The above-noted failings of the current legislative scheme for antiquities protection suggest that alternative solutions are necessary. In fact, writers familiar with the problems antiquities looting presents have recognized that the current legislative regime, with its focus on import and export restrictions, is ineffective. They have proposed several alternative regimes and each, if adopted, has the potential to help curb the looting of antiquities. However, none of these proposals alone will serve as a magic bullet. A more nuanced approach, which adopts aspects of each of these proposals, is therefore advisable. By analyzing the positive and negative points of some of these schemes, a comprehensive alternative regime can be devised that may have some effect on antiquities looting. What follows is not meant as an exhaustive survey of alternatives, but rather an introduction to a few proposals that may, together, form parts of a solution.

A. Free Antiquities Market

One prominent theory, championed by Merryman and Bator, is the liberalization of the antiquities market. This entails the relaxation of existing export and import restrictions so that they only apply to objects classified as national treasures or currently used for religious or ceremonial purposes.

Many of the justifications for the free market approach unsurprisingly focus on monetary factors. Among the arguments for the free international movement of antiquities is that by assigning antiquities a value, they will be more likely to receive the best care possible. Furthermore, this market would allow the individual or institution that most “values”
the object—defined through purchase price—to possess it.\textsuperscript{170} This, it is argued, is a virtue because it allows for the party most likely to have the desire and resources for the care of the object to possess it.\textsuperscript{171}

The free market proponents also argue that their model helps to prevent looting. The sale of available antiquities and the addition of applicable export duties offer source nations an opportunity to generate income off their cultural objects.\textsuperscript{172} This income can then be used in efforts to prevent looters and generally promote antiquities protection.\textsuperscript{173} Supporters of the free market alternative also suggest that the steady increase in the supply of licit, authentic archaeological objects with firm provenance would appeal to museums, collectors, and dealers, reducing the demand for black market objects.\textsuperscript{174} The desirability of legitimate antiquities would also mean that they could be sold at a premium over black market antiquities, creating an incentive for suppliers to sell legitimately.\textsuperscript{175}

An open market system also recognizes that the free movement of antiquities, if properly administered, is beneficial for worldwide cultural exchange.\textsuperscript{176} Antiquities are a universal link to the past and, once their archaeological context is properly documented, the objects’ cultural value is not diminished if they are housed in another country. The 1970

\begin{footnotesize}
\begin{enumerate}
\item[170.] "Two Ways of Thinking", supra note 23, at 849.
\item[171.] Id. Merryman uses the example of Peru, where archaeological objects are retained through restrictive export restrictions even though the materials are not adequately conserved or displayed. If these objects were allowed, through a free international market, to be bought and housed in a wealthier nation, they would likely be better preserved, displayed, and studied, as well as more widely appreciated. By preventing such a movement of these antiquities, Merryman suggests that Peru displays “destructive retention” or “covetous neglect” to the harm of not only the archaeological object, but also the world’s cultural heritage. Id.
\item[172.] Merryman, supra note 29, at 29. Merryman has also suggested that through managing the degree to which it sells its surplus, a source nation can seek to either maximize income (by carefully controlling the number of objects it allows on the market) or flood the market, thereby driving down prices and severely damaging the black market. Id.
\item[173.] Id. at 35–36.
\item[174.] Id. at 35–36.
\item[175.] Kremer & Wilkening, supra note 158, at 1. Collectors and museums pay a premium for objects with known provenance for the same reason that any object with good title is more valuable (i.e., the ability to exhibit, publish, or merely own the object without fear of civil or criminal proceedings, clean conscious, etc.). See supra note 97.
\item[176.] Free market proponents recognize that not all antiquities should be available on the open market. There are certain items that are “culturally immovable” and should not be tradable. Merryman identifies three criteria for identifying such objects: “1. the culture and belief system from which the object came were still alive; 2. the object was made to be used in religious/ceremonial ways by that culture according to that belief system; and 3. if returned, the object would again be put to those uses.” Merryman, supra note 29, at 18.
\end{enumerate}
\end{footnotesize}
UNESCO Convention drafters recognized this when they wrote that “the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.” 177 The benefits of an open antiquities trade for market nations are readily apparent: easy access to archaeological objects for both their cultural institutions and citizens. Less obvious, but equally important, is the advantage an open trade offers to source countries. As Bator noted, “Art is a good ambassador.” 178 Through exposure to art from various countries, viewers may become more interested in the countries of origin. By creating a taste for its art through export, a source country can encourage foreign tourists, scholars, and students to visit and study its culture. 179

B. Antiquities Leasing and Option Contracts

A prominent reason that source countries have not endorsed a free market in antiquities is the fear that certain objects of superlative cultural importance may be removed from their country of origin—no State wants a repeat of the Elgin Marbles. 180 There is also the threat that corrupt officials might deplete a country’s archaeological heritage for financial gain if an open market exists. 181 In response to these concerns, some academics have suggested using long-term leasing or option contracts. 182 This would allow private collectors and museums to lease antiquities for long periods or purchase the items while the source nations maintain an option to repurchase after a set time. 183 This system may offer a compromise between source countries and collectors because it will, as suggested by Kremer and Wilkening, “preserve local ownership and avoid alienation of the object while reducing looting, helping to preserve artifacts, and allowing international access.” 184

Kremer and Wilkening further argue that

177. 1970 UNESCO Convention, supra note 9, pmbl.
179. Id. Coins are particularly good as “cultural ambassadors” because they were designed as potent symbols of the State and serve as tangible links to ancient daily life.
180. For the history and legal argument regarding the Elgin Marbles, see Kate Fitz Gibbon, The Elgin Marbles: A Summary, in WHO OWNS THE PAST?, supra note 48, at 109.
182. See id.
183. Id.
184. Id. at 5.
allowing lease markets could raise revenue for artifact-rich countries and create incentives for maintenance and preservation, while maintaining long-term ownership rights for the country of origin. By putting the object in the hands of the highest value consumer at each point of time, leases would generate incentives for protection of objects and funds that could be used for the legal excavation of at-risk sites or other needs. Since future ownership rights are preserved, a country could manage its cultural heritage without restricting objects from flowing to highest value use.185

Using economic models, Kremer and Wilkening conclude that leasing and option contracts are better protections for many of the rationales that are raised for export and import restrictions.186 They also suggest that giving limited leasing rights to chance finders of artifacts may encourage these finders to report the objects to the appropriate authorities rather than selling them on the black market,187 a view shared by Wendel.188

Wendel favors rewarding finders who come forward to the proper authorities with an ownership for a term of years while the source country maintains a future interest.189 He reasons that, if given temporary possession, a finder will be more likely to come forward rather than going to the black market.190 Wendel also suggests that incentivizing chance finders who leave objects in situ by awarding them an increased term of years can potentially result in a greater number of proper excavations.191

Leasing and options contracts, however, may not be the final solution. Many items, such as the average Cypriot coin, are not valuable enough to warrant making such elaborate arrangements. Instead, leasing and option contracts are more appropriate for rarer and more valuable antiquities. Also, even if a leasing scheme helps limit the black market,192 it will nonetheless be necessary to increase antiquities-related policing—perhaps with funds generated through leasing193—in order to curb organized looting.

185. Id. at 2.
186. Id. at 42.
187. Id. at 58.
188. Wendel, supra note 156, at 1020.
189. Id. at 1052.
190. Id. at 1052–53. This is because finders typically receive a small fraction of an antiquity’s value on the black market and there are added risks to selling it, such as fines or imprisonment.
191. Id. at 1053–54. Another advantage that Wendel notes is the ability to have foreign museums fund excavations in exchange for limited property rights over objects found.
192. As with a free market, leasing schemes would decrease the demand for black market antiquities by making legitimate objects more readily available. It would also incentivize individuals to protect possible antiquities on their private property. Id.
193. See id. at 1061.
C. Partage

Recently, an old system of distributing archaeological finds is gaining some ground among commentators. Known as partage, the system entails the sharing of archaeological finds between the source country and an archaeologist’s affiliated museum or university. This system was widely practiced during the twentieth century and was instrumental in the formation of some of the finest archaeological collections in Western museums and universities. Though currently only used to a limited extent, commentators, such as Cuno and Renfrew, favor a return to the practice as a means of allowing market countries to continue to collect newly excavated antiquities. As they note, the advantage of partage is that it allows for the legitimate dispersal of antiquities after careful excavation. Furthermore, it incentivizes museums and universities to give greater financial and expert support to these excavations, particularly in the countries that require it the most. Part of this funding can help differ the costs of policing the sites and combating antiquities looting. One problem with this regime, however, is that it may not take into account private collectors. This is a concern if the goal is the creation of a legitimate licit antiquities market. Still, this issue could be addressed if a private partage system is adopted in which collectors can contribute financial funds to a dig in return for a small portion of the finds.

D. Antiquities Registration

Regardless of what type of cultural heritage regime a country favors, without obtaining the proper provenance information for newly discovered antiquities these alternatives can be easily manipulated and trans-

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194. CUNO, supra note 36, at 14.
195. Id. (noting that partage led to the Gandaran collection in the Musee Guimet in Paris, the Assyrian collection in the British Museum in London, the Lydian collection at the Metropolitan Museum in New York, the Egyptian collection in the Museum of Fine Arts in Boston, a number of the collections in the State Hermitage Museum in St. Petersburg, as well as the archaeological collections at such universities as Chicago, Harvard, Pennsylvania, and Yale). For a description of the partage system in Iraq in the early twentieth century, see also id. at 55.
197. See id.; RENFREW, supra note 24, at 21.
198. There would, of course, need to be limits to what private contributors could receive. One possibility could be to restrict their portion to redundant pieces (particularly useful for coinage) and have stipulations regarding the housing of the finds as well as access to them.
gressed. The ultimate objective of any legislation (or lack thereof) must be the protection of archaeological context, but the lack of transparency regarding provenance in the present system is directly at odds with this goal. Without standardized provenance information, participants in the antiquities trade (i.e., dealers and collectors) can easily rationalize that any piece that lacks provenance is a licit, good faith, chance find. Furthermore, the lack of any systematic notation of provenance greatly hinders any attempt at enforcing anti-looting laws and, because of evidentiary difficulties, makes repatriation claims more difficult. In order to combat this problem, Mackenzie has proposed instituting a mandatory public registration scheme for antiquities. Several parties, including UNESCO, have suggested registration for buyers and sellers of antiquities, administered through dealers. This type of scheme, however, does not cover transactions that do not go through a dealer, and would therefore fail to prevent the entry of illicit antiquities into the market.

Instead, a more comprehensive scheme is necessary. As Mackenzie envisions it, public registration would enable the tracing of antiquities through their stages of private and public ownership; would be useful for the purposes of insurance; would discourage the purchase from sellers within those countries of antiquities not listed, on the inference that they were looted; and would enable museums and historians to track down items they might care to inspect or borrow for the purposes of scholarship or display.

In order for a registration system to work, one necessary sacrifice would be a type of amnesty, whereby all known antiquities within the system’s jurisdiction would be registered and receive clean title, effectively wiping out any repatriation claims on items already out of the ground. As Mackenzie notes, however, if the goal is to prevent further looting, because these items’ archaeological context is already lost, the focus should be on items still in the ground—not on repatriation claims. If the registration scheme is only enacted in limited jurisdictions, it will also be ne-

199. Mackenzie, supra note 34, at 229.
200. Id. at 117.
201. Id. at 237–52.
202. Id. at 238–39.
203. Id. at 239.
204. Id. at 240.
205. Id. One possible side effect is the possibility that, upon hearing of the amnesty, looters will increase their efforts until the amnesty is over. This is a legitimate concern and could be difficult to combat. Some combination of secrecy in the planning process, a somewhat short time frame for the amnesty, and particularly heightened policing just before and during the amnesty seems necessary.
cessary to require that all archaeological items that subsequently enter the jurisdiction be accompanied by well-documented provenance in order to be registered.206 In conjunction with his registration plan, Mackenzie advocates for more effective criminal penalties, modeled after those used for white collar crimes.207 He suggests that the registration system, coupled with the threat of severe, yet appropriate, criminal penalties, would stem the trade in looted antiquities by making it more difficult for dealers to hide behind the “unknown” factor, and more dangerous for them to deal in illicit items.208

One flaw in Mackenzie’s suggested system is that he does not account for the methods by which licit antiquities will continue to be available. If source countries continue to focus on retention and repatriation, there will be fewer new antiquities for the market. This could promote dishonesty in dealers and collectors, particularly if they are able to persist in rationalizing their behavior by relying on the belief that the source country’s laws are unduly restrictive. Consequently, it is probably necessary to create a scheme that embraces both the mass registration of antiquities and a system similar to the leasing regime or open market approach.

Mass registration would also be costly, but technologies like computers and the Internet make registration more economically viable than ever before. More problematic are the costs necessary to police the sites and train archaeologists to properly locate and document the finds. These costs could perhaps be offset through the leasing and sale of antiquities, coupled with fees for granting export licenses and foreign aid.

V. POLITICAL MOTIVATIONS?

Having outlined some of the possible alternative regimes for the protection of antiquities, one must ask: why have countries persisted in using import/export restrictions to attempt to prevent antiquities looting? Cost is undoubtedly one factor. In particular, increased policing of archaeo-

206. *Id.* at 241.
207. *Id.* at 243. A public antiquities registration program would also make criminal prosecutions for dealing in illicit objects more efficient and effective. If criminal penalties were attached to mere possession of unregistered items, the prima facie case would simply be: (1) the item was within the group of items that must be registered; (2) the item was in the possession of the accused, who had a duty to register the item; and (3) the item was not registered. *Id.* at 246.
208. *Id.* at 244. Mackenzie also believes that by taking a more active role in the prosecution of dealers and possessors of illicit antiquities (made far more viable by the institution of a registration scheme), market countries will help relieve some of the financial strain on source countries, particularly regarding the costs of pursuing repatriation claims. *Id.* at 245.
logical sites and an administration registration system would be significantly more costly than the measures currently employed. Another important factor, however, appears to be political.

As Cuno has noted, “Antiquities . . . have a political meaning. They give modern nations a claim on an ancient past and legitimize politically dominant cultures as national cultures.” He argues that

[national cultures] are defined by and are meant to sustain the powerful elite within a nation, and they are defined by others as a way of distinguishing one national culture from another: ours from theirs. Antiquities play a role in this, either because the people of a modern nation feel a direct, racial link to those earlier peoples, or because more frequently a modern nation derives a particular (modern) benefit from them. That benefit may be financial, in terms of tourism, or political: important archaeological remains give a modern nation a place of prominence at international forums (such as UNESCO) that it might not otherwise have for is lack of political, economic, military, or strategic importance in the world’s affairs.

In light of this, commentators have noted the tendency of source nations to restrict the export of archaeological objects aggressively as the protection of patrimony increasingly becomes an important political tool. Meanwhile, the United States has exacerbated this tendency by acquiescing to source country demands because it is politically expedient. As a result, politicians make decisions regarding antiquities protection with an eye towards domestic and foreign relations rather than towards the best means of preserving our fragile archaeological record.

A. Cypriot Political Motivation

Though other countries are better known for using antiquities as political tools, Cyprus is not immune to the practice. In particular, Cypriot
officials often employ the issue of looting as a means to focus attention on the occupation of northern Cyprus by Turkey in 1974. This occupation was explicitly referenced by the Cypriot Ambassador to the United States, Andreas Kakouris, in his remarks at the MOU signing ceremony on July 19, 2007. In fact, in most official remarks regarding looting, Cypriot sources almost exclusively refer to the problem as either only occurring in the Turkish-controlled portion of the island, or after 1974 (the date of the Turkish invasion). During this ceremony, Ambassador Kakouris reiterated the mantra he used when speaking to pro-coin collecting individuals when he said: “[i]t may be your hobby, but it’s our heritage!”

When government officials fail to recognize that antiquities are the common heritage of the world and they use these objects as a nationalistic, political tool, it is not so much the protection of archaeological objects and context that are the focus of legislative regimes, but instead the

shelf of some American museum . . . . With nostalgia, they have returned. These beautiful pieces have reconquered their souls.” Jason Felch & Livia Borghese, *Italy Exhibits Its Recovered Masterpieces*, *L.A. Times*, Dec. 18, 2007. See also Nadeau, supra note 211 (noting that the unveiling of Rome’s most recent archaeological discoveries were timed for the greatest political impact, such as upstaging the formation of Silvio Berlusconi’s new political party). For examples of other nations’ use of antiquities for political purposes, see Cuno, supra note 36 (discussing the political use of antiquities by China, Iraq, and Turkey).


216. Burns, supra note 15.


218. Burns, supra note 15.
symbolic retention of the objects in the source country. However, as Merryman has noted, “[T]he belief that cultural objects belong within the national territory and the rhetoric that supports that belief are themselves cultural relics; they are lingering expressions of the romantic nationalism that blossomed in the first half of the nineteenth century.”

B. U.S. Political Motivations

Though certainly motivated by a desire to protect archaeological material, the United States also uses MOUs to gain political capital. To be sure, the United States has long supported antiquities protection. It was also one of the first countries to enact the 1970 UNESCO Convention. Additionally, a recent Harris Poll found that ninety-six percent of Americans favored laws protecting archaeological sites. The United States, however, continues to utilize the CPIA regime despite the questionable success of the legislation and the presence of several alternatives that potentially offer more effective approaches to the protection of antiquities. Furthermore, as noted above, most attempts at enforcement and repatriation utilize the National Stolen Property Act, making the CPIA “a sideshow” rather than the legal focal point of U.S. antiquities law. Why, then, does the United States continue to use the CPIA as the only regime for the protection of antiquities?

