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THE RISE OF EQUALITY IN INTERNATIONAL LAW AND ITS PITFALLS: LEARNING FROM COMPARATIVE CONSTITUTIONAL LAW

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INTRODUCTION

Since the end of the United States Supreme Court’s “Lochner era” in 1936, federal and state legislators have had unbridled authority to regulate economic matters in the United States. Having determined that the legislature is the arm of government best-suited to make such regulatory decisions, the Supreme Court announced that constitutionally challenged economic legislation would be subjected to the most deferential standard of judicial review. On the international stage—particularly in the wake of the global financial crisis that began in 2007—one would expect judicial deference toward socioeconomic regulation to be a foregone conclusion. However, the United Nations Human Rights Committee (the “Committee”) has actually harked back to a brand of judicial scrutiny reminiscent of the Lochner era, having recently condemned certain types of public interest legislation as incompatible with international equal protection.

The Human Rights Committee was established after the entry into force of the International Covenant on Civil and Political Rights (“ICCPR”) in 1976 and is now the primary international body charged with monitoring the implementation of this important human rights treaty. Meeting regularly in Geneva and New York, the Committee is comprised of 18 individual experts reviewing formal complaints of international human rights violations and rendering responsive opinions (known as “views”) under the Optional Protocol to the ICCPR. Since its inception, the Committee has amassed a substantial body of recommend-
dations, and several have dealt with the principle of nondiscrimination. It has been in this context that the Committee’s recommendations bear resemblance to Lochner era adjudication.

The principle of nondiscrimination prohibits any distinction, exclusion, restriction, or preference that is based on any grounds, such as race, color, or other identifiable individual or group distinctions. Most early cases before the Committee concerned claims of narrowly defined discrimination in the enjoyment of civil and political rights under the ICCPR, but more recently, the Committee has reviewed a broader range of disputes involving social and economic legislation. Recent views have demonstrated the Committee’s willingness to expand the meaning of “equal protection” under the ICCPR, and, given the subject matter underlying the disputes in question, there is reason to believe the Committee will find issues of equal protection increasingly relevant to the propriety of certain types of socioeconomic legislative measures in the


7. This development began in 1987 when the Committee dealt with gender discrimination in socio-economic legislation. See Zwaan-de Vries v. Netherlands, supra note 5.
future. Therefore, the Committee has already applied rigorous scrutiny to such measures.

While the Committee’s jurisprudential ideology differs from the laissez-faire capitalism of the *Lochner* Court—it aims instead to protect the interests of disadvantaged citizens—their standard of judicial scrutiny is similarly demanding. As a result, the Committee has deemed a number of laws incompatible with international human rights and the ICCPR. Though the efforts of the Human Rights Committee to enhance equality on the international level are well-intentioned, these efforts may have a chilling effect on the future enactment of important socioeconomic legislation. Socioeconomic legislation is often, by necessity, based on distinctions among groups, as it is designed in pursuit of public interests. If legislation is rejected as discriminatory because the Human Rights Committee is prone to second-guess the legislature’s rationale, the legislature may be tempted to avoid enacting such laws in the first place. Thus, it is necessary to work toward developing a more thoughtful approach to international equal protection going forward. International judicial organs should carefully evaluate the implications of their jurisprudence before introducing a sweeping interpretation of equality that does not adequately represent international human rights standards.

Of course, the Committee’s approach is only part of a broader trend to extend the scope of the nondiscrimination principle to the international plane. A central problem with the Committee’s methodology arises from the concept of international equal protection itself, since the term’s precise meaning is still essentially unsettled. The opaqueness of the nondiscrimination provision calls for a clearly enunciated conceptualization and begs the question whether there is a generalized human rights norm to treat all persons equally, or whether international law is only concerned with certain invidious distinctions. Since the case-by-case approach applied by international human rights institutions lacks coherence at present, adjudicative bodies should look to the experience

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9. See id.

10. See infra Part I.A. Another difference is the fact that the *Lochner* Court applied economic due process while the Human Rights Committee applies equal protection analysis. But, in effect, both rationales can be used to invalidate economic legislation.


gained over time under domestic equal protection jurisprudence in order to refine their approach.

In this Article, I explore the most recent developments in international jurisprudence in order to evaluate the consequences of such developments critically and make suggestions for the future of nondiscrimination analysis. In Part I of this Article, I will explain the expanding role of equal protection in international law, and highlight jurisprudential shortcomings and misconceptions within recent Human Rights Committee views. In Part II, I will examine equal protection interpretation under various domestic constitutional regimes and argue that such comparative analysis should guide international equal protection application. Finally, in Part III, I will propose a coherent doctrinal framework for the future of international equal protection jurisprudence.

I. THE SPREAD OF INTERNATIONAL EQUAL PROTECTION

The principles of nondiscrimination and equal protection have been on the dockets of international human rights institutions for decades, and various conventions and treaty mechanisms have been established in order to deal with specific types of discrimination. Still, while the concept of "equal protection" is embedded in the existing comprehensive human rights instruments, the exact meaning of the term as used in various clauses requires clarification.

Whereas the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Elimination of All Forms of Discrimination against Women are tailored to specific distinctions, the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") both prohibit general discriminatory application of domestic laws based on distinctions provided within the covenants themselves. Such prohibited grounds of dis-

16 ICESCR, supra note 13.
17 For a comparison of the nondiscrimination provisions under the different human rights treaties, see Aileen McColgan, Principles of Equality and Protection From
Crimination include: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”\(^{18}\) Article 1 of the American Convention on Human Rights\(^ {19}\) and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibit discrimination on identical grounds.\(^ {20}\)

While these provisions spell out an accessory right, providing only for the equal enjoyment of conventional rights, Article 26 of the ICCPR goes


18. The ICCPR reads:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, supra note 3, art. 2, ¶ 1. See also, ICESCR, supra note 13, art. 2, ¶ 2. For the guarantee of equal enjoyment of the Covenant rights to men and women, see ICCPR, supra note 3, art. 3.

19. Article 1, paragraph 1 reads:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.


20. Art. 14 of the Convention states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

even further by referring to equal protection “before the law” as a matter of formal equality and equal protection “of the law” as a matter of substantive equality, and by neglecting to limit the Article’s application to the rights enumerated in the Covenant. The American Convention on Human Rights also provides for a comprehensive right to equal protection. No such general provision is found in the European Convention. However, Protocol No. 12 to the European Convention, promulgated in 2005, extends the nondiscrimination principle beyond the scope of conventional rights by providing for a general prohibition of discrimination, which applies to any right set forth by law.

Though the nondiscrimination principle has generally been recognized in various treaties, the search continues for a more fleshed out interpretation. As the body called upon to apply and interpret the ICCPR, the Human Rights Committee has dealt extensively with the meaning of “equal protection of the law.” As compared to Article 2(1), the broad

21. Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, supra note 3, art. 26.


23. The Convention notes that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” ACHR, supra note 19, art. 24.


25. Article 1, paragraph 1 of the Protocol states:

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Protocol No. 12, supra note 24, at 2, art. 1, ¶ 1.

26. See cases cited supra note 5.
wording of Article 26 has led the Committee to deal with a considerable number of discrimination cases that, upon first glance, would not appear to fall within the realm of civil and political rights.\(^{27}\) By 1987, the Committee had already determined that Article 26 prohibits discrimination in law or in practice in any area regulated and protected by public authorities, including unemployment benefits.\(^{28}\)

This line of jurisprudence is of particular relevance to cases implicating a variety of socioeconomic interests. Since the ICESCR does not yet provide for an individual complaint procedure, the complaint mechanism under the ICCPR seems to be an attractive alternative for complainants to pursue their claims before the Committee. This is all the more true since the Committee has recently taken an even broader interpretation of its mandate, and has, in the process, opened new grounds for challenging allegedly discriminatory practices and laws. While the Committee originally only dealt with clear-cut cases of gender discrimination in socioeconomic matters, it has now indicated that it is willing to apply Article 26 to other types of discriminatory distinctions. This change of course will likely prompt complainants to use the equal protection clause as a vehicle to enforce social and economic rights more generally, as evinced by recent disputes to come before the Committee.

A. Application to Economic Issues

A recent dispute reviewed by the Committee, *Haraldsson and Sveinsson v. Iceland*,\(^{29}\) illustrates the new areas of application of the universal nondiscrimination clause of ICCPR Article 26. In *Haraldsson*, the Committee dealt with the Fisheries Management System in Iceland and the question of whether giving preferential treatment to existing fishing licenses violated new license applicants’ equal protection rights.\(^{30}\) In response to overfishing, Iceland adopted an Act in 1985 requiring a fishing permit for several species of fish.\(^{31}\) The Act gave preferential treatment to those vessels that had received permits in the previous three years: only those ships were entitled to fishing quotas on the basis of their catch


\(^{28}\) Zwaan-de Vries v. Netherlands, supra note 5, at 168, para. 12.3.

\(^{29}\) *Haraldsson and Sveinsson*, supra note 8.

\(^{30}\) Id.

\(^{31}\) Id. at 4.
performance during the reference period. A new permit was only to be granted if a vessel already in the fleet was decommissioned. However, because the quota share of a vessel was transferrable, access to the regulated fishing market, at least in practice, depended on the purchase or lease of such a quota on the free market.

Market prices for quotas rose considerably and the complainants in this case, having purchased a ship without an attached quota, faced bankruptcy from the entitlement leasing expense. They denounced the system and started fishing without catch entitlements in order to challenge the Act’s validity. As a result, the complainants were fined, and this sentence was confirmed by the Supreme Court of Iceland. Shortly thereafter the complainants declared bankruptcy and faced considerable financial hardship in the subsequent months.

The authors of the communication claimed that the quota discriminated against new fishers, who had to pay money in order to take part in the fishing of regulated species, and further denied the fishers the opportunity to pursue the occupation of their choice in accordance with “the principles of freedom of employment and equality . . . .” Iceland contested these claims, pointing out that freedom of employment is not protected by the ICCPR. According to Iceland, there was also no impermissible discrimination in violation of Article 26, because the fisheries management system sought to prevent over-fishing and to protect the vital public interest of the State.

One might assume that this case, which was effectively concerned with economic matters, would be dealt with under the “freedom of work” doctrine. In jurisdictions that provide this right via their constitution, this is

33. Haraldsson and Sveinsson, supra note 8, at 6, para. 2.8. The Act, however, stated that the fishing banks around Iceland were the common property of the nation and that the quotas to the ships would not give rise to rights of private ownership. Id.
34. Id. at 6, para. 3.1.
35. Id. at 6–7, paras. 3.2–3.3.
36. Id. at 7, para. 3.4.
37. Id. at 7, para. 3.5.
38. Id. at 7, para. 4.1.
39. Id. at 9, para. 5.6.
40. Id. at 9, para. 5.7.
41. See David P. Currie, Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany, 1989 SUP CT. REV. 333, 347, n. 110 (1989), reprinted in 9 GERMAN L.J. 2179, 2194, n. 110 (2008) (describing the basis of the doctrine in German law to be the belief that one’s vocation “is the foundation of a person’s
primarily a matter of access to, and the practice of, a profession.\textsuperscript{42} However, in the absence of a complaint procedure under the ICESCR, the challenge was brought under the Optional Protocol of the ICCPR.\textsuperscript{43}

B. The Sweeping Interpretation of the Nondiscrimination Grounds

The Committee, in its analysis under Article 26, reiterated its prior interpretation that discrimination does not only apply to exclusions and restrictions, but also to preferences.\textsuperscript{44} The differentiation between fishers in business during the statutory reference period and fishers who had to purchase or lease quota shares from the first group was considered to be a distinction which “is based on grounds equivalent to those of property.”\textsuperscript{45} In order to satisfy Article 26, such a distinction must be objective and reasonable according to the standing jurisprudence of the Committee.\textsuperscript{46} Though the aim of protecting fish stocks was considered legitimate, the measure of granting quotas on a permanent basis was not deemed reasonable by the majority of the Committee.\textsuperscript{47} They preferred a system in which quotas no longer in use would revert to the State for allocation to new holders in accordance with standards of fairness and equity.\textsuperscript{48}

Though the Icelandic statutory regime raises questions about its inherent fairness, it is more questionable whether it qualifies as an unlawful discriminatory State action. The Committee’s line of reasoning, however, is based on a broad scope of nondiscrimination protection and establishes a high level of justification under Article 26. In short, the Committee considerably extended the grounds of nondiscrimination. At issue was the distinction between those taking part in fishing during the reference period and new fishers. The Committee asserted that this statutory distinction was equivalent to a distinction based on property,\textsuperscript{49} but, in effect, the distinction was not based on property, or anything of the sort. Properly understood, the distinction turns on the extent of fishing

\textsuperscript{42} See, e.g., Grundgesetz fur die Bundesrepublik Deutschland [GG] (Basic Law) May 23, 1949, Bundesgesetzblatt, Teil I (BGBl. I), as amended, § 2034, art. 12.

\textsuperscript{43} Id. at 3. Since there is no right to freedom of work in the Civil and Political Covenant, the case could only be dealt with under Article 26.

\textsuperscript{44} General Comment No. 18, supra note 6, ¶ 7.

\textsuperscript{45} Haraldsson and Sveinsson, supra note 8, para. 10.3.

\textsuperscript{46} See, e.g., Zwaan-de Vries v. Netherlands, supra note 5, at 167–69 paras. 12–15.

\textsuperscript{47} Haraldsson and Sveinsson, supra note 8, para. 10.4.

\textsuperscript{48} Id.

\textsuperscript{49} According to Yuji Iwasawa, in his dissenting opinion in the Haraldsson matter, the case involved none of the explicitly-listed grounds of prohibited discrimination. Id. at 25–26.
conducted in a given reference period. This is a purely factual distinction relating to actions taken. It is true that the statute allowed established fishers to accrue an economic asset (the right to partake in fishing), but this was merely a side effect of the regulation, not the result of any discriminatory distinction. By the time the complainants entered the market, most of their competitors had already purchased their quotas as well. The real problem in this case is not the distinction among competitors but the permanent distribution of quotas. This is not a matter of discrimination on the basis of property (or anything equivalent) but a matter of access to the profession. Such a dispute should be dealt with under Article 6 of the ICESCR. It seems that the Committee circumvented the ICCPR’s lack of such a provision by resorting to the nondiscrimination clause.

There is another argument that cautions against such an extensive reading of Article 26. If discrimination on the basis of property is interpreted to prohibit de facto discrimination on the basis of economic assets, there may hardly be any socioeconomic regulation immune to challenge. Such loose interpretation goes far beyond that which appeared in earlier Committee recommendations. For instance, in Zwaan de Fries v. the Netherlands and Broeks v. the Netherlands, the Committee discussed the prohibition of gender discrimination in unemployment law, and explained that Article 26 went beyond Article 2, in that it was also applicable to rights not guaranteed by the ICCPR. However, these were cases involving de jure instances of gender discrimination. Once it was determined that Article 26 was applicable, it was undeniable that there had been an impermissible discrimination on the grounds of sex, because the laws themselves were based on gender stereotypes.

In Haraldsson and Sveinsson v. Iceland, on the other hand, the Committee substantially broadened the scope of challengeable discriminatory distinctions in ruling for the complainants. After all, it is one thing to use an expansive reading of the covenant to forbid racial and gender discrimination in areas of life that are not explicitly protected, but it is quite another to read the grounds for discrimination so broadly as to equate

50. Zwaan-de Vries v. Netherlands, supra note 5.


53. This was the view taken by the Committee in Broeks and Zwaan-de Vries. Zwaan-de Vries v. Netherlands, supra note 5; Broeks v. Netherlands, supra note 51. See also General Comment No. 18, supra note 6, ¶ 12.
almost all imaginable distinctions with those listed explicitly in Article 26. Therein lies the crucial difference between Zwaan de Fries and Haraldsson. Whereas Zwaan de Fries only scrutinized those socioeconomic regulations that discriminated between men and women, Haraldsson essentially opened the door to challenges for a much wider array of socioeconomic regulations—whenever a potential complainant can claim membership to some sort of identifiable group—and this is problematic.

The trouble with the Committee’s interpretation is not the application of the nondiscrimination principle to non-Conventional rights, but, rather, the seemingly unlimited extension of impermissible grounds. Properly viewed, however, the Committee’s interpretation was part of a broader jurisprudential development established in earlier cases, which indicated a gradual extension of the scope of nondiscrimination. Those prior decisions resorted to the term “other status,” and thereby extended the grounds of nondiscrimination under Article 26 beyond those explicitly mentioned in the Convention. In Gueye et al. v. France, the Committee held that differentiation by reference to “nationality acquired upon independence” falls within the parameters of “other status.” The Committee has also dealt with discrimination based on marital status, which it considered a protected class similar to those enumerated in Article 26.

However, the instances in which the Committee considered such distinctions unreasonable were limited. Distinctions such as those between

55. After all, socioeconomic legislation is necessarily based on distinctions when it seeks to address social costs or benefits affecting specific groups. See Gianluigi Palombella, The Abuse of Rights and the Rule of Law, in Abuse: The Dark Side of Fundamental Rights 5, 12 (András Sajó ed., 2006). Thus, if Article 26 were to apply to virtually all distinctions arising under the law, then there would hardly be any area of law that could avoid a test for reasonableness.
56. But see Ando, supra note 3; Tomuschat, supra note 3.
57. See cases cited supra note 6.
59. Id. at ¶ 9.4. In Guyel, the Committee considered the different treatment of Senegalese as compared to French citizens with respect to military pensions. Id. This, however, cannot be read as a general mandate to treat aliens and nationals equally in the context of social-security. Distinctions between citizens and aliens are permissible if based on reasonable and objective criteria. U.N. Hum. Rts. Comm., Report of the Human Rights Committee: General Comment No. 15, ¶ 17, U.N. Doc. A/41/40 (Apr. 11, 1986).
60. See Nowak, supra note 3, at 625.
employed and unemployed persons, between graduates and others, between persons sharing a household with their parents and others, as well as between police officers and volunteer firemen, were found to be reasonable and objective. The significance of this jurisprudence was rather limited, not only because these cases involved unique fact patterns, but also because of the lenient level of scrutiny applied, which regularly upheld legislative distinctions. The interpretation of equal protection in Haraldsson and Sveinsson v. Iceland, on the other hand, was quite novel. There, the Committee demanded a high level of justification and extended the scope of Article 26 to discrimination based on economic circumstances, thereby clearing the way for a far more inclusive economic equal protection analysis. Such an extension of the nondiscrimination grounds moves Article 26 in the direction of a general principle of equality, which requires equal treatment in all contexts and on all grounds. This is a dubious undertaking that seemingly has no basis in the text of the Article itself. Though Article 26 provides for equal protection of the law, it explicitly notes that such protection shall be “without any discrimination.” What is meant by “discrimination” is then specified in the second sentence, which lists “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Even though reference is made to “other status,” which opens the concept of nondiscrimination to new grounds of exclusion, the enumeration of impermissible grounds, such as race, sex, and social origin, suggests that it must be comparable to the grounds specified.

It is dubious at best to claim that engagement in fishing during a certain period of time can be compared to such personal characteristics as race, gender, and religion. In effect, extending the grounds of nondiscrimination to such a vague, almost random, criteria of distinction, which relates to entirely fact-specific situations and personal behavior, devalues the other grounds of discrimination. As a consequence, almost all imaginable groups and activities will fall within the scope of Article 26, and, thus, any form of statutory distinction could be scrutinized by the Committee. When it comes to international human rights protection, such


62. See NOWAK, supra note 3, at 626–27. It is, however, doubtful whether such distinctions fall within the scope of “other status” in the first place.

63. ICCPR, supra note 3, art. 26.

64. ICCPR, supra note 3, art. 26. For a contextual reading of the two sentences, see NOWAK, supra note 3, at 609.
a generalized concept of equality goes too far.\textsuperscript{65} Even when appearing unreasonable, some distinctions simply cannot be deemed unlawfully discriminatory.\textsuperscript{66}

C. The Level of Scrutiny

Such a broad interpretation of the nondiscrimination principle is particularly problematic when combined with a high level of scrutiny for the justification of distinctions. In \textit{Haraldsson and Sveinsson v. Iceland}, the Committee held that the State party had not shown that the particular quota system met the requirements of reasonableness.\textsuperscript{67} The State argued that the quota system was necessary to protect sustainable fishing in Iceland.\textsuperscript{68} Though the protection of fish stocks was acknowledged as a legitimate aim, the existence of permanent entitlements rendered the law unreasonable.\textsuperscript{69} The application of the reasonableness test in \textit{Haraldsson and Sveinsson v. Iceland} shows that the standard for justification is more demanding than a basic “rational basis” review.\textsuperscript{70} The Committee engaged in a searching analysis of proportionality in which it asked what means would be least intrusive while still effective.\textsuperscript{71} Yet, by favoring a revertible quota, the majority of members substituted their preferences for the Icelandic legislature’s and effectively applied a necessity test.

It is startling that the Committee, in just a few sentences, concluded that the quota fishing system of Iceland was unreasonable. The case involved a complicated matter of economic and environmental regulation with competing and conflicting public and private interests.\textsuperscript{72} The legis-


\textsuperscript{67} \textit{Haraldsson and Sveinsson, supra} note 8, para. 10.4.

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} The United States Supreme Court, in economic matters not involving suspect or quasi suspect classifications, has applied the arbitrary and capricious test, a low standard of reasonableness. \textit{See, e.g.}, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

\textsuperscript{71} \textit{Haraldsson and Sveinsson, supra} note 8, para. 10.4.

\textsuperscript{72} Public interest demanded restrictions on commercial fishing in order to prevent over-fishing. \textit{Id.} at para. 5.7. The government enacting the legislation tried to reconcile the interest in the environment with the interest in a prosperous fishing industry. \textit{Id.} at para. 5.8. The goal of the quota system was to manage fisheries in the most sustainable and efficient manner in order to guarantee profitable and economically efficient utilization of the fish stocks. \textit{Id.} at para 5.7–8. But with the distribution of quotas, new fishers’
lature considered not only the public interest in conservation of their natural environment, but also the interest in a vital and sustainable fishing industry.\footnote{Id. at 10.4.} The rights of those taking part in the fishing economy, as well as those trying to enter the business, also had to be taken into account.\footnote{See id.} The divergence of these interests did not render the solution an easy one. It involved value judgments and prospective decisions. The State party must have concluded that a different model would jeopardize operating vessels’ investments (i.e., previously purchased quotas) and would consequently endanger the fishing industry in the future. The Committee, in open disagreement with the Supreme Court of Iceland, did not accept this rationale.\footnote{Id. at para. 10.4.}

The lack of deference to the careful evaluation of the matter by State organs is striking. The Icelandic statutory framework had been revised several times in response to judgments by the Supreme Court of Iceland in order to accommodate individual rights.\footnote{See id. at para. 2.1.} Finally, the highest court of Iceland had held the restriction on commercial fishing by the quota system to be compatible with the equal protection clause of the Constitution.\footnote{Id. at 6, para. 2.6.} The court, in explaining its finding, noted that permanent catch entitlements had made it possible for operators to plan their activities for the long term.\footnote{Haraldsson and Sveinsson, supra note 8, para. 2.6.} It is difficult to see why such a responsible analysis and revision by the State party should not be considered reasonable. Taking interests in access to the fishing industry conflicted with the interests of those existing fishers who had already acquired quotas. Meanwhile the government merely tried to facilitate long-term planning, \textit{id.} at para. 5.8, and to create stability for those who had invested in fishery operations, \textit{id.} at para 5.3. The government acknowledged that existing fishers had become dependent on this sector for their livelihoods. \textit{id.} at para 5.7. With the permanent quotas, the government sought to protect those individuals who had direct interests in the protection of extensive investment in vessel operations, \textit{id.} at para 5.7, and, at the same time, the government took action for the sake of the general public interest. \textit{id.} at para 2.7.

\footnote{Id. at para. 10.4.}
\footnote{See id.}
\footnote{Id. at para. 10.4.}
\footnote{See id. at 4, para. 2.1.}
\footnote{Id. at 6, para. 2.6. According to Iceland’s Constitution:}

\begin{quote}
All shall be equal before the law and enjoy human rights without regard to sex, religion, opinion, national origin, race, color, financial status, parentage and other status. . . . Men and women shall enjoy equal rights in every respect.
\end{quote}


\footnote{Haraldsson and Sveinsson, supra note 8, para. 2.6.}
into account that the case involved purely economic matters without any kind of invidious discrimination (such as a distinction on the basis of race or gender), it would have been adequate to defer to the parliament’s evaluation and to limit judicial review to an arbitrariness standard. The Committee’s mere perception that a statutory regulation was unjust or inequitable should have been insufficient to render it in violation of the ICCPR.

D. The Role and Capacities of the Committee

It is not clear whether the consequences of this new kind of equal protection analysis have been fully considered. If Article 26 is continually interpreted and applied in this fashion, the Committee will soon be confronted with a veritable onslaught of disputes encompassing a vast array of fact patterns. Such disputes will demand a high degree of competence in order to be properly evaluated and the Committee will be required to balance competing concerns to determine whether the high threshold of reasonableness advocated in *Haraldsson and Sveinsson v. Iceland* has been met. Not only will professional and technical competence be necessary, the Committee will also need a deeper understanding of complicated areas of economic and social regulation. Such an undertaking creates an unnecessary and distracting burden on an international human rights body.

It is true that in the late 1980s the interpretation of Article 26 as a non-accessory right in *Zwaan de Fries* attracted similar criticism, but that interpretive leap was clearly justified. The current trend of extending the meaning of this provision further by moving the nondiscrimination rule in the direction of a less deferential, general equal protection principle has a new quality. Previously, the Committee limited its analysis to the grounds spelled out in Article 26, and, thus, the judicial analysis was restrained by the text of the Convention. In *Zwaan de Fries v. the Netherlands* the Committee explained that art. 26 “does not extend to differences of results in the application of common rules in the allocation of benefits.”

79. Arguably, Article 26 was never implicated here, because the statute at issue did not concern any of the nondiscrimination grounds.


81. Opsahl in 1988 already questioned whether the Committee is competent to become an effective Ombudsman for Equality in every area covered by legislation. Opsahl, supra note 22, at 64.

82. See, e.g., Tomuschat, supra note 3, at 227.

83. In *P.P.C. v. the Netherlands* the Committee explained that art. 26 “does not extend to differences of results in the application of common rules in the allocation of benefits.” *P.P.C. v. the Netherlands* (Communication No. 212/1986), reprinted in, U.N.
lands, it was clear that the gender discrimination at issue was based on stereotypes and therefore unreasonable.\textsuperscript{84} But if a dispute is purely economic (i.e., if it concerns an area of purely socioeconomic issues), and if the distinction is based on economic facts (e.g., fishing during the reference period in the case of \textit{Haraldsson and Sveinsson}), the analysis of the regulation’s reasonableness will involve an assessment of factors that lie beyond the sphere of human rights standards. There is then a risk that claimants will use the individual complaint procedure to have a broad range of legislation reviewed by the Committee on the basis of equal protection. This will lead to an unmanageable load of cases and a reduction in judicial effectiveness. Furthermore, it is doubtful whether such a course of action would further the interests in economic, social, and cultural rights. The ICESCR is much better equipped with the expertise to resolve such issues and will be competent to consider individual communications once the Optional Protocol to the ICESCR enters into force.\textsuperscript{85}

Fortunately, several members of the Committee took nuanced positions in dissent. Sir Nigel Rodley, for instance, having acknowledged the difficulties a nonexpert international body faces in attempting to master the issues at stake, called for greater deference to the State party’s determination.\textsuperscript{86} Yuki Iwasawa also advocated a wider scope of legislative discretion in economic regulation.\textsuperscript{87} Ruth Wedgwood concurred with Iwasawa, arguing that the ICCPR is not a “manifesto for economic deregulation” and that the Committee should remain true to the limits of its legal and practical competence in order to protect the important rights covered by the Covenant.\textsuperscript{88} Elisabeth Palm, Ivan Shearer, and Iulia Antoanella Motoc, in their dissenting opinions, did not require such deference.\textsuperscript{89} Instead, they required distinctions to be “based on objective ground” and “proportionate to the legitimate aim pursued.”\textsuperscript{90} They concluded, however, that Iceland had carried out a “careful balance” and

\textsuperscript{84} The Netherlands, by changing the law retroactively, seemed to acknowledge that the differentiation involved gender discrimination. See \textit{Zwaan-de Vries v. Netherlands}, supra note 5, at 162, para. 4.5.


\textsuperscript{86} Haraldsson and Sveinsson, supra note 8, at 24.

\textsuperscript{87} Id. at 25–26.

\textsuperscript{88} Id. at 27.

\textsuperscript{89} Id. at 22.

\textsuperscript{90} Id. The Committee, however, used the terms “objective” and “reasonable” in describing the standard they would adhere to. Id. at 19–20, ¶ 10.2.
met this test. This lack of unanimity among the members may indicate that the Committee will reevaluate and refine its approach to equal protection analysis in the future.

II. LEARNING FROM CONSTITUTIONAL EQUAL PROTECTION

The following section will make some suggestions for the future conceptualization of international equal protection. In order to develop a solid and constructive approach, it is necessary to evaluate the underlying rationales of the equal protection doctrine. With that end in mind, consideration of the evolution of the equal protection principle in the context of domestic law and its interpretation over time is instructive.

A. The Focus on Grounds of Nondiscrimination

The equal protection principle, a fundamental feature of modern constitutional law, has many facets and has evolved substantially over the past two centuries. Equal protection “before the law” was first emphasized as early as the French Revolution. It required equal application of the law and thus became particularly relevant to the administration of law. Later, the Civil War Amendments to the United States Constitution introduced the principle of equal protection “of the law,” which binds the legislature, as well as the judiciary and the executive. The Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The earliest interpretation of this edict was limited to the prohibition of slavery. In the nineteenth century, the concept of comprehensive, substantive equal protection was not yet developed. It was an advent of the twentieth century that

91. Id. at 22.
92. For the relationship between comparative law and international law, see George A. Bermann, Le droit comparé et le droit international: allis ou ennemis?, 2003 REVUE INTERNATIONALE DE DROIT COMPARE 519 (2003).
93. Déclaration des droits de l’homme et du citoyen de 1789, art. 6.
94. See Nowak, supra note 3, at 598.
96. U.S. Const. amend. XIV.
98. For the historical development of the nondiscrimination doctrine, see, Stolleis, supra note 65, at 7–122. See also Opsahl, supra note 22; Karl Josef Partsch, Fundamental Principles of Human Rights: Self-Determination, Equality and Nondiscrimination, in 1
domestic and international law went beyond procedural protection and focused on the more specific prohibition of discrimination on the basis of certain individual characteristics.\textsuperscript{99}

Beginning with the \textit{Slaughter-House Cases} in 1873, the U.S. Supreme Court interpreted the Equal Protection Clause of the Fourteenth Amendment to prohibit racial discrimination.\textsuperscript{100} Though this was the first official enunciation of the equality principle, the Court refused to apply the clause beyond the context of discrimination based on race and alienage until the 1960s.\textsuperscript{101} Then, the Court gradually tabulated a list of quasi-suspect classifications covering such grounds as gender and illegitimacy.\textsuperscript{102} More recently, the Court has refused to expand the list further, reasoning that the Equal Protection Clause could then be used to expand constitutional rights beyond those explicitly recognized in the Constitution.\textsuperscript{103} As Justice Powell explained, “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”\textsuperscript{104} In sum, despite its seemingly broad wording, the Equal Protection Clause of the U.S. Constitution has never been interpreted by the Supreme Court as providing for general equality. The pursuit of such broader goals has instead been left to the legislature.\textsuperscript{105}

The insight that equal protection is best expressed by identifying specific grounds of nondiscrimination was also manifested in several other post-World War II constitutions.\textsuperscript{106} These examples usually differ from the open-ended text of the French and U.S. Constitutions.\textsuperscript{107} Though they

\textsuperscript{99} Partsch, \textit{supra} note 98, at 73.

\textsuperscript{100} Slaughter-House Cases, 83 U.S. at 81.


\textsuperscript{104} Id.


\textsuperscript{107} For ready access to constitutional law worldwide, see \textit{Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies} (Albert P. Blaustein & Gisbert H.
also provide for equal protection of the law, they tend to include non-discrimination clauses that define equal protection by spelling out impermissible grounds of nondiscrimination. The Canadian Charter of Rights and Freedoms, for example, mentions race, national or ethnic origin, color, religion, sex, age, and mental or physical disability. The South African Constitution contains a more elaborate catalog. Apart from the traditional nondiscrimination grounds, such as race, color, ethnicity, alienage, and gender, it outlaws discrimination on the basis of wealth, age, disability, religion, conscience, belief, culture, language, birth, sexual orientation, pregnancy, marital status, and social origin. In both jurisdictions, constitutional equal protection review is not a matter of general equality but of invidious discrimination. According to the Supreme Court of Canada, “[E]quality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good


reason, or that otherwise offend fundamental human dignity.” The South African Constitutional Court also gives special attention to specific grounds of nondiscrimination and has interpreted the general equal protection clause narrowly.

B. Equality as a Measure to Probe Legislation?

There have been efforts in a few jurisdictions to go beyond textual nondiscrimination distinctions and test legislation under general principles of equality, but those efforts have been challenged. One example comes from the German constitution, the German Basic Law, which provides both a general principle of equality clause in Article 3(1) and a nondiscrimination clause in Article 3(3). In practice, the latter plays a less significant role due to the fact that constitutional adjudicators are mainly concerned with the general equality principle. In that sense, equal protection has become a structural principle for the organization of government, and is utilized primarily to limit the government’s discretionary power. With this emphasis, German equal protection analysis differs from that of many other jurisdictions that focus on specified grounds of discrimination. Nonetheless, it should be noted that German courts do not apply a uniform standard of review for all inequalities. The level of scrutiny varies depending on the subject matter concerned and the distinction upon which unequal treatment is based.
Federal Constitutional Court applies a high level of scrutiny only with respect to distinctions implicating fundamental rights and distinctions based on grounds sufficiently similar to those specified in Article 3(3), such as race, sex, gender, language, national origin, disability, faith, religion, and political opinion. Other types of distinctions are evaluated for arbitrariness. Though German jurisprudence does not formally distinguish between different classifications, such as suspect classification and quasi-suspect classification, the courts’ analyses vary depending on the nature of the distinction involved and its potential implications. Compared to the United States’ jurisprudence, the analysis of the German Constitutional Court is generally more probing, but the standard of review applied in individual cases depends nonetheless on the distinction made. In this sense there are parallels between these jurisdictions, as will be further addressed below.

Suffice it to say that the concept of equal protection has not remained fixed throughout its history. Equal protection of the law, as a matter of substantive equality, has raised many difficulties, as the principle of equality itself is intrinsically vague and therefore requires specification. Most courts have tried to give meaning to this general principle by focusing on the concept of nondiscrimination, and this is true even in jurisdictions where the text of the constitutional equal protection clause
is open-ended, such as the United States. The interpretation of such general clauses reveals a focus on specific types of distinctions, requiring higher standards of justification. A general equal protection analysis going beyond these nondiscrimination grounds is rather exceptional in constitutional review. It is very controversial; thus, it is far from representing a universal consensus. If exercised at all, such an approach usually applies different standards of review depending on the nature of the discrimination at issue.

C. The Transfer to International Equal Protection

Given the historical development of equal protection norms in domestic law, it should come as no surprise that the equality principle has also been codified as a nondiscrimination principle on the international level. The ICCPR, for instance, incorporated both the principle of equality “before the law” and equality “of the law.” However, language within the ICCPR indicates that its drafters never meant to provide for general quality with respect to all socioeconomic legislation—the ICCPR explicitly states that equal protection “of the law” merely protects against discrimination on specified grounds. In this sense, Article 26 of the ICCPR exhibits several parallels to modern equal protection provisions, and the grounds listed in Article 26 seem to reflect an international consensus with respect to impermissible grounds for discrimination.

Consistent with this wording, the early jurisprudence on Article 26 focused on the nondiscrimination clause as a clarification of equal protection. However, by extending its application in later reports, the Committee has moved it in the direction of a general equality principle. The nondiscrimination principle, which was introduced in order

128. See sources cited supra note 107.
129. Partsch, supra note 98, at 73.
130. Id. at 69.
131. Id.
132. Id. at 73.
134. But see Tomuschat, supra note 3, at 227 (suggesting that Article 26 merely applies to enacted laws).
135. The first sentence of Article 26 explicitly refers to the right to equal protection of the law “without any discrimination.” ICCPR, supra note 3, art. 26. The second sentence identifies specific grounds of discrimination which are impermissible. Id.
136. See Nowak, supra note 3, at 598; see also Part II.A.
137. See cases cited supra note 6.
138. See analysis of Haraldsson Case at supra Part I.B.
to clarify the equal protection principle, thereby stands to lose its essential contours and meaning. Given the historical trajectory from equality “before the law,” to equality “of the law,” to the nondiscrimination principle, this shift toward an open-ended notion of equality seems almost anachronistic. At the very least, it is unparalleled in the world of constitutional law due to its generality and breadth.

It is important to remember that the ICCPR is an international human rights instrument concerned with the protection of fundamental rights.139 It sets universal standards that its Member States are required to guarantee at a very minimum.140 In the interpretation of these standards, the Committee should not lose sight of comparative constitutional law. The legal practice of several democratic states has also guided the European Court of Human Rights in its analysis of the nondiscrimination principle of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.141 This is not to advocate a least common denominator approach to international law, but to encourage the consideration of the profound legal discourse that has occurred regarding similar matters of domestic law. At least in the area of equal protection, it is not the prerogative of the Human Rights Committee or the regional courts of human rights to expand their interpretations beyond the views shared within comparative constitutional law without a firm legal basis.142

Yet another argument cautioning against such a sweeping interpretation is that the rise of equal protection of the law has far-reaching structural implications with respect to nation-state governments and separation of powers. The dialogue surrounding constitutional equal protection has long been preoccupied with the tension between democracy and constitutionalism.143 However, with judicial review moving in the direction of a general principle, equality of the law is evolving into more of a tool for the judiciary, rather than a matter for democratically-elected legislatures. In short, legislative determinations are increasingly subjected to judicial scrutiny in order to ascertain whether they adequately provide for

139. ICCPR, supra note 3, art. 5.
140. ICCPR, supra note 3, preamble.
142. For a comprehensive overview of equal protection in domestic and international law, see GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ (Rüdiger Wolfrum ed., 2003).
substantive equality. This adjudicatory second-guessing could cause a chilling effect on socioeconomic legislation, which would be counter-productive to the societal goals of enhancing social and economic wealth. This approach is already questionable on the domestic level, and it is definitely not embraced by all states.¹⁴⁴

Furthermore, international institutions, such as the European Court of Human Rights and the Human Rights Committee, are not in a competent position to comprehensively reassess democratic decisions regarding economic and social issues.¹⁴⁵ It is one thing to evaluate a law as to whether it constitutes racial, sexual, or otherwise suspect discrimination, but it is quite another thing to demand that all distinctions arising from legislation meet vague standards of general equality and pass the substantial hurdles of review in accordance with reasonable and objective criteria. The question of what is reasonable and fair is context-specific; thus, it is unlikely that the standard of fairness is homogenous enough to qualify as a universal principle, and it is even less likely that it could qualify as a human rights principle. In other words, to clothe purely economic inequalities as an issue of human rights raises serious concerns over the dilution of the human rights ideal. Therefore, international judicial bodies should be confident in exercising more judicial self-restraint, not only in the face of their already overwhelming case loads, but also as a matter of democracy. International human rights bodies should not blithely interfere with, or substitute their analyses of socioeconomic legislation for, that of democratically elected legislators and competent constitutional adjudicators, particularly in disputes that have been carefully scrutinized by responsible domestic institutions.

III. SUGGESTIONS FOR FUTURE INTERNATIONAL EQUAL PROTECTION ANALYSIS

As the foregoing discussion has shown, the Committee’s current reading of the equal protection clause of the ICCPR does not reflect broad consensus, and a focus on nondiscrimination would be preferable. The analysis of the Committee’s interpretation demonstrates that the basic problems arise with the proper reading of the grounds of discrimination and in the definition of reasonableness. These elements, therefore, are the focus of the following discussion. Drawing on domestic jurisprudence, I will make suggestions for a future conceptualization of international

¹⁴⁴ Partsch, supra note 98, at 69.
equal protection, and I will consider ways to integrate early Committee recommendations into a coherent equal protection doctrine.

A. Focus on Nondiscrimination Analysis

One step to adequately deal with nondiscrimination cases in the future would be to focus on the grounds of discrimination explicitly delineated\(^{146}\) and to develop a differentiated doctrinal framework along these lines. According to settled Human Rights Committee doctrine, Article 26 of the ICCPR is applicable to any field regulated and protected by public authorities; however, this does not mean that it provides for a principle of general equality.\(^{147}\) Equality "of the law," pursuant to Article 26, merely prohibits discrimination on the bases listed in the second clause.\(^{148}\)

It is therefore incumbent upon the Committee to further specify the grounds of nondiscrimination that will be entertained as potential violations of Article 26. If an excessively broad interpretation of those grounds is not avoided, nearly any distinction could be characterized as discrimination, and this would result in comprehensive scrutiny of a plethora of legislation for reasonableness.

One example is discrimination based on property. As the Haraldsson case demonstrates, with a broad reading of the term "property," almost every piece of economic regulation could be considered discriminatory on the basis that some controlling distinction is equivalent to a distinction based on property.\(^{149}\) If "property" were interpreted to include "all forms of economic assets," the Committee would soon have to contend with the reasonableness of tax laws, which regularly provide for different levels of regulation depending on an individual's income and assets. Subsidies and public procurement laws could also become the subject of the Committee's scrutiny. This would be similarly questionable. Of course, to advocate a stricter reading of Article 26 is not to remove

\(^{146}\) This approach was already advocated by Partsch. Partsch, \textit{supra} note 98, at 69. \textit{But see} Georg Nolte, \textit{Gleichheit und Nichtdiskriminierung, in Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechts-Schutz} 235, 237 (Rüdiger Wolfrum ed., 2003).

\(^{147}\) \textit{See, e.g.}, Zwaan-de Vries \textit{v. Netherlands}, \textit{supra} note 5, at 168.

\(^{148}\) This is also the approach taken by the Inter-American Court of Human Rights. The Court of Human Rights has interpreted Article 24 of the American Convention on Human Rights as referring to the grounds of nondiscrimination in Article 1, paragraph 1. Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am Ct HR (ser A) No. 11 (Aug. 10, 1990), para. 22.

\(^{149}\) \textit{Haraldsson and Sveinsson}, \textit{supra} note 8.
“property” from lists of explicit discriminatory distinctions, but it would be sensible for the Committee to focus on such cases in which voting rights, for example, are afforded discriminately on the basis of property. Evaluating economic and social regulations comprehensively but without greater doctrinal focus is beyond the scope of Article 26.

B. The Meaning of “Other Status”

Though the list in Article 26 is not exhaustive, one should be careful in extending it to remote bases of impermissible discrimination. The reference to discrimination on the basis of “other status” renders the concept flexible over time, but there is an implicit caveat that overreaching should be avoided. The term “other status” should not be interpreted so expansively that it becomes the primary measure of the reasonableness of legislative acts.\(^\text{150}\) Instead, this term should be interpreted contextually, in light of the other grounds explicitly listed.

There is consensus that discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, and birth” is unacceptable.\(^\text{151}\) Further, the grounds listed in Article 26 refer to identifiably distinct categories.\(^\text{152}\) They are personal characteristics that should not be the principal determinants of an individual’s rights or privileges. Some are immutable, such as race, colour, sex, origin, and birth, reflecting the idea that individuals are born equal.\(^\text{153}\) Others follow from an exercise of universally accepted fundamental rights, such as freedom of religion, the right to own property, and free-


\(^{153}\) Tomuschat, \textit{supra} note 3, at 232 (referring to these characteristics as “stable characteristics”). However, Sadurski argues that “immutability” is not an adequate or appropriate touchstone for determining the existence of impermissible classifications. Sadurski, \textit{supra} note 115, at 78–84. Instead, he advocates focusing on the wrongful motives of prejudice and hostility in discerning whether legislative enactments are discriminatory. \textit{Id.} at 93–102.
dom of expression (political or otherwise). Distinctions based on these traits are intolerable because they seriously jeopardize the fundamental concept of human rights—the conviction that individuals are born equal with inalienable rights. This conviction is called into question when a governmental body distinguishes citizens on one of these bases. This understanding of nondiscrimination is reflected in the jurisprudence of several constitutional courts. As the South African Constitutional Court in *Prinsloo v. Van der Linde* explained, unfair discrimination means essentially “treating persons differently in a way which impairs their fundamental dignity as human beings.” A similar approach was adopted by the Supreme Court of Canada in the matter of *Law v. Canada*. There, the Court explained that the purpose of the equality rights provision of the Canadian Charter is “to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice.”

It is not only the area of application that triggers equal protection analysis, but also the particular nature of the distinction and the criteria used in the implementation thereof. In other words, fundamental rights are not only implicated where there is unequal treatment with respect to the specified areas protected by the Covenant, but also if there is discrimination in other fields of law on the basis of, for example, race, religion, opinion, or sex. Therefore, a high standard of scrutiny should be exercised in reviewing the following types of legislation: (1) legislation under which distinguishable groups do not enjoy the same fundamental rights (e.g., voting rights); and (2) legislation under which a specific type of discrimination, such as racial discrimination, is so invidious that it cannot be tolerated regardless of the exact context in which the distinction is made. For instance, where public benefits are distributed on the basis of race, the basic human right of equal dignity before the law is subverted. A high burden of justification ought to be demanded from any legislature willing to pass such a measure.

155. *See Va. Const. of 1776, § 1, reprinted in, 7 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America* 382 (Francis N. Thorpe ed., 1909) (“That all men are by nature equally free and independent, and have certain inherent rights.”); *Déclaration des Droits de l’Homme et du Citoyen de 1789*, art. 1, (“Les hommes naissent et demeurent libres et égaux en droits.”) [Men are born and remain free and equal in rights.].
156. *Prinsloo v. van der Linde* 1997 (6) BCLR 759 (CC) (S. Afr.).
157. *Id.* at para. 33.
159. *Id.* at 516.
The distinctions listed in Article 26 make up significant elements of personal identity, however, other grounds of discrimination, such as sexual orientation, age and disability, should be similarly protected as immutable personal characteristics. Still, it is unclear whether additional characteristics, particularly those linked to personal decisions of free will, should be included in this list. One example is marital status. That married couples enjoy preferential treatment such as tax benefits is unlikely to be deemed a human rights issue. Marital status is not an invidious distinction because there are a number of legitimate reasons for legislatures to afford certain types of benefits to married couples but not to single individuals. These reasons include the State’s interest in family welfare, as well as the lack of impact on unmarried individuals’ fundamental rights (provided they do not wish to marry).

C. Refining the Standard of Reasonableness

If a legislature wishes to cast distinctions on the basis of any of the explicitly enumerated grounds or on a sufficiently analogous basis, the distinction must then be justified. As the Committee has explained repeatedly, there is no absolute prohibition on legislation that treats certain groups differently from others. Rather, it is only those distinctions that

160. In other words, it is not only immutability or prejudice and hostility which might explain the classifications listed in Article 26. See Sadurski, supra note 115, at 78–84 (critiquing the use of “immutability” alone as a measure of discrimination).

161. The Committee has found that discrimination on the basis of sexual orientation is a form of sexual discrimination, and thus contrary to articles 2, paragraph 1, and 26 of the Covenant. Toonen v. Australia, (Communication No. 488/1992), reprinted in Hum. Rts Commm., Report of the Human Rights Committee, at 235, U.N. Doc. A/49/40 (Sept. 21, 1994). But see, Nowak, supra note 3, at 623 (favoring the inclusion of sexual orientation with the definition of “other status”). Another good reason to consider sexual orientation as an “other status” is that it goes to the heart of the right to privacy.

162. Love v. Australia (Communication No. 983/2001) at 14, ¶ 8.2, U.N. Doc. CCPR/C/77/D/983/2001 (Apr. 28, 2003) (noting that age discrimination is generally impermissible; however, it may be justified if “based on reasonable and objective criteria”).


164. The South African Constitutional Court refers to “fundamental dignity” of human beings in its equal protection analysis. Prinsloo v. van der Linde 1997 (6) BCLR 759 (CC) at para. 31 (S. Afr.); see also Ackermann, supra note 111, at 112.

165. But see, Damning v. Netherlands, supra note 61 at 151, para. 14; Sprenger v. the Netherlands, supra note 64, at 308.

are neither objective nor reasonable that are to be deemed impermissi-
ble. Still, the standard of reasonableness is inherently vague and
neither the Human Rights Committee’s General Comment on Nondi-
scripation nor the relevant case law defines the term “reasonable.”
Given the recently expanded scope of application of the principle of
nondiscrimination in the Committee’s jurisprudence, it is necessary to
specify what is meant by “reasonableness.” Of course, crafting a def-
inition of the term may be easier said than done, and the substantial
number of dissenting opinions in recent cases indicates that there is a
controversy among the Committee with respect to the meaning of—and
the standards for determining—reasonableness.

1. Different Levels of Scrutiny

The “reasonable and objective” criterion is also to be found in domestic
constitutional equal protection jurisprudence and in the case law of the
European Court of Human Rights. Generally speaking, what is “rea-
sonable” can only be determined by comparing the competing interests at
stake in a given dispute. This involves a balancing inquiry; the adjudica-
ator evaluates the legislative aim in relation to its consequences with the
goal of striking a certain degree of proportionality between the two. In
the Case “Relating to Certain Aspects of the Laws on the Use of
Languages in Education in Belgium,” the European Court of Human
Rights explained that “[t]he existence of . . . a justification must be
assessed in relation to the aim and effects of the measure under consid-
eration.” Therefore, the Court requires a legitimate aim and a “reaona-

167. Zwaan-de Vries v. Netherlands, supra note 5, at 168, para. 13; Broeks v. Nether-
lands, supra note 51, at 150, para. 13.
168. General Comment No. 18, supra note 6, ¶ 13.
169. See, e.g., Brok and Brokova v. Czech Republic, supra note 80 at 110; Diergaardt
Ando, supra note 3, at 220.
170. The proportionality analysis is found, for example, in Germany, France, and Pol-
land. See Guy Carcassonne, The Principle of Equality in France, 1998 ST. LOUIS-
WARSAW TRANSATLANTIC L.J. 159, 159–72; Leszek Lech Garlicki, The Principle of
Equality and the Prohibition of Discrimination in the Jurisprudence of the Constitutional
Tribunal of Poland, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 7 (1999); Jouanjan,
supra note 127, at 59–78.
constitutionnel.fr.
172. Case “Relating to Certain Aspects of the Laws on the Use of Languages in Educa-
173. Id.
ble relationship of proportionality between the means employed and the aim sought to be realised.”\textsuperscript{174} Even though the Human Rights Committee does not regularly refer to the term “proportionality,” its earlier method of dispute analysis clearly reflected a balancing of the competing interests.\textsuperscript{175} Thus, it was unsurprising that Committee members Elisabeth Palm, Ivan Shearer, and Iulia Antoanella Motoc used the phrase “proportionate to the legitimate aim” in their dissenting opinions in the Haraldsson case.\textsuperscript{176}

So, ultimately, “reasonable” means “proportionate to a legitimate aim.” But the answers to the questions, “what will be found to be a legitimate aim?” and, “what consequences will be found to be proportionate to that aim?” still depend on the distinction at issue. An examination of comparative jurisprudence reveals that the level of scrutiny varies depending on the nature of discrimination. For example, adjudicators require governmental bodies to provide much more compelling justifications if drawing distinctions on the basis of race as compared to gender.\textsuperscript{177} But a more compelling justification is required for gender distinctions than for those based on property.\textsuperscript{178} It is impossible to conceive of any justification for de jure discrimination on the basis of race, but the idea of common but differentiated responsibility under socioeconomic legislation may very well justify distinctions based on property. In other words, the exact standard of justification should depend on the specific ground of discrimination at issue. The more a distinction jeopardizes the recognition of fundamental rights, the more demanding the scrutiny of its “reasonableness.” As explained, this is a common theme in constitutional jurisprudence.\textsuperscript{179} For instance, the use of the term “suspect classification” in U.S. equal protection analysis reflects the understanding that certain distinctions, such as race, are not acceptable and, therefore, presumptively


\textsuperscript{175} See cases cited supra note 6.

\textsuperscript{176} Haraldsson and Sveinsson, supra note 8, at 22; see also id. at 25 (in his dissenting opinion, Committee member Yuji Iwasawa concluded that the disadvantages of the regulation were not disproportionate to the advantages).


\textsuperscript{178} Choudhury, supra note 3, at 27; Gerards, supra note 177, at 172.

\textsuperscript{179} See, e.g., Garlicki, supra note 170, at 9.
invalid.\textsuperscript{180} A high threshold of justification and a particularly careful analysis is required in such cases.\textsuperscript{181}

This balancing approach can also be recognized in international case law. According to the European Court of Human Rights, discrimination on the basis of race or ethnicity is particularly invidious, and, therefore, no difference in treatment will be justified if it is based exclusively on those immutable traits.\textsuperscript{182}

A heightened level of justification is also usually sought with respect to gender discrimination. The Human Rights Committee explained in \textit{Müller and Engelhard v. Namibia}\textsuperscript{183} that differential treatment based on gender “places a heavy burden on the State party to explain the reason for the differentiation.”\textsuperscript{184} The European Court of Human Rights asks for “very weighty reasons” as well when it comes to gender discrimination.\textsuperscript{185}

However, in cases involving distinctions based on property—i.e., purely economic distinctions—the Committee’s analysis should be more deferential.\textsuperscript{186} The Committee should follow Yuji Iwasawa’s approach—explained in Iwasawa’s dissenting opinion in the \textit{Haraldsson} case—and state actors should be afforded wide latitude in devising economic regulatory policies.\textsuperscript{187} Such government action should not be found imper-

\textsuperscript{180}. For a critical evaluation of the “\textit{per se}” test and the “color blindness” theory, see Sadurski, \textit{supra} note 115, at 74–84.

\textsuperscript{181}. Loving v. Virginia, 388 U.S. 1 (1967); \textit{see also Haraldsson and Sveinsson, supra} note 8, at 25–26.


\textsuperscript{184}. \textit{Id. at} 243, para. 6.7.


\textsuperscript{187}. Committee member Iwasawa explained that, “[s]tates should be allowed wider discretion in devising regulatory policies in economic areas. . . . The Committee should be mindful of its own expertise in reviewing economic policies that had been formed
missible under Article 26 under the rubric of unfairness. This was also the position of Committee member Sir Nigel Rodley, who recognized the insufficient capacity of an international body to master the issues at stake in economic regulations and, therefore, conceded deference to the State party’s arguments.\(^{188}\) It is telling that, even under the most stringent domestic law standard of review, deference is still given to the legislature when it comes to purely economic matters.\(^{189}\) As mentioned above, under the “new formula” of the German Federal Constitutional Court, a more lenient standard of review is exercised in these matters.\(^{190}\) Distinctions neither based on discriminatory grounds nor deemed to affect a fundamental right are tested only for manifest inappropriateness.\(^{191}\) In this respect, German jurisprudence is similar to that of many other jurisdictions. A comparison of domestic constitutional jurisprudence reveals that distinctions involving purely economic matters are usually upheld.\(^{192}\)

It is difficult to understand why international human rights protection should go further in developing overly stringent standards of equal protection scrutiny. Presumably, this is due to a misunderstanding of the term “reasonable,” which is inherently vague. The Human Rights Committee should therefore enhance its doctrinal understanding of Article 26 with a focus on refining the term “reasonable” as used in nondiscrimination analysis, in order to ultimately differentiate its analytical approach according to the intensity with which unequal treatment affects fundamental rights.\(^{193}\)

carefully through the democratic process.” Haraldsson and Sveinsson, supra note 8, at 25–26.

188. Id. at 24; see also, Sadurski, supra note 115, at 72 (stating that “the ideal of equality in the law is narrower and more specific than an ideal of overall justness.”).

189. See, e.g., Carolene Products Co. v. United States, 344 U.S. 144 (1944).

190. Eberle, supra note 106, at 2100.

191. The “new formula” only provides for a more stringent standard of review if basic rights are affected and if discrimination is based on grounds similar to those listed in Article 3, paragraph 3 of the Constitution. Apart from this, an arbitrariness test is applied. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 7, 1980, 55 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 72 (89) (F.R.G.). The regulation at issue in Haraldsson and Sveinsson v. Iceland would not be invalidated on the basis of equal protection. For the jurisprudence under the “new formula” in general, see Sachs, supra note 120, at 152–53.

192. Baer, supra note 116, at 257.

193. This does not duplicate the fundamental rights analysis. Equal protection becomes relevant if the analysis reveals that there has not been a violation. This is particularly relevant in cases in which a State party goes beyond the standards of the Covenant and makes distinctions between different groups of people.
2. Standards of Review or a Sliding Scale?

By standardizing the review according to the severity of the discrimination—an approach comparable to that of the U.S. Supreme Court, which distinguishes between suspect, quasi-suspect, and other classifications\(^{194}\)—the Committee could generate a more coherent equal protection doctrine. The respective standards would each specify permissible aims, as well as the proper means-to-ends relationship. The U.S. standard of review ranges from “strict scrutiny” to deferential “rational basis” review: strict scrutiny review applies to suspect classifications and infringements of fundamental rights;\(^{195}\) intermediate scrutiny applies to quasi-suspect classifications;\(^{196}\) and rational basis review applies to non-suspect classifications.\(^{197}\) Under strict scrutiny review, statutory distinctions based on race and alienage can only pass muster if they serve a compelling state interest and are narrowly tailored to achieve that designated interest.\(^{198}\) The intermediate standard of review—applied, for example, to classifications based on gender and illegitimacy—requires a substantial connection between the classification and an important government objective.\(^{199}\) And rational basis review—the least rigorous standard, which applies to nonsuspect distinctions such as economic status—requires merely that the given statutory means be rationally related to the achievement of a legitimate legislative aim.\(^{200}\)

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194. This approach has not gone unchallenged in the United States. For example, Justice Thurgood Marshall advocated a “sliding scale” methodology, which entails that the intensity of judicial review should vary depending on the value of the particular interest or individual right affected and the importance of the legislative goal. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting).


199. ‘Important’ means that a purpose needs to be less than compelling but more than legitimate, where as ‘substantial’ means that the classification must be more than reasonable but less than the almost perfect fit between ends and means, which is required for suspect classifications. See, e.g., Craig v. Boren, 429 U.S. at 190.

The advantage of this approach—as compared to proportionality analysis or the sliding scale method pursued by Continental European courts and the European Court of Human Rights—is standardization. It arguably renders judicial outcomes more predictable and perhaps even more rational. The flexible standards and the case-by-case approach found in the German Federal Constitutional Court and the European Court of Human Rights case law have been criticized as lacking doctrinal coherence and predictability and leaving too much room for judicial value judgments. On the other hand, a certain degree of subjectivity will always exist with any method of nondiscrimination analysis. Even in the United States, the questions of whether a classification is suspect or quasi-suspect, and whether a classification serves an important objective, both require judgments of value. Further, what may seem to be a standardized level of scrutiny may vary in its application to individual cases. In practice and implementation, the difference between the European sliding scale approach and the U.S. standard of review approach is almost insignificant. Even though the European approach lacks formally standardized levels of scrutiny, the jurisprudence of these Courts effectively reflects varying degrees of scrutiny depending on the nature of the discrimination and its implications. The outcomes of equal protection cases in European domestic courts shows that distinctions which impinge on the exercise of fundamental rights have a much harder

202. See Partsch, supra note 98, at 69.
204. According to Dupuy, the determination as to whether a statute is reasonable requires an evaluation of socio-cultural elements, traditions, and mentalities. Pierre-Marie Dupuy, Equality under the 1966 Covenants and in the 1948 Declaration, in Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz 149, 154 (Rüdiger Wolfrum ed., 2003).
time surviving judicial scrutiny than discrimination based on purely economic categories.  

The difference between the two approaches should not be overstated. If European scrutiny is more demanding in some areas, it is not due to a difference of method. Rather, the variance is more appropriately attributable to different value judgments with respect to the invidiousness of a classification. German jurisprudence, for example, is concerned with the protection of vulnerable groups more generally and tends to exhibit a different understanding of the role of the judiciary in shielding those groups from what it perceives as harmful.

What is important is that domestic and international courts realize that the degree of their review must correspond to the invidiousness of the discriminatory classification. As such, regardless of whether the Committee adopts a variable proportionality analysis or a standardized test, it will need to fine-tune its analysis. In practice, the Committee has already applied the “reasonable” test with varying intensity. A close look at the Committee’s reasoning in particular cases shows that the standards of justification have indeed varied. While a more lenient approach originally dominated judicial review of socioeconomic legislation, such that a number of regulatory distinctions were upheld, more recent cases trend toward increasing demands for justification, even when no fundamental rights are at stake. The Committee should re-evaluate this trend and take note of the varying standards it has applied in earlier cases. In order to develop a balanced and consistent approach, it is high time to acknowledge the underlying rationale of equal protection and to structure equal protection analysis accordingly.

Even if the Committee is not willing to develop a standardized test for different categories of discrimination, the Committee must define the contours of the “reasonableness” test, and, in doing so, must acknowledge that it is in fact utilizing a proportionality review in order to determine what is reasonable. As a matter of transparency, the Committee should specify what aims are permissible, clarify the means-to-ends relationship, and note that the standards will vary depending on the na-

208. Id. at 256. Judicial self-restraint is not a common theme of European constitutionalism.
209. See cases cited supra note 6.
210. The Committee usually engaged in an intermediate standard of review, standing somewhere between basic rationality and strict scrutiny. See cases cited supra note 6.
211. See Ando, supra note 3, at 213–22 (detailing accounts of relevant cases).
ture of the discriminatory distinctions at issue. After all, the more a distinction or its implications affect a fundamental human right, the more rigorous the justification requirements for permissible state interests and for the means-to-ends relationship. Finally, with respect to economic matters, a deferential approach should be applied across the board.

CONCLUSION

Article 26 of the ICCPR comprises two elements of equality: equality before the law (i.e., formal equality); and the principle of nondiscrimination (i.e., substantive equality of the law). In order to inject real meaning into the concept of equal protection, it is necessary to focus on the enumerated grounds of impermissible discrimination as set forth therein. The nondiscrimination rule renders the abstract notion of equality more concrete because it indicates the criteria by which equality should be granted; however, Article 26 does not provide for a principle of general equality that supersedes the nondiscrimination grounds. The emphasis on nondiscrimination is also the predominant approach in domestic constitutional law across a number of jurisdictions. The structural parallels of equal protection rules in international human rights instruments and national constitutions imply that comparative constitutional analysis is a valuable tool for evaluating the meaning of the international nondiscrimination principle. After all, equal protection rules are based in the same historical preoccupation with harnessing the control of State power in the interest of protecting human rights. International equal protection is thus yet another field in which comparative constitutional law can play a significant role, and a shift toward such analysis offers mutual benefit for all involved.

Thus far, the discussion in the United States has centered on the question of whether comparative constitutional analysis is a permissible tool in the interpretation of national constitutional law. However, it is not only domestic constitutional jurisprudence that stands to benefit from a

212. This appears to be implicit in the Committee’s evaluation of whether a regulation is reasonable.
213. Unfortunately, General Comment No. 18 already seems to depart from the assumption that Article 26 comprises three elements: equality before the law, equal protection of the law, and nondiscrimination. See General Comment No. 18, supra note 6, ¶ 12. However, the discrimination principle is essentially a negative formulation of equal protection of the law. See NOWAK, supra note 3, at 607–608.
214. See NOWAK, supra note 3, at 598.
consideration of the reflections of foreign and international institutions. International jurisprudence can also take advantage of domestic constitutional interpretation, including the long standing experience of the U.S. Supreme Court and other constitutional courts worldwide. This is particularly true with respect to equal protection analysis, given that it is a relatively new area of international law. Current trends in the interpretation of the universal nondiscrimination principle seem, unfortunately, to lose track of the theoretical underpinnings of equal protection analysis. There is an urgent need for re-conceptualization, but this requires an effort by all those working in this field of law.

Instead of continuing to criticize the Committee for applying Article 26 to non-Conventional rights, international law scholars and practitioners should join in the development of a sound jurisprudential approach. Drawing from a comparative analysis, this Article has attempted to provide suggestions for the future realization of an international equal protection framework. The Human Rights Committee should heed these suggestions and, rather than extend the grounds of nondiscrimination further, should instead allow a wider margin of deference to State parties where less serious distinctions are being made. The Committee should be confident that it is not its responsibility to venture into notions of general equality. To interpret Article 26 as a principle of general equality, requiring sound and persuasive grounds for any kind of distinction, is not in the interest of international human rights. The purpose of human rights norms is to set basic standards for the enjoyment of fundamental rights and freedoms, not to unduly limit legislative discretionary power by providing a judicially prescribed model for legislation.216

Whether legislation is generally reasonable largely depends on value judgments that vary from nation to nation. What may be considered unreasonable in western societies may have a reasonable explanation in other settings. If equal protection on the international level is to be regarded as a general measure in assessing the reasonableness of legislation, it would most certainly run into the trap of cultural imperialism. In order to avoid such criticism, it is necessary to concentrate on universal values. Fortunately, the grounds of nondiscrimination spelled out in Article 26 stand for a universal consensus that discrimination based on certain classifications cannot be tolerated.217 A stronger focus on the specified grounds of nondiscrimination would guide equal protection

216. This is why it is not appropriate to apply the German equal protection model as a structural element of constitutional law at the international level.
217. Compare ICCPR, supra note 3, art. 26, with discussion supra Part II.A.
analysis along these well tread lines and help to reemphasize the validity of Article 26 as a truly international human rights instrument.

The suggestions presented herein are not only relevant for the interpretation of Article 26 of the ICCPR, but also for the future of international equal protection more generally. For example, interpretation of the parallel provisions in the American Convention on Human Rights\(^\text{218}\) and the African Charter on Human and Peoples’ Rights may well benefit from this discussion.\(^\text{219}\) With Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms having entered into force in 2005, the European Court of Human Rights is also about to deal with similar questions.\(^\text{220}\) The trials and errors of its counterparts can help the Court develop a thoughtful and reasoned approach to this issue.\(^\text{221}\) If only one lesson is to be passed on, let it be that the principle of equal protection should not be misunderstood as a principle of general equality. Rather, the principle of equal protection should be afforded a narrow nuanced interpretation, such that it may be rendered a truly universal principle.


\(^\text{220.}\) See generally European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 20 (dealing with the issue of values that can be considered international human rights standards across all nations, without infringing upon national law-making sovereignty).

\(^\text{221.}\) Fortunately, article 1, paragraph 1 of Protocol No. 12, supra note 24, does not provide for equality, but is limited to the rule of nondiscrimination.
GLOBAL CORPORATE GOVERNANCE: SOFT LAW AND REPUTATIONAL ACCOUNTABILITY

Kevin T. Jackson*

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INTRODUCTION

As transnational firms traverse the planet in today’s global economy, they conduct many of their business activities beyond the legal reach of nation-states.¹ To some, this seems like one of globalization’s most troubling consequences.² The conventional wisdom predicts that, if unchecked, corporations will freely flout societal interests and impose significant external costs on the public.³ However, globalization has been expanding the role of nongovernmental actors in shaping global governance.⁴ This trend tends to placate detrimental corporate conduct in the absence of governmental enforcement authority.⁵ Indeed, globalization has not only heralded a “global economy,” but has also brought about the phenomenon of a broader “global civil society.”⁶ Increasingly alert to the social and ecological dimensions of transnational corporate conduct, global civil society stands to exert significant regulatory control over firms simply by propounding public preferences and expectations.⁷ These

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⁷ See Donaldson, supra note 5, at 30–35.
preferences and expectations constrain corporate conduct and explain why firms have begun to self-impose civil regulations that proactively accommodate broader moral and social concerns.

