COLONIAL CARTOGRAPHIES, POSTCOLONIAL BORDERS, AND ENDURING FAILURES OF INTERNATIONAL LAW: THE UNENDING WARS ALONG THE AFGHANISTAN-PAKISTAN FRONTIER

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Frontiers are indeed the razor’s edge on which hang suspended the modern issues of war or peace, of life or death to nations.¹

We have been engaged in drawing lines upon maps where no white man’s foot has ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.²

Three degrees of latitude upset the whole of jurisprudence and one meridian determines what is true…. It is a funny sort of justice whose limits are marked by a river; true on this side of the Pyrenees, false on the other.³

A place on the map is also a place in history.⁴

I. INTRODUCTION

When the U.S. decided to inject another 30,000 troops into the current Afghan war, now in its ninth year, _The New York Times_ emphasized that “[i]t’s not about Afghanistan. It’s about a people straddling a border.” ⁵ It went on to explain:

The land is not on any map, but it’s where leaders of Al Qaeda and the Taliban both hide. It straddles 1000 miles of the 1600-mile Afghan-Pakistani border. It is inhabited by the ethnic Pashtun, a fiercely independent people that number 12 million on the Afghan side and 27 million on the Pakistani side. They have a language (Pashto), an elaborate traditional code of legal and moral conduct (Pashtunwali), a habit of crossing the largely unmarked border at will, and a centuries-long history of foreign interventions that ended badly for the foreigners.⁶

The report adds: “[T]he Pashtun themselves have never paid the boundary much regard since it was drawn by a British diplomat, Mortimer Durand, in 1893. ‘They don’t recognize the border. They never have.

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They never will.”7 An American military officer complains: “The only ones who recognized the border were us, with our G.P.S.”8 Some describe the Durand Line as one “drawn on water.”9 Perhaps, but it has been on fire for over a hundred years.

Fig. 1. The Durand Line and the Pashtun Areas10

For over a century, the Durand Line and the border region between Afghanistan and Pakistan has been the epicenter of political and military conflicts in the region and beyond. As the current cycle of wars in and around Afghanistan, which started with the Soviet invasion in 1979,11 enters its thirty-first year, this line continues to both create and aggravate security challenges. The U.S. Army’s official history of the war in Afghanistan, covering the period from 2001 to 2005, observes that “the single greatest obstacle to conceptualizing . . . [this war] in a holistic sense was ambivalence . . . about . . . nation-building . . . [in] Afghanistan

7. Id.(quoting Shuja Nawaz, director of the South Asia Center at the Atlantic Council, Washington, D.C.). Pashtun, Pakhtun, Pashtoon, and Pathan are among the various designations used for this ethnic group. I will use the term Pashtun, unless quoting from or citing other materials.
8. Id. at WK 1.
10. Shane, supra note 5, at WK1 (map appears to the left of the article as available at www.nytimes.com).
[that] remained a failed state.” It bemoans that while “the need for a plan that …offered a clear vision for this transition should have been obvious,” instructions were to “avoid being enmeshed in nation building.” It concludes that:

The Afghan experience reinforces the critical point that regardless of the nature of the Army’s future campaigns, U.S. soldiers will almost inevitably interact with foreign cultures. If these campaigns are focused on nation building, cultural awareness will become not just a necessary but perhaps a critical skill like marksmanship or land navigation.

These observations raise many questions about the relationship between contested borders, nation-building, failed states, cultural difference, and foreign interventions. In particular, they put into contention the elusive search for the “nation-state,” a term absent in any English language dictionary before 1950. In response to these vexing questions, we are offered a “bifurcated world . . . inhabited by Hegel’s and Fukuyama’s Last Man . . . [and] Hobbes’ First Man.” Binary geographies of danger and safety are deployed that see bloody boundaries between a “functioning core” and a “non-integrating gap,” with the “disconnectedness” between the two designated as the “ultimate enemy.” An inverted map of the world is unfolded to offer prescriptions for “[g]eostategic success,” namely, “prevent collusion and maintain security dependence among the vassals . . . keep tributaries pliant and protected, and . . . keep the barbarians from coming together.” A “new paradigm” is enunciated for a war of “uncertain duration” against “the enemies of civilization.”

References:

13. Id. at 327 (emphasis added).
14. Id. at 336 (emphasis added).
established rules of war. This article argues that the Afghan war, like many of today’s international conflicts, is rooted in contested borders that have not stood the test of time. Contested borders require that we “rethink the lazy separations between past, present, and future.”

Conflicts that appear as new iterations of the binary-divides between civilized versus uncivilized, reason versus faith, and modernity versus fundamentalism, only confirm the “presence of the past.” Disruptions of the triumphal march of civilization, reason, and modernity necessitate that we shift our focus from “present futures to present pasts.”

However, any effort to look back and bring into relief the history that animates the present confronts “a privilege of power too often unseen: the luxury of not having had to know, a parochialism and insularity that those on the margins can neither enjoy nor afford.” Often, contemporary ills have their roots in past policies and actions. When faced with intractable conflicts, it is useful to heed to the admonition: “Always historicize!”

To understand why the escalating Afghan war remains intractable it is beneficial to inquire into when, why, and how borders, nations, and states took shape in that region. It is also important to understand how modern international law, both in its incipient and mature stages, is implicated in designs that set the region into its current, unhappy course.

This article addresses questions of borders, cultures, nations, states, and foreign interventions underscored by the current war in the Afghanistan-Pakistan region by exploring the genealogy of the Durand Line, its conflict-ridden career, and the attendant role of the law. In this frame, this article interrogates modern law’s subscription to a “territorialist epistemology.”

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26. WILLEM VAN SCHENDEL, THE BENGAL BORDERLAND: BEYOND STATE AND NATION IN SOUTH ASIA 5 (2005). This entails a “transposition of the historically unique territorial structure of the modern interstate system into a generalized model of sociospatial organization, whether with reference to political, societal, economic, or cultural processes.” Nein Brenner, Beyond State-Centrism? Space, Territoriality, and Geographical Scale in Globalization Studies, 28 THEORY & SOC’Y 39, 48 (1999). In this schema, “[a] nation can be imagined without a word or other symbol or color on a map, but this is impossible if
ternational law, geography, geopolitics, and borders that formed the scaffolding that made the drawing of the Durand Line possible. It shows that drawing lines, both actual and metaphoric, constitutes modern legal orders, particularly international law. Part III narrates the story of the demarcation of this line in the midst of imperial rivalries and the role it has played in colonial and postcolonial operations of power. It focuses on nation-building and security dilemmas of postcolonial states that are imprisoned in territorial straitjackets bequeathed by colonial cartographies. Part IV examines how international law preserves contested borders bequeathed by colonialism, and thereby precludes imaginative flowerings of self-determination in tune with identities and aspirations of communities located within and beyond received colonial boundaries. Part V draws conclusions about the mutually constitutive role of colonialism and international law in ordering spaces and subjects. It posits that conceptual and doctrinal frames of international law remain tangled in its colonial lineage, and thus accentuate postcolonial dilemmas and conflicts.

II. SCAFFOLDINGS OF COLONIAL CARTOGRAPHIES

Just as none of us is outside or beyond geography, none of us is completely free from the struggle over geography. That struggle is complex and interesting because it is not only about soldiers and cannons but also about ideas, about form, about images and imaginings.27

Drawing boundaries is the inaugural gesture of the law, while policing boundaries is its routine function. The genesis of law signals that “[t]he primordial scene of the nomos opens with a drawing of a line in the soil . . . to mark the space of one’s own.”28 Modern law’s insistent claims of its universality notwithstanding, lines of demarcation that separate legality from illegality often create zones where bodies and spaces are placed on the other side of universality, a “moral and legal no man’s land, where universality finds its

Material and discursive orders that enjoy hegemony in any setting, fashion and enable instruments to draw these lines and carve out such zones. The story of the Durand Line testifies to this phenomenon.