The answer may be that politics rather than the best interests of the antiquities are driving U.S. policy. To begin with, though partly motivated by a desire to protect archaeological objects and sites, the United States also based its involvement in the drafting of the 1970 UNESCO Convention on political considerations. Specifically, as developing nations became more integral participants in international organizations in the late 1960s, the United States saw the Convention as a means of fostering better relations with these States.

220. Id. at 15.
223. Pearlstein, supra note 152, at 11.
224. See PROTT & O’KEEFE, supra note 86, at 727.
225. Id.
Even the United States’ present participation in UNESCO is dictated by foreign policy. In 1984, the United States, feeling that the organization’s policies were adverse to Western interests, formally withdrew from UNESCO. It was not until 2003, under the shadow of the second Iraq War, that the United States rejoined the organization. Statements from various U.S. government officials at the time demonstrated the clear foreign policy rationale for the United States’ return. The United States has followed the same logic expressed by Cuno, who argues, “Participation in the working of UNESCO is determined by national political self-interest. If a country believes it is to the benefit of its political position in the world to participate in UNESCO, it will. If it believes it is not, it won’t.”

The MOU process itself is also fraught with political considerations. Because it is housed within the State Department, CPAC’s recommendations regarding MOU requests are considered with U.S. foreign policy objectives in mind. One former CPAC member has noted that the Committee’s Executive Director, Maria Kouroupas, must ensure that the group’s decisions “reflect the wishes of her State Department superiors. And those wishes are clear: [c]ultural objects exist to make international friends and create better diplomatic relations.” That this is the case is further suggested by the fact that the State Department keeps classified most of the material the CPAC uses in its deliberations, including the original MOU request, as well as the final recommendation the Committee makes to the Department. If the only consideration was whether

226. For example, Assistant Secretary of State Gregory Newell wrote in a report to the Senate regarding the decision: “UNESCO programs and personnel are heavily politicized and answer to an agenda that is often inimical to U.S. interests. . . . Most UNESCO programs are aimed almost exclusively at the Third World and have little or no direct impact on U.S. interests.” CUNO, supra note 36, at 150.


228. For example, in a speech at UNESCO headquarters, Laura Bush stated that “[a]s the civilized world stands against terror, UNESCO’s work can make an enormous difference. Together we can construct, as UNESCO’s constitution states, the defences of peace in the minds of men.” CUNO, supra note 36, at 150–51.

229. Id. at 151.

230. CUNO, supra note 36, at 36.

231. Id. at 178 n.30. Some dealers and collectors have gone so far as to claim that the State Department’s professional staff has manipulated the nomination process in order to stack the Committee with individuals who favor broad-reaching importer restrictions. Kahn, supra note 38.

232. Kahn, supra note 38. See also CUNO, supra note 36, at 37–38.
import restrictions would assist in the protection of antiquities, why the need for secrecy?\textsuperscript{233}

Recently, a group of coin collecting organizations filed a complaint against the U.S. State Department asking for declaratory and injunctive relief under the Freedom of Information Act.\textsuperscript{234} Through the suit, the plaintiffs seek to compel the government to shed light on the decision-making process of the CPAC and the State Department.\textsuperscript{235} Some commentators see this lawsuit as a means to investigate the motivation for U.S. willingness to side with source nations, as many in the art world “suspect that the [United States] is too quick to sacrifice the interests of American museums to help secure the cooperation of foreign nations in matters like drug trafficking and the war on terror.”\textsuperscript{236}

Though some of the pro-coin collecting lobby claims are wrong-headed at best, there appears to be some foundation for the belief that U.S. antiquities policy is focused more towards appeasing valuable political allies rather than on protecting artifacts and archaeological sites. Statements from U.S. officials as well as treaties and initiatives consummated between the two countries attest to the close relationship between Cyprus and the United States, particularly in relation to the U.S. wars in Iraq and Afghanistan.

In 2006, the U.S. Assistant Secretary of State for European and Eurasian Affairs, Daniel Fried, said in a public address, “Cyprus is an important friend and a key partner on vital issues such as security and counter-terrorism.”\textsuperscript{237} Furthermore, “[t]hroughout the wars in Afghanistan and

\textsuperscript{233} There is also a possibility that the State Department is violating the CPIA in entering some of the current MOUs. In particular, it is unclear, in part due to the secrecy surrounding the process, the extent to which the MOUs satisfy the requirements of 19 U.S.C. § 2602(a)(1), such as whether the agreement is part of an effort at antiquities protection that includes other market countries, to what degree the MOUs are part of an effort that includes other market nations, whether there are less drastic measures available to achieve the MOU’s goals, and if the MOU “is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.” 19 U.S.C. § 2602(a)(1).


\textsuperscript{235} Id.


\textsuperscript{237} Daniel Fried, Remarks at the 17th Annual Cyprus Conference (June 8, 2006), available at http://www.cyprusembassy.net/home/uploads/pdf/Miscellaneous/Fried%20remarks%20at%20PSEKA%20conference%2008.06.06.pdf.
Iraq, Cyprus has provided over-flight and landing rights to U.S. aircraft and port access for U.S. ships.\textsuperscript{238} During this time, “[a]pproximately 800 U.S. military flights have used Cyprus’s airports, transporting troops and cargo to Iraq.”\textsuperscript{239} Finally, in his remarks at the MOU signing ceremony, U.S. State Department Under Secretary Nicholas Burns made reference not only to Cypriot aid in evacuating 15,000 Americans from Lebanon during its civil war, but also to Cyprus’ current status as an important partner in U.S. foreign policy.\textsuperscript{240} He stated, 

“Cyprus, of course, is also a partner in our war to keep—in our efforts to keep the world peaceful and stable. Cyprus was the very first member of the European Union that signed a bilateral ship boarding agreement under our Proliferation Security Initiative, which has become our flag-ship operation to try to help prevent the spread of terrorism in the world.”\textsuperscript{241}

Together, these statements and agreements demonstrate the close political ties between the two countries. It also suggests that the United States might equate appeasing Cyprus’ retentionist policies with winning the “Global War on Terror.”

Another area where the United States is apparently seeking to curry Cyprus’ favor is the entry of Turkey into the European Union. Turkey has long been an important American strategic ally and its most important ally in the Muslim world.\textsuperscript{242} But, recent events, in particular the Iraq War, have strained the relationship between the two countries.\textsuperscript{243} In order to strengthen its ties with Turkey, the United States is seeking to aid the Mediterranean State by endorsing its application for EU membership.\textsuperscript{244} Of the factors delaying Turkey’s possible acceptance, the “Cyprus Ques-
tion” is one of the most prominent.\textsuperscript{245} Part of this problem is the Greek-Cypriots’ reluctance to unify the island. In 2004, Greek-Cypriots voted down a referendum, which Turkish-Cypriots approved, to reunite the island.\textsuperscript{246} Additionally, Cypriot representatives have continually thwarted EU attempts at ending northern Cyprus’ isolation.\textsuperscript{247} However, after a new Greek-Cypriot president was elected in 2008, the island’s Greek and Turkish factions have begun to restart reunification talks.\textsuperscript{248} Could the United States be working in the background to help move this process along? And, if so, did the generous MOU, even if only subconsciously, help “grease the wheels”?

The above factors suggest that rather than purely seeking to protect archaeological materials in an effective way, the United States is using the CPIA to gain political capital, which it can use to carry out its other goals, such as the “war on terror.”

CONCLUSION

Though unprecedented, the inclusion of Cypriot coins in the U.S. MOU with Cyprus is simply another example of an attempt by the international community to protect archaeological sites from looting and artifacts from losing their all-important context. Regardless of the type of object being regulated, the current U.S. approach to antiquities protection is highly flawed. Although interested parties, including academics and commentators, have proposed several alternative regimes, the existing system persists. It is possible that, given time and stronger enforcement, the CPIA will become an effective tool against the global looting of antiquities. But as Prohibition, the “War on Drugs,” and similar enforcement regimes that rely on strict import restrictions demonstrate, such measures are not always effective. Furthermore, without addressing the critical matter of standardizing provenance information no regime can hope to succeed. It is also self-evident that no matter what protection scheme is favored, its effectiveness would increase exponentially as the number of States that adhere to it increases. If only the United States restricts the import of Cypriot coins, there are still buyers available in other States such as France, Japan, Switzerland, and the United Kingdom. Every party with an interest in the protection of archaeological sites should seek wide-reaching international solutions.

\textsuperscript{245} Turkey and Cyprus: Island Trouble, ECONOMIST, Jan. 28, 2006.
\textsuperscript{246} Susan Sachs, Greek Cypriots Reject UN Peace Plan, N.Y. TIMES, Apr. 25, 2004.
\textsuperscript{247} No Love Lost. The Two Halves of Aphrodite’s Island Remain at Loggerheads, ECONOMIST, May 29, 2008.
This suggests the political motivations of the MOU; if the United States is concerned with actually protecting antiquities it would take steps to create a multilateral regime that more effectively addressed the international antiquities market, rather than solely utilizing agreements consummated with individual States. The debate over antiquities protection by the United States is marred by the suggestion that the United States may be using MOUs as a carrot to gain political capital. This the United States should not do, because it ignores the important place that archaeological information holds in the human experience.

Because Cypriot coins have proven to be a flash point on which proponents on either side of the dealer/collector and archaeologist/source country divide have focused their attention, they may serve to promote important change. Over the course of this often-heated debate, both sides have been forced to reevaluate the effectiveness of the CPIA and the importance of legislative protection for antiquities. Vocal commentators from both points of view have suggested fostering a “forum for constructive dialogue,” and coupled with the continued mainstream media attention devoted to the issue, this development may prove critical for the evolution of global antiquities protection. Coin collector groups have filed Freedom of Information Act lawsuits in order to shed light on the CPIA evaluation process. This may help reveal the extent to which the process is politicized.

In an online post, Rosenbaum addressed the importance of developing a “ceasefire in the cultural-property wars.” It appears that the attention garnered by restrictions on Cypriot coin importation may be an important factor in achieving this goal, and the debate may serve as a stepping-stone to more effective global antiquities protection schemes.

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BREAKING BARRIERS, PUSHING PROMISE: AMERICA’S NEED FOR AN EMBRYONIC STEM CELL REGULATORY SCHEME

INTRODUCTION

For years, “[b]iomedical researchers have . . . known that their favorite lab critters, mice, have both ‘adult’ and embryonic stem cells.”¹ In 1998, however, stem cell research was extended to human beings, “in the process touching off a massive ethical and political debate.”² Specifically, biologist Dr. James Thomson, a researcher at the University of Wisconsin-Madison, and his team published a paper in Science revealing that they had isolated the very first human embryonic stem cell line.³ For some, this was a major medical breakthrough, as human embryonic stem cell research was expected to have extremely promising health benefits.⁴ For others, this was the destruction of human life,⁵ as “the only

². Id.
³. James A. Thomson et al., Embryonic Stem Cell Lines Derived from Human Blastocysts, 282 SCIENCE 1145, 1145–47 (1998), available at http://www.sciencemag.org/cgi/reprint/282/5391/1145.pdf. See also NAT’L ACADEMIES, UNDERSTANDING STEM CELLS: AN OVERVIEW OF THE SCIENCE AND ISSUES FROM THE NATIONAL ACADEMIES 2 (2006), available at http://dels.nas.edu/dels/rpt_briefs/Understanding_Stem_Cells.pdf (In 1998, “a team of scientists from the University of Wisconsin-Madison became the first group to isolate human embryonic stem cells and keep them alive in the laboratory. The team knew that they had in fact isolated stem cells because the cells could remain unspecialized for long periods of time, yet maintained the ability to transform into a variety of specialized cell types, including nerve, gut, muscle, bone, and cartilage cells.”).
⁴. See, e.g., Nicholas Wade, Scientists Cultivate Cells at Root of Human Life, N.Y. TIMES, Nov. 6, 1998.
⁵. See id. (quoting Dr. Lori Andrews as saying that “[a]ny time you take [an embryonic] cell off a blastocyst, that cell could be used itself to create a human being, so some groups in our society believe in making it transplantable you have derailed it into becoming a kidney or some other tissue”). It is to be noted that

[a]long the wide spectrum of debate, there are those for whom embryonic stem cell research is acceptable as long as embryos are used with the consent of the egg and/or sperm donors . . . ; there are those who believe it is acceptable as long as it is done with embryos that would be destroyed anyway; and there are those for whom destroying even these ‘extra’ embryos is abhorrent, and creating embryos for research or therapy all the more so.

James Trefil, Brave New World: Everything You Wanted to Know About Stem Cells, Cloning, and Genetic Engineering but Were Afraid to Ask, in CRITICAL PERSPECTIVES ON STEM CELL RESEARCH 108, 119 (Brian Belval ed., 2006). See also MARSHA GARRISON & CARL E. SCHNEIDER, THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION 841 (2003) (remarking that some argue that “because preembryos have the
way to get such . . . cells was to pluck them from a human embryo several days after fertilization, destroying the embryo in the process." Currently, over a decade later, new methods of embryonic stem cell retrieval allow for embryo preservation, which may quell much of the ethical debate, and it is commonly understood that embryonic stem cell research holds the key to medical advancement and the possibility of curing “complex and debilitating diseases and injuries.”

Despite the fact that embryonic stem cells are regarded as the holy grail of medicine, there is still no American federal regulatory scheme in place to deal with such research. During his administration, President George W. Bush twice vetoed legislation that would support, promote, and fund embryonic stem cell research, and consequently, individual capacity to become human beings . . . preeembryos are already human lives and thus cannot ethically be destroyed to benefit others”).


8. See Kristen Hicks, Note, Embryonic Stem Cell Research and the Theory of Medical Self-Defense, 21 HARV. J.L. & TECH. 547, 549 (2008) (“[C]urrently no federal law supports or bans embryonic stem cell research.”). See also Maneesha Deckha, The Gendered Politics of Embryonic Stem Cell Research in the USA and Canada: An American Overlap and Canadian Disconnect, 16 MED. L. REV. 52, 71 (2008) (“The American debate at the federal level about the ethics of [embryonic stem cell research] is a product of multiple voices with competing values. . . . Yet, competing concerns that other countries with more liberal regimes will exceed American technological prowess in [embryonic stem cell research] and impair private enterprise, also explain why [President George W. Bush’s 2001] federal ban for [embryonic stem cell research] on non-pre-existing stem cell lines only affects public funds. The overall American federal position is reasonably viewed as a conservative position on [embryonic stem cell research] that matches the conservative national position on abortion that is corroding the rights secured in [Roe v. Wade].”). It is to be noted, however, that the federal position on embryonic stem cell research is changing under the Barack Obama administration. For more information on the steps that have been taken by President Obama regarding embryonic stem cell research, see infra note 9.

9. In August 2001, President Bush announced that because embryonic stem cell research “offers both great promise and great peril,” his administration would limit federal funding for such research to [sixty] pre-existing stem-cell lines. George W. Bush, President, U.S., Remarks on Stem Cell Research (Aug. 9, 2001), available at http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html. For a thorough understanding of the implications of George W. Bush’s 2001 decision, see MOONEY, supra note 1, at 188–89 (“George W. Bush’s 2001 decision so dramatically constricted the potential of research by limiting federal funding to embryonic stem cell lines already in existence as of August 9, 2001. At least for scientists in need of federal funding, the Bush policy ei-
states have chosen not to wait. 10 Several states have not only legalized embryonic stem cell research, but also authorized millions in funding and

ther entirely blocks or substantially impairs [them from doing so] . . . not to mention stiff[es] more basic research aimed at understanding the properties of human embryonic stem cells in the first place . . . [The Bush-approved lines were limited in number, but] hardly represent[ed] the genetic diversity of America, much less the world. . . . Rather, they contain[ed] the genes of affluent, mostly white Americans with fertility problems” who had sought out IVF, and thus, because not used for implantation, may also “have been flawed or undesirable to begin with.”). Despite Bush’s 2001 announcement, research plowed forward. See Roland Jones, After California, More States Eye Stem Cell Research, MSNBC.COM, Feb. 9, 2005, http://www.msnbc.msn.com/id/6847933 (discussing how some states have donated millions to the embryonic stem cell research effort). In July 2006, Bush “issued the first veto of his . . . administration[,] . . . rejecting Congress’s bid to lift funding restrictions on human embryonic stem cell research.” Charles Babington, Stem Cell Bill Gets Bush’s First Veto, WASH. POST, July 20, 2006, at A04. And similarly, in June 2007, he vetoed the Stem Cell Research Enhancement Act of 2007, which “would have allowed the use of federal funds to support embryonic stem cell research,” remarking that “[d]estroying human life in the hopes of saving human life is not ethical— and it is not the only option before us.” Maura Reynolds, Bush Vetoes Embryonic Stem Cell Funding, L.A. TIMES, June 21, 2007, at A12 (discussing Bush’s veto of the Stem Cell Research Enhancement Act of 2007).