Also known as “soft law” or “quasi-legislation,” voluntary civil regulations will prove an important alternative to governmental authority in the era of globalization. These emerging trends are arguably only the “tip” of a larger global social contract that has been forming in light of society’s demand for corporate social responsibility (“CSR”). In fostering soft law, this new global governance paradigm reignites timeless


12. See generally THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 233–36 (1999). In some sense, as a form of voluntary governance, corporate social responsibility was precipitated by global civil society’s pressure and constrains on multinational business interest.

13. Thomas Kuhn employed the term “paradigm” in an effort to account for the way that fields of knowledge are constituted by shared systems of belief which are defined by
principles and values such as human rights, environmental sustainability, responsible citizenship, and corporate accountability, as well as integrity and credibility of character. As a result transnational firms, despite their wherewithal, are now vulnerable as their brands have become susceptible to reputational harm in response to breaches of the social contract. Consequently, these firms are establishing regulatory regimes in an effort to build reputational capital and thereby enhance, or at least safeguard, their bottom lines.

Global civil society primarily demands that businesses abide norms of social responsibility in their pursuit of profit. This emphasis on the “character” of transnational business conduct is a departure from the entrenched metaphor that sees corporations as amoral profit machines, utterly devoid of moral character or probity. The fact that transnational firms adopt civil regulations voluntarily in order to build credibility in the eyes of global civil society—i.e., the fact that firms proactively

a common vocabulary, a set of accepted problems and agreed-upon solutions. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 175 (2d ed. 1970). Thus, on the one hand, a paradigm defines a community of belief; on the other hand, communities of belief do not exist but for the shared beliefs, acknowledged problems and solutions that comprise a paradigm. See id. Although Kuhn’s book was aimed at the history of changes in the physical or “hard” sciences, John Kenneth Galbraith expresses a similar notion that is closer to the context of the present study: “The first requirement for an understanding of contemporary economic and social life is a clear view of the relation between events and the ideas which interpret them.” JOHN K. GALBRAITH, THE AFFLUENT SOCIETY 6 (4th ed. 1984). As to the emerging paradigm, stemming from the new forms of global corporate governance, the following passage is prescient:

“Tomorrow’s successful company can no longer afford to be a faceless institution that does nothing more than sell the right product at the right price. It will have to present itself as if it were . . . an intelligent actor, of upright character, that brings explicit moral judgment to bear on its dealings with its own employees and with the wider world.” Anonymous, Saints and Sinners, THE ECONOMIST, June 24, 1995, at 15.


17. See generally LYNN S. PAINE, VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE 47 (2003) (arguing that beyond good public relations, corporate social responsibility is a powerful tool for achieving superior performance and generating greater profits).

comply with the new global social contract—presupposes that international businesses are able to distinguish moral choices and then make them.19 

Unlike traditional legal regimes whose norms are enforced through centralized systems of sanctions, the emergent soft law norms of global economic governance rely on decentralized enforcement mechanisms.20 These emergent norms are not the product of parochial regulation or local cultural mores.21 Rather, they represent the expectations of various economic communities around the world that together comprise global civil society.22 Thus, the promulgation of voluntary civil regulations by firms reveals an acceptance of extant global social contracts borne of growing global societal consensus as to the proper performance, responsiveness, and responsibility of transnational corporations.23

Consequently, transnational business enterprises are further committing to rule-making and rule-implementation in the spheres of social and environmental responsibility.24 They engage in inter-firm cooperation and collaborate with nongovernmental organizations.25 Over the past decade, CSR has gained prominence in both developed and developing countries at local, national, regional, and international levels.26 International businesses are therefore under increasing pressure from civil society organizations and corporate accountability networks that monitor

22. See id. at 295–96; see also Scholte, supra note 20, at 19–21.
24. See JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 18 (2000); see also Cutler, Haufler & Porter, supra note 4, at 3.
business conduct. In response, these firms are adopting responsible business policies.

Although the conventional views of corporate governance—"shareholder theory" and "stakeholder theory"—reach divergent conclusions about the proper nature and scope of CSR, both evolved at a time when firms were constrained, at least in principle, by the rule of law and legal sanctions. Yet, unlike traditional hard law enforcement regimes, today’s emerging “civil regulations” are grounded in the “rule of reputation,” which ties accountability solely to reputational capital, or lack thereof. Operating internationally and faced with pressure to self-regulate, a company’s reputation has become one of its most valuable assets. Today’s companies must reconcile economic and moral value with traditional notions of corporate governance.


28. See ZADEK, supra note 25, at 63.

29. Shareholder theory states that the corporation should serve the interests of shareholders only. See ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT 832–85 (7th ed. 2009). Grounded in agency theory, the underlying idea is that shareholders differ from other constituencies by virtue of being residual risk-bearers, and as such should exercise control over the firm. See id. at 84. Agency theory further asserts that, as residual risk-bearers, shareholders are in the best position to ensure that firms operate efficiently and focus on profit maximization. Thus, corporate managers answer only to shareholders and act only with the interests of shareholders in mind. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962). Stakeholder theory, on the other hand, maintains that since business serves the larger society, managers must be responsive to a broad constellation of constituencies both within and outside of the firm. See R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 43 (1984). This theory is based on the premise that the employees of a corporation, especially its managers and directors, can be held accountable for harmful side-effects of corporate conduct. Id. Corporate employees should be held accountable for the realization of a variety of objectives of the corporation. Such widening of responsibility is deemed essential as stockholders’ liability is often remote and financially limited. Id.; see also Kenneth E. Goodpaster, Business Ethics and Stakeholder Analysis, 1 BUS. ETHICS Q. 53, 53–55 (1991). See generally Morey W. McDaniel, Stockholders and Shareholders, 21 STETSON L. REV. 121, 126 (1991).


31. See KEVIN T. JACKSON, BUILDING REPUTATIONAL CAPITAL: STRATEGIES FOR INTEGRITY AND FAIR PLAY THAT IMPROVE THE BOTTOM LINE 28 (2004); see also Jackson, supra note 16, at 443–44.

In this Article, I will argue that corporate governance must focus on the role of soft law in today’s global environment. Soft law is a novel mechanism for constraining corporate behavior. In reconciling financial and social imperatives, firms must consider its impact on reputational capital. In Part I, I analyze the emergence of the CSR paradigm and its connection to global corporate governance. By examining its history, I will first illustrate how the CSR movement has rendered firms’ reputations accountable to the movement’s demands, and then I will trace the conceptual expansion of CSR to the related notions of “corporate social responsiveness” and “corporate social performance.” In Part II, I examine alternative conceptual models of global corporate governance including the “monophonic” model, the “polyphonic” model, the “integrative social contracts” model, and finally, the “reputational capital” model. In Part III, I examine specific types of global civil regulations in detail, and I discuss the bases for why global corporations accept the emerging soft law regime. After highlighting the chief characteristics of civil regulations in light of the underlying regulatory aim to bind firms and markets to worldwide norms, I will discuss the dominant forms of civil regulation within the triad of voluntary self-regulation, inter-firm and cross-industry initiatives, and co-regulation and multi-stakeholder partnerships. In Part IV, I build on the discussion in Parts II and III to analyze the role reputational accountability mechanisms play in securing firms’ compliance with global civil regulations. After distinguishing reputational accountability from legal accountability, I will explain the operational components of reputational accountability, the process by which key constituents of transnational firms enforce the “rule of reputation,” and the strategic and operational implications firms face as a result of such enforcement. In Part V, I take on arguments in opposition to the emerging paradigm of global civil regulation.

I. CORPORATE SOCIAL RESPONSIBILITY: THE PARADIGM

A. History of Corporate Social Responsibility

The origins of the modern debate on corporate social responsibility can be traced to the early 1950s. Howard Bowen, a renowned economist, first coined the phrase when he argued that economic and social benefits would result if businesses introduced broader social goals into their

decision-making processes. In the 1960s, the argument was extended
to the assertion that ethical principles should govern a corpo-
ration’s relationship with society. In the 1970s, the view emerged that
business should not only protect but also improve the welfare of society.

Regarding the global context, attention to the ethics of international
business has been mounting ever since the late 1960s. It began as an
activist movement aimed at U.S.-based multinational companies in
France and later spread to other parts of the world. Less-developed
countries were especially worried about outside infiltration into their
economies and the resulting dilution of national control. Yet, at the same
time, as a means of economic development, they were interested in
attracting foreign investment that would lead to a rise in employment.
The expansion of direct foreign investment around the world prompted
attempts to create codes of business conduct at the intra-firm and inter-
national levels. One notable example of this dynamic could be seen as
early as the 1940s with the promulgation in the United Nations of the
Universal Declaration of Human Rights. Another later example is the
attempted development of a Voluntary Code of Conduct for Transnation-
al Corporations at the United Nations Conference on Trade and Devel-
opment (“UNCTAD”) beginning in the 1970s. Similarly, national legis-

34. See, e.g., Howard Rothmann Bowen, Social Responsibilities of the
Businessman 8 (1953).
35. See Richard Eells & Clarence Walton, Conceptual Foundations of
36. See Keith P. Davis & Robert L. Blomstrom, Business and Society:
Environment and Responsibility 8–9, 20–21 (3d ed. 1975).
37. See generally Barnet & Mueller, supra note 2, at 113 (1974); Jean Jacques
Servan-Schreiber, Le Défi américain [The American Challenge] 1 (1968) (Fr.) (pro-
viding a provocative angle on America-style management, business, and ethics);
Raymond Vernon, Sovereignty at Bay 1 (1971) (a seminal book that was widely
acclaimed to be “no more than the tip of an iceberg”).
38. See, e.g., Barnet & Mueller, supra note 2, at 113.
39. See Donaldson, supra note 5, at 35–39; see also Paul M. Minus, Introduction to
The Ethics of Business in a Global Economy 1, 1 (Paul M. Minus ed., 1993); Robert
C. Solomon, The New World of Business: Ethics and Free Enterprise in the
Global 1990s, at 167 (1994). See generally Theodore H. Moran, Multinational
Corporations: The Political Economy of Foreign Direct Investment 1 (1985) (pre-
senting an extensive and a thorough discussion of the sociopolitical developments result-
ing from spread of multinational corporations).
41. See Development and International Economic Cooperation: Transnational Corpo-
(setting forth comprehensive norms of transnational corporate conduct). Moreover, in
idences, backed by enforcement regimes, adjusted their laws to reach transnational firms doing business overseas. International treaties and national legislation, however, did not succeed everywhere in combating misconduct. Rather, in a significant number of cases, business reforms were precipitated by public outrage at corporate malfeasance.

In the 1980s, a number of ecological and social calamities began impacting the reputations of individual firms and the corporate world in general. The ensuing reputational crises vividly illustrated the consequences of embracing a self-regulating, profit-maximizing, shareholder-focused brand of corporate governance, notwithstanding its substantial reputational risks. Hitherto, the traditional governance paradigm of multinational corporations rigidly stressed shareholder profit maximization. Essentially, in an effort to reach narrowly defined goals in the form of financial targets, many transnational firms failed to consider how backlash from public perceptions of raw corporate greed could affect business. Instead, leading and aspiring multinational corporations traversed the globe seeking locations that offered low labor costs and lax environmental and socioeconomic regulations.

With the advent of the 1990s came a succession of ecological crises stemming from morally questionable business practices. This propelled

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43. Id.


multinational corporations further into the spotlight. The Exxon Valdes disaster in Prince William Sound and the Royal Dutch Shell controversy over the disposal of the Brent Spar in the North Sea were two well-publicized incidents that caused considerable damage to the reputations of the firms involved. Royal Dutch Shell also suffered reputational damage over its apparent complicity with the execution of Ogoni indigenous leaders in Nigeria, and Nike suffered significant backlash, especially between 1992 and 1997, when reports regarding the company’s operations in Southeast Asia spawned public concern over child labor and poor working conditions in “sweatshops.”

As a result of these public controversies, corporations began guarding their reputations while global civil society began questioning the unregulated market dominance of transnational firms. Such unbridled control was exacerbating social inequalities and human rights violations while endangering the earth’s ecological systems and depleting natural resources.

Seeking institutional authority to voice its position, global civil society condemned multinational corporations collectively for failure to provide proper employment conditions and decent wages, and for failure to foster human rights as mandated by the United Nations Declarations and International Labor Organization Conventions and Recommendations. With respect to ecology, civil society began to insist that firms comply with United Nations’ agreements and conventions on development and the environment. Furthermore, pressured by civil society, firms began to recognize state-sanctioned environmental regulations promulgated by regional organizations, such as the European Commission.

Consequently, in the latter part of the 1990s, many firms began advocating the notion that responsible corporate conduct produces mid- to long-term financial rewards. This idea stood in opposition to the long-
held notion that corporate wealth is solely grounded in maximization of profits for stockholders.\textsuperscript{56} Firms that were clinging to the conventional viewpoint were equally opposed to the advent of CSR because they believed it entailed significant financial costs.\textsuperscript{57} To this day, the international business community remains at odds over these divergent perspectives. Nevertheless, several features of CSR have gained prominence, including:

- Adoption of voluntary initiatives aimed at elevating the ethical level of operations above that which is required by law;
- Internalization of externalities;
- Consideration of a range of stakeholder interests;
- Integration of the firm’s social and economic mandates;
- Contributions to nonprofit, charitable, and other civic organizations and causes;
- Provision of employee benefits and improvement of quality of life in the workplace.\textsuperscript{58}

B. Social Responsibility, Responsiveness, and Performance Distinguished

Scholars have crafted a distinction between CSR, which stresses obligations and accountability, and “corporate social responsiveness,” which emphasizes action and activity.\textsuperscript{59} But beyond these distinctions, there is a third, results-oriented concept known as “corporate social performance.” Below, I will explain all three perspectives on social-awareness.

1. Corporate Social Responsibility

Some say it is futile to attempt an operational definition of CSR because there are too many conceivable applications of CSR.\textsuperscript{60} But, broadly stated, CSR merely implies that businesses share responsibility for societal conditions. Archie Carroll separates business obligations into

\textsuperscript{56} Friedman, \textit{supra} note 46, at 32.
\textsuperscript{57} Winston, \textit{supra} note 48, at 85.
\textsuperscript{58} \textit{See generally Corporate Social Responsibility: Reading and Cases in Global Context, supra} note 25, at 1.
four classes: economic, legal, ethical, and discretionary. A firm has an economic responsibility to provide goods and services, offer employment at a living wage, and generate profits to survive. Through these obligations, firms enhance societal well-being. Similarly, corporations shoulder legal responsibilities imposed by courts, legislatures, and administrative agencies. These responsibilities can assume many forms and may extend to consumers, employees, stockholders, suppliers, and other stakeholders.

In addition, CSR signifies conformity to society’s expectations of appropriate business behavior such as honoring unwritten ethical standards. For example, while corporations are not legally bound to contribute to charities, many citizens expect profitable enterprises to do so. Moreover, as law sometimes lags behind social norms, some of society’s normative expectations may eventually evolve into law. Lastly, some of society’s expectations are not clearly defined for corporations. For instance, although society might expect corporations to invest in efforts to resolve significant social problems, society does not have a clear idea of what shape or form those solutions might take.

62. Peter Drucker elaborates this point of view as follows:

Economic performance is the first responsibility of business. A business that does not show a profit at least equal to its cost of capital is socially irresponsible. It wastes society’s resources. Economic performance is the basis; without it, a business cannot discharge any other responsibilities, cannot be a good employer, a good citizen, a good neighbor. But economic performance is not the sole responsibility of business.

64. For instance, legal responsibilities imposed by FDA, FTC, OSHA, CPSC, EPA, EEOC, and SEC regulations, to name but a handful from the morass of U.S. regulatory agencies. See id. at 111, 210, 264, 272, 306–11, 339.
65. See id. at 369.
66. See Carroll, supra note 61, at 500.
67. See id. at 502–04.
68. See id. at 500.
69. See id. at 500.
2. Corporate Social Responsiveness

Robert Ackerman and Raymond Bauer claim that the term “social responsiveness” is a label more apt for a process-focused social outlook.\(^7\) Ackerman and Bauer have argued that emphasizing companies’ obligations places too much importance on motivation rather than on performance.\(^7\) In their words, “Responding to social demands is much more than deciding what to do. There remains the management task of doing what one has decided to do, and this task is far from trivial.”\(^7\) Focus on responsiveness allows companies to fulfill social responsibilities without being distracted by issues of accountability that arise when organizations attempt, prior to acting, to determine their precise responsibilities.\(^7\) Social responsiveness addresses a firm’s ability to be alert to social pressures.\(^7\) Thus, rather than simply reacting to a crisis, the socially responsive firm would have preempted the crisis by implementing a process enabling it to foresee predicaments and be proactive in a productive and humanitarian manner.\(^7\)

3. Corporate Social Performance (“CSP”)

Under the “performance” viewpoint, it is firms’ capabilities that are paramount.\(^7\) In other words, once a firm accepts that it has a “social responsibility” and adopts a responsiveness mentality, it is the results achieved thereafter that are critical. Constructing a CSP framework requires more than a determination of the nature of the responsibility.\(^7\) It also involves articulating certain philosophies, patterns, modes, or strategies of responsiveness.\(^7\) Carroll has designed a CSP model around three key facets: (1) social responsibility categories—economic, legal, ethical, and discretionary; (2) philosophies (or modes) of social responsiveness—reaction, defense, accommodation, and pro-action; and (3) social (or

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71. See id. at 6.
72. See id.
73. See id.
75. BOATRIGHT, supra note 63, at 370 (discussing the difference between responsibility and responsiveness).
76. See Carroll, supra note 61, at 502, 504 (explaining the use of the social performance model to guide managerial actions in responding to a range of business obligations).
77. See id. at 500 (illustrating an elaborate framework of the “social issues involved”).
78. See id. at 501.
stakeholder) issues involved—consumer issues, environmental issues, and employee issues. This configuration illustrates that corporate social responsibility is not separate from financial performance. Moreover, it places ethical and philanthropic expectations into a rational, economic, and legal structure.

C. Corporate Social Responsibility and Global Governance

As the preceding discussion suggests, the emergence of CSR poses a challenge to a corporate governance framework centered on shareholder value creation. The rise of CSR has engendered a debate about the ultimate purpose and essential nature of a business corporation. The competing visions expose conflicting political and moral preferences regarding the corporation’s nature. In the same vein, scholars sympathetic to CSR argue that both the contractual model of the firm, where the corporation is seen as a “nexus of contracts,” and the legal person model, where a corporation has a distinct legal personality, do not establish a basis for conferring superior property rights to shareholders over employees. It is argued instead that employees contributing labor

80. See sources cited supra note 79.
81. Hereafter “CSR” is used to designate corporate social responsibility, corporate social responsiveness and corporate performance collectively.
82. See Reuven S. Avi-Yonah, The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility, 30 DEL. J. CORP. L. 767, 767 (2005); cf. Eric W. Orts, The Complexity and Legitimacy of Corporate Law, 50 WASH. & LEE L. REV. 1565, 1587 (1993) (arguing that the “policies underlying corporate law cannot be reduced to a unidimensional value, such as the economic objective of ‘maximizing shareholders’ wealth.’”).
83. See Avi-Yonah, supra note 82, at 768–70 (delineating the parameters of the debate about the broader role of the corporations).
to the firm are entitled to legal recognition of their residual interest in the assets of the enterprise.  

In addition, CSR advocates challenge narrow economics-based justifications for the stockholder-centered view, asserting that the ideal of corporate efficiency carries a broader meaning than elevated stock prices. Accordingly, CSR-oriented theorists have generally repudiated the type of cost-benefit analysis that ignores and segregates distributive considerations from conventional notions of profit-maximizing efficiency. Because a corporation’s existence depends on sophisticated financial transactions, contracts, managers, employees, and other relationships among investors, it functions as a semi-public enterprise. However, this view is not universally shared among corporate governance scholars. Consequently, CSR’s main tenets have highlighted corporate stakeholders’ interests. They have recognized that firms’ constituencies play similarly active roles in corporate conduct and strategy. Moreover,


92. For example, corporate law professors Henry Hansmann and Reinier Kraakman argue that “the recent dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions” has left no serious contenders to this view of a corporation. Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 439 (2001); see also John C. Coffee, Jr., The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications, 93 Nw. U. L. Rev. 641, 650 (1999); Ronald J. Gilson, Globalizing Corporate Governance: Convergence of Form or Function, 49 Am. J. Comp. L. 329, 333 (2001). For a critique of Hansmann’s and Kraakman’s position decrying their perspective as “Americanocentric,” see Douglas M. Branson, The Very Uncertain Prospect of “Global” Convergence in Corporate Governance, 34 Cornell Int’l L.J. 321, 331 (2001).

recent scholarly literature illustrates that conventional approaches to corporate governance are changing due to concerns facing management of multinational firms.\textsuperscript{94} These changes have led to economic analysis of managerial incentives for undertaking corporate social responsibility,\textsuperscript{95} fiduciary duties,\textsuperscript{96} stakeholder-oriented management strategies,\textsuperscript{97} and pro-CSR activism by corporate boards and their shareholders.\textsuperscript{98} The inquiry also highlights quantitative metrics of ratings, reporting practices, and indexes that relate to corporate responsibility governance.\textsuperscript{99} In addition, new methods have been suggested for allowing enhanced participation on the part of boards of directors.\textsuperscript{100} Greater inclusion on a board will foster a stronger connection between corporate accountability and governance.\textsuperscript{101}


\textsuperscript{96} See Lyman P.Q. Johnson & David Millon, Recalling Why Corporate Officers are Fiduciaries, 46 WM. & MARY L. REV. 1597, 1600–01 (2005).

\textsuperscript{97} See Bradley, Schipani, Sundaram, & Walsh, supra note 94, at 28–29; see also Adam Winkler, Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History, LAW & CONTEMP. PROBS., Autumn 2004, at 109, 110.


\textsuperscript{100} See generally Lawrence E. Mitchell, The Board as a Path Toward Corporate Social Responsibility, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 279, 302 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) (proposing several remedial measures).

II. CORPORATE GOVERNANCE GLOBALLY

From the standpoint of global corporate governance, the discussion regarding corporate social responsibility, corporate social responsiveness, and corporate social performance is reduced to a debate about what may be termed a monophonic versus a polyphonic\(^{102}\) view of corporate objectives. For years, assuming various labels, the debate between the monophonic and polyphonic camps has encompassed business ethics, management, corporate law, and corporate governance theories.\(^{103}\) The debate has focused predominate on the behavior of domestic, rather than multinational, business enterprises.\(^{104}\) It has thus centered on interpretations of domestic corporate law (e.g., U.S. corporate law).\(^{105}\) As the following discussion demonstrates, the monophonic-polyphonic controversy—either in a local or global context—aims to explain what form of governance would fulfill the obligations of corporate social responsibility while moving beyond the narrow goal of shareholder wealth maximization.\(^{106}\)

\(^{102}\) The author uses the terms by way of analogy to music. In musical composition, polyphony (derived from the Greek words for “many” and “voice”) refers to a texture made up of two or more independent melodic voices. By contrast, monophony refers to music composed with only a single voice. BARBARA RUSSANO HANNING, CONCISE HISTORY OF WESTERN MUSIC 44 (1st ed. 1998). Accordingly, a monophonic orientation in global corporate governance is characterized by its concern for the single voice of shareholders, while a polyphonic orientation seeks to orchestrate a plurality of stakeholder voices.

\(^{103}\) Depending on disciplinary context, the various designations have included: “communitarian versus contractarian,” “Berle versus Dodd debate,” “shareholder paradox,” “separation fallacy,” “separation thesis,” and “monotonic versus pluralist” and “unidimensional versus multidimensional.”


\(^{105}\) Curiously, the same conflict is embodied in the Company Law of the People’s Republic of China, which sets out a legal framework for the organization and operation of private stock enterprises. See Michael Irl Nikkel, Note, “Chinese Characteristics” in Corporate Clothing: Questions of Fiduciary Duty in China’s Company Law, 80 MINN. L. REV. 503, 523 (1995) (Whereas Article 102 states that shareholders “shall be the organ of authority” of the firm, Article 14 maintains that business enterprises must “strengthen the establishment of a socialist spiritual civilization, and accept the supervision of the government and the public.”).

A. Monophonic Governance Model

Over the years, the debate over the nature and purpose of the corporate enterprise has lingered and has sought to apportion priority between shareholder and nonshareholder interests.\textsuperscript{107} In the United States, the debate extends back to the landmark case of Dodge v. Ford Motor Company,\textsuperscript{108} where the court held that a business corporation is organized primarily for the profit of its stockholders, rather than for its employees or the community.\textsuperscript{109} The debate then poured into academia. Whereas Adolf Berle advocated the stockholder-centric view, E. Merrick Dodd urged increased consideration for nonstockholders.\textsuperscript{110}

For a considerable time, the prevailing corporate governance paradigm was dominated by the monophonic perspective, which emphasizes the stockholder-centric approach to corporate governance.\textsuperscript{111} Consequently,
corporate governance was focused mainly on the board’s structure, its functions, and its relations with other corporate organs, and the emphasis was on profit maximization.112 This governance model was heavily influenced by both Berle’s and Means’s analyses of principal-agent problems arising from separating stockholders’ ownership rights from corporate managerial duties.113 The business community relies on corporate law to influence management so as to reduce such agency-cost problems.114 This enables shareholders to trust managers with their investments.115 With an emphasis on resolving agency conflicts, the monophonic corporate governance paradigm embraced a view of economic efficiency116 that favored cost-benefit analysis and value-maximization objectives in business decision-making.117 But it typically ignored adverse social and environmental externalities, downplayed the stakeholders’ interests,118 and disregarded firms’ obligations to nonshareholders.119

Milton Friedman advocated an extreme version of the monophonic view for promoting a free-market economy:

In such an economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which

112. Id. at 172.
115. See id.
is to say, engages in open and free competition, without deception or fraud.\textsuperscript{120}

This view emphasizes competition to maximize the bottom line. This approach, called the “separation thesis” by some, is antithetic to the view that economic value may flow from a firm’s commitment to social responsibility.\textsuperscript{121} Business managers view economics and ethics as two mutually exclusive spheres.\textsuperscript{122} From the monophonic standpoint, “social responsibility” possesses three key defects. First, it expresses a fundamental misunderstanding of the essence of a free market.\textsuperscript{123} Second, it mistakenly allows the interests of groups other than shareholders to constrain, rather than expand, corporate activities.\textsuperscript{124} Third, it does not provide evidence of any economic benefits from investing in social initiatives.\textsuperscript{125} This position suggests a single argument for legal and ethical compliance; namely, to sidestep the monetary costs of noncompliance.\textsuperscript{126} Accordingly, the monophonic view of corporate governance leads to reactive compliance with environmental and human rights standards but only insofar as these norms are grounded in the “hard” rule of law.\textsuperscript{127} That is, under the monophonic view, corporations comply only when noncompliance threatens sanctions pursuant to the “hard” rule of law. The monophonic view is hardwired to legal accountability (legal norms

\textsuperscript{120} See \textsc{Friedman}, supra note 29, at 133; see also \textsc{Willa Johnson}, \textit{Freedom and Philanthropy: An Interview with Milton Friedman}, 71 \textsc{Bus. & Soc. Rev.} 11, 14 (1989). Friedman also offered this decidedly monophonic account of corporate governance:

In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.

\textsc{Friedman}, supra note 46, at 32.

\textsuperscript{121} R. \textsc{Edward Freeman}, \textit{The Politics of Stakeholder Theory: Some Future Directions}, 4 \textsc{Bus. Ethics Q.} 409, 412 (1994).

\textsuperscript{122} See \textsc{Jackson}, supra note 31, at 87; \textsc{Kevin T. Jackson}, \textit{A New Mindset for Business Education: Cultivating Reputational Capital}, in \textsc{Rethinking Business Management} 149, 150 (Samuel Gregg and James Stoner, Jr. eds., 2d ed. 2008).

\textsuperscript{123} See \textsc{Friedman}, supra note 29, at 133 (arguing that a corporation’s social responsibility is to “increase profits”).

\textsuperscript{124} See \textit{id.} at 133 (implying that social responsibility is distracting and restrains corporate activity).

\textsuperscript{125} \textit{Cf. id.} at 133–36.

\textsuperscript{126} See \textsc{Jackson}, supra note 122, at 149, 150.

\textsuperscript{127} \textsc{Jackson}, supra note 16, at 448.
backed by hard sanctions) and fiscal accountability to stockholders, insofar as this is mandated by corporate law.128

B. Polyphonic Governance Model

Whereas the monophonic model is addressed to matters of agency, the polyphonic model focuses on ethics and accountability to parties outside the firm.129 Under the polyphonic approach, maximizing profits for shareholders is not the sole purpose of a business.130 Polyphonic corporate governance seeks to link relationships among various parties together with a broadly defined corporate mission.131 This model sees businesses as fulfilling various functions within a society.132 Here, businesses serve an array of other constituents.133 Thus, the scope of social responsibility extends beyond merely meeting the bottom line, and business firms’ ethical and discretionary responsibilities go beyond their purely economic and legal objectives.134 Nevertheless, the monophonic view retains the basic assumption that corporations are fundamentally profit-making enterprises.135 Corporations strive to meet the bottom line as it is necessary to preserve their economic viability. They are not social welfare agencies. Stated differently, managers have an institutional and moral duty to broader constituencies to keep the firm profitable. Norman Bowie writes, “[N]ot only does Wall Street expect a business rationale for corporate good deeds; Wall Street has a moral right to those expectations.”136 Bowie continues, “This strategy grounds the motive to seek profits in ethics itself.”137 The polyphonic view, however, correctly assumes that,

128. Id.
129. See Carroll & Buchholtz, supra note 29, at 83–85 (discussing the notion of a stakeholder, and what is at stake for stakeholders or those outside of the firm).
130. See id.
133. These constituencies include employees, customers, bondholders, suppliers, distributors, lenders, creditors, regulators, local communities, state and federal governments, special interest groups, the environment, the communities in which the firm operates. See Freeman, supra note 29, at 25; see also Goodpaster, supra note 29, at 54; McDaniel, supra note 29, at 123; David Millon, Communitarians, Contractarians, and the Crisis in Corporate Law, 50 Wash. & Lee L. Rev. 1373, 1378–79 (1993).
134. See Carroll & Buchholtz, supra note 29, at 87 (providing a graphical illustration of stakeholder view of the firm).
135. See Jensen & Meckling, supra note 116, at 310.
137. See id. at 142.
even in pursuit of profit, corporations must deploy financial, political, and social capital in a socially responsible way. Corporate governance must seek to confer not only financial benefits to shareholders, but also social benefits to all of the firm’s stakeholders.\textsuperscript{138}

The monophonic perspective, which has been characterized as “corporate Neanderthalism,”\textsuperscript{139} fails to account for the fact that, in today’s information age, corporations are under meticulous observation.\textsuperscript{140} It fails to consider that a watchful public, media, and government will hold multinational corporations accountable for “corporate Neanderthalism”; it ignores firms’ broader social responsibilities; and it ignores the potential for firms to incur “ethical blowback”\textsuperscript{141} from broader constituencies. Robert Solomon, for example, attacks the monophonic model for its “pathetic understanding of stockholder personality as homo economicus,”\textsuperscript{142} Whereas Amartya Sen challenges the mindset according to which “business principles are taken to be very rudimentary . . . essentially restricted . . . to profit maximization, but with a very wide reach [to] . . . all economic transactions.”\textsuperscript{143}

Before turning to the question of whether a polyphonic approach to corporate governance provides a satisfactory theoretical anchoring for the emerging regime of civil regulations that increasingly characterizes global governance, it will be useful to examine an additional approach, known as “integrative social contracts theory.”

\textit{C. Integrative Social Contracts Theory (“ISCT”)}

Both corporate social responsiveness and the stakeholder view alike are criticized on the ground that they do not provide management with precise standards of conduct.\textsuperscript{144} By itself, the concept of corporate social responsiveness falls short of offering normative guidelines for managers

\textsuperscript{138} See \textit{Boatright}, supra note 63, at 385 (setting forth the stakeholder theory).
\textsuperscript{139} \textit{Donaldson}, supra note 5, at 45.
\textsuperscript{140} Ross, supra note 32, at 7–8; Spar, supra note 47, at 7–9.
\textsuperscript{143} See Amartya Sen, \textit{Economics, Business Principles, and Moral Sentiments}, \textit{7 Bus. Ethics Q.} 5, 5 (1997). “In contrast, moral sentiments are seen to be quite complex (involving different types of ethical systems), but it is assumed, that at least in economic matters, they have a very narrow reach (indeed, it is often presumed that such sentiments have no real influence on economic behavior).” \textit{Id.}
\textsuperscript{144} See \textit{Boatright}, supra note 63, at 368; see also \textit{Donaldson}, supra note 5, at 45.
to pursue in response to social expectations and demands. Likewise, stakeholder theory has been faulted for its failure to reconcile the competing interests of various stakeholders.

In response to these challenges, Thomas Donaldson and Thomas Dunfee developed a social contract theory of business. The ISCT develops two key concepts: hypernorms and moral free space. These concepts are illustrated by a reference to a series of concentric rings that represent core norms accepted by corporations, industries, or economic cultures. Hypernorms, which rest at the center, are norms embodying transcultural values fundamental to human existence, such as prescriptions shared by main religions around the world and most basic human rights. Such higher-order norms impose minimal necessary constraints on the capacity of communities to formulate their own rules. Advancing away from the center of the rings, one finds norms which have greater cultural specificity than those at the center. These rules are molded by the social norms of sundry economic communities, such as corporations, subunits

145. See Boartright, supra note 63, at 370 (noting that CSR requires “responsiveness”); R. Edward Freeman & Daniel R. Gilbert, Jr., Corporate Strategy and the Search for Ethics 104–05 (1988); CSR-1 to CSR-2, supra note 59, at 152; Mitnick, supra note 59, at 6.
146. Donaldson, supra note 5, at 45–46. Thomas Donaldson writes that “[d]espite its important insights, the stakeholder model has serious problems. The two most obvious are its inability to provide standards for assigning relative weights to the interests of the various constituencies, and its failure to contain within itself, or make references to, a normative justificatory foundation.” Id.; see also Thomas W. Dunfee & Thomas Donaldson, Contractarian Business Ethics: Current Status and Next Steps, 5 Bus. Ethics Q. 173, 175 (1995). The stakeholder model has also been challenged on the ground that it does not provide sufficiently rigorous criteria for settling disputes about who or what qualifies as a legitimate stakeholder, as in the case of child laborers working for a multinational corporation’s supplier when the firm is in the process of a merger with another multinational firm. See Bert van de Ven, Human Rights as a Normative Basis for Stakeholder Legitimacy, 5(2) Corp. Governance 48, 55–56 (2005).
149. See id.
150. See id. at 74–81.
151. See id. at 49–52.
152. Id. at 222.
within firms, industries, professional associations, trade groups, governmental bodies, and so on.\textsuperscript{153}

The next ring represents moral free space, where one finds norms that are inconsistent with at least some other norms embraced by other economic communities.\textsuperscript{154} Within moral free space, members are free to establish their own norms for economic conduct.\textsuperscript{155} However, such norms must have the status of being both “authentic” and “legitimate.”\textsuperscript{156} A norm is “authentic” if community members have given their informed consent to the norm’s existence while still retaining a right to exit the community should they come to disapprove of the norm.\textsuperscript{157} The existence of specific authentic norms is established by empirical conditions expressing customary acceptance by the relevant economic community.\textsuperscript{158}

A norm is “legitimate” if it does not run afoul of a hypernorm.\textsuperscript{159} At the outermost ring are illegitimate norms, which are incompatible with hypernorms. Donaldson and Dunfee assert that integrative social contracts theory provides a normative core for stakeholder theory.\textsuperscript{160} Following this line of thought entails consulting relevant community norms to decide, first, who counts as a stakeholder, and, second, what obligations extend from the firm to the stakeholders.\textsuperscript{161} Conflicts between norms are resolved by determining the dominant legitimate norms, which are accorded priority.\textsuperscript{162}

The preceding discussion shows the need for corporations to adapt to societal expectations and adopt societal norms. While both CSR and stakeholder theory advance the general notion that corporations should be attuned to a variety of stakeholders’ demands, social contract theory makes a significant contribution beyond those accounts. Social contract

\textsuperscript{153} Id. at 40.  
\textsuperscript{154} Id. at 222.  
\textsuperscript{155} Id. at 38.  
\textsuperscript{156} Id. at 46.  
\textsuperscript{157} Id. at 43.  
\textsuperscript{158} Most members of community C approve of compliance with N in recurrent situation S, most members of C disapprove of deviance from N in S, a substantial percentage (well over 50%) of members of C comply with N when facing S. See Toward a Unified Conception, supra note 147, at 263–64.  
\textsuperscript{159} Id. at 265.  
\textsuperscript{160} Id. at 254.  
\textsuperscript{161} See Donaldson & Dunfee, supra note 12, at 235–36.  
\textsuperscript{162} Id. at 49. In circumstances lacking dominant or well-established norms, firms remain in the area of moral free space. Id. at 85. It should be noted that, according to ISCT, all of firms’ activities must comply with extant and applicable hypernorms. See Donaldson & Dunfee, supra note 147, at 89; see also Toward a Unified Conception, supra note 147, at 268–69.
theory accords deeper meaning and substance to the notion of CSR by
fastening it to communal norms. The social contract perspective on
corporate governance provides an explanation for corporations’ accep-
tance of global civil regulations. These regulations, as understood in
ISCT’s terminology, are “extant social contracts”—the product of eco-
nomic communities voluntarily adopting norms within moral free
space. ISCT highlights the normative content of the standards neces-
sary for adopting moral principles. Without definite content—i.e., with-
out a definite mission for corporate governance—stakeholders would
engage in power-wars over their respective interests. CSR scholars and
ethicists, for instance, consider the human rights and environmental
norms that are voluntary established by multinational firms to incorporate
genuine moral obligations that are recognized by worldwide consen-
sus. Accordingly, ISCT’s notion of hypernorms accounts substantially
for the emergence of global civil regulations in the form of “soft” and
“hard” law.

D. Corporate Reputational Capital: The Missing Link

Given its emphasis on the wider society, the rise of civil regulation
should lead corporate governance to embrace the polyphonic view. Para-
doxically, however, its rise has not diminished the importance global
companies attach to the monophonic model. Nevertheless, as many
global companies have discovered, there is evidence that commitment to
responsible global corporate citizenship comes with financial advantag-
es. The rise of civil regulations, therefore, begs the question whether
corporate governance can effectively synchronize the monophonic and
polyphonic viewpoints. When corporate governance, in an effort to

163. See, for example, Robert C. Ellickson, Law and Economics Discovers Social
Norms, 27 J. LEGAL STUD. 537, 546 (1998), and Richard H. McAdams, The Origin,
Development, and Regulation of Norms, 96 MICH. L. REV. 338, 338 (1997), for a discus-
sion of the concept of social norms.

164. See generally DONALDSON & DUNFEE, supra note 12, at 25 (discussing social
contract and global civil regulations).

165. Thomas Dunfee, Challenges to Corporate Governance: Corporate Governance in
a Market with Morality, LAW & CONTEMP. PROBS., Summer 1999, at 129, 145. See generally
Dunfee, supra note 23, at 23.

166. See DONALDSON & DUNFEE, supra note 12, at 97 (the graphic table sets out the
dynamics that occur in the “moral free space”).

167. See, e.g., Frederick, supra note 14, at 165.

168. BAKAN, supra note 3, at 27.

169. See S. Prakash Sethi & Linda M. Sama, Ethical Behavior as a Strategic Choice
by Large Corporations: The Interactive Effect of Marketplace Competition, Industry
stockpile reputational capital, begins to maximize shareholder wealth by properly accommodating various stakeholders’ interests, synchronization may be attained. In other words, reputational capital provides a missing link in global governance. The notion of reputational capital recognizes that the volume and breadth of social expectations are increasing. The ISCT provides the theoretical foundation. When micro-social contracts are breached, the breaches cause direct reputational harm and diminish corporate “reputational assets.” When the “contracts” are “performed,” the firm’s reputational capital grows.

The concept of reputational capital emerged in tandem with the ideal of free-market capitalism, which has been modified with the advent of civil society’s focus on CSR. Reputational capital may prove to be indispensable for modern corporate managers. It illuminates how managers should commit to CSR to preserve and build a firm’s intangible reputational assets. Managers’ commitment to CSR is further buttressed by the emerging corpus of global civil regulations. Simply put, the “sanction” for noncompliance with civil standards translates into reputational loss. The “reward” for honoring the standards is reputational gain. Accordingly, the emerging “accountability regimes” sanction corporations for breaches of their CSR.

III. THE REGIME OF GLOBAL CIVIL REGULATIONS

I now turn to the emergence of a global governance regime that primarily stands for civil business regulation, or “soft law.” Civil regulations utilize private, nonstate, and market-based regulatory regimes to

170. See Goodpaster, supra note 29, at 57–58.
171. See Donaldson, supra note 141, at 534–36.
172. The author defines “reputational capital” as a firm’s intangible long-term strategic assets calculated to generate profits. The reputational capital of a corporation is a hybrid of economic values and moral values. See Grahame Dowling, Creating Corporate Reputations: Identity, Image, and Performance 23 (2001); see also Charles J. Fombrun & Cees B.M. Van Riel, Fame & Fortune: How Successful Companies Build Winning Reputations 32–35 (2004) (discussing “perceptual and social assets”); Jackson, supra note 31, at 56; Paine, supra note 17 (discussing numerous payoffs including increased market share, acquisition of ideas and talent, and diminished costs for activities such as funding, marketing, and recruiting). See generally Ronald J. Alsup, The 18 Immutable Laws of Corporate Reputation 17 (2004); Charles J. Fombrun, Reputation: Realizing Value from the Corporate Image 1 (1996).
173. See Jackson, supra note 31, at 25–35.
174. Ross, supra note 32, at 8.
govern multinational enterprises and their global supply networks.\textsuperscript{176} They regulate the impact multinational companies and markets have on human rights practices, labor conditions, environmental sustainability, and community development, particularly in less developed countries.\textsuperscript{177} In the past, businesses and their leaders sought to cure social ills at the local level through philanthropic initiatives.\textsuperscript{178} Unlike local community philanthropy, however, CSR has become increasingly transnational in its reach due to the social contract for multinational business.\textsuperscript{179}

\textbf{A. Background on Civil Regulations}

Along with the growth of CSR, a surge of public interest advocacy, spearheaded by nongovernmental organizations (“NGOs") and regulators, calls for the introduction of enforceable instruments to support supervision of social responsibility and corporate accountability.\textsuperscript{180} Among the mechanisms to be employed are public monitoring campaigns and litigation targeting multinational enterprises over human rights and workplace violations, as well as promulgation of “soft” law norms.\textsuperscript{181} The goal is to increase businesses’ involvement with CSR.\textsuperscript{182} To that aim, civil society groups step in to pressure businesses and hold them accountable.\textsuperscript{183}


\textsuperscript{177} See id. at 262.

\textsuperscript{178} See, e.g., Robert H. Bremner, \textit{American Philanthropy} 45, 123 (1st ed. 1960) (noting that philanthropy occurred on the local, community level).

\textsuperscript{179} See Donaldson & Dunfee, supra note 12, at 15 (discussing the European social contract).


\textsuperscript{182} See Parker, supra note 181, at 207, 215–16.

\textsuperscript{183} See generally Winston, supra note 48.
Civil regulations differ from customary methods of business self-regulation in several ways. First, the regulations promote a variety of public interests, not just the interests of companies or industries. Second, unlike established modes of business self-regulation, civil regulations arise in reaction to the society’s expectations with respect to businesses. Society’s expectations, in turn, are driven by activists who expose corporations’ breaches of their CSR, or, in terms of the ISCT, breaches of the “terms” of the social contract. Finally, unlike conventional business self-regulation, civil regulation is more apt to engage nonbusiness constituents in processes that are pertinent to civil society. In sum, the regulations establish nonstate mechanisms for governing transnational companies and markets.

1. The Global Public Domain

The growth of global civil regulation serves as an interface between multinational corporations and private governance. The rise of such regulation is connected to the emergence of a new global public domain. Comprised of both private and public participants, the global public domain is a forum for discussion, debate, and activism regarding the creation of “global public goods.” In the context of global environmental and social responsibility, cooperation between multinationals and civil society institutions presupposes delineation of the scope of those responsibilities. Many of the entities comprising the global public domain are NGOs. NGOs are mainly headquartered in North America and

184. See Vogel, supra note 176, at 263.
185. See id. at 262–63.
186. See generally Donaldson, supra note 141.
187. See Vogel, supra note 176, at 263.
188. Robert Falkner, Private Environmental Governance and International Relations: Exploring the Links, GLOBAL ENVTL. POL., May 2003, at 72, 79.
189. See Ruggie, supra note 55, at 499–531.
191. See id. 113–15; see also Ronnie D. Lipschutz, From Local Knowledge and Practice to Global Environmental Governance, in APPROACHES TO GLOBAL GOVERNANCE THEORY 259, 261 (Martin Hewson & Timothy J. Sinclair eds., 1999).
192. NGOs are turning increasingly global, as illustrated by the fact that over 1,000 of them have memberships comprised from three or more countries. See Shaughn McArthur, Global Governance and the Rise of NGOs, ASIAN J. OF PUB. AFF. 54, 60 (2009). NGOs are also becoming highly influential global agents. See id. Although a significant amount of NGO efforts have been directed toward public institutions and policies, in recent years, they have been seeking more and more to gain sway over practices of companies, industries, and markets as well. See Caroline Harper, Do the Facts Matter? NGOs, Research,
They scrutinize and try to gain sway over an array of transnational business practices. There are, however, other actors in the global public domain that exert influence on corporate accountability. Consumer organizations, environmental and sustainability groups, human rights advocates, labor unions, religious affiliations, student associations, social and ethical funds, and socially oriented institutional investors, are all part of the global public domain.

2. Scope and Magnitude of the Regulations

The quantity and span of global civil regulations grew substantially throughout the 1990s. Private regulations that specify standards for responsible business conduct are in place for nearly all global industry sectors and internationally traded products or services. Currently, an expansive body of scholarship has also examined the make-up of the global public domain. See, e.g., SRI LANTHA BATLIWALA & L. DAVID BROWN, TRANSNATIONAL CIVIL SOCIETY: AN INTRODUCTION 1 (2006); T ARROW, supra note 194, at 1 (2005); MOVEMENTS, supra note 194 (defining global social movements).

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Among them are apparel, athletic equipment, chemicals, coffee, cocoa, computers and electronic equipment, diamonds and gold, energy, financial services, fisheries, forestry, minerals and mining, palm oil, rugs, toys, and tourism. See Mathias Koenig-Archibugi, Transnational Corporations and Public Accountability, 34 GOV’T & OPPOSITION 234, 234–35 (2004); Ans Kolk & Rob van Tulder, Setting New Global Rules? TNCs and
approximately 300 products or industry codes are enacted. Many of these codes speak to environmental or employment practices. Multiple codes regulate a significant number of different products and sectors. Many companies periodically report their environmental and social practices. A large number of these companies have formulated their own codes while also subscribing to additional industry and cross-industry codes of conduct. For example, The United Nations Global Compact, which is the biggest private business code, boasts over 3,500 corporate signatories, spanning six continents. The number of major global financial institutions signing the United Nations Principles for Responsible Investment more than doubled to reach 381 in 2008, representing assets of $14 trillion.

As previously noted, the growth of civil regulations has resulted from civil society’s increased expectations for CSR. Self-regulation and voluntary compliance have grown up within the global business framework. A variety of self-regulation tools are available to assist

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198. Vogel, supra note 176, at 262.
199. Id.
200. See id.
201. See id.
202. See id.
203. See generally U.N. GLOBAL COMPACT., CORPORATE CITIZENSHIP IN THE WORLD ECONOMY (2008), available at http://www.unglobalcompact.org/docs/news_events/8.1/gc_brochure_final.pdf. Among them are BP, Cisco Systems, Daimler Benz, Deloitte Touche, DuPont, Hewlett-Packard, Novartis, Royal Dutch Shell, Unilever, and Volvo. The Compact contains 10 principles that aim to advance human rights and worker rights, protect the environment, and reduce corruption. Id. Firms wishing to join the Compact submit a letter of intent from the CEO and consent to publish in annual reports or similar communications an account of the ways they are lending support for the Compact. Id. The objective is to merge principles of the Compact into a company’s business culture, strategy, and day-to-day undertakings. Id.
205. See generally Ruggie, supra note 55, at 499–531.
206. See ZADEK, supra note 25, at 122.
207. Voluntary compliance takes various forms, but they are mainly best practices, codes of conduct, environmental and social management systems, performance standards,
firms in their commitments to corporate social responsibility. As the discussion below illustrates, these tools are used within the context of accountability regimes, which are principally linked to the firms’ reputations. Thus in the context of reputational capital, the private sector is equipped with instruments to manage and regulate business conduct. This regulation seeks to reduce the degree of environmental and social risk that firms’ actions otherwise cause.

B. Characteristics of Civil Regulations

Unlike traditional top-to-bottom relations established by governmental authority, no clearly established hierarchy exists among the various agents exerting influence on international commercial society within transnational civil regulation. For the past several decades, globalization has transformed the landscape of international civil and business regulations. The polyphonic view has finally caught up with corporate labeling and certification schemes, rating agencies, sustainable monitoring, reporting transparency, and disclosure guidelines. Barricades and Boardrooms, supra note 49, at 27–30.

208. See EU Green Paper, supra note 48, at 6.
209. See Ronnie D. Lipschutz, supra note 191, at 259, 261. Nevertheless, significant connections remain between civil regulations and conventional ‘hard’ legal regimes. See Kenneth W. Abbott & Duncan Snidal, The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State, in THE POLITICS OF GLOBAL REGULATION 44, 48 (Walter Mattli & Ngaire Woods eds., 2009). For example, civil regulations adopted by private enterprise tend to incorporate host countries’ domestic legal norms. See id. at 49. Moreover, many private regulatory initiatives result from regulatory standards promulgated by intergovernmental organizations, such as the International Finance Corporation of the World Bank, the International Labor Organization, and the Organization for Economic Cooperation and Development. Id. at 44. Further, the United Nations and the European Union, along with the governments of Austria, Belgium, France, Germany, Great Britain, and the United States, have all been involved in promoting the establishment of global industry codes of conduct. See K. J. Holsti, Governance Without Government: Polyarchy in Nineteenth-Century European International Politics, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 30, 55–56 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

governance. That, together with the advent of CSR, reveals the private sector’s intensifying influence on public policy and regulation. Scholars have noted that the regulatory power of the state is undergoing extensive decentralization under the influence of globalization. Accordingly, blends of state and market, public and private, and traditional and self-regulatory institutional structures, characterized by alliances built among nation-states, NGOs, and business enterprises, are replacing the traditional mode of top-to-bottom hierarchical regulation.

Public policy once created and enforced through official regulatory organs, such as environmental boards and employment nondiscrimination panels, is being handled by means of dialogue, negotiation, and cooperation between the public and private sectors. Consequently, global business regulatory instruments are undergoing transformation. Global business regulation is no longer restricted to administrative and legislative activity. It encompasses market-oriented agents that impose business disclosure, monitoring, reporting, and transparency requirements, backed with reputational sanctions to address business misconduct.


C. The “Triangular” Nature of Authority

Civil regulation is comprised of market-based, nonstate, and private regulatory structures.219 These components govern the behavior of transnational enterprises along with their global supply networks.220 One of the chief characteristics of civil regulation is that its enforcement, governance, and legitimacy do not rest on traditional institutions of public authority.221 Whereas, traditionally, corporate governance was shaped by substantive law promulgated by governmental authority, today’s transnational businesses function within a new slate of authorities.222 Areas of authority traditionally reserved to government are now shared with nonstate authorities.223

Civil regulations ordinarily function alongside nation-states, not from within.224 Thus, as opposed to hard law, civil regulations are the product of “soft law,” or private law, rather than of nation-states’ legally enforceable norms.225 In that sense, companies subject to a multitude of civil regulations face reputational rather than legal penalties.226 The advent of soft-law’s regulatory influence outside nations’ regulatory schemes has empowered transnational nonstate actors.227 The result is that the private sector has a much more prominent public role, and private authorities have a growing role in transnational economic regulation.228 Corporations increasingly form a part of an emerging global public domain. Civil regulations, however, do not supplant nation-states. Instead, they institute

219. Cutler, Haufler & Porter, supra note 4, at 3; see Scholte, supra note 20, at 19.
220. See sources cited supra note 219.
221. See sources cited supra note 219.
222. See Cutler, Haufler & Porter, supra note 4, at 4–18; Scholte, supra note 20, at 19.
225. See id. at 226–27.
governance systems within wider global structures of “social capacity and agency” where none existed before.\textsuperscript{229} The advent of civil regulation spells the emergence of what some scholars term a global “governance triangle,” wherein nation-states are but a single source of global regulatory authority.\textsuperscript{230}

The notion of governance without government made its debut in the scholarly literature during the 1990s.\textsuperscript{231} Its debut, precipitated by economic globalization, highlighted the changes that globalization caused in the governance structure of international society.\textsuperscript{232} The term “governance” came to be used to refer to self-organizing systems that stand alongside the hierarchies and markets that comprise government structures.\textsuperscript{233} Global governance, in turn, refers to the expansion of the sphere of influence of governing structures to entities beyond nation-states that do not possess sovereign authority.\textsuperscript{234} Governance and government are in fact two logically distinct notions. Governance connotes a process founded on absence of centralized international governmental authority. Ideally, “global governance” undertakes the role within the international realm that governments assume within the nation-state.\textsuperscript{235}

\textbf{D. Forms of Civil Regulations}

The growth of corporate social responsibility reveals the emergence of novel global governance mechanisms and business civil regulations.\textsuperscript{236} Global companies are deploying a variety of devices to propagate principles for responsible business conduct.\textsuperscript{237} These may be categorized as follows: (1) self-regulation—voluntary mechanisms taken on individually in the market; (2) inter-firm cooperation—voluntary tools established

\begin{itemize}
\item \textsuperscript{229} See Ruggie, supra note 55, at 519.
\item \textsuperscript{230} See Abbott & Snidal, supra note 209, at 44–50.
\item \textsuperscript{232} See id.
\item \textsuperscript{234} Lawrence S. Finkelstein, \textit{What is Global Governance?}, 1 \textit{Global Governance} 367, 369 (1995).
\item \textsuperscript{236} See Cutler, Haufler & Porter, supra note 4, at 20.
\item \textsuperscript{237} See Laura Albareda, \textit{Corporate Responsibility, Governance and Accountability: From Self-Regulation to Co-Regulation}, 8 Corp. Governance 430, 430 (2008).
\end{itemize}
cooperatively between firms and business associations; and (3) co-regulation and multi-stakeholder partnerships—voluntary mechanisms developed collaboratively with other entities, such as public-private and hybrid partnerships (governments, international organizations, NGOs, trade unions, and governments).238

1. Voluntary Self-Regulation

Numerous large, global companies institute their own codes of conduct that aim to regulate their operations worldwide.239 One example of voluntary self-regulation is the Leon Sullivan Foundation’s promulgation of the Global Sullivan Principles of Social Responsibility (the “Principles”) in 1999.240 The Principles encompass a breadth of CSR concerns, such as: employee freedom of association, health and environmental standards, and sustainable development.241 Fortune 500 companies are now motivated to adjust their internal practices to comply with the standards found within the Principles.242

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238. See id. at 435–36.
239. See, e.g., Gene R. Lacznik & Jacob Naor, Global Ethics: Wrestling with the Corporate Conscience, Bus., July—Sept. 1985, at 7 (discussing the examples of Allis Chalmers, Caterpillar Tractor, Chiquita Brands International, Medtronic, and S.C. Johnson). While there are firms that do not have comprehensive codes addressing their international operations, many adopt codes that include sections that speak to foreign practices. Id. For instance, Northrop Grumman Corporation’s “Standards of Business Conduct” contains an “International” segment. Northrop Grumman Corporation, Standards of Business Conduct, at 10, http://www.northropgruman.com/pdf/noc_standards_conduct.pdf (last visited Sept. 20, 2009). The section reads, in relevant part:

Employees and consultants or agents representing the company abroad or working on international business in the United States should be aware that the company’s Values and Standards of Conduct apply to them anywhere in the world. Less than strict adherence to laws and regulations that apply to the company’s conduct of international business would be considered a compromise of our Values and Standards of Conduct.

Id.
241. The objectives of the Principles are to support economic, social, and political justice by firms wherever they conduct operations; to advance human rights and to promote equality of opportunity at all levels of employment, including racial and gender diversity on decision-making committees and boards; and to train and advance disadvantaged workers for technical, supervisory, and management opportunities. Id.
In 2005, the Global Business Standards (“GBS”) Codex was published by a group of scholars. Intended “as a benchmark for [firms] wishing to create their own world-class code,” the GBS Codex set forth eight principles shared by five well-known codes that are embraced by the world’s largest companies. Incorporated in the principles were standards in the following categories: citizenship, dignity, fairness, fiduciary, property, reliability, responsiveness, and transparency. Individual corporate codes of conduct usually contain an amalgamation of prudential, technical, and moral norms, declared as general principles. Critics point to the various codes’ failures to include enforcement sanctions and failures to emphasize profit maximization. Yet corporations increasingly specify criteria such as “profitability” and “shareholder interests” in their mission statements. Nevertheless, they also affirm that corporate responsibility for “stakeholder interests” means considering both community interests and sustainability.

244. Id. at 124–25.
245. See id. at 125.
247. WALDMANN, supra note 246, at 65 (discussing the need to emphasize profit); James E. Post, Global Codes of Conduct: Activists, Lawyers, and Managers in Search of a Solution, in GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 103, 111(Oliver F. Williams ed., 2000) (expanding on the lack of enforcement criticism).
248. Broadhurst, supra note 42, at 89.
249. The credo of Johnson & Johnson, for instance, is particularly noteworthy:

We believe our first responsibility is to the doctors, nurses and patients, to mothers and fathers and all others who use our products and services. In meeting their needs everything we do must be of high quality. We must constantly strive to reduce our costs in order to maintain reasonable prices. Customers’ orders must be serviced promptly and accurately. Our suppliers and distributors must have an opportunity to make a fair profit.

We are responsible to our employees, the men and women who work with us throughout the world. Everyone must be considered as an individual. We must respect their dignity and recognize their merit. They must have a sense of security in their jobs. Compensation must be fair and adequate, and working conditions clean, orderly and safe. We must be mindful of ways to help our employees fulfill their family responsibilities. Employees must feel free to make suggestions and complaints. There must be equal opportunity for employment,
2. Inter-Firm and Cross-Industry Cooperation

As key agents in the global economy, transnational firms wield enormous clout to influence economic activities. Firms utilize various instruments to influence global civil society. Among the more significant mechanisms are inter-firm and cross-industry cooperative instruments. These instruments are developed through CSR business associations, which formulate strategies for concerted action in the form of self-regulating proposals within the private sector. These nongovernmental associations of businesses promote the dissemination of best business practices. They seek to establish universal, uniform standards to combat a wide range of practices including apartheid, conflicts of interest, deception, discrimination, embezzlement, executive compensation, fraud, forgery, genocide, insider trading, the misuse of pension funds, slavery, theft, and corruption. Business associations serve as forums for corporate development and advancement for those qualified. We must provide competent management, and their actions must be just and ethical.

We are responsible to the communities in which we live and work and to the world community as well. We must be good citizens—support good works and charities and bear our fair share of taxes. We must encourage civic improvements and better health and education. We must maintain in good order the property we are privileged to use, protecting the environment and natural resources.

Our final responsibility is to our stockholders. Business must make a sound profit. We must experiment with new ideas. Research must be carried on, innovative programs developed and mistakes paid for. New equipment must be purchased, new facilities provided and new products launched. Reserves must be created to provide for adverse times. When we operate according to these principles, the stockholders should realize a fair return.


251. See Albareda, supra note 237, at 435–36.
252. See id. at 434.
254. For example, Business for Social Responsibility runs programs including business ethics, the workplace, the marketplace, the community, the environment, and the global economy. See BSR, How We Work, http://www.bsr.org/about/how-we-work.cfm (last visited Sept. 12, 2009).
255. For example, the Caux Round Table, headquartered in Switzerland, has adopted an international code for multinational firms in Europe, North America, and Japan. The Code identifies five basic principles which, as statements of aspirations for business lead-
rate leaders to discuss and agree on a CSR plan. This entails creation of consolidated private rules, standards, and management instruments, all in the absence of legally enforceable “hard” sanctions.256 The associations often serve as a means for collective exertion of pressure, in order, for instance, to defend the corporations’ positions before national governments and international organizations, such as the European Union and the United Nations.257 As such, business associations serve as an interface between public and private authorities.258

Joining cooperative regulations is a wise business tactic for companies whose social or environmental practices have been targeted by activists. Whereas implementing higher environmental or social standards normally increases costs, attracting the competition to follow suit levels the playing field.259 At least in theory, industry and cross-industry standards inhibit companies from competing with each other. In their absence, firms would engage in a “race to the bottom” by adopting less rigorous protections for employees or the environment.260 Similarly, civil regulations help companies to assist each other in establishing best practices.261 They also assist with communication and implementation of operational upgrades recommended by civil society.262 It is noteworthy that NGOs’ participation in civil regulations accords a higher degree of legitimacy than obtained by codes of conduct authored by individual companies.263

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256. See Albareda, supra note 237, at 433.
257. For example, the “WBCSD defended a voluntary approach before the United Nations; CSR Europe did the same before the European Commission, [the executive branch of the European Union], and individual European governments, and BSR has done the the same with the United States government.” Id. at 435.
258. Although typically underwritten by corporate contributions, inter-firm initiatives sometimes obtain financial backing from international organizations. Id. at 436 (noting contributions from European Union, various national governments, and the United States).
259. See Sethi & Sama, supra note 169, at 89.
261. See Broadhurst, supra note 42, at 95–96.
262. See id. at 97.
This partnership increases the credibility of a company’s commitments to corporate social responsibility.\(^\text{264}\)

Moreover, transnational enterprises often follow their industry peers to implement comparable procedures and norms.\(^\text{265}\) This “follow the leader” dynamic spreads managerial protocols, global CSR undertakings being among them.\(^\text{266}\) Hence, if an industry leader consents to a code of practices, its industry peers typically follow suit.\(^\text{267}\) This trend also works across sectors.\(^\text{268}\) Indeed, the rise of civil regulations among global companies and industries has provided its own impetus as market participants wish to avoid losing reputational capital.\(^\text{269}\)

Lastly, even ill-intended modifications in standards often have a substantial and lasting impact on business practices.\(^\text{270}\) CSR-type initiatives that originate as mere symbolic gestures or efforts at appeasement may well acquire legitimacy among global civil society.\(^\text{271}\) In today’s increasingly transparent global economy, staffing a CSR office, sending out an annual CSR report, combining forces with NGOs, signing on to voluntary industry codes, and having a chief reputation officer are all becoming standard operating practices for management at global companies that attract high visibility.\(^\text{272}\)

3. Co-regulation and Multi-Stakeholder Partnerships

Together with self-regulation instruments, transnational firms are increasingly implementing various CSR mechanisms and civil regulations geared to a number of collaborative regulatory arrangements.\(^\text{273}\) They arise out of crossbreed devices originating with civil society bodies and

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264. See O’Rourke, supra note 263, at 125.
266. See id. at 366.
267. See Broadhurst, supra note 42, at 97.
268. See id.
269. See Alison Maitland, Industries Seek Safety in Numbers, FIN. TIMES (Special Report), Nov. 25, 2005, at 1. The headline by the author here is ostensibly intended as a quip.
270. See Lieberman & Asaba, supra note 265, at 366.
272. See generally Emerging Norm, supra note 271, at 1431 (discussing the relationship between corporate social responsibility and human rights movement).
273. See Albareda, supra note 237, at 435–36.
business associations.\textsuperscript{274} One of the motivations for collaborative governance is the ability to provide public goods through alliances.\textsuperscript{275} For example, some civil regulations and civil regulatory bodies have been instituted with the backing of trade unions, inter-state organizations, or governments.\textsuperscript{276} Nevertheless, nation-states have not insisted on enforcing the regulations, which, after all, are not compulsory.\textsuperscript{277} Instead, states have mainly played the role of intermediaries.\textsuperscript{278} They help companies and, in some instances, NGOs and labor unions, to reach a consensus on mutual standards.\textsuperscript{279} Such multi-stakeholder initiatives amount to public-private systems of co-regulation.\textsuperscript{280}

Business-NGO cooperative arrangements have emerged over the past several years.\textsuperscript{281} There is a significant variety among these cooperative arrangements.\textsuperscript{282} In addition, an array of regulatory bodies is undertaking multi-stakeholder projects such as the Ethical Trading Initiative that

\textsuperscript{274} See id. at 435–36.


\textsuperscript{276} The United Nations Environmental Program, for instance, assisted in setting up the Electronics Industry Code of Conduct. Similarly, the governments of the United States and the United Kingdom assisted companies in extractive industries in assembling Voluntary Principles on Security and Human Rights. In addition, the government of Austria helped underwrite the Forest Stewardship Council.

\textsuperscript{277} See generally O’Connell, supra note 9, at 110.

\textsuperscript{278} See, e.g., BRAITHWAITE & DRAHOS, supra note 24, at 198–200.

\textsuperscript{279} See, e.g., id.

\textsuperscript{280} See, e.g., id.


seeks to promote compliance with labor guidelines within the context of business supply chains.\textsuperscript{283}

The growth of these arrangements has given corporations a role in global public policy networks.\textsuperscript{284} Global public policy networks are coalitions linking civil society organs, firms, government agencies, international organizations, NGOs, professional associations, and religious groups.\textsuperscript{285} Companies that join global public policy networks commit to dialogue with other stakeholders to devise ethical standards.\textsuperscript{286} Their objective is to establish monitoring mechanisms for firms, so as to improve accountability.\textsuperscript{287} The formation of global public policy networks takes place on three levels: (1) establishment of standards, (2) development of regulatory structures, and (3) creation of assessment and enforcement systems.\textsuperscript{288}

For example, the Global Reporting Initiative is a partnership of the Coalition for Environmentally Responsible Economies (“CERES”) and the United Nations Environmental Program (“UNEP”), linking firms, governments, the media, NGOs, and professional associations in order to establish uniform reporting standards to assess the organizations’ environmental and social impact.\textsuperscript{289} Signatory firms agree to observe CERES principles and to preserve and protect the environment at levels exceeding what local law mandates.\textsuperscript{290} Every five years, CERES conducts an independent audit to certify that signatory companies are in compliance with the principles.\textsuperscript{291}

As for Western NGOs, many of them deem co-regulation initiatives an effective way to influence trends in transnational corporate conduct.\textsuperscript{292} Altering procurement protocols of corporate giants such as Carrefour,

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\textsuperscript{283} Other multi-stakeholder initiatives are the Forest Stewardship Council, the Global Reporting Initiative, the Marine Stewardship Council, and the United Nations Global Compact. See, e.g., GRI Portal, About GRI, http://www.globalreporting.org/AboutGRI/ (last visited Sept. 1, 2009).


\textsuperscript{286} See, e.g., BRAITHWAITE & DRAHOS, supra note 24, at 159–60.

\textsuperscript{287} See, e.g., id. at 168-69.

\textsuperscript{288} See generally id. at 550.


\textsuperscript{290} See id.

\textsuperscript{291} See id.