The Durand Line was drawn by a colonial power in the nineteenth century, which was a defining phase in the consolidation of modern regimes of knowledge, along with the suturing of epistemology with the state. Therefore, it is critical to identify the conceptual ensemble that furnished the scaffolding for such a venture. It is the Author’s position that the conceptual and discursive apparatus of international law, modern geography, geopolitics, and borders are interwoven in the enabling frame that made the drawing of this conflict-ridden dividing line possible.
A. International Law and Differentiated Sovereignty

No sooner was a new world “discovered,” than a line, _patiition del mar oceano_, was drawn by the Treaty of Tordesillas on June 7, 1494. This line divided the world beyond Europe between Portugal and Spain, and supplemented Pope Alexander VI’s edict _Inter caetera divinae_ of May 4, 1494, with an agreement between sovereigns. The right of two royal houses of Europe over the division of the non-European world as “lords with full, free, and every kind of power, authority and jurisdiction” now stood grounded both in divine sanction and sovereign will and consent. This inaugural act of the incipient global order injected colonialism into the genetic code of modern international law. The “amity lines,” initiated by a secret clause of the Treaty of Cateau-Cambresis of 1559, institutionalized a differentiation between the European “sphere of peace and the law of nations from an overseas sphere in which there was nei-

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31. The line ran from the North Pole to the South Pole, approximately through the middle of the Atlantic Ocean. Portugal and Spain agreed that all newly discovered territories west of the line would belong to Spain and those east of the line to Portugal. _European Treaties Bearing on the History of the U.S. and Its Dependencies to 1648_, at 85, 170–71 (Frances Gardiner Davenport ed., 1967) (1917). Subsequently, the Treaty of Saragossa (1526), drew the Molucca Line through the Pacific Ocean along the 135th meridian. _Id_. See also _Anthony Pagden, Spanish Imperialism and the Political Imaginaton_ (1990); _Carl Schmitt, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum_ 89 (G. L. Ulmen trans., 2003) (1950).


33. Tr. “dominos cum plena libera et omnimoda potestate, auctoritate et jurisdictione.” The Papal edict besides seeking expansion of _fides catholica_ and _Christiana lex_, and conversion of barbarian peoples, expressly effected _donatio_ of territories, as in classic feudal law. See _Schmitt, supra_ note 31, at 91 n.7.

34. The treaty both “affirmed the importance of Catholicism as a rationale for empire and undermined papal authority by authorizing sovereigns to act on their own to oppose threats by infidels.” _Lauren Benton, A Search for Sovereignty: Law and Geography in European Empires_, 1400-1900, at 22 n.62 (2010). For the tension between canon law and secular authority in early European colonial expansion, see _James Muldoon, Popes, Lawyers, and Infidels_ (1979).

35. Modern international law, therefore, “is a world historic result of the early colonial experience of transatlantic and eastern trade . . . it is the dialectical result of the very process of conflictual, expanding inter-polity interaction in an age of early state forms and mercantile colonialism . . . .” _China Miéville, Between Equal Rights: A Marxist Theory of International Law_ 168–69 (2005).
ther peace nor law.”36 These “amity lines,” which mandated peaceful cooperation in the region within their bounds and gave license to unbridled conflict without, gave rise to the maxim: “Beyond the equator there are no sins.”37 In the new global order, “[e]verything that occurred ‘beyond the line’ remained outside the legal, moral, and political values recognized on this side of the line.”38 In this zone, “beyond the line” and “beyond the equator,” doctrines of “discovery,” “terra nullius,” and “anima nullius” flourished.39 The career of modern international law is the story of making, maintaining, and managing this enduring line.

36. A. Claire Cutler, Towards a Radical Political Economy Critique of Transnational Economic Law, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 199, 205 (Susan Marks ed., 2008), (citation omitted). For details of the amity lines, see SCHMITT, supra note 31, at 92–99.

37. Quoted in, SCHMITT, supra note 31, at 90 n.6. See also Santos, supra note 32, at 30 n.10; Eliga Gould, Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772, 60 WILLIAM & MARY Q. 471 (2003) (discussing the legal justifications of colonialism). One can trace the emergence of spheres of influence in the sixteenth century to the nineteenth century amity lines. For the status of such spheres of influence, see PAUL KEAL, UNSPOKEN RULES AND SUPERPOWER DOMINANCE 179-192 (1983); SCHMITT, supra note 31 at 281–94.


39. Santos finds the idea of anima nullius, colonized people as empty receptacles, embedded in Pope Paul III’s bull Sublimis Deus of 1537, that declared that indigenous people of the colonies were “truly men . . . [but] they are not capable of understanding the Catholic Faith but . . . desire exceedingly to receive it.” Santos, supra note 32, at 30 n.12. See also JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004). Pope Paul III reading of these “empty receptacles” is more optimistic than that of Lord Coke, who said in the landmark Calvin Case of 1602, that “if a Christian King should conquer a kingdom of an infidel, and bring them under submission, there ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the Decalogue.” 1 SIR EDWARD COKE, THE SELECTED WRITINGS & SPEECHES OF SIR EDWARD pt. 7 (Steve Sheppard ed., 2003), available at http://oll.libertyfund.org/title/911/106335. See also, Robert A. Williams, The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man’s Indian Jurisprudence, 1986 WIS. L. REV. 219, 239–45 (1986). On the doctrine of territorium res nullius, see PAUL KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES (2003). For British representations of empire’s “empty spaces,” see D. GRAHAM BURNETT, MASTERS OF ALL THEY SURVEYED: EXPLORATIONS, GEOGRAPHY, AND A BRITISH EL DORADO (2000). This zone “beyond the line” also furnished the constitutive grounds for the founding canon of liberalism, modern law, and the identity of Europe. See PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 45 (1993) [hereinafter FITZPATRICK, MYTHOLOGY]; PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW (2001) [hereinafter FITZPATRICK, MODERNISM]; DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000); UDEH SING MEHTA,
In the nineteenth century, colonialism animated a decisive turn in the evolution of modern international law, even though “international law consistently attempts to obscure its colonial origins, [and] its connections with the inequalities and exploitation inherent in the colonial encounter.” The unquestioned universality of international law “was principally a consequence of the imperial expansion.” The development of modern conceptions of sovereignty and the international subject, which are bedrock constructs of modern international law, has little to do with the professed foundational concern of international law, i.e., stability of the relations between sovereign states. Rather, these constructs were fashioned to manage the colonial relations of domination and racial difference.

Expansion of colonialism triggered a search for a legal framework that could legitimize the securing of a range of rights and privileges from colonized and dominated polities. Recognition of some measure of sovereignty of the dominated polities was warranted by the need to ensure that the terms of colonial treaties would be honored, even though the terms of these treaties betrayed a lack of sovereignty and equality. This

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42. Eurocentric expositions treat the Treaty of Westphalia of 1648 as the inaugural moment of modern international law by bringing into alignment sovereign and territorial claims within Europe. For revisionist readings of the Treaty that question this understanding, see STÉPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTEL AND THE MYTH OF WESTPHALIA (2004). For the argument that sovereignty within Europe differed from Europe’s imperial sovereignty that rested not on frontiers but aimed at keeping rival imperial powers out of zones and spheres of control, see CHARLES MAIER, AMONG EMPIRES: AMERICAN ASCENDANCY AND ITS PREDECESSORS (2006).
44. The dilemma was that African and Asian social formations “could neither be ignored as States nor treated quite on the same footing of ordinary States.” T. Baty, Protectorates and Mandates, 2 BRIT. Y.B. OF INT’L L. 109, 112 (1921). See also ANGHIÉ.
tension raised anew the question of what entities were eligible to be regarded as proper subjects of international law. In response, international law jettisoned classical natural law constructs of sovereign equality, now considered “pseudo-metaphysical notions of what the essential qualities of Statehood ought to be,” and turned to positivism based on actual practice of states. Frames of *jus gentium*, or principles of law common to all peoples, yielded to positivist ontology of law and sovereignty. This sharp turn yielded quick results. By the mid-nineteenth century, a new construct of differential sovereignty was entrenched in international law—sovereigns and international subjects were not alike in terms of rights, eligibilities, and competencies. Sovereignty was now to be seen as a differentially distributed bundle of rights. Several classes of sovereign states were constituted—some fully sovereign, others partly so; some part of the “family of nations,” some outside it; some entitled to domination, others with minimal legal competence. A sliding-scale of “layers of sovereignty” emerged, stretching from “Great Powers” to colonies, with suzerains, protected states, and protectorates positioned in

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45. International lawyers were emphatic that “the public law . . . has always been, and still is, limited to the civilized and Christian people of Europe and to those of European origin.” *Henry Wheaton, Elements of International Law* 15 (George Grafton Wilson ed., Clarendon Press 1936) (1866) (emphasis added). Furthermore, “[t]he area within which the law of nations operates is supposed to coincide with the area of civilization. To be received within it is to obtain a kind of international testimony of good conduct and respectability.” *T. Lawrence, The Principles of International Law* 59 (3d ed. 1900).