Since President Barack Obama’s induction as the 44th President of the United States, the federal position on embryonic stem cells has been changing. President Obama is a supporter of the effort and has recently issued an executive order reversing George W. Bush’s 2001 directive limiting stem cell research. Exec. Order., Removing Barriers to Responsible Scientific Research Involving Human Stem Cells (Mar. 9, 2009), available at http://www.whitehouse.gov/the_press_office/Removing-Barriers-to-Responsible-Scientific-Research-Involving-Human-Stem-Cells/. See also Sheryl Gay Stolberg, Obama Lifts Bush’s Strict Limits on Stem Cell Research, N.Y. TIMES, Mar. 10, 2009 (explaining President Obama’s executive order and quoting him as saying that “the majority of Americans ‘have come to a consensus that we should pursue this research, that the potential is great, and with proper guidelines and strict oversight the perils can be avoided’”). President Obama has not, however, addressed “the thorniest question in the debate: whether taxpayer dollars should be used to experiment on embryos themselves”; he intends to “leave it to Congress to determine whether the long-standing legislative ban on federal financing for human embryo experiments should also be overturned.” Sheryl Gay Stolberg, Obama Is Leaving Some Stem Cell Issues to Congress, N.Y. TIMES, Mar. 8, 2009. See also Maggie Fox, Stem Cell Bill Research Supporters Offer Senate Bill, REUTERS, Feb. 26, 2009 (noting how the Stem Cell Research Enhancement Act of 2007, vetoed by Bush, has been reintroduced by Senators Tom Harkin and Arlen Specter). Thus, as it stands on March 11, 2009, President Obama’s new executive order will open the door for change, but federal funding has not been approved, nor is an embryonic stem cell regulatory scheme been established.

10. See, e.g., Richard Guerra, States Take the Initiative to Regulate and Resolve the Stem Cell Debate, 7 FLA. COASTAL L. REV. 35, 39 (2005) (“In the absence of federal regulation on the issue, states have been busy developing their own legislation regulating research, funding and possible liabilities associated with stem cell research and human embryonic cloning.”). George W. Bush’s decision to decline to fund the embryonic stem
developed institutes to administer state stem cell research programs.\(^{11}\) California, for example, passed Proposition 71 in November of 2004,\(^{12}\) which

provided $3 billion in funding for [all kinds of] stem cell research at California universities and research institutions . . . and called for the establishment of a new state agency [the California Institute for Regenerative Medicine] to make grants and provide loans for stem cell research, research facilities and other vital research opportunities.\(^{13}\)

However, there are also states that specifically prohibit most or all forms of embryonic stem cell research, like Arkansas, Louisiana, North Dakota, and South Dakota.\(^{14}\) Other states, like Iowa, permit embryonic stem cell research but do not fund the effort.\(^{15}\) States like North Carolina and West Virginia have no law on the subject.\(^{16}\) And some states are

cell research effort has also spurred a bit of a “brain drain,” as some researchers have opted to move to other countries, such as “Britain, Singapore and China, where the governments [a]re more receptive to their work.” Alice Park, *The Quest Resumes*, TIME, Feb. 9, 2009, at 41. See also *Embryonic Stem Cells: Can I Serve You Now?*, ECONOMIST, Jan. 31, 2009, at 85 (noting that with a federal regulatory scheme supporting embryonic stem cell research, “American academics will no longer have to watch enviously from the sidelines as their colleagues in Australia, Britain, China, the Czech Republic, Israel, Singapore and South Korea push ahead”).


14. National Conference of States Legislatures, supra note 11. See also Guerra, supra note 10, at 41–42 (noting that South Dakota law, like Arkansas law, “has the effect of banning any and all forms of embryonic stem cell research regardless of the possible therapeutic applications that the research was designed to explore”).

15. Iowa’s Stem Cell Research Enhancement Act, passed in 2007, repealed a prior ban on embryonic stem cell research and ensured the research’s legality. See Vestal, supra note 11; Press Release, Office of Governor Chet Culver, Gov. Culver Provides Facts on Stem Cell Research (Feb. 14, 2007).

deadlocked on the issue, like Florida. Clearly, “a void of nationally cohesive regulation on the issue [of embryonic stem cell research] remains,” and this lack of uniformity among states will cause only some states to prosper economically and medically, with others lagging behind. It will also be difficult for researchers to engage in interstate collaboration. Most importantly, however, this wide range of embryonic stem cell research policy and regulation makes the United States look polarized and in disarray, with the more “blue” states surging ahead with research and the more “red” states sticking to a conservative approach, likely due to religious influence.

It is necessary for the United States to construct a federal framework of rules and guidelines to govern the use of embryos for research purposes, particularly since American society is one that aspires towards both gov-

17. In Florida, two initiatives regarding embryonic stem cell research began circulating in 2005—one requiring state support of embryonic stem cell research and the other prohibiting it. In 2007, the Florida Supreme Court was asked to review these bills because of their opposition to each other, and it approved both to be placed on the 2008 ballot. See Advisory Opinion to the Attorney General Re: Funding of Embryonic Stem Cell Research, Nos. SC06-2183 & SC06-2261 (May 31, 2007), available at http://www.floridasupremecourt.org/decisions/2007/SC06-2183.pdf; Deanna Poole, Stem Cells Debated Around Tallahassee, PALM BEACH POST, Apr. 17, 2007, http://www.palmbeachpost.com/business/content/state/epaper/2007/04/17/a13a_xgr_stemcell_0417.html. The two competing proposals failed to make the 2008 ballot, with both initiatives still pending. Tim Martin, Michigan Voters to Decide Stem Cell Research Measure, ASSOCIATED PRESS, Oct. 4, 2008 (“In Florida, two competing stem cell proposals failed to make the ballot this year. One proposal would have banned state funding of embryonic stem cell research, while the other would have required the state to provide $20 million a year for such research.”).

18. Guerra, supra note 10, at 39.

19. See, e.g., id. at 39–43. For example, Arkansas and South Dakota, which both, in essence, prohibit embryonic stem cell research and development, ranked in 2002 in the bottom third of states

for the total amount that [their] universities expended on research and development; . . . for the amount received from the National Institute of Health in support of its research institutions; . . . in the amount of higher education degrees awarded in the biological sciences; [and] . . . in the amount of biological scientists that compromise the[ir] workforce.

Id. at 41–43 (internal citations omitted). Both states’ employment in the national research and development market was 0.1% in 2002. Id.


21. See Deckha, supra note 8, at 71 (noting that the embryonic stem cell research ethical debate “has occurred in the shadow of a political and legal landscape that is indelibly marked by religious influences and polarized views on abortion and the beginning of human life in particular”).
government monitoring and a green light for research. Countries like the United Kingdom\textsuperscript{22} have thorough regulation for embryonic stem cell research, and even Germany, which has been notoriously “conservative about genetic research,”\textsuperscript{23} has passed the Stem Cell Act of 2008, which allows for the importation of “human embryonic stem cell lines that were extracted before May 1, 2007.”\textsuperscript{24} In order for the United States to stay at the forefront of medical research, be able to develop new drugs to cure disease, and be able to pioneer new technologies to aid in the transplantation of organs and tissue, our nation needs to dispel ambiguities and unite our country’s states with thorough regulation that supports and funds embryonic stem cell research.

This Note will explore the progress of embryonic stem cell research in the United States and will argue for thorough federal regulation on the subject. Specifically, it will look to the regulatory models in the United Kingdom and in the state of California for guidance, as well as the Bush-vetoed Stem Cell Research Enhancement Act of 2007, and will discuss what the best approach is and in which direction the United States ought to move. This Note proceeds in four parts. Part I examines why embryonic stem cells are so vital to medical research, as well as how they can help our generation and future generations. Part II addresses the traditional ethical arguments against embryonic stem cell research, looking to the pro-life commentary, which argues that it is immoral to use embryonic stem cells for medical experimentation. Part II then explains why the medical benefits of embryonic stem cell research trump the moral concerns, particularly in light of new techniques of embryonic stem cell extraction. Part III examines the regulatory models of the United Kingdom and California, as well as the Stem Cell Research Enhancement Act of 2007. Finally, Part IV notes where the three aforementioned models

\begin{itemize}
\item \textsuperscript{23} German Lawmakers Loosen Limits on Stem Cell Research, SPIEGEL ONLINE, Apr. 11, 2008, http://www.spiegel.de/international/germany/0,1518,546867,00.html.
\end{itemize}
agree and divide, and proposes what an American embryonic stem cell regulatory model should look like and why.

I. EMBRYONIC STEM CELL RESEARCH AS HOPE FOR THE FUTURE

A. Stem Cells: A Background

A stem cell is a single cell that has the capacity to both replicate itself (“self-renew”) and differentiate into many different cell types (“specialize”). Stem cells are like “blank microchip[s] that can ultimately be programmed to perform particular tasks”—under certain conditions, they will begin to distinguish themselves and turn into specialized cells that carry out a specific function for the body. There are three different types of stem cells, embryonic stem cells, fetal stem cells, and adult stem cells.

Five days after a sperm fertilizes an egg, a blastocyst is born—a five-day-old embryo. The blastocyst “contains all the material necessary for the development of a complete human being,” but at five days, is “a mostly hollow sphere of cells that is [incredibly] small[].” Inside the interior of the blastocyst is the “inner cell mass, which is composed of [thirty to thirty-four] cells that are referred to by scientists as pluripotent because they can differentiate into all of the cell types of the body”; these inner cell mass cells, when removed, are laced “in a culture dish with a nutrient-rich liquid where they give rise to embryonic stem cells.”

Fetal stem cells, on the other hand, are derived from fetal tissues and are also termed “embryonic germ cells.” Fetal stem cells “come from the primordial germ cells of a [five to ten] week-old embryo/foetus.”

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25. Deckha, supra note 8, at 55–56; NAT’L ACADEMIES, supra note 3, at 3.
27. Deckha, supra note 8, at 55–56.
29. Id.
30. Id. at 4–5. See also Deckha, supra note 8, at 56 (“Embryonic stem cells are extracted from the inner cell mass of the 4–5 day old embryo, called the blastocyst, which consists of 50–150 cells. Embryonic stem cells are pluripotent; they can develop into almost all cell types of the foetus and the adult body.”). Yet while embryonic stem cells are pluripotent, they are not totipotent—that is, “they cannot develop into placental cells.” Id.
32. Deckha, supra note 8, at 56.
They, too, are pluripotent, but have different properties, live for less time, and “have a more limited range of potential specialization.”

Lastly, adult stem cells are stem cells obtainable from adult tissues. While they “retain the ability to renew themselves for the lifetime of the organism,” they are “not found in all tissues.” It is currently being debated whether adult stem cells can, like embryonic stem cells, undergo transdifferentiation—that is, give rise to a cell of a different tissue type. Moreover, adult stem cells cannot multiply at the rate of embryonic stem cells and are “difficult to identify, isolate, maintain, and grow in the laboratory.”

B. Why Scientists Are Particularly Interested in Embryonic Stem Cells

Embryonic stem cells are the most versatile type of stem cell because “they have the potential to produce every [single] cell type in the human body.” Their ability to self-renew quickly is also very beneficial, as “just a few embryonic stem cells can build a large bank of stem cells to be used in experiments.” Accordingly, scientists believe that human embryonic stem cells have “great scientific, technological and therapeutic potential.” Namely, embryonic stem cells “could generate specia-
lized tissue for transplantation”\(^{43}\) and could be used “to treat currently untreated diseases such as Parkinson’s Disease, diabetes, traumatic spinal cord injury, and heart disease.”\(^{44}\)

Yet, many believe that “anything that can be done with embryonic stem cells can be accomplished with adult stem cells,”\(^{45}\) and that the plasticity of stem cells—that is, their ability to differentiate into a variety of cell types—is equivalent to that of embryonic stem cells. Much research indicates that “adult stem cells continue to ignore the dogma of developmental biology, [for example] . . . blood cells switching to lung cells.”\(^{46}\) Other studies, such as a highly regarded study conducted by Irving Weissman of Stanford University and Amy Wagers of Harvard University, indicate that plasticity “may not be a biological principle but rather an experimental peculiarity.”\(^{47}\) Specifically, Weissman and Wagers’ study noted both technical problems and cell fusion, “resulting in cells that masquerade as ‘transdifferentiated’ cells.”\(^{48}\) Weissman and Wagers also “combed through the [existing] literature” and concluded “that reports of adult stem plasticity may be due to other reasons than cells switching their fates.”\(^{49}\) As the plasticity of adult stem cells is controversial, it is clear that for the moment embryonic stem cells have greater therapeutic power. Thus, research must be conducted on embryonic stem cells in order to break ground on medical therapies and procedures.

Lawrence S. B. Goldstein, a professor at the University of California-San Diego and the Director of the UC San Diego Stem Cell Program,\(^{50}\) explained in a 2004 speech at Rice University why researchers are interested in embryonic stem cell research. Goldstein stated that “because of their unique attributes, embryonic stem cells could help us bypass four current ‘bottlenecks’ in the development of medical therapies.”\(^{51}\) His theory is as follows:

\(^{43}\) MOONEY, supra note 1, at 187.
\(^{45}\) CHRISTOPHER THOMAS SCOTT, STEM CELL NOW 89 (2006).
\(^{46}\) Kadereit, supra note 37, at 1.
\(^{47}\) SCOTT, supra note 45, at 91, 93.
\(^{49}\) MOONEY, supra note 1, at 187.
First, there [are not] enough sources of tissues for transplantation to meet medical needs at present, but we might grow vast amounts of tissues from embryonic stem cells. Second, drugs are extremely expensive to bring to market because of the cost of human trials and because animal trials can often lead scientists down the wrong road, but drug discovery might proceed much more efficiently if we could test drugs in human stem cell preparations. Third, we currently lack a complete understanding of the mechanisms by which many diseases develop, but research on stem cells bearing the generic signature for various diseases would allow for greater understanding of how these conditions emerge (which, in turn, could suggest new possibilities for treatment). And finally, we see enormous variations among individuals when it comes to their responses to various drugs and other therapies, but certain kinds of stem cells would eventually lead to therapies specially tailored to individual patients.52

Goldstein’s explanation clearly demonstrates that stem cell research is “not a one trick pony,” but rather, a “broad enabling technology” that could help us in many different areas of medicine.53

II. DEFEATING THE ETHICAL CONCERNS

A. The Traditional Argument: The Moral Status of the Embryo

“In the field of regenerative medicine, embryonic stem cell research holds far-reaching promise in alleviating and preventing an array of debilitating diseases and conditions. Yet the biggest ethical stumbling block continues to be conflicting beliefs about the moral status of the human embryo.”54

As the traditional method of removal for embryonic stem cells destroys the blastocyst, many have argued that this involves the “intentional[] creat[i]on of a blastocyst that will never develop into a human being,” and, accordingly, that it is immoral to use them for medical experimentation.55 Much of the traditional argument has religious influence, particu-

52 Id. at 187–88 (discussing Goldstein’s speech at the Stem Cells: Saving Lives or Crossing Lines—Human Embryonic Stem Cell Policy forum at Rice University in 2004). See also Stem Cells: Saving Lives or Crossing Lines—Program Day 1, http://www.ruf.rice.edu/~neal/stemcell/program1.html (last visited Nov. 4, 2008) (demonstrating that Dr. Goldstein delivered this speech).
53. MOONEY, supra note 1, at 188.
55. NAT’L ACADEMIES, supra note 3, at 6.
larly that of the Roman Catholic Church, which “has declared its formal opposition to [embryonic stem cell research] despite the prospective medically beneficial potential, urging . . . lawmakers and scientists to promote the use of methods that would not entail resorting to embryos for stem cell research.”56 The Church believes that “life and personhood begins at conception and that [pre]embryos are sacred forms of life because they are human beings who deserve the respect and protection that being human affords.”57 Persons of the Eastern Orthodox Christian, Islamic, and Protestant faiths have also expressed their opposition to embryonic stem cell research, often utilizing a “sanctity of life” argument.58

Pro-life advocates have also had a “prominent voice shaping [embryonic] stem cell discourse,” particularly in spurring opposition to it.59 The religious and anti-abortion views are very similar: both follow the idea that “human life is sacred and personhood begins at conception.”60 However, since abortion law and politics is such a dense topic, I have chosen to limit Part II(a) of this Note to a synopsis of the traditional argument against embryonic stem cell research, and would merely like to note that some courts have viewed pre-embryos as humans in wrongful death actions and have “increase[d] the scope and nature of the interest that states can recogni[z]e in fetuses when regulating abortion,”61 which not only puts Roe v. Wade in “precarious standing” but also demonstrates the impact of pro-life philosophy on American decision making.62

56. Deckha, supra note 8, at 62.
57. Id. at 63.
58. Id. But see Margaret A. Farley, Roman Catholic Views on Research Involving Human Embryonic Stem Cells, in THE HUMAN EMBRYONIC STEM CELL DEBATE (Suzanne Holland, Karen Lebacqz & Laurie Zoloth eds., 2001) (noting that while some Roman Catholics disagree with embryonic stem cell research, there is also “a case for human embryo stem cell research . . . within the Roman Catholic tradition,” since “[g]rowing numbers of Catholic moral theologians, for example, do not consider the human embryo in its earliest stages (before development of the primitive streak or implantation) to constitute an individualized human entity with the settled inherent potential to become a human being.”). However, there is “widespread Jewish support for stem-cell research . . . [partly because of] the high regard that ‘the Jewish vision places on life and on healing . . . and on the good of medicine.’” The Moral Status of the Embryo, HARV. MAG., May–June 2007, at 66–67, available at http://harvardmag.com/pdf/2007/05-pdfs/0507-66.pdf. See also Elliot N. Dorff, Stem Cell Research—A Jewish Perspective, in THE HUMAN EMBRYONIC STEM CELL DEBATE, supra (explaining why the Jewish tradition may allow for embryonic stem cell research).
59. Deckha, supra note 8, at 64.
60. Id. at 65.
61. Id.
62. Id. at 65–67.
Opponents of embryonic stem cell research believe that the blastocyst possesses a moral status, and because “we tend to think of moral status as simply being synonymous with the ownership of moral rights . . . moral status equals having moral rights.” Thus, for the person who believes blastocysts should have moral status, since “there is no more fundamental moral right than the right to exist . . . [and] the moral right to exist is fundamental . . . [t]he moral right to exist is therefore a foundational right.” Some scholars have argued that there should be more flexibility with regard to the moral status of the blastocyst, but staunch pro-life advocates see the blastocyst’s moral status as static.