\textsuperscript{292} See Vogel, supra note 176, at 267.
Tesco, and Wal-Mart can obtain more substantial environmental and social results than enacting even massive quantities of national regulations. 293 Although some NGOs stress strategies that “name and shame” multinational corporations, others opt to combine forces with companies and industry associations to establish voluntary standards and take an active part in their enforcement. 294 The NGOs’ forming of coalitions with transnational companies has been instrumental to the creation, legitimacy, and efficacy of civil regulations. 295

A number of Western governments, particularly those in Europe, are supporting civil regulations. The European Union has offered substantial support for global CSR. 296 Some European governments implicitly endorse CSR by demanding that firms trading on their stock exchanges distribute annual reports detailing environmental and social performance. 297 Additionally, public pension funds are either encouraged or, at times, required to take firms’ environmental and social track records into account in choosing investments. 298 Moreover, some governments grant preferences for privately certified merchandise pursuant to their procurement policies. 299

Various features of civil regulation resemble characteristically European attitudes toward business regulation. That is, the European Union, along with a number of European governments, lean heavily on voluntary agreements and soft-law, often turning to nonstate actors to formulate regulatory standards. 300 In the eyes of some European governmental


298. See id. at 336.

299. See id. at 337.

300. See, e.g., MICHELLE EGAN, CONSTRUCTING A EUROPEAN MARKET 263 (2001); Christopher Ansell & David Vogel, The Contested Governance of European Food Safety Regulation, in WHAT’S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 8–9 (Christopher Ansell & David Vogel eds., 2006); Jan Willem Biekart, Negotiated Agreements in EU Environmental Policy, in NEW INSTRUMENTS FOR
authorities, endorsing global civil regulations is a convenient way of assuaging home-country activists and trade unions that may well be antagonistic to globalization and the immense political sway held by multinational companies.\(^\text{301}\) This, however, does not grant nation-states sole regulatory authority over firms operating in their territories.

Thus one notable benefit of civil regulations as a mechanism of global business regulation is that their terms are outside the World Trade Organization’s (“WTO”) purview, as the WTO’s regulations have force only if accepted by national governments.\(^\text{302}\) Whereas the WTO deems government-mandated eco-labels to constitute potential trade barriers, private product certifications and labels do not have that status.\(^\text{303}\) Similarly, whereas companies could require global suppliers’ compliance with environmental rules and labor standards as a prerequisite for transacting business, governments typically may not condition market access upon such requirements.\(^\text{304}\)

In the case of co-regulation and multi-stakeholder partnerships, CSR’s focus shifts away from voluntariness and toward accountability backed by enforcement mechanisms.\(^\text{305}\) Accordingly, public accountability mechanisms for private actors constitute a centerpiece of the emerging global governance paradigm.\(^\text{306}\) As illustrated below, such emerging governance networks are “held in orbit” around the notion of reputational

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\(^{301}\) See Institutional Emergence in an Era of Globalization, supra note 282, at 337.


\(^{303}\) See Organisation for Economic Co-operation and Development [OECD], Informing Consumers of CSR in International Trade, ¶¶ 44–46, June 28, 2006.

\(^{304}\) See Vogel, supra note 176, at 264–65.

\(^{305}\) See Utting, supra note 281, at 381.

\(^{306}\) See id. at 383–86.
capital. Reputational sanctions and rewards linked to global firms’ most valuable asset (reputational capital) therefore constitute an emerging mode of accountability in global governance. Reputational sanctions and rewards linked to global firms’ most valuable asset (reputational capital) therefore constitute an emerging mode of accountability in global governance.307 Global firms utilize corporate legitimacy management to shift the role of businesses in society at large.308 Meanwhile, multi-stakeholder initiatives provide the forum for a dialogue between business and society—a dialogue that is required for accountability mechanisms to work.309 Moreover, involvement in co-regulation and enforcement of multi-stakeholder devices is connected with the new idea of corporate citizenship, or what has been termed “political activism.”310 Through these devices, citizens can participate in dialogue with, and can influence, the conduct of businesses in the environmental and social spheres.311

E. Why Global Businesses Adopt Voluntary Regulations

1. Protecting Reputations

To a significant extent, the growth and influence of civil regulations is attributable to the rise of global brands. The pervasiveness of branding means that companies are becoming increasingly vulnerable to attacks on their reputations in consumer, labor, and financial markets. Moreover, firms’ reputations are susceptible to technological advancements in communication via broadband internet, coupled with the advent of decentralized and globally available media, such as Facebook, YouTube, and Twitter, to name a few, as well as the proliferation of inexpensive voice and text communication via wireless handheld devices.312 Such

307. Id. at 384 (discussing the relationship between rewards and penalties on accountability and performance); Ross, supra note 32, at 8 (arguing that managing reputation requires awareness of stakeholder’s opinion and the capacity to respond); see Jackson, supra note 31, at 35–38 (explaining that the market rewards or sanctions corporate deeds and misdeed).


310. See generally Virginia Haufler, Self-Regulations and Business Norms: Political Risk, Political Activism, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 199, 199 (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 1999) (arguing that corporate behavior is guided by principles and norms beyond profit maximization).


technologies subject companies to attack by blogs, spoofs, e-mail campaigns, parasites, and other protest campaigns. This technology has made it easier for activists to obtain and disseminate information concerning business conduct at the speed of light around the globe. Thus, inability to hide, literally and figuratively, in a distant part of the world has made reputation a valuable commodity.

Consequently, the bulk of civil regulations emerge as a result of citizen campaigns aimed at specific business behavior, enterprises, or industry sectors. The number of such campaigns has gradually increased over the past two decades. They address workplace conditions, fair wages, child labor, agricultural worker compensation, sustainable forestry practices, corruption, environmental preservation, and human rights. Such campaigns to “name and shame” corporate character have targeted prominent companies including Citibank, Exxon, Levi-Strauss, Monsanto, Nike, Royal Dutch Shell, The Gap, Nestlé, Rio Tinto, Starbucks, Union Carbide, and Wal-Mart. The assault on corporate character through modern media, reaching audiences globally, has pressured transnational companies to behave with increased responsibility.

The combination of two trends, in CSR and firms’ building and preservation of their reputational capital, has manifested in a nascent framework of global governance. The movement has led companies to develop environmental and social standards and to formulate strategies that impact their supply chains. Additionally, companies have begun to reconfigure as “relational corporations,” from “vertical” to “flat” and from domestic to international. They have also begun to transition

313. See sources cited supra note 312.
316. Vogel, supra note 176, at 268
317. See generally supra notes 310–315 and accompanying text.
318. See Kracher & Martin, supra note 308, at 62; see also Bartley & Child, supra note 315.
319. See Kracher & Martin, supra note 308, at 59; see also O’Rourke, supra note 263, at 121–22, 124 (discussing the role of the media in successful campaigns by NGOs against companies, specifically by the foreign press and international NGOs in the anti-sweatshop market campaign against Nike).
320. See Vogel, supra note 176, at 268; see also Scholte, supra note 20, at 19.
321. See Lozano, supra note 131, at 60–63.
away from managing relationships and toward building relationships. Moreover, in cooperation with civil society actors, firms continue to implement settled transnational, environmental, and social regulation standards, which substantially impact the firms’ reputations.

2. Breakdown in Global Governance

Over the last twenty years, globalization has transformed the world economic landscape. The situs of manufacturing has moved from industrialized nations to developing nations. In addition, global corporations’ production and supply chains transcend national borders more than ever. The bulk of transnational commerce occurs among firms or inter-firm networks. The rise of global civil regulation has, in significant measure, resulted from the recognition that globalization dampens the ability of national legal authorities to effectively regulate global companies and markets. Hence, it has been observed that, although some multinational firms are as powerful as some small nation-states, they are less accountable.

While state and international business regulations are still growing in range and degree, today’s global economy, while highly integrated, is plagued by regulatory breakdown. The multinational nature of global manufacturing strains national governments’ abilities to control economic activity outside of, and straddling, their own territories. National and global regulatory frameworks will remain dangerously ineffective so long as national governments and global companies alike are incapable of controlling, or ill-disposed to control the international trade’s envi-

322. See id.
323. See ZADEK, supra note 25, at 66.
325. See CARROLL & BUCHHOLTZ, supra note 29, at 395 (noting the trend that jobs follow manufacturing).
326. See RICHARD T. DE GEORGE, COMPETING WITH INTEGRITY IN INTERNATIONAL BUSINESS 78–79 (1993); DONALDSON, supra note 5, at 30-35.
327. See generally sources cited supra note 324.
328. See Vogel, supra note 176, at 266.
331. Abbott & Snidal, supra note 209, at 44.
ronmental and socioeconomic externalities. Yet, the rise of civil regulation does not signify an outright replacement of state regulation. Rather, it signifies an attempt to expand regulation to a broad array of transnational corporate conduct that remains difficult to regulate via purely national mechanism. The advent of novel types of public civil regulation has resulted in reputational accountability, complementing nation-states’ regulations that have proven inadequate in the era of globalization.

IV. REPUTATIONAL ACCOUNTABILITY MECHANISMS

As a result of major industry scandals, coupled with the recent global financial meltdown, and motivated by accountability principles, corporate management is implementing ethical, transparency, and disclosure standards. The following discussion aims to highlight the need for global corporate governance to recognize the crucial role of the rule of reputation. The need to adopt voluntary civil regulations is especially strong for firms operating in the global environment. The traditional concept of legal accountability is distinguishable from the emerging concept of reputational accountability. As will be shown, the latter is especially intricate since it entails multifaceted components of accountability. This section will illustrate how the reputational capital model of corporate governance influences managerial decision-making—namely, how managers seek to accommodate the burgeoning demands for reputational accountability under the emerging regime of civil regulations.

A. Legal Accountability

Legal accountability simply means that normative regulatory standards are enforceable. Compliance with black-letter legal rules creates a presumption of validity in the eyes of judicial tribunals or quasi-judicial forums. The notion of legal accountability stems from the rule of law.

332. See Koenig-Archipugi, supra note 197, at 234–35.
333. See Knill & Lehmkuhl, supra note 11, at 44–45.
336. Cf. HANS KELSEN, PURE THEORY OF LAW 11 (1967) (discussing validity of norms and noting that if a norm is not obeyed, it is thus not valid); H. L. A. HART, THE CONCEPT
maxim. A vast body of civil and criminal law has developed to hold non- and for-profit institutions legally accountable. In the international arena, the WTO Dispute Settlement System, the Hague International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, are just some of the institutions that enforce “hard” international law. Of course, an actor’s failure to comply with law will typically trigger reputational sanctions as well; and compliance may provide for its own reputational rewards.

Similar to the early international law phenomena, civil regulations, absent hard enforcement mechanisms, function as mere normative stan-

of law 197 (1961) (noting that if the “system is fair,” it “may gain and retain allegiance”).

337. Throughout the latter part of the 20th century, one of the central topics addressed by legal philosophers was the nature of the rule of law. See Robert P. George, Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition, 46 Am. J. Juris. 249, 249 (2001). Arguably one reason for the keen attention extended to the concept was the rise and decline of totalitarian governments. See id. “In the aftermath of the defeat of Nazism, legal philosophers of every religious persuasion tested their legal theories by asking, for example, whether the Nazi regime constituted a legal system in any meaningful sense.” Id. Following the collapse of communism throughout Europe, scholars of jurisprudence sought to account for the manner in which legal institutions and procedures foster respectable democracies. See id. Today, the rise of global civil regulations for business leads to the analogous question of whether, and to what extent, such initiatives embody the rule of law. On this point, reference to the fundamental components of legality is illuminating. See, e.g., Lon L. Fuller, The Morality of Law (rev. ed. 1964) (Basic elements constituting the “internal morality” of law are: non-retroactivity, amenability to compliance, promulgation, clarity, coherence, temporal constancy, generality, and congruence between official behavior and rules.). Arguably, global business civil regulations display many if not all of these characteristics.

338. See Parker, supra note 181, at 207–17; see also Alnoor Ebrahim, Making Sense of Accountability: Conceptual Perspectives for Northern and Southern Nonprofits, 14 Non-Profit Mgmt. & Leadership 191, 194–95 (2003).

339. Concerning violence and nation-states, enormous changes have come about in relevant international standards, practices, and institutions. War crimes tribunals and the International Criminal Court were established in order to make accountable, to the point of incarceration, chiefs of states that deploy violence aimed at their own populace. These developments represent a tremendous departure from customary norms governing the principle of national sovereignty. That principle extended immunity to heads of states from legal petitions for accountability, save from members of their own principalities. Indeed, an inaugural precept of the nation-state system, observed all the way from Westphalia in 1648 to Nuremberg in 1946, dictated that heads of states enjoyed immunity from prosecution. See Geoffrey Robertson, Ending Impunity: How International Criminal Law Can Put Tyrants on Trial, 38 Cornell Int’l L.J. 649, 650 (2005).

340. See Ross, supra note 32, at 11.
dards and are intended to persuade compliance. Corporations comply with soft law in order to protect their intangible reputational assets; it is not that they are deterred by enforcement sanctions. Arguably, a regime of global civil regulations and the accompanying rule of reputation comprise an integral part of both the domestic and international rule of law. They are, however, often ignored by commentators because they are only backed by reputational sanctions, the nature and extent of which are not always fully appreciated. To fully account for the ontology of civil regulation and actors’ compliance internationally, the concept of reputational capital must be incorporated into our current thinking about corporate governance. A deeper inquiry into the various sources of soft law, however, reveals its intricacy and complexity. Global civil regulations embody a compromise among private and public entities. Rather than imposing cost of compliance with formal regulation, civil regulations encourage corporations to examine their conduct and guide it by means of voluntary self-regulation. Global civil regulations are continually undergoing an organic evolution, yet national law depends on its institutions to act, which takes longer.

B. Reputational Accountability

From the standpoint of the conventional rule of law maxim and its experience, voluntary CSR seems utterly inadequate. That is, CSR is de-


345. The sources of law applied and enforced by courts of law are generally understood by both legal practitioners and scholars. But what sources of “soft law” are applied by reputational accountability-holders? Consider the famous dictum that the task of jurists is to prophesize what courts will do. See Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457–58 (1897). This so-called “predictive theory” of law helps us understand the nature of the “soft law” of accountability holders. “The idea is that the law [of soft law] resides in the actual judgment given, not in any crisp preexisting formulation in a statute or case precedent.” Jackson, supra note 31, at 38. The challenge for firms is to forecast what these (non-legal and unelected) accountability-holders expect. Id.
corporations, it carries conflicting norms, it is run by bureaucrats, and there are no hard sanctions for noncompliance.346 The concept of reputational accountability offers an explanation for how the enforcement of civil regulations makes global firms more accountable. Accountability means that actors may ensure that other actors also follow standards, and may apply sanctions for noncompliance with those standards.348 In the context of global corporate governance, civil regulations that impact a firm’s reputational capital arguably represent the strongest sanctions, as a firm’s most valuable, albeit intangible, asset is its reputation.349

1. Elements of Reputational Accountability

The process of corporate reputational accountability involves the following three components.350 First, reputational accountability presupposes the existence of civil regulations that hold companies accountable; thus, compliance is expected.351 Similar to the maxim that the law must be knowable—i.e., that it must be published by the State so that citizens can discover what rights and responsibilities are given or imposed upon them by law—civil regulations must also be a matter of common knowledge.352 Second, reputational accountability requires that “enforcement agents” possess relevant information about firms’ actions to evaluate

346. From this standpoint, the rise of global governance raises questions about the legitimacy of the actors attempting to hold transnational firms accountable. The theory of rent seeking proceeds from the hypothesis that the priority of typical bureaucrats are to advance their own self-interest. Consequently, if restraints of accountability and election are removed, bureaucrats become owners of rents, with the power to potentially raise these rents at the cost of those for whom the resources are supposed to benefit. Rosemary Righter argues that United Nations institutions provide substantial income for the politicians and bureaucrats that control them, and that the objectives for which they were set up are absorbing ever smaller portions of their internal budgets. See generally ROSEMARY RIGHTER, UTOPIA LOST: THE UNITED NATIONS AND THE WORLD ORDER 56–63 (1995).


348. See Grant & Keohane, supra note 335, at 29.

349. Cf. Jonathan M. Karpoff & John R. Lott, Jr., The Reputational Penalty Firms Bear from Committing Criminal Fraud, 36 J.L. & ECON. 757, 758-59 (1993) (noting that majority of falling stock price in the wake of corporate malfeasance, whether proven or not, is attributable to reputational fraud, whereas anticipated legal sanctions, including fines and damage awards comprise only 6 percent of the decline in share value).

350. This analysis builds upon the discussion by Robert O. Keohane, illustrating the power dimensions of accountability demands. See Keohane, supra note 32, at 362.

351. Cf. id. at 362.

352. See supra note 337 and accompanying text.
compliance with applicable civil regulations. Thus, on the one hand, to be held accountable, firms must be aware of the expectations. On the other hand, enforcement agents must know by what standards to render an assessment of business conduct. Because accurate information is essential, some measure of transparency and dialogue among stakeholders appears to be a prerequisite for reputational accountability. Third, reputational accountability depends upon the existence of incentives for compliance. That is, enforcement agents must be able to impose reputational sanctions or reputational rewards. Of course, no worldwide government, democratic or otherwise, exists to provide wholesale regulation. Consequently, demands for corporate accountability are decentralized and, thus, diffused.

2. Enforcement of the Rule of Reputation

Whereas the concept of legal accountability derives its central meaning from the notion of the rule of law (ultimately upheld by courts), the concept of reputational accountability may be understood in terms of the rule of reputation. The rule of reputation is upheld by market participants that evaluate business conduct within several forums. For instance, the “Forum of Key Constituents” is especially significant for business enter-
prises. 360 “Key Constituents” are firms’ customers, employees, and investors, whose authority and control are exerted in transactions occurring in consumer, labor, and capital markets respectively. 361 For example, individual investors as well as mutual funds may cease investing in companies whose practices or policies they find objectionable. 362 Some pension funds shun securities of certain companies, often on the basis of criteria determined by their beneficiaries. 363 Alternatively, investors may require higher interest rates on corporate bonds. 364 Further, customers may decline to purchase the products produced by firms struck by negative publicity stemming from human rights violations, unfair labor practices, or environmental violations. 365 It has been shown that consumers are willing to incur added costs, such as the cost of traveling greater distances, in order to punish retailers whose conduct they find egregiously unfair. 366 Finally, those in employment markets may select among competing job offers on the basis of the prospective employer’s publicity and reputation. 367

Business partners and associates comprise another type of forum for the evaluation of conduct. This forum functions as a peer-driven reputational accountability network powered by the process of business partners’ reciprocal appraisals. 368 Institutional lenders, for instance, use caution in scrutinizing their borrowers’ creditworthiness as well as that of their

361. See id. at 106–108.
362. The Council on Economic Priorities reports that there are three key factors accounting for escalation in social and ethical investing: (1) the existence of more reliable and more sophisticated data regarding corporate social performance than previously; (2) investment firms utilizing social criteria have a demonstrated track record, and it is not necessary for investors to sacrifice gains for principles; (3) the socially conscious generation of the 1960s is currently engaged in rendering investment decisions. See, e.g., First Affirmative Financial Network, LLC, Socially Responsible Investing (SRI) In the United States, http://www.firstaffirmative.com/news/sriArticle.jsp (last visited Oct. 12, 2009); see also Samuel B. Graves & Sandra A. Waddock, Institutional Owners and Corporate Social Performance, 37 Acad. Mgmt. J. 1034, 1034 (1994).
368. Grant & Keohane, supra note 335, at 35. “When standards are not legalized, we would expect accountability to operate chiefly through reputation and peer pressures, rather than in more formal ways.” Id.
partners’ borrowers. Business enterprises that are rated low by their peers are less likely to find willing business partners among them. These businesses find themselves in a strategic disadvantage and therefore tend to stagnate.

Next is the forum of public opinion, or the proverbial “court of public opinion.” Public reputational accountability means that members of civil society penalize companies by promulgating negative publicity. Lawmakers, courts, government regulators, fiscal watchdogs, journalists, competitors, licensing boards, rating agencies, and markets, all render judgments about the reputations of market participants. In fact, reputation constitutes a type of “soft power,” which has been characterized as “the ability to shape the preferences of others.” Companies with tarnished reputations find it hard to establish relationships, assert authority, or attract loyalty from others.

The Royal Dutch Shell scandal involving the Brent Spar and the Ogoni in Nigeria presents a vivid example of a company experiencing a reputational crisis as a result of its failure to comply with public social expectations and its neglect of both environmental and human rights standards. In 1995, Shell made plans to sink a large decommissioned oil buoy storage rig in the North Sea. It conducted an environmental impact assessment and gained approval from the government of Great Britain. Greenpeace activists challenged the proposed deep-sea dumping and alleged that Shell’s sinking the rig would cause serious environmental

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370. Id. at 14.
371. Id.
372. Id. at 36.
374. See Jackson, supra note 31, at 42, 45.
376. See Jackson, supra note 31, at 15, 36.
damage.\textsuperscript{379} Shell disputed the claim on scientific grounds and maintained that sinking was the best available option.\textsuperscript{380} Since Shell refused to abandon its plans, Greenpeace, acting in front of television crews, surrounded the rig with small boats and even occupied it.\textsuperscript{381} Millions of protests erupted throughout Europe.\textsuperscript{382} In response to Greenpeace’s pressure and the boycotts, Shell abandoned its sinking strategy and towed the rig to a Norwegian fiord.\textsuperscript{383}

Reversing its original plan cost Shell considerable expense.\textsuperscript{384} In addition, when Shell failed in the same year to intercede to stop the execution of Ken Saro-Wiwa in Nigeria, voices worldwide expressed indignation.\textsuperscript{385} Saro-Wiwa, a writer, businessman, and political journalist, had organized the Movement for the Survival of the Ogoni People to take a stand against mounting problems with Shell and the government of Nigeria.\textsuperscript{386} Saro-Wiwa, along with nine others, was tried for the murder of four Nigerian officials, a fabricated accusation.\textsuperscript{387} Saro-Wiwa was not tried by a traditional court, but rather a special tribunal that refused to admit evidence of innocence.\textsuperscript{388} As the defendants were found guilty and sentenced to death, Shell stated that political issues were not their concern.\textsuperscript{389} Magazines and newspapers roundly called for punishment of Nigeria and Shell, the Sierra Club initiated a massive boycott campaign against the company, and celebrities advocated a U.S. oil embargo.\textsuperscript{390} Shell’s subsequent efforts to revive its reputation in the aftermath of the Spar and Nigerian scandals, while very expensive, were successful at

\begin{itemize}
\item \textsuperscript{379} See id. at 9.
\item \textsuperscript{380} See generally Greenpeace Admits Error Against Shell, L.A. TIMES, Sept. 6, 1995, at D2.
\item \textsuperscript{381} See Shell Oil Platform to Become a Pier, HOUSTON CHRONICLE, Jan. 30, 1998, at Business 1.
\item \textsuperscript{382} JACKSON, supra note 31, at 36.
\item \textsuperscript{383} See Shell Oil Platform to Become a Pier, HOUSTON CHRONICLE, Jan. 30, 1998, at Business 1.
\item \textsuperscript{384} In January 1998, after assessing a range of proposals, Shell opted to cut up the rig and turn it into a pier in Norway, costing the company approximately $42 million, over twice the cost of dumping the rig into the sea. See id.
\item \textsuperscript{385} JACKSON, supra note 31, at 36.
\item \textsuperscript{386} Eaton, supra note 377, at 269.
\item \textsuperscript{387} Id. at 270.
\item \textsuperscript{388} See id. at 270 (citing Paul Lewis, Nigeria Rulers Back Hanging of 9 Members of Opposition, N.Y. TIMES, Nov. 9, 1995, at A9).
\item \textsuperscript{389} See id. at 271 (citing Paul Lewis, Rights Groups Say Shell Oil Shares Blame, N.Y. TIMES, Nov. 11, 1995, at A6).
\item \textsuperscript{390} Christopher S. Wren, U.S. is Seeking Further Ways to Punish Nigeria for Executions, N.Y. TIMES, Dec. 17, 1995, at 1.11.
\end{itemize}
averting a public relations crisis, which could have been relentless. By contrast, companies that achieve superior reputations within each of the above forums, enjoy a host of advantages. In that sense, reputational accountability involves not just punishing firms but also rewarding them for their compliance with civil regulations and commitment to CSR.

C. Networks of Reputational Accountability

Reputational accountability in global economic governance is multifaceted. Global companies operate within networks of continuous relationships. Firms are linked with their customers, suppliers, and even rivals via strategic alliances. When companies enter into arrangements with various parties, such as government regulators and special interest groups, they are in effect establishing “reputational networks.” These networks form a variety of channels of accountability, which are divided by and cover a range of topical areas. On the other hand, relationships involving international organizations typically establish sequences of accountability. In addition, multiple intersecting accountability relationships exist when different groups of market participants, with potentially diverse interests, set out to hold other agents accountable for their behavior.

In the modern business environment, companies confront manifold and frequently incompatible or contradictory reputational accountability demands. Often it is not sufficient to meet the demands of shareholders and credit markets. Moreover, it is not enough to comply with legal rules as law often lags behind rapidly evolving social norms.

391. See Eaton, supra note 377, at 270–71; see also sources cited supra notes 386–89.
392. See JACKSON, supra note 31, at 13, 47, 59.
393. See id. at 5.
394. In a common accountability sequence, an agent will be authorized by a given accountability relationship, and yet another such relationship will restrict it. Thus, the International Accounting Standards Board holds companies responsible for accounting practices, yet is itself accountable to the entities granting authority to it, namely the G-7 Finance Ministers and Central Bank Governors and the International Organization of Securities Commissions. See Keohane, supra note 32, at 364.
396. See Ross, supra note 32, at 8, at 11–13.
397. See id. at 7–8.
398. CARROLL & BUCHHOLTZ, supra note 29, at 41.
nesses, however, must remain mindful of their constituencies’—peers, the media, and advocacy groups—reactions to their actions. Various calls for reputational accountability concerning a firm’s conduct reveal conflicting expectations of outside observers.  

A reputational crisis can also rapidly spread to infect an extensive network. For example, the uncovering of accounting irregularities at the Indian outsourcing firm Satyam Computer Services, Ltd. led to immediate suspicion about the firm’s global auditor, PriceWaterhouseCoopers, and prompted a group of its clients, including Cigna, Citigroup, Coca-Cola, GlaxoSmithKline, Merrill Lynch, Nissan, Novartis, Pfizer, and State Farm Insurance to move their business away from the firm.  

D. Reputational Accountability is Dynamic  

Mandates for reputational accountability undergo a constant process of change as activist campaigns are impermanent and public interest and attention are constantly shifting; in general, however, the bar continues to rise. For example, only a few decades ago, controversy regarding environmental and labor conditions was almost nonexistent, whereas today it is front and center. Those unable to forecast these shifts tend to lag behind the current norms. As far as reputational accountability is concerned, such lag may cause strategic problems. New laws and regulations may be enacted, the ire of civil society activists raised, or reputations sullied before managers implement remedial measures. Thus, a key

399. See generally JACKSON, supra note 31. For example, when U.S. West contributed to the Boy Scouts of America they were criticized by gay-rights activists. Id. at 109. Yet when Levi-Strauss ceased its funding of the Boy Scouts, they were attacked by many religious leaders. Id. Similarly, the retailer Dayton-Hudson donated to Planned Parenthood. Id. This led to anti-abortion demonstrators outside of the company’s stores. Id. The company reversed its stance and began contributing to anti-abortion groups instead. This move was met by pro-choice protesters’ denouncing the company for abandoning their cause. Id.


401. See CARROLL & BUCHHOLTZ, supra note 29, at 15–16.


404. For example, in the Financial Times 1997 annual survey of Europe’s most respected corporations, the Times cited the public criticism of Shell’s ethical behavior in connection with environmental and human rights issues as the main cause of the firm’s precipitous fall in ranking. BP Steals the Limelight from Shell, FIN. TIMES (Surveys edition), Sept. 24, 1997, at I-II.
motivation for companies to become industry leaders in building reputa-
tional capital is the need for additional insurance against reputational
harm from negative publicity and pressures that may be detrimental to
the company. In such instances, having a superior reputation may turn
out to be a global company’s most valuable asset, albeit an intangible
one.

E. Implications for Global Operations

To integrate the considerations of reputational capital into global cor-
porate governance is to recognize the corporation’s reputation as a pro-
ductive asset that generates capital, not only for the firm’s shareholders,
but ultimately for a broad range of constituents. Of course, reputational
capital goes unrecorded on corporate balance sheets. But creating share-
holder value extends beyond capitalization on traditional balance sheet
assets; it also entails leveraging value from the company’s reputational
capital.

A firm will realize competitive advantage by correctly forecasting
“new waves” of civil society’s expectations for responsible corporate
conduct. Corporate officers must develop the ability to effectively reach
consensus with key decision makers regarding new waves of demand for
CSR. To become industry leaders in terms of CSR standards, corpora-
tions must implement internal ethical standards and focus on their visions,
developing strategies to beat the competition. Having to define accounta-

405. See generally Joe Marconi, Crisis Marketing: When Bad Things Happen to
Good Companies 26 (2d ed. 1997).

406. As one scholar writes:

[Companies that have built up a stock of reputational capital may enjoy an
e extra measure of goodwill in times of difficulty or crisis. This goodwill can
cash out in varied and sometimes surprising ways—as other parties refrain
from using their superior bargaining power, remain willing to forego costly and
time-consuming formalities, or tolerate mistakes they would otherwise challenge.

Paine, supra note 17, at 49.

407. See Dowling, supra note 172, at 145; Fombrum & van Riel, supra note 172, at
33; see also Fombrun, supra note 172, at 1; Jackson, supra note 31, at 1; Paine, supra
note 17, at 49. See generally Alsop, supra note 172, at 1.

408. See Sharon H. Garrison, The Financial Impact of Corporate Events on
Corporate Stakeholders 3–6 (1990); Ian I. Mitroff & Mural C. Alpaslan, Preparing
for Evil, Harv. Bus. Rev., Apr. 2003, at 109, 115; see also Ian I. Mitroff, Crisis
101, 101–02.
creating activity. If firms fail to comply with reputational accountability requirements, however, they may eventually face reputational sanctions. Still, over time, industry as a whole seeks to catch up with its leaders and innovators. At this point, no special advantage comes from compliance with the new norms. Nevertheless, the emerging global civil regulations function as signposts for corporations. Following their trends, firms may institutionalize norms to respond to their demands.

V. CRITICISMS AND REPLIES

On the one hand, the advent of global civil regulation and CSR has been hailed as a panacea to the unhealthy symptoms caused by the inability of nation-states to regulate internationally. For example, laws are often outpaced by rapidly developing technology. This often happens in technical fields, such as the supervision and regulation of risk in the banking industry. In this context, international industry leaders call for allowing institutions’ own risk models to participate in financial regulation. On the other hand, while acknowledging the numerous positive aspects of self-regulation, critics contend that voluntary business regulations are intrinsically unable provide a comprehensive regulatory landscape, especially because transnational firms may evade regulation by relocating. Moreover, critics allege that civil regulations are too soft when it comes to regulating conduct as compared to the hard rule of law. For example, absent any adjudicative institution with multinational


412. See James, supra note 15, at 20.

413. See id.

414. See id.

415. See LIPSCHUTZ & ROWE, supra note 181, at 154, 167.

or international jurisdiction, it is difficult to obtain redress for human rights violations if the victim’s home state does not provide the same.  

In addition, conceptual difficulties arise to the extent that civil regulations amount to self-regulation and are voluntary codes that merely codify firms’ or their primary subjects’ responsibilities. A potential drawback is the perception that compliance with the codes is undertaken on a purely voluntary or discretionary basis. Nevertheless, logic dictates that responsibility for human rights, in their broad sense, stems from the fundamental maxim that people possess a bundle of human rights that may not be transgressed. Acknowledging the universality of the human rights principle negates the notion that firms’ human rights responsibilities are purely voluntary or discretionary. Rather, the universal maxim of human rights imposes overriding obligations on transnational firms. Human rights norms fall squarely within the category of hypernorms. Therefore, any CSR initiative that seeks to comply with human rights hypernorms should be viewed as mandatory, rather than discretionary. The Integrative Social Contract Theory, however, fails to account for why corporations commit their resources to advancing human rights. While detailing the firms’ decision making processes, the ISCT focuses on mechanisms for resolving conflicts between authentic norms and hypernorms. The theory does not address the businesses’ economic motivations, resources, or competencies. The ISCT framework is thus deficient. Under the ISCT, a firm’s decision to act responsibly with respect to human rights remains discretionary, or, within “moral free space.” This, however, betrays the nondiscretionary nature of human rights. An alternative theory is necessary—namely, the theory of reputational capital. The latter best accounts for how firms, recognizing the mandatory nature of human rights obligations, can expect support from civil society while proactively advancing them, thus improving their financial and social standing.

Regulation and Adverse Selection: A Comparison Across Four Trade Association Programs, 12 BUS. STRATEGY & ENV’T 343, 343 (2003); Eaton, supra note 377, at 297.

418. See Khanna, supra note 416, at 15, 35.
419. See id. at 15, 31–32.
420. See Eaton, supra note 377, at 261, 297.
421. Ven, supra note 146, at 50.
422. See DONALDSON & DUNFEE, supra note 12, at 74–81.
423. See Donaldson & Dunfee, supra note 12, at 89.
424. See id. at 90–94, 109–110.
425. DONALDSON & DUNFEE, supra note 12, at 38.
While the practical impact of civil regulations is slight, it is nevertheless palpable. The scores of intergovernmental treaties and agreements have been ineffective, at least in the area of ecological preservation. Civil regulations provide greater influence than inter-governmental treaties with respect to human rights, workplace conditions, and forestry practices as they reach beyond national borders. Yet in the absence of universally accepted criteria for assessing such impact, it is difficult to draw solid conclusions.

But the reputational pressure is on. In order to effectuate positive change in businesses’ environmental and socioeconomic practices in the developing world, activists in the West make public demands on well-reputed, high-profile transnational companies based in Europe and the United States. These demands and pressures often obviate the need for governmental involvement in the sphere that is left unchecked due to governments’ limitations. The main aim in this process is to transfer the more demanding regulatory guidelines from the developed world to businesses, industries, and markets in the developing world. In doing so, civil regulations cause the “California effect”—the export of higher standards through international trade.

Of course, international civil regulations are arguably more effective than the human rights, environmental, and labor standards originating from the developing world. Indeed, civil regulations are almost the exclusive source of effective business regulation for many developing countries. Global civil regulations have led to greater levels of compliance with human rights, workplace, and environmental standards by

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428. See id. at 81.
432. See Winston, supra note 48, at 76.
433. See id. at 72–73.
Western companies or their affiliates operating in a developing region. However, some would deny this claim or discount its significance. Indeed, the traditional regimes of hard law and the emerging regimes of soft law are capable of working together. They are not mutually exclusive vehicles for corporate governance. While civil regulations offset some deficiencies in governmental regulation, they need not completely replace or substitute the hard regulation that originates in domestic, regional, or global arenas. The continuing success of private global business regulation hinges on the degree to which its standards and its instrumentalities for accountability can be successfully incorporated into, and strengthened by, regulatory procedures backed by both traditional legal sanctions and emergent reputational sanctions at domestic, regional, and transnational levels.

Another criticism is that manufacturers in the developing world consider the Western civil regulations to be a burden on their development. Critics point out that compliance with Western codes elevates

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business costs. Consequently, companies in developing countries are tempted to follow the bare minimum in terms of compliance with requirements foisted upon them by Western contractors. Their relationships with private inspectors and ethics auditors often turn hostile and even involve instances of deception.

Similar criticisms are leveled at Western companies as well. Critics contend that Western firms adopt civil regulations merely as public relations ploys to divert attention away from wrongdoing, or as marketing strategies, or in reaction to public and peer influences. For example, the Global Compact is accused of “blue washing.” It permits member-companies to exhibit the blue logo of the United Nations, while ignoring their failure to file annual reports and their mere token efforts to comply with the Compact’s standards. Thus, critics contend that the corporations become free-riders. Some companies have even been accused of violating the Compact’s principles.

Nevertheless, not all CSR initiatives lack genuine commitment. Arguably, those with genuine respect for civil regulations, as opposed to their mere instrumental value for good business, are most likely to reap long term reputational and financial rewards. The public, in the long run, is able to discern which firms exhibit a genuine commitment to CSR.

Indeed, the critics’ assertions that many corporations act insincerely...
presuppose that it is possible to distinguish disingenuous public relations ploys from sincere moral commitments. In other words, the skeptic’s argument assumes what it wants to deny—that corporations are behaving wrongly when they use CSR superficially instead of honoring environmental and social standards for their own sake. If it were true that all corporations always act insincerely, meaning, therefore, that they are incapable of acting otherwise, then what would be the point of drawing our attention to, and condemning, such behavior?

In addition, critics doubt whether firms that proactively comply with civil regulations in order to merely enhance profitability can ultimately grow reputational capital. In other words, critics insist that the pure profit motivation necessarily taints any purported ethical act. Addressing this important objection requires reflection upon two fundamental points. First, wealth creation is itself a source of public good. Second, while getting reputational rewards from CSR most likely requires genuine commitment, it is unnecessary and likely impossible to gauge the degree of its authenticity, as the motives for corporate compliance with CSR are notoriously complex. The public, however, deplores corporate marketing and public relations campaigns masquerading as citizenship and social responsibility initiatives, especially when used to divert attention


449. Roger Scruton makes this point as follows:

The very same ‘invisible hand’ that, according to Mandeville and Smith, produces public good from the pursuit of private profit, produces private profit from the pursuit of public good. Moral and economic values are not in competition but, in the right context, to pursue the one is to obtain the other: and the dependency goes both ways.


450. One author identifies four ways in which companies respond to demands placed by CSR, arguing that taken together they establish a business case for CSR. ZADEK, supra note 25, at 64. The four approaches are distinguished as follows: (1) defensive approach, intended to alleviate pain; (2) traditional cost-benefit approach holding that firms commit to activities for which they can see direct benefits exceeding costs; (3) strategic approach, according to which firms recognize the changing environment and thus engage with CSR as part of a conscious emergent strategy; (4) innovation and learning approach, where active engagement with CSR both provides fresh opportunities to understand the marketplace and enhances organizational learning, all of which fosters competitive advantage. Id.
from a firm’s own misconduct. As has been shown, activists have been quick to expose firms that engage in disingenuous image-laundering tactics. Any attempt to deceive the public, in today’s age of far-reaching, decentralized media, will quickly cause reputational harm.

In other words, reputational capital is generated from CSR backed by genuine intention. A company will find it difficult to capitalize on compliance with civil regulations unless it has explicitly declared its moral commitment. Companies that exhibit the “it pays to be ethical” attitude will be undermining their efforts in the long run. From a purely financial standpoint, it arguably pays to appreciate the intrinsic value of good business conduct. Executives of multinational corporations should guide their organizations’ actions by this premise.

Finally, some critics contend that the bulk of global CSR practices resemble corporate philanthropic efforts in the sense that they are situated at the outer margins rather than at the core of firms’ business strategies. Thus, critics see the CSR practices more as constituting inoculation against public denunciation than as an effort at long-term competitive advantage. On the other hand, such companies as American Apparel, British Petroleum, Seventh Generation, Starbucks, Timberland, and Whole Foods make CSR commitments a vital component of their brands and their core business policies. As it is commonly suggested in order to debunk the widespread misconception that costly Madison Avenue advertising campaigns do not really work: if that were really true, then why would companies continue to spend so much on them?

CONCLUSION

This article has attempted to delineate the transformative trends in global governance that are backed by reputational capital. This change is taking place through emerging civil regulations enforced by reputational accountability mechanisms established by global civil society to impose responsibility on firms for environmental and social standards. Several

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452. See Deva, supra note 442, at 148.
factors have caused the emergence of CSR, including: economic globalization, the development of global civil society, and the role multinational enterprises have begun to play as private authorities. The efforts of businesses to advance human rights and to promote ethical, responsible, and sustainable practices continue to mature, manifesting in the advent of civil regulations and the emergence of a regime of global economic governance.

The rise of CSR is also the result of firms—pressured by the corporate accountability movement—seeking to address the social and ecological byproducts of their conduct. A set of self-regulating norms and mechanisms, along with multi-stakeholder initiatives and co-regulation, guide CSR. The global corporate governance paradigm continues to be shaped by ethical standards and the pursuit of greater accountability for business. As corporate social responsibility adjusts to meet expectations for transnational business conduct, it will coalesce within the space of reputational capital theory. Thus, reputational accountability will continue to fill the ever-expanding gap between national regulations and the burgeoning multitude of “soft law” civil regulations.
SHOULD STATES HAVE A LEGAL RIGHT TO REPUTATION? APPLYING THE RATIONALES OF DEFAMATION LAW TO THE INTERNATIONAL ARENA

Elad Peled*

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INTRODUCTION

Various sources throughout the world, primarily the mass media and nongovernmental organizations, routinely publish reports on the conduct and circumstances of states. These reports shape states’ reputations in the eyes of individuals, publics, organizations, and governments. While most reporting may be presumed accurate, disinformation inevitably finds its way into the international public domain. Whether such disinformation is a product of biased agendas, interests of political actors, omissions of relevant details, or merely a matter of honest mistakes, it might do injustice to the states concerned.

Several examples show that this phenomenon does not discriminate among states on the basis of political orientation. According to false, or at least questionable, allegations voiced in the past, Bolivia had an astonishing rate of infant deaths (2007); Iran forced non-Muslims residing in its territory to wear identification patches (2006); Iraq killed Kuwaiti babies in hospital incubators (1990) and held weapons of mass destruction (2003); Israel carried out a massacre in Jenin refugee camp (2002); the U.S. military employed nerve gas during the Vietnam War (a report published in 1998) and its interrogators at Guantánamo Bay flushed a Koran down a toilet (2005); and the Uzbek police tortured a person to death (2004). From this list, we may reasonably assume that

other beliefs currently shared by the international community might actually be based on erroneous reports. The fact that in some instances the falsity of such reports was eventually revealed does not guarantee a similar result in other instances. It certainly does not ensure that inaccuracies are corrected early enough to prevent severe detriment.

Nevertheless, no effective relief is currently available to defamed states. Presumably, most states share the notion that reputation is merely an interest and not a right, hence the weak efforts to subject their reputations to international legal protection. A similar attitude prevails in the academic literature. As will be demonstrated, scholars have mostly focused on connections between reputation and both economic and political power, as well as the manners in which reputational concerns incentivize compliance with international law and treaty obligations.10 Meanwhile, barely any attention has been dedicated to states’ legal abilities to protect their reputations against wrongful harm. This Article fills that void by attempting to conceptualize state reputation as a legal right and to determine what remedies states may use to enforce such a right.

Bearing in mind that general principles of law recognized by national legal systems form a source of inspiration for international law,11 the observation that almost every state in the world has a civil or criminal law protecting individual and institutional reputation against defamation12 is highly significant. Generally speaking, the core issue redressed by domestic defamation law is false allegations injurious to reputation.13 Although offensive expressions of opinion—which can neither be proved nor rebutted—are punishable in some jurisdictions under certain cir-

10. See infra Parts III, IV.
cumstances, the central meaning of defamation around the world, under which most cases fall in practice, seems to concern derogatory statements of fact. The internationally agreed-upon notion that a collective of actors should employ a set of norms protecting the reputations of its individual members may be applied to states if sufficient similarities between the domestic and the international realms can be traced.

Drawing insights from the disciplines of political science, international relations, sociology, and communications studies, this Article will argue that the principal rationales of defamation law, which typically concerns natural persons and private legal entities, are indeed relevant to states as well. Given the prominence of mass media reporting and public opinion in today’s international arena, false defamatory statements harm substantial interests of states, especially politically and economically weaker states. This is particularly true when states are accused of violating the laws of war or international human rights, to which immense moral significance is attributed. The harm states suffer also generates side-effects that are often felt by individual citizens domestically. Furthermore, viewed from the perspective of the international community, defamatory falsehoods reduce states’ incentives to comply with international law, and render global decision-making less informed and, consequently, less

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14. Under the dictates of the American Constitution, as interpreted by the United States Supreme Court, a statement of opinion is not actionable unless “it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” Restatement (Second) of Torts § 566 (1977). In other common law jurisdictions, the defense of “Fair Comment” (sometimes called “Honest Opinion”) precludes recovery for expressions of such kind relating to matters of public interest. See William Akel & Tracey J. Walker, New Zealand, in International Media Liability 271, 280 (Christian Campbell ed., 1997); Peter L. Bartlett, Australia, in International Media Liability 3, 21–22; Roger D. McConchie, Canada, in International Media Liability 57, 74–76; Alan Williams, England and Wales, in International Media Liability 107, 114. In addition, the defamation laws of most Continental countries provide for a defense for expressions of opinion, though such defense is usually qualified. See International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers 378–79 (Charles J. Glasser, Jr. ed., 2006) [hereinafter International Libel and Privacy Handbook]; Emmanuel E. Paraschos, Media Law and Regulation in the European Union: National, Transnational and U.S. Perspectives 60 (1998). The European Court of Human Rights similarly grants what it labels “value-judgments” heightened protection. See Lingens v. Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 407 (1986). The opinion defense is also recognized by the laws of major Asian states, namely, Hong Kong, India, Japan, Russia, South Korea, and Singapore. International Libel and Privacy Handbook, supra, at 378–79. For further support for the contention that defamation law focuses on factual statements, see generally Dienes & Levine, supra note 13, at 237; Bone, supra note 13, at 325 n.250.
efficient. Arguably, defamatory falsehoods also undermine individuals’ rights to be properly informed and to take a meaningful part in global governance.

Hence, this Article will call for an acknowledgment of state reputational rights within international law through a novel normative framework parallel to established domestic defamation laws. The right to reputation would only protect states against inaccurate statements of fact depicting concrete events, as distinguished from unpleasing professional or ideological views about complex political situations, or critical statements of opinion. The proposed regime—the precise, detailed characterization of which exceeds the scope of this Article—would aim to vindicate unjustly defamed reputations without imposing any sanction whatsoever on publishers. Alternatively, this Article will propose the establishment of a mechanism for the effective dissemination of states’ replies to defamatory accusations.

Following a review and an analysis of the current domestic and international legal landscape in Part I, this Article will apply the logic of domestic defamation law to the international realm. Part II of this Article will examine the perspective of the defamed state and its nationals, describing the political, economic, and personal harms that defamatory publications targeting states produce. Part III will demonstrate the ways in which false allegations regarding states can interfere with international efforts to establish organized, efficient, and rational global governance. Part IV will explain why defamation against states is an existing phenomenon and why such defamatory communications are internalized by their recipients (both presuppositions up to this point), thereby spotlighting the practical importance of protecting the reputations of states. Thus, Part IV will argue that contemporary trends in global politics and media jeopardize states’ abilities to maintain accurate reputations in that they foster the wide circulation of false defamatory allegations, render such statements highly influential, and stymie correction of such statements. Finally, Part V will briefly touch upon the question—which merits separate research—of how to solve the posed problem. Part V will discuss several parameters for plausible courses of action, which take into account the various interests at stake, including those of publishers of defamatory content as well as the collective interest in preserving freedom of speech.

I. CURRENT PROTECTION OF STATE REPUTATION UNDER DOMESTIC AND INTERNATIONAL LAWS

The following review of the contemporary legal situation aims to illustrate two points: (1) that there is a lacuna concerning the protection of
state reputation; and (2) that this state of affairs is not grounded in any sweeping jurisprudential rationale or general policy consideration that deny altogether the theoretical justification for such protection.

A. The Domestic Level

Democracies seem to share the position that expressions portraying a state, government, or subdivision thereof in a negative light normally do not give rise to liability.15 This is so in both the civil and the criminal contexts, which will be discussed separately.

In many democratic legal systems, governmental entities may not file civil suits for defamation that targets them.16 Such an approach has been endorsed, for instance, by courts in the United States,17 the United Kingdom,18 Australia,19 India, and South Africa.20 Thus, when a governmental body is criticized as such in an impersonal manner—without explicit or implicit reference to any of its individual members—no cause of action arises.21 While legal authorities following this approach typically handle cases in which governmental bodies file claims in their own jurisdictions, there is no reason to assume courts would treat differently suits brought

15. See sources cite infra note 21.
17. E.g., City of Chicago v. Tribune Co., 139 N.E. 86 (Ill. 1923); State v. Time, Inc., 249 So. 2d 328, 329 (La. Ct. App. 1971), writ denied, 252 So. 2d 456 (La. 1971); Johnson City v. Cowles COMM’ns, Inc., 477 S.W.2d 750, 753 (Tenn. 1972); see also 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2.10.1 n.554 (3d ed. 2003); 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:76 (2d ed. 2009).
by foreign states. Not only would such an approach constitute discrimination against the domestic government, but entertainment of these claims is also expected to raise serious problems, as will be explained below.\textsuperscript{22}

Two main arguments underlie the aforementioned policy, neither of which compels the conclusion that states’ reputations in the international community are not to be protected.

The first rationale is the proposition that governmental entities do not meet the definition of a “person,” to whom the defamation cause of action generally relates.\textsuperscript{23} Thus, a Louisiana court of appeal held in \textit{State v. Time, Inc.} that the state, which is a creature of the people and does not exist separately from the people, is incapable of being defamed by the people.\textsuperscript{24} The Court of Appeal of New South Wales based its view on quite a similar argument.\textsuperscript{25} The English House of Lords elaborated this notion by observing that in the case of an elected body temporarily under the control of one political party or another, it is difficult to say that such a body has any reputation of its own. According to this view, “[R]eputation in the eyes of the public is more likely to attach itself to the controlling political party,” or to the executives who carry on such body’s day-to-day management.\textsuperscript{26}

Yet, this line of reasoning appears to be confined to domestic relations between government and citizenry. The rationale that governmental bodies do not have any independent image in the minds of the people they represent does not seem to apply in the international realm, where various actors interact in a more-or-less horizontal manner and none is elected directly by the others. A simple example demonstrates this point. While it may be true that the German Ministry of Health has no reputation among the German people distinct from that of the Ministry’s senior

\textsuperscript{22} See infra Part VI. It should be noted that high-ranking officials who have been individually defamed are not barred \textit{a priori} from suing for defamation abroad. As the officials’ actions are often equated with those of their states, such claims could also serve the reputational interests of the states. For a famous example see \textit{Sharon v. Time, Inc.}, 599 F. Supp. 538 (S.D.N.Y. 1984). However, personal reference may not always be inferred from a defamatory report pertaining to a state. Moreover, the problems inherent in handling matters of that kind in domestic courts, explained infra in Part II(A), also affect personal suits.

\textsuperscript{23} Smolla, supra note 17, § 4.76.


\textsuperscript{25} Ballina Shire Council v. Ringland (1994) 33 N.S.W.L.R. 680 (Austl.).

officials or governing political party, the Federal Republic of Germany certainly has a reputation in the eyes of other states’ leaders, foreign publics, and nongovernmental organizations. Furthermore, as we shall later see, the contention that states have reputations abroad is firmly supported by vast international relations literature.27

The second policy consideration that leads courts to deny governments’ standing in civil defamation suits is the importance of allowing criticism of governments.28 Under U.S. law, this approach is grounded in the First Amendment of the Constitution, the primary purpose of which is to ensure the freedom to criticize the government without the threat of retaliation of any kind.29 Similarly, the House of Lords has held that under English common law principles “[i]t is of the highest public importance that . . . any governmental body . . . should be open to uninhibited public criticism.”30 Once again, however, what these courts have in mind is the domestic defamation action familiar to them, in which the publisher of the allegedly defamatory material finds himself or herself the defendant in a judicial proceeding and faces sanctions if found liable. In contrast, if substantially different paths are adopted for vindicating states’ reputations—paths that do not involve adversary litigation—such difficulty might be resolved. The final Part of this Article will propose such a solution.

The state of the law is somewhat different in the criminal context. The legislation of many states renders certain expressions against the government, usually falling under the general category of “sedition,” criminally punishable.31 Sedition laws often cover value judgments and true statements, in addition to false allegations.32 Such laws are particularly common in regions that are relatively unstable or where democratic principles are not deeply rooted, such as Asia, Africa, and Eastern

27. See infra Part III.
29. E.g., City of Chicago v. Tribune Co., 139 N.E. 86, 90 (Ill. 1927); Johnson City v. Cowles Commc’ns, Inc., 477 S.W.2d 750, 754 (Tenn. 1972); see also Smolla, supra note 17, § 4:76.
31. See infra notes 32–41 and accompanying text.
32. See Enabling Environment, supra note 12, at 34.
Europe, and they are most prevalent in authoritarian regimes. Western countries, however, have restricted the applicability of these laws over the years to communications that endanger national security or the public order; they are normally only resorted to in rare, extreme circumstances. When European states, in particular, attempt to utilize such statutes, they are often restrained by the European Court of Human Rights.

Two issues are particularly important for the purposes of this Article. First, it may be inferred from the above discussion that mere defamation of a state, devoid of salient security implications, seldom gives rise to indictment in democratic states. Second, sedition laws seem to prohibit only insults directed at domestic authorities. Comprehensive comparative surveys of the areas of defamation, sedition, and political speech do not mention any statute criminalizing defamation against foreign states (as opposed to contempt of their flags or symbols) or indictment brought for such expressions. Thus, the current level of protection for states’ reputations is even further reduced. Assuming that states’ interests in reputation reside primarily in the realm of international relations, a ruling of a

35. See Yanchukova, supra note 13, at 870.
36. See id. at 883–90.
37. See ALRC REPORT, supra note 33, at 120, 133–38; PARASCHOS, supra note 14, at 97–101; Yanchukova, supra note 13, at 871, 873. As these sources indicate, the scope of sedition laws has been restricted through statutory amendments, judicial interpretation, or prosecutorial policy.
40. See infra Part III.
domestic court in favor of its own government—which is not expected to gain much prominence and trust abroad—is arguably quite unhelpful.

Nevertheless, the absence (or scarcity) of legislation prohibiting defamation against foreign states, as well as the limited feasibility of punishing expressions against domestic democratic governments, do not in and of themselves negate the justification for protecting state reputation under international law. First, one might guess that the main reason states permit defamation that targets other states is simply the lack of sufficient practical interest to proscribe such defamation, at least on a unilateral basis. Second, the freedom of speech concerns that led to the restriction of sedition laws are arguably far less significant when the speech one seeks to regulate is false statements of fact, as opposed to true statements of fact or value judgments. The European Court of Human Rights, for instance, has refrained from holding that false allegations targeting a government may not be penalized; on the contrary, it can be inferred from the Court’s decisions that they may.41

Thus, when examining the practical concerns that drive countries to leave state reputation essentially unprotected under domestic laws, it is apparent that these concerns, on the one hand, do not touch upon the theoretical dimension of the problem, and, on the other hand, are hardly applicable in the international realm.

B. The International Level

There has been only one genuine attempt during the last several decades to protect states from defamation internationally. This attempt was made within the Convention on the International Right of Correction (“CIRC”),42 which entered into force in 1962. The contracting states intended for the CIRC to, inter alia, “implement the right of their peoples to be fully and reliably informed[.] . . . to improve understanding between their peoples through the free flow of information and opinion,” and to redress the danger to the “maintenance of friendly relations between peoples . . . arising from the publication of inaccurate reports.”43

Under the CIRC, when a contracting state contends that a news report published about it abroad is false or distorted, and capable of injuring its

43. Id. Preamble.
relations with other states or its national dignity, the state may submit its
version of the facts to the contracting states where the report has been
disseminated. The receiving states are obliged to forward the reply to
the relevant media outlets. If any of the receiving states fails to do so,
the defamed state may then submit the reply to the United Nations Secre-
tary-General, who is prompted by the CIRC to give the reply appropriate
publicity through the information channels at his disposal.

The CIRC’s impact is rendered insignificant by the fact that it was only
joined by a small number of states, none of which, except France, may
be regarded as a strong player in the international community. Further-
more, parties to the CIRC have rarely made use of it. This probably
stems from the CIRC’s ineffectiveness at protecting state reputations,
since it does not require the media to publish states’ replies.

The question is why states have refrained from devising greater protec-
tion for their reputations than that provided by the CIRC. One possible
answer may be found in the Preamble of the CIRC itself. According to
the Preamble, the imposition of international penalties for the publication
of false reports is not practicable. Since the international libel law regime
proposed by this Article does not mandate the imposition of sanctions,
the Preamble’s practicality concern does not preclude it. Under another
explanation, it is the weak states whose reputations are most jeopardized
and who find it the most difficult to communicate their views to foreign
audiences. This very weakness also prevents them from redressing their
problem effectively in the international legal field. Alternatively, perhaps
what is missing is merely a conceptual or a definitional shift, which
would elevate the interest in reputation—undoubtedly recognized by
each and every state—into a right.

44. Id. art. 2.
45. Id. art. 3.
46. Id. art. 4.
47. For a list of states parties, see United Nations Treaty Collection, Convention on
the International Right of Correction, http://treaties.un.org/Pages/ViewDetails.aspx?
49. Charles Danziger, The Right of Reply in the United States and Europe, 19
50. See infra Parts III, V.
51. For the sake of comparison, it may reasonably be assumed that people have al-
ways felt outraged when private information about their lives was disclosed without their
permission, but it had never occurred to them that they might be entitled to a remedy for
their harm until the law started to conceptualize the interest in privacy as a legal right.
II. THE STATE’S PERSPECTIVE: DEFAMATION AND THE NEED TO REDRESS ITS CONSEQUENCES

The following section will attempt to show, from the perspective of the defamed state and its nationals, how the basic principles and objectives underlying domestic defamation laws support the claim that states should be protected by a similar set of norms.

A. Drawing an Analogy from Domestic Defamation Laws

Domestic defamation laws seek to preserve a given reputation or image enjoyed by the individual in the eyes of others or society at large. Such laws are based on the premise that false derogatory statements of fact relating to a person have the capability of altering third parties’ attitudes toward the person, thereby causing him or her unjust injuries. Those injuries may manifest in various forms, such as a reduction in the subject’s social status, interferences with his or her relationships and professional progress, pecuniary harm stemming from loss of employment income or business revenue, and emotional distress.

Significantly, not only natural persons but also juridical persons are recognized as capable of suffering damages from defamatory publications and are granted the right to sue for them. Although some jurisdictions limit recovery to certain kinds of entities, or for provable economic loss only, there is a large international consensus that business corporations may sue for defamation, or at least have a parallel cause of action.
for trade libel or commercial disparagement. This approach reflects the common belief that large organizations may have reputations in the minds of third parties distinct from those of the people comprising them. Organizations build such reputations through hard work, talent, and, possibly, virtuous conduct. Financial revenues serve as the main indicator of their reputations. Defamatory utterances, including those pertaining to the quality of products or services, are capable of harming the organization’s reputation, thereby depriving it, at least partially, of the fruits of its labor.

The notion that an artificial being with no intrinsic honor or feelings can bring suit in defamation may be applied to another entity that is legally and factually separable from the human collective comprising it, and that undoubtedly has a reputation in the minds of others—the state. Much like corporations, states have financial interests of their own. If and when these interests are jeopardized by defamation, granting states relief may be justified, similarly to the case of corporations. Furthermore, as opposed to nearly all corporations, whose ultimate objective is profit maximization, states have many nonfinancial interests in the international sphere. The question is whether, how, and to what extent states’ legitimate interests are affected by defamatory publications targeting them. If such harms can be demonstrated, then the state—as the principal subject of rights and duties in international law—is arguably entitled to protection against them.

It is worth noting that, according to some scholars, the reputations of states are not uniform but, rather, context-specific. Under this approach,

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55. This is the law, for instance, in Australia, Belgium, Canada, China, England, France, Germany, Hong Kong, India, Italy, Japan, the Netherlands, Russia, Singapore, Spain, South Korea, Switzerland, and the United States. See INTERNATIONAL LIBEL AND PRIVACY HANDBOOK, supra note 14. It should be noted that the European Court of Human Rights has deemed it legitimate to grant corporations a cause of action for defamation. See Steel & Morris v. United Kingdom, 41 Eur. Ct. H.R. 403, 435 (2005); Markt Intern & Beermann v. Germany, App. No. 10572/83, 12 Eur. H.R. Rep. 161, 173-75 (1989).

56. See Sack, supra note 17, § 2.10.1, and sources cited therein.

57. Barendt, supra note 53, at 115.


59. See Post, supra note 58, at 693–96; see also Barendt, supra note 53, at 115.

each state has a relatively independent reputation in the areas of trade, environment, human rights, and so forth, in addition to reputations in matters that are unrelated to legal compliance, such as financial and political stability, and military strength. For the purpose of the following discussion, however, it is not necessary to decide whether such a view has merit, nor is it crucial to make a priori distinctions between different kinds of state reputations. In order to satisfy the main goal of this Article and establish states’ conceptual entitlement to a right of reputation, it is sufficient to prove in general that defamation targeting states exposes them to tangible harms. As the examples presented below will demonstrate, such harms do occur at least with regard to the specific areas mentioned by a given defamatory publication, and, in some cases, other areas as well. For the sake of comparison, the legal concept of reputation in private law comprises an individual’s interest in being respected by society in regard to various aspects of his or her personality—morality, honesty, compliance with law (in any legal field), professional competence, and so forth—unitarily. Moreover, as we have seen, very different types of harm related to such different interests jointly justify protecting individuals against defamation in positive law. A similar approach may therefore be taken in the context of state reputation.

B. The Value of State Reputation

Perceptions of a state’s characteristics, behavior, or condition obviously impact the choices of foreign state officials and non-state actors in their dealings with that state. Thus, for example, by developing and preserving a good reputation for compliance with obligations, states are able to extract greater concessions in exchange for their promises. Furthermore, the level of foreign investment in any given state is immensely

affected by evaluations of the state’s financial situation. Communications scholar Jian Wang summarizes this notion by observing that a nation’s reputational capital may affect the country’s ability to build coalitions and alliances to achieve international political objectives, to influence perceptions and purchase decisions regarding products from certain countries of origin, to attract foreign investment or in-bound tourism.

In addition, government officials’ beliefs concerning another state’s conduct could lead the first state to respond in a way that harms the latter’s interests. For instance, information indicating that a state has breached its bilateral or multilateral obligations, such as by engaging in acts of aggression, might induce other states to resort to trade or diplomatic sanctions, or to take military actions against it.

The issue of state reputation is particularly acute in the modern day. Since the global phenomenon of democratization has increased governments’ attention to their citizens’ views regarding foreign policies, mass media and public opinion have come to play major roles in international politics. In a two-step process, mass media communications on international matters shape public opinion of states and events, which in turn, affects directly or indirectly the foreign policies of states and the actions of the international community vis-à-vis the states concerned. Naturally, this effect is mostly prominent in democracies. But even non-democratic regimes are influenced to a certain extent by domestic public

66. Evidence of which is supplied, for instance, by credit rating agencies.
68. See Guzman, supra note 65, at 1846.
70. PHILIP M. TAYLOR, GLOBAL COMMUNICATIONS, INTERNATIONAL AFFAIRS AND THE MEDIA SINCE 1945 58 (1997); Gilboa, supra note 69, at 58.
71. For further analysis, see infra Part IV.
opinion, though such public opinion is much more susceptible to manipulation by the governments themselves than in democracies.

Public opinion of foreign states—and the events and situations involving them—may affect foreign policy in diverse ways. First, and most directly, foreign policy platforms introduced by candidates and parties in national elections can play a factor in voters’ decisions, which are thereafter expressed in the actual policies implemented by the elected government. Second, the public can exert pressure on the government to act in a particular fashion with regard to a discrete situation. Real-time media reporting of dramatic news events, especially through televised images, tends to arouse an emotional response on the part of the public, who then demands that quick and often simplistic measures be taken to deal with the crisis. Commentators use the phrase “CNN effect” to describe “television coverage, primarily of horrific humanitarian disasters, that forces policy makers to take actions they otherwise would not have taken, such as military intervention.” Third, a subtler but arguably more consistent and profound impact of public opinion on foreign policy is embedded in the general images and reputations it attributes to states. The level of popularity enjoyed by a state in public opinion abroad influences its ability to achieve concessions from foreign governments and to reach other desired policy outcomes. International law, among other factors, plays an important role in this context. Alleged violations of its norms—particularly those pertaining to human rights—tend to have a strong impact on public opinion, which in turn shapes foreign policies and private actors’ economic choices.

Thus, according to Wang:

National reputation is unquestionably an instrument of power . . . . Foreign public opinion is gaining ever more significance in forming an emerging globalized public and influencing international political

75. TAYLOR, supra note 70, at 94–95.
76. Gilboa, supra note 69, at 63.
77. See Nye, supra note 64, at 36–37, 129–30.
process and outcome . . . [T]he role of individuals and their expressed opinions do form a climate of opinion, in which decision-makers pursue policies. When public opinion is activated, the climate of opinion can limit or broaden policy choices and actions. Therefore, the perceptions and opinions held by foreign publics regarding a given nation become critically important to decisions by nation-states.79

And, as Professor Evan Potter further explains:

Image counts for a lot in contemporary world politics. Whether a country needs to build international coalitions against terrorism, co-operate to protect the environment, attract foreign investment, or bring in foreign students, influencing foreign public opinion is critical to national success because, in the absence of substantial military or economic weight, most countries are the image or ‘words’ they project abroad. Their room to maneuver is affected by their image, or soft power, so that all points of contact—whether promoting policies or exporting—will feed off this general image in both positive and negative ways.80

Notably, a state’s reputation often has concrete implications for its population. For instance, national economic recession—which, in the context of this Article, could result from the shattering of a state’s international status, a reduction of its credit rating, or sanctions or boycotts imposed on it in response to its perceived behavior—tends to percolate down to the level of the ordinary citizen. In addition, the scope of tourism and foreign investment directly affects domestic businesses.81 Finally, since the state represents the collective interests of its citizens in the international arena,82 its negotiating power and ability to extract concessions could dictate prevailing conditions in a myriad of areas that are relevant to the citizens’ lives and welfare, such as security, international trade, health, and the environment.

The high value of reputation is best evidenced by the growing understanding among states of the utility of actively enhancing and using rep-

80. Potter, supra note 69, at 44.
utation as a tool of foreign policy. Since “communication, education, and persuasion have become major techniques in foreign relations,” successful “image politics” translates to power in the international arena. In addition, extensive academic literature is dedicated to the issue of states’ image strategies, mainly within the context of two related and frequently discussed concepts. The first is soft power: a state’s ability to achieve its objectives by highlighting the attractiveness of its culture, political ideals, and policies. The second is public diplomacy: the endeavor to shape foreign public opinion, thereby inducing foreign governments to make policy decisions compatibly with the political objectives of the state taking these measures. Scholars have gone so far as to say that “today half of ‘power politics’ consists of image-making. With the rising importance of publics in foreign affairs, image-making has steadily increased.” Likewise, it has been contended that

[favorable image and reputation around the world, achieved through attraction and persuasion, have become more important than territory, access, and raw materials, traditionally acquired through military and economic measures.

C. The Harms of Defamation

Having examined the importance of state reputation, we must recall that information about states inevitably contains inaccuracies in some cases, and distorts others’ perceptions of those states. Such erroneous perceptions are occasionally favorable to the state concerned, but on other occasions they might portray the state in a negative light. Although a state’s overall image is the product of a complex plethora of components, it must be presumed—as domestic defamation laws do—that the available factual information pertaining to an actor is a crucial factor in the formation of others’ opinions of the actor. It is therefore clear that all the reputation-related benefits states enjoy in the international arena are jeopardized when false derogatory statements of fact are published about

84. Gilboa, supra note 69, at 60.
85. Giffard & Rivenburgh, supra note 83, at 8.
86. NYE, supra note 64, at x.
87. See id. at 105; TAYLOR, supra note 70, at 96; Gilboa, supra note 69, at 57, 59; Wang, supra note 67.
89. Gilboa, supra note 69, at 56.
90. For elaboration see Part IV infra.
them. The damage may be irreversible, even if the truth is finally revealed after months or years, as history is "a succession of short-run situations that may alter the course of events for good."\[91\] While a state’s significant political, economic, or military power may counterbalance certain reputational harms, the weaker the state, the more acute the consequences of defamation. International legal protection against the harms of defamation is thus critical.