47. Benton characterizes the process as one of “modified positivism,” that derived “not from legislation or from agreements among [European] polities but from proliferating practices and shared expectations about legal process, stretched across the centuries of European imperial expansion and rule.” *Benton, supra* note 34, at 6.


49. Anghie argues that the project to align degrees of civilization with recognition by international law was never stable: “The ambivalent status of the non-European entity, outside the scope of law and yet within it, lacking international capacity and yet necessarily possessing it . . . was never satisfactorily denied or resolved.” *Anghie, Imperialism, supra* note 40, at 81.

between. Given that “the founding conception of late nineteenth-century international law was not sovereignty but a collective (European) conscience,” it is no surprise that this sliding scale of sovereignty mirrored the Eurocentric scale of “civilization” attendant to colonialism. “[P]ositivism’s triumphant suppression of the non-European world” rested on the premise that “of uncivilized natives international law [took] no account.” No wonder then that “[t]o characterize any conduct whatever towards a barbarous people as a violation of the laws of nations, only shows that he who so speaks has never considered the subject.”

51. See generally Siba N’Zatioula Grovogui, Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law (1996) (analyzing colonial and neocolonial strategies in the debate of sovereignty and self-determination within the structure and history of international order).


53. See Gerrit Gong, The Standard of ‘Civilization’ in International Society 44 (1986); Anghie, Francisco de Vitoria, supra note 43; James Thuo Gathii, Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), 15 Leiden J. Int’l L. 581 (2002); Saito, supra note 41, at 19–34.

54. Anghie, Finding the Peripheries, supra note 41, at 7.


56. John Stuart Mill, Essays on Politics and Culture 406 (Gertrude Himmelfarb ed., 1962). Antony Anghie captures the relationship between international law’s turn to positivism and a particular characterization of colonized people well:

The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these people, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission—the discharge of the white man’s burden.

Anghie, Finding the Peripheries, supra note 41, at 7. When confronted with some agreement between colonizers and the colonized, international law to this day remains at a loss to classify their nature much less their validity. For example, in Aloeboetoe v. Suriname, the Inter-American Court was confronted with a 1762 agreement between the Dutch and the Saramakas, a tribe that lives in Surinamese territory and was formed by African slaves fleeing from their Dutch owners, that recognized, among other things, the local authority of the Saramakas over their territory. Aloeboetoe et al. v. Suriname, Reparations, Inter-Am. Ct. H.R. 66, OAS/ser.L/V/V./III.29, doc. 4 (Sept. 10, 1993). The question was whether the obligations of the treaty are applicable, by succession, upon Suriname. The Court did “not deem it necessary to investigate whether or not that agreement is an international treaty.” Id. ¶ 57. It simply noted that “the Commission has pointed out that it does not seek to portray the Saramakas as a community that enjoys international status. The autonomy it claims for the tribe is one governed by domestic public law.” Id. ¶ 58. It then indulged in a hypothetical to say that even if the agreement was an international treaty, it “would be null and void because it contracts the norms of jus cogens superveniens,” on account of providing for the capture and sale of slaves. Id. ¶ 57.
This muscular and positive international law at the service of states “with good breeding”\textsuperscript{57} categorized a confluence of people and territory as “backward” and legitimated colonial acquisition of “backward territory.”\textsuperscript{58} Note that in yet another deployment of the enduring civilized/uncivilized binary, the constituent statute of the International Court of Justice (“ICJ”) mandates that judges be selected with due regard to “the main forms of civilizations . . . of the world,” and the Court is required to apply “the general principles of law recognized by civilized nations.”\textsuperscript{59} The ICJ has lived up to this mandate by, for example, reaching out to “geographical Hegelianism” to resolve territorial disputes in Africa.\textsuperscript{60}

While imperatives of colonialism shaped positivist doctrines of modern international law, by the late nineteenth century they also ushered in a new global order where mutual rivalries among colonial powers gave

\textsuperscript{57} JOHN WESTLAKE, THE COLLECTED PAPERS ON INTERNATIONAL LAW 6 (L. Oppenheim ed., 1914).

\textsuperscript{58} M. F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORIES IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION (1926). This was, of course, in tune with what the courts of “civilized” states had held. For example, \textit{Johnson v. M’Intosh}, the canonical American case about the legal import of discovery, had enunciated a positivist theory of law by holding that:

Conquest gives a title which Courts of the conqueror cannot deny….However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

\textit{Johnson v. M’Intosh}, 21 U.S. 543, 587–91 (1823). Of course, Europeans had to enforce their claims to lands occupied by “fierce savages . . . by the sword.” \textit{Id.} at 590. See also Robert A. Williams, Jr., \textit{The American Indian in Western Legal Thought: The Discourses of Conquest} (1990) (discussing the laws and legal discourses that were imposed upon the New World).


\textsuperscript{60} See James Thuo Gathii, \textit{Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), in The Third World and International Order: Law, Politics and Globalization} 75 (Antony Anghie et al., eds., 2003).
way when concerted action in the service of maintaining colonial domination was warranted. The first concrete step in this direction was containment of the “scramble for Africa” at the Berlin Conference on the Congo (1884-85), which aimed “to bring the natives of Africa within the pale of civilization by opening up the interior of the continent to commerce.”61 This Conference, from which Africans were completely excluded, institutionalized the “right” of “Great Powers” to colonial dominion.62 It was determined that when faced with assertions of sovereignty over colonized territories, “it is only the recognition of such sovereignty by the members of the international society which concerns us, [of] that of uncivilised natives international law takes no account.”63 The logic of nineteenth century international law could not have had it any other way:

International law has to treat such natives as uncivilised. It regulates, for the mutual benefit of the civilised states, the claims which they

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63. JOHN WESTLAKE, INTERNATIONAL LAW 136 (1894) [hereinafter WESTLAKE, INTERNATIONAL]. It was agreed that:

The power which henceforth take possession of a territory upon the coast of the African continent situated outside of its present possession, or which, not having had such possessions hitherto, shall acquire them, and likewise, the Power which shall assume a protectorate there, shall accompany the respective act with a notification addressed to the other Signatory Powers of the present Act, in order to put them in a condition to make available, if there be occasion for it, their reclamations.

make to sovereignty over the region and leaves the treatment of the na-
atives to the conscience of the state to which sovereignty is awarded.64

Consider that the Berlin Conference took place in the midst of Eu-
rope’s agrarian crisis and the Great Depression of 1873—86, which had
“shaken confidence in economic self-healing” and gave colonial expan-
sion further impetus.65 This was also the time when a “specter of ‘over-
civilization’” was breeding “militarism” and a longing for “imperial ad-
venture” in the U.S.66 With the Great Powers’ right to colonize now se-
cure, collective military interventions to protect colonial orders were the
next step in this progression. The coordinated military action in China by
Western powers to put down the Boxer Uprising of 1900 was “the dra-
matic beginning of the contemporary phase of international history.”67 It
was also in 1885, the year of the Berlin Conference, that British foreign
policy and intelligence officials first developed blueprints for a “pan-
Islamic alliance [between] Egypt, Turkey, Persia, and Afghanistan
against czarist Russia.”68 This sowed a poison seed, the bitter fruits of
which sour many a palate today. The Durand Line was drawn in this mi-
lieu.