**B. The Benefits of Embryonic Stem Cell Research Trump the Moral Argument**

Legal, medical, and sociological scholars alike have stated that embryonic stem cells “have the potential to provide a limitless source of specific cell types for transplantation,” organ creation, tissue regeneration, nerve repair, and so on, which could aid in alleviating the “debilitating conditions” of so many persons around the globe. Michael Brannigan has argued that “[b]ecause the benefits of embryonic stem cell research clearly outweigh the burdens, the moral status of [persons who

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63. See, e.g., ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 202–03 (2008) (arguing that pre-embryos are human beings, that “any scientific research conducted on embryonic humans, and destructive of their life or health, is wrong, immoral, unjust,” and that “[n]o scientist, or any other agent, should ever willingly engage in activities that would deliberately threaten the life or health of human beings at any stage of development or in any condition”).

64. Brannigan, supra note 54, at 45.

65. Id. Brannigan constructs his “equation” as follows: “moral status equals possessing moral rights equal possessing the right to exist.” Id. Accordingly, for a person fixated on the moral status of the blastocyst, establishing that the blastocyst does indeed have such a status leads to the necessary conclusion that the blastocyst “has an absolute right to an existence.” Id.

66. See, e.g., id. at 54. See also Brent Waters, *Does the Embryo Have a Moral Status?, in God and the Embryo: Religious Voices on Stem Cells and Cloning* 64–76 (Brent Waters & Ronald Cole-Turner eds., 2003) (Although a Christian who finds himself ambivalent towards embryonic stem cell research, Waters does find there to be many problems with assigning a “moral status” to the embryo, and suggests viewing the embryo as a “neighbor,” rather than an “abstract object[] to which . . . [there] must [be] assign[ed] a value or moral status.”).

67. See, e.g., GEORGE & TOLLEFSEN, supra note 63, at 22 (“We argue in this book that embryonic human beings deserve full moral respect.”).


69. Brannigan, supra note 54, at 52.
suffer from debilitating diseases and conditions] clearly have priority over the moral status of the early embryo.”\textsuperscript{70} Brannigan joins philosopher Mary Anne Warren in arguing for a sliding-scale approach to moral status.\textsuperscript{71} While I will not go to the same extent as Brannigan to say that the moral status of diseased persons trumps the moral status of the blastocyst, under a cost-benefit analysis, this nation should fully support embryonic stem cell research by implementing a federal regulatory scheme so that “other countries will not . . . outpace the United States in embryological science.”\textsuperscript{72}

With the benefits being so great—the capacity to understand disease, the potential to save so many peoples’ lives, and the ability to remain at the forefront of medical research and development—it is difficult for the moral argument to trump the need for this kind of medical research. Utilitarian ethicists would agree that the ultimate beneficence of this science justifies the cost,\textsuperscript{73} particularly because adult stem cell research is not an alternative that would rationalize abandoning the great promise of embryonic stem cell research. Furthermore, embryonic stem cell research still shows respect to the embryo, just “respect of a different kind”: as argued by Heather Johnson Kukla, “by allowing spare embryos to be used in stem cell research to enhance the lives of people who otherwise would continue to suffer,” the embryo becomes “a powerful symbol of human life [and] . . . more respected and valued . . . than when it is simply discarded.”\textsuperscript{74}

Another argument in favor of embryonic stem cell research is that the blastocysts used in such research are doomed for destruction anyway, and serve no other purpose. Embryonic stem cells traditionally come from blastocysts created at fertility clinics, and “[b]ecause not all the fertilized eggs are implanted [in the woman’s womb], a large bank of ‘excess’ blastocysts [remains with many blastocysts] that are currently

\textsuperscript{70} Id.
\textsuperscript{71} Id. at 41–57.
\textsuperscript{72} Id. at 55.
\textsuperscript{73} See, e.g., Marianne Means, Editorial, \textit{Undeveloped Human Tissue Can Help Save the Living}, \textit{Seattle Post-Intelligencer}, Sept. 28, 2000, at B4 (“The political struggle over abortion intrudes once again on an issue crucial to the health of millions of Americans, pitting reverence for undeveloped, unborn human tissue against potential advances in medical treatment for living men, women and children. . . . Where should the compassion lie? With inanimate, non-breathing embryonic stem cells or disabled and sick friends and family members needing medical help? No contest, I say. Save the living.”).
stored in freezers around the country." These in-vitro fertilization ("IVF") leftovers, if not used for a future pregnancy, donated to another couple, or used for research, are discarded, so they might as well provide researchers with the opportunity to "learn[] about early human developmental processes that they otherwise can[not] access, modeling disease and establishing strategies that could ultimately lead to therapies to replace or restore damaged tissues." 77

C. Reducing Controversy: Blastomere Biopsy

In order to reduce controversy, scientists have strived to find other methods for producing embryonic stem cells that do not damage the embryo. Most recently, a new technique known as blastomere biopsy has come about, which relies on the pre-implantation genetic diagnosis ("PGD") procedure. Blastomere biopsy is "performed on a two-day-old embryo, after the fertilized egg has divided into eight cells, known as blastomeres." When a woman is undergoing IVF at a fertility clinic, "the embryo is available outside the woman" and "one of these blasto-
meres can be removed for diagnostic tests, like for Down syndrome.81 If there are no abnormalities found when that single blastomere is tested, then the embryo, now with seven cells, can “be implanted into a mother’s womb,”82 and the extracted blastomere can be used for research. This procedure differs from the traditional method of embryonic stem cell retrieval in that it derives the cells at an earlier stage of development, and instead of destroying the embryo, leaves the embryo intact.83

The pioneer of this procedure, Dr. Robert Lanza, has stated that extracting the blastomere (that is, the embryonic cell) is unlikely to pose any additional risk to the embryo,84 other than the risks inherent in PGD, and that the procedure itself “does not itself harm or destroy embryos,” making it morally acceptable.85 That is not to say that blastomere biopsy is perfect and without controversy. Ethical questions still abound, as it is uncertain whether the procedure will always be safe for the resulting fetus and child,86 and there is still a risk that embryos may be harmed or destroyed.87 PGD currently has an embryo survival rate of eighty percent,88 and while Dr. Lanza “seeks] to piggyback on [PGD’s] safety

81. Id.
87. Marietta, supra note 86, at 3.
record, such may seem too low for staunch pro-life advocates. But if Lanza’s predictions for the safety of blastomere biopsy are indeed correct, this may reduce the controversy that surrounds embryonic stem cells.

Currently, “there is no evidence that a single blastomere [removed during the blastomere biopsy procedure] could develop into a person.”

If it were proven that a single blastomere could never become a human being, then there is no pro-life, religious argument for challengers to rely on. In sum, assuming the blastomere biopsy procedure is thoroughly vetted and everything articulated by its pioneers is “demonstrated to be viable,” there leaves no “rational reason[, or moral one, for that matter,] to oppose this [method of extraction and embryonic stem cell] research.”

D. Embryonic Stem Cell Near Equivalents

Researchers have also been busy creating embryonic stem cell near equivalents. Harvard University researchers have created induced pluripotent stem cells (“iPS cells”)—that is, they have induced “adult stem cells into an embryonic-like state without forming tumors,” which “are one of the efficacy problems, along with immune system rejection issues, that plague embryonic stem cells.” However, the success of iPS cells has only been demonstrated in mice. Scientists have also recently re-

89. Kaplan, supra note 83, ¶ 17. There is little comprehensive data about PGD’s accuracy and the effects it has on children. See, e.g., Susannah Baruch et al., Genetic Testing of Embryos: A Critical Need for Data, 11 Reprod. Biomed. Online (No.6) 667, 667–70 (2005) (commenting on the lack of PGD data and conducting a survey regarding the practices and beliefs of IVF clinic directors with respect to PGD).

90. See Wade, supra note 80 (noting critics’ objections to the blastomere biopsy procedure).

91. Id. ¶ 29.

92. Editorial, supra note 84, ¶ 5.

93. Wade, supra note 80, ¶ 7.


95. Ertelt, supra note 94, at 1. See also Park, supra note 10, at 43 (“iPS cells have yet to prove that they are a safe and suitable substitute for the diseased cells they might even-
ported being able to “turn[] human skin cells into what appear to be embryonic stem cells without having to make or destroy an embryo,” 96 but these near equivalents “might not be medically ready for years and they might never be as powerful as [embryonic stem cells].” 97 Thus, “[u]ntil those [skin] cells [or iPS cells] are ready, . . . research on embryonic stem cells is still required.” 98


Knowing that embryonic stem cell research is the key to medical advancement, and assuming that embryonic stem cell research opponents have been painted into a corner, it is clear that the United States needs federal regulation for embryonic stem cell research. Thus, the question is not whether the nation needs it, but rather, what provisions it should include. For guidance, this Note will examine two regulatory models—that of the state of California, the U.S. state most recognized for its embryonic stem cell research regulation and funding, and that of the United Kingdom, a nation that has had embryological science law in place for decades. This Note will then look at the proposed Stem Cell Research Enhancement Act of 2007, which was vetoed by President George W. Bush.

A. California’s Proposition 71

On November 2, 2004, California passed Proposition 71, “a controversial bond measure that devote[d] $3 billion to human embryonic stem cell experiments and comprise[d] the biggest-ever state-supported scientific research program in the country.” 99 Proposition 71 established the California Institute for Regenerative Medicine (“CIRM”) and its Inde-

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98. Id. at 2. See also Baltimore et al., supra note 7, at 2 (“[T]he recent success in reprogramming adult human cells into cells that closely resemble [embryonic stem] cells would not have occurred without the last decade of human [embryonic stem] cell research. . . . [I]t will likely be several years before we know whether the resulting iPS cells differ in clinically significant ways from human [embryonic stem] cells . . . [and thus] vital research on human [embryonic stem] cells must continue to move forward.”).
ependent Citizen’s Oversight Committee ("ICOC") in order to centralize the funding for California’s stem cell research projects, to dole out research grants to state universities and research laboratories, and to “support and advance stem cell research and regenerative medicine under the highest ethical and medical standards."{100} Immediately thereafter, however, groups opposed to embryonic stem cell research, abortion, and taxes challenged the program set forth in Proposition 71, {101} arguing “that the program . . . violate[d] laws concerning state spending, the structure of ballot initiatives [and] rules regarding conflicts of interest.”{102} Although the state did not issue any of its $3 billion in bonds “[b]ecause of the uncertainty over the litigation,”{103} an appeals court held in their favor in February of 2007, which Robert Klein, CIRM’s chairman, “hailed . . . as ‘one huge step for California.’”{104} CIRM has since allocated over $635 million in grants all over the state, mostly to University of California schools and to private research institutes, notably the Salk Institute for Biological Studies.{105}

Proposition 71, now codified in the California Constitution at Article XXXV, provides a right to conduct embryonic stem cell research—to be precise, it “established a right to conduct stem cell research . . . on adult stem cells, cord blood stem cells, pluripotent stem cells, and/or progenitor cells.”{106} Under Proposition 71, pluripotent cells are those that are “capable of self-renewal, [and also] have broad potential to differentiate into multiple adult cell types,”{107} a definition which encompasses embryonic stem cells.{108} Proposition 71 clearly notes the sources that could be used to obtain embryonic stem cells, namely IVF and SCNT,{109} but also indicates that human reproductive cloning would be neither tolerated nor funded.{110}

100. CIRM, supra note 13. See also California Proposition 71 (codified as California Constitution Art. XXXV), available at http://www.cirm.ca.gov/pdf/prop71.pdf [hereinafter Proposition 71].
103. Id. ¶ 4.
104. Id. ¶ 5.
106. Proposition 71, supra note 100, § 5.
107. Id.
108. See supra Part I.A.
109. Proposition 71, supra note 100, art. XXXV, § 5.
110. Id. art. XXXV, § 3.
Proposition 71 also amended the California Health and Safety Code, notably adding the California Stem Cell Research and Cures Bond Act,\footnote{California Health and Safety Code, §§ 125290.10–125290.70, available at http://law.justia.com/california/codes/hsc/125290.10–125290.70.html [hereinafter CSCR&C] (last visited Nov. 5, 2008).} the California Stem Cell Research and Cures Bond Act of 2004,\footnote{California Health and Safety Code, §§ 125291.10–125291.85, available at http://law.justia.com/california/codes/hsc/125291.10-125291.85.html [hereinafter CSCR&C 2004] (last visited Nov. 5, 2008).} \footnote{California Health and Safety Code, § 125292.10, available at http://law.justia.com/california/codes/hsc/125292.10.html [hereinafter Definitions] (last visited Nov. 5, 2008).} and Definitions.\footnote{CSCR&C, supra note 111, § 125290.35(b)(1).} Proposition 71 amended the Health and Safety Code to include public meeting laws for the CIRM’s ICOC,\footnote{Id. § 125290.30(d).} a provision that disallows an ICOC disinterested member to “use his or her official position to influence a decision to approve or award a grant, loan, or contract to his or her employer,” thus omitting the possibility for conflicts of interests;\footnote{Id. § 125290.30(g)(1)(A).} a prohibition on compensation to research donors or participants in the stem cell research process, but an allowance for the reimbursement of expenses;\footnote{Id. § 125290.35(b)(3).} a time limit for when embryonic stem cells can be extracted from blastocysts, that is, no more than eight to twelve days after cell division commences;\footnote{Id. § 125290.35(b)(6).} and competitive bidding for government-funded grants.\footnote{Id. § 125290.30(f).} It is very important to note that Proposition 71 also has a provision that requires the CIRM to create standards for obtaining all research donors’ informed consent.\footnote{Id. § 125290.35(b)(1).} Now, CIRM’s informed consent standards are as follows:

Because human embryonic stem cell research is controversial, prospective donors need to be informed as completely as possible about possible research uses of embryos, gametes, and tissue that they might donate. If donors have stated restrictions on the future uses of donated materials, CIRM-funded researchers must respect these. Because it is difficult to foresee all future uses, however, researchers are free to utilize only materials whose donors have consented to all future research uses that are approved by scientific and ethical review bodies. This . . . strikes a balance between respecting the informed preferences of donors and maximizing the scientific benefit from research funding.\footnote{Geoffrey P. Lomax, Zach W. Hall & Bernard Lo, Responsible Oversight of Human Stem Cell Research: The California Institute for Regenerative Medicine’s Medical}
B. The United Kingdom’s Fertilisation and Embryology Act, Regulations, and Pending Bill

The United Kingdom’s Fertilisation and Embryology Act of 1990 (“1990 Act”) established a national Human Fertilisation and Embryology Authority (“Authority”) to grant licenses to researchers. In order to obtain a license for research under the 1990 Act, two criteria must be satisfied: first, an application must demonstrate that the activity is “for the purpose of . . . (a) promoting advances in the treatment of infertility, (b) increasing knowledge about the causes of congenital disease, (c) increasing knowledge about the causes of miscarriages, (d) developing more effective techniques of contraception, or (e) developing abnormality detection methods for . . . embryos” pre-implantation, and second, it must demonstrate that the activity is “necessary or desirable” to achieve one of the specified purposes.

Because the 1990 Act does not clearly permit stem cell research, in 2001, Parliament specified that a license may be issued by the Authority for the purposes of “(a) increasing knowledge about the development of embryos[,] (b) increasing knowledge about serious disease, or (c) enabling any such knowledge to be applied in developing treatments for serious disease.” This can be viewed as an explicit endorsement of embryonic stem cell research by the British government, and the Authority soon began to grant licenses for such research.

The pending 2007–2008 Human Fertilisation and Embryology Bill hopes to supplement the 1990 Act in order for it to remain appropriate for the twenty-first century. The bill aims to ensure that “all human embryos outside the body—whatever the process used in their creation—are subject to regulation” and that “the scope of legitimate embryo research activities, subject to controls,” is extended. The bill will also
provide regulation for “‘inter-species’ embryos created from a combination of human and animal genetic material for research” and will alter the “restrictions on the use of data collected by the [Authority] to make it easier to do follow-up research.” Members of Parliament have backed this bill, particularly in its support for the creation of hybrid embryos, which have been referred to as “saviour siblings” because of their ability to aid in the treatment of debilitating diseases.

C. The Vetoed U.S. Stem Cell Research Enhancement Act of 2007

The Stem Cell Research Enhancement Act of 2007 (“2007 Act”) aimed “[t]o amend the Public Health Service Act to provide for human embryonic stem cell research.” The 2007 Act explicitly supported human embryonic stem cell research and noted that the Secretary would conduct such research, meaning that embryonic stem cell research would be federally funded. The 2007 Act also included the creation of guidelines and would have mandated that the Secretary comply with some reporting requirements. Most importantly, however, the 2007 Act provided for three ethical obligations to be met in order for human embryonic stem cells to be used for research purposes. These three requirements were as follows:

1) The stem cells were derived from human embryos that have been donated from in vitro fertilization clinics, were created for the purposes of fertility treatment, and were in excess of the clinical need of the individuals seeking such treatment.