III. THE INTERNATIONAL COMMUNITY’S PERSPECTIVE: THE COLLECTIVE INTEREST IN PROTECTING STATES FROM FALSE DEFAMATORY STATEMENTS

The justifications for establishing an international parallel to domestic defamation laws transcend particular states’ interests in maintaining their reputations. The following section will contend—by analogy to the view that private defamation law serves the society at large—that protecting state reputation can enhance organized and efficient global governance for the benefit of the entire international community.

A. Preserving Incentives for Compliance with International Law

Private reputation, so it is contended, is an efficient social mechanism that promotes cooperation within a community while relying on the self-interest of the individual.\[92\] Given the social benefits that are bestowed upon those who are known to conform to public values, and are otherwise denied, reputation provides an incentive to conform to these values.\[93\] While the dissemination of true information creates transparency and serves the stated objective, false information undermines it. When it is hard to discern whether negative reports regarding individuals are true or false, the level of censure an alleged wrongdoer is subjected to decreases, and the cost associated with wrongdoing consequently lessens.


On the other hand, the perceived social advantages of compliance are moderate or uncertain where compliance does not immunize one from being accused of noncompliance. Assuming that abiding by any norm involves certain personal costs, the incentives to respect the community’s norms thus recede. The law of defamation is designed to prevent such outcomes. A similar analysis can be applied, mutatis mutandis, to the international arena. Arguably, repetitive publication of false reports accusing States of violating international norms might diminish the overall tendency of compliance. This proposition is sustainable under the two principal social science paradigms commonly used to interpret state behavior: rational choice theory and social constructivism.

According to the rational choice model, States act as “rational decision-makers [by selecting] the course of action . . . that maximizes their utility, as determined by their goals and the alternative options available to them.” Among the complex plethora of factors affecting the choice between compliance and defection with regard to a certain norm or regime, a prominent role is attributed to states’ interests in maintaining good reputations within the international community. As international relations theorists and international lawyers have long argued, States honor their commitments primarily because they fear that any evidence of unreliability will reduce the willingness of other actors to interact with them. Having a good reputation for compliance allows States to enter into more profitable cooperative arrangements and, as explained above, assists them in achieving various policy goals in the international political and financial arenas. Thus, whether a state will comply with international law in any given case depends on the balance of the reputational benefits of compliance and the costs of compliance.

False defamatory publications accusing compliant States of noncompliance undercut the benefits they seek to enjoy by complying. Since this

96 See Guzman, supra note 65, at 1861, 1870.
97 Downs & Jones, supra note 61, at 895–896.
phenomenon renders the perceived political advantages of compliance \textit{ex ante} moderated or uncertain, States—especially those that feel routinely injured—have reduced incentives to maintain international agreements and abide by international law.\textsuperscript{99} While the extent of the decrease is obviously speculative and unquantifiable (and constitutes only one of many factors influencing State behavior), it might become acute in borderline cases in which the costs and benefits of compliance appear to be equal. It is asserted, for instance, that when matters of national security are at stake, the scales are not easily tipped in favor of compliance with the pertinent international norms,\textsuperscript{100} such as those demanding respect of human rights during the fight against terrorism. Even when states choose to comply despite opposing interests, there is necessarily a delicate balance of cost and benefit. Any minor interference with the equation, in the form of a decrease in the reputation-related advantages, might therefore increase the overall rate of noncompliance in these crucial matters.

Social constructivism may lead to similar conclusions. According to this model, compliance with international law is not the outcome of cost-benefit calculations, but rather of a process of international socialization, driven in a large extent by states’ non-instrumental desires to obtain positive evaluations by their peer members in the international community.\textsuperscript{101} Much like individuals’ tendencies, most states’ reluctance to provoke negative social judgments inhibits their inclination to violate norms.\textsuperscript{102} The preservation of an appropriate incentive to comply thus requires high compatibility between the reputation a state deserves and its actual reputation.

Sociology may provide us with additional, related insights in this context. For instance, it is contended that a feeling of detachment from society causes an individual to self-alienate from society and its norms, which in turn reduces his or her willingness to comply with those

\textsuperscript{99} Picker, \textit{supra} note 1, at 114.
\textsuperscript{100} Guzman, \textit{supra} note 65, at 1874.
\textsuperscript{101} See ROBERT H. JACKSON \& GEORG SORENSEN, \textit{INTRODUCTION TO INTERNATIONAL RELATIONS: THEORIES AND APPROACHES} 162 (2007).
norms. Moreover, the lower the social status that the individual risks losing as a consequence of deviance, the higher the likelihood of rule-breaking. The same could be applied, perhaps, to states that are positioned at the periphery of the international community. Arguably, ostracism and isolation of states caused by persistent dissemination of negative information about them might undermine their tendency to comply with international law. It is, of course, particularly important to prevent false information from generating such an outcome.

B. Promoting Informed Global Governance

An important function that defamation law may serve in democratic societies is fostering informed self-governance, especially where false publications regarding public figures and public matters are concerned. This notion may be applied, mutatis mutandis, to the international arena.

It is commonly held, particularly within American First Amendment jurisprudence, that collective decision-making is best served by the constant exchange of views and information, which enables society to make informed choices between competing courses of action. The information whose free flow is most crucial is the information concerning the actions of the government and its people. However, information must not only be available but also be accurate in order to sustain valuable and beneficial public debate. The political value judgments of individuals and society, which are the driving forces of self-governance, are based largely on raw data. Since a decision-maker’s “image of reality” and the information he or she possesses have significant influence on the deci-

103. HIRSCH, supra note 93, at 16–21; MACIONIS, supra note 93, at 213; Hirsch, supra note 95, at 182–83.
104. HIRSCH, supra note 93, at 16–21; MACIONIS, supra note 93, at 213; Hirsch, supra note 95, at 182–83.
sion he or she will make,\textsuperscript{110} the nature of the information in the public
domain necessarily projects upon the quality of collective decision-
making. Thus, “democratic governance requires accurate information
and knowledge of public affairs, not mere opinion, and certainly not an
aggregation of uninformed preferences.”\textsuperscript{111}

Clearly, if the public and its representatives deliberate while relying on
false information, the decisions reached are likely to be less wise.\textsuperscript{112} Dis-
semination of false defamatory statements pertaining to public officials
and public figures is capable of producing precisely that situation. Even
the U.S. Supreme Court, despite its restrictive approach to defamation
law, has conceded in this context that “there is no constitutional value in
false statements of fact.”\textsuperscript{113} Most resolved in this view was Justice Byron
White, who declared that “First Amendment values are not at all served
by circulating false statements of fact about public officials. On the con-
trary, erroneous information frustrates these values.”\textsuperscript{114}

Similar to national political processes, international actions are based
not so much on objective international reality as on subjective percep-
tions of such reality.\textsuperscript{115} When any of the players in the international
community have in mind an image of a certain event or situation that
does not coincide with reality, their response could be ill-suited to
achieve the intended policy outcomes and may lead to undesirable con-
sequences.\textsuperscript{116}

This contention is applicable, first, to the traditional—and still rele-
vant—realm of foreign policy decisions by state officials. Erroneous
perceptions of a state’s behavior could lead other states to respond in

\textsuperscript{110} Oscar H. Gandy, Jr., Beyond Agenda Setting: Information Subsidies and
Public Policy 198 (1982); Johan Galtung & Mari Holmoe Ruge, The Structure of
Foreign News: The Presentation of the Congo, Cuba and Cyprus Crises in Four Norwegian
Newspapers, 2 J. Peace Res. 64, 64 (1965); Oswald, supra note 74, at 396.

\textsuperscript{111} R. Randall Rainey & William Rehg, The Marketplace of Ideas, the Public Inter-
est, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory

\textsuperscript{112} See Frasier, supra note 106, at 507; Rodney K. Smith & Patrick A. Shea, Religion


\textsuperscript{114} Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 767 (1985)
(White, J., concurring).

\textsuperscript{115} Kunczik, supra note 69, at 20; Yaacov Y. I. Vertzberger, The World in Their
Minds: Information Processing, Cognition, and Perception in Foreign Policy
Decisionmaking 7–10, 35–36 (1990); Galtung & Ruge, supra note 110, at 64.

\textsuperscript{116} Vertzberger, supra note 115 at 22, 35–36.
manners that injure the interests of the international community as a whole. Generally speaking, undermining friendly international relations is harmful in itself, particularly with respect to international stability.\textsuperscript{117} More concrete examples are the imposition of sanctions on states, which hampers economically desirable free trade; the exclusion of states from institutional regimes, which weakens those regimes; and the refusal to cooperate with states, which results in a loss of the resources and endeavors they could contribute.

The idea that inaccurate perceptions regarding states may lead others to take harmful action is also true in the era of globalization, in which states no longer enjoy exclusive power in the international arena.\textsuperscript{118} Unlike before, the direction of global politics is determined by complex interactions between a plethora of state and nonstate actors. But what has not changed is the fact that any of the actors involved can make policy mistakes when provided with inaccurate information, which can thereby negatively affect collective community interests. Special attention should be dedicated in this respect to the quality of the information available to the international public, whose effective participation in global decision-making processes is attributed great normative importance.\textsuperscript{119} For such participation to be beneficial—i.e., in order for it to ensure a meaningful manifestation of individual political rights, as well as to promote the


\textsuperscript{118} Linda Weiss, Globalization and National Governance: Antinomy or Interdependence? The Interregnum: Controversies in World Politics, 25 REVIEW OF INTERNATIONAL STUDIES (SPECIAL ISSUE) 59, 59–60 (1999).

collective interest in wise and just decisions—it must be based on appropriate information. 120

IV. FACTORS IMPEDING THE MAINTENANCE OF ACCURATE STATE REPUTATIONS

The preceding analysis of the individual and collective interests in protecting state reputation is of little practical significance if one contends that states do not face substantial risks of being defamed or that they are capable of coping with them effectively. The following will attempt to demonstrate that both contentions are wrong.

A. Threats to States’ Reputations

1. The Public’s Dependence on Information Supply

Before identifying the information sources that actively threaten states’ reputations, one should consider the background against which these sources operate. Thus, in order to facilitate comprehensive understanding of the phenomenon of state defamation, this section discusses the characteristics of the primary addressee of defamatory communications: the international public. 121 These characteristics both foster the circulation of defamation in the first place and render such defamation influential.

Most individuals do not tend to dedicate significant resources to forming their opinions on political matters. 122 There is a clear disincentive to invest individual effort in gathering and evaluating information on public affairs. 123 The costs in terms of time and money are far greater than the gains since each person’s relative influence on the political process is negligible, and the impact of the collective decisions on his or her life


121 KUNCEK, supra note 69, at 19; see also sources cited supra notes 69–73.

122 See John G. Matsusaka, Explaining Voter Turnout Patterns: An Information Theory, 84 PUB. CHOICE 91, 93 (1995) (listing groups for which the expenditures of resources in obtaining information on political matters yield higher returns, including public employees, farm owners, and people who are married, highly educated, older than average, and long-time residents of a given community).

123 Id.
often seems remote and obscure. The further decisions shift away from private concerns to issues that lack a direct and unmistakable personal link, the less motivated are individuals to command the facts and to shape wise preferences. This is even truer with regard to the foreign and international domains, in which the costs of information gathering and assessment are greater and the effects of political decisions on one’s personal life are usually slighter. Indeed, many studies have shown that levels of knowledge about foreign affairs among publics in the developed world are very low. This situation provides a fertile ground for endeavors to fashion the will of the people through the supply of biased information, and even when inaccuracies are not deliberate, they can easily mislead the public into making unsubstantiated judgments.

2. Superficial and Biased Media

Since the average person presumably possesses limited personal knowledge of public matters, the media significantly impacts the political positions he or she is likely to adopt. For nearly all concerns on the public agenda, citizens are exposed to a secondhand reality that is structured by media reports of events and situations, especially with regard to news concerning foreign affairs. “The media are the principal means by which the vast majority of individuals receive information about [these topics,] . . . for which personal experience is unlikely to provide much useful information.” This situation is intensified by the revolution in

124. See Gregory G. Brunk, The Impact of Rational Participation Models on Voting Attitudes, 35 PUB. CHOICE 549 (1980). Brunk states that “few citizens should vote in any large-scale election since the chance is very small that any person’s vote will affect an electoral outcome,” and attributes the apparently contradictorily high levels of voter turnout in most elections to a common idea that voting is a civic duty and makes one a “good citizen.” Id.


129. POPKIN, supra note 125, at 9.

130. MAXWELL MCCOMBS, SETTING THE AGENDA: THE MASS MEDIA AND PUBLIC OPINION 1, 12 (2004); Soroka, supra note 72, at 28.
communication technologies, manifested mainly in the advent of the internet and global news networks such as CNN International, BBC World, Sky News, and Al-Jazeera, which have enabled “broadcasting . . . almost every significant development in world events to almost every place on the globe.”

In line with the premise of domestic defamation laws—that messages influence people’s views—various studies have demonstrated that news reports, especially on television, powerfully shape public opinion, particularly with respect to foreign affairs. Thus, clear correlations have been found between media coverage and popular perceptions of foreign nations. One study revealed, for example, that in nine different Muslim countries, television news viewing has influenced anti-American attitudes more than any other examined variable. Hence, mass media is said to be the strongest shaper of national images. These images, in turn, often translate to public pressure on the political branches to adopt certain policies vis-à-vis the states concerned. It should be noted that the “mediation” of public opinion between media reports and foreign policies is not always present or necessary; obviously, political decision-makers rely on mass media information, which shapes their own beliefs and orientations with regard to states and situations.

In light of the media’s overwhelming impact, it is important to examine the overall quality of the information it conveys. Despite the noble role attributed to the press in democratic societies—enabling the citizenry to make informed political, economic, and social decisions, and serving as a check on the government—the ultimate ob-

131. Gilboa, supra note 69, at 56; see also Taylor, supra note 70, at 95.
132. Shanto Iyengar & Donald R. Kinder, News That Matters 112 (1987); Sunstein, supra note 107, at 62. Communications theorists often talk about the “framing” function of the media, namely, the “selection, exclusion of, and emphasis on certain issues and approaches to promote a particular definition, interpretation, moral evaluation, or a solution.” Gilboa, supra note 69, at 63–64.
133. Gilboa, supra note 69, at 64.
137. Id. at 20; see also Donald L. Jordan & Benjamin I. Page, Shaping Foreign Policy Opinions: The Role of TV News, 36 J. CONFLICT RESOL. 227, 234 (1992).
138. Kunczik, supra note 69, at 58, 86; Østgaard, supra note 72, at 54.
jective of modern media outlets is financial profit. Thus, the press strives to maximize its circulation or rating by adapting the news flow to assumed audience preferences. This commercial orientation distorts the media’s priorities by emphasizing their entertainment function at the expense of their commitment to properly informing the public.

As a result, news coverage is often characterized by two salient features. First, given the inherent pressure for speed in reporting, and the lack of patience of most readers and viewers when it comes to long or complicated argumentation, the media tend to oversimplify the news. Second, the nature of the mass media is to prefer sensationalized stories and negative events, since, compared to the “ordinary,” the “exceptional” is more newsworthy, and, presumably, more interesting to the public. “Good news,” i.e., news relating to good performances or to the non-occurrence of catastrophes, is seldom considered news at all.

Similar trends prevail, perhaps to an even greater extent, in foreign affairs reporting. As the space or time given to foreign news is restricted by financial considerations, the press often refrains from covering and explaining “sociostructural contexts or complex motives for actions.” In addition, newsworthiness considerations, favoring unusual and dramatic events over complex and prolonged situations and processes, often deprive the public consciousness of broad context and prevent genuine

139. See Al Gore, The Assault on Reason 15–22 (2007). This is so because most of these firms are privately owned in the developed world.
141. Østgaard, supra note 72, at 45; Oswald, supra note 74, at 394; see also Schumpeter, supra note 91, at 262.
143. Oswald, supra note 74, at 404.
145. Østgaard, supra note 72, at 44–45.
146. Kunczik, supra note 69, at 21.
understanding of events. Consequently, simplistic reports of alleged state aggression, human rights violations, and other breaches of international law are inherently prone to gain prominence.

Further harm to state reputation results from media bias. Such bias might stem from willful editorial decisions, or at least from concrete political views that shape the judgments of journalists and influence the manner in which they present supposedly hard-fact news. In addition, the foreign news desks of major media outlets often hire local reporters and photographers residing in conflict zones, who might provide their employers with information that fits the views and interests of their respective nations. It is also well known that totalitarian regimes seek to control the content of information reported from within their territories by censoring stories, threatening journalists and limiting their access to places and sources. Publication of deficient or inaccurate reports in these cases might improperly influence the public’s evaluation of the behavior of states that are in conflict with such regimes.

Perhaps more latent is the systematic prejudice that developing countries ascribe to the Western press, which dominates the international news channels. Developing countries complain that the coverage of their affairs is generally negative, incomplete, distorted, and ethnocentric. According to this perspective, since all news is filtered through

147. Kunczik, supra note 69, at 20–22; Taylor, supra note 70, at 69; Galtung & Ruge, supra note 110, at 67; Östgaard, supra note 72, at 45, 48–51.
148. Östgaard, supra note 72, at 44.
149. In September 2000, a Palestinian photographer working for a French television station documented the killing of a Palestinian boy by the Israeli army. The pictures he provided were published by the media across the world. A French publicist claimed that the televised report did not depict the occurrences accurately and that the Palestinian boy might not have been killed by the Israeli army. Within a libel suit filed against that publicist, a French court of appeals held his allegations to be sustainable by the facts, upon examining the unedited footage and hearing further evidence. Cour d’appel [CA] [regional court of appeal] Paris, 17e ch., May 21, 2008, Dossier No. 06/08678, available at http://www.theaugeanstables.com/wp-content/uploads/2008/05/arret-appel-21-05-08-trebuq.PDF. For a translation of the judgment into English, see http://www.theaugeanstables.com/2008/06/18/the-court-of-appeals-decision-a-professional-translation-into-english (last visited Aug. 28, 2009). I am thankful to Ben-Dror Yemini for referring me to these sources.
152. Saleem, supra note 151, at 144.
Western moral, cultural, and political values, journalists focus on sensational events that tend to be negative while ignoring processes such as economic and health development. Additionally, they emphasize the Western angle of stories at the expense of the broader picture, and mischaracterize events by discussing them out of context.\(^{153}\)

Finally, the media obviously make honest mistakes occasionally. Even in *New York Times v. Sullivan*, which restricted the law of defamation probably more than any other judicial decision or piece of legislation in the world, the U.S. Supreme Court recognized that media errors are inevitable.\(^{154}\) To make matters worse, many commentators believe that the media tends to be very reluctant to publicly admit its errors.\(^{155}\)

3. Unregulated and Unaccountable Nongovernmental Organizations

Nongovernmental organizations (“NGOs”) enjoy considerable power in global politics with respect to virtually all issues of international concern.\(^{156}\) NGOs pursue their goals mainly through massive involvement in the activities of supranational bodies\(^{157}\) and—even more relevant to this Article—through direct communication with publics. By disseminating information, mostly through the media, NGOs are able to mobilize domestic public opinion in various states to exert pressure on governments to implement desired policies.\(^{158}\) As discussed in Part IV.A.1, *supra*, the

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156. Falk & Strauss, *supra* note 119, at 196–204; Martin Köhler, *From the National to the Cosmopolitan Public Sphere, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* 231, 231 (Daniele Archibugi, David Held & Martin Köhler eds., 1998); Perritt, *supra* note 78, at 160.
fact that citizenries are inadequately informed about international affairs makes them highly vulnerable to NGO influences.\footnote{159. \textit{See infra} note 136 and accompanying text.}

Human rights NGOs are particularly powerful.\footnote{160. Blitt, \textit{supra} note 78, at 292; Mertus, \textit{supra} note 119, at 1369.} The international community increasingly relies on NGOs to investigate and report human rights violations.\footnote{161. Blitt, \textit{supra} note 78, at 263.} These NGOs now enjoy considerable influence in virtually all UN decision-making processes mainly by providing various bodies with information relevant to their activities.\footnote{162. PAYNE & SAMHAT, \textit{supra} note 158, at 69–70; Blitt, \textit{supra} note 78 at 263, 296–317; Mertus, \textit{supra} note 119, at 1369–72.} Most importantly, NGOs shape global public opinion while exploiting the moral authority inherent in human rights rhetoric, which often elicits instinctive support.\footnote{163. Blitt, \textit{supra} note 78, at 262–63, 290.} The prime weapon of human rights NGOs is the “mobilization of shame.”\footnote{164. \textit{Id.} at 290.} This technique seeks to induce compliance with human rights norms by reporting the behavior of target states, which exposes these states to embarrassment, ostracism, and isolation.\footnote{165. \textit{Id.} at 290–91; Mertus, \textit{supra} note 119, at 1368–69.}

Despite many NGOs’ important goals and their aspiration to reflect the interests and positions of large sectors in international civil society, their activities should be looked upon with caution. NGOs are often described as self-elected elite that have limited legitimacy, advocate special causes and are unrepresentative of the general public.\footnote{166. \textit{E.g.}, John O. McGinnis, \textit{The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO}, 44 VA. J. INT’L L. 229, 245 (2003); Mertus, \textit{supra} note 119, at 1385; Jed Rubenfeld, \textit{Unilateralism and Constitutionalism}, 79 N.Y.U. L. REV. 1971, 2018 (2004); Stein, \textit{supra} note 119, at 491; Andrew J. Walker, \textit{When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees}, 106 W. VA. L. REV. 245, 295–96 (2004).} Moreover, their fine organizational capabilities, stemming from their relatively small size, enable them to exercise effective lobbying that is arguably disproportional to their actual public support.\footnote{167. \textit{See, e.g.}, Benvenisti, \textit{supra} note 119, at 171–72.} Finally, in light of the general observation that “[a]ctors [in international politics] attempt to mislead and manipulate target actors by disseminating incorrect or only partially correct facts and interpretations to create desired expectations and con-
ceptions,” it is even possible that NGOs deliberately deceive on certain occasions.  

Particularly significant, again, are human rights organizations, because of their political influence and their central role in circulating communications critical of states. Thus, the human rights NGO community is said to have a problematic record with regard to accuracy in reporting.  

Several factors might support and explain this assertion.

First, no prerequisite or certification is required in order to pursue the classic activities of human rights organizations, since anyone may simply take steps to investigate and publish reports. Additionally, no “formal checks or balances . . . regulate the quality or reliability of NGO work” once it is performed. This sometimes has apparent negative consequences. Some studies of the works of human rights organizations have demonstrated that their fact-finding missions commonly do not comport with reasonable procedural and evidentiary standards. For example, they often rely upon hearsay statements and documents that are not fully authenticated; the witnesses they question are not cross-examined; they do not operate for sufficient periods; they do not possess enough personnel to guarantee sufficient thoroughness; their reports rarely contain dissenting opinions; and the line between their inferences and concrete findings of fact is frequently blurred. The depth, quality, and reliability of their work may also be jeopardized on many occasions by reliance on testimony of interested parties. Furthermore, international NGOs often base their reports on the fact-finding of nationally based NGOs, which are likely to be more biased against a party to a conflict, “without meaningful guidelines for obtaining corroborative evidence or . . . [checking the] methodologies employed by the national” organization.

168. VERTZBERGER, supra note 115, at 27.
169. Blitt, supra note 78, at 263.
170. Id. at 288.
171. Id. at 292.
174. See id.
175. Id. at 341–42, 360.
Second, there is ample evidence of bias and political motivation among NGOs. Particularly, some NGOs are funded by interested governments or private donors that influence their operation, while the public at large is often completely unaware of such influence.

And, third, the fact that many NGOs compete for scarce media coverage and limited resources from a few foundations is said to generate constant competition between them. This competition in turn incentivizes them to devise dramatic new angles and to uncover even greater atrocities, sometimes at the expense of accuracy.

Many commentators resist such criticism and claim that informal controls to which human rights NGOs are subject—mainly their interests in maintaining their own reputations—guarantee the quality of their work. However, even assuming that most reports issued by human rights organizations—at least, by the most prominent and influential ones—are true, this does not preclude the risk of mistakes. Thus, the need to redress the harms of false reports may not be dismissed.

4. Interested Governments and State Officials

Governments often use propaganda to further various legitimate interests, but, for some, propaganda constitutes a weapon of distortion and...
defamation. States have often disseminated misinformation in order to influence foreign governments’ decision-making so as to advance national interests. States have also used false reports initially publicized in the media for their own purposes. Finally, there are arguably cases in which government officials deliberately deceive their counterparts, superiors, or subordinates in order to promote the policies they wish their own state to adopt.

B. The Insufficiency of Existing Mechanisms to Redress Reputational Harms

As has been demonstrated, suing for defamation in a domestic court is not an available option for a state that has been the subject of a false, derogatory report. The following analysis will indicate that such a state cannot count on mechanisms outside the scope of defamation law to properly protect its interests either.

1. Relying on Market Competition to Correct Erroneous Reports

Defamed states may allegedly count on competition in the press market to drive media outlets to expose each others’ mistakes. This possibility, however, should be given limited weight.

First, it cannot be assumed that competing media will always be willing to bear the cost of conducting an extensive investigation in order to refute a defamatory report. This is true especially since reports refuting or contradicting allegations of outrageous conduct are not as sensational and dramatic as the accusations themselves. As Justice William Brennan of the United States Supreme Court has contended in the context of personal defamation: “Denials, retractions, and corrections are not ‘hot’ news.”

183. Whitton, supra note 117, at 601–02.
184. Kunczik, supra note 69, at 25, 51; see also Vertzberger, supra note 115, at 27.
185. See Blitt supra note 78, at 350–51.
186. For example, it has been asserted recently that the U.S. decision to attack Iraq in 2003 was influenced by an intercepted letter indicating a link between Saddam Hussein and Al-Qaeda, which turned out to have been faked. Ron Suskind, The Way of the World: A Story of Truth and Hope in an Age of Extremism 172–74 (2008). The U.S. administration denied this report. Joby Warrick, CIA More Fully Denies Deception About Iraq, The Washington Post, Aug. 23, 2008, at A03.
187. See supra Part V.A.2 for discussion of media motivations.
Second, concentration of ownership in mass media is said to seriously diminish the competition in that market.\textsuperscript{189} Scholars therefore claim that the contents and viewpoints communicated by the press are likely to become increasingly homogeneous,\textsuperscript{190} and often use as an example the rather uniform position taken by the U.S. media in support of the government before and during the Second Gulf War.\textsuperscript{191}

Some commentators add that media outlets might even demonstrate real reluctance to attack each others’ publications, wishing to show professional courtesy or to receive similar treatment themselves.\textsuperscript{192} The situation in the realm of international news intensifies such concerns. Many media outlets opt for the relatively cheap method of relying on news agencies for their international affairs reports.\textsuperscript{193} Since four major suppliers dominate the news agency market, the prisms through which most international news enters the public domain are quite uniform.\textsuperscript{194} This is especially true in developing countries, where the media lacks resources and, therefore, depends on news agencies and global networks for information.\textsuperscript{195} The increasing reliance of transnational news agencies on their national counterparts further reduces the likelihood of obtaining diverse viewpoints with regard to particular events.

For similar reasons, one may not assume that inaccurate reports issued by NGOs and circulated through the media are often corrected by the media. Nor may competition in the NGO community itself be relied upon as a check. By definition, NGOs tend to promote causes that do not appeal to states and often even contradict states’ interests. Few NGOs dedicate their activities to supporting particular states or enhancing gen-

\textsuperscript{189} Eric Barendt, Broadcasting Law: A Comparative Study 122 (1995); Bollinger, supra note 140, at 27, 162 n.1–2; Gillmor, supra note 155, at 9; Lucas A. Powe, Jr., The Fourth Estate and the Constitution: Freedom of the Press in America 272 (1991); Donald Meiklejohn, Public Speech and Libel Litigation: Are They Compatible?, 14 Hofstra L. Rev. 547, 566–67 (1986); Perzanowski, supra note 155, at 850, n.116; Oswald, supra note 74, at 387.

\textsuperscript{190} Gillmor, supra note 155, at 9; Graubart, supra note 142, at 658; Meiklejohn, supra note 189, at 567.


\textsuperscript{192} James H. Hulme, Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation, 30 Am. U. L. Rev. 375, 394 n.101 (1981); Note, Vindications of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1732 (1967) [hereinafter Vindications of Reputation]; see also Frasier, supra note 106, at 505.

\textsuperscript{193} Kunczik, supra note 69, at 24.

\textsuperscript{194} Taylor, supra note 70, at 68–69.

\textsuperscript{195} Kunczik, supra note 69, at 24.

\textsuperscript{196} Id. at 22.
eral state interests such as national security, crime control, or public order; the ones that do are unlikely to attract much media attention.

The appearance of the internet has not changed the portrayed reality dramatically. No single internet publication can be as effective as a report in the traditional mass media, which still constitute the primary source of information in the Western world. Though there are news websites that enjoy impressive popularity, most are subsidiaries of the major newspapers and television networks. Furthermore, it should be remembered that “in order to retrieve information about a certain topic [on the internet], one must actively conduct a targeted search.” However, “[t]ew people have the time or wish to expend the effort to explore the gigantic virtual world in any depth . . . .” Thus, a person researching on the internet who is not specifically looking for information about a certain state will not frequently come across any such information.

2. Self-Help: Disseminating the State’s Response

A course of action supposedly available to defamed states is to try to have their version of the relevant facts published in one forum or another. But this option is not very promising. First of all, in the current global reality, the state is obliged to interact not only with other states, but also with intergovernmental and supranational institutions, networks of regulators, corporations, investors, NGOs, and so forth. This means that it is much more difficult for the state to locate the relevant actors and inform them of its position on a certain issue.

Reaching global public opinion through the media is especially hard. Here again, the fact that denials are not as exciting as the allegations preceding them is the primary obstacle to having the state’s reply published prominently in the commercial press. To the extent that governments reply to defamatory accusations against them in state-owned newspapers or on television stations, such outlets are unlikely to obtain sufficient exposure to foreign publics in order to effectively negate the impact of previous negative reports. Responding on news websites or official state websites is not generally helpful either, given the above-mentioned characteristics of the internet.

197. See Levi, supra note 140, at 1104–05; Perzanowski, supra note 155, at 850–51, 862.
199. See Peled, supra note 91, at 53.
201. See Magarian, supra note 191, at 889; Peled, supra note 91, at 53.
States do not have a right of reply vis-à-vis publishers of defamatory content. The laws of common law countries do not grant a right of reply even to natural persons.203 Though many civil law systems do recognize such a norm, it is rarely enjoyed by governments—let alone foreign ones—as they are normally not deemed to have a legal right to reputation in the first place.204 And as to ethical standards, which often impose a general duty to publish a reply in appropriate cases, they rarely bind the press.205

The assumption that self-help is effective is particularly questionable with regard to less-developed states, which lack the communication capabilities to effectively compete globally through public diplomacy and to disseminate their positions and viewpoints worldwide.206

Finally, even where states succeed in disseminating their versions of the facts, another crucial problem emerges: a reply has limited ability to persuade the public of the falsity of the defamatory charges and to rem-

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204. See BARENDT, supra note 189, at 157 (noting that “Continental legal systems usually provide individuals and organizations with right of reply to (factual) allegations in the press.”); Youm, supra note 48.

205. Rather they are merely guidelines. See, e.g., ROY L. MOORE, MASS COMMUNICATION LAW AND ETHICS 16 (2d ed. 1999) (discussing U.S. law). But see PARASCHOS, supra note 37, at 196 (stating that courts in various European countries consult ethical codes “to assess professional journalistic behavior”).

206. WILLIAM A. HACHTEN & JAMES F. SCOTTON, THE WORLD NEWS PRISM: GLOBAL MEDIA IN AN ERA OF TERRORISM 104, 173–74 (6th ed. 2002); KUNCZIK, supra note 69, at 26. It is worth mentioning in this context the “New World Information Order,” which is a series of documents adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The New World Information Order seeks to promote the right of every nation to participate in the international exchange of information, and to provide international publics with a comprehensive and balanced flow of information. Among the enumerated ways of fulfilling that goal is to ensure that states that feel injured by information published about them be heard. This is, however, a mere declaration of principles unaccompanied by recognition of a legal right to reply, let alone a device for enforcing such a right. See Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid, and Incitement to War, U.N. Educ., Scientific & Cultural Org. [UNESCO] Res. 4/9.3/2, art. 5 (Nov. 28, 1978), available at http://www.unesdoc.unesco.org/images/0011/001140/114032Eb.pdf; Thomas Cochrane, The Law of Nations in Cyberspace: Fashioning a Cause of Action for the Suppression of Human Rights Reports on the Internet, 4 MICH. TELECOMM. & TECH. L. REV. 157, 177–78 (1997); Graubart, supra note 142, at 639.
eddy reputational harm, since it is necessarily perceived as biased. In particular, publics often mistrust communications by governments. As Wang notes:

The credibility and efficacy of the government, as the primary communicator, is now often suspected, because people tend to perceive communication by a foreign government as political propaganda. Without source credibility, no amount of communication and information will ever be effective and, worse, could even be counter-productive.

V. AN INTERNATIONAL VERSION OF DEFAMATION LAW: EVALUATING PLAUSIBLE ALTERNATIVES

As the foregoing analysis indicates, it is reasonable to assume that the “marketplace of ideas” relating to international affairs fails to guarantee the accuracy of the information disseminated worldwide about states. This Article has also shown that the potential consequences of such market failures are serious. It is therefore justified to endow states with a legal right to reputation, and to devise institutional and procedural instruments to give effect to such a right. At the same time, special care must be taken to prevent excessive harm to actors involved directly or indirectly in the international political debate, in order not to chill the invaluable exchange of information and opinions. Regulation of the crucial and sensitive realm of speech is justified only insofar as its costs do not exceed its benefits.

Designing a detailed international libel regime is a complex task that exceeds the scope of the present framework. Instead, the following Part will briefly discuss several plausible courses of action, rule out some, and call for further examination of others.

Two theoretical alternatives may be dismissed at the outset. First, establishing a cause of action for state defamation in domestic laws by virtue of a multilateral agreement is ineffective, unrealistic, and undesirable. The main problem with this approach is the difficulty of adjudicating events that took place far away from the forum of the court, especially when understanding the issues at hand requires on-site examinations, questioning of individuals located abroad, overcoming language barriers,
or comprehending intricate political contexts. Thus, from the perspective of the defamed state and the international community, this approach would often fail to meet the goal of declaring the true nature of situations and events. From the forum state’s perspective, substantial judicial resources would be expended with no real returns, and political tensions with applicant states might arise. And from the media’s perspective, evidentiary hardships would yield high litigation costs. Coupled with the questionable prospects of proving the accuracy of journalistic reports in court and the limited interest of most media consumers in foreign affairs, such hardships could produce a chilling effect and reduce the scope and depth of foreign news reporting. Finally, forum shopping may be expected. A state defamed by a report disseminated in more than one state would be tempted to sue in a country friendly to it in terms of political orientation and convenient in terms of applicable law—perhaps even on a reciprocal basis—thereby turning such a domestic-level regime into a farce.

Second, holding states responsible for defamatory communications published by private actors within their territories—which would imply that governments should exert tough oversight over the work of the media and might actually induce them to do so—does not coincide with the modern conception of freedom of the press.

Two additional proposals will now be discussed in greater detail.

A. Option 1: Reviving and Modifying the CIRC

In the realm of private law, it is often contended that publication of a defamed individual’s reply to the allegations against him or her, if it has merits and is well phrased, is capable of reducing the libel’s influence on listeners. The idea that reply properly redresses reputational harm is supported by psychological research and by the fact that European defamation and media laws provide for a right of reply. A right of reply

211. Cf. William V. O’Brien, *International Propaganda and Minimum World Public Order*, 31 LAW & CONTEMP. PROBS. 589, 593 (1966) (stating that it is established international law that a state is responsible for “condon[ing] or encourage[ing] warmongering, subversive, and, in some cases, defamatory propaganda against another state as to contribute bases and materiel to an aggressive invader”).


also raises the quality of public debate by allowing media consumers to critically evaluate the reports to which they are exposed.216

By analogy, a plausible remedy for defamation targeting states could be to enable them to present their positions in response to disparaging publications in a way that reaches the public.

The formation of a legal regime that would compel private media outlets throughout the world to provide states with a right of reply—which is a theoretically powerful device for protecting states’ reputations—is highly impractical,217 and might pose a grave threat to the editorial autonomy of the press.218 A more reasonable alternative is to establish mechanisms to facilitate the delivery of the defamed state’s response to relevant international audiences. This is precisely the objective of the CIRC, but as discussed in Part II, supra, the CIRC’s means of achieving it are deficient.219 The CIRC could become more effective—and thus more appealing to states—if the existing procedure, which relies on the discretion and limited mass communication resources of the UN Secretary-General, were improved. For instance, state parties could create an international forum accessible worldwide through the internet and possibly by additional means, in which states’ manifestos would be published.

However, any instrument for an international right of reply would face two inherent problems, both discussed supra. First, given the preferences of modern media consumers, designing a forum for replies that would attract sufficient public attention is hardly an easy task. Second, the utility of states’ replies is cast in serious doubt since many would view such replies as untrustworthy political propaganda.220

B. Option 2: Establishing a Standing International Fact-Finding Commission

Many commentators believe that reputational harm can be effectively cured if an impartial, official institution enjoying public trust and respect—typically a court—were to thoroughly examine the pertinent facts

\[\text{Defamation: Will the Tail Wag the Dog?}, 19\text{ Emory Int’l L. Rev.} 1733, 1761 (2005)
\]
\[\text{Danziger, supra note 49, at 183–95.}
\]
\[\text{216. Hayes, supra note 212, at 576.}
\]
\[\text{217. Crucially, the United States would surely refrain from joining such a regime absent a dramatic shift in its First Amendment jurisprudence, as indicated by Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241 (1974).}
\]
\[\text{218. Id.}
\]
\[\text{219. See supra pp. 10–11.}
\]
\[\text{220. Nye, supra note 64, at 113; Wang, supra note 67, at 94.}
\]
and declare that the defamatory imputations are untrue. 221 Declaratory relief is thus compatible both with the principal desire of defamed individuals222 (as indicated by empirical research)223 in restoring their reputations, and with society’s interest in correcting false information circulated in the public domain.224 Moreover, confining the remedy for defamation to a declaratory judgment removes the major chiller of press freedom, namely, publishers’ risks of being subject to significant damages awards.225 Against this background, various legislative and academic proposals have been raised to institute a declaratory judgment procedure within U.S. defamation law.226

A comparable mechanism could arguably be adopted in the international sphere. As the International Court of Justice ("ICJ")227 and the


222. See CHAFEE, JR., supra note 208, at 145; RESTATEMENT (SECOND) OF TORTS § 944 cmt. k.


224. Vidicication of Reputation, supra note 192, at 1730.


226. See, e.g., RESTATEMENT (SECOND) OF TORTS ch. 27 Special Note on Remedies for Defamation Other Than Damages; 2 RODNEY A. SMOLLA, LAW OF DEFAMATION §9:96 (2d ed. 2009) (text of Annenberg Libel Reform Act); David A. Barrett, Declaratory Judgments for Libel: A Better Alternative, 74 CAL. L. REV. 847 (1986); Franklin, supra note 225; Hulme, supra note 192, at 393–94; Leval, supra note 225. See generally Cook, supra note 221.

International Law Commission have recognized, declaration by a competent tribunal of the wrongfulness of an act is a legitimate remedy for nonmaterial harm. In addition, there is an increasing understanding that the resolution of international “disputes arising predominantly from a difference of opinion on facts [may be facilitated] by elucidating these facts.”

The task of examining the accuracy of defamatory publications should be entrusted to an institution with such features and processes as would ensure maximum professionalism, efficiency, and fairness to all actors involved. The ICJ does not appear to be an ideal candidate for such an assignment. First, the ICJ’s jurisdiction only extends to contentious cases between states and advisory opinions pursuant to the request of UN organs. Suing states for defamation published by the private media within their territories, as explained above, is not a suitable framework for resolving international defamation disputes, and UN organs cannot always be relied upon to act when appropriate. And, second, the ICJ is often criticized for having questionable fact-finding capabilities and practices.

Alternatively, international bodies addressing human rights issues could potentially vindicate states’ unjustly tarnished reputations in the course of their routine work of investigating reports of human rights abuses. However, the UN human rights institutions, notably the Human Rights Council, are claimed to be heavily influenced by political considerations. In addition, such institutions are highly dependent upon information supplied by NGOs, which is not infrequently inaccurate.
Finally, not all defamatory content pertaining to states concerns human rights issues.

As no other existing body seems suitable for administering international libel law, a plausible solution is to form a new institution designated specifically for that purpose. Such an institution probably should not be a court in the traditional sense. Any institution whose operation is largely or exclusively confined to its physical territory is bound to have serious difficulties in independently ascertaining the facts of remote conflicts. Instead, inspiration may be drawn from fact-finding commissions in particular regimes. Such commissions were established, for instance, by Article 90 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Article 26 of the Framework Convention for the Protection of National Minorities; and Article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses. These commissions are authorized to engage in active information gathering and to conduct onsite visits, which significantly enhance their fact-finding capabilities. Under additional rules that apply to at least some of these

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235. See the discussion concerning the ICJ, supra note 232. Additionally, the European Court of Human Rights had to rely heavily on NGO reports on at least one occasion, in which information about the prevailing conditions in a place outside Europe—Tunisia—was necessary for the resolution of the case. See Saadi v. Italy, App. No. 37201/06, Eur. Ct. H.R. ¶¶ 65–94 (2008), http://www.echr.coe.int/echr/Homepage_EN.


240. International Watercourses Convention, supra note 239, art. 33(7); European Torture Convention, supra note 237, art. 1; Protocol I, supra note 236, art. 90(4); Wolfgang Benedek, Final Status of Kosovo: The Role of Human Rights and Minority Rights, 80 Chi.-Kent L. Rev. 215, 217 (2005) (referring to the processes established in the European Torture Convention and the European Minorities Convention).
commissions, states are obliged to give them access to any site relevant to their mandate, to provide them with necessary information, to allow them to hold closed meetings with relevant parties, and to grant their members immunity from legal process of any kind. The commissions on torture and on minority rights fulfill their fact-finding roles and routinely issue reports in their respective fields.

In this Article’s context, the fact-finding commission would conduct factual investigation at the request of a state seeking to refute specific defamatory content, and would publish its findings. As the objective of the procedure would be to determine the facts rather than to punish the defamers, the latter would not be defendants, nor would they be subject to any duty or sanction even if the commission found for the applicant state. Furthermore, the commission’s holding that the defamatory charges are false would not prevent anyone from insisting thereafter that the charges were nevertheless accurate. While ordinary individuals tend to attribute importance to judicial and quasi-judicial decisions and thus consider them reliable, they presumably recognize that judges and comparable fact-finders might err, and they would not be immune to persuasion that such is the case with respect to a given dispute. Thus, the commission’s findings are expected to be useful in bettering the applicant state’s image, but at the same time, the findings could foster subsequent global public discourse.

Though the lack of an adversarial process might look like a recipe for the commission’s “capture” by the interests and resources of the applicant state, this outcome is avoidable. Any dispute involving a state necessarily involves additional actors with opposing interests and views,

241. International Watercourses Convention, supra note 239, art. 33(7); European Torture Convention, supra note 237, arts. 2, 8.
242. International Watercourses Convention, supra note 239, art. 33(7); European Torture Convention, supra note 237, arts. 8(2)(b), 8(2)(d).
243. European Torture Convention, supra note 237, art. 8(3); Council of Europe, Rules Adopted by the Committee of Ministers on the Monitoring Arrangements Under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities, Res. 97(10), ¶ 32, (Sept. 17, 1997).
245. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, About the CPT, http://www.cpt.coe.int/en/about.htm (last visited Aug. 8, 2009); European Minorities Convention, supra note 238.
246. See Frasier, supra note 106, at 517; Peled, supra note 91, at 76–77.
be they other countries, domestic minority groups, peoples under belligerent occupation, NGOs, media outlets that previously published relevant reports about the state, and the like. These actors could provide the commission with information in support of their respective stances and should be allowed to do so. Such actors in fact compete currently to influence international public opinion, but the failures they generate in the unregulated international marketplace of ideas are likely to decrease if all the available information is processed within the confines of neutral and professionalized procedures. The relevant actors’ levels of cooperation with the commission may also be mentioned in the commission’s report, especially if the behavior of the actors prevents the commission from reaching conclusive findings.247 Such obstruction could occur, for instance, if the applicant state or another state, authority, or organization involved were to prohibit the commission’s entry to certain places, limit its access to certain documents, or bar its communication with certain groups.

Within the definition of the commission’s competence, as clear a line as possible must be drawn between political value judgments, which may not be adjudicated, and assertions of objective fact, which may. Though that distinction, as well as the determination of truth and falsity, is hardly an easy task, the analogy to domestic defamation laws—under which the distinctions between fact and opinion, and between truth and falsehood, are essential elements—indicates that it is achievable. An equally important effort should be made to distinguish between allegations pertaining to relatively concrete events, which ought to be the sole subject of the defamation process, and publications providing professional analysis of complex political or economic situations, the evaluation of which cannot possibly lead to conclusive and unequivocal results. For similar practical reasons, it might be advisable to confine international libel law to certain kinds of reputations, relating, for instance, to law observance and moral behavior, as opposed to military or financial strength.

Many other issues will also have to be addressed. For instance, with regard to substantive law, the regime must define the nature and extent of the required link between an applicant state and the defamation complained of that would trigger the fact-finding process. Among the institutional issues that arise is the fact-finding commission’s composition. The members of the commission should be elected in a way that would both

248. Epstein, supra note 207, at 809.
guarantee the commission’s professionalism, and satisfy states’ presumed desires to maintain control of the election process, thereby enhancing the commission’s legitimacy and the degree of cooperation it elicits. At least some of the commission’s members should be reputable journalists. Finally, with regard to procedure, the commission must be equipped with all the tools necessary to gather and evaluate materials effectively and to avoid dependence on the information supplied by interested parties. In addition, the status of the defamer in the process should be defined, and mechanisms should be formed to ensure that the commission’s reports obtain adequate publicity and attention worldwide. These issues and many more will have to wait for further research.

CONCLUSION

The idea of endowing states with a legal right to reputation certainly seems odd at first glance. But upon exploring the concept of reputation and understanding the individual and collective interests that justify its protection under domestic laws, it becomes clear that reputation is as valuable to states and the international community as it is to individuals and the societies they live in. The law, which aims to regulate human affairs compatibly with the realities and needs of any given time, place, and context, should not ignore these observations. Considering that international law is essentially an endeavor to build an organized society of actors that would try to imitate, to the extent feasible, the internal order prevailing in modern states, and given the fact that the array of issues international law treats is consistently expanding, it is plausible to add yet another segment to that legal fabric and to begin thinking about an international parallel to defamation law.

This Article did not intend to present a complete account of the desirable international libel law—quite the contrary, I recognize that the suggested courses of action would be hard to implement and that the best solution may lie elsewhere. Rather, my purpose is to raise awareness of the importance of state reputation and to demonstrate that it is worthy of legal protection. If states and the international community as a whole begin to regard the interest in reputation as a right, they might be more determined to protect it.
IN SEARCH OF ALTERNATIVE SOLUTIONS:
CAN THE STATE OF ORIGIN BE HELD
INTERNATIONALLY RESPONSIBLE FOR
INVESTORS’ HUMAN RIGHTS ABUSES
THAT ARE NOT ATTRIBUTABLE TO IT?

Vassilis P. Tzevelekos*

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INTRODUCTION

The road to hell is said to be paved with good intentions, and while there is no reason to question the intentions of international investors, there is good reason to question the activities of the international firms they invest in, as these firms have a significant impact on the states and communities in which they operate. While the impact of international investor firms can be beneficial—such corporations do, for instance, contribute to social and economic development—international businesses can also conduct their activities with detrimental disregard for the environment and human rights. Indeed, the idea that global businesses harm local populations around the world is far from fiction. Even if extreme or systematic violations of “fundamental” human rights are not the rule, “minor,” everyday infractions are frequent and multitudinous. Private economic actors have an influential international role and in fact, some of their actions—had they been state actions instead—would potentially amount to wrongful international conduct.

The answers provided by international law to this relatively new reality are far from sufficient. The investor is recognized as a passive subject of international law whose rights are guaranteed by interstate bilateral investment treaties (“BIT”), preferential trade agreements, and other regional and multilateral instruments. At the same time, states recognize the international investor as an “equal,” active subject, with whom they sign “state investment contracts” that create reciprocal obligations for both parties. The objectives of these investment contracts are clear—the investor pursues profit and the host state pursues economic development. It is true that the so-called globalization phenomenon arrived in the spirit of liberalization to facilitate and expand international investment practices; however, the normative landscape has remained largely


2. The Preamble to the International Center for Settlement of Investment Disputes Convention on the Settlement of Investment Disputes between States and Nationals of Other States begins: “Considering the need for international cooperation for economic development, and the role of private international investment therein.” Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, pmbl., opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; see also Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986) (in regards to the right to development as a human right, Article 1 states that “every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”).
intersubjective, highly fragmented, and underinstitutionalized. A complete set of general international norms is lacking and the various arbitral tribunals\(^3\) that continue to operate without centralized, organic, and systemic links are forced to vacillate between the private will of the particular contracting parties and general international law.\(^4\) In other words, although the investor is often elevated to the level of an international subject with the above-mentioned capacities, the international legal order remains silent as to the general obligations of that investor—particularly with respect to the universal values that make up the international public order.

Given this asymmetry, this Article will examine the question of whether there is room for classic state responsibility to be applied when investors violate international human rights norms in the course of their activities within their host states. The circle of subjects that could be—according to various legal bases—held accountable, however, extends beyond mere investors. International investment is a game of at least three players—the host state, the investor, and the investor’s home state.\(^5\)

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3. Although a large portion of arbitral tribunals are instituted within the framework of the International Center for the Settlement of Investment Disputes (ICSID), there are many others instituted \textit{ad hoc} (mostly following the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules).

4. See Charles Leben, \textit{La théorie du contrat de état et l’évolution du droit international des investissement}, 302 \textit{Recueil des Cours} 197, 220 (2003); \textit{see also} ICSID Convention, \textit{supra} note 2, at art. 42(1). The ICSID Convention provides:

   The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.


5. Two other “players” are also involved in this “game”: individuals (members of the local population which is directly affected by the consequences of the behavior of the three main “players”) and the international community as a whole (which can be indirectly affected when the behavior of the three main “players” amounts to a violation of \textit{erga omnes} norms of international law). See Steven R. Ratner, \textit{Corporations and Human Rights: A Theory of Legal Responsibility}, 111 \textit{Yale L.J.} 443, 508 (2001) (describing the relationship between the investor corporations and affected individuals as “ties . . . falling within concentric circles emanating from the enterprise, with spheres enlarging from
With respect to international law, the responsibility of the host state in which the violation occurs is self-evident. In similar terms, as far as the home state is concerned, while exercising its territorial jurisdiction, it is expected to regulate and control investment activities in a way that will effectively guarantee respect for all universally recognized human rights. However, the international responsibility of the second player—the investor—is in status nascendi, or, underdeveloped. This very gap (or, lacuna) calls for the exploration of alternative legal pathways. Accordingly, the object of this Article is to focus on classic state responsibility as the basis for the argument that, next to the host state, the home state may also be held internationally responsible for the conduct of an investor violating internationally protected human rights.

To validate this argument in terms of positive law, this Article proposes a legal framework de lege ferenda (i.e., legal framework of “what the law ought to be”) and outlines its limitations and conditions of application. The idea is simple. In terms of international law, for a state to be deemed internationally responsible, it must have breached, by act or employees to their families, to the citizens of a given locality otherwise affected by their operation (admittedly a broad and amorphous category), and eventually to an entire country.”). Special attention should also be paid to the role of international organizations, particularly to the role of the World Bank and the International Monetary Fund, whose impact in promoting (mainly through conditionality) international standards is quite often bigger than that of the states. See, e.g., Manisuli Ssenyonjo, Non-State Actors and Economic, Social, and Cultural Rights, in Economic, Social and Cultural Rights in Action 109, 118–33 (Mashood A. Baderin & Robert McCorquodale eds., 2007).

6. See Banković v. Belgium, 2001-XII Eur. Ct. H.R. 351–52 (stating that “from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial” and “as a general rule, defined and limited by the sovereign territorial rights of the other relevant States”).

omission, one of its international obligations. Accordingly, to hold the home state responsible for conduct of its own investors acting outside its territory—i.e., conduct in principle not attributable to it—the home state must be bound by an autonomous international obligation, the breach of which is deemed an internationally wrongful act. Part I of this Article will clarify and delimit certain aspects of this discussion and the bases of its significance. In Part II, this Article introduces the generic international obligation of due diligence, which requires that every state should, to the best of its respective ability, fight breaches of international law by implementing deterrent or retributive punishment measures. Part II will also examine more closely the scope of the due diligence obligation and its effect with regard to international human rights, highlighting its benefits as well as necessary limits on its imposition. Part III will then link the due diligence obligation to the home state’s duty to deter investors from, or punish investors for, committing human rights violations outside its territory, implying that a state’s failure to do so implicates international liability on the part of that state. To facilitate this framework, two types of jurisdictional basis are proposed: universal jurisdiction and active personality. While the first basis falls under the absolute discretion of state authorities, the latter, if seen from the perspective of extraterritoriality, turns into an international obligation for the state of origin.

I. FRAMING THE ISSUE

A. The Asymmetries of Public International Law and the Need for Surrogate Solutions

Since the “mainstream” solutions provided by public international law have been inadequate thus far, the “surrogate” solutions proposed in this article are promising, if not necessary, in the face of ongoing investor human rights violations. The scenario is well-understood. While international investors callously perpetrate violations, they remain immune to retribution from their host states because the governmental bodies of those states are either corrupt or blinded by the economic growth the corporations stand to stimulate.8 This picture of inefficiency is replete

8. See, e.g., Chimugwuanya Nwobike & Richard Aduche Wokocha, Privileging Investor Rights over Public Interest in Investment Agreements - The Human Rights Implications of the Chad/Cameroon Conventions of Establishment, 10 RECHT IN AFRIKA 95 (2007) (Ger.) (detailing the contracts of establishment signed between Chad and Cameroon on one side, and a consortium of oil companies on the other which contained burdensome clauses that were voluntarily endorsed by local governments and might in fact undermine those governments’ ability to guarantee the respect of human rights); see also Kenneth F. McCallion, Institutional and Procedural Aspect of Mass Claims Litigation
given the absence of a mature and effective legal body for holding the investor directly accountable at the international level. Thus, the situation calls for more imaginative ideas.

The international legal order has always been imperfect. The transition from *jus gentium* to the Vatelian model of *jus inter gentes* deprived the individual of legal consideration at the international level for quite some time. It was only after the Second World War that the need to move toward a “modern” international legal regime emerged. And it was then that universal human rights norms emerged and established the “individual” as a passive subject who holds rights and owes duties that emanate directly from the international legal order.

However, modernity did not disown each and every characteristic of “classicism” within international law. With modernity, the focus remained on states; sovereign domestic governments continued to assert exclusive competence and authority to determine the extent of the international legal capacity of the other international subjects, including private entities. The attributes of that legal capacity with respect to natural persons (e.g., citizens, minority citizens, terrorists, rebels or members of a liberation group) as well as legal persons (e.g., non-governmental organizations, multinational corporations, or trade unions) varied according to sovereign state’s will. At the international level, the private actor was only assigned legal rights or duties to the extent that states consented. This is the “voluntarist” narrative of international law.

The “objectivist” perspective, on the other hand, marginalizes the role of states in determining the legal rights and duties of private actors by

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10. See, e.g., JOE VERHOEVEN, DROIT INTERNATIONAL PUBLIC 295–312 (2000).

11. See ROSENNE, supra note 9, at 15–16.

12. Id.

13. Id. at 15–17.

placing emphasis on international social *necessity*. The International Court of Justice (“ICJ”) has outlined in case law a system of “variable geometry” stressing that the nature of international legal personality depends upon the collective needs of the international community. Still, despite the emergence of the objectivist perspective, there remains a glaring asymmetry. The *lacunae* of the international system are the result of its very nature and its transition towards a multilayered society. Thus, while the individual investor is a “giant” international actor, the legal obligations and responsibilities attributed to him or her are those of a “pygmy.” Indeed, when it comes to individual actors, international law only provides for hybrid criminalization of certain serious transgressions.

Of course, it is true that the problem of investor human rights violations is relatively new; the private economic actor was never as rambunctious in the past. But efforts at the international level to prevent corporations from abusing human rights did not begin with globalization as they date back to the 1970s and the New International Economic Order (“NIEO”). In June 1976, the Guidelines for Multinational Enterprises (“Guidelines”) were drafted as part of the broader “policy commitment” of the Declaration on International Investment and Multinational Enterprises, which was adopted within the framework of the Organization for Economic Co-operation and Development (“OECD”). After numerous

15. *Id.* at 94–95 (characterizing social objectivism as “translating what [is] necessary for social solidarity”).


17. The fact that corporations are accredited more prerogatives than duties is not simply the result of the unwillingness or feebleness of the international community of states to set a complete general normative *corpus* for their obligations and the consequent responsibility in the case of violation. This *lacunae* in fact reflects a broader asymmetry in the development of general international law and can, equally, find explanation in the fact that the international realities generating the *necessity* to develop a broader international legal frame for the activities of the private factor are relatively new.

18. For an overview of the initiatives undertaken at the international level until recently, see Andrew Clapham, Human Rights Obligations on Non-State Actors 201, 201–531 (2006); Josep M. Lozana & Maria Prandi, Corporate Social Responsibility and Human Rights, in Corporate Social Responsibility: The Corporate Governance of the 21st Century 183 (Ramon Mullerat ed., 2005); Olivier De Schutter, The Challenge of Imposing Human Rights Norms on Corporate Actors, in Transnational Corporations and Human Rights 1, 2–22 (Olivier De Schutter ed., 2006).

revisions, leading up to the most recent version in 2000, these Guidelines remain in force. The provisions are in the form of recommendations by governments addressed to corporations operating in, or originating from, participating states, including members of the OECD as well as a very small number of non-member governments. The Guidelines contain non-binding principles and standards of good practices for responsible corporate behavior, which are complementary to the pre-existing legislation. As far as human rights are concerned under the Guidelines, corporations are expected to respect the human rights of the people affected by their activities consistent with the host government’s international obligations. Although supervision remains voluntary and is characterized by the absence of sanctioning mechanisms, the effectiveness of the Guidelines is controlled by the network of National Contact Points, which operate at a domestic level and cooperate with the Investment Committee.

The International Labour Organization’s (“ILO”) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the “Declaration”) was added in 1977 to the list of the nonbinding

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22. OECD Guidelines, supra note 20, Part II (suggesting that enterprises should “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”); see also ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 204–205 (2006).

23. See, e.g., Final Statement by the U.K. National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (U.K.) Ltd., (Aug. 28, 2008), available at http://www.berr.gov.uk/files/file47555.doc. Global Witness accused Afrimex U.K. Ltd., inter alios, for having paid taxes to rebel forces in the Democratic Republic of Congo and for having practiced inadequate due diligence on the supply chain, by purchasing minerals from mines that used child and forced labor. Id. ¶ 6. The National Contact Point concluded that, although the accused corporation did not pay taxes to the rebel groups, its associated companies did so, with Afrimex failing to influence its associates. Id. ¶ 26–27. With regard to the second main allegation, it was held that Afrimex in fact applied failed to exercise due diligence on the supply chain. Id. ¶ 51–62. However, since the National Contact Points lack authority to impose sanctions or order reparation for the violated rights of the victims, and their decisions are deprived of any binding effect, the statement in the Afrimex case limits its scope in a number of recommendations to the respondent company. Id. ¶ 63–77.

international documents calling for corporations to respect human rights. Apart from referring to those rights afforded strictly under the ILO, such as the fundamental rights of workers, the Declaration contains a provision making specific reference to the ILO conventions, as well as the United Nations Universal Declaration of Human Rights ("UNDHR") and the Covenants. Despite the soft law nature of the Declaration and the absence of any sanctioning mechanisms, member states are expected to report to the ILO’s Governing Body on its implementation. The ILO Governing Body has the power to make recommendations to member states’ governments and interpret—under a specific procedure for the examination of disputes—the provisions of the Declaration.

The third step toward the progressive development of investor’s international human rights obligations coincided with the well-known United Nations Global Compact. Among the principles announced by the United Nations Secretary General in 2000, the first two refer to the support and respect that corporations should demonstrate in the field of internationally proclaimed human rights within their sphere of influence, and to the obligation to avoid acts of complicity in human right abuses. The next four principles are devoted to labor rights—namely, the freedom of association, the right to collective bargaining, the elimination of forced and compulsory labor, the abolition of child labor, and the prohibition of employment discrimination. Following the “trend,” the Global Compact presents itself as a nonregulatory “instrument” that does not provide for legal enforcement of its provisions. Instead, the Global Compact merely provides a framework for corporations to endorse voluntarily. At the same time, the Global Compact serves as a consensus-based political forum that involves, in the process of effecting values incorpo-


27. For further information, see UNITED NATIONS GLOBAL Compact, http://www.unglobalcompact.org (last visited on Nov. 12, 2009).


29. Id.
rated in its ten principles, all the relevant social actors such as states, international organizations, and international private actors.  

Finally, at the forefront of previous efforts to prevent corporate abuses of human rights is the 2003 United Nations’ Norms on the Responsibilities of Transnational Corporations and other Enterprises with Regard to Human Rights (the “UN Norms”), recommended by the United Nations’ Commission on Human Rights’ Sub-Commission on the Promotion and the Protection of Human Rights. Contrary to the first three endeavors, the UN Norms were intended as “normative” in the prescriptive sense. Nevertheless, their current legal standing remains unsurprisingly limited to soft law. To the extent that the UN Norms do not restate preexisting law, they identify the need for further normative prescription in the field. They also have, as all soft law documents, an indisputably permissive effect, serving as a basis for further regulation. Since the preamble of the UN Norms refers to UN treaties and other international instruments that set human rights standards, the proposed UN Norms are meant to be read in light of the existing international standards. While states bear the primary responsibility for ensuring the respect of international human rights standards, corporations also are expected to “promote, secure the fulfillment of, respect, ensure respect of and protect human rights” within their sphere of influence. Although the UN Norms include provisions regarding implementation, monitoring (by the UN), and forms of reparation, the absence of clear-cut normativity sterilizes the UN Norms and diminishes the likelihood that the “instrument” could be made effective via domestic or international judicial interpretation. Consequently, a number of questions regarding the nature and ex-

30. Among others, the private actors include global civil society, the labor force, and of course, businesses.
33. This is the case for both multinational corporations and states. Also, while multinational corporations may “self-restrict” their conduct so that it meets the standards of the UN Norms, national governments also have the power to impose these norms on the corporations through domestic legislation.
34. UN Norms, supra note 31, ¶ 1.
tent of investor obligations remain unanswered. For instance, while the obligations of the private actors are mainly limited in the *status negativus*\(^{35}\) dimension of human rights, the question of affirmative obligations remains unclear.\(^{36}\)

Customary international human rights are *erga omnes* in that they are applicable against the entire world; thus, they are implicitly objective. Indeed, it is uncontroversial that certain universal values bind each and every subject of the international legal order, including nonstate actors.\(^{37}\) Still, while it may be self-evident that investors are required to respect human rights, international law lacks a mature normative framework regulating *ad hoc* the human rights duties of corporations. Furthermore, no direct international legal enforcement mechanism exists for the human right obligations of the investor. In the absence of explicitly enforceable norms, efforts to sanction investors for transgressions fall flat. At present, the only tangible development with respect to investors is the self-restrictive ideal of “social accountability,” which leaves much to be desired.\(^{38}\)

The blame for these shortcomings, however, should not be placed solely on states or international governmental bodies or institutions. General international law has always been a product of custom, reflecting practical social necessity that was often validated by a judge with the authori-

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36. It has been suggested that corporations have a positive duty to protect human rights in cases of certain categories or groups of individuals, such as their own workers or people residing on land owned by the corporation. See The Danish Institute for Human Rights, *The Human Rights and Business Project, DEFINING THE SCOPE OF BUSINESS RESPONSIBILITY FOR HUMAN RIGHTS ABROAD*, at 8-9, available at http://www.humanrightsbusiness.org/files/320569722/file/defining_the_scope_of_business_responsibility_.pdf (last visit Dec. 20, 2009).

37. For example, the Institute of International Law suggested that “certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community.” Institut de droit international, Resolution: *Obligations Erga Omnes in International Law* (Aug. 27, 2005); see also UNDHR, supra note 26, Article 1 (providing: “All human beings . . . should act towards one another in a spirit of brotherhood.”); UNDHR, supra note 26, art. 30 (providing: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”).

38. Corporate Social Responsibility is a set of discretionary corporate policies aimed at responding to social expectations. However, they lack legal enforceability. Cf., e.g., Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, in *HUMAN RIGHTS AND CORPORATIONS* 335, 335–365 (David Kinley ed., 2009).
ty of which he or she disposed. In short, the process is ongoing—as long as global investments continue to raise complicated legal and moral issues, one should expect that the gaps discovered in the existing international legal framework will inevitably be filled.

Until the gaps discussed herein are filled, it is likewise inevitable that legal scholars and the practice itself will search for “substitute” solutions. However, these alternative legal frameworks can only be based on positive international law and its “realities,” among which the most profound is that of a legal order suffering from the “not-a-cat” syndrome. The mere fact that private economic actors are referred to as “nonstate” illustrates the extreme extent to which the international legal system is state-centric. The law of the international community lato sensu remains in essence the result of the international community stricto sensu, which is the international community of states. Accordingly, the duty to exercise control over corporations rests primarily with the state. While this may sound obvious when it comes to a host state exercising jurisdiction over investors’ actions or omissions occurring in or affecting that state, it ought to be an equally well-received principle even when a state lacks such a straightforward interest in the matter—for instance, when the state is home to the investor. Since states cannot assert territorial jurisdiction over resident investors for conduct taking place abroad, another jurisdictional basis is necessary if investors are to be policed by their home states for human rights transgressions.

39. Philip Alston, The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, in NON-STATE ACTORS AND HUMAN RIGHTS 3, 3–36 (Philip Alston ed., 2005). Alston criticizes the use of negatively defined terms, such as “non-state actors,” as well as the state-centric reading of international law by the means of comparison with the linguistic skills of his daughter at the age of eighteen months, when she was calling all animals as “not-a-cat.”