This global framework animated instrumental deployment of the law to
reorder colonized spaces and bodies.69 Law in the colony aimed to “re-

64. WESTLAKE, INTERNATIONAL, supra note 63, at 143 (1894).
65. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC
ORIGINS OF OUR TIME 223 (2001). See also GIOVANNI ARRIGHI, THE LONG TWENTIETH
CENTURY: MONEY, POWER AND THE ORIGINS OF OUR TIMES (1994) (exploring the deve l-
opment of the global capitalist system).
66. JACKSON LEARS, REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA,
67. MARTIN WRIGHT, POWER POLITICS 57 (Hedley Bull & Carsten Holdbraad ed.,
1978). For the genesis, the course, and the aftermath of the Boxer Uprising, see
JONATHAN D. SPOECE, THE SEARCH FOR MODERN CHINA 229–36 (2d ed. 1999); JOSEPH
ESHERICK, THE ORIGINS OF THE BOXER UPRISING (1987); PAUL A. COHEN, HISTORY IN
68. See ROBERT DREYFUSS, DEVIL’S GAME: HOW THE UNITED STATES HELPED
UNLEASH FUNDAMENTALIST ISLAM 19 (2005); CHARLES C. ADAMS, ISLAM AND
MODERNISM IN EGYPT 10 n.1 (1933).
69. See Sally Engle Merry, From Law and Colonialism to Law and Globalization, 28
LAW & SOC. INQUIRY 569–71 (2003); NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB
WORLD: COURTS IN EGYPT AND THE GULF 5–18 (1997); CONTESTED STATES: LAW,
HEGEMONY, AND RESISTANCE (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994) (pre-
senting case studies on people use law to contest oppression); RONEN SHAMIR, THE
colonies of law: Colonialism, Zionism, and Law in Early Mandate Palestine
(2000) (analyzing the ideologies and justice system that guided the development of Brit-
ish colony).
duce them to civility,” those who had “no skill of submission.” 70 Violence was deemed a vital instrument of colonial progress, 71 with law furnishing “the cutting edge of colonialism.” 72 Violence, in general, and the violence of law, in particular, played “the leading part in the creation of civilization.” 73 Colonial rule deemed “[o]ur law . . . a compulsory gospel which admits of no dissent and no disobedience.” 74 This overt concert of law and violence has been aptly characterized “lawfare[:] the effort to conquer and control indigenous peoples by the coercive use of legal means.” 75 The geo-legal space of colonialism brings into sharp relief “the blood that has dried on the codes of law.” 76

In the colony, law congealed epistemic, structural, and physical violence. The colonized other, deemed an error of arrested evolution, was prescribed corrective norms of a higher rational order. This “soul making” 77 colonial project entailed entrenchment of a layered legal order. First, the colony was inserted into the global legal system of hierarchically differentiated sovereignties. 78 Second, metropolitan law was transplanted in the colony supplemented by exceptions that ensured that coercion displaced hegemony as its animating force, 79 thereby ordering a “rule of difference” that mandated performance of nonidentity between the colonizer and the colonized. 80 Third, through selective recognition, malleable norms of the colonized were truncated and reconstituted as

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73. ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA 289, 294 (1959) [hereinafter STOKES, ENGLISH UTILITARIANS].
76. Michel Foucault, quoted in, JAMES MILLER, THE PASSION OF MICHEL FOUCAULT 289 (1993).
78. See supra notes 49–59 and accompanying text.
79. See generally RANAJIT GUHA, DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA (1997) (exploring the consequences of the social-political structure born out of British control).
fixed “customary law.”81 In the career of the Durand Line all these legal machinations of the colonial project came into play.

B. Modern Geography and the Colonial Encounter

Examination of the role of geography within the matrix of modern regimes of knowledge production in general, and of colonialism in particular, is sorely needed. Modern social theory, while privileging time, has tended to treat space as “dead, the fixed, the undialectical, the immobile.”82 The point of departure of this article, however, is that the spatial and the temporal are mutually constitutive, “in that each shapes and is simultaneously shaped by the other in a complex interrelationship which may vary in different social formations and at different historical conjunctures.”83 Edward Said spoke of “imaginative geography[ies]” that fold distance into difference by multiplying partitions and enclosures that serve to demarcate “the same” from the “other” and by “designating in one’s mind a familiar space which is ‘ours’ and an unfamiliar space beyond ‘ours’ which is ‘theirs.’”84 Besides, “geography legitimates, excuses, rationalizes, in its very act of origination.”85

Modern geography is “amongst the advance-guard of a wider ‘western’ epistemology, deeply implicated in colonial-imperial power.”86 Not surprisingly, “geography is inescapably marked (both philosophically and institutionally) by its location and development as a western-colonial science.”87 From its very inception, modern geography formed part of the knowledge production and application attendant to colonialism that aimed to get a grasp on colonized territories and bodies by deploying an

84. EDWARD SAID, ORIENTALISM 54 (1978) [hereinafter SAID, ORIENTALISM]; see also Derek Gregory, Imaginative Geographies, 19 PROGRESS IN HUM. GEOGRAPHY 447 (1995).
87. Id.
impulse to chart, count, and map. As a critical component of the Enlightenment’s project of knowledge production, geography helped constitute the “other” against which modernity itself was interpolated. Geography adopted the confident regime of reason that “there can be nothing so remote that we cannot reach to it, nor so recondite that we cannot discover it.” Of course, what was “discovered” was unavoidably constituted by the “discovery,” such that “[g]eography was not merely engaged in discovering the world; it was making it.” Given the spatial imperatives of an empire, modern geography developed “to serve the interests of imperialism in its various aspects including territorial acquisition, economic exploitation, militarism and the practice of class and exploitation.”

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89. Quoting a 1537 statement by Portuguese cosmographer Dom Joao de Castro, in Benton, supra note 34, at 1. See also MarÃ­a M. Portuondo, Secret Science: Spanish Cosmography and the New World (2009).
90. See generally Geography and Enlightenment (David N. Livingstone & Charles W. J. Withers eds., 1999) (looking at the geography of the Enlightenment, ways it was practiced, and how it engaged with rationality and human nature). As Fitzpatrick articulates:

Enlightenment creates the very monsters against which it so assiduously sets itself. These monsters of race and nature mark the outer limits, the intractable ‘other’ against which Enlightenment pits the vacuity of the universal and in this opposition gives its own project a palatable content. Enlightened being is what the other is not. Modern law is created in this disjunction.

Fitzpatrick, Mythology, supra note 39, at 45. Modern law, then, “is imbued with this negative transcendence . . . imperiously set against certain ‘others’ who concentrate the qualities it opposes.” Id. at 10.
93. David N. Livingstone, The Geographical Tradition: Episodes in the History of a Contested Enterprise 168 (1992) [hereinafter Livingstone, Geographical Tradition]. This is in line with the mutually constitutive role of knowledge and power, whereby “[t]he Orient was Orientalized not only because it was discovered to be ‘Oriental’ in all those ways considered common-place by an average nineteenth-century European, but also because it could be . . . made Oriental.” Said, Orientalism, supra note 84, at 5–6.
Geographers were “among the front ranks of explorers, surveyors, technologists, and ideologues of empire” and often “the most vociferous imperialists.”

Geography played a critical role in colonial technologies of governance that produced territorially coherent units such as “India.” Colonizers were “anxious to inaugurate some system for . . . correcting and revising received geography of [the newly created colony].” To govern a territory, one must know it. Because, supposedly, “a single shelf of a good European library was worth the whole native literature of India and Arabia,” the colonists tried “to graft the science of the West on to an Eastern stem.” They settled upon “a technological solution—"triangulation"—which promised to perfect geographical knowledge.”

The survey of Bengal, initiated in 1763, and the resulting Bengal Atlas (1779) and the Map of Hindoostan (1782), were deemed works of “the first importance both for strategic and administrative purposes.” Theoretical debates of geographers and geologists of Britain and continental Europe during the nineteenth century drew extensively on this work. The Great Trigonometrical Survey of India (1878), guided by the “flawed . . . certainty and correctness granted by the Enlightenment’s epistemology” finally helped colonizers produce “their India.” This process furnished the grounds for the colonial production of India, which had “hardly ever been a single, integrated political entity,” as a
bounded political unit and substantiated that “an imagined epistemology could intervene to shape the political definition of actual territory.”

The late nineteenth century is by most accounts a unique moment in the history of modern geography. As colonialism spread across the globe, the incipient discipline of modern geography had to contend with colonial expansion and imperial ambitions. This is when geography shifted its conceptual grounds from naturalistic theology to evolutionary biology, and geographers became part of the “stratum of organic intellectuals of empire.” Darwin’s theory of evolution through natural selection, Spencer’s theory of environmental determination, and Lamarck’s theory of inheritance left formative imprints on the discipline. As a result, modern geography played a critical role in the modern constructions of race that enabled and sustained colonial domination. These constructions of racial difference and hierarchy helped reconcile colonial domination with liberal ideals of liberty and equality. Most important for this article, modern geography produced classifications of bodies and spaces that enabled colonial powers to draw “lines on a map which had little relation to underlying cultural or economic patterns. . . . These designations continue to haunt these regions to this day.” Also relevant to this story is the proclivity of European colonizers to “categoriz[e] mountain

111. See Uday Singh Mehta, Liberalism and Empire 1–17 (1999); Tayyab Mahmud, Race, Reason, and Representation, 33 U.C. Davis L. Rev. 1581, 1591 (2000).
and hill regions as distinctive political and cultural spaces . . . [and to]
portray[. . . highlanders as belligerents . . . [and] hill regions as tending
towards violence.” 113 Modern geography facilitated such an image and
colonial designs were devised to subdue and control mountain and hill
regions.