2) Prior to the consideration of embryo donation and through consultation with the individuals seeking fertility treatment, it was determined that the embryos would never be implanted in a woman and would otherwise be discarded.

127. Id.
130. Id. § 2 (amending the Public Health Service Act to include 42 U.S.C. § 498D). Hereinafter in this Note, when provisions of the 2007 Act are referred to, they refer to what would have been 42 U.S.C. § 498D(a)–(d) had the statute been enacted.
131. Id. § 498D(c)–(d).
132. Id. § 498D(b)(1)–(3).
3) The individuals seeking fertility treatment donated the embryos with written informed consent and without receiving any financial or other inducements to make the donation.  

President George W. Bush vetoed the 2007 Act, after it passed in the House and Senate, on June 20, 2007.  

IV. WHAT KIND OF FEDERAL REGULATION WOULD BE OPTIMAL?  

A. The Six Elements  

I have isolated six important issues stemming from an analysis of the aforementioned regulatory models, as well as the Massachusetts regulatory model, which is quite thorough, like California’s. These issues are, in no order of importance, (1) a centralized agency, (2) the right to research, (3) the sources of the human embryonic stem cells, (4) a prohibition on compensation, (5) informed consent, and (6) federal licensing.  

First, the Californian and British regulatory models have both established a centralized agency to make grants and loans to researchers, and to monitor and report all stem cell activities. Yet, a centralized agency is not only useful to dole out funds and report where money is going. A centralized agency could also encourage cooperation, advocate for a common cause, allow for effective monitoring, and could ensure that different sorts of projects are pursued in a way that avoids too much overlap. Furthermore, a centralized agency could ensure that funds are spread across the nation, and could also push for adherence to certain ethical standards, as well as medical ones. The vetoed 2007 Act, however, did not contain a provision to establish such an agency. An American federal regulatory agency could be extremely beneficial to an embryonic stem cell regulatory scheme, particularly as there has been no prior federal law on the subject and there is great variance among the states’ laws.  

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133. Id.  
134. Reynolds, supra note 9.  
136. See supra Part III.A–B.  
137. See supra Intro.
Second, California’s Proposition 71 explicitly establishes a constitutional right to conduct stem cell research. While federal legislators may not want to form an absolute right to research, one could make the argument that “[i]f the First Amendment serves to protect free trade in the dissemination of ideas and information, it must also protect the necessary preconditions of speech, such as the production of ideas and information through research.” Indeed, the government could argue for the establishment of a federal right to embryonic stem cell research because “society must foster bio-scientific inquiry and innovation,” especially in a context such as this, where so many lives could be saved. While this argument may satisfy a constitutional rational basis analysis, it is unlikely that the government would establish the constitutional right to embryonic stem cell research in its first law on the subject.

Third, Proposition 71 and the vetoed 2007 Act specifically describe where embryonic stem cells for research purposes could be obtained. California’s Proposition 71 notes IVF and SCNT as both acceptable sources for embryos. In the first of its three ethical requirements for embryonic stem cell research, the vetoed 2007 Act also states that fertility clinics are an appropriate source for embryos. However, the vetoed 2007 Act does not indicate a position on SCNT, nor does it mention it, likely because it involves cloning and is therefore controversial. In a federal regulatory scheme for embryonic stem cell research, IVF should be designated as the primary source for embryos, and if SCNT is ever

138. See Steve Keane, Note, The Case Against Blanket First Amendment Protection of Scientific Research: Articulating a More Limited Scope of Protection, 59 STAN. L. REV. 505, 506 (2006) (noting that, in addition to the $3 billion in state funding, California’s right to “unfettered” research has resulted in many stem cell researchers relocating to the state).
139. Id. at 507 (“[I]n its 1997 report, the National Bioethics Advisory Commission claimed that ‘society recognizes that the freedom of scientific inquiry is not an absolute right and scientists are expected to conduct their research according to widely held ethical principles.’”).
141. Id. at 189.
142. Under minimal rationality review, the Supreme Court determines whether there is a rational relationship to a legitimate government end, and deference is usually given to means-ends relationships—any conceivably rational basis suffices. E.g., New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (noting that states may make “rational distinctions . . . with substantially less than mathematical exactitude”).
143. Proposition 71, supra note 100, § 4 (now Article XXXV of the Constitution, § 5).
145. See supra note 78 (discussing SCNT and the controversy that surrounds it).
proven to be extremely successful beyond mice, it too could be added as an appropriate source.

Fourth, California and the vetoed U.S. federal bill both articulate a prohibition on compensating embryo donors. The United Kingdom’s law, as it currently reads, does not have such a prohibition, but this could be relevant to the pending 2007–2008 bill. This prohibition is not, however, uncommon: for example, Massachusetts’ embryonic stem cell regulatory scheme provides that “[n]o person shall knowingly purchase or sell any pre-implantation embryo for human embryonic stem cell research for valuable consideration,” adding that “reasonable payments associated with storage, quality control, preservation, processing or transportation of such pre-implantation embryos” are to be excluded from the definition of “consideration.” The prohibitory language in the Massachusetts law does not differ much from California’s, which only allows reimbursements to be paid. The vetoed 2007 bill articulates that nothing ought to induce one to make the embryo donation, but its reasoning is entirely the same as both states’ provisions: the donation should not be coerced or executed out of self-interest. Rather, the donation should be voluntary and incentive-free.

Fifth, Proposition 71 and the vetoed 2007 bill (in the third of its three ethical requirements) equally stress the need for informed consent when receiving a donated embryo. The vetoed 2007 bill states that informed consent must be given in written form; Proposition 71 does not specify the method by which informed consent is to be given. Either way, this might be one of the most important inclusions in a regulatory scheme for embryonic stem cell research. Given that individuals may “suffer a dignitary harm by being deprived of their ‘autonomous right to choose’” if they are not “adequately equipped with information pertinent to their decision about whether or not to participate in [embryo donation],” the informed consent procedure is critical to the donor as well as to the embryonic stem cell donation process. This is likely why Massachusetts has pro-

147. Massachusetts Act, supra note 135, § 3(b)(ii).
148. CSCR&C, supra note 111, § 125290.35(b)(3).
150. Id.; CSCR&C, supra note 111, § 125290.35(b)(1).
152. CSCR&C, supra note 111, § 125290.35(b)(1).
vided a lengthy definition of what qualifies as informed consent, articulating the physician’s expansive duties, the need for an informational pamphlet to be provided to the patient, and the need for an informed consent form to be fully filled out by both the patient and the physician.\textsuperscript{154} Accordingly, it is imperative that a thorough informed consent provision be included in a federal embryonic stem cell research regulatory scheme.

Lastly, the United Kingdom’s 1990 Act established an agency with all federal licensing authority, but has requirements that must be met in order to obtain a license for research.\textsuperscript{155} Particularly after the addition of the 2001 Regulations, the United Kingdom’s structure for giving out licenses seems especially organized, seeing as everyone’s embryonic stem cell activity is authorized and monitored by the government.\textsuperscript{156} Such a licensing structure for embryonic stem cell research could prove beneficial in the United States, as it would create order and cohesion in a system that is in disarray. While there are certainly benefits to implementing such licensing, there are certainly some complications that could arise, notably the typical time delays in dealing with government agencies and standards that could prohibit certain kinds of researchers from engaging in very promising research. Moreover, some research projects have been ongoing for years, and may have multiple phases to them, so it may prove difficult to decide at what point it is necessary for the researchers to apply for a license. While this qualm could be easily rectified by excusing ongoing projects from applying for a license for their current phase, and requiring them to apply for a license for the next phase, issues could still come about if their application for a license is denied. That is, any potential benefit gained from the research could be unrealized. More comprehensive research must be conducted to determine if federal licensing is indeed a beneficial structure for the United States and whether or not it will abate the controversies that surround embryonic stem cell research. Chances are, however, that most researchers would find a federal licensing system to be unfeasible in the United States, as it would be too costly to implement and administer.

\textit{B. What an American Federal Regulatory Scheme Should Look Like}

As previously mentioned, a federal regulatory scheme for embryonic stem cell research should prohibit compensation for donors, and if SCNT is proved successful beyond mice, SCNT should be deemed an appropriate source for embryos. Furthermore, if research does reveal that federal

\textsuperscript{154} See Massachusetts Act, supra note 135, § 5(b)(1)–(2).
\textsuperscript{155} 1990 Act, supra note 22, sched. 2, ¶ 3.
\textsuperscript{156} 2001 Regulations, supra note 22, ¶ 2(2)(a)–(c).
licensing would be beneficial to the United States, then such a system should also be implemented via a federal licensing authority, such as in the United Kingdom.

The United States should establish a new federal agency under the U.S. Department of Health and Human Services to deal with regenerative medicine and stem cell research. This agency would be empowered, like the Human Fertilisation and Embryology Authority in the United Kingdom and CIRM in California, to delegate federal funds to researchers who meet objective criteria of an application process. It would also be responsible for federal licensing, if such a system were deemed appropriate for the United States. This new agency would not only fund, monitor, and report all stem cell projects, but also affirmatively endorse embryonic stem cell research as medicine’s key to the future. This agency would expressly focus on the need for embryonic stem cell research for medical advancement. While another federal agency in the U.S. Department of Health funds research opportunities—the Agency for Healthcare Research and Quality (“AHRQ”)—the research this agency funds and supports is broad and focuses more on improving the quality and safety of the current healthcare system than on understanding and developing treatments for incurable diseases and degenerative conditions. Specifically, the AHRQ’s mission is “to improve the quality, safety, efficiency, and effectiveness of health care for all Americans.” The mission of a regenerative medicine and stem cell research agency would be “to endorse, support and fund regenerative medicine and stem cell research projects in order to develop new therapies and treatments for untreatable disease and to aid with tissue and organ transplantation.”

A new federal regulatory scheme should not only establish a new federal agency, but also explicitly include a thorough informed consent provision. However, while informed consent is critical for patient autonomy, patients should not be inundated with information that merely confuses them, as this will not lead to better decision making, which is the goal of the informed consent doctrine. Furthermore, providing informed consent necessitates an extraordinary expenditure of time, resources, and funds. Thus, in deciding what kind of informed consent to provide to embryo donors in a U.S. federal regulatory scheme, it is important to take into account both the need for patient autonomy as well as the con-


I propose that a patient give both oral and written consent and that a physician engage in dialogue that firmly discloses to the patient that her embryos will be used for research, as well as the benefits and risks of choosing to donate embryos for research purposes. An explanation of where, how, and why embryonic stem cell research is conducted is not mandatory, although a very brief one could be encouraged; elaborate videos, pamphlets, and pictorial displays are excessive. Since embryo donation for research purposes is not a life-or-death, patient-determinative medical process, and each donated embryo will undergo the same procedure in order to be utilized for research, each patient can be told the exact same information by a physician. Accordingly, physicians can adhere to a reasonable physician informed consent standard: he or she should disclose all information that would usually be disclosed to an embryo donor.\footnote{160}

Information that should be disclosed to all embryo donors, both in the written consent form and by the physician, should be the following: (1) that an agreement to donate does not necessarily mean that the embryos will be used for research purposes, but that they could be, and if not used, or if stem cells cannot be obtained from them, they will be discarded; (2) that any embryonic stem cell line derived from the embryo will be anonymized;\footnote{161} (3) that an embryonic stem cell line can be maintained for years, can be transferred among facilities, and can be used for various different projects; (4) that a failure to donate will not adversely affect the potential donor’s medical care;\footnote{162} (5) that donors will not receive any direct financial or personal benefit from donating, but that donation will benefit research to better the social aggregate; (6) that a risk of donation is that this embryo will not be able to be used for fertility purposes; and (7) that there is a psychological risk of “anxiety or regret.”\footnote{163} Donors should also be told that they can withdraw their consent.

\footnote{160. For comparative purposes, see Massachusetts Act, supra note 135, § 5(b).}

\footnote{161. Canada, for example, has necessitated in its informed consent guide for stem cell research that donors be told that “the cell line(s) will be anonymized (i.e., that no personal identifiers of those who donated embryos from which ES cell lines were derived for research will be provided to stem cell investigators), except if the research involves autologous donation.” CANADIAN INST. OF HEALTH RESEARCH, UPDATED GUIDELINES FOR HUMAN PLURIPOTENT STEM CELL RESEARCH 8.3.3., June 28, 2006, available at www.irsc.ca/e/31488.html.}

\footnote{162. See Robert Streiffer, Informed Consent and Federal Funding for Stem Cell Research, 38 HASTINGS CENTER REP. 140, 141 (2008) (discussing a 1997 statement from the American Society of Reproductive Medicine, which noted the need for informed consent with embryo donation).}

up until the stem cells are obtained from the embryos. When procedures like blastomere biopsy become commonplace, the language used to disclose the above information would be different. For example, “embryo donation” would become “embryonic stem cell donation.” Moreover, the need to explain to the donor that the donated embryos cannot be used for fertility purposes would be eliminated.

CONCLUSION

It is critical for the United States to develop a federal regulatory scheme for embryonic stem cell research. The range of embryonic stem cell research policy and regulation across the fifty states is much too wide for a topic so vital to our country’s medical future and, accordingly, the United States should endorse, support, regulate, and fund the embryonic stem cell research effort on a federal level. As the principal objection to embryonic stem cell research, which was also President Bush’s objection, can be overcome with new technology such as blastomere biopsy, it is time for the United States to follow many other Westernized countries and develop thorough regulation on the subject. Optimal regulation for embryonic stem cell research would articulate the establishment of a centralized federal agency to administer and fund such research, the kind of informed consent to be provided to embryo donors, the need for incentive-free embryo donation, the appropriate sources for embryos, the fact that such research will be awarded federal funds, and the federal government’s active endorsement of the embryonic stem cell research effort. Embryonic stem cells hold medicine’s key to the future—now all we need is a federal regulatory scheme in place to deal with such research.

Sylvia E. Simson*

THE RIGHT TO REPARATIONS IN INTERNATIONAL HUMAN RIGHTS LAW AND THE CASE OF BAHRAIN

INTRODUCTION

The evolution of international law towards a system capable of promoting “global justice” has been accompanied by a growing consensus that States bear an obligation both to punish wrongdoers and to act on behalf of victims in the wake of widespread, systematic human rights abuses.\(^1\) In fact, U.N. General Assembly Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, sets forth “existing,” complementary international legal obligations of States in this arena without introducing new obligations.\(^2\) The right to a remedy is premised on three core rights: (1) the right to “equal and effective access to justice”; (2) “the right to adequate, effective and prompt reparation for the harm suffered”; and (3) “the right to truth.”\(^3\) Despite being a U.N. Member State since September 21, 1971,\(^4\) the Kingdom of Bahrain (“Bahrain”) is a nation with a disturbing legacy of unaddressed human rights abuses and impunity for perpetrators.\(^5\) Such incongruence raises fundamental questions with respect to the current international legal frame-

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work and the complex moral, legal, and political challenges involved in any reparations process.⁶

Located off of the eastern coast of Saudi Arabia in the Persian Gulf, Bahrain sits in the center of the highly complicated and volatile Middle East region.⁷ With a population of approximately 718,000,⁸ Bahrain is the smallest of the six Persian Gulf States that make up the Gulf Cooperative Council (“GCC”).⁹ However, due in large part to its historical antecedents—the Sunni al-Khalifa tribe wrested control of the archipelago from indirect Persian rule in 1782, and subsequently sought to consolidate and maintain power—Bahrain is considered “the most complex and stratified of the Gulf states.”¹⁰ Today, members of the al-Khalifa family and their “Sunni tribal allies” exercise most of the political and economic power in Bahrain.¹¹ At the bottom of the “social and political hierarchy” are the al-Bahrainah indigenous Shiite Arabs and all Persians regardless of sect.¹² Despite comprising approximately seventy percent of Bahrain’s population, Shiites continue to endure systematic discrimination.¹³

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⁹ The other five GCC states are Kuwait, Oman, Qatar, Saudi Arabia, and the UAE.

¹⁰ ICG Report, supra note 8, at 1; C.I.A. World Factbook: Bahrain, supra note 8.

¹¹ ICG Report, supra note 8, at 5. According to the International Crisis Group, members of the royal family occupy at least 100 of the top 572 government posts, including 24 of 47 cabinet-level posts, 15 of the top 30 in the Ministry of the Interior, 6 of the top 12 in the Ministry of Justice, and 7 of the top 28 in the Ministry of Defense. Id. See also C.I.A. World Leaders: Bahrain, https://www.cia.gov/library/publications/world-leaders-1/world-leaders-b/bahrain.html (last visited Dec. 19, 2007). After the al-Khalifa family and their “Sunni tribal allies” are other descendants of Sunni Arab tribes and then hawalah, Iranian Sunni and Arab immigrants to Bahrain of over a century or more. ICG Report, supra note 8, at 1.

¹² ICG Report, supra note 8, at 1.

¹³ Id. The ongoing government ban of the 2006 “Al-Bandar report” released by the Gulf Centre for Democratic Development does little to dispel this perception. The report details a conspiracy led and funded by known official organizations, most notably the
The story of Bahrain’s past and present bears telling for three primary reasons. First, on a universal level, it is important to raise awareness of the experiences of victims of grave human rights violations and to promote accountability. Second, on a geopolitical level, the United States has a major stake in the stability of Bahrain and developments in the Royal Court, to ensure the sustained political and economic dominance of the Sunni minority to the exclusion of Bahrain’s Shiite majority. The report includes evidence of plans to fix elections, to undermine dissident groups, to disenfranchise Shiite populations, to restrict the operation of civic organizations, and to facilitate a change in the country’s demographics through pro-Sunni immigration policies. International Freedom of Expression Exchange, Authorities Reinforce Sweeping Media Ban, Internet Censorship on Controversial Report, http://canada.ifex.org/en/content/view/full/88028/ (last visited Dec. 19, 2007).