41. As it will be explained below, the idea here concerns the exercise of parallel jurisdiction by the home state when the host state cannot or does not want to exercise its own jurisdiction for regulating and controlling the activities of the investor that threaten the enjoyment of human rights by the local population. See infra Part III.
B. Presumptions and Simplifications: The Gordian Knot of Nationality

To qualify as a “home state” or “state of origin,” the state must have a particular association with the investing firm that is developing its activities abroad. General international law provides a number of practice-based criteria for determining the nationality of a legal person. In general, states enjoy absolute discretion to unilaterally establish conditions for granting nationality. If these conditions are met, they are given full effect within the domestic order of the state which granted its nationality to a subject (for instance, access to justice). However, the international opposability of nationality vis-à-vis the other states remains a controversial issue, mainly depending on the criterion of the effectiveness in the bonds between an individual person and the state which granted its nationality to that person. 42 With respect to corporations, as the ICJ suggested with its famous dictum in the Barcelona Traction case, the two potential bases for determining nationality are the place of incorporation and the location of the corporation’s administrative seat (the so-called effective seat or siège social). 43 The piercing of the corporate veil in order to investigate the nationality of the shareholders is not viable. 44 Accordingly, for the

42. For example, see the Nottebohm case before the ICJ. Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6). There, the Court refused to allow Liechtenstein to exercise diplomatic protection in favor of a formerly German citizen, which has only acquired its nationality during the war. The Court based its decision on the criterion of the effectiveness in the bonds between the state and its nationals. The nonopposability of the nationality conferred to Nottebohm at the international relations of Liechtenstein with Guatemala had no impact at all to the rights and obligations of Nottebohm within Liechtenstein’s domestic legal order.

43. Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 42 (Feb. 5); see also Article 9 of the International Law Commission Draft Articles on Diplomatic Protection which provides:

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.


44. According to Article 25(2)(b) of the ICSID Convention, a “national of another Contracting State” is
purposes of this Article, a corporation acting abroad can be presumed to be either incorporated in its state of origin (transnational corporations), or linked with its state of origin by an alternative, informal, but effective link—namely, the location of its headquarters.

Since corporate law is not one of the fields of expertise of international lawyers, this Article will simplify discussions of multinational corporate structure as if limited to one parent company located in state X and several subsidiaries conducting business in countries A, B, and C. The seat of the parent company—effective or not—is deemed the home state. Although the subsidiary corporation might be incorporated in the host state, and may, as such, be an independent legal person within the latter’s legal order, the parent company will be presumed to exercise decisive control over subsidiary policy-making and consequent practice. Accordingly, any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

ICSID Convention, ¶ 25(2)(b). As Christoph H. Schreuer suggests in his commentary on the ICSID Convention, since the second clause of Article 25(2)(b) provides expressly that the test of foreign control shall be applied in the case that the corporation has the nationality of the host state, the logic of systematic interpretation calls for accepting that in all other cases the foreign control test should be excluded. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 278 (2001). The case law of ICSID tribunals supports Schreuer’s analysis. Id. at 278–281 (providing the relevant ICSID case law and a list of the authors supporting this point of view).

45. In line with the language of the second clause of Article 25(2)(b) of the ICSID Convention, jurisdiction of the tribunals established under ICSID rules is extended to companies which, because of foreign control, the parties have agreed should be treated as nationals of another contracting party rather than the respondent (host) state. Foreign control constitutes the objective condition for both the applicability of this provision and the consequent extension of ICSID’s jurisdiction. Accordingly, the contractual freedom of states parties to ICSID is conditioned by the respect of the criterion of the effective foreign control. In a recent ICSID award case, TSA Spectrum de Argentina S.A. v. Argentine Republic, the tribunal, after referring in extenso to the relevant international—and mainly ICSID—case law, suggested,

the ratio legis of [the second clause of Article 25(2)(b)] exception is the wording ‘because of foreign control.’ Foreign control is thus the objective factor on which turns the applicability of this provision. It justifies the extension of the ambit of ICSID, but sets the objective limits of the exception at the same time. . . . A significant difference between the two clauses of Article 25(2)(b) is that the first uses a formal legal criterion, that of nationality, whilst the second uses a material or objective criterion, that of ‘foreign control’ in order to pierce the corporate veil and reach for the reality behind the cover of nationality. Once the Parties have agreed to the use of the latter criterion for juridical persons having
the bridge between the state of origin and the firm incorporated in the
host state, although lacking in formal terms, should correspond to the
criterion of effectiveness of the parent’s company control of its subsidiar-
ies.46 It goes without saying that the degree of effectiveness is subject to
proof on a case by case basis.

C. Delimiting the Article’s Focus: Excluding “Direct” Attribution and
Complicity

Before moving on to this Article’s chief focus—the due diligence obli-
gation—the last point of logistics is to point out two legal bases which,
although under certain conditions they may open the way to state respon-
sibility for human rights abuses by the investor, will not be among the
primary considerations of this discussion: “direct” attribution and com-
pliicy.

Acts or omissions of private entities are generally not attributable to
states.47 Accordingly, in principle, states are not internationally responsi-

the nationality of the host State, they are bound by this criterion as a condition
for ICSID jurisdiction and cannot extend that jurisdiction by other agreements.

TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID award (W. Bank)
ARB/05/05 2008, ¶ 139-141. “The text itself allows the parties to agree to lift the corpo-
rate veil, but only ‘because of foreign control,’ which justifies, but at the same time condi-
tions, this exception.” Id. ¶ 147. The aim of the arbitrator should be the discovery of the
real source of foreign control.

46. See Institut de Droit International, Obligations of Multinational Enterprises and
their Member Co., at ¶ 2 (Sept. 1, 1995), available at http://www.idi-
il.org/idiE/resolutionsE/1995_lis_04_en.PDF (last accessed Nov. 10, 2009); Andrew J.
Wilson, Beyond Unocal: Conceptual Problems in Using International Norms to Hold
Transnational Corporations Liable under the Alien Tort Claims Act, in TRANSNATIONAL
CORPORATIONS AND HUMAN RIGHTS 43, 47, 63 (Olivier De Schutter ed., 2006) (examin-
ing the question of whether parent companies have an obligation of vigilance under the
theory of “piercing the corporate veil”).

47. See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON

In theory, the conduct of all human beings, corporations or collectivities linked
to the State by nationality, habitual residence or incorporation might be attrib-
uted to the State, whether or not they have any connection to the Government.
In international law, such an approach is avoided, both with a view to limiting
responsibility to conduct which engages the State as an organization, and also
so as to recognize the autonomy of persons acting on their own account and not
at the instigation of a public authority. Thus, the general rule is that the only
conduct attributable to the State at the international level is that of its organs of
government, or of others who have acted under the direction, instigation or con-
tr ol of those organs, i.e., as agents of the State.

Id.
ble for the wrongful conduct of their nationals. However, there are exceptions. Article 8 of the International Law Commission’s Draft Proposal on the Responsibility of States for Internationally Wrongful Acts (the “ILC Norms on State Responsibility”) provides that the conduct of a private individual can be considered an act of the state if the individual is in fact acting “on the instructions of, or under the direction or control, of that State” (de facto organ). Outside this case, wrongful acts of individuals may be attributed to states in four other instances as well: (1) when any private entity (including a corporation) is empowered by a state to exercise elements of the state’s governmental authority (empowered entity); (2) when the state voluntarily endorses, or “acknowledges and adopts,” the illicit conduct of a private actor (adopted agent); (3) in the case of insurrectional movements which become the new government of the state; and (4) in the event of an “agency in necessity,”—that is, a situation where individuals are “in fact exercising elements of a governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of the elements of authority.”

Of the above-mentioned five legal bases, only the first three could potentially allow for the attribution of investor human rights abuses to states, and only in highly unlikely scenarios. Thus, if direct attribution

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49. The interpretation of Article 8 concerning the nature or the level of control that a State shall exercise over the behavior of the individual so that this behavior is directly attributable to it has opened a “Pandora’s Box” towards the fragmentation of general international law. Compare Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999), with Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 64–65 (June 27), and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide case) (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), ¶ 406–07, available at http://www.icj-cij.org/docket/index.php?p1=3&p2=2 (Judgment of Feb. 26, 2007). The International Criminal Tribunal for Former Yugoslavia (“ICTY”) in Tadic diverted from ICJ’s “effective control” test set forth in the Nicaragua judgment and introduced a less strict level of control, described as “overall.” Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999). In response, the ICJ, in the Genocide decision criticized ICTY’s proposed basis and insisted on its own Nicaragua test. Genocide Case, ¶ 406.

50. Crawford, supra note 47, at 100.

51. Only governmental activities, and not commercial ones, of a corporation acting as an “empowered entity” may be attributed to states. Id. at 101.

52. Id. at 121–23.


54. Id. at 114.

55. Id.
were the only available basis, a large number of investor human rights violations would be left outside the scope of state international responsibility.

As far as the second legal basis that is excluded by the analysis of this Article is concerned, while states are often complicit in investor human rights abuses, the international legal framework regarding such complicity appears to be rather elliptic and problematic. According to Article 16 of the ILC Norms on State Responsibility, a state may be internationally responsible as complicit when it provides aid or assistance for an act that would be internationally wrongful if committed by the state itself, with knowledge of the circumstances of the act.\(^{56}\) The very fact that Article 16 governs instances where a state is complicit in the acts of another state but fails to concern itself with instances in which a state is complicit in the acts of private entities serves as another perfect illustration of the asymmetrical development of general international law. However, this is just one side of the coin.

The framework regulating corporate complicity, though in its infancy, goes well beyond that of state complicity. Leaving aside the regulation of state complicity in international crimes,\(^{57}\) it is important to return to the

\(^{56}\) See id. at 148.

\(^{57}\) Referring specifically to the issue of complicity in international crimes by multinational corporations, Andrew Clapham gives the example of the 2002 Unocal case before the domestic courts of United States on the basis of the Alien Tort Claims Act. Andrew Clapham, State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations, in RESPONSIBILITY IN WORLD BUSINESS: MANAGING HARMFUL SIDE-EFFECTS OF CORPORATE ACTIVITY 50, 60–65 (Lene Bomann-Larsen & Oddny Wiggen eds., 2004); see also infra Part III.A.1. The Unocal case concerned crimes, involving forced labor, committed by the army of Myanmar in favor of the defendant-corporation. One of the issues addressed in the case was the appropriateness of attributing those crimes to Unocal, in whose interest the army acted. Despite the fact that the claim concerned a tort and not a crime, the American courts found it appropriate to refer to international criminal law and concluded that, although under international criminal law the support provided by the individual shall have a substantial effect, complicity does not require full participation in the execution of an international crime. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), reh'g granted, 395 F.3d 978 (9th Cir. 2003), appeal dismissed per stipulation and judgment vacated, 403 F.3d 708 (9th Cir. 2005). In a recent case, the United States Court of Appeals for the Second Circuit articulated a high standard for establishing that a corporation has aided and abetted a government in breaching human rights. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009). Under this standard, mere knowledge of the human right breaches is insufficient under the ATCA for establishing the responsibility of a corporation; instead, for a finding of corporate responsibility, intent to further the breaches must be shown. Talisman Energy, 582 F.3d at 259. ("Thus, applying international law, we hold that the mens rea standard for aiding and abetting liability in [ATCA] actions is purpose rather than knowledge alone. Even if there is a sufficient international consensus for imposing
UN Global Compact, which, from its own perspective, draws a broader picture. The comments to the Global Compact regarding the second principle that prohibits complicity, introduce an artful typology of the concept, classified as direct, beneficial, and silent. According to the comments, corporations are not only expected to avoid behaviors that are directly complicit with state abuses of human rights, but also must not benefit from such abuses and must refrain from acts that might undermine state efforts to protect human rights. Although the UN Norms do not make explicit use of the term “complicity,” the attributes described are equally concrete. According to paragraph 3 of the UN Norms, corporations should not “engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.” Similarly, paragraph 11 requires that corporations “refrain from any activity which supports, solicits, or encourages states or any other entities to abuse human rights,” and should “seek to ensure that the goods and services they provide will not be used to abuse human rights.”

The prima facie normative asymmetry between the concept of complicity introduced by the ILC Norms on State Responsibility and the two above-mentioned documents is self-evident. However, one could argue that such a comparative approach lacks substance. While the UN Norms aim at setting primary substantive obligations, the ILC Norms on State Responsibility refers to secondary obligations, which become applicable

59. See Andrew Clapham & Scott Jerbi, Categories of Corporate Complicity in Human Rights Abuses, 24 HASTINGS INT’L & COMP. L. REV. 339, 339–349 (2001). The analysis proposed by Clapham and Jerbi moves in the direction of confirming the existence of an obligation for corporations to adopt one certain positive measure against human rights violations. According to Clapham and Jerbi, in order for a corporation not to be accused of “silent complicity,” it is expected to “raise systematic or continuous human right abuses with the appropriate authorities.” Id. at 347–48.
60. UN Norms, supra note 31, ¶ 3.
61. UN Norms, supra note 31, ¶ 11.
only if a state violates a primary obligation.\textsuperscript{62} However, as has been noted by scholars, the way in which the ILC Norms on State Responsibility treat complicity bears a strong resemblance to the identification of a primary norm.\textsuperscript{63}

To the extent that this argument is valid, it justifies the comparison of the two parallel normative frameworks. It is noted then that, despite the fact that the soft-law prohibition on private entity complicity in state human rights abuses is broader than the prohibition on state complicity, both states and investors have a substantive, core international obligation not to “aid or assist” each other in violating international human rights norms. Recognition of this implicit parallel is an important step toward remediying the abovementioned normative asymmetry. Its extension into practice could be achieved on the basis of Article 16 of the ILC Norms on State Responsibility. First, state complicity could, by the means of analogy of law, be extended so that it also covers complicity in private wrongful acts. Second, the criteria introduced by Article 16 can, also by analogy of law, serve as the basis for establishing the responsibility of corporations that aid or assist states in perpetrating human rights abuses.\textsuperscript{64}

However, even if analogy of law would prove an effective solution, another asymmetry would still substantially differentiate state complicity from investor complicity. While there is a full set of secondary international obligations for states, private international responsibility remains

\textsuperscript{62} Crawford, \textit{supra} note 47, at 77.

Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part 1. The term ‘international responsibility’ covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

\textit{Id.}

\textsuperscript{63} See, e.g., Bernhard Graefrath, \textit{Complicity in the Law of International Responsibility}, 29 \textit{REVUE BELGE DE DROIT INTERNATIONAL} 370, 372 (1996) (Belg.). Although the author’s comments are made on the basis of an earlier draft of the ILC Norms on State Responsibility, they remain opportune. See Crawford, \textit{supra} note 47, at 146–147 (stating that the responsibility for complicity is “in a sense derivative”).

\textsuperscript{64} Clapham, \textit{supra} note 57, at 67–68.
limited to the criminalization of a very limited number of heinous acts.\(^{65}\) This situation, complemented by the absence of a mature set of primary international norms against human rights abuses by corporations, deprives the analogy of law technique of an adequate practical effect.

Last but not least, it is important to note that the absence of a framework explicitly regulating state complicity in private wrongfulness does not come free of consequences. First, there is always the danger of imprudently widening the concept of “de facto organ.”\(^{66}\) Second, conceptual expansions in legal scholarship have already caused confusion between the concepts of due diligence and complicity.\(^{67}\) In fact, the dividing line between the facilitation of a wrongful act (complicity) and the failure to attempt to prevent or prohibit the act by available means (due diligence) may be much finer than assumed. As such, the issue of complicity between states and corporations in human rights abuses will also be omitted from the analysis that follows, and the focus will fix on the extent that inadequate due diligence on behalf of the state authorities, can give rise to international responsibility.

II. STATE RESPONSIBILITY UNDER THE DUE DILIGENCE PRINCIPLE

Such an endeavor entails two assumptions: (1) the rebuttable presumption that business practice is completely independent from any type of State influence and (2) the assumption that positive international law sets such state obligations. The analysis that follows aspires to prove the existence of a set of relevant primary international obligations for the state of origin, the violation of which leads to the state’s international responsibility for the human rights abuses committed by its investors in the territory of a third state, even though the abuses are not attributable to the state.

As defined above, the due diligence principle of international law provides that every state should, to the best of its respective ability, fight

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65. The ILC explains in its Commentaries on Article 58 of the ILC Norms on State Responsibility that “so far the principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.” See Crawford, supra note 47, at 312. The United States’ Alien Tort Claims Act (the “ATCA”) provides a good example. Although it produces its effects at the domestic level, the ATCA makes a positive contribution towards developments in the field of individual civil responsibility on the international level. See infra Part III.A.1.


breaches of international law by implementing preventive and punishment measures.\textsuperscript{68} It is common knowledge that states may generally be held internationally responsible for: (1) their own wrongful acts or omissions (negative duty to abstain from wrongfulness), (2) the wrongful acts or omissions of third subjects of international law which are attributable to them, or (3) being negligent in their primary/substantive obligation to be vigilant, that is, to behave in a way that will aim—through prevention or/\textit{ex post facto} punishment—at ensuring that no damage will occur to the rights of third subjects as a result of situations or of wrongful conduct by persons falling into their jurisdiction (positive duty to protect). This third basis corresponds to due diligence. It is true that, unlike the first two legal bases for state responsibility, the due diligence principle does not find any explicit legal confirmation in the ILC Norms on State Responsibility\textsuperscript{69} and lacks an objective element.\textsuperscript{70} Despite that, the fol-

\textsuperscript{68} For a thorough analysis of the concept see RICARDO PISILLO MAZZESCHI, “DUE DILIGENCE” E RESPONSABILITÀ INTERNAZIONALE DEGLI STATI (1989).

\textsuperscript{69} It is generally accepted that both the first and the third categories are part and parcel of the general prohibition on states to breach an international obligation (found in Articles 1, 2 and 12 of the ILC Norms on State Responsibility). The only (implicit) reference made by the ILC Norms on State Responsibility to due diligence is found in Article 14(3) which refers to the temporal dimension of the obligations to prevent and according to which, the wrongful act for failure to prevent is a continuous one. ILC Norms on State Responsibility, \textit{supra} note 48, art. 14(3). The ILC Commentaries are more instructive, particularly in commenting on Articles 9 and 10 of the ILC Norms on State Responsibility. Article 10(3) of the ILC Norms on State Responsibility—which concerns the attribution to the state of the wrongful acts of an insurrectional movement which became the new government of that state—stipulates that “this article is without prejudice to the attribution to a State of any conduct . . ., which is to be considered an act of that State by virtue of articles 4 to 9.” \textit{Id.} art. 10(3). Accordingly, even before the insurrectional movement assumes any governmental functions, its behavior may, pursuant to the Article 9 “agency in necessity” provision, be directly attributed to the state. In remarking on these provisions, the ILC Commentaries explain that “exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement’s conduct but improperly failed to do so.” Crawford, \textit{supra} note 47, at 120. The ILC Commentaries effectively attest to the fact that positive international law contains an obligation for states to be vigilant and to adopt measures in order to prevent and punish wrongful private conduct. Thus, it has been correctly argued that, in an “agency in necessity” case, “a better rationale for holding the State responsible is its failure to fulfill its functions.” Jan Arno Hessbruegge, \textit{The Historical Development of the Doctrines of Attribution and Due Diligence in International Law}, 36 N.Y.U. J. Int’l L. & Pol. 265, 274 (2004). Nonetheless, it is reasonable to ask why a state should, in an “agency in necessity” situation, be burdened with the wrongful acts of an entity which—far from being its organ or acting according to its will—“usurps” its functions. In other words, why does the ILC opt to establish a clause of direct attribution to the state of illicit conduct that has not been committed by its organs, while there already exists an alternative legal basis—due diligence—for holding that very same state internationally respon-
Following discussion will demonstrate that the foundations of due diligence within positive international law are well established and that this principle sets up a substantive set of state obligations, taking the form of goals to be achieved or of standards to be attained. Accordingly, when it comes to business practices that are independent of state influence, the due diligence principle should legitimately render a state an active player with a positive duty to protect human rights rather than a mere passive observer of wrongful acts. But first, some background on the origins of the due diligence principle will be instructive.

A. The Origins of the Due Diligence Standard and Its Twofold Nature

Although the source of the due diligence principle can be traced to international judicial practice long before its indirect confirmation by the ICJ,\(^1\) it is mainly after that court validated some of its normative expressions that a consensus\(^2\) arose within legal scholarship on the idea of consis-

\(^1\) See infra Part II.C. Furthermore, the term “agency in necessity” actually reflects an exceptional “state of necessity”—a situation which calls for higher standards of protection than those offered by due diligence. Finally, even if the highly improbable situation of a multinational corporation acting as an “agent in necessity” occurred, the necessity element found at the basis of the direct attribution of the private conduct to the state would lead to holding the host state, and not the state of origin, exclusively. As such, this Article looks to the “arena” of primary state obligations, emphasizing due diligence. Despite its inherent limits, the concept of due diligence offers the advantage of an ample and solid basis to cover each and every internationally wrongful act of the investor.\(^7\)

\(^7\) See infra Part II.C.

\(^1\) Providing one of the most classic examples of the application of the due diligence principle in pre-ICJ international judicial practice, the 1872 *Alabama* case involved the breach by the United Kingdom of its due diligence obligations in light of its failure to comply, through prevention or punishment of the activities of persons found under its jurisdiction, with its duties of neutrality in times of maritime war. See Thomas Willing Balch, *The Alabama Arbitration* (1900). In the 1928 *Island of Palmas* case, the tribunal stated that “[t]erritorial sovereignty . . . has as corollary a duty: the obligation to protect within the territory the rights of other states.” Island of Palmas Case (or Miangas) (U.S. v. Neth.) (Perm. Ct. Arb. 1928) at 9, available at http://www.pca-cpa.org/upload/files/Island%20of%20Palmasaward%20only%20+TOC.pdf. For the judicial history of the due diligence principle in the twentieth century, see Robert P. Barnidge, *The Due Diligence Principle under International Law*, 8 INT’L COMMUNITY L. REV. 81, 92–121 (2006).

\(^2\) Although there seems to be a consensus over the existence of the “generic” concept of due diligence, there are still voices denying its extent or applicability in certain fields. See, e.g., John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT’L L. 291 (2002) (challenging the applicability of the due diligence concept in environmental law).
firming an international principle of customary nature in positive international law. The ICJ, in the Corfu Channel case, referred to “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.” Several years later, in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ provided in very similar terms another confirmation of the principle, this time in the field of environmental law. According to the dictum in that opinion, there exists “a general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control.” Finally, the situation in the occupied Palestinian territories offered the ICJ the possibility of stating, in its opinion, that given the “numerous indiscriminate and deadly acts of violence” against the civilian population of Israel, “it has the right, and indeed the duty, to respond in order to protect the life of its citizens.”

The absence of an explicit reference by the ICJ to the term “due diligence” finds a possible explanation in the fact that, in substance, this concept corresponds to a generic notion—a sort of a matrix from which a general type of “pilot” or “guide” obligation derives, which takes a concrete content and finds an application in various fields or sub-disciplines of international law. The structure of the due diligence model sets up for states the dual obligation to punish past and prevent future internationally wrongful acts. The punitive dimension of due diligence, in turn, reflects a twofold objective: (1) to prevent the repetition of the illicit act, and (2) if it is continuing, to cease it. Due diligence covers a vast portion of international law; it spans various subjects and issues, including the law

73. It is interesting to note that the ICJ never deemed it necessary to examine the customary nature of due diligence since it merely stated the existence of a “general obligation.”
76. Id. at 241–42; see also Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 41 (Sept. 25) (directly quoting the same dictum).
77. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 195 (July 9).
78. Dictionnaire de Droit International Public, supra note 67, at 770.
79. Since the scope is identical, these two objectives of the due diligence principle can be aptly compared with Article 30 of the ILC Norms on State Responsibility which imposes a requirement of cessation and non-repetition of illicit conduct by state authorities.
of neutrality, environmental law, the security of foreign states and their representatives, and, of course, the international protection of human rights.

That being said, it is easy to understand why due diligence is classified as a “principle,”81 in that it expresses a general substantive state obligation that serves as a vehicle for the expansion of the effect to be given to specific rules or norms of international law via deductive reasoning.82 However, it would not be a mistake to describe the due diligence principle in terms of an international standard as well. The Dictionnaire de droit international public provides two definitions of a “standard” that are useful in conceptualizing due diligence. According to the first definition—which is almost identical to the definition of the term “principle” as described above—a standard is a “norm of a high level of abstraction and generality, which, although as such cannot be applied without first undergoing concretization, its juridicization is incontestable.”83 Therefore, be it either a standard or a principle, the due diligence norm introduces a general normative framework of positive international law, which requires that states adopt affirmative measures for preventing and sanctioning internationally unlawful conduct. However, due diligence lacks a concrete content and effect until it is applied with regard to a specific international norm or rule—for example, the protection of human rights.

The second pertinent definition of a “standard” corresponds to the idea of minimum requirements. In this sense, a standard is a norm implying that there is a “level” to reach or a “model” by which one has to abide and with regard to which the evaluation of a situation or of a conduct has


82. Dictionnaire de Droit International Public, supra note 67, at 876–77 (defining “principle” as: “proposition de portée générale, présentée sous une forme ramassée et synthétique, exprimant une norme juridique d’une importance particulière et susceptible de servir de fondement à des règles de droit par le biais d’un raisonnement déductif”). But see Timo Koivurova, What Is the Principle of Due Diligence?, in Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi 341, 346 (Jarna Petman & Jan Klabbers eds., 2003) (arguing that due diligence is a “principle of equity, triggered when a dispute arises and requiring a more careful balancing of the situation than the standard juristic approach of finding out whether a state has breached international law or not”).

83. Dictionnaire de Droit International Public, supra note 67, at 1049 (defining a “standard” as a “norme d’un haut niveau d’abstraction et de généralité, et dont le contenu doit être concrétisé pour son application, mais dont la juridicité est incontestée”).
to be made.\textsuperscript{84} To view the due diligence principle as imposing minimum standards is to imply the existence of a universally common minimal level of affirmative conduct expected of states at the international level. Thus, failure to satisfy the due diligence principle amounts to a wrongful act by omission, which opens the door to designations of state responsibility at the international level. Furthermore, legal scholars distinguish the international principle of due diligence from the concept of \textquotedblleft diligen\textit{tia quam in suis\textquotedblright}—that is, the vigilance that a state exercises with respect to its own affairs.\textsuperscript{85} Indeed, demonstrating a level of diligence equivalent to that applied at the domestic level is not sufficient to satisfy the minimum standard of conduct set by the international due diligence obligation.\textsuperscript{86}

The generic nature of the due diligence principle is a factor decisively affecting the determination of the minimum standard of state affirmative action in a given field of policy. As mentioned above, since due diligence can be seen as a sort of matrix, it can only take on full and concrete shape and effect if complemented by a specific rule of international law. The nature, the content and the sphere of application of that specific rule that is “integrated” or “embodied” into the due diligence matrix is significant for the content of the due diligence minimum standard itself. In other words, the actual content of the standard changes depending on the positive law at issue—the “minimum” action that will be sufficient to satisfy the due diligence obligation will vary according to the specific type of wrong-doing to be prevented or punished, and according to the particular circumstances and context that form the backdrop for the wrongdoing. The following section outlines how due diligence finds an application in the field of human rights protection at international level and the effect that both civil and social rights take when applied in its light. The examples have been chosen with a focus on clarifying and expounding upon the theoretical scheme described above.

\textbf{B. The Positive Effect of Human Rights under the Due Diligence Standard}

Before discussing the precise state obligations that arise under the due diligence principle with respect to civil and social rights, some background on the normative quality of human rights will be helpful. Public

\textsuperscript{84} Id. (providing a second definition of a “standard” as a “norme impliquant l’idée d’un ‘niveau’ à atteindre ou d’un ‘modèle’ auquel il faut se conformer et par rapport au-quel l’évaluation d’une situation ou d’un comportement doit être opérée” and giving “due diligence” as an example).

\textsuperscript{85} See Pisillo-Mazzeschi, supra note 80, at 41–46 (presenting relevant case law).

\textsuperscript{86} Id. at 41.
international law contains a *corpus* of customary “fundamental” rights of the human being, and although the vocabulary of international law does not provide a definition of the notion of “fundamental” rights the concept forms part of the casual jargon and reflects the notion of universally accepted rights of human beings. Although a complete and exhaustive “bill” of fundamental human rights does not exist at the international level, the view that such a bill should, at minimum, include the rights enumerated in the UN Universal Declaration of Human Rights enjoys wide acceptance among legal scholars.87 Furthermore, it is undoubtedly certain that the list of “fundamental” human rights exceeds the rights protected by the *Universal Declaration*.

The protection of human rights at the international level reflects the essential belief of the whole international community that states, as the central subjects of the international legal order, adhere to certain values that are generally recognized as common to the entire international society. Stated differently, general international law norms regarding human rights, customary human rights, or universal human rights imply obligations *erga omnes* (i.e., obligations that each state owes to the international community as a whole).88 Since these are objective, non-synallagmatic obligations, they are owed vis-à-vis the entire international community and thereby exclude any type of reciprocity.

Viewed from this framework, Karel Vasak’s famous classification of human rights into three “generations” is more than just an empirical summary of the historical developments of protection of human rights at the international level.89 Through an analogy to the three themes of the


88. There is a substantive number of human rights (or of special expressions of the “fundamental” ones) whose normativity derives exclusively from international conventions. These rights lack a general normative effect and, being “inter-subjective,” they are limited to the circle of the contracting *instrumentum* parties. However, for precisely the same reasons that lead to the qualification of general human rights norms as *erga omnes*, human rights obligations deriving from a multilateral international treaty are of *erga omnes partes* nature.

French Revolution, Vasak traces the philosophical and historical origins and the *raison d’être* that underlies the international protection of human rights through the course of its evolution. Under the Vasak typology, the first-generation civil and political rights stem from liberty and produce their effect in line with the exigencies of that notion. According to the libertarian logic, the primary state obligation is of a negative nature and requires that domestic authorities abstain from any interference with individual liberty. Since the norm is exclusively focused on state’s abstention from action, it therefore results in a “hands-off” *status negativus* policy. In contrast to the line of reasoning derived from libertarian notions, the second-generation’s social and economic rights stem from equality. States, under the egalitarian rationale, are required to adopt necessary positive measures (*status positivus*) that ensure the enjoyment of recognized rights by all humans. Lastly, the normative theme of fraternity calls for solidarity as the necessary condition for realization of universal aims reflecting values such as international peace and development. Such values can only be promoted collectively through the combined efforts of the entire international community.

1. Civil Rights

Civil rights were initially formed in a “negative” way, and accordingly, only required a minimal level of engagement from the states. Under this conceptualization, in order to avoid committing a wrongful act, a state simply had to abstain from any interference with individual civil rights. As a result, civil rights initially excluded from their semantic field any type of positive action.\(^90\) The integration of due diligence positive duties within the first-generation rights eventually occurred largely through judicial practice that was primarily influenced by constitutional theory.\(^91\)

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90. Unless, of course, the norm’s wording expressly included an obligation to prevent or punish. For example, Article 2 of the European Convention sets forth that “everyone’s right to life shall be protected by law.” European Convention on Human Rights art. 2, Nov. 4, 1950, 213 U.N.T.S. 222.

91. This is particularly the case with the German theory of *Drittwirkung*, under the terms of which, an individual shall have direct access to justice against another individual who violated her or his human rights. Denis Alland explains that the libertarian idea rules equally the positive obligations for the protection of civil rights—since the individual abandoned his or her natural liberty in favor of the state, the latter is under a positive obligation to protect the individual against third individuals. Denis Alland, *Observations sur le devoir international de protection de l’individu, in Libertés, Justice, Tolérance: MÉLANGES EN HOMMAGE AU DOYEN GÉRARD COHEN-JONATHAN* 13 (L. Condorelli ed., 2004). Samantha Besson in turn places the emphasis on—among other—human dignity.
This development was gradual and reflected the necessity of providing individuals with maximum protection of their human rights. Through this evolution, the semantic field of the norms protecting civil rights was expanded in a way that would develop a broader practical effectiveness (effet utile). The emphasis was explicitly placed on the teleology, focusing on the “aim and purpose” of the norm. A “dynamic” reading of the norm enabled its content to be continuously redefined, allowing it to be adapted to the social momentum at the time, as well as to the particular circumstances of a given case.

The Inter-American Court of Human Rights (“ICHR”) perfectly summarized the nature of the positive duties that states have under the American Convention on Human Rights (“ACHR”) and described their relation to the due diligence principle in its very famous Velasquez Rodriguez case. There, the Court stated:

>[I]n principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the state. However, this does not define all the circumstances in which a state is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the state might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

With respect to the question of how the due diligence principle is concretely applied in the field of human rights, the Velasquez Rodriguez Court noted that states have the obligation to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation


94. Id. ¶ 172.
implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.95

Likewise, the Human Rights Committee (“HRC”), which monitors the implementation of the UN International Covenant on Civil and Political Rights (“ICCPR”), described the ICCPR obligations as both negative and positive in nature.96 With respect to the positive dimension of the obligations, the HRC noted that states are expected to “adopt legislative, judicial, administrative, educative, and other appropriate measures in order to fulfill their legal obligations.”97 Furthermore, according to the HRC, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.98

For its part, the European Court of Human Rights (“ECHR”), despite having developed a rich case law on positive human rights duties as early as the 1970s, provided only a general basis for the status positivus effect of the European Convention on Human Rights (the “European Convention”) in the Ilășcu judgment.99 Article 1 of the European Convention, which sets forth the general obligations of states to secure for everyone within their jurisdiction the rights protected by the European Convention, is the basis of the various and multiple expressions of the due diligence

95. Id. ¶ 166.
97. Id. ¶ 7.
98. Id. ¶ 8.
principle within the ECHR’s case law. Although the Ilaşcu Court made no express reference to the due diligence principle, it did state that “[t]he undertakings given by a [c]ontracting [s]tate under Art. 1 of the [European] Convention include, in addition to the duty to refrain from interfering with enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory.”100

Thereby, through the principle of due diligence, positive duties of states to prevent and punish violations of first-generation rights found their place next to “classic” negative obligations. However, the line between prevention and punishment is somewhat blurred where prevention policy is pursued through sanctions that aim to deter wrongful conduct. In general, the affirmative action of state authorities should simply aim to end ongoing human rights abuses and prevent their repetition.

The need for positive protection arises in situations where the enjoyment by citizens of their civil rights is threatened by something other than state acts. 101 With respect to human rights abuses by third parties (such as foreign investors), the first-generation norm creates an affirmative “quasi-horizontal” effect, which imposes an obligation upon the state to adopt—for the benefit of subjects under its jurisdiction—the necessary


101. The concept of threats caused by reasons other than state acts includes both threats caused by the conduct of individuals, as well as threats coming from natural phenomena or general situations. Concerning this second dimension, see the case law presented by Besson, supra note 91, 79–80. The case-law of the ECHR presents several examples of situations which are not the result of the conduct of a third subject. See generally A.R. Mowbray, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004) (detailing ECHR case law on positive obligation, including cases discussing official recognition of transsexuals, the official recognition of the choice of names, and the provision of free of charge legal assistance). The first and most famous case in this category was Marckx v. Belgium which involved the legal status of children born outside of a marriage. The ECHR explained that

[b]y proclaiming in paragraph 1 the right to respect for family life, Article 8 signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2... . the object of the Article is ‘essentially’ that of protecting the individual against arbitrary interference by the public authorities ... . Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life.”

positive measures for prevention and prohibition of human rights abuses by third parties.102

In juxtaposition to the classic “vertical”103 dimension of the protection, which allows the individual to bring claims against the state for wrongful conduct in violation of individual rights which is directly attributable to it, the indirect horizontal aspect of the protection permits the individual to bring a similar legal claim (for violation of his or her substantive rights) against the state where the state authorities failed to demonstrate due diligence by reasonably preventing and/or punishing behavior committed by a third party (even though such third-party acts or omissions are not directly attributable to the state). However, this horizontal effect is indirect104 and, therefore, it does not extend to the point where the violated individual is authorized to bring a legal claim directly against the third party on the basis of a violation of an international human rights norm.105

The ECHR confirmed the indirect horizontal effect of the European Convention on several occasions, including the widely cited X and Y case regarding a prohibition on individuals from initiating criminal proceedings within the Dutch legal order against a person who sexually abused a mentally handicapped minor.106 The ECHR pointed out that the European Convention is “designed to secure respect for private life even in the sphere of relations of individuals between themselves,” and found the respondent state responsible for failing to adopt positive legislative measures that would facilitate the prosecution of an individual violating a right protected by the European Convention.107

Having concluded with the theoretical framework that set forth the effect of due diligence on civil rights, it is necessary to turn the analysis

102. Dean Spielmann, Obligations positives et effet horizontal des dispositions de la Convention, in L’INTERPRÉTATION DE LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME 133 (Frédéric Sudre ed., 1998).

103. The vertical dimension of human rights protection stems from the status negativus effect of human rights norms. If state organs unlawfully interfere with the rights of the individual, then that individual is entitled to bring claims against the state for its internationally wrongful conduct.

104. Spielmann, supra note 102.

105. General Comment No. 31, supra note 96, ¶ 8. 


107. Id. at 11, 22; see also Plattform “Ärzte für das Leben”, 139 Eur. Ct. H.R. (ser. A) at 12 (1988) (“Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.”).
toward a more concrete “case-study,” that will illustrate how the sphere of application of a given civil right is in practice expanded through due diligence and develop the consequent concrete state obligations. Arguably, from the perspective of due diligence, the most thoroughly examined human right is the “right to life.” The right to life is referred to in Article 2 of the European Convention, which expressly requires that states must prevent violations of this right. Therefore, as noted by the ECHR, the preventive dimension of the obligation requires

[s]tate[s] not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction . . . . This involves a primary duty on the [s]tate to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.109

However, as illustrated by the Kiliç case, a state’s positive obligations to prevent violations of the right to life, are not only limited to the adoption of criminal legislation. In Kiliç, the ECHR condemned the respondent state (Turkey) for the failure of its authorities to seriously investigate the circumstances surrounding the death of a journalist working for a pro-Kurdish newspaper.110 According to the Court, the negligence of the state authorities undermined the effectiveness of the domestic criminal legislation which aimed at preventing right to life abuses.111

Ex ante police action aimed at protection of the right to life consists of another type of positive measures aiming at preventing a violation of the right to life. Although they reach seemingly contradictory conclusions, two ECHR cases—Osman and Mahmut Kaya—are particularly illustrative of this potential necessity for positive measures and the conditions that guide that necessity. While in the Osman case the ECHR held that the failure of the state’s police authorities to prevent an individual’s death did not result in a violation of the right to life,112 in the Mahmut Kaya case the ECHR found that the failure of the Turkish authorities to prevent the death of an individual did in fact constitute a breach of the European Convention.113

108. See supra note 90.
110. Id. at 98–100.
111. Id. at 99.
While the cases appear inconsistent, the ECHR did in fact apply the same standard in both, and the divergence in results stems from the difference in the nature of the risk to human life present in each case. In the Osman case, which concerned the assassination of a person by his son’s obsessive former teacher, the Court found that the applicants failed to demonstrate that the police “did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.”\textsuperscript{114} In contrast, the ECHR in the Mahmut Kaya case, which also involved an assassination of an individual (but this time, likely perpetrated by contra-guerilla groups in southern Turkey), the findings of the ECHR led to the conclusion that “in the circumstances of this case[,] the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life.”\textsuperscript{115}

The juxtaposition of these two cases is important as it aims to stress the fact that positive obligations of states are not limitless. While the limits of positive obligations will be addressed in more detail below,\textsuperscript{116} it bears mentioning that, whereas in general there are concrete “tools” for assessing the elasticity or legality of the limitations resulting from state interferences in circumstances that implicate negative obligations, such an assessment in cases of due diligence positive obligations is considerably different as it raises the issue of minimum standards.\textsuperscript{117} As mentioned above, the minimum standards for state vigilance in protecting human rights can take shape with a concrete definition only if interpreted in light of the ad hoc circumstances of a specific situation. Although international judicial practice has proposed certain criteria to be taken into account when assessing the limits of positive obligations, these criteria are far from being complete and they fail to introduce an overall “mechanism” of interpretation.

2. Social Rights

In contrast to first-generation rights, the origin (or, terminus a quo) of social rights is the status positivus rationale that requires state authorities

\textsuperscript{116} See discussion infra Part II.C.
\textsuperscript{117} In fact, these two concepts—“limitations” and “minimum standards” of rights—reflect equally the idea of a “narrowed” sphere of protection of a given right. Since the status negativus of a norm presumes an obligation to generally abstain from interference, the permissible reduction of its semantic field leads to a limitation. On the contrary, the positive obligations depend upon the condition that the state is in a position to provide the necessary means for protecting human rights. Since the presumption is reversed, the term “minimum standards” seems to be more suitable.
to provide (or make available) benefits to individuals that ensure the
enjoyment of a certain level of standard of living. Although it shares simi-
larities with the civil rights affirmative obligations stemming from due
diligence, the status positivus dimension of social rights pursues a differ-
ent objective and, as such, corresponds to a distinct category of state ob-
ligations. While state authorities are expected to actively engage in the
protection of human rights in both cases, in the case of civil rights’ dil-
genent affirmative conduct, the pursued aim is to prevent a violation of a
given right whose enjoyment is threatened not by state acts or omissions,
but by a third party (e.g., a private actor) action. On the other hand, posi-
tive measures adopted within the framework of the traditional status po-
sitivus dimension of social rights aim to provide the individual with cer-
tain resources, benefits, and/or entitlements to goods or services, which
are considered to be vital for the individual’s “well-being.” However a
classic social right obligation can develop beyond its pure status positiv-
us dimension and effectively move in the direction of an affirmative due
diligence obligation.

As originally conceived, social rights were meant to correspond to
rights that were to be realized progressively and to reflect the idea of a
welfare state. Accordingly, while social rights have been “shielded”
with the binding force of a norm, they also have been provided with a
mechanism for “disarmament.” Considering the progressive nature of

118. In the terms of the International Covenant on Economic, Social and Cultural
Rights (ICESCR), each state agrees to take steps “to the maximum of its available re-
sources, with a view to achieving progressively the full realization of the rights recog-
nized in the present Covenant by all appropriate means, including particularly the adop-
tion of legislative measures.” Office of the High Commissioner for Human Rights, In-
national Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI),
U.N. Commission on Economic, Social and Cultural Rights (the “CESCR”),

[the concept of progressive realization constitutes a recognition of the fact that
full realization of all economic, social and cultural rights will generally not be
able to be achieved in a short period of time. . . . Nevertheless, the fact that rea-

eralization over time, or in other words progressively, is foreseen under the Cove-

nent should not be misinterpreted as depriving the obligation of all meaningful
content. . . . the phrase must be read in the light of the overall objective, indeed
the raison d’être, of the Covenant which is to establish clear obligations for
States parties in respect of the full realization of the rights in question. It thus
imposes an obligation to move as expeditiously and effectively as possible to-
wards that goal.

Comm. on Econ., Soc. and Cultural Rights [CESCR], General Comment No. 3 – The

14, 1990)
social rights, it is important to point out that there is a fine line between declarative manifestation of good intentions and judicially enforced rights. This dividing line separates pure social policy, which depends on the will and priorities of a given government (as well as, of course, the applicable political model or the ideology), from the concept of a judicially protected "acquis social." Assuming arguendo that there exists a "core" acquis social, whose undermining engages, in legal terms, the responsibility of state authorities at the international level, the problems remains that the minimum standards of that acquis are far from being objective and universally recognized. Rather, the minimum


   It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.

Id. at 73.

120. As the United Nations' Committee on Economic, Social and Cultural Rights [CESCR] noted,

   in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems.

General Comment No. 3, supra note 119, at ¶ 8. Nonetheless, no one can deny that the political and economic system adopted by a polity has a strong impact on the nature, extent, and effectiveness of its welfare services. Regarding the political philosophy dimensions of the issue, see, for example, Sandra Fredman, Human Rights Transformed: Positive Duties and Positive Rights, 2006 PUB. L. 498, 505–508 (2006).

121. In one of its general comments, the CESCR interprets the ICESCR in a way that introduces minimum standards.

   Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être.

General Comment No. 3, supra note 119, at ¶ 10. Nonetheless, the extent of these minimum standards depends upon the means of which a state disposes.
standards would depend upon the state’s level of development and the means at the state’s disposal. As such, those minimum standards are likely to diverge from one national legal order to another.

The classic question of the extent of justiciability of social rights has led to a search for alternative legal bases that can, to a certain degree, accommodate the aims of social rights indirectly. At the international level, this trend was reinforced by the absence of mechanisms for the protection of social rights accessible by the individual that would be as effective as those existing at the regional and global levels for the enforcement of civil rights. The justiciability of a given right—even through an alternative civil right legal “etiquette”—is closely connected with effective implementation of that right. Accordingly, within certain limits, this “contrivance” has proven in a number of cases to be successful and has resulted in first-generation norms acquiring, besides their original “genuine” civil or political content, a new “pseudo-social” application.

While, as a result of being read under the “magnifying lenses” of effectiveness, this interpretation manages to cover objectives that fall mainly within the field of classic social rights, what remains certain is the fact

By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources.” In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

Id.

122. The ECHR has explicitly recognized the plurality of pertinent legal bases for accommodating one and the same situation. In its own words:

The Court is aware that the further realisation of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. . . . Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers . . . that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.


123. Undoubtedly, this was the product of what the international judge aimed for every time that he or she proceeded with an expansive interpretation and, thereby, allowed the sphere of the civil right norm that was invoked by the applicant to be broadened.
that such “genetic modification” of the “DNA” of the “alternative” civil right legal basis could not be effected unless its actual “nature” allowed this to occur. The schematization of the relationship between the mainstream and the alternative legal basis may be aptly illustrated by the tracing of two homocentric circles, where the narrower circle corresponds to the alternative norm and the broader circle to the mainstream legal basis.

If, for any reason, the mainstream norm fails to produce a satisfactory effect, the enlargement of the narrower circle may allow for the coverage of certain situations that were originally envisaged as falling into the broader circle. However, the *conditio sine qua non* for such an enlargement of the alternative norm circle is that both circles are homocentric (i.e., they share a common semantic center *ratione materiae*). Accordingly, the core of the two norms, if not identical, must at least be sufficiently similar to accommodate contiguous factual situations. For example, it is possible that the right to health may, under certain conditions, be appropriately accommodated under the right to life.

However, there are consequences to such a shift. With respect to the right to life, the social, *status positivus* dimension of that right, which, in its *lato sensu* conception requires the state to progressively build up the necessary apparatus to protect the health and life of its citizens, effectively relinquishes its place to the actionable obligation of diligence under the legal basis of civil right to life. This, in turn, limits the obligations of the state authorities to providing to the patient the means available at that specific point in time. Accordingly, if the right to health is to be conceived *stricto sensu*, the affirmative conduct in light of due diligence is absolutely identical in both its social and civil right legal bases.

The *Botta* case, which involved the right to private life being invoked before the ECHR as the alternative available legal basis for protecting a right that is social in its substance, provides a good example of the homocentric circle illustration.124 The *Botta* applicant, a person with physical disability, alleged a violation of Article 8 of the European Convention due to the difficulties in accessing the beach and sea while vacationing.125 Interestingly, the situation described in his application had both a “general” affirmative dimension, as well as, an indirect horizontal dimension, because the applicant was prevented from accessing both public and private beaches.126 However, the *Botta* Court declined to enlarge the sphere of the civil right to private life protected by the European

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125. *Id.* at 416–20.
126. *Id.* at 416. Private beaches are required, under domestic law, to be equipped with necessary facilities for persons with disabilities. *Id.*
The Court effectively avoided drawing a distinction between access to private and public beaches, which are differentiated mainly on the basis of the standard of conduct that would suffice for ensuring the enjoyment of the right by the applicant.128 Whereas construction of the necessary facilities on public beaches falls into the broader scope of progressive realization of social rights, the indirect horizontal dimension would be satisfied by state implementation of national legislation imposing a requirement on private beaches to facilitate access to persons with disability. The adoption of such domestic legislation would constitute a preventive positive measure that clearly falls within the concept of due diligence.

The ECHR clarified its position with respect to the general affirmative dimension of social rights under a civil “labeling” in the Sentges case.129 The applicant in Sentges, an individual suffering from progressive muscle degeneration, brought a right to private life claim against the state after state authorities rejected his request for a robotic arm, which would reduce his dependency on third persons. In deciding against the applicant, the ECHR, after referring to the conditions according to which affirmative conduct is envisaged under the right to private life, emphasized

127. Id. at 423; see also Zehnalová and Zehnal v. Czech Republic, 2002-V Eur. Ct. H.R. 336. There, the Court declared as inadmissible the allegations of the applicants, who were claiming a violation of Article 8 of the European Convention on Human Rights due to the lack of disability options in buildings providing public services. Id. at 347–53.


the discretion accorded by the European Convention to states where a given situation involves “an assessment of the priorities in the context of the allocation of limited state resources.” It arguably follows then, that the general affirmative dimension of a given right is, in its “core” conception, limited, and does not extend to such a degree as to transform into a pure status positivus social entitlement.

In a particularly pertinent case, the African Commission on Human and Peoples Rights (“ACHPR”) discussed the indirect horizontal dimension of social rights. The case involved the potential state imposition of affirmative measures against a multinational corporation, which, according to the allegation, formed an oil consortium with the state oil company and exploited oil reserves in Nigeria with detrimental consequences for the environment, as well as, for the health of the local population. Finding multiple violations of Nigeria’s international human rights obligations, the ACHPR noted that the respondent state “has given the green light to private actors . . . to devastatingly affect the well-being of the Ogonis,” the local population. With respect to the right to food, the ACHPR declared that this right “is implicit in the African Charter, in such provisions as the right to life, the right to health and the right to economic, social and cultural development.” Furthermore, the Commission stated,

The African Charter and international law require[s] and bind[s] Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy

130. Sentges v. Netherlands, App. No. 27677/02 (July 8, 2003), available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sentges&sessionid=4216821&skin=hdouc-en; see also Olivier De Schutter, Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights, in Disability Rights in Europe: From Theory to Practice 35, 42 (Anna Lawson & Caroline Gooding eds., 2005) (referring to the problem of “polycentricity”—i.e., the unavoidable social side-effects that the adjudication of such type of social remedies will have for the interests of other social groups equally needing to benefit from limited state resources).


132. Id. ¶ 1–9.

133. Id. ¶ 58.

134. Id. ¶ 64 (internal citations omitted).
or contaminate food sources, and prevent peoples’ efforts to feed themselves. In concluding, the ACHPR held that the respondent state breached its right to food obligation because it “allowed private oil companies to destroy food sources.”

The Powell and Rayner case provides another example concerning the indirect horizontal dimension of essentially social rights. In that case, the ECHR was asked to decide whether sonar pollution produced by the Heathrow airport amounted to an infringement of the right of the applicants to the respect of their private life and home protected by Article 8 of the European Convention. The Court held that Article 8 applied to the applicants, as the quality of their private lives and the possibility for them to enjoy the amenities of their respective homes had been affected. Because the airport had been privatized, the question raised was whether the Court should examine the alleged violation under the status negativus or under the affirmative (due diligence) dimension of the right to respect of private life and home. According to the Court,

Whether the present case be analyzed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants’ rights under paragraph 1 of article 8 or in terms of an “interference by a public authority” to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

After proceeding with the proportionality test, the ECHR concluded that, given the importance of the airport to the public interest and the positive measures adopted by the respondent government (such as re-
strictions on night flights and aircraft noise monitoring), there was no violation of the rights of the applicants.142

With respect to the right to work, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) noted that “[t]he obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labor by non-State actors.”143 Interestingly, an equivalent obligation is imposed on states on the basis of the civil right that prohibits forced labor or servitude. Utilizing this legal “etiquette,” the applicant in the Siliadin case, a female minor unlawfully present in a foreign country, brought her case before the ECHR claiming a violation of the European Convention due to the failure of the respondent state to protect her from her employers, who were forcing her to work without pay for more than fifteen hours per day.144 The ECHR reviewed the quality of domestic legislation criminalizing behaviors like the one to which the applicant was subjected, and concluded that the existing legislation did not deal specifically with the right guaranteed by the European Convention and therefore failed to provide effective penalties.145 Consequently, the Court held that the respondent state failed to comply with its obligation to punish the breach of a specific expression of the right to work by third-party individuals.146

Finally, it bears noting that social rights include negative aspects as well as their original status positivus dimension.147 However, the effect of social rights vis-à-vis diligent affirmative behavior should be distinguished from their mainstream status positivus dimension. Additionally, it should be noted that, to the extent diligence is developed against a “general” situation (excluding the conduct of a third-party individual), the notion that diligent conduct and the broader status positivus are identical is limited only to the core field of the norm. By contrast, the status positivus dimension of a social right extends beyond the obligation of demonstrating simple diligence and moves in the direction of a progressive fulfillment. Despite the problem of justiciability, the pure status positivus sphere of a social right norm requires the progressive realization

145. Id. at 372–73.
146. Id. at 373.
of its objectives. Accordingly, a social right norm, without excluding the prevention and punishment of situations threatening its enjoyment (the due diligence aspect), aspires to create the ideal circumstances under which the right to an entitlement can become equally accessible to all members of a given society. Additionally, as far as the indirect horizontal dimension (under due diligence) of a social right is concerned, its nature, function, and logic are similar in both civil and social rights.

Having concluded with the presentation of the effect that due diligence has over civil and social rights, at this point, it is helpful to examine the limits of the scheme presented thus far in this Article.

C. Limits on the Primary Obligations of the “Home” State

As explained above, the due diligence principle is merely a vehicle. In order to express or impose a more concrete duty, that vehicle must be fitted with a separate substantive international legal norm (a “protected right”). This two-layer configuration results in limits to a given application of the principle potentially arising at two separate levels. This section considers the limits inherent at both levels, as well as potential limits arising, more specifically, from the rights of investors.

1. Limits Inherent to the Due Diligence Principle

At the macro level of the due diligence principle, states are expected, pursuant to their “duty to protect,” to make every possible effort toward affirmative action. Nonetheless, states are not expected to guarantee a given result, but rather to merely demonstrate their best efforts in light of the means available to them. Thus, in domestic law, a distinction is drawn between “obligations of result” and “obligations of means.”

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148. Although it is relatively easy to identify where the obligation begins, it is impossible to know where it ends. Therefore, it is difficult to define the “distance” separating the obligations stemming from due diligence with the broader mainstream status positivus effect of social rights.

149. Corresponding to the obligation to fulfill a social right, the concept is distinguished in the scholarship from the obligation to protect (diligence).

150. As the case law presented so far suggests, under due diligence, states are expected to effectively prevent and punish any threat to the enjoyment caused by third-party individuals of both civil and social rights.

151. Crawford, supra note 47, at 140.


153. Concerning the origins of the classification and its sources in French civil law, see Jean Combacau, Obligations de résultat et obligations de comportement. Quelques ques-
“Obligations of result” require states to guarantee that a given result is in accordance with the norms that oblige them to either act or refrain from acting in the first place. Where a state fails to obtain such a result, the obligation is broken and, consequently, the state’s conduct becomes wrongful, regardless of the circumstances under which the failure occurred. By contrast, “obligations of means” merely require that the responsible subject demonstrate each and every possible effort to achieve the desired result. If the result is never reached, the responsibility of the state will only be questioned insofar as the state must prove that it employed all the means reasonably available to it in attempting to obtain the desired result.

The classification of the obligations of due diligence as “obligations of means” stems from the simple reality that results pursued via diligent conduct will frequently hinge on factors beyond the scope of a state’s will (i.e., beyond its control). Although a state might make use of all the means at its disposal, other factors or circumstances may intervene and decisively impact the final outcome. Accordingly, predictability and effectiveness in state control over a given situation are considered two of the most essential factors in evaluating diligent state conduct. However, the term “evaluation” implies the existence of a certain degree of subjectivity in the assessment of state actions and omissions. While a state’s breach of a negative duty to abstain from wrongfulness imposes an objective responsibility upon the state, a positive duty of diligent affirmative action triggers a subjective evaluation of the conduct to be expected in light of the given conditions and the extent of the available means. Appropriately, all such situations are to be considered in light of the specific content of the applicable substantive norm. It follows that state responsibility for lack of due diligence will occur only when the specific circumstances would have called for a better use of the means at
the state’s disposal. As such, there is significant space left for a subjective evaluation of the state’s “fault.”

Still, if international responsibility for failure to satisfy a due diligence standard is dependent upon a subjective appreciation of the specifics circumstances of a particular case, it is arguable that some minimum standards must also be set, so as to provide a broad threshold for state action in such instances. Defining these standards, however, may be easier said than done. For instance, such minimum due diligence standards ought to be low enough that they would be attainable by all states, without regard to a state’s economic resources. Otherwise, one would still need to perform a subjective inquiry into the extent that a use of resources was legitimately too burdensome for a state. Such an inquiry would require an informal categorization of states with respect to level of development, and even then, states would still have to be bound only in relation to certain common or usual factual circumstances. In practice, the minimum standards of diligence are far from objective in absolute terms, rather they are multiple and flexible. This applies equally to all categories of norms that may rely on diligence practices, including human rights. Even fundamental rights, whose status negativus effect is universally accepted, are barely susceptible to a standardized minimum of protection common to all states under due diligence. This is because a government need only prove that the adoption of the positive measures that are necessary under due diligence is beyond its capacities.

2. Limits Inherent to the “Protected Right”

At the micro level, both civil and social rights are equally able to produce their results in regard to the principle of due diligence. Affirmative action, originating from the generic obligation of due diligence, is distinguishable from both the status negativus and the mainstream status positivus effect given to a human rights norm. Although the status positivus dimension of a social right norm shares a common point of departure with the affirmative action adopted against a general situation under that very same norm, it is the actual standard of due diligence that sets the limits of the affirmative conduct. Therefore, it is the due diligence standard that renders the affirmative action standard discernable from the broader sphere of the status positivus effect. Thus, the status positivus effect can extend further towards an unlimited progressive fulfillment of the objectives of the social norm. The desirable result in terms of diligence is present in cases of both first and second generation human rights

156. That is to say, it does not result is an indirect horizontal effect as against a threat caused by a third-party individual.
and is parallel to that of the status negativus effect of a norm. Nonetheless, the main difference between the status negativus dimension and due diligence is that the effect that states are obliged to guarantee through abstention from interference reflects an obligation of result, while, in the case of affirmative measures of due diligence, the obligation for national authorities is limited to their capacities.

In order for a court to assess whether a state has fulfilled its obligations of due diligence in a given situation, the court must first define what type of affirmative action was necessary given the nature of the circumstances. However, as a threshold matter, the court must examine whether the situation experienced by the victim, as well as the victim’s expectations for benefitting from affirmative action, fall into a right guaranteed by the body of positive international law. With respect to this analysis, the passage from negative to positive obligations is facilitated by the “object and purpose” method of interpretation, aiming to extend the effect of a norm to its full effet utile (or “practical effectiveness”). Nonetheless, the effet utile method is just one among several others available to an adjudicator and nothing prohibits the choice of another technique of interpretation.

For example, in the Pretty case, the applicant, an individual suffering from a progressive neuro-degenerative disease resulting in general paralysis, applied to the state authorities for the granting of a positive measure—permission for her husband to assist her in committing suicide. Invoking the right to life provided in the European Convention, the applicant argued that the right also included the right to choose whether or not to go on living. The ECHR, in concluding that the refusal of the national authorities to give this permission did not breach their positive obligations stemming from the European Convention, proceeded with a grammatical reasoning focusing on the textual analysis of the norm. According to the Court, the right to life “cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die.” The applicant’s counterargument, that such assistance to suicide is permitted in the national legal order of other coun-

157. See supra Part II.B (particularly case law presented therein).
159. Id. at 184–85.
160. This is an interpretative technique that is strongly related to the one focusing on the will/intention of the contracting parties—a diametrically opposite technique to that of effet utile. See Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) 24–25 (1986) (where the ECHR concluded that the Convention does not guarantee the right to divorce, since this was deliberately omitted by the wording of article 12, establishing the right to marriage).
tries, prompted the Court to use another interpretative technique: the margin of appreciation. Under this method, states have the right to define a concept of the ECHR at the national level in accordance with the legal traditions particular to their domestic legal order. Thus, the court reasoned that

even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the Convention, that would not assist the applicant in this case, where the very different proposition - that the United Kingdom would be in breach of its obligations under article 2 if it did not allow assisted suicide - has not been established.

In short, the Court found that, while the right to life does not guarantee the adoption of positive measures enabling euthanasia, the right does not prohibit it either which effectively left the issue up to the states.

Once it has been established that a situation is covered by the semantic field of a particular right, the extent of the state obligation for affirmative conduct will then have to be identified. This might properly be seen as the process of defining the standard introduced by the human rights norm as it relates to the nature of the risk and the particular circumstances of a case.

In its Osman judgment, the ECHR enunciated a set of criteria for judging the adequacy of a state’s preventive positive measures. These criteria include the unpredictability of human conduct, the knowledge of the risk,

162. Generally, the ECHR is reluctant to recognize the existence of positive obligations for states where there is an absence of consensus reflected by common “principles” over an issue at the national level. Nonetheless, nothing prohibits a judge from diagnosing the existence of common obligations for affirmative conduct even in the absence of such a consensus. Compare Rees v. United Kingdom, 106 Eur. Ct. H.R. 1 (1986), with Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1. The Rees v. United Kingdom case concerned the question of whether the respondent state was obligated to adopt positive measures in order to confer on the applicant, a transsexual, a legal status corresponding to his actual condition. The ECHR recognized that, in the absence of consensus, states enjoy a margin of appreciation to regulate this type of situation at the domestic level. Rees, 106 Eur. Ct. H.R. at 15. By contrast, in Goodwin v. United Kingdom, the ECHR employed, despite the absence of a consensus at the European level, a dynamic/evolutive interpretation and noted that

the Court . . . attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

the operational choices, which must be made by the national authorities in terms of priorities and resources, the possibility for the authorities to provide the necessary measures, as well as the need for proportionality. Obviously, this approach fails to offer a unitary pathway for interpretation. Instead, it seeks to determine the existence of a state’s affirmative obligation by depending on several heterogeneous criteria, which do not present the systemic interconnectedness that is necessary for qualifying it as an overall mechanism of interpretation. However, the criteria may serve a limited purpose as a set of tools a judge may choose to employ according to the exigencies of the particular case at hand. In this view, judges enjoy discretion in both their choice of the applicable criteria, as well as their subjective evaluation of the facts of the particular case. These criteria, then, might be used in a cumulative manner towards an overall evaluation of the reasonableness of the expectations that a citizen has for state affirmative conduct.

In contrast to the aforementioned criteria, which should be applied only when the particular circumstances justify it, the classic proportionality test is more consistently relevant to the due diligence analysis. In the field of human rights, the traditional function of the proportionality test is to evaluate the necessity and reasonableness of state interference with the

164. Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. 3123, 3159–60; see also Benedetto Conforti, Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 129, 132 (Malgosia Fitzmaurice & Dan Saroooshi eds., 2004). Conforti introduces the idea of the foreseeability of the risk/threat to the right and notes that the “specification of the test of foreseeability” is the “causality test,” applied to demonstrate the existence of a causal link connecting the risk/threat of the right with the facts/situation constituting its source. Conforti, supra, at 132; see, e.g., Mastromatteo v. Italy, 2002-VIII Eur. Ct. H.R. 151; L.C.B. v. United Kingdom, 1998-III Eur. Ct. H.R. 1390. In L.C.B. v. United Kingdom, the ECHR refused to accept that a causal link existed between leukemia suffered by the applicant and the exposure of her father to radiation when he was a serviceman in an area where nuclear tests were conducted by the respondent state. L.C.B., 1998-III Eur. Ct. H.R. at 1404. The ECHR noted that in the absence of scientific proof, the way to subjective appreciation is wide open. Id. In the Mastromatteo v. Italy case, the applicant argued before the ECHR that the Italian authorities breached the right to life of his son because they failed to prevent his death, which occurred when a group of criminals, who had been granted prison leave, co-opted his car in an attempt to escape after a bank robbery. The Court applied the foreseeability test and concluded that the death of the applicant’s son was the “result of the chance sequence of events” and that there was nothing in the circumstances of the particular case to alert the national authorities “to the need to take additional measures." Mastromatteo, 2002-VIII Eur. Ct. H.R. at 168. Or, as the respondent state claimed, “the causal link was tenuous . . . given the circumstances in which the victim died, namely, following a long series of coincidences and, therefore, fortuitous, unforeseen and unforeseeable incidents." Mastromatteo, 2002-VIII Eur. Ct. H.R. at 164–65.
rights of an individual so that a suitable equilibrium between the general interest and the individual rights can be maintained. Although the ECHR has held that the criteria within the European Convention used to justify the limitation of a given right in its negative dimension cannot be applied to affirmative obligations in the same way, 165 the Court has also noted that the search for a fair balance between community and individual interests is “inherent in the whole Convention.”166 Therefore, as long as the required affirmative action raises issues of conflict between individual and general interests, the principle of proportionality becomes applicable in order to evaluate the purpose of the positive measures and to assess whether their adoption is necessary and reasonable.

For example, in Rees v. United Kingdom, the Court applied the proportionality test in deciding whether the respondent state had an obligation to adopt positive measures to guarantee secrecy concerning the original gender of the applicant, who was transsexual.167 After discussing the margin of appreciation recognized by various national authorities, the Court concluded that third parties, including public authorities, maintained a legitimate interest in receiving such information, and, therefore, the personal right claimed by the applicant could not extend so broadly.168

Almost twenty years later, in the Christine Goodwin case, the Court once again applied the proportionality test in order to investigate the balance that should be maintained between the right of a transsexual person to legally recognize his or her gender change and the general interest.169 On this occasion, the Court examined the latter interest from the perspective of the burden that it would cause for the birth register system, the detriment that third parties might suffer in being unable to access the original entries, and the complications that would occur in the fields of family law, succession law, and social security. Interestingly, the Court found the right of the applicant to live in “dignity and worth in accordance with the sexual identity” choice was not of “concrete or substantial hardship or detriment to the public interest.”170 Consequently, the Court

170. Id.
departed from its previous case law and concluded that the respondent state breached its obligation to protect the applicant’s right to private life.\footnote{171}

The conclusions a court reaches regarding the extent of positive state obligations will undergo one last test, carried out at the macro, or generic, level of the due diligence principle. The baseline for this test is that the state has at its disposal the necessary means for providing the measures that have been considered reasonable in a given case.\footnote{172} Where a state possesses several equally useful means to satisfy the standard of diligence identified in a given situation, the recognized margin of discretion may be considered and effectively allows the state authorities the discretionary power to choose freely among the various available means.\footnote{173}

3. Balancing Human Rights with the (Human) Rights of the Investor

Human rights are not intended solely to protect local populations from the wrongful conduct of investors; rather, human rights call for the equal protection of each and every individual. As subjects under international law, investors are entitled to general human rights protection,\footnote{174} as well as the protection of those rights that are specific to the identity or role of “investor.”\footnote{175} Therefore, it is possible that states, in their effort to protect

\footnote{171. \textit{Id.} at 32. The \textit{Goodwin} case suggests that state fault for failing to demonstrate diligence is far from inter-temporal or location-blind, and may instead arise as the subjective product of societal momentum.}

\footnote{172. Alland, \textit{supra} note 91, 24.}

\footnote{173. Plattform “Ärzte für das Leben”, 139 Eur. Ct. H.R. (ser. A) at 12 (1988); see also Spielmann, \textit{supra} note 102, at 141; Sudre, \textit{supra} note 92, at 1370.}

\footnote{174. More importantly, rights of investors extend to protection of property and access to justice.}

the human rights of the local population through affirmative conduct, may end up interfering with the rights of the investor. Concomitantly, there is the possibility that a state, by neglecting to interfere with the human rights of the investor, may breach its due diligence obligation to protect the human rights of the local population.