C. Geopolitics and Imperial Designs

The late nineteenth century also saw the rise of the discipline of geopolitics—knowledge claims about the relationship between space and power, and particularly about the impact of geography on the conduct of foreign policy. A geopolitical vision is “any idea concerning the relation between one’s own and other places, involving feelings of (in)security or (dis)advantage (and/or) invoking ideas about a collective mission or foreign policy . . . [which] requires at least a Them-and-Us distinction.” 114 From its birth, this discipline bore the marks of the temporal and spatial context of its emergence, i.e., the age of empire and “race sciences.” 115 The discipline’s professed claims to objectivity and neutrality notwithstanding, geopolitics “was always a highly ideological and deeply politicized form of analysis” 116 that furnished “pseudo-scientific justifications for colonial expansionism . . . .” 117 Incipient geopolitics sutured colonialism with theories of biological and social evolution to predict the decline

113. BENTON, supra note 34, at 224–25.
and even the demise of “inferior” races. In 1899, a military surveyor and future President of the Royal Geographical society made an evocative statement:

Truly, this period in our history has been well defined as the boundary-making era . . . such an endless vista of political geography arises before us . . . such a vision of great burdens for the white man to take up in far-off regions, dim and indefinite as yet.

The founding canon of geopolitics is directly relevant to the story of the Durand Line. Halford John Mackinder’s “Heartland” thesis foresaw a reassertion of Central Asia as swinging the global balance of power to the Asian heartland, which could become the base of a global empire. Alfred Mahan saw the territorial arc running from Turkey to China as a geopolitical “no man’s land,” one “‘destined’ to be a disputed area between Russia and maritime powers.” Nicholas John Spykman gathered these conceptual threads to weave the “Rimland” thesis which posits that the real power potential of Eurasia lay not in its heartland but in its littoral rim which was thickly populated, rich with resources, and strategically located. Consequently, “[w]ho controls the rimland rules Eurasia; who rules Eurasia controls the destinies of the world.”

118. See, e.g., WALTER FITZGERALD, AFRICA: A SOCIAL, ECONOMIC AND POLITICAL GEOGRAPHY OF ITS MAJOR REGIONS 137 (1934) (“It is agreed that Negro and European civilizations cannot remain mutually exclusive while existing side by side in the same continent . . . . [I]t seems inevitable that the infinitely weaker civilization of the Negro should ultimately pass away.”) (emphasis added).
120. See Chaturvedi, supra note 117, at 7–8; Halford Mackinder, The Physical Basis of Political Geography, 6 SCOT. GEOGRAPHICAL MAG. 78, 79–83 (1890); ANITA SENGUPTA, HEARTLANDS OF EURASIA: THE GEOPOLITICS OF POLITICAL SPACE (2009). Mackinder was quite alert to the imperatives of financial capital to expand globally. He pointed out at the turn of the century in a speech delivered to a group of London bankers that power “will always be where there is the greatest ownership of capital . . . we are essentially the people who have capital, and those who have capital always share in the activity of brains and muscles of other countries.” Quoted in, Peter J. Hugill, WORLD TRADE SINCE 1431: GEOGRAPHY, TECHNOLOGY, AND CAPITALISM 305 (1993).
a specific recipe particularly relevant to the Durand Line: “In all the Brit-
ish Empire there is but one land frontier on which war-like preparation
must ever be ready. It is the north-west frontier of India.” 124 Later geopo-
litical enunciations about the region remain little more than worked-up
permutations of the Makinder-Mahan-Spykman combine. 125

D. Frontiers, Boundaries, and Borders

Borders are human constructs built through an amalgamation of geo-
graphy, cartography, theories of sovereignty, and prevailing constella-
tions of power. In the process of being drawn “maps make reality as
much as they represent it.” 126 Any examination of borders often con-
fronts an official politics of forgetting, an elaborate attempt to obliterate
the contested origins and nature of the border. 127 Borders take different
forms in different historical and political circumstances. Usually traced
back to the Roman Empire that marked out discrete territories to dis-

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124. Halford J. Mackinder, The Sub-Continent of India, in 1 THE CAMBRIDGE
125. See, e.g., BREZENSKI, supra note 18; BARNETT, supra note 17; RALPH
PETERS, WARS OF BLOOD AND FAITH: THE CONFLICTS THAT WILL SHAPE THE TWENTY-FIRST
CENTURY 132–34, 139–41 (2009); See also EMPIRE’S LAW: THE AMERICAN IMPERIAL
PROJECT AND THE ‘WAR TO REMAKE THE WORLD’ (Amy Bartholomew ed., 2006) (a col-
lection of essays looking at modern day imperialism). The genesis of these related
and lasting geopolitical enunciations is captured well by P. J. Taylor:

Throughout the second half of the nineteenth century Britain and Russia had
been rivals in much of Asia. While Britain was consolidating its hold on India
and the route to India, Russia had been expanding eastwards and southwards
producing many zones of potential conflict from Turkey through Persia and
Afghanistan to Tibet. But instead of war, this became an arena of intrigue, of
bluff and counter-bluff, know as the ‘Great Game’ . . . . Put simply, the hear-
tland model is a codification and globalization of the Great Game; it brings a
relatively obscure imperial contest on to the center stage.

Quoted in, Sanjay Chaturvedi, Can There be an Asian Geopolitics?, supra note 117, at 8.

126. Jeremy W. Crampton & John Krygier, An Introduction to Critical Geography, 4
127. See James Anderson & Liam O’Dowd, Borders, Border Regions and Territorial-
ity: Contradictory Meanings, Changing Significance, 33 REGIONAL STUD. 593, 596
(1999).
128. See generally MALCOLM ANDERSON, FRONTIERS: TERRITORY AND STATE
FORMATION IN THE MODERN WORLD (1996) (examining the impact and nature of fron-
tiers); PETER SAHLINS, BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES
(1989) (discussing the formulation of nations along an imaginary boundary); ALISTAIR
tended this practice to Gaul and Britain. In the Middle Ages, newly discovered long-distance trade routes were loosely divided into zones as clear assertions of political control to allocate responsibility for protection of trade caravans and the right to levy transit charges. Consolidation of centralized monarchies in Europe in the twelfth and thirteenth centuries ushered in the phase of defined political borders. The Renaissance made cartography popular; maps became an instrument of centralizing control. With colonialism, maps became a weapon of statecraft when imperial powers used topographical features on maps as bargaining chips among themselves. Boundaries were drawn to manipulate distribution of power among colonial powers, thereby creating a direct connection between colonialism and borders later inherited by postcolonial states. In this progression, a European practice of demarcated borders was imposed upon, and subsequently internalized by, postcolonial formations.

Borders just as often join what is different as divide what is similar. Here, it is important to distinguish *frontiers* from *boundaries*. A boundary denotes a line while a frontier is a zone. In effect, a boundary grids a frontier. Frontiers—zones at the periphery of political orders—have over the last few centuries been replaced by defined lines of political control, the borders of the state. The idea of the frontier had a particular purchase in the colonial imagination. Discourses of “discovery,” “*terra nullius*,” and the “frontier” commingled to furnish license to occupy and subjugate coveted spaces that were represented as being “empty.”

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131. See A. O. Cukwurah, *The Settlement of Boundary Disputes in International Law* 11–16 (1967). By one account, “frontiers are areal, boundaries are linear . . . . The former may be correctly described as ‘natural’ . . . . The latter are artificial.” A. E. Moodie, *Geography Behind Politics* 73–74 (5th ed. 1963).