14. For purposes of this Note, the term “victim” should be understood consistent with the 2006 Principles and defined as

[persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate . . . the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

2006 Principles, supra note 2, para. 8.

15. CRS REPORT FOR CONGRESS 95-1013, Bahrain: Reform, Security, and U.S. Policy 3 (Apr. 23, 2007). In an effort to protect itself from its powerful neighbors, Bahrain cultivated a strategic alliance with the United States centered on defense issues. Id. The U.S. naval command has maintained a presence in Bahrain since 1938, and the Fifth Fleet is currently headquartered in Juffair, Bahrain. The headquarters is responsible for coordinating support missions by U.S. warships in the Iraq War, and conducting counter-terrorism and counter-narcotrafficking operations in the Arabian Sea. Id. at 4. After the terrorist attacks of September 11, 2001, the Bush administration took extensive measures to further strengthen the U.S.-Bahrain relationship. The two countries renewed a ten-year defense agreement in October 2001, which “provides U.S. access to Bahraini bases during a crisis, the pre-positioning of strategic material (mostly U.S. Air Force munitions), consultations with Bahrain if its security is threatened, and expanded exercises and U.S. training of Bahraini forces.” Id. at 4. In March 2002, President Bush made Bahrain a major non-NATO ally, a status that allows for U.S. arms sales. Id. Moreover, the U.S. Congress identified access to Bahrain-based military installations and airspace as critical to U.S. military operations in Iraq, Afghanistan, and the Horn of Africa in addition to contingency operations or force projections in the Gulf and Southwest Asia. Human Rights Watch, Bahrain: Events of 2006, http://hrw.org/englishwr2k7/docs/2007/01/11/bahrain14699.htm (last visited Dec. 20, 2007). The Bush administration requested an estimated $17.3 million in military aid for Bahrain in 2007. Id.
Persian Gulf region more generally. 16 Third, on a historical level, a successful transitional justice experience in Bahrain could lend further support to the precedent established by the Equity and Reconciliation Commission (“IER”) in Morocco, and encourage other Gulf States, such as Saudi Arabia, to make similar efforts to resolve mass human rights violations.

Beginning shortly after Bahrain achieved independence in 1971 and continuing through the mid-1990s, the Bahraini government undertook a campaign of political repression that targeted opposition activists, leftists, unionists, and others perceived as threats to the State. 17 Hundreds of Bahrainis and their families were forcibly exiled, and the use of torture was “endemic.” 18 Under the leadership of King Hamad, who assumed power following the death of his father Amir ‘Isa in 1999, Bahrain has undergone a series of political reforms and has slowly begun to confront its past. 19 In this vein, the King has expressed interest in pursuing national reconciliation and transitional justice to confront Bahrain’s legacy of human rights abuses. 20 In January 2006, the decision was made to provide monthly payments of $660 (250 Bahraini dinars) to 250 families with either unemployed or elderly former exiles allowed back to the isl-

16. CRS REPORT RL 31533, supra note 7, at 26. Approximately fifty-seven percent of the world’s proven oil reserves (715 billion barrels) and about forty-five percent of the world’s proven natural gas reserves (2462 trillion cubic feet) are located in Iran, Iraq, and the GCC States. The United States imports about twenty percent of its net oil imports from the Gulf States. Id.

17. See HRW, ROUTINE ABUSE, ROUTINE DENIAL, supra note 5, at 11; REDRESS, REPARATIONS FOR TORTURE, supra note 5.

18. REDRESS, REPARATIONS FOR TORTURE, supra note 5. See also HRW, ROUTINE ABUSE, ROUTINE DENIAL, supra note 5, at 11; REDRESS, SUBMISSION OF THE REDRESS TRUST TO THE MEETING ON BAHRAIN—THE HOUSE OF LORDS, supra note 5.


and as part of the reform program. However, there is only one known instance to date of government compensation to a victim of torture.

It is important to recognize the two different ways in which the term “reparations” is used. Within the context of international law, the term connotes the array of measures available to redress the different harms that a victim may have suffered due to certain crimes. Therefore, under international law, reparations may include restitution, compensation, rehabilitation, and satisfaction and guarantees of nonrecurrence. Such measures, which include material and moral (or “symbolic”) undertakings by a society in individual or collective form, seek to restore the victim to the status quo ante by expressing a society’s “recognition, remorse and atonement for harms inflicted.” Material reparations may include monetary compensation, service packages providing healthcare or counseling to promote rehabilitation, restoration of property rights, or a pension.

Moral, or symbolic, reparations focus on allowing the victim’s story to be told and promoting a sense of (nonlegal) justice, and may include official apologies, rehabilitation, and the creation of memorials or other acts of remembrance. For reasons to be discussed later, symbolic reparations may prove more valuable in facilitating the healing sought through any material reparations process.

However, the term is often used in a more narrow sense to refer to “the design of programs (i.e., more or less coordinated sets of reparative measures) with massive coverage.” Historically, most reparations pro-

22. REDRESS, REPARATIONS FOR TORTURE, supra note 5, at 14.
24. Id.
25. Id.
27. HAYNER, supra note 1, at 182 (“[F]or those left destitute from the loss of a breadwinner in the family, or left emotionally or physically shattered, financial reparation, basic medical benefits, and other support services will be necessary in order to begin to repair the damage.”); De Greiff, supra note 23, at 453; Roht-Arriaza, supra note 26, at 157–58.
28. De Greiff, supra note 23, at 453
30. De Greiff, supra note 23, at 453. In analyzing the design of reparations programs, De Greiff believes emphasis should be placed on three goals: recognition, civic trust, and social solidarity. Id. at 451.
grams have incorporated elements of both connotations of the term. Such overlapping is logical given that settlement of court cases has often directly or indirectly resulted in the formation of “administrative compensation schemes.” This Note will address both contexts. Nevertheless, unless otherwise indicated, the term “reparations” will refer to the broader meaning as understood in international law.

This Note makes two central propositions. First, the existing international legal framework for reparations to victims of mass human rights violations is inadequate as evidenced by the current situation in Bahrain. At least in the short term, legal recognition of a victim’s right to reparations without an effective enforcement mechanism at the international level ultimately perpetuates the cycle of victimization for those whom the pronouncement of such principles seeks to protect. Not only must Bahraini victims of state abuse suffer the indignities of their mistreatment while being denied access to justice at the domestic level, but they are also reassured of their rights by an international legal framework incapable of guaranteeing them justice, thereby reinforcing their position of helplessness. Nevertheless, at the supranational level, there is an

32. Id.
33. See Bassiouni, supra note 2, at 203, 260 (discussing a theory of victims’ rights and advocating “for a strengthening of current victims’ rights norms”). See also Roht-Arriaza, supra note 26, at 158 (“If reparations are so universally accepted as part of a state’s human rights obligations, why have so few states emerging from periods of conflict or mass atrocity put viable programs into place?”).
34. See Michael Reisman & Janet Koven Levit, Reflections on the Problem of Individual Responsibility for Violations of Human Rights, in THE MODERN WORLD OF HUMAN RIGHTS: ESSAYS IN HONOUR OF THOMAS BUERGENTHAL 419, 420–23 (Antonio A. Cançado Trindade ed., 1996). However, this says nothing about the potential positive implications of such a principle ripening into customary international law. See The Paquete Habana, 175 U.S. 677, 708 (1900) (relying on the customs and usages of civilized nations in concluding that “it is an established rule of international law . . . that coast fishing vessels . . . are exempt from capture as prize of war”).
35. Reisman & Levit, supra note 34, at 421. Reisman and Levit address a further indignity that victims must suffer as a result of the “normative gray gap” between the international human rights framework and national law:

[V]ictims of [gross and systematic human rights] violations actually suffer twice: first, in being the victims and second, in their obligation to participate, with all other citizens, in paying compensation . . . . When we say that the state is responsible and must compensate, we are really saying that the citizens of the State, including the victims, must pay to compensate for [human rights] violations.
emerging trend of enforcement for grave violations of international law, which represents a positive development for human rights and the rule of law.  

Second, the implementation of a “comprehensive and coherent reparations program”36 in Bahrain is ultimately in the best legal, moral, and political interests of the al-Khalifa regime and two of its closest allies, Saudi Arabia  

This Note is divided into three main sections. Part I discusses Bahrain’s history of human rights abuses and major advances and setbacks in the nation’s ongoing transitional justice or “national reconciliation” process. Part II discusses the effectiveness of the existing international legal framework in guaranteeing victims of massive and systematic human rights abuses the right to a remedy and reparations. Part III explores what an administrative reparations scheme for Bahraini victims might look like in light of progress made.  

It draws upon lessons learned from the Moroccan transitional justice experience, the first of its kind in the Middle East,  

and introduces some key political issues involved in financing any such reparations program. The Note concludes by examin-
ing the likely implications of Bahrain’s current, limited course of action and what other nations seeking to confront similarly repressive pasts can learn from the Bahraini experience.

I. SYSTEMATIC HUMAN RIGHTS ABUSES AND THE BEGINNINGS OF TRANSITIONAL JUSTICE IN BAHRAIN

As a member of the international community of States, Bahrain is obligated to prevent the practice of torture within its sovereign territory and to remedy any such violations once they have occurred.42 The Draft Articles on State Responsibility for Internationally Wrongful Acts establish that a State commits an internationally wrongful act when (1) conduct consisting of an action or omission is attributable to the State under international law; and (2) such conduct constitutes a breach of an international obligation of the State.43 There is thus widespread consensus that a State bears an international legal obligation to provide reparations where state agents are responsible for the violative act.44 In fact, even in instances where the State’s direct involvement cannot be proven, the State is still responsible if it was complicit in the violations or failed to exercise due diligence in investigating or prosecuting the violations.45

The prohibition against torture is widely understood to have achieved jus cogens status.46 Article 1 of the Convention Against Torture and Oth-

44. E.g., Roht-Arriaza, supra note 26, at 157, 163.
45. Id.
46. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332, 344 (defining a jus cogens norm, or a “peremptory norm of general international law,” as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”). See, e.g., Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714, 717 (9th Cir. 1992), cert. denied 507 U.S. 1017 (1993) (quoting the Vienna Convention on the Law of Treaties’ definition of jus cogens and stating that the prohibition against torture has “the force of a jus cogens norm”); Al-Adsani v United Kingdom, 34 Eur. Ct. H.R. 11, 30 (recognizing the prohibition of torture as a rule of jus cogens); BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 496 (2007).
er Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.47

Even though Bahrain did not accede to CAT until March 6, 1998,48 and the provisions of the treaty cannot be applied ex post facto, the State still breached its obligation to prevent torture under customary international law.49 Ironically, Article 19 of the 1973 Bahraini Constitution explicitly proscribed physical and mental torture and the use of confessions obtained under torture or degrading treatment.50 Since ratifying CAT, Bahrain has the affirmative obligation to prevent torture by "take[ing] effective legislative, administrative, judicial or other measures to prevent acts of torture under its jurisdiction."51 This requires States Parties to criminalize the act of torture and complicity or participation in torture.52

In 1973, only two years after Bahrain achieved its independence, Amir ‘Isa bin Salman al-Khalifa issued a decree officially making Bahrain an


48. UNTC CAT, supra note 47.


51. CAT, supra note 47, art. 2(1).

52. Id. art. 4(1).
Islamic State in which Islamic law, or *sharia*, is the main source of legislation.\textsuperscript{53} Initial optimism within Bahraini civil society following the enactment of the new constitutional regime quickly dissipated after the issuance of the State Security Law of 1974.\textsuperscript{54} The law provided the legal pretext for many of the human rights abuses perpetrated during the next two decades by empowering security forces to arrest and detain for up to three years any person who allegedly "perpetrated acts, delivered statements, exercised activities or [was] involved in contacts inside or outside the country, which are of a nature considered to be in violation of the internal or external security of the country."\textsuperscript{55}

Following the Amir’s decision in 1976 to dissolve the National Assembly—Bahrain’s parliament—the government relied on the State Security Law and a policy of forced exile to silence opposition.\textsuperscript{56} The repression intensified following the 1978–1979 Islamic Revolution in Iran.\textsuperscript{57} The Revolution emboldened Bahrain’s Shiite majority to challenge the status quo rule of the Sunni elite.\textsuperscript{58} Fearing Iranian support for opposition groups and the possibility of a coup, the Bahraini Government cracked down.\textsuperscript{59} State security forces detained dozens of Shiite leaders on allegations of plotting to overthrow the royal family.\textsuperscript{60} Detainees were allegedly tortured and held incommunicado for months before they were all found guilty by the State Security Court in 1982.\textsuperscript{61} Sentences ranged from seven years to life in prison.\textsuperscript{62}

Torture was most prevalent in Bahrain during the mid-1990s at the height of the popular uprising that called for democratic reform and a return to a constitutional system of governance.\textsuperscript{63} The report by the U.N. Special Rapporteur on Torture to the Human Rights Commission in 1997 describes the prevailing approach towards the practice during this epoch:

\begin{quote}
[M]ost persons arrested for political reasons in Bahrain were held incommunicado, a condition of detention conducive to torture. The Security and Intelligence Service . . . and the Criminal Investigation Department . . . were alleged frequently to conduct interrogation of such
\end{quote}

\textsuperscript{53} B AHR. CONST. of 1973, art. 2.
\textsuperscript{54} HRW, ROUTINE ABUSE, ROUTINE DENIAL, supra note 5, at 11.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 12.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 11–12.
\textsuperscript{61} Id. at 12.
\textsuperscript{62} Id.
\textsuperscript{63} REDRESS, REPARATIONS FOR TORTURE, supra note 5, at 3–4.
detainees under torture . . . said to be undertaken with impunity, with no known cases of officials having been prosecuted for acts of torture or other ill-treatment . . . .

In addition to its use as a means to extract a ‘confession,’ torture was also reportedly administered to force detainees to sign statements pledging to renounce their political affiliation, to desist from future anti-government activity, to coerce the victim into reporting on the activities of others, to inflict punishment and to instill fear in political opponents. The methods of torture reported include: *falaga* (beatings on the soles of the feet); severe beatings, sometimes with hose-pipes; suspension of the limbs in contorted positions accompanied by blows to the body; enforced prolonged standing; sleep deprivation; preventing victims from relieving themselves; immersion in water to the point of near drowning; burnings with cigarettes; piercing the skin with a drill; sexual assault, including the insertion of objects into the penis or anus; threats of execution or of harm to family members; and placing detainees suffering from sickle cell anemia (said to be prevalent in the country) in air-conditioned rooms in the winter, which can lead to injury to internal organs.64

Ian Henderson, a citizen of the United Kingdom and the head of the State Intelligence Service from 1966 to 1998, is widely believed to be responsible for the routine use of torture during his tenure.65 Although Henderson himself admits that “vigorous interrogation” techniques were used, he categorically denies engaging in torture or ordering his forces to do so.66

In 1999, Amir Sheikh ‘Isa bin Salman al-Khalifa died and was succeeded by his son, Sheikh Hamad bin ‘Isa al-Khalifa. Recognizing that social peace was essential to securing foreign investment—the royal family’s major source of income—and its political survival, Sheikh Hamad launched a series of reforms.67


Prior to the adoption of a new constitution in February 2002, King Hamad issued two legislative decrees central to any discussion about justice and reparations for governmental abuses in Bahrain. Legislative Decree No. 10 of 2001 established a “general amnesty . . . for crimes affecting national security . . . committed by citizens before the enactment of this Law.” The Decree led to the release of all political detainees, both pretrial and posttrial, and hundreds of people forcibly exiled were allowed to return.

The initial positive effects of the amnesty were quickly overshadowed by Legislative Decree No. 56 of 2002, which clarifies the scope of Legislative Decree No. 10 and effectively grants immunity to security officers and state officials from prosecution for human rights abuses perpetrated prior to 2001. The key provision stipulates that no cases arising under Legislative Decree No. 10 shall be heard by any “judicial authority,” regardless of “the person filing it and irrespective of the capacity against whom it is filed, whether he is an ordinary citizen or a civilian or military public servant.”

II. THE RIGHT TO REPARATIONS IN INTERNATIONAL HUMAN RIGHTS LAW

Natural justice has long recognized that harms should be remedied. In fact, some form of the right to redress can be found in “every organised society.” The right to a remedy for victims of violations of international

68. Legislative Decree No. 10 of 2001 with Respect to General Amnesty for Crimes Affecting National Security; Legislative Decree No. 56 of 2002 with Respect to Interpreting Certain Provisions of Legislative Decree No. 10 of 2001 with Respect to General Amnesty for Crimes Affecting National Security [hereinafter Legislative Decree No. 56].

69. Id. The sole exception is in cases of crimes resulting in death. Id. art. 2.


71. Legislative Decree No. 56, supra note 68; Comm. Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/CR/34/BHR (June 21, 2005) [hereinafter CAT Comm. 2] (Expressing concern at the “blanket amnesty extended to all perpetrators of torture or other crimes by Decree No. 56 of 2002 and the lack of redress available to victims of torture”); REDRESS, REPARATIONS FOR TORTURE, supra note 5, at 14.