While there may appear to be a conflict of rights upon first glance, it should be understood that a true normative conflict—i.e., a conflict *per se*—between the fundamental human rights is highly unlikely to occur. The term “conflict” is quite often used improperly, particularly when used to describe situations raising issues of “priority” in protection. In

NAFTA investment chapter as “a human rights treaty for a special-interest group.” José E. Alvarez, *Critical Theory and the North American Free Trade Agreement’s Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 308 (1996); see also Biloune and Marine Drive Complex LTD v. Ghana, 95 I.L.R. 183, 203 (UNCITRAL Arbitration, 1994). There, the investor complained, *inter alia*, about his arbitrary arrest and deportation. According to the tribunal, “contemporary international law recognizes that all individuals, regardless of nationality, are entitled to fundamental human rights.” *Id.* However, the tribunal concluded that the investor’s claim fell outside its jurisdiction, which was limited to commercial issues. As was explained, “while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.” *Id.*

176. In their *status negativus* dimension.

177. The state will breach its obligation in the indirect horizontal dimension.

178. However, it is possible that a question of priorities in the protection of conflicting human rights arises. Taking into account the context and the *ad hoc* circumstances of the case, the role of proportionality is to set these priorities. Of course, a normative conflict may well arise between human rights and the specific investment rights of the investor. Law offers a number of well-known techniques applicable in the case of a conflict of norms, including hierarchy. If a given human right is susceptible to derogations, then these might also be justified on the basis of the legitimate aim of the protection of the investment rights of the investor. In that case, proportionality comes into play again in order to balance the human rights of the local population with the investment rights to which a corporation is entitled. Due to the *erga omnes* nature of human rights, the investor’s rights may produce their effect only to the extent that they will not disproportionately impede the effectiveness of human rights. This is provided, of course, that a given right has not acquired the *status of jus cogens* in which case, no limitations are permitted. See Ursula Kriebaum, *Privatizing Human Rights: The Interface between International Investment Protection and Human Rights*, in *THE LAW OF INTERNATIONAL RELATIONS - LIBER AMICORUM HANSPETER NEUHOLD* 165, 168–72 (August Reinisch & Ursula Kriebaum eds., 2007) (examining various scenarios of potential conflict between the rights of the investor and human rights, with an emphasis on social rights and on the right to water); Yannick Radi, *The Place of Human Rights in Investment Treaty Arbitration? Making Use of the International Investment Law ‘Tool-Box’* (on file with author) (describing how proportionality functions in the frame of the fair and equitable treatment standard in international investments).
other words, while the obligations stemming from two different human rights norms are not in conflict with each other in the abstract, a conflict might arise in situations like the one examined here, where different rights are owed to two different subjects and the effective protection of one’s rights requires a limitation on the rights of the other. In such a case, the question becomes—to what extent should derogations of protection be allowed? 179

As argued above, proportionality is the most valuable instrument available in testing the legality of derogations. Under the principle of proportionality, the necessity of a state’s behavior in both its negative and affirmative dimensions is evaluated by balancing the relevant human rights against the general societal interest. Accordingly, under a proportionality evaluation, when a claimant alleges that state authorities negligently failed to implement positive measures to protect him or her from human rights abuses perpetrated by a corporation, the necessity of the adoption of such affirmative conduct is examined as it relates to the general interest of the society. The general societal interest implicitly and indirectly includes respect for the rights of the corporation, which is a vital engine for social and economic growth and development. 180 Similarly, if the investor complains about his or her (both human and investor) rights, the proportionality test will enable the judge to evaluate the nature and the gravity of the state’s interference with the investor’s rights in comparison to the general interest that the interference allegedly aims to protect. 181 Here, in turn, the general interest includes ensuring respect of the human rights of the local population.

Except for jus cogens norms, human rights norms are susceptible to limitations. Proportionality allows for the ad hoc setting of priorities, as it outlines the limits of governmental discretion in: providing freedoms, incentives, and prerogatives to the investor; regulating investment activities; and, more broadly, shaping economic policy. However, liberty or discretion in policy-making for governments is automatically excluded if the policy is found to interfere disproportionately with human rights. Such a balanced approach to this type of dispute allows human rights

179. Provided, of course, that a derogation of a protection is even allowed. In the case of the few human rights that enjoy a jus cogens status, no derogation is permitted.


181. In the case of expropriation, the proportionality test will come into play in the frame of the ECHR in order to assess the amount of compensation. Accordingly, full compensation is not always guaranteed. See Matthias Ruffert, The Protection of Foreign Direct Investment by the European Convention on Human Rights, 43 GERMAN Y.B. OF INT’L L. 116 (2000).
concerns to co-exist with financial interests, while providing a reasonable framework for settling legitimate conflicts when they actually arise.

III. TAKING DUE DILIGENCE BEYOND TERRITORIALITY

It goes without saying that the responsibility to prevent and deter a corporation from perpetrating human rights abuses belongs, first and foremost, with the state that hosts the corporation—that is, the state exercising sovereign jurisdiction over the land where the corporation is operating and where the abuses occur. However, there are two rationales for highlighting the parallel obligations that the corporate investor’s state of origin bears. First, host states are often developing countries; even if authorities in such states are sensitive to human rights, either their protective efforts are ineffective or they are prone to prioritizing the economic benefits that corporate activities create and disregarding human rights abuses. Second, from a moral standpoint, the state of origin is by no means a neutral actor in international investments, as it clearly benefits from the investment activities of its citizens abroad. Indeed, states actively promote businesses that originate within their respective legal orders, and that means they inherently support domestic investors. At a minimum, states negotiate BITs with the aim of guaranteeing the best possible conditions and the highest level of security and protection for their own investors.

A democratic state of origin that remains silent in the face of human rights abuses perpetrated by its investors abroad but prosecutes domestic human rights abuses in accordance with due diligence thus creates a double standard. Such territorial limitations on the obligation of states to prevent and punish human rights abuses correspond to a rather outdated formalistic logic that may be incompatible with the nondiscrimination principle. This is especially true when states maintain such double standards with respect to human rights. “Human rights” is an area of international law that incorporates objective values that the whole interna-

182. The Bhopal Gas Disaster case provides a good example of judicial ineffectiveness in protecting human rights. See supra note 8.

183. More broadly, particularly in connection with human rights protection, states should not “screen behind” a narrow interpretation of sovereignty and jurisdiction. According to the argument that will be set forth below, provided that there is no interference with the sovereign rights of the state exercising territorial jurisdiction, jurisdiction shall extend beyond the traditional basis of territoriality in such a manner as to allow other states to exercise—in the name of the effectiveness in human rights protection—a parallel extraterritorial jurisdiction.

tional community is committed to safeguarding. Each and every state is authorized to react to human rights violations even in cases where the state is not directly affected. This section examines two possible legal bases for extending the due diligence human rights obligations beyond the territorial jurisdictional basis. Such an extension automatically enlarges the circle of states that may—or, perhaps, must—prevent and punish human rights violations by the investor. As will be argued, the first basis, universal jurisdiction, falls under the discretion of governments and, therefore, simply authorizes those governments to exercise jurisdiction, while the second basis, active personality, becomes a pure international obligation of the state of origin if seen from the perspective of extraterritoriality.

A. Bases of Jurisdiction

1. Universal Jurisdiction

One expression of this state of affairs is the relatively recent tendency, demonstrated by a number of states, to apply universal jurisdiction. Universal jurisdiction is the exercise of jurisdiction by a state, where there is no direct link between that state and the wrongful conduct.

As far as civil jurisdiction is concerned, \(^{185}\) the most widely cited example is the United States Alien Tort Claims Act (“ATCA”) which provides that domestic courts have jurisdiction over civil actions brought by aliens for torts committed in violation of the law of nations or a treaty of the United States. \(^{186}\) Although this statute, adopted in 1789, had been a

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186. Particularly in the last few years, the ATCA served as the basis for bringing cases against multinational corporations engaged in human rights violations in the territory of the host state (mostly for being complicit with local governments). See, e.g., Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (concerning non-consensual human medical experimentation in Nigeria); Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008) (concerning slave labor in Papua New Guinea); Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080 (N.D. Cal. 2008) (concerning breaches of the rights of local population in the Niger Delta). On June 8, 2009, a settlement was reached in the case of Wiwa v. Shell, which concerned a claim brought under ACTA for the death of Ken Saro-Wiwa, one of the leading activists protesting against human rights breaches and the environmental harm caused in the region of the Niger delta by the investment activities of the defendant. Ignacio Saiz, Wiwa v. Shell Settlement Just One Small Step Toward Ending Corporate Impunity, CENTER FOR ECONOMIC AND SOCIAL RIGHTS, June 10, 2009, http://www.cesr.org/article.php?id=363. Ken Saro-Wiwa has been arrested by the authorities of Nigeria, tried by a special tribunal and executed on November 10, 1995. Id. The settlement did not require the defendant to assume responsibility for wrong doing.
dead letter for more than two hundred years, the U.S. Supreme Court recently confirmed its validity in *Sosa v. Alvarez-Machain*. According to the Court, the term “law of nations” refers to the understanding of international law in the present day, rather than that at the time of the adoption of the statute. Such understanding must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth] century paradigms [the Court has] recognized.” The *Sosa* Court held that a brief, arbitrary detention does not amount to a breach of international law with the specificity that customary international law requires, thereby skirting the jurisdictional issue presented by the ATCA.

Since the ATCA only grants a jurisdictional basis and not a cause of action, the cause of action must be established under substantive international law. Yet, as has rightly been pointed out, the Supreme Court’s *dicta* gives the impression that, for the ATCA to apply, it is not necessary for the norm violated to fall into a specific category, such as *jus cogens* or *erga omnes*. Rather, the Court seems only to require that the norm be mature, well-established, and specifically defined in international law. The logical next question concerns whether the ATCA may serve as a basis for universal jurisdiction in every case of an individual’s violation of international law, regardless of the nature of the norm breached.

However, the defendant agreed to pay $15.5 million to the plaintiffs as a “humanitarian gesture.” Id. There is little doubt that the choice of the defendant to proceed with such a generous and unprecedented “humanitarian gesture” was affected by the district court’s decision to recognize the existence of a jurisdictional basis under ATCA for crimes against humanity, extra-judicial killing, inhuman treatment, and arbitrary arrest and detention. *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377 (S.D.N.Y. 2009).

188. *Id.* at 725.
189. *Id.*
190. *Id.* at 736–737.
191. *Id.*
192. Georg Nolte, *Universal Jurisdiction in the Area of Private Law – The Alien Tort Claims Act*, in *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* 373, 375–376 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006). Andrew J. Wilson notes that the term tort in the text of the ATCA may be misleading since international law lacks a clear separation between torts and crimes. Accordingly, the term may refer either to domestic torts or simply to “wrongs” committed in violation of international law. Wilson, *supra* note 46, at 47.
194. For an overview of the opinions expressed in the literature on this issue, see Donovan & Roberts, *supra* note 185, at 142–45.
As mentioned above, obligations *erga omnes* reflect the idea of the existence of certain interests or values that are common to the international community as a whole rather than being exclusive to individual state. Accordingly, an obligation *erga omnes* is owed towards each and every state within the international community. This is why, in the case of wrongful conduct that breaches an obligation *erga omnes*, international law recognizes the legitimate interest and competence of states other than the one that is directly injured to invoke the international responsibility of the perpetrator. 195 Given this framework, one can reasonably argue that the exercise of universal jurisdiction to prosecute violations of norms of lower stature than *erga omnes* lacks justification in terms of positive international law. 196 As such, where the norm breached is not *erga omnes*, then a link must be established between the wrongful conduct and the legal order of the judicial *forum* exercising jurisdiction. 197 From there, it is arguable that universal civil jurisdiction might, in the future, prove to be broader than universal criminal jurisdiction. 198 While the latter can only be applied for a fairly small number of heinous internationally criminalized human rights abuses, civil universal jurisdiction may extend well beyond the limited number of international crimes, provided, of course, that the violated norms introduce obligations *erga omnes*.

However, U.S. judicial practice seems to neglect the *erga omnes* criterion. “In all ATCA cases decided to date, courts have held that only the gravest violations of human rights . . . violate the law of nations.” 199 Si-
milarly, the amicus briefs submitted by the European Community in the Sosa case suggested that universal civil jurisdiction should be limited to cases of “grave” violations of international law. The distance separating the two concepts—“grave” or serious violations of human rights and “each and every” *erga omnes* international norm—is considerable. The difference is primarily pragmatic rather than legal. Since universal jurisdiction is permissive rather than obligatory, states have considerable discretion in exercising it. As a result, it is the national judicial branch, which, by deciding cases that are neither directly related to the national legal order nor to the state’s exclusive interests, decides whether to act as a unilateral guardian of certain universal values. Given that the exercise of a wider universal jurisdiction encompassing all violations of *erga omnes* norms would impose a substantial burden on a state’s judiciary, it is understandable for national courts to set certain screening criteria even if these criteria are described in extra-legal or axiological terms.

It appears, then, that there is a new category of international norms—something “stronger” than *erga omnes* but not quite as “strong” as *jus cogens*. Despite the fact that this new category has not yet been defined or named, its task is to provide a (still unformed) criterion for facilitating a reasonable balance between the need to effectively punish
heinous human rights abuses and a given state’s capacity to shoulder responsibilities that do not belong exclusively to it. However, the national courts and tribunals are the only competent authorities to engage in such balancing.205

Even if it can be concluded that the ATCA may serve as the basis for universal civil jurisdiction in the case of “grave” and, in terms of the Sosa standard, sufficiently “definite,” violations of erga omnes norms of international law, the question remains whether the ATCA grants jurisdiction to causes of action brought by foreign plaintiffs against private individuals and entities, including corporations, or only against persons or entities exercising public authority. While the existing case law suggests that ATCA jurisdiction is not predicated on the defendant exercising public authority,206 the picture that emerges is rather fragmented because there are not very many cases. Unfortunately, as of now, the case law creates more questions than it answers.

For instance, in *Kadic v. Karadžic*, the U.S. Court of Appeals for the Second Circuit concluded that, while the defendant was only liable for certain allegations to the extent that he was a “state actor,” he could also be held liable for genocide and war crimes in his private capacity.207 As such, the reach of the “law of nations” is not strictly confined to state actors. However, since “torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of

205. This is provided that the legislature intervenes. And even this route may be closed off in the United States in the future. See Kevin R. Carter, Note, *Amending the Alien Tort Claims Act: Protecting Human Rights or Closing Off Corporate Accountability?*, 38 CASE W. RES. J. INT’L L. 629, 639 (2006-2007). As Carter explains, there has been strong lobbying against universal jurisdiction on the basis of the ATCA. As such, it comes as no surprise that initiatives for amending it have already been undertaken. Amicus briefs submitted by a number of countries, including Australia, Switzerland, and the United Kingdom, to the U.S. Supreme Court in the *Sosa* case provide a number of arguments against universal civil jurisdiction (including sovereignty, conflict of legal commands, legitimacy). Some argue that universal civil jurisdiction should be applied in conformity with comity and *forum non conveniens*. Anne O’Rourke & Chris Nyland, *The Recent History of the Alien Tort Claims Act: Australia’s Role in its (Attempted) Downfall*, 25 AUSTL. Y.B. INT’L L. 139, 139–176 (2006). In connection with that argument, see also John B. Bellinger III, *Enforcing Human Rights in the U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT’L L. 1 (2009) (presenting a more pragmatic approach by emphasizing the political and diplomatic burden of ATCA for the United States government, as well as the exigencies of the principle of the separation of powers).


law,” they are actionable under the ATCA only with regard to “state action.” If, on the other hand, the wrongs are committed in the course of genocide or war crimes, state action is not necessary in order to find liability, since the wrongs violate norms of international law that “bind[] parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents.”

A similar, but not identical, conclusion was reached by the U.S. Court of Appeals for the Ninth Circuit in *Doe I v. Unocal Corporation*. *Doe I* concerned an action brought against an American corporation for forced labor imposed on the local population by the army of Myanmar, which was responsible for security in the area where the corporation constructed a gas pipeline. The Court concluded that the alleged violations did indeed constitute breaches of international law, as “[t]orture, murder, and slavery are *jus cogens* violations and, thus, violations of the law of nations.” Furthermore, the Court held that, while “most crimes require state action for ATCA liability to attach,” the corporation could be held personally liable, since “there are a ‘handful of crimes,’ including slave trading, ‘to which the law of nations attributes individual liability,’ such that state action is not required.”

Forced labor, being a modern variant of slavery, is one of those crimes.

The establishment of private liability on the basis of ATCA presupposes that the law of nations attributes such responsibility directly to the individual in his capacity as an international subject. However, whether

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208. *Id.* at 243.
209. *Id.*
210. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *rehearing granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed per stipulation and judgment vacated*, 403 F.3d 708 (9th Cir. 2005). The case eventually settled in 2005 on confidential terms. *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (granting the parties’ motion to dismiss the appeals and vacating the district court’s opinion).
212. *Id.* at 945.
213. Provided that it could be proven that Unocal (the corporation-defendant) aided and abetted the army in subjecting the local population to forced labor, so that a connection to the crime can be established.
215. *Id.* at 946.
216. For the types of individual conduct that have been interpreted as covered by ATCA, see Jean-François Flauss, *Compétence civile universelle et droit international général* [*Universal Civil Jurisdiction and General International Law*], in *The Fundamental Rules of the International Legal Order* 385, 405–06 (Christian Tomuschat & Jean-Marc Thouvelin eds., 2006). For a review of cases that have been brought against corporations before U.S. courts on the basis of ATCA, see Lucien J.
the concept of civil individual responsibility is to be construed narrowly (such that it requires that international law provide for a specific duty of the individual), or broadly (such that it comprises all objective international norms that impose obligations on the international community as a whole) remains at the discretion of the national judge. The pro homine advantage of construing individual responsibility broadly is that it will cover a breach of each erga omnes norm committed by private actors, such as human rights abuses by multinational corporations. In its narrowest possible interpretation, individual responsibility will be limited to a small number of internationally wrongful acts that expressly address conduct of individuals and that, by their terms, establish a basis for holding the individual internationally responsible. In that case, the universal civil jurisdiction over private individuals and entities will end up being parallel to criminal jurisdiction, which, in turn, is limited to only the gravest of human rights violations. Indeed, the case law presented here reveals a certain U.S. tendency to confer civil jurisdiction on the basis of international criminal responsibility of individuals.

Nonetheless, despite any criticisms of civil universal jurisdiction’s appropriation of tools developed in the framework of international criminal law—tools that are foreign to its civil counterpart—one should keep in mind that, since universal jurisdiction is traditionally criminal in nature,217 it contains certain elements that can be very useful to civil jurisdiction.218 Furthermore, criminal universal jurisdiction has been developed in light of the aut dedere aut iudicare principle, which is seen as a remedy against the impunity from prosecution for certain gross human rights violations considered to be the common responsibility of the whole international community. Given the gravity of these violations, the international community moved in the direction of criminalizing them and holding perpetrators personally liable, regardless whether they acted in the course of their state functions or as individuals.

217. In terms of criminal universal jurisdiction, states unilaterally extend their jurisdiction to prosecute and punish foreigners who commit crimes against foreigners abroad. This is true despite the lack of any direct link (principle of territoriality, nationality of either the offender or the victim, flag, or protection, related to situations threatening or damaging state fundamental interests) between the state asserting jurisdiction and the crime. The literature on the question of universal criminal jurisdiction is very rich. See Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Aspects* (2003) (offering a comparative overview of national practices on the topic); Alexander Zahar & Göran Sluiter, *International Criminal Law* 296 (2008).  
218. Such as the criminal law “tools” for establishing complicity.
As in the case of universal civil jurisdiction, there are several arguments against a state’s unilateral exercise of universal criminal jurisdiction. The point of departure is always the legality of this practice in terms of international law and the concern of noninfringement of state sovereignty. However, the practice also implicates a number of more specific questions, such as the applicability of the maxim *ne bis in idem* and the problem of concurrent jurisdictions, as well as the need for coordination between parallel competencies. The picture becomes even more blurred if one considers that international law lacks general norms with respect to criminal jurisdiction, and, therefore, states enjoy significant discretion in setting the criteria according to which they will assume jurisdiction.

Therefore, according to the Permanent Court of International Justice (“PCIJ”), every state “remains free to adopt the principles [that] it regards as best and most suitable,” provided it “does not overstep the limits [that] international law places upon its jurisdiction.”

The ICJ had the opportunity to examine the legality of universal criminal jurisdiction in terms of international law and to bring certain criteria to the forefront that, if disrespected, would render the exercise of universal jurisdiction by national courts *ultra vires*, which would result in states being held internationally responsible for wrongful acts carried out by their judiciaries. In the *Arrest Warrant* case, the government of the Democratic Republic of Congo (“DRC”) filed an application before the ICJ against Belgium claiming that Belgium’s issuance, pursuant to the Belgian Universal Jurisdiction Law, of an international arrest warrant

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219. Although it is generally accepted that the right of an accused person not to be prosecuted twice for the same offense is applicable only within a national context, recent tendencies in legal scholarship recognize the existence, under certain conditions, of an inter- or transnational effect of the maxim. See Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT’L CRIM. L. REV. 217 (2003).

220. It is generally sustained that universal jurisdiction should be applied only in the case that the *fora* which are territorially or personally linked to the wrong are unwilling or unable to bring the perpetrators to justice. Legal scholarship generally tends to criticize the so-called “absolute” universal jurisdiction. Under the “conditional” universal jurisdiction, the prosecution of an international crime can only be exercised by a state if the accused person is on its territory. See Antonio Cassese, *International Criminal Law* 338, 338–39 (2d ed. 2008).


222. The ICJ is the successor to the PCIJ.


in absentia against the DRC’s foreign minister, Mr. Yerodia Ndombasi, violated international law. The Court focused its analysis on the question of the extent of the immunity that the DRC minister enjoyed under customary international law, skillfully avoiding having to take a position on the issue of universal jurisdiction.

The universal jurisdiction phenomenon reflects the necessity for alternative and activist solutions to the drawbacks of international law. While the International Criminal Court centralizes and internationalizes the fight against impunity, its jurisdiction depends—one way or another—on states’ willingness. Consequently, despite the absence of a clear answer on its legality and the conditions of its application, universal criminal jurisdiction remains in the foreground. At the same time, the effect of universal criminal jurisdiction is limited to a small number of crimes—those considered of universal concern. As such, a minimum level of gravity is required for universal criminal liability. Although it is possible that investor conduct could rise to such a level, if universal jurisdiction were to be the sole basis for punishing human rights abuses by corporations, a large number of everyday offenses would go unpunished.

2. Active Personality Jurisdiction

State practice, as reflected in national criminal law, provides an alternative to the universal basis of jurisdiction that may prove to be of great utility in punishing the illegal conduct of investors abroad. Under the active personality (or “active nationality”) basis of criminal jurisdiction, states are competent to prosecute their nationals (and in some legal orders, persons domiciled in their territory), without regard to the place where an offense was committed. While an indirect link—based on the

1999. “concerning the Punishment of Serious Violations of International Humanitarian Law”).
226. Id. at 9–10. The Belgian arrest warrant charged Mr. Yerodia Ndombasi with grave breaches of the 1949 Geneva Conventions and crimes against humanity. Id. at 9.
227. Id. at 19–22.
228. However, the ICJ may take the opportunity to address this question in a case currently pending before it. Certain Criminal Proceedings in France (Congo v. Fr.), available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=129. It should be noted that in a separate opinion, the former president of the ICJ, Judge Guillaume, concluded that universal jurisdiction exists against piracy. Arrest Warrant, 2002 I.C.J. at 37–38 (separate opinion of Judge Guillaume). Also, in a separate opinion, Judge Koroma added genocide and slave trade to the list of crimes subject to universal jurisdiction. Id. at 61–62 (separate opinion of Judge Koroma).
229. In terms of the narrower version of the active personality principle, the exercise of jurisdiction hinges on the condition that the conduct also be illegal within the legal order of the locus delicti, the place where the offense is committed.
concept of obligations *erga omnes*—between the forum and the wrongful act suffices to establish universal jurisdiction, the link between the wrongful conduct and the forum has to be more tangible and direct to establish “active personality” jurisdiction. Active personality stems from the notion that states have both a responsibility and a legitimate interest in preventing and punishing offenses committed by their own nationals, who remain their subjects even when they are abroad. In light of the fight against impunity, active personality jurisdiction can be seen as a sort of counter-balance to state policy of refusal to extradite nationals.

Obviously, the application of the active personality basis for punishing human rights abuses committed abroad by the investor raises a number of technical problems.\(^{230}\) First and foremost, as argued above, the complicated corporate structure of multinational firms makes the determination of their nationality difficult.\(^{231}\) Second, where the domestic legal order confines prosecution to natural persons, the attribution of criminal responsibility to the people participating in corporate decision-making proves to be a rather thorny issue. Nonetheless, since active personality is a unilateral basis for the exercise of jurisdiction that, in substance, associates an illegal act with the legal order of the forum exercising jurisdiction, it vests that very same legal order with the authority to solve these issues.

Like universal jurisdiction, active personality jurisdiction is the product of state practice. Both these principles reflect the idea that states enjoy discretion in unilaterally establishing the jurisdictional bases within their domestic legal systems.\(^{232}\) Nonetheless, this Article argues that, un-

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230. Olivier de Schutter, *L’incrimination Universelle de la Violation des Droits Sociaux Fondamentaux* [Universal Criminalization of the Violation of Fundamental Social Rights], 64 *Annales de Droit de Louvain* 209, 209–245 (2004). Olivier de Schutter examines this issue in regard to the legislation adopted by Belgium for the “universal incrimination” of the violation of fundamental social rights. After proving that, in reality, the legislation does not confer the judiciary with universal jurisdiction but an active personality jurisdiction, De Schutter discusses its compatibility with international law and analyzes certain problems related to its application against moral persons.

231. *See supra* Part I.B.

232. Even scholars who are skeptical of the idea of universal jurisdiction in terms of its compatibility with international law tend to recognize that active personality is allowed. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 36–37 (Feb. 14) (separate opinion of Judge Guillaume). Judge Van den Wyngaert, in a dissenting opinion in the *Arrest Warrant* case, drew a broader theoretical framework. According to Judge Van den Wyngaert, a distinction should be made between prescriptive jurisdiction and enforcement jurisdiction. *Id.* at 167–68 (separate opinion of Judge Van den Wyngaert). As such, despite its extraterritorial effects, the active personality jurisdictional basis is permitted for states, as long as it does not lead to material acts of extraterritorial enforcement. *Id.*
like universal jurisdiction, which does not introduce an obligation on states to apply it, active personality represents one of the means by which states can comply with their due diligence obligations. When viewed only from the due diligence standpoint, a state of origin’s use of active personality jurisdiction to prosecute human rights abuses committed by investors in the host state is not discretionary, but rather constitutes an international obligation. The only condition for the validity of this argument is that states’ human rights obligations extend beyond their territory.

B. The Question of Extraterritoriality Revisited: Beyond the Criterion of Effectiveness in the Exercised Control

Although a considerable amount of international case law has been produced in recent years on the issue of extraterritoriality in the protection of human rights, the specific proposal examined in this Article has never been subject to judicial analysis. However, as always, the lack of a judicially validated answer leaves the door wide open for unbridled debate among scholars. This section will review the ways in which the existing case law, while not quite on point, is often relevant nonetheless, and offers, at the very least, significant probative insight. The cases to be discussed are divided into two broad categories. The first group of cases, while focusing on obligations arising from conduct directly attributable to states, is included to demonstrate that, regardless of the highly problematic nature of the basis that has been used, the metaphorical um-
bilical cord of territoriality has been categorically cut. The second group of cases is more relevant to this Article’s specific discussion of the obligations of a state to exercise vigilance with respect to extraterritorial human rights abuses.

1. Extraterritorial Obligations and Direct Attribution

The first category of cases corresponds to situations where, although the wrongful conduct was committed outside the territory of a state, it is directly attributable to that state. As it often happens, regional judicial regimes—especially those of the ECHR—were at the forefront of this evolution.\(^2\)\(^3\)\(^6\) Still, despite the ECHR’s contribution to the general context of extraterritoriality, this section argues that the Court’s role is not without any side effects, and that there is a strong risk of “embedding” the function of the universal protection of human rights with characteristics that are inherent only to the regional level of protection.

So far, the ECHR has extended the reach of the European Convention beyond state territory for wrongful conduct directly attributable to a state in two types of cases: (1) where state-agents committed human rights abuses abroad,\(^2\)\(^3\)\(^7\) and (2) where a \textit{de facto} control was exercised over the territory of another state.\(^2\)\(^3\)\(^8\) According to the ECHR, the \textit{conditio sine qua non} for such an extraterritorial effect of the European Convention provisions is that the control exercised by state authorities is “effec-


tive,” even if it is exercised temporarily. The failure to prove that the state—accused of breaching human rights outside its territory—exercised an effective control over the violative conduct excludes the applicability of the European Convention regardless of whether the conduct could, in terms of the law on state responsibility, be attributable to that state. That is to say that, under the European Convention regime, the attribution to a state of a wrongful act committed outside its territory, does not automatically authorize the ECHR to exercise jurisdiction. Next to the preliminary question of the attribution of the wrongfulness, the ECHR case law has raised a second, artificial criterion—namely, the effectiveness in the exercised control.

However, the activist choice of the ECHR in the Loizidou case to silently “isolate” the criterion of effective control from the norms regarding the attribution of internationally wrongful acts—done in order to directly transpose it as an artificial condition for the limitation of the extraterritorial effect of the European Convention (and, consequently, of its own judicial competence)—is rather unfortunate. Although, admittedly, the ECHR case law succeeded in effectively cutting the cord of territoriality in human rights protection, the criterion of effectively exercised control appears—in terms of positive law—to be a rather problematic

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241. In a controversial decision of the ECHR on admissibility in Banković v. Belgium, the court held that, under the terms of the European Convention, the breaches of human rights in the territory of a third country fall under the jurisdiction of the state which perpetrated it only if that state has effective control over the territory. Banković v. Belgium, 2001-XII Eur. Ct. H.R. 356–59; see also Hussein v. Albania, App. No. 23276/04, Eur. Ct. H.R. (2006), available at http://www.echr.coe.int/eng/press/2006/March/HUSSEIN%20ADMISSIBILITY%20DECISION.htm (declaring the case inadmissible because the applicant “has not demonstrated that [the respondent states] had jurisdiction on the basis of their control of the territory where the alleged violations took place.”).

242. Loizidou, 310 Eur. Ct. H.R. at 31. Although the reasoning of the ECHR lacks the clarity that one would expect from a judicial forum of its standing, the Court jointly answered in the affirmative the questions of both the attribution of the conduct to the respondent state and the extraterritorial jurisdiction of that state (and consequently of the Court itself).

construction that threatens to negatively affect the broader regime of human rights protection at the universal level.\textsuperscript{244}

In terms of positive international law, the rules governing attribution are secondary state obligations that refer to state responsibility. By contrast, the concept of jurisdiction—both territorial and extraterritorial—stems from the framework of primary state obligations and serves as the basis for delimiting the sphere of competence. That being explained, it becomes clear that the questions of attribution and extraterritoriality are regulated by different bodies of law and should therefore have been treated by the ECHR separately.\textsuperscript{245} Since the premises and the \textit{raison

\textsuperscript{244} See, e.g., General Comment No. 31, \textit{supra} note 96, \S 10 (requiring that states “respect and ensure the rights laid down in the [ICCPR] to anyone within [their] power or effective control . . . even if not situated within [their] territory”).

\textsuperscript{245} Without necessarily affecting the correctness of the conclusions drawn, the tendency to confuse attribution with extraterritoriality is present also in the case law that the ICJ produced after the relevant ECHR case law. For instance, in the \textit{Armed Activities on the Territory of the Congo} case, the ICJ concluded that “Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account,” but only after the Court was satisfied that the respondent state exercised—as an occupying power—effective control over a part of the territory of the Democratic Republic of Congo. \textit{Armed Activities on the Territory of the Congo} (Dem. Rep. Congo v. Uganda), at 60 (Dec. 19, 2005), \textit{available at} \url{http://www.icj-cij.org/docket/files/116/10455.pdf}. In its advisory opinion on the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, the ICJ opted for a broader approach. \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, Advisory Opinion, (July 9, 2004), \textit{available at} \url{http://www.icj-cij.org/docket/files/131/1671.pdf}. There, the ICJ simply stated that

while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

\textit{Id.} \S 109. However, although the ICJ seems reluctant in the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} opinion to rely on the criterion of effective control, presumably, the control that an occupying power exercises is \textit{ipso facto} an effective one. \textit{See id.} Lastly, in its recent Order on Provisional Measures in the \textit{Georgia v. Russia} case, the ICJ took an equally broad view with regard to the territorial reach of the UN Convention on the Elimination of All Forms of Racial Discrimination. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ. Fed.) (Req. for the indication of Provisional Measures) (Order of Oct. 15, 2008), \textit{available at} \url{http://www.icj-cij.org/docket/files/140/14801.pdf}. There, the ICJ observed:
d’être of the two legal bases are divergent, attribution cannot serve as the
basis for extraterritoriality or be treated as a pretext for jumping into un-
justified conclusions about the limits of judicial competence. However,
in assessing ECHR’s practice, one has to recognize that the European
Convention is in fact a treaty “operating in an essentially regional con-
text” and is “not designed to be applied throughout the world, even in
respect of the conduct of the State Parties to it.”246 In other words, the
criterion of the effectiveness in the exercised control is akin to an arti-
ficial tool that has been maladroitly developed by a regional court when
that court felt the necessity to somehow delimitate its competence in a
way that would enable it to maintain its regional nature and avoid ending
up a de facto quasi-global court.247

However, these constraints are inherent only to regional systems of
protection. They are absent in cases of customary human rights norms
and the so-called UN human rights system, which are by definition uni-
versal. In light of this, it is arguable that at the universal level, extraterri-
toriality should not be limited by the criterion of effectiveness in the con-
trol exercised over a situation. As such, states should simply be prohi-
bited from acting outside their territory—either through their organs or

Whereas the Parties [to the conflict] disagree on the territorial scope of the ap-
plication of the obligations of a State party under CERD . . . [the] provisions of
CERD generally appear to apply, like other provisions of instruments of that
nature, to the actions of a State party when it acts beyond its territory.

Id. ¶ 108–09. However, the general extraterritorial effect of the CERD does not appear to
be the result of an explicit rejection by the ICJ of the criterion of effectiveness in the
exercised control. Quite the contrary, the Court chose to justify its interpretation on the
wording of the CERD in that “there is no restriction of a general nature in CERD relating
to its territorial application . . . [and], in particular, neither Article 2 nor Article 5 of
CERD, alleged violations of which are invoked by Georgia, contain a specific territorial
limitation.” Id. at 109.

246. Christos Rozakis, The Territorial Scope of Human Rights Obligations: The Case
of the European Convention on Human Rights, in THE STATUS OF INTERNATIONAL
TREATIES ON HUMAN RIGHTS 55, 63 (Venice Commission ed., 2006). As the ECHR points
out, other international instruments designed for the protection of human rights expressly
H.R. at 357–58.

247. This delimitation arguably circumvented the effect of the European Convention
on Human Rights. Of course, other objectives do exist as well. For example, the criterion
of the effectiveness in the exercised control was used by the ECHR to allow the Court
“escape” from exercising jurisdiction on the merits of certain highly politicized cases,
such as the NATO military intervention over Kosovo and the occupation of Iraq by the
available at http://www.echr.coe.int/eng/press/2006/March/HUSSEIN%20ADMISSIBILITY
through third subjects whose conduct is attributable to them—in a way that they are not allowed to behave on their own.\footnote{248} In this case, extraterritoriality and direct attribution do in fact converge.

2. Extraterritorial Obligations under Due Diligence

Within the second general category of extraterritorial effect of human rights norms, the question is whether the sphere of jurisdiction should be limited only to those actions or omissions that are “directly” attributable to the state. Interestingly, the ECHR provided an answer to this question even before crystallizing its effective control criterion as a condition for the extraterritorial enlargement of jurisdiction over conduct attributable to one of the parties to the European Convention.

In the \textit{Soering} case, the United States asked that the United Kingdom extradite a German national who committed a crime on U.S. territory.\footnote{249} Noting that the accused would be kept on death row for a prolonged period of time if the United Kingdom proceeded with the extradition, the Court concluded that the respondent state (the United Kingdom) would be found in breach of Article 3 of the European Convention, which prohibits torture and inhuman or degrading treatment.\footnote{250} According to the Court’s opinion, the requirement set forth in the very first article of the European Convention—to “secure to everyone within their jurisdiction the rights and freedoms” protected by the European Convention—cannot be read as creating an obligation for states to impose the Convention standards on third states.\footnote{251} Nonetheless, the European Convention does develop an extraterritorial effect in the sense that, even if “the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant’s complaints . . . [t]hese considerations cannot . . . absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.”\footnote{252}

In other words, in cases of extradition, the respondent state can in fact be found internationally responsible for conduct that was neither committed by its own agents nor took place on its territory. The semantic field of prohibition of torture develops extraterritorial effect to guarantee

\footnote{250} \textit{Id.} at 44–45.
\footnote{251} \textit{Id.} at 33–34.
\footnote{252} \textit{Id.} at 34.
that there will be no risk of individuals suffering a violation.\textsuperscript{253} The state exercising (effective) jurisdiction over a subject is obligated to adopt the available necessary measures to prevent a foreseeable violation. The preventive extraterritorial effect of the obligation is justified in terms of the effectivenes required by the European Convention in the protection of an absolute human right that does not allow for derogations (i.e., \textit{jus cogens}) and that will amount to an irreparable violation.\textsuperscript{254} Finally, it should be noted that the \textit{jus cogens} nature of the protective norm is not a condition for the extraterritorial effect of the due diligence obligations in the field of human rights. The ECHR recognized the same effect with respect to the right to life “in circumstances in which the expelling state knowingly puts the person concerned at such a high risk of losing his life that the outcome is a near-certainty.”\textsuperscript{255} Since both the right to life and the prohibition of torture are closely linked to human physical integrity, one could argue that the Court tends to limit the extraterritorial effect of due diligence only to the most “serious” human rights violations. However, once the criterion of \textit{jus cogens} is eliminated, the road is open for the case law—in the name of \textit{effet utile}—to enlarge the circle of rights.

In the \textit{H.L.R.} judgment regarding deportation, the ECHR recognized an indirect horizontal effect to the extraterritorial dimension of due diligence for the safeguarding of Article 3 of the European Convention.\textsuperscript{256} “Owing to the absolute character” of Article 3, the ECHR found that the right is to be protected from the risk of a foreseeable violation abroad even if “the danger emanates from persons . . . who are not public officials.”\textsuperscript{257} Nonetheless, the right’s extraterritorial dimension is limited by the fact that “[i]t must be shown that . . . the authorities of the receiving

\begin{footnotesize}
\begin{enumerate}
\item[253.] See Saadi v. Italy, App. No. 37201/06, Eur. Ct. H.R. (Feb. 28, 2008), available at http://www.echr.coe.int/ECHR/homepage_en. There, the Court had the opportunity to reassert the absolute prohibition of extradition in a situation where the respondent state was suspicious that the applicant was involved in international terrorism. Holding that a “real risk” for the right of the applicant existed despite the relevant diplomatic assurances provided by the authorities of the receiving state, the ECHR noted that since “the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct, the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.” \textit{Id.} ¶ 127 (internal citation omitted).
\item[254.] \textit{Id.} ¶ 87–90.
\item[257.] \textit{Id.} at 758.
\end{enumerate}
\end{footnotesize}
state are not able to obviate the risk by providing appropriate protection.” Accordingly, the respective obligations to prevent the violation of human rights through affirmative conduct of the territorial state and the state exercising effective control are autonomous and parallel to each other with the latter state’s obligation being subsidiary in nature and only activated where the territorial state is unable or unwilling to provide effective protection.

Nonetheless, it should be noted that the case law puts emphatic emphasis on effectiveness of exercised control, even though it is a rather artificial tool geared toward the need for regional systems to be able to maintain their regional nature and avoid the burden of exercising jurisdiction over each and every international human rights violation. However, the ECHR provided a contradictory example in the Ilașcu case where the Court seemed to imply that the effective control test does not apply at all in the case of extraterritorial due diligence/affirmative obligations. There, the applicants claimed illegal detention by the “Moldavian Republic of Transdniestria” (“MRT”), an entity that proclaimed independence in 1991. There were two respondent states—Russia, which was exercising effective control over “MRT” and, therefore, de facto jurisdiction, and Moldova, which was exercising no control at all over that part of its territory. In light of the fact that the conduct of the de facto entity was directly attributable to Russia, it was natural that Russia was deemed responsible. However, the Court reached a surprising conclusion:

[E]ven in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.

The condemnation of Moldova by the Court was justified on the basis of the country’s failure to adopt positive measures for the safeguarding of the applicants’ rights, which continued to fall under Moldova’s jurisdiction despite the lack of any type of effective control, either over the territory (de facto extraterritoriality) or over the persons (victimizers and victims alike). As the Vice President of the ECHR, Judge Rozakis, noted:

258. Id.
260. Id. at 199.
261. Id. at 266.
262. Id. at 267–72.
[The Court in the case of Ilaşcu took a different approach by incorporating the issue of positive obligations within the very notion of jurisdiction and by disregarding the test of effective control as a precondition for the establishment of jurisdiction. . . . It clearly transpires from the Ilaşcu judgment that the Court has developed a rather subjective test in determining whether Moldova faced up to its positive obligations, by calling into question its political tactics in effectively protecting the human rights of the individual applicants. . . . 263

Arguably, then, the extraterritorial effect of due diligence in the protection of human rights does not rely on the condition of effective control. However, this is not meant to imply that effectiveness is deprived of any practical significance. Due diligence, being an obligation of means, relies upon the condition that the state dispose of the necessary means to preempt wrongfulness. Obviously, the wider the extent of control that a state exercises over a given situation, the more the state is capable of guaranteeing the effectiveness of the affirmative conduct. In other words, expectations of effectively demonstrated diligence should be proportionate to the effectiveness of control the state exercises over a given situation. However, even in the case of absolute absence of control, provided that the state is linked to the situation, the state’s authorities are expected to demonstrate an effort to prevent wrongfulness by any means available (even purely political). The sole condition for a state to bear an obligation to demonstrate diligent protection of human rights beyond its national territory is simply that the state be somehow linked with the situation. 264

Clearly, the more tangible the link between the state and the specific situation, the stronger the obligation that the state to adopt affirmative conduct.

As previously noted, universal jurisdiction entails an indirect, normative link between wrongfulness and domestic courts, namely the *erga omnes* quality of the breached norm. In that scenario, the state enjoys absolute discretion. Where the state is not directly linked with the wrongfulness of the investor, the exercise of extraterritorial jurisdiction remains optional. However, given the broad extraterritorial effect developed under the due diligence principle, a home state that is directly linked—through the bonds of nationality—to human rights violations committed by its own citizen-investors abroad is expected to exercise jurisdiction on

263. Rozakis, *supra* note 246, at 70.
264. *But see* Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT’L L. 989, 994, 1012–1013 (2008) (examining this question in light of the responsibility of the state for the illicit activities of the private military companies hired by it and suggesting that the condition of effective control for the exercise of extraterritorial jurisdiction applies as well in the case of the due diligence-stemming positive obligations of the state).
the basis of active personality. In that case, the exercise of active personality jurisdiction ceases to be a “privilege” for the home state and becomes an international obligation.\textsuperscript{265}

Finally, while the case law presented in this Article leaves no room for doubts concerning the conditioned extraterritorial effect of the due diligence obligations in the field of human rights, a potential objection is that, in these cases, states are in fact exercising effective control over the victim of the violation and not over the victimizer. Arguably, then, if the analogy must be a perfect one, the existent case law is inadequate to conclude, in positive terms, that the state of origin is obliged to undertake the prevention and punishment of the violations of human rights perpetrated abroad by its investors.

In countering this objection one could argue, as the \textit{Ilaşcu} judgment indicates, that there is nothing to suggest that the application of the extraterritorial effect of due diligence should be restricted only to control exercised over victims. On the contrary, there are numerous good rea-

\textsuperscript{265} One of the questions examined by the ICJ in the \textit{Genocide Case} was the alleged responsibility of Serbia for failing to prevent and punish—on the basis of the Convention for the Prevention and Punishment of the Crime of Genocide—the genocide against Bosnian Muslims in Srebenica. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (\textit{Genocide case}) (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), ¶ 425, available at http://www.icj-cij.org/docket/index.php?p1=3&p2=2 (Judgment of Feb. 26, 2007). The massacre was committed by Serbian nationals acting outside the territory of Serbia and was not attributable to it. The Court made clear that the duty to prevent corresponds to an obligation of conduct and decided to distinguish the two aspects of due diligence, namely prevention and punishment, and to consider them separately. \textit{Id.} ¶ 425–30. With respect to the obligation to punish, the Court noted that, given that the genocide has not been carried out in the territory of Serbia, Serbian tribunals were—under the Genocide Convention—allowed to punish it, but not obliged to do so. \textit{Id.} ¶ 442. Moreover, the ICJ concluded that Serbia had an obligation to cooperate with the ICTY. \textit{Id.} ¶ 443. The \textit{prima facie} impression given by ICJ’s decision is that it refuses to recognize the extraterritorial effect of the duty to punish. However, a more careful reading of the judgment reveals that the Court wished to remain “faithful” to the text of the Genocide Convention, which was its sole focus. As the Court made clear from the very beginning of its analysis on the duty to protect, the content of that duty varies from one instrument to another. Therefore, making a more general statement on the duty to protect is not within the Court’s scope. \textit{Id.} ¶ 429. Hence, the margin of appreciation that it recognizes to the respondent state concerning the punishment of genocide at domestic level stems exclusively from Article VI of the Genocide Convention, which is also establishing an obligation for it to co-operate with ICTY. \textit{Id.} ¶¶ 442–43. The aim of the Court is clearly not to depart from the regime of the “Genocide Convention” and to put the accent to the obligation for Serbia to co-operate with ICTY. Given these remarks, the Genocide Case cannot serve as a source for drawing more general conclusions on the nature of the extraterritorial effect of the duty to punish on the basis of active personality.
sons—hinged on international reality, as well as the normative structures of international law—for why the extraterritorial effect of the due diligence obligations of the state of origin should cover human rights abuses committed by investors abroad. First, the international reality today is such that, while host states are often not in a position to effectively protect the local population from the wrongful conduct of investors, international law remains quasi-silent at best, as to the international responsibility of investors. This creates a clear necessity to fight impunity in the field of international investments, and states should be expected to make a positive contribution toward that goal. Additionally, at the normative level, the *raison d’être* of the international law of human rights is to provide effective protection. Therefore, in terms of positive international law, states have the duty to fight human rights abuses through diligent conduct to the best of their capacities. After territoriality, nationality offers the second most pragmatic, substantive, tangible, and material basis allowing for the extension of jurisdiction beyond territory in order for states to effectively protect “legitimate community interest[s]”—obligations *erga omnes*—of the global community.266

That being said, it comes as no surprise that the CESCR included, in its *Comment* on the right to water, a clear obligation for states “to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.”267 According to the line

266. General Comment No. 31, *supra* note 96, at ¶2.

267. General Comment No. 15, *supra* note 147, at ¶33. The ICESCR, in contrast to the majority of other human right instruments, remains silent as to its jurisdictional sphere of application. Instead of defining it in terms of territory or jurisdiction, it only mentions, in Article 2(1), that all states must take steps, individually and through international assistance and cooperation to achieve the full realization of the rights enlisted in it. ICESCR, *supra* note 118, art. 2(1). By emphasizing the concept of progressive realization, Matthew Craven suggests that a “territorial conception of economic, social and cultural rights . . . puts into question the very rationale of ESC rights.” Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social and Cultural Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION* 71, 78 (Mashood A. Baderin & Robert McCorquodale eds., 2007). Fons Coomans suggests that, given the nature of social rights, there is no need for an immediate and direct link with the wrongful conduct of the state as the extraterritorial application of social rights “often relates to general situations of deprivation that cannot always be qualified in terms of violations of [social] rights of specific individual victims.” Fons Coomans, *Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHT TREATIES* 183, 186 (Fons Coomans & Menno T. Kamminga eds., 2004). Therefore, according to Coomans, extraterritoriality “cannot be qualified as the exercise of effective authority and control over persons, although persons in another country may be affected by a decision taken in a (donor) country.” *Id.*
of reasoning presented in this Article, such prevention cannot extend beyond the means available to a state. However, no matter how limited those means, it is difficult to imagine a set of circumstances that could keep states from—on the basis of the active personality principle—prosecuting their citizen-investors who, for instance, pollute the water resources in a third country, or from adopting domestic legislation that prohibits such behavior regardless of where it takes place.

CONCLUSION

Early on in this Article, it was suggested that the classic state-centric vision of international law can and should offer certain alternative solutions to the asymmetries that its legal order contains with regard to the disequilibrium in the attributes of the international legal personality of multinational corporations. The effective implementation by states of their due diligence obligations in the field of human rights protection, apart from protecting the victims of human rights abuses, will also be of

268. Although that legislation also cannot disproportionately violate rights of the investor.

269. See Institut de Droit Int’l, supra note 46, ¶ 6(a).

A State may impose reasonable regulations on a multinational enterprise whose parent company is established in that State with regard to the activity of its subsidiaries established in other States . . . . In applying such regulations a State should seek to avoid conflict with the law or regulations of the States in which the subsidiaries are established or the activities take place.

At the international level, there is nothing to prohibit states from including human rights provisions in their BITs. For example, the draft model of BIT proposed by Norway which provides for the encouragement of “investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.” Draft Model Norwegian Bilateral Investment Treaty art. 32, Dec. 19, 2007, available at http://www.asil.org/. However, one has to admit that the complex corporate structures of multinational corporations with the attendant overlap between multiple domestic legal orders and the difficulties in the determination of their nationality, render it more difficult to define the state which is entitled (or, according to the argument advanced by this Article, even obliged) to exercise control over a company and regulate its activities. Furthermore, as noted by Steven Ratner,

[m]any of the largest TNEs have headquarters in one state, shareholders in others, and operations worldwide. If the host state fails to regulate the acts of the company, other states, including the state of the corporation’s nationality, may well choose to abstain from regulation based on the extraterritorial nature of the acts at issue.

Ratner, supra note 5, at 463. In accordance with this argument, the role of the home state cannot be but complementary to that of the host state.

substantive aid in the process of crystallization of the *corpus juris* regulating both the primary and secondary obligations of investors in the field of human rights. However, even after the framework of the international obligations of corporations reaches a level of normative and practical maturity, the state’s role will continue to be central in its effective implementation.

This Article suggests that until the international legal order reaches that point of maturity, the existing *lacunae* may be filled by emphasizing the affirmative obligations that states have under the due diligence principle. Although priority is given to the state exercising territorial authority, states that are directly linked to a given situation (through nationality, for instance) are equally obligated to make a positive contribution to prevention and sanctioning of an international wrong. In fact, the latter state’s international obligations to demonstrate diligence are parallel and complementary to those of the state exercising territorial jurisdiction. The criterion here is the equilibrium that must be maintained between state sovereignty and effectiveness in human rights protection. Accordingly, where the host state (possessing the territorial link) is found to be in a situation of impossibility or unwillingness to adopt the necessary positive measures, it is for the state of origin (which possesses the nationality link) to exercise subsidiary diligence through the punishment of the human rights abuses of its investors. With respect to prevention, there is nothing that prevents both the home state and the host state from advancing parallel policies.

The need for such a pro-active approach is self-evident in light of today’s international reality, in which powerful corporations develop their activities within the territory of less *puissant* states. In this game, the state of origin is far from neutral and the puzzle is further complicated by the quasi-silence of international law as to human rights obligations and the responsibility of corporations.

The “construction” proposed in this Article regarding the international obligations of the state of origin was developed on three levels. First, we must accept that states have a generic obligation to demonstrate diligence. Second, for the standard of diligence to take on a concrete shape, it must be “embodied” within the substantive international human rights obligations of states. And, finally, these human rights obligations must develop an extraterritorial effect on the basis of a nexus connecting one state’s legal order with specific wrongful conduct. The cumulative confluence of these three conditions makes it not just possible but, in fact, obligatory for the state of origin to regulate and control the international activities of its investors. Accordingly, states enjoy discretion in punishing investors’ human rights breaches on the basis of universal jurisdic-
tion, while the “home” state bears a positive international obligation via active personality jurisdiction to both regulate and punish its own investors who abuse human rights abroad. Any failure to do so results in international responsibility on the part of that state.

Nonetheless, this construct of obligations does have specific limitations that stem from each level of the proposed structure and interact cumulatively. For one, due diligence only introduces an obligation of means. Moreover, leaving aside the handful of human rights norms that enjoy the *jus cogens* normative supremacy, the rest of the nonabsolute fundamental rights are susceptible to legitimate limitations. Additionally, proportionality is the instrument that enables the maintenance of a fair balance between the protection of dignity-stemming values of humanity on the one hand, and the libertarian margin of discretion for governments to regulate their markets and decide on priorities with regard to investment or, more broadly, to economic policy, on the other hand.
RECOGNIZING CIVIL RICO IN FOREIGN COURTS: SINCE THEY CAME, SHOULD WE BUILD IT?

“The periods in which countries have produced their greatest jurists, and exercised the widest influence, are those in which the concerns these jurists addressed were the least national.”

INTRODUCTION

Like a Hollywood blockbuster, this case contains an irresistibly thrilling set of ingredients: a transnational conspiracy implicating a prominent financial institution, an Eastern European crime syndicate facilitating transactions, billions of dollars changing hands, a public scandal, a high profile FBI investigation, a Department of Justice (“DOJ”) nonprosecution agreement, and, to top it off, a House Committee on Financial Services hearing. All of this transpired almost a decade ago, but only recently did the drama culminate when Russia’s Federal Customs Service (“FCS”) filed a lawsuit against the Bank of New York (“BONY”). To ponder the lawsuit’s aftermath and highlight its legal nuances will require us to take a few steps back and proceed with caution.


In May 2007, the FCS filed a lawsuit in Russia against BONY in the Arbitrazh Court of the City of Moscow\(^5\) (“the Moscow Arbitrazh Court”). The FCS sought to recover customs duties\(^6\) that it allegedly should have collected on the $7.5 billion that a BONY employee, along with her accomplices, helped to transfer out of Russia during the 1990s.\(^7\) The FCS also sought $22.5 billion in treble damages\(^8\) under the Racketeer Influenced and Corrupt Organization Act’s (“RICO”) civil component as damages for the massive capital flight caused by the illegal wire transfers that nearly crippled Russia’s economy.\(^9\) It is the first RICO claim filed in a foreign court.\(^10\) The unprecedented nature of the case makes it unusual and inevitably raises numerous questions.\(^11\) Blindsided by the Moscow Arbitrazh Court’s decision to apply civil RICO, BONY was exposed to potential liability equivalent to $7.5 billion for the unlicensed wire transfers, as well as three times that amount in damages under civil RICO.\(^12\)

A civil RICO claim litigated in a Russian court against an American bank (the “Russian RICO case”) is a novel, if not bizarre, lawsuit with regard to procedural posture and choice-of-law principles. On the one hand, the Russian RICO case is the product of an innovative approach to transnational litigation\(^13\) where a foreign plaintiff seeking a civil remedy...
asks a court in its home forum to apply U.S. federal regulatory law against a U.S. defendant. On the other hand, the FCS’s RICO claim may be described as the next “act” in the ongoing “saga” of foreign sovereign plaintiffs “knocking on the doors” of the U.S. courts to litigate similar claims. In these cases, foreign plaintiffs have lost revenues due to unpaid taxes or various duties that resulted from a pattern of transnational racketeering activity. Having suffered damages, they have brought RICO claims in U.S. courts in order to enforce their domestic revenue laws but have been unsuccessful. The FCS’s attorneys, however, chose to file their claim in Russia, the FCS’s home forum. But some have argued that their claim is still essentially for lost revenue.

Transnational regulatory litigation—that is, litigation to obtain a remedy for economic harm resulting from cross-border transactions—has gained momentum and is likely here to stay. Because domestic regulation is inherently limited to its borders, the growing volume of cross-border transactions and economic interaction creates an ever-expanding regulatory gap. Plaintiffs from around the world are increasingly seeking redress for malfeasance caused by foreign and multinational businesses.

Professor Buxbaum defines transnational regulatory litigation as private actions where national courts apply foreign or domestic economic regulatory law to remedy “cross-border regulatory harm.”

15. See Parloff, supra note 2, at 128; Goldhaber, supra note 2; Key Facts, supra note 5, at 3; Montgomery, supra note 2.
16. See generally Buxbaum, supra note 13, at 278–80 (discussing some of the recent claims that have failed due to the revenue rule); Elizabeth J. Farnam, Note & Comment, Racketeering, RICO and the Revenue Rule in Attorney General of Canada v. R.J. Reynolds: Civil RICO Claims for Foreign Tax Law Violations, 77 Wash. L. Rev. 843, 846 (2002).
17. See generally Buxbaum, supra note 13, at 278–80.
18. Att’y Gen. of Can. v. R. J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 103 (2d Cir. 2001) (holding that the revenue rule barred Canada’s civil RICO lawsuit for lost tax revenues caused by R. J. Reynolds’ extensive tobacco smuggling scheme); see Restatement (Third) of Foreign Relations Law § 483 (1987) (stating that courts in the United States are not required to recognize or to enforce judgments for the collection of taxes). See generally Buxbaum, supra note 13, at 278–80 (discussing the revenue rule and its role in “transnational regulatory” litigation); Farnam, supra note 16, at 846 (arguing that the revenue rule should be abandoned).
19. See Goldhaber, supra note 2; see also Key Facts, supra note 5, at 1.
20. See sources cited supra note 19.
21. See generally Buxbaum, supra note 13, at 251.
situated in remote corners of the world, far from the reach of their home courts and legislatures.\textsuperscript{23} Many recognize that the U.S. civil litigation system—the world’s most developed—may play a significant role in filling the gap in the global regulatory system should it hear transnational litigation.\textsuperscript{24}

The international civil society and its legal community, however, may justifiably distrust empowerment of one nation’s judiciary resulting from its adjudication of significant economic disputes with high financial and political stakes.\textsuperscript{25} One possible solution—where jurisdictional and choice-of-law rules permit—is to foster proper application of a nation’s regulatory law in courts other than those of the home forum where the law originates. The Russian RICO dispute is arguably a case-in-point. Such “legal tourism”—where plaintiffs seek application of a foreign regulation in their domestic courts—is likely to grow in the coming decades.\textsuperscript{26} The Russian RICO case’s legal nuances and implications are important factors in considering whether the U.S. judiciary, or Congress, as a matter of policy, should recognize similar claims in the future.

The Russian RICO case settled on October 22, 2009, for $14 million,\textsuperscript{27} but despite the settlement, the case still sets a precedent in that it is likely to spur similar lawsuits abroad. Indeed, the plaintiffs’ litigation strategy has permanently altered the “legal ontology” of transnational litigation, and this means U.S. courts will need to articulate a legal position in response. Had a money judgment actually been awarded—or, if such a judgment is awarded in the future—the judgment creditor would likely seek to enforce the judgment in a recognition action in the United States.\textsuperscript{28} The U.S. courts will eventually face a dilemma: they may either

\textsuperscript{23} See generally Buxbaum, supra note 13, at 251
\textsuperscript{24} See id. at 267–68.
\textsuperscript{25} See Buxbaum, supra note 13, at 272 (making a similar argument only with respect to litigation in U.S. courts); cf. Christopher A. Whytock, Litigation, Arbitration, and the Transnational Shadow of the Law, 18 DUKE J. COMP. & INT’L L. 449, 452 (2008). “Transnational regulatory cases [have been criticized for] . . . [shifting] power to the courts of particular countries in a way that . . . infringe[s] the sovereignty of other countries. Because the regulatory cases apply domestic rather than international law, they are also criticized as vehicles for the illegitimate application of national law to foreign conduct.” Buxbaum, supra note 13, at 272. It is noteworthy that the Russian RICO case stands squarely to face this criticism head on.
\textsuperscript{26} Cf. Buxbaum, supra note 13, at 252–53 (discussing relevance and prevalence of transnational regulatory litigation).
\textsuperscript{28} A recognition action is filed in a court as a first step in a judgment enforcement process. See generally Katherine R. Miller, Playground Politics: Assessing the Wisdom of
dismiss such recognition actions, rejecting the notion that a foreign plain-
tiff may bring a civil RICO claim in its home forum, or, in the spirit of
international comity, they may embrace the new development in
“transnational regulatory” litigation and recognize the foreign court’s
judgment. If or when a U.S. court chooses to recognize a foreign court’s
civil RICO judgment, that court will have to account for the judgment’s
novel element, namely the application of civil RICO by a foreign forum.

This Note will examine a hypothetical action for recognition in U.S.
courts and the various threshold issues that would arise. Essentially, I
will discuss the ways in which a U.S. court should analyze these nuanced
issues under existing precedent. I will argue that U.S. courts—especially
in the Russian RICO case scenario—may recognize a foreign money
judgment rendered abroad under civil RICO because nothing in the Rus-

sian case triggers mandatory nonrecognition under the Recognition
Act. Thereafter, I will conclude that, as a matter of sound legal policy,

writing a reciprocity requirement into U.S. international recognition and enforcement

courts to extend comity to a foreign judgment, courts of that foreign nation must reciprocate
by extending comity to U.S. judgments).

comity, in the legal sense, is neither a matter of absolute obligation on the one
hand, nor a mere courtesy and good will upon the other. But it is the recogni-
tion 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.

563 (2000) (arguing that the significance of international comity is diminishing). See gener-
ally Joel R. Paul, Comity in International Law, 32 harv. int’l L. J. 1, 37 (1991)
giving historical and comparative background on comity in international law and sug-

gesting that the U.S.S.R., as a civil code jurisdiction, generally rejected the notion of comity).

30. See Buxbaum, supra note 13, at 278. In fact, the FCS claim is the type that has
been categorized as a “transnational regulatory” claim because collection of lost tax reve-

ue falls within the ambit of economic regulation. See id. at 278–80.

31. For the purpose of the analysis herein, I will assume that FCS succeeded on the
merits in the Moscow Arbitrazh Court and will now attempt to have the judgment recog-
nized in a U.S. court.

32. See generally Joseph J. Simeone, The Recognition and Enforceability of Foreign
Country Judgments, 37 St. Louis U. L. J. 341, 362 (1993); Violeta I. Balan, Comment,
Recognition and Enforcement of Foreign Judgments in the United States: The Need for
aspects of foreign money judgment recognition analysis).

(2005) [hereinafter Recognition Act].
U.S. courts should recognize a hypothetical Russian RICO judgment. Finally, in light of the Russian RICO case offering a “new paradigm” in “transnational regulatory” litigation, I will propose a modification to the recognition analysis that will account for issues presented should a foreign court apply U.S. law against an American defendant. Accordingly, Part I will lay out the background of the Russian Court case as well as the RICO Act in general. Part II will discuss the current recognition regime. Part III will explain why civil RICO may be applied by a foreign court. Part IV will discuss the strongest available defenses against recognition of a hypothetical Russian RICO case judgment in the United States. And, finally, Part V will propose a modification to the recognition analysis under the Recognition Act.

I. THE FACTS AND THE LAW

A. The Facts

Let us start from the beginning—the early 1990s. BONY first established its operations in Eastern Europe and opened a branch in Moscow after the disintegration of the Soviet Union. At that time, BONY became the leading U.S. bank in Russia in terms of its business volume with Russian banks and citizens. Lucy Edwards, a Russian expatriate, worked for BONY as a midlevel bank official during the 1990s. Together with her husband, Peter Berlin, and another junior BONY employee, Edwards used BONY accounts and software to arrange unlicensed wire transfers totaling nearly $7.5 billion from Russia to the U.S. over the course of three years.
In 1996, Berlin, claiming to run an import-export business, opened accounts at a BONY branch in Manhattan.\(^{41}\) Subsequent investigation revealed\(^{42}\) that the accounts were used in Russia to perform illicit money transfers\(^{43}\) by another Russian bank’s customers, some of whom carried “machine guns.”\(^{44}\) The investigation showed that, to hide her scheme from the BONY officials, Edwards “bribed a subordinate and falsified records.”\(^{45}\) Further, to enable the transfers, Edwards supplied Berlin with BONY’s proprietary software that enabled them to conceal the wire transfers from BONY’s auditors.\(^{46}\) In compensation for the transfers, the couple was paid $1.8 million.\(^{47}\) As a result of the BONY employees’ conduct, Russia suffered massive capital flight during the 1990’s that further exacerbated Russia’s economic crisis at the time.\(^{48}\) The FBI began its investigation in 1999.\(^{49}\) The scope and breadth of the fraud was so wide that it became the subject of the testimony of BONY’s CEO before the House Committee on Banking and Financial Services.\(^{50}\)

In February 2000, Berlin and Edwards pled guilty to “conspiring to violate U.S. laws.”\(^{51}\) The couple also “pled guilty to, among other things, conspiracy to . . . promote wire fraud,” and they admitted that their accounts were used ‘among other things, to launder money.’\(^{52}\) In November 2005, BONY entered into a nonprosecution agreement with the U.S. Attorney for the Southern District of New York.\(^{53}\) BONY agreed to pay a $14 million fine and to implement “new anti-money-

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41. Parloff, supra note 2, at 130.
43. Parloff, supra note 2, at 130.
44. Goldhaber, supra note 2.
45. Parloff, supra note 2, at 129.
46. See generally Parloff, supra note 2; Goldhaber, supra note 2.
47. See generally Parloff, supra note 2; Goldhaber, supra note 2.
49. See Parloff, supra note 2.
50. See Committee Hearing on Russian Money Laundering, supra note 2.
52. Goldhaber, supra note 2.
53. Goldhaber, supra note 2; see Non-Prosecution Agreement, supra note 42.
laundering policies and procedures, including the creation of a new compliance position.\textsuperscript{54}

\textbf{B. The Litigation}

On June 30, 2008, BONY’s attorneys filed a motion in the Moscow \textit{Arbitrazh} court to dismiss the FCS suit on grounds that a Russian trial court may not apply civil RICO to this case.\textsuperscript{55} The judge\textsuperscript{56} requested briefs on the issue from both sides.\textsuperscript{57} A month later, on July 28, the Court denied the motion and decided to proceed under civil RICO.\textsuperscript{58} Then, pre-trial hearings began in Moscow at the end of October.\textsuperscript{59} On October 6, the court granted the FCS’s request for a continuance and stayed the action six weeks.\textsuperscript{60} And thereafter, the case was adjourned until June 10, 2009 pending settlement agreement.\textsuperscript{61} Even now that the case has settled, the legal implications of the lawsuit remain significant, but we are left to ponder what could have been. If BONY had lost at trial, it could have pursued three levels of appeal: the appellate \textit{arbitrazh} courts, the federal circuit \textit{arbitrazh} courts, and the Supreme \textit{Arbitrazh} Court.\textsuperscript{62} As one


\textsuperscript{55} Goldhaber, supra note 2.

\textsuperscript{56} One common procedural feature among a common and civil law systems is that, in both, judges decide questions of law. See \textsc{Sofie Geeroms}, \textsc{Foreign Law in Civil Litigation: A Comparative Analysis} 13 (James J. Fawcett ed., 2004). One significant difference, however, is that in a common law system, juries decide questions of fact. See \textsc{id}. In most civil law systems, judges decide questions of fact. See \textsc{id}.

\textsuperscript{57} Goldhaber, supra note 2.

\textsuperscript{58} See Montgomery, supra note 2. Moscow \textit{Arbitrazh} Court, being a court of first instance, does not have a website. At the time of this writing, there are no public documents or press releases available from the governmental source in Russian. Thus, I must rely primarily upon non-Russian sources. It is unclear whether this leaves us with a more, or less, objective view of the case.

\textsuperscript{59} Parloff, supra note 2, at 135. “If the case cannot be resolved through governmental channels, however, the bank may have no choice but to settle rather than risk litigating in a forum that appears to lack both the expertise and independence to render an impartial result . . . .” \textsc{id}, at 135.