Indeed, for colonial settler-states, territorial expansion into and settlement of “empty” areas furnished the constitutive grounds of their identity.134

During the phase of decolonization, borders became a crucial issue for postcolonial states. In most cases, the inherited borders were in large measure determined by geopolitical, economic, and administrative policies of colonial powers that had occupied these territories. Colonial claims were often carved up with little regard to the coherence of historical, cultural, and ethnic zones. As a result, historical and cultural units were split, and different cultures, religions, languages, identities, and affiliations were enclosed in demarcated territorial units. The connection between a people and their territory, assumed and prescribed by Eurocentric theories of the “nation-state,” found no room in these configurations. These inherited colonial demarcations, reinforced by postcolonial states, often provoke challenge and resistance from below by assertions of identity and difference. Power-blocs of postcolonial formations, in an effort to legitimize their new-found hegemony, impose a firm control over the inherited borders to draw “sharper lines between citizens, invested with certain rights and duties, and ‘aliens’ or ‘foreigners.’”135


135. Baud, supra note 132, at 214. See also William F.S. Miles & David A. Rochefort, Nationalism Versus Ethnic Identity in Sub-Saharan Africa, 85 AM. POL. SCI. REV. 393, 401–02 (1991). In order to preserve their converging interests and to ensure a stable order whereby their conflicting interests can be mediated, different dominant classes structurally form a “joint front” to articulate their interests in the states apparatuses. This “joint front” is the power bloc of a social formation. See NICOS POUKANTZAS, POLITICAL POWER AND SOCIAL CLASSES 229–52 (Timothy O’Hagan trans., Verso, 1973) (1968). But see A.I. ASIWAJU, PARTITIONED AFRICANS: ETHNIC RELATIONS ACROSS AFRICA’S INTERNATIONAL BOUNDARIES 1884–1984 (1985) (emphasizing the social relations that take place as part of normal activity virtually disregarding dividing lines and divisive administrative influences).
result is territorial disputes with adjacent polities and/or suppression of difference within, two intractable issues that quickly become the primary preoccupations of the postcolonial states. The career of the Durand Line is an evocative story of these intractable conflicts and the inability of existing legal regimes to resolve them.

III. IMPERIAL GREAT GAMES AND DRAWING OF LINES

What the map cuts up, the story cuts across.136

A. Great Game I: The Genesis of the “Buffer to a Buffer”

The Durand Line emerged as an instrumentality in the so-called Great Game,137 the contest between British colonial expansion in India and eastward colonial expansion of Czarist Russia, one that turned the intermediate region into “a cockpit of international rivalry.”138 During the nineteenth century, issues of frontiers, boundaries, and borders within the Persian Plateau as a geographical unit were contentious.139 Imperial efforts to fix boundaries of control that conflicted with the practices and experience of native populations for whom frontiers were essentially mobile and porous, compounded these contentions. This mobility and porosity stemmed from the region’s location at the junction of historic trade routes between China, India, Central Asia, Persia, and the Arab

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139. The term “Persian plateau” denotes the physical geography of a single plateau that today includes Afghanistan, Baluchistan, and Iran. See GRAHAM P. CHAPMAN, THE GEOPOLITICS OF SOUTH ASIA: FROM EARLY EMPIRES TO THE NUCLEAR AGE 89 (3d ed. 2009).
world. 140 The Great Game was a contest, both overt and shadowy, over territory where different imperial orders came into volatile proximity. The conflicts turned on questions of territory, zones of influence, and spatial buffers.

The British were unequivocal about their empire’s need to have “scientific frontiers” that had to be demarcated under “European pressure and by the intervention of European agents.” 141 Lord Curzon, the arch-imperialist and Viceroy of India, proposed a specific recipe for colonial India—a “threefold Frontier.” 142 British imperial strategists were mindful of the simultaneous expansion of British and Russian empires in the heartland of Asia. A “frontier of separation” rather than a “frontier of contact” was to be the solution which led to the creation of protectorates, neutral zones, and buffers in between. 143 This policy of a “three-fold frontier” was choreographed and implemented in the northwest of colonial India. The first frontier, at the edge of directly controlled territory, enabled the colonial regime to exercise full authority and impose its legal and political order. The second frontier, just beyond the first, was a zone of indirect rule where colonial domination proceeded through existing institutions of social control. The third frontier was a string of buffer states which, while maintaining formal political autonomy and trappings of statehood, aligned foreign relations with the interests of the British.

141. Curzon, supra note 1, at 19, 49 (emphasis added).
142. Id. at 41.
The story of the Durand Line shows that colonial map-making simultaneously exhibits “both delusions of grandeur and delusions of engulfment.” Historically, the river Indus was seen as the western boundary of India. The region west of the Indus and south of the Oxus river, was home to the dominant ethnic group of the region, the Pashtun, who have a recorded history going well before 500 B.C. Located at the southern

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146. EDNEY, supra note 101, at 3–9.
147. See OLAF CAROE, THE PATHANS: 550 B.C.—A.D. 1957, at xvii–xxii, 56–57 (1965); JAMES W. SPAIN, THE PEOPLE OF THE KHYBER: THE PATHANS OF PAKISTAN 27–30 (1963) [hereinafter SPAIN, PEOPLE OF THE KHYBER]. With nearly 40 million members, the Pashtun are one of the largest tribal groups in the world. They have about 350 sub-tribes and five major groupings: the Durrani, the Ghurghusht, the Ghilzai, the Sarbai, and the Karlani. Perhaps the most highly segmented ethnic group in the world, the approximately 350 sub-tribes have a large number of clans that are, in turn, divided into large extended family groups. Relations amongst the groups dating back to more than a millennium are
edge of Central Asia and flanking the Chinese, Persian, and Indian empires, the Pashtun saw different phases of unity and fragmentation, along with Hindu, Buddhist, and Muslim cultural influences. Regional geopolitical maneuverings shaped the formation of the modern state of Afghanistan out of shards of rival tribal fiefdoms, ethnic loyalties, and shifting alliances and allegiances.\textsuperscript{148} In 1747, as the Mughal and Persian empires were imploding, Ahmad Khan Durrani, a Pashtun military commander, took control of the region and created an Afghan tribal confederacy dominated by the Pashtuns, as a distinct political entity in the region—giving birth to what came to be called Afghanistan.\textsuperscript{149} Given the circumstances of its emergence, Lord Curzon was to call the state “purely accidental.”\textsuperscript{150} The Durrani dynasty came to an end only in 1974, when Afghanistan became a republic.

Just as Afghanistan was emerging as a unified political entity, the British East India Company established political control over the fertile delta complex and marked by feuds, alliances, and compromises. Among these fault lines is the 300-year-old conflict between the Ghilzai and Durrani tribes; one that animates the struggle between the Taliban and the Karzai government in Afghanistan. Thomas H. Johnson & M. Chris Mason, \textit{Understanding the Taliban Insurgency in Afghanistan}, 51 ORBIS 71–89 (2007) [hereinafter Johnson & Mason, \textit{Understanding}]. A Pathan’s identity is constituted through concentric rings consisting of family, extended family, clan, tribe, confederacy, and linguistic group. The hierarchy of personal loyalties tracks these circles and become accentuated as the circle gets smaller. This segmentation and locus of loyalties are the primary reasons that no foreign entity—whether Alexander, the British, the Pakistanis, the Soviets, or the Americans—has been able to reconcile the Pathans to external rule. As British colonial rule in India moved westward from Bengal, the East India Company officials began to probe the region in the late eighteenth century. There followed generations of explorers, administrators, and soldiers who remained unable to penetrate and subdue it. This gave rise to the weaving of a complex mythology around the Pathans, portraying them as warlike, brave, savage, and stoic. One elderly Pashtun tribesman told a visiting British official in 1809: “We are content with discord, we are content with alarms, we are content with blood . . . [but] we will never be content with a master.”\textit{Quoted in, Stephen Tanner, Afghanistan: A Military History from Alexander the Great to the Fall of the Taliban} 134 (2002). The Pashtuns “accept no law but their own.” James W. Spain, \textit{The Pathan Borderland} 68 (1963) [hereinafter Spain, \textit{Borderland}]. The absence of modern structures of governance should not be conflated with the absence of governance. Complex and sophisticated dispute-resolution mechanisms, legal codes, and alternative systems of social control have developed in the region over a millennia. \textit{Pashtunwali} (the way of the Pastun) is the keystone of Pashtun identity, social structure, and behavior. Many stereotypes of the Pashtun flourished during colonialism. See, e.g., Paul Titus, \textit{Honor the Baloch, Buy the Pashtun: Stereotypes, Social Organization and History in Western Pakistan}, 32 MOD. ASIAN STUD. 657 (1998).