72. Legislative Decree No. 56, supra note 68, art. 1, para. 2.

73. Bassiouni, supra note 2, at 207; Rohr-Arriaza, supra note 26, at 157.

74. Bassiouni, supra note 2, at 207. See, e.g., Marbury v. Madison, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.”).
human rights law is set forth in numerous international instruments. Article 8 of the Universal Declaration of Human Rights ("UDHR") extends the right to an "effective remedy" by the appropriate national tribunal for any violations of a person's fundamental rights as protected by the constitution or by law. Article 2 of the International Covenant on Civil and Political Rights ("ICCPR") recognizes a "right to an effective remedy." Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") obligates States Parties to assure "effective protection and remedies" and access to "just and adequate reparation or satisfaction" for violations of the rights contained therein. Lastly, Article 14 of CAT mandates a State Party to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."

The Permanent Court of International Justice ("PCIJ") in the Chorzow Factory (Jurisdiction) Case decisively articulated the legal duty to compensate for a recognized harm. For its part, the International Court of

75. 2006 Basic Principles, supra note 2, pmbl. In addition to human rights law, the right to a remedy is implicitly recognized in the context of international humanitarian law, including in (1) the Geneva Convention Relative to the Treatment of Prisoners of War; (2) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and (3) Protocol I Additional to the Geneva Convention. Bassiouni, supra note 2, at 213–14.

76. Universal Declaration of Human Rights, supra note 42, art. 8.

77. ICCPR, supra note 47, art. 2. See also id. art. 9. Bahrain acceded to the ICCPR in 2006. UNTC ICCPR, supra note 47.


79. CAT, supra note 47, art. 14(1). The 2006 Basic Principles also ground the right in Article 3 of the Hague Convention Respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV); Article 91 of the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977; Article 39 of the Convention on the Rights of the Child; and Articles 68 and 75 of the Rome Statute of the International Criminal Court. 2006 Basic Principles, supra note 2, pmbl. For a discussion of the extensive U.N. efforts preceding the introduction of the 2006 Basic Principles, see SHELTON, supra note 6.

80. Case Concerning the Factory at Chorzow, 1927 P.C.I.J. (Ser. A) No. 9, at 29 ("[I]t is a principle of international law... that any breach of engagement involves an obligation to make reparation."). According to Richard Falk, the Advisory Opinion by the International Court of Justice concerning the Israeli security wall reaffirmed the validity of
Justice (“ICJ”) applies the Chorzow approach of seeking to restore the situation to what “would have existed” had no breach occurred. Similarly, current jurisprudence in both the Inter-American and European human rights systems is clear that the underlying principle behind reparations is “full restitution” (restitutio in integrum) and the reestablishment of the status quo ante. While legally and normatively unequivocal, such reasoning illuminates the fundamental paradox inherent in any discussion of reparations: specifically, the fact that it is ultimately impossible to restore the victim of any grave violation of human rights to the status quo ante.

National courts are supposed to serve as the gateway for victims seeking reparations for grave violations of human rights and humanitarian law. In fact, an individual lacks standing to even bring a claim before most international bodies until he or she has exhausted available domestic remedies. Ideally, national courts should operate in conjunction with international criminal tribunals and treaty obligations as part of a “flexible strategy” to enforce an “international consensus” against impunity for those who commit international crimes.

However, experience has repeatedly proven the ineffectiveness of relying on national courts for such a purpose because the courts are “almost always. . . inoperative” during the conflict periods in which massive and systematic human right violations usually occur, and because “it takes quite some time for courts to assume an independent stance capable of

this legal obligation in its finding that Israel has owed a duty to provide reparations to Palestinians harmed by the building of the illegal wall on their territory. Falk, supra note 1, at 482–83.

81. Shelton, supra note 6, at 92. But see Christian Tomuschat, Reparations for Victims of Grave Human Rights Violations, 10 Tul. J. Int’l & Comp. L. 157, 166 (arguing that neither the PJC nor the ICJ “has ever said that states are under an obligation to compensate their own citizens in cases where they have suffered harm at the hands of public authorities”).

82. De Greiff, supra note 23, at 455. See, e.g., Velásquez-Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 174 (1988) (“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”).

83. Roht-Arriaza, supra at 26, at 157–58 (“What could replace lost health and serenity; the loss of a loved one or of a whole extended family; a whole generation of friends; the destruction of home and culture and community and peace?”).

84. Id. at 165.

85. Id.

finding powerful forces (usually the government itself) liable for violations.”

In many cases, amnesty laws, relevant statutes of limitations, and procedural mechanisms block victims from pursuing civil claims or prohibit criminal prosecution.

As a result, many victims of grave human rights violations have had more success pursuing their claims in foreign courts. Particularly in the wake of World War II, several countries have “statutorily institutionalized” the principle of universal jurisdiction to hold perpetrators of grave human rights violations accountable. The universality principle recognizes that certain crimes are so reprehensible that they harm all people, and therefore any nation may act on behalf of the international community to prosecute and punish those responsible, regardless of where the crimes were committed. A national court may thus exercise universal jurisdiction only over those crimes regarded as serious violations of inter-

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87. Roht-Arriaza, supra note 26, at 165.
88. Id. The failure by States to ensure victims their right to reparation is particularly problematic where the substantive breach violated a *jus cogens* norm under customary international law, such as the prohibition against torture. Thus, while States may argue that the right to reparation for victims of torture is a secondary right that is derogable, at least one commentator has rejected such reasoning as untenable because it enables States to “in fact derogate from a peremptory norm by breaching it and not enforcing the respective consequences[,] an outcome [that] is conceptually incompatible with the very concept of *jus cogens*.” Alexander Orakhelashvili, *Peremptory Norms and Reparation for Internationally Wrongful Acts*, 3 Balt. Y.B. Int’l L. 19, 28 (2003).
89. Roht-Arriaza, supra note 26, at 166.
90. Reisman & Levit, supra note 34, at 434. For a comprehensive survey of state practice at the national level in approximately 120 countries relevant to universal jurisdiction prosecutions, see *Amnesty International, Universal Jurisdiction—The Duty of States to Enact and Enforce Legislation* (Sept. 2001). See also *Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art* (June 2006).
ternational law. Offenses rising to this level include war crimes, genocide, hostage taking, and torture.

Perhaps the most effective mechanism to date has been through civil claims under the U.S. Alien Tort Claims Act ("ATCA"), also referred to as the Alien Tort Statute. The ATCA 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." Foreign nationals may thus seek relief for harm they have suffered "in violation of the law of nations" or a treaty to which the United States is a party. States are immune to suit under ATCA, however, and therefore plaintiffs may only bring suit against violators "in their individual capacity."

Beginning with the seminal *Filártiga v. Peña-Irala* decision in 1980, foreign nationals have won numerous multimillion dollar judgments or verdicts against individual perpetrators including torturers, ex-generals, heads of state, and war criminals. However, U.S. courts may only exercise jurisdiction over a defendant where the court possesses *in personam* jurisdiction, and thus the defendant must be

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92. See Ex p. Pinochet Ugarte (No. 3), 1 A.C. at 148, 198. See also Arrest Warrant of 11 April 2000, 2001 I.C.J. at 81 (finding universal jurisdiction appropriate for "those crimes regarded as the most heinous by the international community").


94. Roht-Arriaza, supra note 26, at 157, 166.


96. Human Rights First, supra note 98 ("U.S. courts have interpreted violations of the 'law of nations' under the ATCA to include crimes against humanity, war crimes, genocide, torture, rape, and summary execution.").

97. Bassiouni, supra note 2, at 235.

98. Roht-Arriaza, supra note 26, at 167 (noting that while large judgments under the ATCA are generally uncollectible, they serve other purposes such as "allow[ing] victims to publicly tell their stories, publiciz[ing] the violations at issue[,] . . . official[ly] recognize[ing] that the plaintiffs were wronged," deterring perpetrators from traveling to certain countries or assuming high-ranking government positions, and catalyzing domestic action to address the violation); Human Rights First, supra note 99 ("[T]he ATCA has been used effectively on behalf of victims of gross human rights abuses perpetrated by well-known political and military figures—such as Ferdinand Marcos, Radovan Karadzic, and two Salvadoran generals—as well as by lesser-known government officials in different parts of the world.").
physically present in the United States. 99 Given this jurisdictional requirement, it seems unlikely—though not impossible—that Bahraini torture victims will have an opportunity to pursue claims under the ATCA.

Reparations in the context of transition from a period of authoritarianism to one of relative democracy is still a new concept within the field of international law. Thus, if international law is largely understood to “codify[] behavioral trends in state practice and shifting political attitudes on the part of governments with the intention of stabilizing and clarifying expectations about the future,” then the fact that the current system remains largely ineffective in holding Member States responsible for denying victims of massive rights violations their right to reparations is more easily understood. 100 Nevertheless, as long as “trends of national practice” in similar circumstances and “wider global trends toward individual accountability for crimes against humanity” remain entirely subservient to “domestic discretion” (and inaction), the right to reparation will continue to carry little practical significance for victims. 101 If this is the case, then perhaps Richard Falk will remain justified in “view[ing] reparations as primarily an expression of moral and political forces at work in different contexts.” 102

III. THE CURRENT BAHRAINI APPROACH

A. Bahrain’s Limited Progress

At present, the case of Bahrain serves as an example of a country whose “new” leadership is willing to renounce its oppressive past without taking conclusive action to address it. 103 While Bahrain has taken

99. Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (“[D]eliberate torture perpetrated under the color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within [U.S.] borders, [the ATCA] provides federal jurisdiction.”). See also Bassiouni, supra note 2, at 234.
100. Falk, supra note 1, at 480.
101. Id.
102. Id. at 485.
103. Id. at 495. The phrase “new leadership” is used loosely here, as many government officials from the preceding era of repression remain in positions of power despite the passing of the Amir and his son Hamad’s succession to power. The long-standing position of the Prime Minister, the Amir’s brother and the most powerful man in Bahrain according to many accounts, is telling in this regard. The Prime Minister is generally considered to be opposed to any “dramatic” reform. A power struggle has thus emerged between the Prime Minister and the King’s son, Crown Prince Salman, who is head of the Economic Development Board and more reform minded. The King has seemingly re-
measures over the last decade to comply with its various treaty obligations, the government continues to obfuscate its unwillingness to ensure that victims of torture have access to redress or other compensation.\textsuperscript{104} Bahrain’s civil code specifies that “[e]very unlawful act that has caused damage to others makes an obligation upon the person who committed it to pay compensation.”\textsuperscript{105} However, the law also shields public officials from liability where they were acting in an official capacity or based upon superior orders.\textsuperscript{106} Torture is also prohibited under multiple provisions of the penal code.\textsuperscript{107} Official statements praising the national reconciliation process stand in stark contrast to the government’s “failure to investigate promptly, impartially, and fully the numerous allegations of torture and ill-treatment and to prosecute alleged offenders,” and its refusal to provide “complete and disaggregated information about the number of detainees who have suffered torture or ill-treatment, including any deaths in custody, the results of investigations into the causes, and whether any officials were found responsible.”\textsuperscript{108}

Furthermore, the al-Khalifa regime seemingly remains averse towards viewing the situation as one of massive human rights violations, the scope of which might necessitate the use of nontraditional judicial mechanisms, such as a government-administered reparations program.\textsuperscript{109} Rather, the regime has suggested that victims of torture or ill-treatment have failed to exhaust access to redress through the Bahraini legal sys-
In reality, amnesty legislation has blocked attempts by torture victims to bring claims. While the sheer magnitude of abuses in Bahrain does not reach levels witnessed in postconflict States such as Germany, Argentina, or Peru, the numbers are such that even an earnest attempt to address all of the cases through the national legal system would inherently challenge certain bedrock norms—in particular, the premise that “norm-breaking behavior is more or less exceptional.”

Temporarily setting aside the fact that there is no evidence of victims receiving access to justice through the Bahraini civil system and no known instances of the State prosecuting perpetrators, a case-by-case approach raises other issues as well. According to De Greiff, the two biggest problems are that it serves to “disaggregate” both victims and the reparations process as a whole. Historically, victims do not all receive equal access to the courts, and disparities in damage awards inherently create a “hierarchy” of victims. Moreover, an individualized approach poses challenges from a publicity standpoint. Decisions pertaining to the disclosure of case-specific facts may make it difficult to provide consistent publication of information about awards. The task of effectively conveying to the public the “nature and magnitude” of reparations measures is compounded by this disaggregation. Finally, there is also the

110. CAT Comm. 1, supra note 19, para. 34. The Bahraini delegation before the Committee Against torture stated:

Nobody had filed a claim for civil compensation based on allegations of torture and nobody had brought a claim before the Constitutional Court alleging that Decree No. 56 of 2002 was unconstitutional. That proved the unsound nature and lack of credibility of claims for compensation that failed to exhaust domestic remedies. In effect, such claims merely damaged the interests of those who had suffered human rights violations.

Id.

111. Presentation by Carla Ferstman, Director of Redress, Accountability for Human Rights Violations in Bahrain, Aug. 23, 2006, at 2, available at http://www.redress.org/reports/Presentation%20on%20Bahrain%20Aug%202006%20_final_.pdf (noting that “a number of claims have indeed been filed” and blocked).


113. CAT Comm. 2, supra note 71, para. 6 (expressing concern at the “apparent failure to prosecute alleged offenders, and in particular the pattern of impunity for torture and other ill-treatment committed by law enforcement personnel in the past”); Presentation by Carla Ferstman, supra note 111, at 2 (addressing the inability of torture victims to bring claims as a result of the amnesty legislation).


115. Id.

116. Id.

117. Id.
risk that the completion of legal proceedings may not be coordinated with other reparative efforts that may play an equally important role in providing full restitution to victims.\textsuperscript{118}

B. Financing Massive Reparations and Questions of Political Economy

Transitional societies seeking to finance administrative reparations programs while consolidating democratic reforms typically face challenges resulting from the “political dimensions” of such an undertaking, and the omnipresent “scarcity of resources” dilemma.\textsuperscript{119} While Bahrain is certain to encounter a host of political, economic, and social obstacles in financing a massive reparations program, the country’s power structure and the conditions underlying its transition do present certain opportunities. Prominent among these is that, while the 1990s in Bahrain can aptly be characterized as a time of domestic upheaval and state repression, such circumstances differ considerably from those in a society simultaneously transitioning from war to peace, such as the case in El Salvador or Guatemala.\textsuperscript{120}

As a “relatively well-off” country with “a limited and easily identifiable set of victims,” Bahrain also fits the more traditional profile for governments that have implemented administrative reparations programs to address massive human rights violations.\textsuperscript{121} Noteworthy in this regard is that, similar to the experiences of nations such as Argentina and Chile, governmental abuses in Bahrain were committed “against a largely unarmed opposition,” absent conditions of armed conflict.\textsuperscript{122}

\textsuperscript{118} Id.

\textsuperscript{119} Alexander Segovia, Financing Reparations Programs: Reflections from International Experience, in The Handbook of Reparations, supra note 1, at 650, 652–53. The “political dimension” encompasses the negotiations among key stakeholders necessary to mobilize and allocate financial resources. Id. at 653.

\textsuperscript{120} Roht-Arriaza, supra note 26, at 174–75; Segovia, supra note 122, at 653.

\textsuperscript{121} Roht-Arriaza, supra note 26, at 169. According to the U.N. Development Programme’s 2008 Human Development Index (“HDI”) Rankings, Bahrain ranks 32nd out of 179 countries, making it a “high human development” country ahead of most of its Gulf neighbors and most developing countries. U.N. Development Programme’s 2008 Human Development Index Rankings, http://hdr.undp.org/en/statistics/ (last visited Feb. 16, 2009). The HDI provides a composite measure of three dimensions of human development: living a long and healthy life (measured by life expectancy), being educated (measured by adult literacy and enrollment at the primary, secondary, and tertiary level), and having a decent standard of living (measured by purchasing power parity income).

\textsuperscript{122} Roht-Arriaza, supra note 26, at 169.
Although Bahrain enjoys relative economic prosperity, any program of reparations will require the government to reallocate its current spending priorities and/or seek additional financial support. This is likely to remain a major political challenge without any significant changes to Bahrain’s internal power dynamics and in light of difficulties to date establishing consensus amongst national parties on the scope of any potential compensation payments by the government. However, the recent implementation of a controversial one percent income tax on all public and private sector employees to help fund a national unemployment insurance plan indicates that the government has the ability to mobilize the necessary resources where the political will exists. Ultimately, any progress on this front will require “the support of the Crown Prince and those loyal to him as this block was instrumental in advancing the key reforms of 2000, and national reconciliation is a critical precondition to the Crown Prince’s larger political agenda of modernizing Bahrain.”