\textsuperscript{62} Goldhaber, supra note 2.
Several commentators have raised the obvious question: why was this case not being brought in the U.S.? Could the FCS’s claim be res judicata? In *Pavlov v. Bank of New York*, private Russian parties brought a civil RICO claim arising out of the same core facts. In *Pavlov*, depositors of another Russian bank sued BONY to recover damages that were allegedly caused by unauthorized money transfers and money laundering that were the subject of the FBI’s investigation of BONY. The *Pavlov* plaintiffs claimed that the illicit money transfers—those at the heart of the FCS’s claim—caused their bank’s insolvency and thus caused them to lose their deposits. United States District Judge Lewis Kaplan, in a memorandum opinion, dismissed the claim on *forum non conveniens* grounds. Nowhere in his decision did Judge Kaplan con-

63. *Id.*
64. *Id.*; see Parloff, *supra* note 2, at 132.
65. *Pavlov v. Bank of New York*, Inc., 135 F. Supp. 2d 426, 426 (S.D.N.Y. 2001) (finding that the complaint failed to state a RICO claim because it did not allege an enterprise extending beyond the objectives of the racketeering acts charged or a structural hierarchy, and dismissing the two remaining plaintiffs’ state law claims for *forum non conveniens*), *vacated*, 25 F. App’x 70 (2d Cir. 2002) (vacating the district court’s decision, but disagreeing *only* with the Court’s dismissal of plaintiffs’ RICO claim for failure to adequately plead a RICO enterprise, and remanding for consideration of other bases for dismissal), *remanded to No.* 99 Civ. 10347, 2002 WL 31324097 (S.D.N.Y. 2002) (finding plaintiffs in default and dismissing with prejudice for lack of prosecution).
66. *Id.*
67. *Id.*
68. *Id.* at 428–29.
69. *Id.* at 426.
70. *Id.* at 428–29.
template that the FCS, with the help of its U.S. lawyers, would bring a civil RICO claim in Russia arising out of Pavlov’s same core facts.

The Pavlov decision, however, is unlikely to preclude the FCS’s current claim from U.S. courts because the FCS and the Pavlov plaintiffs are not in privity. The FCS is a sovereign, while the Pavlov plaintiffs are private parties. The more likely reason that the case was not brought in the U.S. was that the FCS acts as a foreign sovereign that was arguably seeking to recover lost tax revenue. As a foreign sovereign, the FCS may be barred from bringing a civil RICO claim in U.S. courts because of the “revenue rule.” The revenue rule is not categorical and is not a clear cut bar for the purposes of judgment recognition because of the rule’s fragile doctrinal and policy foundations. In light of the novel post-

71. The U.S. lawyers lined up a phalanx of prominent U.S. academics as expert witnesses to the Moscow Arbitrazh Court on the issue whether it may apply civil RICO. Goldhaber, supra note 2. One of them was Robert Blakey, one of the RICO statute’s principal drafters, who testified on behalf of Russian FCS that it would not be inconsistent with the Congressional intent to apply civil RICO. The Final Brief, supra note 38, at para. 87, 90. Alan Dershowitz, a Harvard Law School Professor and a leading expert on civil RICO, also testified for the Russian FCS that, inter alia, BONY is not prejudiced to being held accountable under civil RICO as it is a U.S. corporation that must conform to U.S. laws. Id. at para. 100. Also, the Honorable Judge George Pratt, who served as a U.S. District Judge and then sat on the United States Court of Appeals for the Second Circuit until 1995, interpreted the civil RICO and its elements for the Moscow Arbitrazh Court. Id. at para. 108.

72. See Pavlov, 135 F. Supp. 2d at 435–38. Moreover, in ruling on the motion for forum non conveniens, the Court relied on the assumption that the plaintiff’s claim would be adjudicated under Russian law. Id. For a discussion of the consequences of dismissal based on forum non conveniens, see Howe v. Goldcorp Investments, Ltd., 946 F.2d 944, 944 (1st Cir. 1991) and Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd., 918 F.2d 1446, 1446 (9th Cir. 1990). See, e.g., Zen-Noh Grain Corp. v. M/V Theogenitor, No. Civ.A. 97-543, 2002 WL 31886745, at *6 (E.D. La. Dec. 18, 2002) (noting that “[d]ismissal on the grounds of forum non conveniens is appropriate even though it may result in a foreign jurisdiction applying American law.”).

73. In Pavlov, the plaintiff's claims were eventually dismissed with prejudice for lack of prosecution. Pavlov v. Bank of New York, Inc., No. 99 Civ. 10347, 2002 WL 31324097 (S.D.N.Y. Oct. 16, 2002). While dismissal with prejudice is considered to have res judicata effect, the parties must be identical or in privity. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 19–20 (1982).

74. See Goldhaber, supra note 2. See generally Farnam, supra note 16 (providing a thorough discussion of lost revenue claims).

75. See Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 103 (2d Cir. 2001); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987). “The courts recognized the discretionary nature of the rule, acknowledging that U.S. courts can choose, in light of the need for international comity and cooperation between countries, to give effect to a foreign claim.” Buxbaum, supra note 13, at 279.
ure of the Russian RICO case, however, the preliminary issue for recognition is whether a Russian court may apply civil RICO.

C. Racketeer Influence and Corrupt Organizations Act

Congress enacted RICO in 1970 as part of an effort to improve law enforcement’s ability to prosecute organized crime. RICO is, at heart, a criminal statute. If found guilty of “racketeering,” defendants can receive lengthy prison sentences and be subject to large fines. But RICO also contains a civil component. While civil RICO provides for treble damages under the statute’s forfeiture provision, defendants can also be forced to disgorge any property acquired through the predicate illegal activity. In enacting this “private attorney general” mechanism, Congress evidently intended to allow private plaintiffs to fully recover losses caused by racketeering; in doing so, Congress sought RICO to function as a deterrent.

79. Id. at 526. The essential elements of a civil RICO action are: (a) a pattern of racketeering activity; (b) the existence of an enterprise engaged in or affecting interstate or foreign commerce; (c) a nexus between the pattern of racketeering activity and the enterprise; and (d) a resulting injury to the plaintiff’s business or property. See id.
81. Id. “Like compensatory damages, treble damages are mandatory once the victim establishes liability and the extent of the harm [and] . . . [u]nlike punitive damages, treble damages are not discretionary either in award or amount . . . .” Morse, supra note 78, at 528.
83. “The appeal of civil RICO is obvious . . . [it] entitles a successful plaintiff to treble damages as well as attorneys’ fees. As a result, it provides a powerful litigation weapon and a strong lever in settlement negotiations.” Robert M. Jarvis, The Use of Civil Rico in International Arbitration: Some Thoughts after Shearson/American Express v. McMahon, 1 TRANSNAT’L L. W 1, 6 (1988). “[S]tatutory language and statutory construction . . . reflect Congress’ intent that RICO’s treble damage provision serve broad remedial purposes.” Morse, supra note 78, at 530.
Civil RICO gained wide use during 1980’s. Some have criticized the use of the statute to pursue conduct that is arguably less extreme than the era’s typical criminal “racketeering,” which served as the impetus for the statute and which RICO’s broad provisions were designed to combat. The Supreme Court, however, has stated that RICO is to “be liberally construed to effectuate its remedial purposes.” The Court noted in 1981 that RICO “has become a tool for everyday fraud cases brought against ‘respected and legitimate’ enterprises.” In sum, civil RICO is a powerful litigation tool in the hands of a resourceful plaintiff.

While RICO permits foreign governments to recover losses resulting from racketeering activity, Congress did not consider at the time of enactment whether RICO could be applied by a foreign court. Congress’s sole focus was merely to enact a law to be applied, first and foremost, by U.S. courts to combat organized crime domestically. There is simply no evidence of Congressional intent as to civil RICO’s effect or applicability abroad beyond what Congress intended to effec-

84. Jarvis, supra note 83, at 6 (recounting that “civil plaintiffs started to include RICO counts in their suits, often accompanied by fraud and antitrust claims”).

85. See generally O’SULLIVAN, supra note 14, at 657–58. In enacting RICO, the “legislature was . . . addressing . . . pervasive public interest [in a governmental response] to unprecedented domestic strife and violence, [thus] Congress sought to provide federal law enforcement officials with a weapon against organized crime.” Jarvis, supra note 83, at 5.

86. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985). In Sedima, a Belgian corporation filed a civil RICO claim against an American corporation based on mail and wire fraud. Id. at 483–84. The Sedima court also stated that a civil RICO claim does not require a finding of a predicate criminal act. Id. at 485.

87. Id. at 499; see also United States v. Turkette, 452 U.S. 576, 587 (1981) (holding that both legitimate and illegitimate businesses could be prosecuted under civil RICO).

88. RICO defines a person as “any . . . entity capable of holding a legal or beneficial interest in property.” 18 U.S.C. §1961(3) (2006). Thus, “a foreign government is considered a person for the purposes of the RICO statute, allowing foreign governments to file RICO claims,” Farnam, supra note 16, at 846 (citing Phil. v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988); cf. Ill. Dep’t of Revenue v. Phillips, 771 F.2d 312, 316 (7th Cir. 1985) (holding that state governmental units can sue under RICO)).

89. But RICO does not contain a mandatory provision requiring litigation in U.S. courts. Cf. Transunion Corp. v. PepsiCo, Inc., 811 F.2d 127, 130 (2d Cir. 1987) (“A review of the legislative history of RICO, however, discloses no mandate that the doctrine of forum non conveniens should not apply[].”); see also Gemini Capital Group, Inc. v. YAP Fishing Corp., 150 F.3d 1088, 1092 (9th Cir. 1998) (holding that a RICO action “does not implicate any United States law which mandates venue in the United States district courts.”). In Transunion, the court affirmed dismissal of a civil RICO claim even though the Philippine court might apply civil RICO law. Transunion Corp., 811 F.2d at 130.

90. See generally O’SULLIVAN, supra note 14, at 657–58.
But criminal laws are public laws and may only be enforced by the enacting sovereign and applied only by its courts, never by a foreign judiciary. Importantly, while RICO is a criminal law, and thus public, RICO’s civil component may be conceptualized as a quasi-public law because it provides a private cause of action based on a criminal violation of public law.

The key to solving the Russian Court case puzzle is to delineate how a potential plaintiff obtains a cause of action under civil RICO. The BONY employees’ criminal conduct was imputed to BONY in the course of the DOJ white-collar crime investigation that resulted in a nonprosecution agreement where BONY admitted responsibility for its conduct. The FCS’s attorneys, thus, argued that the Moscow Arbitrazh Court would not need to resolve whether a predicate criminal violation took place for two reasons. First, Lucy Edwards, BONY’s employee, was convicted in federal court on July 26, 2006, and, second, BONY has admitted wrongdoing in its nonprosecution agreement with the DOJ. The predicate violation was the U.S. money laundering statute, 18 U.S.C. § 1956, which is a valid predicate act under RICO. Because a corporation is a legal fiction that can only act through its employees, BONY is vicariously liable for Edwards’ conduct. Thus, the Moscow Arbitrazh court’s task

91. See id.
92. Jarvis, supra note 83, at 16 n. 64. In the United States, the ban on enforcing penal legislation can be traced to The Antelope, 23 U.S. (10 Wheat.) 66 (1825), in which Chief Justice Marshall held that “[t]he Courts of no country execute the penal laws of another. . . Id. at 123. The Antelope involved a question whether slaves on ships seized by the United States should be returned to Spanish and Portuguese slave traders. The Antelope, 23 U.S. 66. The Court rejected the argument that it should enforce the Spanish and Portuguese laws against the slave trade. See William S. Dodge, Breaking the Public Law Taboo, 43 HARV. INT’L L.J. 161, 165 (2002).
93. See generally Dodge, supra note 92, at 161 (arguing that “nations should break the public law taboo because cooperation in the enforcement of public law would be mutually beneficial.”).
95. See Non-Prosecution Agreement, supra note 42.
96. See id.
98. See Brady v. Dairy Fresh Products, 974 F.2d 1149 (9th Cir. 1992). Ninth Circuit stated with respect to respondeat superior liability for violations of §1962(c):

We hold that an employer that is benefited by its employee or agent’s violations of section 1962(c) may be held liable under the doctrines of respondeat superior and agency when the employer is distinct from the enterprise. Corporations and other employers that have benefited from their employees or
would be simplified. It would not need to interpret the money laundering statute, nor would it need to find BONY guilty under U.S. criminal law. The predicate investigation and conviction was conducted in the U.S., where it belonged. The genius of the FCS attorney’s innovative strategy was perhaps that, once they convinced the Moscow Arbitrazh court that it may do so, the court would have needed only to interpret and apply civil RICO to award civil damages, without meddling in the U.S. criminal justice system.

Because its employees’—and, thus, BONY’s—“racketeering activity” allegedly caused damage in Russia, a Russian plaintiff (here the FCS) has a cause of action under civil RICO.\(^9\) On the one hand, the fact that the FCS is seeking remedy for allegedly unpaid customs duties places the Russian lawsuit among the “garden variety” civil RICO claims for lost revenue that are regularly brought in the U.S.\(^10\) On the other hand, FCS and its attorney were asking for a civil remedy in the form of treble damages pursuant to civil RICO. In that sense, they were not looking to recover unpaid duties or taxes, but simply seeking damages for the predicate wrongful conduct. This, the attorneys argue, places their civil RICO claim outside the typical revenue claims and would thus make the revenue rule inapplicable. Nevertheless, the Russian RICO case raises numerous issues for the purposes of recognition in the U.S.

II. RECOGNITION OF FOREIGN JUDGMENTS IN THE U.S.

The United States is not a party to any bilateral or multilateral treaty on recognition and enforcement of foreign judgments.\(^10\) Furthermore, there is no national, uniform approach to recognition and enforcement of for-

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9. See Buxbaum, supra note 13, at 278. See generally Farnam, supra note 16 (discussing the lost revenue claims).

10. See Buxbaum, supra note 13, at 278.
eign judgments in the U.S.\textsuperscript{102} Because recognition actions come from abroad, they must be filed in federal district courts under diversity jurisdiction.\textsuperscript{103} The \textit{Erie} doctrine\textsuperscript{104} has led federal courts to conclude that state law governs judgment recognition in diversity cases.\textsuperscript{105} As a result, federal courts around the country apply standards from one of the following sources:\textsuperscript{106} Uniform Foreign Money-Judgments Recognition Act\textsuperscript{107} ("Recognition Act") or "a similar statute";\textsuperscript{108} Restatement (Third) of Foreign Relations Law;\textsuperscript{109} "prior state court decisions setting forth local common law rules";\textsuperscript{110} or "prior federal court decisions determining as best as possible the law the state court would have applied if it had been faced with the same issue."\textsuperscript{111} The New York recognition statute reflects the common array of doctrinal principles in the Recognition Act, which in turn mirrors the Restatement.\textsuperscript{112} Any recognition discussion, however, must begin with the common law antecedent to the modern law of recognition.

\textbf{A. The Rule Based on Comity: Hilton v. Guyot}

Originally, the U.S. inherited the old English common law rule that a foreign money judgment was only "prima facie evidence of the matter

\begin{itemize}
\item\textsuperscript{102} Ronald A. Brand, \textit{Enforcement of Foreign-Money Judgments in the United States: In Search of Uniformity and International Acceptance}, 67 NOTRE DAME L. REV. 253, 257 (1991) (explaining that Congress has not passed a statute and that the federal courts have yet to find common ground, and arguing further that the judiciary should adopt a uniform rule for recognition and enforcement of foreign judgments).
\item\textsuperscript{103} \textit{Id.} at 262. "Diversity jurisdiction is founded on the article III jurisdiction of the federal courts, U.S. \textit{C}ONST. art. III, and is statutorily prescribed by 28 U.S.C. \textsection 1332 (1988) . . . ." \textit{Id.} at 262 n.32.
\item\textsuperscript{104} \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 64 (1938).
\item\textsuperscript{105} \textit{Id.} at 262. "Diversity jurisdiction is founded on the article III jurisdiction of the federal courts, U.S. \textit{C}ONST. art. III, and is statutorily prescribed by 28 U.S.C. \textsection 1332 (1988) . . . ." \textit{Id.} at 262 n.32.
\item\textsuperscript{107} \textit{Recognition Act}, \textit{supra} note 33. The Recognition Act was proposed because "[c]odification by a state of its rules on the recognition of money judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad." \textit{Id.} at prefatory note.
\item\textsuperscript{108} \textit{Id.} at prefatory note.
\item\textsuperscript{109} \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} §§ 481–482 (1987).
\item\textsuperscript{110} Brand, \textit{supra} note 102, at 262.
\item\textsuperscript{111} \textit{Id.}
\item\textsuperscript{112} N.Y. C.P.L.R. §§ 5301–05 (Consol. 2004).
\end{itemize}
decided." Under this rule a foreign judgment was “not conclusive of the merits of the dispute between the parties” and, thus, was likely to be subject to a thorough review. In 1895, the Supreme Court rejected the English rule in an influential case Hilton v. Guyot. The Hilton Court adopted a rule based on comity. In lowering the bar to recognition, the Hilton decision afforded deference to a foreign judgment. But it required further analysis of a number of the judgment’s aspects.

Specifically, the foreign court rendering the judgment must have had jurisdiction over the cause of action and the judgment “must have been rendered . . . upon regular proceedings and due notice” by a court within a “system of jurisprudence” that provides an “impartial administration of justice.” The Hilton Court required absence of prejudice or fraud in the proceedings, as well as in the court and in the system of laws. The Court held that in the absence of any other “special reason,” if the judgment satisfied the above criteria, the merits of the case should not be tried again “upon the mere assertion” by a defendant that the original “judgment was erroneous in law or in fact.”

In order to approach the discussion of the Russian RICO case objectively, it is necessary to dispel the pervasive perception of Russian courts’ partiality, which is contrary to the Hilton “impartiality” requirement. Frequently, when a case is heading to a court in Russia, litigants and non-litigants with vested interests question the forum’s integrity by raising issues of partiality or political favoritism in order to frustrate the litigation. Not surprisingly, the party that raises the issue is usually the

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113. See FOLSOM, GORDON, & SPANOGLE, JR., supra note 34, at 730.
114. Balan, supra note 32, at 235 (citing RALPH H. FOLSOM, MICHAEL WALLACE GORDON, & JOHN A. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS 1109 (2d ed. 2001)).
115. FOLSOM, GORDON, SPANOGLE, JR., supra note 34, at 730.
117. Id. at 170; see also FOLSOM, GORDON, SPANOGLE, JR., supra note 34, at 730.
118. See Hilton, 159 U.S. at 158.
119. Id. at 163–64.
120. Id. at 166–67.
121. Id. at 158.
122. Id.
123. Id.
124. Id.
125. For example, on October 17, 2008, the Moscow Arbitrazh Court, the venue for the FCS’s claim, “overturned most of [the] Russian government’s tax claims against the British Council, the British government’s cultural relations arm.” Ximena Marinero, Russia Arbitration Court Rules Most Tax Claims Against British Council Unlawful, JURIST, Oct. 18, 2008, http://jurist.law.pitt.edu/paperchase/2008/10/russia-arbitration-court-rules-most-tax.php. This dispute over unpaid taxes was highly publicized and took place in the
party that is likely to benefit from being in a forum other than Russia. For example, the Russian plaintiffs in *Pavlov*, in resisting BONY’s motion for *forum non conveniens*, claimed that Russia would not be an appropriate forum because its courts are believed to be prone to partiality. Nevertheless, BONY persisted with its *forum non conveniens* motion despite Russian plaintiffs’ allegation of partiality in the Russian forum, which would, if it were true, adversely affect BONY as a foreign litigant. As a result, BONY would now be unlikely to be able to persuade a U.S. court that a Russian judgment should not be recognized on grounds of Russian courts’ alleged partiality. While the inference here is simple, it is an important one: litigants’ allegations of a Russian forum’s inadequacy due to partiality of the Russian judi-
context of a diplomatic standoff between Russia and Great Britain. *Id.* It appears that the Moscow *Arbitrazh* court has thwarted the Kremlin’s attempt to corner the British Counsel. This is indicative of Russia’s courts’ burgeoning independence, assertiveness, and commitment to rule of law.

126. *See Pavlov v. Bank of New York, Inc.*, 135 F. Supp. 2d 426, 433 (S.D.N.Y. 2001). As matter of speculation, if a Russian court displayed bias against a party—as it may have during the Soviet era that was marred by the State control over the judiciary—it would likely be against a foreign party, not its national.

127. *Id.* at 435. “In view of BNY[M]’s staunch assertion here that the Russian legal system provides an adequate alternative forum, it quite likely would be estopped to mount such a challenge to a Russian money judgment in this case. Moreover, at least one U.S. court has recognized and enforced a Russian custody decree.” *Id.* at 435.

128. On the other hand, the Russian Court case’s press coverage makes it clear that, to assuage its shareholders, BONY was attempting to sway the “proverbial jury in the court of public opinion.” Claiming to be a victim of political influence and corruption in the Russian judiciary, BONY attempted to discredit the case in the press, a litigation tactic equally utilized by domestic litigants. BONY argued that the courts’ partiality is likely to impede equitable resolution on the merits. Parloff, *supra* note 2, at 127; *Key Facts, supra* note 5, at 3; *see also* Press Release, Bank of New York Mellon, The Fundamental Flaws in the Federal Customs Service’s Case, http://www.bnymellon.com/russiacase/rebuttal.pdf (last visited Oct. 4, 2009). This position, however, is contrary to the one BONY had taken on a motion for forum non conveniens in *Pavlov*. *See supra* text accompanying notes 72–73.


130. Moreover, commentators have described Russia’s *arbitrazh* courts as a place where the State’s influence is no longer as palpable as it was during the Soviet era. *See generally* Kathryn Hendley, *Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts*, 46 AM. J. COMP. L. 93, 93 (1998) (discussing the transition of the *arbitrazh* courts toward an independent judiciary).
B. Normative Standards in the Recognition Act and the Restatement

It is noteworthy that the Pavlov court recognized that, had the plaintiffs sued BONY in Russia, a Russian judgment would be subject to recognition proceedings in the U.S. In response to plaintiffs’ concern about having to re-litigate a substantial portion of a judgment from a Russian court, the Pavlov court stated:

The Uniform Foreign Country Money-Judgments Recognition Act, which has been adopted in New York, insofar as it is relevant here, would permit a court to refuse enforcement to a Russian money judgment only if it concluded that the Russian legal system “does not provide impartial tribunals or procedures compatible with the requirements of due process of law . . .”

The Recognition Act and Restatement (Third) of Foreign Relations Law are the prevailing sources of normative principles and criteria for judgment recognition in a majority of American jurisdictions. The

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The effectiveness of arbitrazh courts in Russia has grown. . . . Numerous efforts were made in order to create uniformity in application of law. Since 2000, the Supreme Arbitrazh Court of the Russian Federation has introduced a number of rulings and governing interpretations aimed at stabilisation of the judicial practice. These clarifications particularly have to do with such essential aspects of commercial relationship as protection of shareholders rights, turnover of securities, performance of insurance contracts, state guarantees for foreign investors, disputes with state and state-owned enterprises, bankruptcy procedures, and a huge variety of tax issues.

Id.

132. Historically, “arbitrazh was relatively free of corruption . . . because the stakes in an economic dispute between state-owned enterprise[s] were generally lower than . . . in criminal cases,” Hendrix, supra note 129, at 153.


134. See RECOGNITION ACT § 1(2), supra note 33.


136. See Brand, supra note 102, at 268 (juxtaposing each criterion in both sources and finding merely “cosmetic” differences between the Recognition Act and the Restatement). Brand continues:

[T]here are only two significant differences between the Recognition Act and the Restatement. Whereas the Act treats lack of subject matter jurisdiction as a
Recognition Act and the Restatement are also substantially similar. In an action for recognition, U.S. courts focus on a common array of issues entailing the presence or absence of the following elements: finality and conclusiveness of the judgment; due process; in personam and in rem jurisdiction; subject matter jurisdiction; notice and opportunity to be heard; fraud; public policy; inconsistent judgment.

mandatory ground for nonrecognition, it is only a discretionary ground under the Restatement rule. In addition, the Act includes a limited forum non conveniens ground in its list of discretionary grounds for nonrecognition.

Id.

137. See id. Recognition is conceptually and procedurally different from enforceability—a judgment must first be recognized by U.S. courts in order to be enforced. Enforceability is regulated by the Enforcement of Foreign Judgments Act, which deals mainly with the procedure, or the “how,” for judgment collection. See id.

138. Id. at 269.

139. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. e. “[A] judgment at law is not a final judgment if further judicial action by the court rendering the judgment is required to determine the matter litigated.” RESTATEMENT OF JUDGMENTS § 41 cmt. a (1942).

140. RECOGNITION ACT § 4(a), supra note 33. “[A] mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.” Id. “The . . . due process [issue] has arisen principally in the context of discussions of personal jurisdiction. United States courts apply United States concepts of due process developed in International Shoe v. Washington[, 326 U.S. 310 (1945),] and its progeny, rather than looking to similar concepts applicable in the foreign jurisdiction.” Brand, supra note 102, at 270; see CIBC Mellon Trust Co. v. Mora Hotel, 100 N.Y.2d 215, 222 (2003) (holding that New York State law does not demand that the foreign tribunal’s procedures exactly match those of New York—rather, the statute is satisfied if the foreign court’s procedures are compatible with the requirements of due process of law).

141. RECOGNITION ACT § 4(a), supra note 33, at 268; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(1)(b). In Hilton, the Court required that “[e]very foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice.” Hilton v. Guyot, 159 U.S. 113, 166–67 (1895).


143. “Courts have required proper notice, generally in the form of proper service of process, as a prerequisite to granting recognition or enforcement of a foreign judgment.” Brand, supra note 102, at 274.

144. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482; see also Hilton, 159 U.S. at 206. Generally, “fraud [is] a defense to the recognition of a foreign-nation judgment. . . . [A] foreign judgment can be impeached only for extrinsic fraud, which
ments, or judgments contrary to party agreement, and convenience of forum. In the Russian Court case, public policy and due process are the most fertile grounds for defenses against the recognition of the Russian Court’s judgment.

Judging by the history of the proceedings in Moscow and by what issues BONY has raised in the court and in the press, most of the above criteria will not present an obstacle for the recognition of the Russian Court’s judgment. At this stage, BONY has not alleged any irregularities or foul play in the Russian RICO case, except that initially it has challenged the court’s subject matter jurisdiction, instinctively objected to deprives the aggrieved party of an adequate opportunity to present his case to the court.” Brand, supra note 102, at 274.


146. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. g. “Inconsistent judgments may arise either in the context of two conflicting foreign judgments or of a foreign judgment in conflict with a judgment from another United States court.” Brand, supra note 102, at 276.

147. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. h.

148. The Recognition Act allows nonrecognition where the judgment is “rendered in a foreign country on the basis only of personal service,” and where the court “believes the original action should have been dismissed by the court in the foreign country on grounds of forum non conveniens.” Brand, supra note 102, at 277; see also RECOGNITION ACT § 4 cmt., supra note 33, at 268–69. The forum non conveniens exception . . . is available only when personal jurisdiction is based solely on personal service. . . . [If] jurisdiction exists on any other ground, recognition may not be refused because the foreign court was a seriously inconvenient forum.” Brand, supra note 102, at 277.

149. While there is a dearth of information available, from what has surfaced in the U.S. press, it appears that BONY initially sought to transfer the lawsuit to a Russian Tax court. See Parloff, supra note 2, at 128; Goldhaber, supra note 2; Key Facts, supra note 5, at 3. At the time, that motion failed and the Arbitrazh court asserted jurisdiction over the case. Parloff, supra note 2, at 128. Moreover, BONY had entered appearance in several hearings. See Parloff, supra note 2, at 128. Because the subject matter jurisdiction is a discretionary nonrecognition ground, BONY would have likely lost this argument at the recognition stage. Moreover, regarding litigation of RICO claims in the U.S., its courts have held that when a RICO claim involves foreign events or conduct in a foreign country, subject matter jurisdiction to hear a RICO action exists as long as one of two alternative tests are satisfied: the conduct test or the effects test. See Madanes v. Madanes, 981 F. Supp. 241, 250 (S.D.N.Y. 1997); see also North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1046 (2d Cir. 1996).
application of civil RICO and has argued that the lawsuit is improper because it is contrary to the U.S. public policy that a judiciary of one nation will not enforce public laws of another nation.150 The BONY’s arguments in the Moscow Arbitrazh Court foreshadowed some of the difficult issues that a U.S. court will have to wrestle with during a recognition action.

III. A CIVIL RICO CLAIM MAY BE FILED ABROAD

The U.S. courts do not have exclusive jurisdiction over civil RICO claims.151 The U.S. Supreme Court in Shearson/American Express v. McMahon152 has held that a foreign arbitrator may apply civil RICO in a foreign arbitral tribunal. This has effectively eliminated U.S. courts’ exclusive monopoly over civil RICO. The pertinent question here is whether a U.S. court, in a recognition action, will tolerate a foreign court’s application of civil RICO against an American defendant. The Shearson decision at least provides an analytical point of departure.

In June 1987, the Supreme Court in Shearson held that claims brought under the civil provisions of the federal RICO statute are “arbitrable regardless of whether such claims arise in a domestic or international setting.”153 The Court explained:

In sum, we find no basis for concluding that Congress intended to pre- vent enforcement of agreements to arbitrate RICO claims. [Plaintiffs] may effectively vindicate their RICO claim in an arbitral forum, and therefore there is no inherent conflict between arbitration and the purposes underlying § 1964(c).154

The Court justified its reasoning with respect to RICO’s arbitrability by referencing its prior decision in Mitsubishi Motors Corp. v. Soler

150. Dodge, supra note 92, 161 (arguing that “nations should break the public law taboo because cooperation in the enforcement of public law would be mutually beneficial.”).
151. For example, one prominent American practitioner and a prolific author noted that “[a]t least in theory, some foreign courts’ choice-of-law rules may permit or require application of RICO.” GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 24 n.30 (2d ed. 2000). This makes sense because U.S. courts may be equally required to apply Russian law if the U.S. choice-of-law rules mandate.
The Court rejected the idea that “RICO claims are too complex to be subject to arbitration” abroad. The Court further rejected the idea that “overlap” between RICO’s civil and criminal provisions renders § 1964(c) claims nonarbitrable. In order to conceptually sever civil RICO from its penal host, the Court “rejected the view that § 1964(c) ‘provide[s] civil remedies [only] for offenses criminal in nature.’” The Court concluded that “criminal provisions of RICO do not preclude arbitration of bona fide civil actions brought under § 1964(c).”

As to the final obstacle, the Court disposed of the claim that public policy dictates nonarbitrability:

Emphasizing the compensatory function, Mitsubishi concluded that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” The legislative history of § 1964(c) reveals the same emphasis on the remedial role of the treble-damages provision.

The Court’s decision in Mitsubishi provided the impetus for the decision in Shearson. In essence, the Court in Shearson transplanted its reasoning with respect to arbitrability under the Sherman Act in Mitsubishi into its justification with respect to civil RICO arbitrability abroad. Civil RICO’s application abroad by foreign arbitrators and its underlying policy rationale—allowing foreign plaintiffs to vindicate their rights abroad, in a foreign forum, under U.S. law—is best summarized in the Court’s following statement:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.

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156. Shearson/American Express, 482 U.S. at 239–40.
157. Id.
158. Id.
159. Id.
160. Id. (internal citations omitted).
161. See Jarvis, supra note 83, at 2.
The Court’s intuition in Mitsubishi and Shearson is further highlighted by the following statement:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts. 163

In sum, the Shearson decision represents the Court’s willingness to relinquish the U.S. courts’ monopoly over civil RICO’s application. 164 Of course, the Shearson decision is not a green light to a foreign plaintiff to file a civil RICO claim in her home forum against an American defendant. In other words, the Shearson decision is not a precedent on point that the Russian FCS, or any other foreign judgment creditor, could cite to argue that the Moscow Arbitrazh court, or any other non-U.S. court, could apply civil RICO. Shearson is distinguishable because there was a valid arbitration clause at the heart of the parties’ agreement. 165 The Shearson decision was thus by and large driven by a pro-arbitration policy. 166

Significantly, however, the Shearson decision signaled the Court’s willingness to tolerate foreign arbitral awards under civil RICO and, thus, foreign application and interpretation of civil RICO. 167 Therefore, the U.S. pro-arbitration policy in Shearson has arguably carried civil RICO into the international arena. The Court’s emphasis on pro-arbitration policy, however, does not diminish Shearson’s significance for the Russian RICO case because, logically, even in light of the pro-arbitration policy, had it not been civil RICO with its attributes at issue, the Shearson Court may not have reached the decision it did. Thus, it is civil RICO’s particular attributes that stand equally behind the Shearson decision, alongside its pro-arbitration policy. Moreover, the Court decisions in Mitsubishi and Shearson highlight the Court’s deference to foreign courts’ competency to resolve civil RICO claims.

The Court further indicated its commitment to international commerce and its commitment to strengthen the ability of foreign plaintiffs to vin-

163. Id. (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972)).
164. See generally Jarvis, supra note 83, at 4.
165. Shearson/American Express, 482 U.S. at 239–40.
166. See Jarvis, supra note 83, at 6.
167. See id. at 10 (“[W]hile Shearson is not an international decision since it arose in a domestic setting and involved a dispute about the stock market, . . . the international implications of the decision are clear.” Id.)
dicate their legal rights abroad under U.S. law against U.S. entities. These decisions provide a strong argument to a petitioner in an action for recognition of a judgment under civil RICO rendered by a foreign judge. Moreover, the language in the above cases indicates that the Court considered foreign arbitral tribunals, as well as foreign courts, to be competent to apply civil RICO. After all, from the standpoint of applicability of civil RICO, the sole difference between arbitration and a judicial proceeding is that whereas the judiciary is a branch of government, an arbitral forum is a private enterprise. But under the recognition analysis, this distinction has no significance because U.S. courts allow substantial deference to a forum’s impartiality and competence, and, thus, place the burden on the opponent to the judgment to make a specific showing of fraud, lack of due process, or affront to U.S. public policy. That showing may be made equally with respect to an arbitral award or a judgment. Thus, it would not be a stretch of the legal imagination to extend Shears-
son’s reasoning with respect to foreign arbitral tribunals to apply to the Russian RICO case.

This argument is further amplified by contrasting the characteristics of arbitration with those of litigation. Foreign arbitrators are often free to apply substantive legal norms differently than the judiciary of a national that generates those norms. By rendering civil RICO claims arbitrable abroad, the Court signaled its high tolerance for U.S. law’s application abroad against U.S. respondents in a fashion likely diverging from its traditional application by U.S. courts. Courts around the world, although some more than others, pay attention to their colleagues abroad and are presumably self-conscious for the sake of legitimacy and comity.

168. Cf. id. at 14. For example, “[t]he International Chamber of Commerce . . . [is] the most important of the world’s international arbitration centers[,] . . . [but] its arbitrators’ familiarity with civil RICO is likely to be limited at best.” Id. at 14 n.59.
171. See Silberman, supra note 170, at 10. “[W]hen [parties] have adopted [arbitration], they must be content with its informalities. . . . They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.” See FOLSOM, GORDON, & SPANOOGLE, JR., supra note 34, at 732 (quoting American Almond Products Co. v. Consolidated Pecan Sales Co., Inc., 144 F.2d 448, 451 (2d Cir. 1944)).
172. See Jarvis, supra note 83, at 18–19.
in the age of high-volume, transnational intercourse. Unlike arbitrators, however, a foreign court\textsuperscript{173} is likely to apply a foreign law analogously to its counterpart abroad where the law originates.\textsuperscript{174} Thus, arbitration arguably is not the optimal place\textsuperscript{175} to employ a law like civil RICO that is notorious for its broad elements and high penalties.\textsuperscript{176} It is noteworthy that foreign arbitral awards under civil RICO are highly likely to be recognized in the U.S. in a streamlined, “rubber-stamp” fashion under the New York Convention.\textsuperscript{177} This provides further impetus for recognition of the Russian Court case judgment under civil RICO.

One aforementioned point merits clarification as it is a common source of confusion. The proceeding in the Moscow \textit{Arbitrazh} court is not an arbitration proceeding. The Moscow \textit{Arbitrazh} court is not even an arbitral tribunal.\textsuperscript{178} It is a commercial court titled “arbitrazh” that many non-Russian speakers confuse with commercial arbitration. The Russian term \textit{arbitrazh}\textsuperscript{179} is only an approximation and, therefore, a misleading translation of the English term “arbitration.”\textsuperscript{180} If the proceeding in Moscow was in fact a commercial arbitration, it would place the Russian RICO case squarely within the ambit of the \textit{Shearson} decision. But the only parallel between Russian \textit{arbitrazh} and arbitration is that the two terms are homonymous. The actual commercial arbitration tribunal in Russia is the International Commercial Arbitration Court at the Chamber

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\textsuperscript{173} See Silberman, \textit{supra} note 170, at 10 (arguing that disputes implicating public policy should remain in the hands of the national judiciary or, alternatively, there must be a higher authority to review these arbitral awards).

\textsuperscript{174} See generally Folsom, Gordon, & Spanogle, Jr., \textit{supra} note 34, at 732. “International Commercial Arbitration procedures are often informal and not laden with legal rights.” \textit{Id}.

\textsuperscript{175} See Jarvis, \textit{supra} note 83, at 16. “Many civil RICO claims . . . fail due to the inability to have evidence admitted, especially with respect to proving that the respondent was engaged in a racketeering enterprise.” \textit{Id}.

\textsuperscript{176} See \textit{id.} at 17. “The lack of discovery can be fatal to a civil RICO claim, since much of the evidence needed to prove that the respondent engaged in racketeering activities often will be obtainable only by culling through the business records of the respondent.” \textit{Id}.


\textsuperscript{179} The reason for the linguistic dissonance is likely that when Russia imported the term arbitration, it simply chose to apply it in a distinctive fashion, calling its wide network of commercial courts \textit{arbitrazh} courts.

\textsuperscript{180} Hendrix, \textit{supra} note 129, at 148–49.
of Commerce and Industry of the Russian Federation (ICAC) in Moscow.\footnote{181} The lawsuit against BONY in the Moscow Arbitrazh court is in fact equivalent to a civil lawsuit in a court of first instance in the U.S. rather than an arbitration proceeding. While civil courts of other nations may apply foreign private law, they may not enforce strictly public or criminal laws of another nation.

IV. POTENTIAL DEFENSES TO RECOGNITION

A. Is Civil RICO a Public Law?

BONY has objected to the Moscow Arbitrazh Court’s decision to apply civil RICO on the grounds that it is a public law.\footnote{182} But even if there was any doubt beforehand, the Court in Shearson effectively rendered civil RICO a private law. The U.S. courts routinely apply foreign laws where conflicts-of-law and choice-of-law rules permit or mandate application of foreign law.\footnote{183} For example, in the case of Films by Jove, Inc. v. Berov, a United States court applied Russian copyright laws.\footnote{184} But enforcement of public laws is customarily the exclusive domain of a judiciary in a nation where these laws originate.\footnote{185} For example, where courts in a civil proceeding apply foreign law, that foreign law must be a private law, because in civil cases parties are subject to the court’s juris-

\footnote{181. “The main international commercial arbitration institution in Russia is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) in Moscow. It is the successor to the Foreign Trade Arbitration Commission (VTAK) which was established in 1934. ICAC has dozens of years of experience and thousands of arbitrated cases. Currently, ICAC resolves about 600 disputes annually. Its awards are routinely enforced all over the world.” International Commercial Arbitration Russia, Arbitration Institutions, http://www.geocities.com/jdhevh/institutions.html (last visited Oct. 4, 2009). This international arbitral tribunal does not have an official website, but the other two main arbitral tribunals, serving mainly domestic parties, can be found at http://www.mosarbitration.ru.}

\footnote{182. See Parloff, supra note 2; Goldhaber, supra note 2. See generally Dodge, supra note 92, at 61.}

\footnote{183. See Geeroms, supra note 56, at 1; Dodge, supra note 92, at 161. “The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state, which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . ,” Dodge, supra note 92, at 161 n.1 (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145(1) (1971)).}


\footnote{185. See Dodge, supra note 92, at 161 (arguing that ‘nations should break the public law taboo because cooperation in the enforcement of public law would be mutually beneficial.’).}
diction due to private conduct. On the other hand, if a foreign party is subject to a court’s jurisdiction for criminal conduct, that court will apply its own criminal or public law because a court in a criminal proceeding has jurisdiction over criminal conduct only in its own jurisdiction.

Accordingly, if Russian authorities were to prosecute an American defendant under criminal RICO, this would cause a seismic cataclysm in the legal community. Only the DOJ may prosecute a federal criminal case under U.S. criminal laws. Thus, if civil RICO is deemed inseparable from its penal host, rendering it a public law in the eyes of a U.S. court, then the Russian RICO case will be contrary to U.S. public policy and therefore unrecognizable. But the Court in Shearson concluded that private parties may arbitrate civil RICO claims arising in an international business context. The Court further suggested that civil RICO may provide civil remedies even without a predicate criminal violation. Thus the Shearson decision has affirmatively rendered civil RICO a private law rather than public. A private law that may resolve a commercial dispute, applicable abroad notwithstanding any criminal violation, cannot function as a public law. To illustrate, the notion that civil RICO is a public law yet applicable in a foreign forum, would, by analogy, render any and every public law enforceable by a foreign judiciary. The U.S., and other States, would lose sovereignty over their criminal law enforcement regimes. BONY’s argument that civil RICO is a public law is unlikely to withstand the Court’s decision in Shearson. BONY may have a better chance of persuading a U.S. court that the Moscow Arbitrazh court overstepped its jurisdictional limits or that, in electing to apply civil

186. See id. The “public law taboo” resulted from a rule against enforcing foreign penal laws, as well as the “revenue rule,” which barred enforcement of foreign revenue laws. Id. at 165.

187. “The prohibition against applying foreign penal law and (if it exists) the prohibition against applying foreign public law come into play only when a suit is brought by the government.” Dodge, supra note 92, at 165. The dispute whether civil RICO is public or private law was at the heart of BONY’s argument during early stages of the trial. Namely, BONY sought dismissal of the case precisely because of the “public law taboo.” See Goldhaber, supra note 2. If civil RICO is a private law, then, on the surface, there is no “public law enforcement” problem in the Russian Court case. That, of course, does not answer the question whether civil RICO may be applied by a foreign court to award the plaintiff, a sovereign entity, lost revenue.


189. Id. In a dissenting opinion in the Canadian lost revenue case under RICO, Judge Calabresi stated: “[B]y enacting RICO, our government has determined that this suit advances our own interests, and any collateral effect furthering the governmental interests of a foreign sovereign is, therefore, necessarily incidental.” Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 136 (2d Cir. 2001) (Calabresi, J., dissenting) (rejecting the civil-criminal distinction made by the majority).
RICO, it did not apply its choice-of-law rules in good faith. Success on either one of those arguments may render the Russian Court’s judgment unrecognizable.

B. The Arbitrazh Courts’ Jurisdiction

The first and easy issue is whether the Moscow Arbitrazh court has jurisdiction over FCS’s claim. While subject matter jurisdiction is a prerequisite for recognition, U.S. courts tend to apply jurisdictional rules of a foreign court. Russia’s arbitrazh courts’ jurisdiction is statutory and is narrower than Russia’s courts of general jurisdiction. Arbitrazh courts assert jurisdiction over economic disputes between separate “legal entities” and between a “legal entity” and the government. Their jurisdiction, inter alia, extends to property and tax disputes. As part of the judicial reform, the amendment of the Code of Arbitrazh Procedure in 1995 granted arbitrazh courts jurisdiction over foreign entities. While Russia’s courts of general jurisdiction retained jurisdiction over foreign parties, many foreign litigants opt for the arbitrazh courts “because of their greater expertise in commercial matters.” In the Russian RICO case, the Moscow Arbitrazh Court properly asserted jurisdiction over FCS’s claim because FCS is a governmental entity and BONY is a foreign commercial entity. Further, because FCS was seeking to collect allegedly unpaid customs duties or lost tax revenue, its claim may be

190. Brand, supra note 102, at 273.
191. See Hendrix, supra note 129, at 149. Further, “[m]ost commercial litigation is conducted in the arbitrazh courts.” Id. at 151.
192. See Hendley, supra note 130, at 95 (describing the transition of arbitrazh court from state agency to professional and independent judiciary).
193. Id. Arbitrazh courts also have jurisdiction over physical persons who are registered as “entrepreneurs.” Hendrix, supra note 129, at 149.
194. See Hendrix, supra note 129, at 149. Arbitrazh courts also hear bankruptcy cases, contract disputes, and claims of injury to business reputation. Id. They review executive administrative acts in the economic sphere, and rule on government liability in tort, confiscation of land and other valuables, and the imposition of fines and other penalties. Id.
195. The reform began earlier after disintegration of the Soviet Union during the early 1990s with enactment of the Arbitrazh Court Act in 1991 followed by the Code of Arbitrazh Procedure in 1992. As a result, arbiters became judges and were afforded the same protections. Hendrix, supra note 129, at 155. The legislation also provided for permanent tenure, independence, and judicial immunity. Id. at 155. Further, the enactment of Federal Constitutional Law on Arbitrazh Courts in 1995 granted arbitrazh courts federal status and established a framework of intermediate appellate courts, “circuit courts.” See id. It appears that the closest analogs to Russia’s arbitrazh courts in the U.S. are the U.S. District Courts.
196. See Hendrix, supra note 129, at 150.
197. See id. at 151.
characterized as an “economic dispute” within Russia’s jurisdictional terminology. Similarly, FCS’s claim arguably, at least in part, amounts to a tax claim, which arbitrazh courts may properly hear. Consequently, BONY’s argument that the court lacks subject matter jurisdiction would likely fail.

C. Russia’s Choice-of-Law Rules

Although BONY did not assert lack of due process as a defense, it objected to the Russian court’s decision to apply civil RICO. BONY could argue in defense to recognition that the Moscow proceeding was “irregular” or that the court’s decision to apply civil RICO was arbitrary and capricious and thus lacked due process. Before concluding that the Russian Arbitrazh proceeding was “irregular” under Hilton, or lacked due process of law under the Recognition Act, a U.S. court would have to determine whether the Russian Court applied its choice-of-law rules in good faith, since U.S. courts defer to foreign courts’ application of their own rules.

First, it is important to note that the overall theme of Russia’s choice-of-law principles contained in Russia’s Civil Code is to allow application of foreign law in comparatively many more instances than, say, a U.S. court would. In general, Russia’s courts may apply foreign law anytime a party is foreign or where the dispute arises in a transnational context.

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198. See generally Goldhaber, supra note 2; Key Facts, supra note 5, at 1.

199. The argument here would rely on due process because the exuberant monetary penalties authorized under civil RICO provide a lucrative motive for abuse of legal process.

200. It may be argued that because of the unusual nature of the civil RICO claim in Russia, the proceeding in the Moscow Arbitrazh Court was “irregular.” Although it may be argued, for example, that by virtue of the unprecedented nature of the lawsuit, BONY lacked sufficient notice. But such interpretation of “regular proceeding” under Hilton would likely foreclose any creative application of jurisdictional or choice-of-law principles and, thus, is unlikely to withstand judicial scrutiny. Arguably, a more concrete affront is required for a proceeding to be irregular under Hilton, such as violations of due process requirements under the Recognition Act.


202. The drafters’ willingness to allow foreign law into Russia’s courts to supplement its own legal norms reflects their implicit intuition that Russia’s post-Soviet legal system, in its current incarnation, remains relatively young, as it is still undergoing gradual transformations that started in the early 1990s. See generally B. L. ZIMMENKO, INTERNATIONAL LAW AND THE RUSSIAN LEGAL SYSTEM I (William E. Butler ed., 2007) (discussing the relationship between Russian law and international law).

context. Until the enactment of Part III of the Russian Federation Civil Code ("RFCC") in 2001, choice-of-law was governed by the Fundamentals of Civil Legislation ("FCL"), which was enacted in 1991. Part III has a separate Article, titled “International Private Law,” which sets out currently effective choice-of-law rules. Part III of RFCC is significantly different from FCL choice-of-law rules in that the latter no longer operate as a set of statutory defaults dictating choice–of-law on the basis of the type of transaction underlying the dispute. The discussion below will assume that the Moscow Arbitrazh Court could have reasonably applied either set of choice-of-law rules. Because the conduct and transactions underlying the FCS’s lawsuit against BONY occurred during the late 1990s, prior to enactment of the RFCC’s Part III in 2001, the Moscow Arbitrazh Court may have reasonably chosen to apply the choice-of-law rules that were in force at the time, namely the FCL. As illustrated below, both the FCL and the RFCC allow the Moscow Arbitrazh Court to apply U.S. law to the FCS’s claim against BONY.

The FCL provided an array of statutory defaults that dictated whose law applied in a dispute between two foreign parties. For example, in a tort action, the arbitrazh courts applied the law of the country where the tort occurred. Importantly, in an action for unjust enrichment, arbitrazh courts applied the law of the country where enrichment ultimately

204. See Hendrix, supra note 129, at 163–65. For example, the Code of Arbitrazh procedure gives judges broad discretion to “determin[e] the ‘existence and contents’ of foreign law, if applicable to the dispute.” Id. at 163.


206. See Hendrix, supra note 129, at 163.

207. See id. at 164.

208. See id. It seems that Russia’s choice-of-law rules have traveled evolutionary paths similar to those of the choice-of-law rules in the U.S., having shifted away from rigid defaults dictated by the nature of the cause for action and toward a more rigorous policy and interest based analysis. See generally William M. Richman, Diagramming Conflicts: A Graphic Understanding on Interest Analysis, 43 OHIO ST. L.J. 317, 319 (1982).

209. See Hendrix, supra note 129, at 164–65. For example, under Fundamentals of Civil Legislation, art. 166.1 (1), sale contracts were governed by the law of the seller’s country. See Id. Where a party is acting as a lessor, licensor, bailee, agent carrier, freight forwarder, insurer, lender, donor, guarantor, or pledgor, statutory default requires application of the law of that party’s country. Id.

210. See Hendrix, supra note 129, at 165. This is similar to the American choice of law rule based on the place of injury. See Richman, supra note 208, at 319. This rule, however, has been supplanted by Currie’s interest analysis in most modern American jurisdictions. Id.
occurred. For example, where a Russian company mistakenly wired money to an account abroad, the arbitrazh court found that unjust enrichment occurred in the country in which the wire payment was received or credited. Thus, that country’s law governed. By analogy, if the Moscow Arbitrazh Court applied the FCL choice-of-law rules, characterizing the customs claim as one for unjust enrichment, it would reasonably and in good-faith be able to proceed under applicable U.S. law against BONY. Since FCS is a Russian customs authority seeking to recover customs duties, revenue allegedly lost due to “racketeering activity,” and damages arising from a bank doing business on its territory, civil RICO would be the applicable law. It is an appropriate analog to a similar suit in the U.S. where unpaid taxes, lost due to cross-border “racketeering activity,” may be recovered in a civil RICO lawsuit. Accordingly, since this line of analysis is available to the Moscow Arbitrazh Court under the FCL choice-of-law rules, BONY would be unable to argue “irregularity,” or lack of due process under the Recognition Act.

The currently effective code of civil procedure (Part III of the RFCC) changes the choice-of-law rules in Russia. It states in pertinent part:

The law applicable to civil legal relations involving . . . [a] foreign citizen[] or foreign legal entities or civil legal relations complicated by another foreign factor, in particular, in cases when an object of civil rights is located abroad shall be determined on the basis . . . [of] the

211. Richman, supra note 208, at 319. “At its heart, a civil RICO claim is an action for fraud.” Jarvis, supra note 83, at 14.
213. Hendrix, supra note 129, at 165 (illustrating the application of this principle in a case where a Russian company sought to recover a mistaken remittance to Latvian bank account, and the court held that enrichment occurred in Latvia and that Latvian law must therefore be applied).
214. Id.
215. “The Second Circuit has recognized that lost tax revenue is a cognizable RICO injury,” Farnam, supra note 16, at 846; see Buxbaum, supra note 13, at 267.
216. See Buxbaum, supra note 13, at 267; Farnam, supra note 16, at 844 n.7 (citing Mo. v. W.E.R., 55 F.3d 350, 357 (8th Cir 1995) (holding that the State has a cause of action under civil RICO); United States v. Porcelli, 865 F.2d 1352, 1355 (2d Cir. 1988); Ill. Dep’t of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) (finding that the government stated a claim for civil RICO for repeated mailing of false tax returns, a mail fraud violation)).
present Code, . . . and usage recognised in the Russian Federation. . . .
If under [the above] . . . it is impossible to determine [the applicable law] . . . the law of the country with which a civil legal relation complicated by a foreign factor is most closely related shall apply.218

On its face, it appears that application of a foreign law may be triggered when a foreign party is present, when a lawsuit is “complicated by another foreign factor,” or “when an object” of the claim “is located abroad.” The last clause in Russian, as in English translation, means that the law of the country with which the lawsuit (“civil legal relation”) is most closely related will apply.219 This leaves tremendous room for interpretation of the “most closely related” element. This clause does not define criteria by which to evaluate “closeness,” and the term “civil legal relation,” meaning the lawsuit, is equally vague.

Applying RFCC choice-of-law rules, the Moscow Arbitrazh Court could again have reasonably decided, in good faith, to apply U.S. law. BONY is a foreign party and the lawsuit is seriously complicated by a “foreign factor” that the allegedly illicit money transfers were facilitated by “racketeering activity” abroad and the money went to the U.S. Moreover, considering the number of foreign factors in totality, this lawsuit is arguably “most closely related” to the U.S., except for the harm that was allegedly suffered by Russian deposit holders and the Russian economy as a whole. Again, civil RICO, being the proper cause of action in an analogous suit in the U.S., would properly apply to FCS’s claim against BONY. At the minimum, there are no legal obstacles in Russian law for the Moscow Arbitrazh Court to apply civil RICO. In sum, BONY would have been unlikely to defend against recognition on the ground that the Moscow Arbitrazh Court, in electing to apply civil RICO, did not apply its choice-of-law rules in good faith.

D. The Revenue Rule

A critical issue remains after resolution of the procedural issues discussed above: the so-called revenue rule.220 The revenue rule is a U.S. “conflict of laws doctrine that allows a court to decline to enforce a for-

218. Id.
219. This “most closely related” element is arguably parallel to the modern U.S. choice-of-law framework whose guiding principle is to determine the state with the strongest interest. Richman, supra note 208, at 319.
220. The rule is over two hundred years old. It emerged in England, when Lord Mansfield stated that “no country ever takes notice of the revenue laws of another.” Holman v. Johnson, (1775) 98 Eng. Rep. 1120 (K.B.). “In these cases, 18th Century British courts chose to uphold contracts that violated foreign law in order to protect the British smuggling trade.” Farnam, supra note 16, at 849 n.65.
Canada recently brought a lawsuit in the U.S. under civil RICO to recover lost tax revenues. The Second Circuit held that the “revenue rule bars Canada’s claim because the RICO damages would be calculated based on lost revenues” and that would amount to enforcing Canada’s tax laws. The revenue rule has been widely criticized and many commentators argue that the revenue rule should be abandoned because the rule rests on an archaic policy.

221. Farnam, supra note 16, at 843 (arguing that Reynolds was wrongly decided because the court misapplied the revenue rule, and articulating a policy rationale for why the revenue rule should not bar civil RICO claims); see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413-14 (1964); Restatement (Third) of Foreign Relations Law §483 (1987).

222. Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 106–07 (2d Cir. 2001). During the 1990s, R.J. Reynolds allegedly was part of a scheme to smuggle tobacco to avoid Canadian tax laws. Id. The Court framed the problem in the following way: “The illicit tobacco . . . has become a global problem. In recent years, American tobacco companies have apparently smuggled cigarettes into Canada, the European Union, Ecuador, Honduras, Belize, and Colombia. Following the Reynolds [ ] decision, other civil RICO cases have been pursued, most recently in Florida.” Farnam, supra note 16, at 844 (citing Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 125 (2d Cir. 2001); Ecuador v. Philip Morris, 188 F. Supp. 2d 1359 (S.D. Fla. 2002); European Cmty. v. Japan Tobacco, Inc., 186 F. Supp. 2d 231 (E.D.N.Y. 2002); European Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d 456, 460 (E.D.N.Y. 2001)).

223. Att’y Gen. of Can., 268 F.3d at 106–07. “RICO allows foreign states to assert claims to remedy racketeering injuries, [but] the Reynolds . . . decision now effectively nullifies their cause of action if they seek to recover lost tax revenue in the Second Circuit.” Farnam, supra note 16, at 844. There is a strong criticism that, in the tobacco cases, courts applied the revenue rule in a formulaic and artificial manner because the foreign governments argued that at issue were violations of U.S. law and determining liability under civil RICO “required merely the recognition of the tax laws in question.” See Buxbaum, supra note 13, at 284 (citing Brief for Plaintiff-Appellant the Attorney General of Canada at 3, Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 103 (2d Cir. 2001)).

224. Restatement (Third) of Foreign Relations Law § 483. Notably, the Second Circuit in United States v. Trapilo, held that

the revenue rule did not mandate dismissal every time a foreign revenue law was implicated. Instead, the revenue rule should be applied only in cases that would interfere with the separation of powers. For example, the claim might be barred if the court would otherwise have to decide a foreign relations question more properly reserved to the political branches.

Farnam, supra note 16, at 855 (citing United States v. Trapilo, 130 F.3d 547 (2d Cir. 1997)).

rationale that is no longer valid.\textsuperscript{226} BONY probably would have defended against the recognition action arising out of the Russian RICO case by characterizing the FCS’s claim as a civil RICO claim for violation of Russia’s revenue laws.\textsuperscript{227} The issue would present a U.S. court with the opportunity to evaluate the validity of the revenue rule in light of the novel approach of filing a lost revenue lawsuit abroad, rather than in the U.S., which is arguably a major innovation from a strategic standpoint when it comes to “transnational regulatory” litigation.\textsuperscript{228} The “revenue rule” policy rationales are grounded in the “foreign revenue claims” domestic effects.\textsuperscript{229} These rationales arguably crumble in light of the claim being brought abroad rather than in the U.S.\textsuperscript{230} Thus, the question of whether it would be a bar to Russia’s RICO case recognition should be re-evaluated. Evidently, to the extent that U.S. entities violate foreign revenue laws, there is a continual demand from foreign plaintiffs to litigate “lost revenue” claims in U.S. courts. To any transnational litigation observer, the Russian RICO case is a foreseeable outcome of U.S. courts’ commitment to the revenue rule. If the Russian Court case had succeeded, it would have been likely to serve as a “green light” for civil RICO litigation in other countries to recover lost tax revenues. U.S. courts’ continual commitment to the revenue rule signals to potential foreign claimants that U.S. courts have little regard for their legal rights under their domestic revenue laws against U.S. entities. Nonrecognition pursuant to the “revenue rule” is discretionary. U.S. courts are not required, though permitted, to refuse recognition of claims where such recognition would amount to enforcement of foreign revenue laws.\textsuperscript{231} Accordingly, if U.S. courts recognize the Russian Court’s judgments, then that will amount to the final “nail in the coffin” of the revenue rule.

\textsuperscript{226} See Buxbaum, supra note 13, at 283–90; Farnam, supra note 16, at 852–54.

\textsuperscript{227} Cf. Farnam, supra note 16, at 854 (citing United States v. Boots, 80 F.3d 580, 587 (1st Cir 1996)).

\textsuperscript{228} See supra text accompanying note 99.

\textsuperscript{229} See Buxbaum, supra note 13, at 278 (discussing the revenue rule and its role in “transnational regulatory” litigation); Farnam, supra note 16, at 846 (arguing that the revenue rule should be abandoned).

\textsuperscript{230} See Buxbaum, supra note 13, at 283–92. See generally Farnam, supra note 16, at 846.

\textsuperscript{231} European Cmty. v. RJR Nabisco, 150 F. Supp. 2d 456, 483–84 (E.D.N.Y. 2001) (holding that the revenue rule does not bar a suit by a foreign sovereign to recover civil RICO damages for lost tax revenues and that application of the revenue rule was discretionary). The Nabisco court eventually held that the European Community was unable to demonstrate injury separate from that of the member states and thus failed to allege the injury needed to bring suit under RICO. Id. at 501–02.
There are strong arguments for recognition and relaxation, or complete abandonment, of the revenue rule with respect to “transnational regulatory” judgments. As a matter of policy, the U.S. should send a signal that a U.S. court will tolerate foreign “lost revenue” judgments rendered under civil RICO. Currently, U.S. entities conducting business abroad are, in effect, allowed to avoid foreign tax laws with impunity because U.S. courts will not hear foreign revenue claims under civil RICO or otherwise. Recognition of a foreign action for lost revenue would encourage “transnational regulatory” litigation, namely, it would allow foreign sovereign claimants to litigate their “lost revenue” claims abroad. This is arguably a desirable effect because it implements Congress’s intent behind RICO in eliminating “racketeering” activity and remedying the damages such activity causes. It would serve both remedial and deterrent functions, which preoccupied the Supreme Court in Shearson. Moreover, litigation over “lost revenue,” taking place in a foreign forum where injury actually occurred, would preserve U.S. judicial resources as those cases tend to be complex and protracted. In fact, the revenue rule’s application has been uneven, fragmented, and controversial. Existing scholarly criticism of the revenue rule coupled with the novelty of the Russian RICO case scenario should ultimately move U.S. courts to relax the revenue rule with respect to “transnational regulatory” judgments.

V. A MODIFIED STANDARD FOR RECOGNITION

Throughout their history, U.S. courts have helped law evolve to accommodate the changing domestic and global conditions that come with increased cross-border activity. The current regime for recognition of foreign money judgments, however, works well; it has been fine-tuned for over a century since the decision in Hilton. But if U.S. courts are to

232. The Nabisco court stated that U.S. courts have the ability to interpret foreign revenue laws. See European Cmty., 150 F. Supp. 2d at 484 n.16.
233. See Buxbaum, supra note 13, at 265–57.
234. Id. at 255. “Transnational regulatory” litigation, as coined by Professor Buxbaum, encompassed “certain cases brought under U.S. regulatory law including antitrust law, securities law and [RICO], that operate similarly to transnational public law cases; they seek to apply a shared norm, in domestic courts, for the benefit of the international community.” Id.
236. See generally Buxbaum, supra note 13 (discussing the type of cases that fall into the category of “transnational regulatory” litigation).
237. See generally Farnam, supra note 16, at 858; Kovatch, Jr., supra note 225, at 265.
238. See Buxbaum, supra note 13, at 280.
take the approach described above to the Russian Court’s now-hypothetical judgment, the recognition regime will require either some stretching of its extant elements to accommodate foreign judgments or a modification to account for judgments under U.S. law. For example, in Mitsubishi, where the Court allowed foreign arbitrators to apply the private cause of action under the Sherman Act against U.S. parties, the Court expressed its concern over the consequences of releasing its monopolistic control of the antitrust laws: “Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”

The recognition of the Russian Court judgment would echo the “customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign court.” The Mitsubishi court concluded that “[w]hile the efficacy . . . requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”

Similarly, in addition to traditional recognition analysis, a U.S. court should conduct a minimal inquiry to determine whether a foreign court “took cognizance” of the civil RICO claim and “actually decided” it. One way U.S. courts might meet the challenge presented by the Russian RICO case is to allow the common law defense of “manifest disregard for the law” in an action for recognition of foreign money judgments. Currently, this defense may be invoked with respect to recognition of arbitral awards where a foreign tribunal applied arbitrable U.S. law against a U.S. party. This is an appropriate “doctrinal transplant” from

241. Id.
242. Id.
243. Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 208–09 (2d Cir. 2002). The court’s “standard of review under this judicially created doctrine is ‘severely limited.’ To vacate the award . . . [the court] must find ‘something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.’” Id. (citing Saxis S.S. Co. v. Multifacs Int’l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967); see also Folkways Music Publishers., Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) (“In order to advance the goals of arbitration, courts may vacate awards only for an overt disregard of the law and not merely for an erroneous interpretation.”); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) (“Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law.”) (internal citations omitted).
244. Daihatsu Motor Co., 304 F.3d at 209. The court explained:
the law of recognition of foreign arbitral awards to the recognition of foreign money judgments. Both legal regimes “favor” minimal substantive review of the underlying merits, and both presume the competency of foreign forums to apply and decide U.S. law. Incorporating a “manifest disregard for the law” defense into recognition proceedings would allow just the necessary amount of protection to U.S. defendants. A defendant should bear the burden of establishing that the foreign court manifestly disregarded the substance of the U.S. law. This approach strikes an equitable balance between both parties in the litigation. It protects the integrity of the laws and the judiciary of both nations. It provides a minimal normative standard to foreign courts applying U.S. law. Finally, this approach fosters desirable predictability and furthers the equitable goals of “transnational regulatory” litigation.

CONCLUSION

A judgment from the Russian Court case will never reach U.S. shores, but if it had—or, if and when another of its kind does indeed arrive—it will raise a number of complex issues that will have to be resolved during the recognition action. As illustrated above, nothing in terms of legal doctrine prevents a foreign court from applying civil RICO. Moreover, the U.S Supreme Court has given a “green light” to foreign courts to entertain civil RICO claims. Moreover, BONY will not be able to challenge the Russian Court’s judgment on the grounds of “irregularity” or lack of due process. The nature of the lawsuit does not reveal any issues contrary to U.S. public policy so as to bar recognition under the Recognition Act. A U.S. court, however, will likely face an objection by BONY to the recognition based on the revenue rule. Nevertheless, the archaic revenue rule should not preclude recognition of the Russian Court’s judgment. Litigation in Russia’s courts, as a matter of U.S. policy, is a salutary development that does not offend any of the archaic policies behind the

The two-prong test for ascertaining whether an arbitrator has manifestly disregarded the law. . . . We first consider whether the “governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable.” We then look to the knowledge actually possessed by the arbitrator. The arbitrator must “appreciate[] the existence of a clearly governing legal principle but decide[] to ignore or pay no attention to it.” Both of these prongs must be met before a court may find that there has been a manifest disregard of law.

Id. (internal citation omitted).

245. See Daihatsu Motor Co., 304 F.3d at 204.
246. See id. at 200.
revenue rule. But U.S. courts should adopt a safeguard that will protect U.S. parties from arbitrary or bad faith application of U.S. law in foreign courts in violation of due process. U.S. courts should modify the current recognition doctrine by adopting a defense that will focus on the manner in which foreign courts apply such complex statutes as civil RICO. The recognition of the Russian Court’s judgment will advance a number of significant interests: namely, comity, “transnational regulatory” litigation, international cooperation in law enforcement, and the integrity of foreign and domestic judicial processes.