\textsuperscript{148} See Karl E. Meyer & Shareen Blair Brysac, \textit{Tournament of Shadows: The Great Game and the Race for Empire in Central Asia} 65 (1999).

\textsuperscript{149} Chapman, supra note 139, at 90–91.

of Bengal in 1757, and began the process of colonizing India. Over the next century, British colonial rule in India expanded westward. At the time, Russia’s sense of its eastern border was “vague and protean, shaped by the constellation of power on its frontiers at any given moment.” Imperial Russia started to expand southwards and eastwards through the Caucasus, just when British colonial rule was expanding westward and northward in India. Unavoidably, Central Asia, the zone of confluence of two expanding imperial empires, became the terrain of the Great Game. As the frontlines of two empires approached each other, the Great Game intensified. To check Russia’s growing presence in Central Asia in the early nineteenth century, the British aimed to turn Afghanistan into a “buffer state” governed by a compliant ruler. The “three fold frontier,” that Curzon was later to articulate, came into play.

An internal struggle for the throne of Kabul in the 1830’s gave the British their first opening to play kingmakers in Afghanistan. In June 1838, the British signed a secret agreement with Ranjit Singh, the Sikh ruler of Punjab, and Shah Shujah, a claimant to the Kabul throne. In return for their help in putting him in power, Shujah renounced Afghan claims to Kashmir and substantial areas between the Indus river and the Khyber Pass in favor of Ranjit Singh and agreed to become an ally of the British in their struggle with Russia. This agreement triggered what mainstream history styles the First Afghan War, when a 21,000-strong British “Army of the Indus” invaded Afghanistan in 1839 and installed Shujah as the Amir. The license to colonize and dominate granted by contemporaneous international law to the “Great Powers” of the day

151. For the chronology and pattern of spatial expansion of British colonial rule in India, see CHAPMAN, supra note 139, at fig. 4.1, fig. 4.2.
153. By the Treaty of Turkmenchay in 1828, Russia forced Persia to cede Transcaucasia, thus eliminating a barrier to Russian expansion into Turkistan. CAROE, supra note 147, at 317. See also DEMETRIUS CHARLES BOULGER, II ENGLAND AND RUSSIA IN CENTRAL ASIA 338–39, 382–93 (1879).
154. For a detailed account, see MEYER & BRYSAC, supra note 148, at 111–36.
155. See supra note 1 and accompanying text.
156. See HOPKIRK, supra note 137, at 188–201; CAROE, supra note 147, at 319–21.
proved useful. However, the initial British success proved short-lived—resistance against the occupation force and their puppet leader broke out, and in 1842 the deposed Amir, Dost Mohammad Kahn, was returned to power, and the British invasion force was decimated.158

During the subsequent twenty years, the British started to bring the region west of the Indus river under colonial rule. Occupation of the Punjab in 1849, until then an independent state, brought under British control traditionally Afghan areas up to the eastern end of the legendary Khyber Pass that Punjab had annexed before the First Afghan War.159 In 1857, India erupted in an anti-colonial revolt ignited by a mutiny of the Bengal Army. The revolt proved to be a watershed moment in the history of colonial rule, and led to a reordering of the Punjab as the “sword arm of the Raj.”160 British forces finally suppressed the revolt, and the governance of colonial India passed from the East India Company to the Crown, but “British fears of rebellion, conspiracies, holy wars, and possible foreign provocation” heightened.161 Through innovative colonial legal regimes, a “military-fiscal state” was turned into a “military state,” the Bengal Army was disbanded, and a reconstituted Punjab began to serve as “the military bulwark of the Raj.”162 The British deployed a racist recruiting doctrine known as the “martial race theory,” to raise a new “Indian Army,” with over half of it recruited from the Punjab, to serve as the “Empire’s ‘fire brigade.’”163 This army was to be “the iron fist in the velvet glove of

158. HOPKIRK, supra note 137, at 236–77.
159. Upon incorporation into colonial India, the Punjab was declared a “non-regulation” province, combining executive, legislative, and judicial functions, in a form of government that “emphasized dynamic administrative flexibility over ‘rigid adherence to legislative regulations.’” This became the basis of “a paternalistic despotism that was to characterize the famed Punjab school of administration.” TAN TAI YONG, THE GARRISON STATE: THE MILITARY GOVERNMENT & SOCIETY IN COLONIAL PUNJAB 1849–1947, at 17 (2005).
161. MEYER & BRYSCAC, supra note 148, at 152.
162. YONG, supra note 159, at 24, 27, 138 (citation omitted). See also STOKES, ENGLISH UTILITARIANS, supra note 73, at 243.
163. YONG, supra note 159, at 100. See also BYRON FARWELL, ARMIES OF THE RAJ: FROM THE MUTINY TO INDEPENDENCE, 1858–1947, at 179–90 (1986); DAVID OMESSI, THE SEPOY AND THE RAJ: THE INDIAN ARMY, 1860–1940, at 10–43 (1994). Over time, the British used the “Indian Army” in Africa, China, Europe, Middle East, the Indian Ocean, and South East Asia. THOMAS R. METCALF, IMPERIAL CONNECTIONS: INDIA IN THE INDIAN OCEAN ARENA 1860–1920, at 78–101 (2007). “In Lord Salisbury’s words, ‘India was an English barrack in the Oriental Seas from which we may draw any number of troops without paying for them.’” Quoted in, B. R. Tomlinson, India and the British Empire,
Victorian expansionism . . . the major coercive force behind the internationalization of industrial capitalism."164

As the pace of Russian eastward expansion picked up after the Crimean War (1854-56), the British “became obsessed with the Great Game,” and the Punjab as “the garrison province of the Raj . . . [was] reoriented . . . to meet[] the challenge of an external danger.”165 The rapid transformation of the Punjab into a “garrison state” involved novel colonial legal orders of land tenure, revenue extraction, military recruitment, resettlement of indigenous communities, rural social control, and political governance.166 Colonial social engineering included refashioning of religious affiliations, identities, and practices.167 To orchestrate this enterprise, a suitable administrative system was fashioned for the Punjab that “in both form and spirit . . . had a strong military flavor.”168 A century later, this reconstruction of the Punjab became the grounds for “Punjabisation of the state”169 of Pakistan, its praetorian tenor, and the source of its “post-independence propensity towards a military-dominated state.”170


165. Yong, supra note 159, at 20, 57, 58.


British occupation and reordering of the Punjab in the middle of the nineteenth century produced the northwest border problem in the territories to the west of the river Indus that remains a source of conflict to this day. The northwest edge of this region, a great belt of mountains stretching over 1200 miles from Pamir to Persia, was home of scores of Pashtun tribes that had a long history of effective armed resistance against encroachers and of retaining their autonomy from the political orders around them.  

Fierce resistance by these tribes started as soon as colonial rule came to their vicinity. It was then that the British policy of creating a frontier zone between Afghanistan and colonial directly-administered areas came into force. This so-called “close border” policy, also known as “masterly inactivity,” provided that no further westward expansion of direct colonial rule was possible or warranted, and therefore British sovereignty should not be extended to areas and tribes that could not be subdued and governed effectively. First implemented in Baluchistan and later further north, the close border policy created a peculiar frontier zone—a narrow stretch of territory inhabited by Pashtun tribes maintaining their modes of self-governance, dotted with colonial military outposts, absent direct colonial administration, but discouraged from maintaining their traditional political relations with Afghanistan. Foothills at the edge of directly-administered “settled” areas were fortified to keep out the tribes, who, in exchange for monetary subsidies, were to keep access to military outposts open, and, in contravention to their tribal code, were to deny sanctuary to fugitives from the settled areas. The system did not work well. The Pashtun tribes of the frontier zone remained restive, resulting in twenty-three British military operations between 1857 and 1881 to subdue them.