Reparations, by their very nature, require the State to acknowledge its wrongful conduct by recognizing and compensating the victims. The Bahraini government has proved tremendously reluctant to acknowledge and accept responsibility. Instead, it has offered only blanket condemnation for the “situation” combined with limited progress. Such re-

123. C.I.A. World Factbook: Bahrain, supra note 8. “Facing declining oil reserves, Bahrain has turned to petroleum processing and refining and has transformed itself into an international banking center.” In 2007, Bahrain had an estimated real growth rate (GDP) of 6.7%. Id.
124. Segovia, supra note 119, at 655.
125. See supra note 103.
126. MPs Deadlocked over Riots Relief, GULF DAILY NEWS, Apr. 11, 2007. Members of parliament were unable to reach agreement on a proposal to compensate victims of political unrest during the 1990s. Potential beneficiaries discussed included victims of abuse as well as property owners who suffered damages. Id.
129. Segovia, supra note 119, at 655.
130. See CAT Comm. 2, supra note 71.
131. See, e.g., CAT Bahrain Comments, supra note 20, para. A(3) (The national reconciliation process “put an end to internal strife and brought the country out of the political and social crisis which had beset it, closing a chapter on the past and helping to create a climate conducive to the enjoyment of public freedoms.”).
luctance is undoubtedly tied to the fact that “programs of reparation are part of a more general human rights agenda, which involves the defense of traditionally marginalized social groups.” 133 Sectarian tension in Bahrain continues to simmer because the ruling Sunni elite have systematically marginalized Bahrain’s Shiite majority. 134 Therefore, any program of reparations in Bahrain is inextricably tied to the access and exercise of power. 135 This connection helps to explain the reticence exhibited by the Bahraini elite in earnestly addressing the past—particularly the Prime Minister—and why the ruling regime has taken only carefully calculated measures designed to ease pressure without producing any fundamental changes to the Bahraini power structure and its hold on power. 136

Hypothetically speaking, would nations with a strong interest in the stability of Bahrain—such as the United States or Saudi Arabia—ever contribute financially to a program of reparations in Bahrain? 137 Historically, foreign governments have made only limited financial contributions in support of such programs. 138 One explanation for this trend is that foreign States view financing reparations as a responsibility belonging to the State in transition. 139 Another explanation is that given the political nature of reparations programs, foreign governments are hesitant to get involved in a situation that could result in conflict with a govern-


133. Segovia, supra note 119, at 655.

134. See ICG REPORT, supra note 8. According to a 2006 assessment by the Economist, while Bahrain has a per capita income of close to $20,000, a third of the native Bahraini workforce earns less than $600 a month—suggesting a significant disparity in the distribution of wealth within the country’s native population. Playing by Unfair Rules; Bahrain, ECONOMIST, Nov. 25, 2006.

135. See generally Segovia, supra note 119, at 655.

136. CRS REPORT RL 31533, supra note 7, at 20. While promising, Bahrain’s political reforms are consistent with efforts ongoing in the other Gulf states, none of which “aim to fundamentally restructure power in any of these states.” Id. at summary.

137. This question does not imply that either the United States or Saudi Arabia bear any legal responsibility under international law for the practice of torture in Bahrain. This is an entirely different inquiry requiring analysis under the rules on state responsibility and the attribution of wrongful conduct to a State. Heidy Rombouts, Pietro Sardaro & Stef Vendeniste, in OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS, supra note 6, at 345, 482.

138. Segovia, supra note 119, at 659.

139. Id.
ment or an influential sector of a country such as the military. It thus seems highly unlikely that the United States would be willing to contribute to any such effort. Saudi Arabia is also unlikely to contribute financially, particularly given its own shameful human rights record and recent internal civil unrest.

C. The Moroccan Transitional Justice Experience

A large-scale reparations program is not an unprecedented measure for a State in the Middle East and North Africa (“MENA”) region. Since 1990, Morocco has implemented various transitional justice mechanisms in an effort to confront its repressive past, specifically the gross human rights abuses committed by the State in the decades following Moroccan independence in 1956. While Morocco’s experience is certainly unique and should not be understood as mapping directly to other MENA States, it offers critical insights about “both the promise and limits of truth-telling and reparations” and is beneficial to any discussion of transitional justice in Bahrain.

140. Id.
142. The U.S. war in Iraq and the corresponding empowerment of Iraqi Shiites and high levels of sectarian violence that resulted have produced “acute fears of potential Shiite unrest” in Saudi Arabia. CRS REPORT RL 31533, supra note 7, at 5.
143. ICTJ Morocco Overview, supra note 41. Victims of government repression included leftists, Islamists, Saharawi independence activists, unionists, military dissidents, intellectuals, and others considered to be threats to the State. INT’L CTR FOR TRANSITIONAL JUSTICE, WORKSHOP ON THE GOALS AND CHALLENGES OF REPARATIONS AS A TRANSITIONAL JUSTICE MEASURE IN IRAQ 44 (2007) [hereinafter ICTJ WORKSHOP] (on file with the International Center for Transitional Justice, Middle East North Africa Unit).
144. ICTJ WORKSHOP, supra note 143, at 44. For a discussion on the uniqueness of the Moroccan experience, see King Mohamed VI, The Speech of His Majesty the King Mohamed VI Announcing the Formation of the Commission for Equity and Reconciliation (Jan. 7, 2004), available at http://www.ier.ma/article.php3?id_article=1297 (“Reflecting on the different international experiences in this particular field, one must acknowledge that Morocco, acting with wisdom and courage, has managed to come up with a model of its own.”). See also MOROCCAN EQUITY AND RECONCILIATION COMM’N, SUMMARY OF THE FINDINGS OF THE FINAL REPORT 12 (Dec. 2005) (In examining “the issue of reparations through the experiences of truth commission that were formed across the world . . . the Commission concluded that there is no one model that can be adopted.”); An Interview with Hanny Megally, ALL AFRICA, Aug. 4, 2006 (“Each country has its own specificity as...
Morocco’s initial transitional justice efforts began in 1990, under the late King Hassan II, who presided over the most intense era of repression commonly known as the “years of lead” and lasting from the 1960s until the early 1990s. To quell mounting criticism, the King established the Human Rights Advisory Council (Conseil Consultatif des Droits de l’Homme) ("CCDH"), and the government released hundreds of political dissidents throughout the early part of the decade while taking limited measures to reform its incommunicado detention policies. Despite making formal reservations to each, Morocco ratified CAT, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child in 1993.

Similar to Bahrain, the death of King Hassan in 1999 and the succession to the throne of his more reform-minded son, Mohammed VI, presented a new opportunity to confront many of the unresolved issues tied to governmental abuses. King Mohammed VI ordered the formation of an independent Indemnity Commission ("IC") within the CCDH in order to compensate Moroccans “who suffered moral or physical prejudice as a result of enforced disappearance or arbitrary detention.” Over the course of four years, the IC decided more than 5000 cases and awarded a

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145. ICTJ Morocco Overview, supra note 41.
147. HRW Morocco, supra note 146, at 7.
148. Susan Slyomovics, No Buying off the Past: Moroccan Indemnities and the Opposition, 229 MIDDLE EAST REPORT 34 (Winter 2003). See generally Heidy Rombouts, Pietro Sardaro & Stef Vendeginste, supra note 137, at 345, 481–82. “Regime succession” is a typical precursor to reparations for gross and systematic human rights violations, and it is a well established principle of international law that “neither a change of government nor a major regime change accompanied by a political transition and a constitutional reform of the state” disengages the State’s liability for human rights violations committed by a previous regime. Id.
149. Susan Slyomovics, A Truth Commission for Morocco, MIDDLE EAST REP. 218 (Spring 2001).
total of approximately $100 million in reparations. However, the IC was criticized on “legal, moral and emotional” grounds. While the indemnity scheme acknowledged “implicitly, rather than explicitly, an official policy of illegal state practices,” compensation did little to meet the demands of victims seeking truth and justice, particularly those calling for the punishment of perpetrators. Moreover, the IC was derided for its lack of transparency, for the complicity of its administrators in past governmental human rights violations, and for its limited mandate, which precluded the body from resolving thousands of cases.

In 2004, King Mohammed VI took another major step by establishing the Commission for Equity and Reconciliation (Instance Equité et Réconciliation) ("IER"). He declared the IER to be “equivalent to a Truth, Justice and Reconciliation Commission.” The scope of the IER’s mandate was much broader than that of the IC, extending to “gross human rights violations that occurred between 1956 and the end of 1999.” As a result, the IER had broad authority to assess, research, investigate, arbitrate, and make recommendations on claims not only for forced disappearance and arbitrary detention, but also for torture, sexual abuse, and deprivation of the right to life due to unrestrained use of state force and forced exile. The IER was also responsible for continuing

150. ICTJ Morocco Overview, supra note 41.
151. Slyomovics, supra note 148, at 35.
152. Id. As Houria Esslami, sister of political activist and doctor Mohamed Esslami who was “disappeared” in 1997, explained:

    "In the first place, it is necessary to acknowledge all the disappeared, free those still living, speak the truth about the reasons for their disappearance and incriminate those responsible. It is only at that moment that one can speak about indemnification . . . ."

Id.
153. Id. The fact that the Commission did not have access to the extensive files of the security services and the Interior Ministry proved particularly damaging. ICTJ Morocco Overview, supra note 41.
154. Commission for Equity and Reconciliation, Mandate and Tasks, http://www.ier.ma/article.php3?id_article=1305 (last visited Dec. 19, 2007). The Commission’s mandate was from January 2004 to November 2005. The Commission was made up of a president and sixteen members, all appointed by the King upon recommendations by the CCDH. Nine of the members, including its president, were from the CCDH. Many of its members including its now-deceased president, Driss Benzekri, were former prisoners and torture survivors. ICTJ WORKSHOP, supra note 143, at 47.
155. MOROCCAN EQUITY AND RECONCILIATION COMM’N, supra note 144, at 1.
156. Id.
157. Id.
the work of the IC by compensating victims and their heirs.\textsuperscript{158} While the IER was only granted “non-judiciary powers” of investigation, “[public authorities were obliged to cooperate because of [the Commission’s] royal support.”\textsuperscript{159} The IER was also prohibited from identifying individual perpetrators and could thus only identify institutions responsible for abuses.\textsuperscript{160}

During the course of its activities, the Commission considered more than 22,000 applications and held “victim-centered, public hearings” televised throughout country.\textsuperscript{161} The IER released its final report in December 2005.\textsuperscript{162} The report details the responsibility of both State and nonstate actors for gross violations committed, and offers suggestions and recommendations for providing victims with the necessary “moral and medical rehabilitation and social reinsertion.”\textsuperscript{163} Given the extent of suffering endured by certain communities and regions, the Commission focused extensively on communal reparations as well. The Commission thus urged the “adoption of socio-economic and cultural development projects” tailored to those cities and regions, and “specifically recommended the conversion of former illegal detention centers.”\textsuperscript{164} The report also outlines specific measures that the Moroccan government and civil society can undertake to guarantee nonrepetition in the future.\textsuperscript{165} Finally, the report addresses the need for official acknowledgement of wrongdoing by recommending that the Prime Minister apologize publicly for past abuses.\textsuperscript{166}

The IER reparations program ultimately covered approximately 16,000 individuals.\textsuperscript{167} About $85 million in reparations was distributed to beneficiaries.\textsuperscript{168} These beneficiaries received compensation checks, which

\begin{itemize}
\item \textsuperscript{158} Commission for Equity and Reconciliation, \textit{supra} note 157. As part of its task to unveil the truth, the Commission is responsible for “[r]educing damages to the victims and/or their inheritors through material compensation, rehabilitation, social integration, and all other adequate means of reparations.” \textit{Id.}
\item \textsuperscript{159} ICTJ Morocco Overview, \textit{supra} note 41.
\item \textsuperscript{160} ICTJ \textit{Workshop, supra} note 143, at 45.
\item \textsuperscript{161} ICTJ Morocco Overview, \textit{supra} note 41. The IER held seven public hearings, which were widely attended and at times included the King’s senior advisers, government officials, opposition party leaders, diplomats, international press, and civil society representatives. ICTJ \textit{Workshop, supra} note 143, at 47.
\item \textsuperscript{162} ICTJ \textit{Workshop, supra} note 143, at 44.
\item \textsuperscript{163} ICTJ Morocco Overview, \textit{supra} note 41; ICTJ \textit{Workshop, supra} note 143, at 44; \textit{Moroccan Equity and Reconciliation Comm’n, supra} note 144, at 1.
\item \textsuperscript{164} \textit{Moroccan Equity and Reconciliation Comm’n, supra} note 144, at 2.
\item \textsuperscript{165} ICTJ Morocco Overview, \textit{supra} note 41.
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.}
\end{itemize}
included a letter of apology from the State. Minimum payouts to victims were set at 15,000 dirham (approximately $200 in 2006). In addition, all victims were eligible to receive health care. The Moroccan government funded the bulk of the reparations program with some assistance from the European Union.

Due to the restriction against identifying individual perpetrators, the IER has been criticized for maintaining impunity. The subsequent failure to prosecute or recommend the prosecution of individuals has reinforced the belief “some victims may feel that reparations without accountability is only limited justice.”

The IER was also criticized for not doing more to publicize its work and ensure victims adequate notification of the application deadline. This is partially attributable to the large size of Morocco and the many remote communities disconnected from the national media. Any reparations program in Bahrain should draw from the Moroccan experience by undertaking a comprehensive public information strategy aimed at making Bahraini victims aware of available compensation and the relevant deadlines. This should not be difficult given Bahrain’s “highly developed” communications infrastructure and the small size of the country.

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169. ICTJ WORKSHOP, supra note 143, at 48. The one-page letter acknowledged and apologized for government human rights violations. The package also included a ruling on the victim’s individual case, detailing “the specific violations to which the victim was subjected and the amount allocated as compensation.”

170. Id.

171. Id.

172. Id.

173. Id. at 49. For many victims, moral and legal measures of reparations are fundamental, while monetary compensation is controversial and problematic. . . . [V]ictims ask for official and societal acknowledgement that they were wronged, restoration of their good name, [and] knowledge of who and how it was done. . . . [C]ompensation was never enough, or even the most important thing. They especially note the hollowness of material reparations when there has been no pronounced reluctance to prosecute those responsible.

174. ICTJ WORKSHOP, supra note 143, at 49.

175. Id. The IER received 8000 applications after the one-month deadline.

176. Id.

177. C.I.A. World Factbook: Bahrain, supra note 8. Bahrain has a “highly developed” communications infrastructure and a total land area of 665 sq km (compared to Morocco’s 446,300 sq km). Id. Bahrain is also one of the most urbanized countries in the world,
CONCLUSION

Both the story of victim’s rights under international law and the story of Bahrain’s transitional justice experience are far from written. Efforts to close the gap between the rhetoric of human rights and the enforcement of such rights must remain a top priority. The inability of Bahraini torture victims to access justice at either the regional or international level underscores this need. The U.N. General Assembly’s adoption of the 2006 Basic Principles marks an important step in the evolution of human rights law towards a more “victim-centric” framework, but the doctrine must be translated into action in order to protect “the inherent dignity . . . of all members of the human family” on which “freedom, justice and peace in the world” is based.

In Bahrain, recent human rights developments serve as a reminder that there are many obstacles to overcome in guaranteeing respect for essential human rights at the domestic level. Nevertheless, there are also positive signs that some degree of justice may be forthcoming for Bahraini victims of state abuse. In June 2007, eleven Bahraini human rights organizations and opposition groups took the unprecedented step of forming a reconciliation pressure group to lobby the government for the creation of a truth and reconciliation committee (“TRC”) to address human rights abuses committed by the government from the 1970s to the 1990s. However, there has been no indication that the TRC will become official through government support or participation, or by grant-

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As its small population of 708,000 is heavily concentrated in the country’s two major cities, Manama and al-Muharraq, and in main towns such as Jidd Hafs, Sitra, al-Rifaa, and Madinat. HRW, ROUTINE ABUSE, ROUTINE DENIAL, supra note 5, at 9.

178. Bassiouni, supra note 2, at 204.

179. Universal Declaration of Human Rights, supra note 42, prmb.


181. Carnegie Endowment for Int’l Peace Arab Reform Bulletin: July/Aug. 2007, supra note 127. Suggestions for the TRC’s potential mandate included truth-finding and compensation payments to those who sustained injuries or were subjected to torture, deportation, or arbitrary arrest. Members also called for punishment of those allegedly responsible for torture in direct contravention of Decree 56, which pardoned all political prisoners and perpetrators responsible for human rights violations. Id.
ing TRC investigators access to files or personnel.182 Still, a follow-up coalition meeting was held in September 2007 and included the participation of representatives from the International Center for Transitional Justice.183 While the TRC’s launch date was set for December 10, 2007, the anniversary of the UDHR,184 no announcement has been made at the time of writing.

Bahrain appears to be at a crossroads. For the Al-Khalifa regime, pro-longed inaction without officially confronting and remedying past abuses risks igniting wide-scale civil unrest comparable to levels witnessed in the 1990s, or worse.185 Such a risk is compounded by the growing influence of Shiite Iran in regional affairs, and regional destabilization caused by the ongoing sectarian violence in nearby Iraq.186 Widespread civil unrest in Bahrain would also be detrimental to the United States and Saudi Arabia, which depend on the ruling regime and the stability of the island kingdom in pursuing their respective geopolitical and economic interests.187 On the other hand, official measures of reparation would build

182. Prospects for Transitional Justice in Bahrain, supra note 38, at 2. The government remains steadfast in its position that the 2002 pardon remains valid, and that the pardon includes all parties. As such, explained Social Development Minister Fatima al-Balooshi, “[T]he law does not allow for review of cases that fall within the timeframe of the pardon . . . .” DPA: Bahraini NGO’s, Opposition Launch Truth and Reconciliation Panel, DEUTSCHE PRESS-AGENTUR, June 27, 2007.


184. Id.


186. See CRS REPORT RL 31533, supra note 7.

187. See CRS REPORT FOR CONGRESS 95-1013, supra note 15; Prospects for Transitional Justice in Bahrain, supra note 38.
upon the encouraging precedent established in Morocco while demonstrating that political survival and respect for human rights are not mutually exclusive in the Middle East of tomorrow.

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