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*B. A., Rutgers University (2006); J.D., Brooklyn Law School (expected 2010). This Note is dedicated to my parents, Irina and Richard Brownstein, and to my sister, Natalia Naomi Brownstein, for their unending love and support. Special thanks to Professor Robin Effron for her insightful comments on the earlier drafts, and all the editors of the Brooklyn Journal of International Law for their hard work and dedication. All errors and omissions are solely my own. “Physical concepts are free creations of the human mind, and are not, however it may seem, uniquely determined by the external world. In our endeavor to understand reality we are somewhat like a man trying to understand the mechanism of a closed watch. He sees the face and the moving hands, even hears its ticking, but he has no way of opening the case. If he is ingenious he may form some picture of a mechanism which could be responsible for all the things he observes, but he may never be quite sure his picture is the only one which could explain his observations. He will never be able to compare his picture with the real mechanism and he cannot even imagine the possibility or the meaning of such a comparison.” Albert Einstein & Leopold Infeld, _The Evolution of Physics_ 31 (1938).*
SAFE AT HOME? ASSESSING U.S. EFFORTS TO PROTECT YOUTHS FROM THE EFFECTS OF PERFORMANCE ENHANCING DRUGS IN SPORTS

INTRODUCTION

By the summer of 1998, baseball had finally risen from the ashes of the 1994 players strike that had resulted in a shortened season and the first ever cancellation of the World Series. It was 1998 when a nation of baseball fans was once again captivated, particularly by the epic competition unfolding between Mark McGwire and Sammy Sosa, both of whom were in hot pursuit of Roger Maris’ thirty-seven-year single-season home run record. That year also marked the beginning of a stretch of three straight World Series championships for baseball’s winningest and most popular franchise, the New York Yankees. And then, in 2001, Barry Bonds had the nation’s spotlight as he obliterated McGwire’s homerun record, and the Yankees came within one inning of a fourth-straight championship, their epic playoff run helping New York and the rest of the country recover from the tragic events of September 11 only two months earlier. Three years later, Roger Clemens won an unprecedented seventh Cy Young award, becoming the oldest player to ever receive the prestigious honor. Baseball was once again America’s pastime.

The next year, however, saw baseball’s ultimate fall from grace. In 2005, many of the game’s greatest players, including both McGwire and Sosa, were subpoenaed by the United States Congressional House Government Reform Committee to respond to allegations of widespread use of performance enhancing drugs (“PEDs”) throughout the game. An

6. Id. at 146-48.
internal investigation commissioned by Major League Baseball, which released its findings in 2007, named ten members of the 2000 World Championship team as PED users. Bonds has since been indicted on perjury charges following his potentially dishonest testimony regarding his use of steroids, and similar charges may soon be levied against Clemens in the wake of his heavily publicized confrontation with his former trainer before Congress. Suffice to say, a dark shroud has fallen over many historic baseball records in the eyes of fans who have become skeptical of their heroes’ once remarkable athletic accomplishments.

While McGwire and Sosa remain in baseball purgatory, Major League Baseball has ostracized Clemens and Bonds as it scrambles to restore its image and regain the trust of its fan base. Although it boasts a new drug testing policy, Major League Baseball’s efforts to shuttle in a new era of superstars have largely failed. In the past year alone, two of the most influential members of this next generation of supposedly “clean” superstars have been linked to PEDs; one by admission (Alex

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13. Both former players have retired from baseball and are currently eligible to be inducted into the Hall of Fame, but neither player has garnered sufficient votes for induction. The National Baseball Hall of Fame and Museum, Hall of Fame Voting: Baseball Writers Election, http://web.baseballhalloffame.org/hofers/voting_year.jsp?year=2009 (last visited Aug. 2, 2009).

Rodriguez, and another by failing a league-sponsored drug test (Manny Ramirez). This new era of drug testing in professional sports does not mean the game has rid itself of its ugly past. It means only that it has become harder for players to cheat. Now, the question to be asked is: why are professional athletes going to measures as extreme as using women’s fertility drugs to cover up their continued use of PEDs, despite the strict testing regime in place?

Success in professional sports is often accompanied by notoriety and extreme wealth, which only add to the competitive nature of the industry. Athletes seek to gain advantages by hiring personal strength coaches, engaging in high intensity training programs, and monitoring their diets closely. The use of chemical substances to augment training and diet programs can exaggerate the benefits the athletes derive. The principle objective in sport has always been victory, but now, in this modern era, maximizing individual performance is equally important, and a majority of athletes use some form of legal, natural, or artificial means to enhance their athletic performance. Dietary supplements, for example, may improve athletic performance, but they do not create an unfair advantage as they are widely available and are not known to induce the growth or strengthening of muscle tissue or to cause other biological effects that can be directly attributed to athletic success.

In an attempt to achieve greater on-field performance, however, some athletes are willing to use illicit PEDs that their sports’ governing bodies have banned. When competing at the highest levels of professional sport, there is little difference between competitors in terms of pure skill. Only the smallest percentage of athletes will advance to the professional level and succeed by exhibiting superior athletic abilities in comparison

17. Ramirez was caught using “human chorionic gonadotropin . . . a fertility drug for women that men can use to generate production of testosterone after they have stopped using steroids.” Id.
19. Id. at 835.
21. Haagen, supra note 18, at 834.
to their opponents. For this reason, “marginal advantages are likely to produce substantial competitive gains.”

Even if athletes are being tested for PEDs, the prospect of international fame, immense wealth, and the desire to achieve life-long dreams may outweigh the deterrence capacity of the anti-doping polices. Even Olympic-caliber athletes will feel the draw of PEDs in order to improve their chances at a gold medal. Canadian sprinter Ben Johnson, who was once known as “The Fastest Man in the World” (a title given to the world record holder in the 100 meter dash) and who was named the Associated Press Male Athlete of the Year in 1987, was stripped of his world record and 1988 Olympic gold medal when he tested positive for the prohibited substance Stanozolol following the race. Doping scandals have also plagued the world renowned Tour de France, as 2006 winner Floyd Landis was stripped of his title when his urine sample tested positive for the presence of a prohibited PED. And that same year, cycling superstars Jan Ullrich and Ivan Basso were among several cyclists barred from competition because they failed drug tests even before the race began. These athletes competed in their respective events, well aware of the drug testing mechanisms in place. Still, athletes will continue to use PEDs because the prospects for victory and the associated personal and economic benefits justify the risk of being caught.

As professional sports leagues bitterly debate the imposition of new drug testing policies that fall outside the scope of the current testing program that was approved as part of their active collective bargaining agreement (“CBA”), new PEDs are being developed in laboratories and

22. Id.
23. Id.
29. Haagen, supra note 18, at 834.
basements across the nation. Some supplements, known as designer steroids, are being created specifically to avoid detection methods and are being labeled as dietary supplements by their developers. Designer steroids are known steroid compounds that have been chemically altered so that they retain the same enhancement effects while becoming undetectable by drug testing laboratories. Since the creation of designer steroids does not require complex chemical knowledge, the possibility that they will spread throughout professional sports is undeniable.

In response to the increased international awareness of the use of illegal PEDs, and the individual sporting associations’ apparent inability to successfully level the playing field, national governments have taken notice, and, in some cases, have instituted comprehensive national drug testing legislation for professional sports. Italy, for example, has adopted legislation to criminalize the use of PEDs in athletic competition, employing heavy fines or the threat of imprisonment to combat doping in sports. The United States, on the other hand, has implicitly held that doping in professional sports is a matter to be regulated privately between the leagues and the players’ associations through their CBAs. For instance, nearly ten proposed bills intended to regulate drug testing

32. Connolly, supra note 30, at 172.
33. Id. at 173.
36. McKenzie, supra note 34, at 1.
37. See sources cited infra note 275.
in professional sports, a paramount concern of then President George W. Bush, have died on the floor of Congress without sufficient support.

Doping scandals continue to plague professional sports in the United States because the punishments for a positive test remain relatively minimal. Without severe threats of heavy fines, potential expulsion from the sport, or even criminal penalties for positive tests, professional athletes will not be sufficiently deterred from using PEDs. This Note will examine foreign anti-doping legislation in order to ascertain whether similar legislation would be viable in the United States. It will then examine whether or not the implementation of such laws would serve as a successful deterrent against the use of PEDs in professional sports. Part I provides background on the mounting issue of doping in sports and explains the rationale for an anti-doping regulation scheme. Part II surveys foreign and international anti-doping legislation and evaluates the legitimacy of criminal sanctions against professional athletes and associated individuals who violate the national anti-doping legislative scheme. Part III assesses the current stance toward anti-doping legislation in the United States and considers the viability of adopting elements of foreign national anti-doping regulation. Part IV contemplates the effects of a de-regulated playing field and urges Congressional consideration of criminal sanctions in the United States. Ultimately, this Note calls for the United States to adopt criminal anti-doping legislation informed by other international regimes in order to combat the use of performance enhancing drugs by professional athletes, lest the U.S. risk being defeated by unscrupulous steroid manufacturers, distributors, and the professional athletes who exploit undetectable biological performance enhancement substances that degrade the concept of pure athletic competition.

I. HOME-FIELD DISADVANTAGE

A. Background

In 1987, the National Football League (“NFL”) became the first professional sports league in the United States to begin testing for illegal

40. See sources cited supra notes 15–16.
The NFL has by far the most stringent PED testing policy of any major sports league in the United States. Aside from testing its players more often than any other major professional sports league (and without notice to the athlete), the NFL testing program distinguishes itself from other programs with its application beyond athletes. Under the league policy, “[C]oaches, trainers and other personnel are restricted from condoning, supplying, or encouraging the use of steroids” and may be sanctioned by the commissioner.

The National Basketball Association (“NBA”) first began testing for illegal drugs in 1999, but the focus of the program was geared mostly toward treatment of drug abuse. Furthermore, even though the testing program covered PEDs, the sanctions for illegal drug use were hardly punitive. Under the 1999 NBA Collective Bargaining Agreement, a player who voluntarily turned himself in to league officials for any drug use, including PEDs would be given counseling and treatment but would not be penalized for his doping offenses.

It was not until 2002 that Major League Baseball (“MLB”) and the Major League Baseball Players Association (“MLBPA”) finally agreed to implement a mandatory drug-testing program. It is widely believed

43. Id. at 137.
45. Id.
47. As PEDs are taken specifically to gain an unfair competitive advantage, rather than recreationally, the league should take greater punitive measures against those athletes using PEDs. Zachary Coile, House Mocks NBA’s Policy on Steroids/ Tough-talking Lawmakers Want Federal Intervention, SAN FRAN. CHRONICLE, May 20, 2005, at A10.
48. Haagen, supra note 18, at 841.
that the league had never previously implemented a testing program because league officials and team owners were aware of the rampant drug use, tacitly condoning the activity.\textsuperscript{51} This was because they believed that the increased number of homeruns hit by “juiced up” players would provide an economic windfall to both the teams and the league by bringing more fans to the ballpark.\textsuperscript{52} Not surprisingly, as the number of suspected players using PEDs grew during the 1990s, so did the pockets of MLB executives, team owners, and athletes.\textsuperscript{53}

In the year following McGwire and Sosa’s epic homerun chase, Major League Baseball went as far as to lecture team executives on the benefits of testosterone, eschewing the notion that unnatural hormones could have negative health consequences.\textsuperscript{54} By the turn of the decade, baseball had adopted a steroid culture where teams would hire strength coaches with no baseball experience\textsuperscript{55} who would not only put players on training regimes, but also recommend the best combination of “ergogenic aids”\textsuperscript{56} and how to cycle them in order to maximize performance without depleting the body of its natural hormones.\textsuperscript{57}

Former Major League MVP Jose Canseco estimated in 2003 that approximately 85% of players were using some form of illegal PEDs.\textsuperscript{58} Another former MVP and admitted user, Ken Caminiti,\textsuperscript{59} believed half of all baseball players were using steroids.\textsuperscript{60} Canseco’s manager with the Oakland Athletics, Tony La Russa, gave an interview with 60 Minutes\textsuperscript{61}.
and explained how Canseco openly discussed his steroid use with no apparent fear of discipline. La Russa never reported Canseco’s likely abuse to MLB and later stated that Major League Baseball could have been “more hard-nosed about their approach” in combating PEDs. Even so, “any effort would likely have been rebuffed by the [MLB] Players Association” (“MLBPA”). The “don’t ask, don’t tell, don’t care” attitude of the MLB was manifested by athletes exchanging signed memorabilia for sacks of “greenies” directly in front of fans on the field before games and players openly discussing their steroid programs in the clubhouse. Managers and front office executives claimed ignorance under the auspices of “wanting to respect their players’ privacy.” By 2001, “[i]f you weren’t cheating, you weren’t trying.”

Until 2002, the MLBPA refused to engage in any discussions of a steroid testing policy, arguing it constituted an invasion of privacy and an “abuse of human rights.” Eventually, the MLB and the Player’s Association agreed to initial survey testing, in which each player would be tested twice during the 2003 season, though there would be no punishment for a positive test. By spring training that year, players had become so addicted and accustomed to the uncontested use of PEDs and the resulting muscle enhancement and exponential growth in player salaries that they could not stop using even when they knew the tests were coming.

As per the agreement, since more than five percent of the entire league tested positive for some form of PED, mandatory testing was implemented for the 2004 season. The penalties for a positive test, however, were inadequate, as the punishment merely subjected the athlete to fur-
ther testing and treatment programs, with no suspensions or fines for a violation.\textsuperscript{76} The drug policy was again amended in 2005,\textsuperscript{77} but the penalty for a first time offense was only a ten-day suspension—\textsuperscript{78} not even ten games. Even though the league only tested for forty-five banned substances, twelve players received the ten-day suspension in the first year under the amended 2005 drug testing agreement.\textsuperscript{79}

This \textit{de facto} “look-the-other-way” steroid policy has drawn “fierce Congressional and media scrutiny” for the inability of the Commissioner’s Office and MLBPA to reach an adequate drug policy.\textsuperscript{80} Former World Anti-Doping Agency (“WADA”) chairman Richard Pound called the 2003 MLB drug testing program “a complete and utter joke”\textsuperscript{81} and “an insult to the fight against doping in sport, an insult to the intelligence of the American public, and an insult to the game itself.”\textsuperscript{82} Pound could not believe that the MLB would require an athlete to knowingly cheat \textit{five times} before facing only a one-year suspension.\textsuperscript{83} Currently the MLB has a new drug-testing regime in place,\textsuperscript{84} but even with national media and political attention focused specifically on the MLB, the league continues to boast the most lenient drug testing policy of all major professional sports.\textsuperscript{85}

The PED problem, however, does not lie squarely within the professional sports leagues. As more superstars are admitting to PED use or being caught red handed, public perception is rapidly shifting from
outrage to apathy. Fans recently welcomed back Manny Ramirez from his 50-game suspension with celebratory open arms and a standing ovation. Fans were too quick to forgive Ramirez, considering he never fully admitted wrongdoing or even sought forgiveness. Explaining to eight-year-old little leaguers that cheaters can still be idolized sports heroes has become nothing more than an unfortunate side effect of entertaining Americans with the allure of 500-foot homeruns.

Controlling the use of PEDs is by no means an issue limited to the United States. Performance enhancement in sports has been around since the ancient Olympic games in Greece when no rules governed the performance of participants. For centuries, triumphant athletes have been able to reap the rewards and riches that accompany athletic success, ingesting any substance that could potentially enhance performance without risk of punishment. The first major international organization to ban doping in sports was the International Association of Athletics Federations in 1966, with the International Olympic Committee ("IOC") following suit the next year.

Currently, PED use by Olympic Athletes is regulated by WADA, which has established a comprehensive list of prohibited substances. The list is amended constantly because WADA employs first-class scientists to develop new PEDs, which enables additional tests to be developed.

88. Id.
91. See Stuart and Skouroliaiakou, supra note 90; see also, Kate Ravilious, Barry Bonds Steroid Debate Highlights History of Drugs in Sport, NAT. GEOGRAPHIC NEWS, June 22, 2007, http://news.nationalgeographic.com/news/2007/06/070622-barry-bonds.html. Ancient Mayans are believed to have chewed cocoa leaves before playing the violent ballgame “Pok-a-Tok” in which winners were treated as heroes and the losing team was often killed. Cocoa leaves are known to delay fatigue and increase strength. Id.
92. Connolly, supra note 30, at 162.
93. Id.
oped in an attempt to keep pace with and identify new designer steroids.95 WADA has also created universal sanctions for athletes who test positive as part of the comprehensive World Anti-Doping Code.96

B. Rationale

Having spent the majority of his efforts as IOC President working to combat doping in sport, Jacques Rogge has stated that PEDs are the foremost danger to fair competition and the health of Olympians.97 Former WADA Chairman Richard Pound summarily stated that the credibility of sports would be lost until PED users are banished.98 He said, “Doping is the single most important problem facing sport today. If we don’t win the fight, Olympic-standard sport will not survive—because the public will have no respect for it. Cheats make what should be a triumph of human achievement into a hollow pretence.”99

Athletes who use PEDs not only subject themselves to well-documented health risks100 and potentially life threatening consequences,101 but also peripherally implicate other professional athletes by forcing them to use PEDs to remain competitive, as well as high school and college students who admire such athletes as role models.102 In fact, after it was first reported that Mark McGwire used the substance androstenedione103 during the 1998 season, estimated sales of performance-

95. Id.
98. Id.
99. Id.
100. Mitten, supra note 20, at 800–01. Anabolic steroids may cause an increase in blood pressure and harmful changes in cholesterol levels. Lindsay Sutton, Anabolic Steroids: Not Just For Men Anymore, http://www.vanderbilt.edu/AnS/psychology/health_psychology/anabolic_steroids.htm (last visited Nov. 22, 2008). They may also increase the risk of cardiovascular disease or coronary artery disease. Anabolic steroids are believed to alter the structure of the heart, which could cause hypertension, cardiac arrhythmias, congestive heart failure, heart attacks and sudden cardiac death. Id. Furthermore, anabolic steroids can cause liver damage when the steroids are metabolized, and may reduce sexual function and cause temporary infertility in men. Id. Females may experience increases in body hair, deepening of the voice, and the development of traditionally male sexual characteristics. Id. In adolescents, steroids use may prematurely stop bone development and alter the normal development of sexual characteristics. Id.
101. See Tynes, supra note 83, at 495.
102. Mitten, supra note 20, at 800.
103. According to the Food and Drug Administration:
enhancing substances increased nearly five-fold. Furthermore, a 1990s study on steroid use among teenagers concluded that nearly one million teenage athletes had used steroids at least once. A 2003 survey conducted by the United States Center for Disease Control concluded that “steroid use by high school students had more than doubled since 1991, to more than six percent.”

As more athletes are using PEDs to improve on field performance, other athletes may be similarly inspired to attempt to level the playing field. Athletes might use PEDs when they otherwise would not if they are led to believe the league cannot successfully keep the game clean.

The nature of sport has evolved as athletes who once trained alone or with a friend in preparation for a season are now likely to be “surrounded by, and to be increasingly dependent upon” an entire staff of medical personnel in an effort to “compete more effectively in their chosen sport.” If medical and support staff can promise athletes improved levels of performance through the use of PEDs, it may be hard for an

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Children and adolescents are particularly vulnerable to irreversible effects of androstenedione via its conversion to active sex steroids. These effects include disruption of normal sexual development, specifically virilization in girls associated with severe acne, excessive body and facial hair, deepening of the voice, permanent enlargement of the clitoris, disruption of the menstrual cycle, and infertility. The conversion to estrogens can cause feminization of boys, with breast enlargement and testicular atrophy. In girls, exposure to excess estrogens may confer long-term increased risk for breast and uterine cancer. Finally, in boys and girls, the combined effects of excessive androgens and estrogens can induce premature puberty, early closure of the growth plates of long bones, resulting in significant compromise of adult stature.


105. Id. at 382.


107. TORRE & VERDUCCI, supra note 5, at 96; see also Mitten, supra note 20, at 801.

athlete to turn PEDs down with the possibility of lagging behind cheaters in their sport.\textsuperscript{(109)}

Additionally, such prospects of excessive financial reward and international recognition have placed a major emphasis on individual performance. United States Olympic Coach Brooks Johnson explained that the increasing reward from sporting success has driven “top-class international athletes to ‘wake up with the desire and the need and the compulsion and the obsession to win, and they go to sleep with it.”\textsuperscript{(110)} The most lucrative rewards for success at the highest levels of competition are only available to a tiny sub-class of professional athletes.\textsuperscript{(111)} Robert Voy, former Chief Medical Officer for the United States Olympic Committee, stated poignantly that, in terms of money, “[S]econd place doesn’t count.”\textsuperscript{(112)}

The steroid epidemic is hardly limited to our nation’s top performers. As mentioned above, even bench warmers and career minor leaguers are using PEDs and putting their livelihoods in jeopardy for a shot at athletic and financial success that may never come to fruition.\textsuperscript{(113)} For some professional and amateur athletes, a dedication to strength training and close dietary monitoring will not be enough to elevate them to the top of their profession.\textsuperscript{(114)} PEDs have the potential of allowing fringe players to extend their careers by years and remain relevant in their profession long enough to carve out a decent financial nest egg.\textsuperscript{(115)} Positive tests for PED use are significantly more prevalent in baseball’s Minor Leagues,\textsuperscript{(116)} where recent high school graduates and college-age athletes are attempting to live out their dream of playing in the big leagues and signing mega

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\textsuperscript{109} In the United States and, increasingly, in Europe, an Olympic gold medal is believed to be worth several million U.S. dollars in sponsorship deals and product endorsements in the United States. \textit{Id.}
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\textsuperscript{110} \textit{Id.} at 4.
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\textsuperscript{111} \textit{Id.}
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\textsuperscript{112} \textit{Id.}
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\textsuperscript{113} \textit{TORRE & VERDUCI, supra note 5, at 96.}
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\textsuperscript{114} \textit{Id.}
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\textsuperscript{115} Former Major Leaguer Todd Hundley had earned less than one million dollars over his entire career, until he began using PEDs and hit 41 home runs during the 1996 season, turning his career around and earning more than $47 million by the time he retired in 2004. \textit{Id.} at 95.
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\textsuperscript{116} Thus far, in 2009, four MLB players have tested positive for PEDs, but in the Minor Leagues, 44 players have tested positive for a banned substance. Maury Brown, All-Time MLB and Minor League Drug Suspensions, \textit{THE BIZ OF BASEBALL}, Sept. 7, 2007, http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=996&Itemid=85. In 2008, two Major Leaguers failed a drug test, while 66 minor leaguers were suspended for testing positive. \textit{Id.} In 2005, the first year the Minor League Drug Prevention and Treatment Program was in effect, 87 players tested positive. \textit{Id.}
\end{flushleft}
endorsement deals. How are we to teach our nation’s youth that sports are about more than just winning and losing, when their heroes, and even those athletes who never make it to the big leagues, appear repulsively focused on personal statistics and victory alone?

The United States Office of National Drug Control Policy (“ONDCP”) has identified doping in sports as an “international crisis” and has declared that it has reached a level where clean athletes will be indefinitely outscored, outrun, outrivaled, and overwhelmed by PED users. Still, even though the United States Olympic Committee has adopted the WADA code for regulation of international athletic competition, no action has been taken to address similar problems that plague its more prominent national sporting associations.

Many governments and regulatory agencies acknowledge that athletic competition is an essential element of national culture and that regulation of PED use is justified by the need to preserve its spirit. The WADA Code (“the Code”) defines the “spirit of sport” as the “intrinsic value [of sport and] the essence of Olympism . . . [it is] the celebration of the human spirit, body, and mind, characterized by values such as ethics and fair play, respect for rule and laws, teamwork, dedication, and commitment.”

During international competition, athletes represent their countries; therefore, a positive test of a victorious athlete will have ramifications beyond the shamed athlete. Not only will the athlete be stripped of his or her medal, humiliating the athlete’s home nation, but the positive test will also suggest that the athlete’s home country was unable to properly regulate PEDs within its borders. Furthermore, Olympic host nations often play a large role in the organization and facilitation of WADA antidoping regulation, so in an effort to avoid the scandal that has plagued so many previous Olympiads, it is highly important that the host nation

120. The Code, supra note 83.
121. Id.
122. See Fortenberry & Hoffman, supra note 42.
sponsors a drug-free Olympic games. One must begin to question whether recent U.S. bids to host the Olympics—bids that have ultimately failed despite having advanced to the final rounds of consideration—have been stymied by the growing notion that PED use in America cannot be controlled.

Success and recognition are pinnacles of achievement in the medical science profession just as they are in sports. Major breakthroughs, however, such as the development of a chemical compound capable of producing growth of muscle tissue in the human body, may provide a significant economic windfall to the developer, but it will not be likely to attract the same commercial endorsement deals or the notoriety and international celebrity given to Olympic World Record Holders or Home Run Champions. When tempted by the vast sums of money and wide recognition among professional athletes, it would not be surprising to see some medical entrepreneurs willing to pair with athletes for a sub-

123. Koller, supra note 117, at 98.


125. Tetrahydrogestrinone, also known as THG is an anabolic steroid capable of producing increased levels of androgen and testosterone, which may promote muscle growth and weight loss. The steroid was developed by Patrick Arnold for the Bay Area Laboratory Co-operative, a nutritional supplement company. R. Jasuja et al., Tetrahydrogestrinone is an Androgenic Steroid that Stimulates Androgen Receptor-mediated, Myogenic Differentiation in C3H10T1/2 Multipotent Mesenchymal Cells and Promotes Muscle Accretion in Orchidectomized Male Rats, 146 ENDOCRINOLOGY 4472-78 (2005), available at http://endo.endojournals.org/cgi/reprint/146/10/4472.


127. Former Olympic Gold Medalist Marion Jones was a BALCO client who has since been suspended from competition and formally stripped of all her former titles by the I.O.C., even after she had voluntarily returned her five medals, after admitting to using THG between 1999 and 2002. Jones was also sentenced to six months imprisonment in connection to her lying about using PEDs. See Associated Press, Olympic Committee Strips Medals from Marion Jones’ Relay Teammates, FOXNEWS.COM, Apr. 10, 2008, http://www.foxnews.com/story/0,2933,349271,00.html; Phil Hersh, Marion Jones’ fall from grace is complete, L.A. TIMES, Jan. 12, 2008, available at http://articles.latimes.com/2008/jan/12/sports/sp-hersh12; Amy Shipley, Track Star Marion Jones Admits to Using Steroids, WASH. POST, Oct. 5, 2007, at A1.

ststantial sum and provide them with the tools they desire to achieve greatness in their respective sports.

Why, then, should performance-enhancing drugs be banned? Anabolic steroids have well documented medical benefits, and are currently used for therapeutic reasons such as inducing puberty in men129 and treating chronic medical conditions like HIV.130 Athletes, however, may be drawn to PEDs for non-therapeutic purposes because they may improve physical condition by inducing the growth of muscle mass by increasing protein and reducing fat.131

There is a constituency of both athletes and medical professionals who advocate the deregulation of PEDs and would seek to allow athletes to use steroids in sports.132 Former world champion skier Bode Miller has publically voiced his desire to allow athletes to use PEDs under medical supervision after receiving full disclosure of known health risks.133 Athletes already achieve success through intense training regimens and strict adherence to diet and nutrient intake.134 If professional sports are truly the highest level of athletic performance, why not allow the individual athletes to further enhance their abilities through synthetic supplements?

We cannot condone the legal use of PEDs because their legitimization among professional athletes invites young athletes to use them with impunity, meanwhile society has acknowledged the potentially severe medical risks their use entails.135 A popular sentiment among commentators is that “[c]oncern for youth health and moral questions regarding the use of enhancement by youths in sports is without a doubt the driving force in this issue.”136

132. Mitten, supra note 20, at 799.
133. Id.
134. Id.
136. Id. at 210.
For many young athletes, PEDs may be a “gateway to achieving athletic
dreams.” For children, athletes are heroes and role models, and the
media magnifies their every move:

To impressionable young athletes, [PED use by Olympic and profes-
sional athletes] can create the impression of implied legitimacy. Re-
ports of . . . steroid users do not necessarily translate into images of
cheaters or lawbreakers in the eyes of a young athlete. It is more likely
that they see . . . celebrit[ies] . . . in great physical condition, perform[ing]
at the top of their game, and mak[ing] a great deal of money.

As noted by Dr. Denise Garibaldi, who lost her own son after he com-
mitted suicide following a bout of steroid-induced depression, desires to
make the high school sports team, attempts to earn an athletic scholarship
in college, or aspirations to get noticed by professional scouts are com-
mon reasons to use PEDs. Young athletes only see the successes of
their heroes on national television and on Wheaties boxes; they do not
read about the conclusions of preliminary laboratory tests on the long-
term side effects of PEDs.

II. POLICING THE INTERNATIONAL PLAYING FIELDS

A. International Agreements

Conceptually, the legal system functions to impede immoral and dan-
gerous behavior while at the same time attempting to promote desirable
social norms. Once the documented use of PEDs became more preva-
lent in the mid 1980s, the international community determined that the
existing drug testing regimes were not solving the problems. As nations
gathered to brainstorm ways to address this emerging global concern,
their focus was not on punishment of athletes using PEDs, but rather on
educating the world regarding the health risks and moral consequences of
PED use. In 1989, the Council of Europe addressed the issue by creating,
and eventually ratifying, the Anti-Doping Convention (the “Convention”). The Convention set forth a number of technical, legislative,
financial, and educational standards and regulations grounded upon the consensus that anti-doping laws were necessary to preserve individual health and to maintain the integrity of sports. The Convention calls for the protection of current athletes’ health and education for the international youth as to the potential medical consequences associated with PEDs.

The IOC’s goals of informing young athletes of the medical dangers and ethical implications of PED use is essential for combating PEDs. Article Six of the Convention calls for the implementation of programs targeted at school students and young athletes, dedicated to the education and dissemination of information regarding the health risks inherent in doping. Without these educational programs, there will be little to temper the desire of youths to follow in the footsteps of athletes who have publicly admitted to using steroids or those who are alleged to have done so during their professional careers but who have not faced sanctions from their respective leagues.

The Convention was a good first step toward recognizing the global problem of PEDs in sports, but the document fails to address many important issues necessary for a comprehensive anti-doping regime. The

143. The Convention is not limited to the participating members of the Council of Europe, rather it extends to all those states wishing to adopt its governing principles either in whole, or in part. Id. at art. 14.
144. Id. at pmbl., art. I.
145. Id. at pmbl. ¶ 4.
146. Id. at art. 6.
147. Id.
148. Id.
149. During the 1998 season in which he set the single-season home run record, Mark McGwire admitting to using the nutritional supplement androstenedione, which raises testosterone levels, and, although it was legal under the MLB drug policy at the time, the pill was banned by the NFL and has since been added to the MLB banned substances list. See Murray Chass, McGwire’s Grand Finale Makes It 70, N.Y. TIMES, Sept. 28, 1998, at A1; Joe Drape, McGwire Admits Taking Controversial Substance, N.Y. TIMES, Aug. 22, 1998, at C3; Barry M. Bloom, MLB Bans Use of Androstenedione, MLB.COM, Jun. 29, 2004, available at http://mlb.mlb.com/content/printer_friendly/mlb/y2004/m06/d29/c783595.jsp.
150. In 2006, two San Francisco Chronicle reporters, Mark Fainaru-Wada and Lance Williams, released their book Game of Shadows, which documented Barry Bonds’ alleged use of PEDs over at least five seasons, describing in detail his daily drug usage and his persistent doping, including specific drugs Bonds injected during the 2001 season in which he set the single season home run record. Mark Fainaru-Wada & Lance Williams, Game of Shadows: Barry Bonds, BALCO, and the Steroids Scandal That Rocked Professional Sports (2006). To this date, Bonds has never failed an MLB drug test nor has he been criminally charged with possession of a controlled substance in violation of the Federal Anabolic Steroid Act.
Convention makes a noble effort to adopt “appropriate legislation, regulations or administrative measures to restrict the availability . . . as well as the use in sport of banned doping agents, and doping methods and in particular anabolic steroids.”151 Yet, the Convention lacks the compliance and enforcement power—issues commonly associated with international soft law documents.152 The Convention also calls for member nations to assist sports organizations in financing doping controls through subsidies and grants,153 but it fails to identify a source for consistent income.

Similarly, the Convention implores parties to “encourage and . . . facilitate” the implementation of anti-doping controls by sports organizations154 and to assist these organizations and their members in negotiating a satisfactory testing regime that can operate uniformly on the international level.155 However, without required action or benchmarks for implementation, any specific action pursuant to the Convention is left to the individual member states. The Convention recommends that countries create a harmonized list of banned substances,156 drug testing procedures,157 and disciplinary procedures that apply “agreed international principles of natural justice . . . and ensure respect for the fundamental rights of suspected sportsmen and sportswomen.”158 The Convention further encourages parties to work with their sports organizations in order to sanction medical personnel who may be responsible for disseminating PEDs to professional athletes.159 But such efforts may become difficult when nation states must not only seek to unify an anti-doping regime within their borders without clear international guidance, but also then attempt to bring these laws in line with their international counterparts.

For nearly a decade, the international sports community struggled to adhere to the lofty goals set forth in the Convention, and sought to create a new international scheme, particularly with regard to implementing doping controls160 and sanctions for PED use.161 In 1999, WADA

151. Anti-Doping Convention, supra note 142, at art. 4, § 1.
153. Anti-Doping Convention, supra note 142, at art. 3, § 3(a).
154. Id. at § 3(c).
155. Id. at § 3(d).
156. Id. at art. 7(2)(b).
157. Id. at art. 7(2)(c).
158. Id. at art. 7(2)(d).
159. Id. at art. 7(2)(e).
161. Id.
emerged as a byproduct of an international movement to eradicate doping in sports and to “promote, coordinate, and monitor the fight against doping in sports in all its forms.” 162 In particular, WADA was developed in response to the lack of uniform testing procedures and regulation of anti-doping in international sports. 163

To combat the disjointed nature of the fight against PEDs, the creation of WADA was a major step in the fight against doping in sports because the agency was founded on the notion that a comprehensive anti-doping program should provide athletes and sports federations with the same anti-doping procedures “no matter the nationality, the sport[,] or the country where tested.” 164 Unlike the Convention, WADA has generated a comprehensive four-part scheme to anti-doping regulation that includes: mandatory implementation of specific doping controls with uniform testing procedures and sanctions for violations; 165 education and research programs; 166 well-defined roles and responsibilities for athletes and medical and support personnel; 167 and specific guidance with respect to compliance and interpretation of the WADA Code (the “Code”). 168

Much like the Convention, one of the primary goals of WADA was the promotion of “health, fairness[,] and equality for athletes worldwide.” 169 The goal was not only to protect the health of athletes, but also to restore the integrity of athletic competition and preserve the values of fair play, ethics, and honesty. 170 The purpose of WADA, however, was to move beyond the Convention to ensure effective and uniform enforcement at the international level. 171 WADA succeeds by incorporating a list of banned substances and providing specific guidance for laboratory accreditation and testing procedures that are binding on the more than five-hundred sports organizations that have adopted the Code. 172

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163. The IOC governs testing for the Olympic Games while the individual national sports organizations are left to formulate their own testing procedures. Rosen, supra note 160, at 4.
164. Id.
165. See The Code, supra note 83, at pt. I.
166. See Id. at pt. II.
167. See Id. at pt. III.
168. See Id. at pt. IV.
169. Id. at 1.
170. Id. at 3.
WADA takes a hard-line stance towards the presence of prohibited substances in an athletes’ body.\textsuperscript{173} Under a strict liability regime, athletes are under a duty of personal responsibility and any specimen that shows the presence of a prohibited substance, or its metabolites or markers, will be considered an anti-doping violation without any consideration of intent, fault, negligence, or knowing use.\textsuperscript{174} Therefore, an athlete is guilty of an anti-doping violation as soon as an illegal substance is discovered.\textsuperscript{175} Furthermore, athletes who refuse to participate in the anti-doping scheme or those who “fail without compelling justification to submit to a drug test are guilty of an anti-doping violation under WADA.”\textsuperscript{176}

Although the standard for an anti-doping violation does not rise to the level of proof beyond a reasonable doubt, the current regime is necessary to close off potential loopholes in the system. As seen from the BALCO scandal in 2003, in which many prominent American athletes were linked to a drug laboratory known to produce THG,\textsuperscript{177} athletes testing positive for PEDs might claim they did not know a particular substance was prohibited, or that they were simply given a supplement by a trainer or medical personnel without knowledge of its illicit nature.\textsuperscript{178} Even though many athletes involved in the BALCO scandal have claimed ig-
norance to the ingestion of any banned substance, the results of numerous athletic competitions which have not already been overturned may forever remain tainted due to the presence of PEDs in the athlete’s body.

For this reason, and, additionally, to prevent athletes from attempting to cover up “knowing and intentional use” of PEDs by declaring their lack of knowledge of the presence of PEDs in their bodies, WADA imposes a strict liability standard\(^\text{179}\) for anti-doping violations.\(^\text{180}\) WADA also imposes sanctions upon medical and training staff to ensure that those parties who are responsible for intentionally administering PEDs to an athlete without the athlete’s knowledge will be punished under the anti-doping code.\(^\text{181}\) Furthermore, a requirement of intent would impose substantial litigation costs that might not only cripple many sports federations financially,\(^\text{182}\) but could also delay the official results of championship competitions significantly. Although many believe the reduced standard of proof under the WADA scheme is unfair to the athletes,\(^\text{183}\) athletes are put on notice of the stringent WADA policies behind the testing regime when they agree to participate in the sporting event. This lesser quantum of proof forces athletes to make informed choices about what substances they put into their bodies with the goal of ultimately reducing the serious health risks PED users impose upon themselves. Athletes who are willing to chance these health risks do so knowing they are also risking their athletic careers.

WADA’s comprehensive doping control scheme is ineffective without a method of ensuring compliance by the international sports federations. The Code is a nongovernmental document, thus, many governments are unable to enforce its provisions effectively—the threat of governmental sanctions would make it much easier to engender athletes’ compliance with the testing procedures.\(^\text{184}\) The international community reconvened to address the issue of noncompliance and lack of enforcement at the United Nations Educational, Scientific and Cultural Organization

\(^{179}\) An “[a]thlete or other Person who fails a drug test for the first time has the burden of establishing no fault or negligence, and if he or she can successfully meet this burden to the ‘comfortable satisfaction’ of the hearing body, the athlete is eligible for a reduced sanction.” David Howman, Sanctions Under the World Anti-Doping Code (Nov. 12, 2003), www.wada-ama.org/rtecontent/document/LEGAL_sanctions_howman.pdf.

\(^{180}\) The Code, supra note 83, at 9.

\(^{181}\) WADA language sanctions “athletes or other persons” who may be responsible for an athlete’s positive drug test. Id. at 9.

\(^{182}\) Id.

\(^{183}\) Under the Code, athletes may be found guilty of a doping violation based on their use of an over-the-counter drug that contains a banned substance, even when the drug has not been labeled as such. Rosen, supra note 160, at 6–7.

\(^{184}\) Id.
Thirty-eight nations "unanimously adopted and ratified the UNESCO Convention (also known as the Copenhagen Declaration on Anti-Doping in Sport) on October 19, 2005." The agreement was reached upon the premise that "sport should play an important role in the protection of health, in moral and physical education, and in the promotion of international understanding and peace. . . ." The Copenhagen Declaration creates a legal framework for the implementation of the WADA Code, creating the first binding piece of anti-doping legislation. The Declaration required ratification by thirty countries in order for it to become effective which did not occur until December 2006, finally bringing the Convention into effect on February 1, 2007.

The Copenhagen declaration calls for nation-states to "provide funding [for WADA] within their respective budgets" and requires national legislatures to implement laws to control availability of banned substances and to begin to create domestic frameworks for implementing the WADA code in their respective nations. The United States, however, has not ratified the Copenhagen Declaration, and has taken no affirmative legislative action in the fight against illegal PEDs.

Even though WADA and the accompanying Copenhagen Declaration provide for comprehensive doping control systems and the means for nations to implement the policies, there is insufficient evidence that the policies in place are effective at stopping the abuse of PEDs.

B. National Regimes

1. Rationale

The international agreements only establish a baseline of anti-doping regulations, as participating countries are free to enact more stringent
restrictions that address special concerns of the nation not raised or left unresolved by the International agreements. Many governments have found the Code very difficult to understand and thus even harder to implement into their nations’ legal frameworks.\textsuperscript{195} For example, the standard sanction to be imposed for a first time offense may be reduced five different ways, each requiring the application of a different section of the Code.\textsuperscript{196} Additionally, when the individual sports federation has its own sanctioning policy for anti-doping violations, or a banned substances list that is different from WADA’s list, it becomes extremely difficult for athletes and other persons to ensure compliance.\textsuperscript{197} By adopting their own standards, national legislatures can help athletes within their respective jurisdictions understand the anti-doping policy and establish a definitive banned substances list that will be standardized for all national sports federations, as long as it is more inclusive than the WADA banned substances list.

Another difficulty for WADA is that its provisions are enforced and upheld by a specialized administrative tribunal, the Court of Arbitration for Sport (“CAS”).\textsuperscript{198} Even though CAS is an internationally accepted arbitration court that currently holds exclusive jurisdiction over anti-doping violations in international sports, the CAS is only binding upon member states,\textsuperscript{199} and, without clear precedent, and, given the potential for conflicting national legislation, there will be no explanatory guideposts for athletes to follow.\textsuperscript{200} CAS jurisdiction does not extend to professional sports organizations or national sports federations as these groups are not signatories to WADA, so the absence of a localized anti-doping regulation or the creation of a regime that does not adequately mirror the WADA Code may result in incongruous sanctions for the same violation. Similarly, WADA and the Anti-Doping Convention have different definitions for terms, including the definition of “athlete.”\textsuperscript{201}

\begin{itemize}
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{197} \textit{Id.} at 18.
\item \textsuperscript{199} Tarasti, \textit{supra} note 195, at 19.
\item \textsuperscript{200} \textit{Id.} at 21.
\item \textsuperscript{201} The Anti-Doping Convention defines sportsmen and sportswomen as “those persons who participate regularly in organized sports activities.” Anti-Doping Convention, \textit{supra} note 142, at art. 2 §1(c). For the purposes of Doping Control, WADA defines “athlete” as “any Person who participates in sport at the international level (as defined by each International Federation) or national level (as defined by each National Anti-Doping Organization) and any additional Person who participates in sport at a lower
and, therefore, even when CAS has exclusive jurisdiction, the same evidence may be evaluated on a different standard, which may dictate the guilt or innocence of the athlete differently.202

Another problem with WADA is that some countries may find the sanctions inappropriate or ineffective.203 For medical support personnel or physicians who are found guilty of an anti-doping violation, a two-year suspension from the sport may not be a sufficient deterrence from engaging in illicit behavior.204 These individuals can easily shift to another sport, or work privately with teams or athletes that are not governed by international agreements. Some countries may find that a substantial fine or other sanction is more appropriate. Alternatively, the two-year ban for athletes will interrupt their careers and prevent them from engaging in their occupations,205 possibly in violation of national labor laws prohibiting restraint on trade.206 A fine would carry a minimal element of deterrence considering the magnitude of salaries of professional athletes.207

Recent studies have indicated that athletes who still want to cheat even in the face of the comprehensive WADA code can do so with little risk of being caught.208 A study conducted by the Copenhagen Muscle Research Center in Denmark—designed to test the efficacy of the WADA testing facilities—found that WADA accredited laboratories were unable to successfully test for the presence of erythropoietin (“EPO”), a substance that stimulates the production of oxygen-carrying red blood cells that helps improve an athlete’s endurance.209 Researchers

level if designated by the Person’s National Anti-Doping Organization. For purposes of anti-doping and education, any Person who participates in sport is under the authority of any Signatory, government, or other sports organization accepting the Code.” THE CODE, supra note 83, at 72.

203. Id.
204. Id. at 19.
205. Id.
207. Id.
209. Id. Eight men agreed to be injected with EPO over a four-week period, following a regimen similar to those used by athletes attempting to cheat. The study collected urine samples on multiple occasions before, during, and after the men were doping. See Carsten Lundby et al., Testing for Recombinant Human Erythropoietin in Urine: Problems Associated with Current Anti-doping Testing, 105 J. APPLIED PHYSIOLOGY 417, 417 (2008), available at http://jap.physiology.org/cgi/reprint/105/2/417.pdf. When samples were sent
believe that it is very hard to establish the presence of illegal hormones in urine analysis because the body naturally produces hormones such as EPO and testosterone, which are banned substances only when produced artificially, pursuant to WADA.  

Athletes will not be effectively deterred by WADA when they believe they can avoid a positive test. A glaring example is the recent drug scandals that have plagued the Tour de France. The 2007 winner Alberto Contrador did not participate in the 2008 race because his team was excluded, having been involved in various doping scandals over the past two years. American Floyd Landis lost his 2006 title after he failed a drug test. This year, Spanish cyclists Moisés Dueñas Nevado and Manuel Beltrán each tested positive for EPO during the Tour de France, and Italian rider Riccardo Ricco also tested positive, after which his entire team voluntarily withdrew from the race. In each instance, the riders allegedly took PEDs fully aware they would be tested consistently throughout the race—the rules stipulated that the winning rider of each stage, the overall leader, and randomly selected riders would be tested each day. Such results cast doubt upon the validity of previous titles won by the disqualified athletes and also call into question how many other riders were using EPO without being tested and caught.

to WADA accredited laboratories, one lab found some positive and others “suspicious.” Another lab did not find any samples positive, and found others suspicious. Id. The two labs did not agree on which samples were suspicious. Under the Code, if one lab finds a sample suspicious, or even finds it positive for an illegal substance such as EPO, the sample must be tested again by a different laboratory, and the athlete is only found guilty of an anti-doping violation if the second lab detects the illegal substance. Id. Under WADA rules, none of the eight subjects in the study would have been found guilty of a doping violation, even though all eight men had elevated red blood cell counts and improved endurance performances. Id.

211. Id.
213. Id.
214. Id.
Even when the quantity of positive tests is decreasing, it is naïve to believe that athletes are not cheating. Adding a single grain of powdered laundry detergent to a urine sample will destroy EPO and human growth hormone in the urine. When the threat of a two-year suspension is not enough to deter an athlete who has knowingly used PEDs from walking into a drug test because that athlete is confident that he or she can beat the test anyway, a new regime must be implemented. The international regime has only forced athletes, medical personnel, and scientists to work harder to beat the drug tests, but individual countries must take it upon themselves to institute a policy that will force dopers out and restore the integrity of sports.

2. Legislation

In an effort to close the loopholes in the WADA regime, and also to more effectively investigate and eradicate doping violations, European countries have instituted national legislative schemes that build upon the WADA foundation. Due in large part to the doping scandals that have plagued some of Europe’s most prestigious athletic competitions such as the Tour de France, national governments have taken action to expose and eliminate the use of illegal PEDs because “drug use in sports threatens . . . the credibility of heroes, their accomplishments, and the integrity of the games they participate in.” As in the United States, PEDs are becoming more prevalent in European “high school locker rooms and on neighborhood soccer fields.” PEDs’ negative effects can be most harmful when they not only affect the physical health of young people who use them, but also encourage children to cheat and thus corrupt the positive impact sports would otherwise have on their psychological development.

In 2000, the Italian government adopted one of the first national anti-doping statutes aimed at combating the use of PEDs by regulating the health standards in athletic activities. The legislation states that because the aim of sport is to promote individual and collective health,
Sporting activities are to be governed by ethical principles and educational values that are integral to Italian society. As doping is a matter of national health, the Minister of Health is to create, under the law, a commission composed of experts from the entire spectrum of society, including physicians, political representatives, biochemists, athletes, and coaches to help develop a list of banned substances, testing protocols, and to determine appropriate sanctions for violations.

Significantly, the law vigorously targets individuals who “obtain, administer or use drugs not justified by pathological conditions that may alter the performance of athletes” by imposing criminal penalties of potential fines and imprisonment up to three years. Similar penalties are imposed for substances that may, or are intended, to modify the results of a drug test. This law is applicable not only to Italian athletes engaging in international competition, but also to all Italian citizens, including professional soccer leagues (which are populated by some of the most talented and most popular athletes in the world). Italian athletes would have to heavily consider the allure of PEDs and weigh the benefits of use against the costs of a potential criminal conviction and jail time should they test positive. Even for the greatest superstars, such international embarrassment would likely end their professional athletic careers and assuredly terminate any endorsement contracts they possessed. Even if athletes believe they can beat the drug test, the risk of heavy fines or imprisonment would surely serve as a greater deterrent than a comparatively petty two-year suspension.

In France, the legislature adopted a comprehensive anti-doping program, creating the French Anti-Doping Agency (“AFLD”), an independent public legal authority designed to determine and implement anti-doping measures pursuant to French legislation adopted in October 2006. The law makes AFLD responsible for establishing doping con-

224. Id. at §1.1.
225. Id. at §3.3.
226. Id. at §7.
227. Id. at §4.
228. Id. at §9.
229. Id. at §9.1.
230. Id.
trols,\textsuperscript{233} drafting a list of prohibited substances,\textsuperscript{234} and developing prevention, education, and research activities related to anti-doping.\textsuperscript{235} It also gives the AFLD the power to overrule sanctions imposed by national sports federations if the AFLD committee deems a sanction too lenient.\textsuperscript{236} Under this regime, the French government allows the individual sports federations to police themselves, while still employing independent oversight to ensure that sanctions properly correspond to the seriousness of the crime. French law also employs the criminal justice system to punish individuals who supply athletes or minors with illegal performance-enhancing substances.\textsuperscript{237}

The law punishes those who facilitate or encourage the use of PEDs “in any way” with five years imprisonment and a fine of €75,000 Euros.\textsuperscript{238} This hard-line stance shows the nation’s citizens that their government is committed to preserving the health of all sportsmen, both professional and amateur, and that rather than punish the athlete, the law targets the supplier. Imposing such heavy sanctions upon the source suggests a legislative intent to substantially decrease the availability of PEDs within the country, as physicians and drug suppliers will not risk debilitating fines and lengthy jail sentences when they are only intermediary financial beneficiaries of PED use, compared to the athletes who receive fame, glory, and robust endorsement deals.

In 2008, Germany also introduced its own version of an anti-doping law,\textsuperscript{239} as the legislature felt compelled to act to protect “society’s health” upon the recognition that doping “tends to destroy ethical-moral values of the sports world.”\textsuperscript{240} The legislature based this decision on statistics that found that “sixty-six percent of all adults living in Germany participate regularly in sporting activities and see professional athletes as their heroes.”\textsuperscript{241} The German government believed that the current international doping framework was ineffective, that the individual sports federations were unable to adequately regulate doping in sports, and that

\begin{itemize}
  \item \textsuperscript{233} \textit{Code du Sport} [C. Sport] art. L. 232-5().
  \item \textsuperscript{234} The banned substances list mirrors the WADA banned substances list and shall be published in the Official Journal of the French Republic. C. Sport art. L. 232–9().
  \item \textsuperscript{235} C. Sport art. L. 232-5.
  \item \textsuperscript{236} C. Sport art. L. 232-21, 22, 23.
  \item \textsuperscript{237} C. Sport art. L. 232-26.
  \item \textsuperscript{238} Id.
  \item \textsuperscript{239} BTDrucks 16/5526, available at http://dip21.bundestag.de/dip21/btd/16/055/1605526.pdf.
  \item \textsuperscript{240} Julia Völlmecke, \textit{Doping As a Crime? The Policy Issue Concerning the Choice of Method to Deal with Doping}, INT’L SPORTS L.J., 2008/1-2, at 49, 49.
  \item \textsuperscript{241} Id.
\end{itemize}
criminal law was necessary to protect individual athletes as well as society from harm.\textsuperscript{242}

3. The Criminalization Rationale

A state-enforced code of conduct supported by the criminal justice system is an appropriate method to avoid the serious threats posed by illegal PEDs to society’s welfare, integrity, and health.\textsuperscript{243} Methods used for cheating in sports continue to develop at an extraordinary rate, and, as such, the government is in a better position to develop and enforce a code of conduct, as opposed to a private organization whose interests may not necessarily be aligned with the public’s.\textsuperscript{244} Since doping in sports is a public concern, the enforcement of morality-based laws with criminal penalties is valid in that it provides the “certainty, consistency[,] and transparency” that is missing from the private and international regulatory framework.\textsuperscript{245} “The aim of criminal law is to protect the individual as well as society from harm,”\textsuperscript{246} and this is a necessary step, not only to police the ball fields, but also to ensure the prominent position of sports in society and to combat a potentially life-threatening influence on young athletes. The promotion of health in society is not met solely by deterring the use of PEDs—a comprehensive regime that can investigate, detect, and prevent potential use of physically harmful substances is necessary.\textsuperscript{247}

Using the criminal justice system to combat doping violations goes far beyond what is employed by the governing international doctrine. The criminal justice system would offer new ways to conduct criminal investigations into allegations of possession, use, and development of PEDs, as well as provide law enforcement with the necessary tools to order investigatory searches and seizures of incriminating evidence.\textsuperscript{248} An athlete facing criminal charges might be more likely to cooperate with autho-

\textsuperscript{242} Id. at 50.
\textsuperscript{243} Id.
\textsuperscript{244} “Doping is deemed to be unhealthy. Doping is cheating and . . . immoral. The methods used for cheating have become more and more innovative and have reached epidemic proportions. Doping is therefore of public interest and demands a public rather than a private response.” Id.
\textsuperscript{245} Id.
\textsuperscript{248} Id.
ties when faced with imprisonment.\footnote{Völlmecke, supra note 240, at 50.} Even the threat of costly legal proceedings could be sufficiently intimidating to persuade an athlete to cooperate\footnote{Id.} in investigations, which could lead to more convictions of those who are most deeply involved in PED production or distribution schemes.

Certainly, criminalization of doping violations would impose new obligations and responsibilities on the state.\footnote{Ioannidis, supra note 246, at 30.} The state would be charged with preserving the individual autonomy of the athlete while still acting in the name of the public interest.\footnote{Id.} Although the criminalization of doping violations, which would ultimately require the use of evidence collected via mandatory drug-tests in criminal proceedings, may evoke Constitutional challenges in light of the Fifth Amendment’s prohibition on forced self-incrimination, such use of real evidence in a criminal proceeding will likely pass muster under the standard set forth in \textit{Schmerber v. California}.\footnote{Schmerber v. California, 384 U.S. 757, 764 (1966) (“the privilege [against self-incrimination] is a bar against compelling ‘communications’ or ‘testimony,’ but that compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate it.”).} On the other hand, State constitutional provisions often provide greater protection to the accused,\footnote{See, e.g., S.D. CONST. art. VI, §9 (“No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense.”); M.A. CONST. pt. I, art. XII. (“No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself . . . .”); I.L. CONST. art. I, §10 (“No person shall be compelled in a criminal case to give evidence against himself . . . .’’); cf. U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself . . . .”)).} and, therefore, additional Constitutional issues may arise depending on jurisdiction, which further complicates essential doping-control uniformity. Participation in sports, however, necessarily requires acceptance of the governing rules,\footnote{Ioannidis, supra note 246, at 31.} and it is of paramount importance that the public confidence in the integrity of athletic competitions be restored by ensuring the continuing “adherence to the essential values of fairness, justice[,] and equality,”\footnote{Id.} that form the cornerstones of competitive sport. The European Convention on Human Rights provides for the qualified right of respect for privacy, but allows for special exceptions when interference is “necessary in a democratic society . . . for protection of health or mor-
als.”257 Under this document, preserving individual privacy may be outweighed by the justification for criminalizing the harms and risks that threaten “society’s welfare, integrity[,] and existence.”258 If the national legislature determines societal concerns demand the criminalization of doping violations, athletes who participate do so via free will with full knowledge of the consequences of their choices.

Additionally, as sports law expert Gregory Ioannidis notes, sports are inextricably linked with society259 and serve to promote values that society honors and desires to protect,260 thus, the criminalization of doping violations is an important step forward in working to preserve the safe and healthy development of the nation’s youth.261 In addition to honesty and fairness, sports promote healthy development by encouraging young athletes to stay active and to get much-needed exercise,262 all while helping to develop a sense of community and camaraderie fostered by teamwork. It is argued that morality should not influence the law,263 but the criminalization of PEDs is only a small step beyond current law in the United States, which punishes the use and possession of substances with limited or unknown health benefits under the Controlled Substances Act.264

The legal framework is already in place for the United States to follow its international counterparts in adopting a more dynamic approach to counter the unprincipled “pursuit of wealth and fame [that] now threaten[s] our very social fabric.”265 The criminal code has already been employed to preserve and protect the health of society; why not adopt legislation in the United States that also safeguards the public interest266 in sport, which encompasses education, professionalism, and ideals of fairness, justice, and equality?

258. Ioannidis, supra note 246, at 38.
259. Id. at 32.
260. Id. at 33.
261. Id.
262. Id.
265. Id.
266. Ioannidis, supra note 246, at 34.
Although the United States Olympic Association is bound by the WADA Code and testing is carried out by the United States Anti-Doping Agency (“USADA”), American professional sports remain outside WADA jurisdiction. The decision to remain outside the reach of WADA falls squarely on the individual sports leagues, and the inability to agree upon a standardized testing regime is due in part to the fact that professional sports are governed by the National Labor Relations Act (“NLRA”), which severely restricts the ability of the league to unilaterally impose any conditions upon its participants. Sports organizations with a collective bargaining relationship must bargain in good faith for “wages, hours, and other terms and conditions of employment.”

Drug testing is a mandatory subject of collective bargaining. For players who want to use PEDs, or others who feel the testing regime imposed by WADA is too restrictive, the collective preference of the various Players’ Unions in professional sports has been to take a strong stance against the adoption of the WADA Code. Why would an athlete want to subject himself to out-of-season testing, having to report his whereabouts to league officials any time he leaves the state or risk losing his multi-million dollar endorsement deal if he were to test positive for a PED because he took an over the counter common cold medicine that contained a banned substance?

Although athletes who have already made it to the professional leagues may not consider the integrity of the sport in jeopardy, the use of PEDs in sports poisons American youths’ conceptions of fairness, honesty, and, most importantly, health. Seeking to address these important issues of

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267. See sources cited supra note 83.
269. Id. at 476.
271. Showalter, supra note 39, at 655.
273. Johnson-Bateman Co., 295 N.L.R.B. 180, 182 (1989) (finding that drug and alcohol testing is a mandatory subject of collective bargaining because it is “germane to the working environment, and, outside the scope of managerial decisions,” which are two criteria the Supreme Court had established for mandatory subject matters).
274. “In order for authorities to conduct random testing, [athletes] must keep [authorities] informed of . . . [their whereabouts] . . . 365 days a year . . . .” Rosen, supra note 160, at 8 (internal quotation marks omitted). Athletes would be eligible to be tested at any hour of any day, without any prior notice, regardless of whether or not their sport is in season. Id.
public interest, Congressional leaders have proposed legislation to require professional sports leagues to come into accordance with WADA testing protocols to be governed by the USADA, yet no legislative action has been taken.

Although the rationale behind the proposed legislation mirrors the intent of many European legislatures that have successfully adopted national anti-doping laws, such legislation faces heavier resistance in the United States due to privacy issues and Fourth Amendment concerns of unreasonable searches and seizures. Under the proposed legislation, “through the [Controlled Substances Act], the federal government would compel certain private parties—the various professional sports leagues—to drug test their employees.” Under current constitutional law, the only way the federal government could require private drug testing would be on the basis of a special needs exception that could only be justified after a careful balancing of both public and private interests.

Proposed mandatory drug testing will not be constitutional if the government cannot show a special need beyond normal crime control. In order to support the argument that drug testing of professional athletes

275. The Clean Sports Act of 2005 would apply to all four major sports in the United States, and testing policies and procedures are to be as stringent as those of USADA (mandatory two-year suspension for a first offense, and a lifetime ban for a second offense). S. Con. Res. 1114, 109th Cong. §4(b) (2005). Athletes would be tested five times annually, id. at §4(b)(1), and leagues could be fined a civil penalty of $1,000,000 for each violation of non-compliance with any of the Act’s substantive provisions. Id. at §6(b)(2). Similarly, the Drug Free Sports Act, H.R. 1862, 109th Cong. (2005), would cover all four professional sports, as well as Major League Soccer and the Arena Football League. Id. at §2(2). Random testing could be conducted at least once a year and sanctions for positive tests mirror those imposed by WADA. Id. at §3(1)–(4). Additionally, the professional sports leagues would be fined $5,000,000 for failure to adopt testing policies and procedures consistent with the regulations. Id. at §§ 3–5; see also H.R. 2565, 109th Cong. (2005); Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005); Professional Sports Integrity and Accountability Act, S. 1334, 109th Cong. (2005); Professional Sport Integrity Act of 2005, H.R. 2516, 109th Cong. (2005).


277. “To protect the integrity of professional sports and the health and safety of athletes generally,” with the objectives of eliminating performance-enhancing substances from professional sports and reducing usage by children and teenagers. Id. at § 2(a)(8)–(b).


279. Id. at 979.

280. Id.

can evade traditional Fourth Amendment warrant and probable cause requirements, the three elements of a “special need” must be met: (1) the drug use must be an actual threat; (2) the drug testing must be aimed at actually detecting drug use, not simply deterring it; and (3) there must be a genuine threat to public safety. Without a special need, warrantless and suspicionless drug testing is a clear violation of the Fourth Amendment.

While this might at first seem discouraging for proponents of federally mandated drug testing policies in professional sports, supporters identify a 1995 Supreme Court opinion as providing sufficient grounds to establish drug testing as a “special need” necessary to protect public safety. In *Vernonia School District 47J v. Acton*, the Court held that the significant governmental interest in protecting the public safety—especially the safety of children—was sufficient to outweigh the student athletes’ privacy interests. The Court stated that in an effort to curb teenage use of PEDs, random drug testing of student athletes by the school district was constitutionally permissible because drug use had reached uncontrollable levels and participation in athletics was a voluntary decision, to be made with full knowledge of drug-testing procedures. The constitutionality of special needs are assessed under a reasonableness standard, and surely it would be reasonable to extend *Vernonia* to permit federally mandated drug testing of professional athletes as a matter of public health and safety based on the statistical correlation between use of PEDs by athletes and use by teenagers.

Another argument asserted by professional sports organizations against the imposition of sanctions upon athletes is that the sports leagues are in a better position to regulate the conduct of participants, and, historically, Congress has declined to regulate internal governance of professional sports and the collective bargaining process. The leagues argue that they are the primary victims of banned PED use because the principle resulting injury sustained is the shame that players who have been caught

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284. *Chandler*, 520 U.S. at 318–22 (holding that requiring state government candidates to undergo drug testing before running for office violated the Fourth Amendment because using testing to set a good example was not a special need that outweighed the candidate’s privacy interests).
286. *Id*.
287. *Id*.
cheating bring to the league, resulting in the damaged faith and integrity of once-glorified historical records. However, this argument is shortsighted, as it seeks to prevent the government from entering a new regulatory field when legitimate public interest so requires. Health and safety of all citizens is of paramount concern for a government, be it the well-being of children or professional athletes.

IV. RISE OF THE MUTANT-ATHLETE?

The deterrence power of civil sanctions is only as effective as the testing policies and the efforts to remain ahead of PED developers. PEDs undetectable by any drug test may soon be (or already have been) developed. “Gene therapy involves injecting synthetic [genetic material] into muscle cells, where they become indistinguishable from the receiver’s DNA.” As gene therapy can speed up metabolic processes in the body thereby increasing endurance as well as muscle mass, athletes may turn to this innovative field of science to improve performance while avoiding detection. Early lab tests on mice suggest that successful genetic engineering has the potential to double athletic output with no identified side effects. On the other hand, a clinical trial using gene therapy in French teenagers to treat defective immune systems had less promising, lethal results.

Although gene therapy is highly experimental and the potential long-term biological effects are largely unknown, current use of PEDs suggests a willingness among athletes to risk the medical uncertainties for the sake of short-term success. With multi-million dollar contracts and even more lucrative endorsement deals at stake, the cost of genetic dop-

290. Id.
292. Id. at 185.
293. Id.
294. The genetically enhanced mice were able to run nearly 6,000 feet for two and one-half hours compared to the natural mice, which ran for 90 minutes at a distance of 2,950 feet. James Reynolds, Genetically Modified Mice That Spell Age of Athletic Superhero, THE SCOTSMAN (Edinburgh), Aug. 25, 2004, at 9.
295. Three of the teenagers contracted cancer, and once has since died. Duncan Mackay, The Race Hots up to Destroy Genetic Monsters: Gene Doping is the Ultimate in Cheating, THE GUARDIAN (London), Apr. 29, 2005, at 32.
296. Custer, supra note 291, at 186.
297. Kevin Van Valkenburg, Gene Doping Looms as Next Sports Edge: Boost at Cellular Level is All but Undetectable, THE SUN (Baltimore), Jan. 16, 2005, at 1A.
ing would hardly serve as a barrier to elite athletes, and amateur athletes might even consider the cost an investment in their athletic career. If genetic doping becomes a real possibility—assuming it has not already—the integrity of pure athletic competition will be lost for good, as athletes will be juiced with PEDs that cannot be detected by urinalysis or even blood tests.

If performance enhancement reaches this level, athletic competition will be dominated by a super-race of genetic mutants, biochemically engineered to run faster, jump higher, and out-muscle the competition. As new world records are set and the history books are rewritten, it will become harder to prevent young athletes from experimenting with either genetic doping or some cheaper, more easily available alternative that carries equal or greater health risks. Furthermore, countries that cannot regulate the doping epidemic may be banned from international competition, resulting in utter embarrassment not only to the government that was unable to regulate PEDs, but also to the ordinary citizens who no longer have the ability to compete in the games they love or even support their compatriots against the world’s greatest natural athletes. Indeed, the cheaters will have won the race to the finish line.

**CONCLUSION**

If anti-doping violations are not criminalized, we cannot adequately attack the source of the problem. Current sanctions only punish the PED user, while those who develop and distribute PEDs are free to continue to adulterate the integrity of professional sports, certain to find another athlete who will stop at nothing to achieve his or her dream of being the champion. The goal of criminalizing PEDs is not only intended to punish those who are willing to violate the integrity of the game, but also to uncover the culture of fraud that has thus far remained a step (or three?) ahead of efforts to detect and deter PED use.

Unless Congress takes action to further a more comprehensive, effective policy to investigate and tackle the use of PEDs, doping will remain an integral characteristic of American sports, not only tainting the history books but also intensifying the perception of American athletes as cheaters. Legendary former NFL coach Vince Lombardi’s use of the famous

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298. “Detection might involve a magnetic resonance imaging scan or muscle biopsies, which would require inserting a large needle into the muscle.” *Id.* Athletes will never agree to such bodily invasions. The cost would be ten times as much as it costs to conduct steroid testing. Because different genes are produced by different muscles, an anti-doping agency would need advance knowledge of the substance they were seeking in order to know what part of the body to test. *Id.*
quote, “Winning isn’t everything, it’s the only thing”\textsuperscript{299} perfectly epitomizes the current nature of professional sports: to be the best at the highest levels of competition, athletes, teams, coaches, and even medical staff will do anything and everything to attain victory.

Current drug testing protocols and league-mandated sanctions are not an effective deterrence mechanism in the fight against PEDs. The Congressional effort to detect and test for new substances must equal or outshine the rapid development of designer steroids and masking agents conceived by dirty chemists, or society will be forced to trust the safeguarding of athletic integrity to the conscience of professional athletes. As more gold medals are revoked for anti-doping violations and more elite athletes are unmasked as current or former PED abusers, the time has come for Congress to recognize that dependence on professional athletes to self-regulate the integrity of sport is no longer feasible.

The longer Congress waits to act, the greater the chance young athletes will be influenced by athletes who set world records and achieve instant fame but who are later discovered to have fraudulently achieved their success through illicit performance enhancement. By imposing criminal punishments on par with those linked to the Controlled Substance Act for cocaine, heroin, or psychoactive drugs such as ecstasy, Congress can help save the lives of children and professional athletes alike who might otherwise succumb to the serious health problems believed to be associated with PEDs. The United States must follow the lead of its international counterparts and grant crime prevention authorities the tools necessary to investigate and deter and punish PED production and distribution—the heart of the PED crisis—rather than trust that tough talk, empty threats, and blind faith will save the health of our athletes and children and preserve the integrity of our sports. If we can put the teeth of the criminal justice system behind our desire to clean up the game, we can affirmatively state that the race to the finish line is not over, and

America can still prevent the creation of a genetically modified class of athletes and avoid international embarrassment, all in the name of preserving our most cherished values of health, fairness, honesty, and pure athletic competition.

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