A new British policy, initiated by the Disraeli government to build a new strategic line of defense against Russian pressure in Central Asia, led in 1876 to the abandonment of the “close border” policy in favor of the so-called “forward policy.” The new policy called for aggressive

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171. See supra note 147 and accompanying text.
173. See Embree, supra note 143, at 33–37.
175. See id. at 370–73.
176. Melmastia (hospitality and protection), and Nanawati (asylum and sanctuary) are central to Pashtunwali (the way of the Pashtun), the tribal code. See id. at 349–52.
177. See CAROE, supra note 147, at 348. For a table of record of “pacification” expeditions against the frontier tribes, see CHAPMAN, supra note 139, at 104–07.
178. See CAROE, supra note 147, at 370–89; HOPKIRK, supra note 137, at 359–64. The “forward policy” aimed at “pushing the international boundary as far westward and northward as physically possible and by dint of changing existing conditions in the ex-
expansion into and control over the frontier regions. Strong points in the tribal belt were to be captured, fortified, garrisoned, and connected with protected roads. This “forward policy,” in its extreme, envisaged pushing the boundary as far west as the Hindu Kush mountain range in the middle of Afghanistan, with the Kabul-Ghazni-Kandahar arc forming the first line of defense for colonial India. 179 As the new policy unfolded, British meddling in Afghan and Persian affairs increased. 180 Decisions of a British Commission demarcating the disputed border between Afghanistan and Persia and permanent stationing of British garrisons nearby, heightened Afghan concerns about hostile encirclement. 181 The Afghans made overtures towards the Russians to counter-balance the growing British influence. 182 The result was the Second Afghan War, when, in November 1878, the British launched a three-pronged attack on Afghan territory. 183 The Amir abdicated in favor of his son. 184 The son then ceded control over the Khyber Pass and agreed to become a vassal of the British, who were to control the external relations of his country. 185 After some pacification campaigns around the country, the British troops withdrew from Afghanistan in 1880. 186 One result of the Second Afghan War was the institution of a joint Russo-British commission to determine the border between Russia and Afghanistan, with the latter to serve as a buffer between the two imperial empires. 187

179. Omrani, supra note 144, at 183. The policy was first implemented in Baluchistan known as the “Sandeman system.” CAROE, supra note 147, at 376; see also SIMANTI DUTTA, IMPERIAL MAPPINGS IN SAVAGE SPACES: BALUCHISTAN AND BRITISH INDIA 107 (2002).

180. See CAROE, supra note 147, at 370–89.

181. To counter Russia’s growing influence in Persia, and the latter’s renewed designs to retake Afghanistan’s western province of Herat, Britain went to war with Persia in 1856. A year later the two signed a peace treaty and Afghan-Persian border was determined as part of this treaty. Amin Saikal, The Afghanistan-Pakistan Border and Afghanistan’s Long-Term Stability, in BUILDING STATE AND SECURITY IN AFGHANISTAN 216 (Wolfgang Danspeckgruber & Robert P. Finn eds., 2007).


183. See id. at 33.

184. HOPKIRK, supra note 137, at 392.

185. ELLIOT, THE FRONTIER, supra note 138, at 34–35; HOPKIRK, supra note 137, at 384–401. Some scholars date the emergence of Afghanistan as a modern state with the 1880 installation of the new Amir orchestrated by imperial forces. See OLIVIER ROY, ISLAM AND RESISTANCE IN AFGHANISTAN 13–16 (2d ed., 1990).

186. HOPKIRK, supra note 137, at 397–401.

187. After many disputes and disagreements, a commission completed its work to demarcate the boundary in 1895. See ELLIOT, THE FRONTIER, supra note 138, at 46–47;
Confronted with increasing demands for more concessions by the colonial government of India, in 1892, the Afghan Amir sought to visit Britain to negotiate directly with the British government. The algebra of differentiated sovereignties came into play—British authorities refused his request, forcing him to negotiate with British colonial authorities in India. The Amir yielded to British pressure to delineate Afghanistan’s eastern boundary. The British proceeded to “dictate a boundary settlement,” signed by the Amir and Henry Mortimer Durand, foreign secretary of British India, on 12 November 1893. This agreement adjusted the “the eastern and southern frontier of His Highness’s [the Amir’s] dominions, from Wakhan to the Persian border.” The result was the Durand Line, which pushed colonial India’s border with Afghanistan from the eastern foot of the frontier hills to their crest. Curzon’s dream of “scientific frontiers” demarcated under “European pressure and by the intervention of European agents,” appeared to be coming true.

The Durand Line proved more difficult to delineate on the ground than to draw on paper. Initially surveyed in 1894-5, most of the demarcation was completed by 1896, though the section around the Khyber Pass

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HOPKIRK, supra note 137, at 430–38. The border was demarcated along the Oxus River from Pamir to today’s Turkmenistan, and the Oxus Line was linked westward to Persia’s northern boundary. Some adjustments were made soon after, and the demarcation was finalized in an Afghan-Soviet agreement in 1946 with further adjustments to compensate for changes in the flow of the Oxus River. ALASTAIR LAMB, ASIAN FRONTIERS: STUDIES IN A CONTINUING PROBLEM 86–89 (1968).

188. ELLIOT, THE FRONTIER, supra note 138, at 47.
189. Id.
190. Id. at 45–46.
191. Id. at 46.
192. See CAROE, supra note 147, at 381–82, app. B at 463.
194. See Embree, supra note 143, at 36.
195. See supra notes 141–142 and accompanying text.
196. Particular care was taken to create and allocate to Afghanistan the narrow Wakhan strip to avoid any territorial contiguity between Russia and colonial India. See Omran, supra note 144, at 185. Some call it “one of the best defined and most clearly recognized frontiers in the world.” M UJTABA RAZVI, THE FRONTIERS OF PAKISTAN 143 (1971). Others state that some sectors were never demarcated. Difficulties cited are that in some sectors “the fact that geographical watersheds and tribal boundaries do not coincide,” in others “the failure to demarcate is of no consequence, for the range summit is unmistakable,” in yet others tribal resistance. CAROE, supra note 147, at 382.
was only demarcated after the Third Afghan War in 1921. While some inaccessible sections remained unmarked, the line created a strategic frontier that “did not correspond to any ethnic or historical boundary.” Slicing through tribes, villages, and clans, it “cut the Pukhtoon people in two.” The Pashtun tribes resisted attempts at demarcation, including, in some cases, burning down camps of the Boundary Commission. The British response was to station substantial permanent garrisons. The Pashtuns remained restive, with religious leaders often playing leading roles in the insurgencies.

In tune with the colonial project of reordering colonized bodies and spaces, in 1901, British authorities severed the “settled areas” of the northwest region under British control from the Punjab to form an evocatively named North-West Frontier Province (“NWFP”), though with a status not on par with other provinces. Control over the tribal belt between the “settled areas” of NWFP and the Durand Line remained with the central government. The belt, now designated Federally Administered Tribal Area (“FATA”), was to serve as a “buffer to a buffer.” The legal order of colonial India did not extend to this zone and the tribes on the grounds that “[r]igour is inseparable from the government of such a people. We cannot rein wild horses with silken braids.” Tribes were to conduct their internal affairs under their customary norms. However, to supervise matters that touched the security interests of the British, a unique set of rules and procedures, draconian even by colonial standards, were enforced under the Frontier Crimes Regulation. This created yet another “anomalous legal zones” like others that came into existence.

198. ROY, supra note 185, at 17. The Durand Line has been characterized “illogical from the point of view of ethnography, of strategy and of geography.” W. K. FRASER-TYTLER, AFGHANISTAN: A STUDY OF POLITICAL DEVELOPMENTS IN CENTRAL AND SOUTHERN ASIA 188 (1953). Others call it “a classic example of an artificial political boundary cutting through a culture area.” LOUIS DUPREE, AFGHANISTAN 425 (1980).
199. OWEN BENNETT JONES, PAKISTAN: EYE OF THE STORM 23 (3d ed. 2009) [hereinafter JONES, PAKISTAN].
200. See Omrani, supra note 144, at 187.
204. JOHN W. KAYE, THE WAR IN AFGHANISTAN 123–24 (1851) (emphasis added).
205. The FCR was first designed in 1858, and amended in 1872 and 1901. For a detailed discussion of FCR, see infra notes 342–345 and accompanying text.
206. For a discussion of anomalous zones, see Gerald L. Neuman, Anomalous Zones, 48 STAN. L. REV. 1197, 1201 (1996); BENTON, supra note 34, at 165.
in many European colonies. In the case of FATA, Pashtun tribes, “though not [] fully-fledged British subject[s] in the legal sense of the term, lived within the territorial boundaries of India.”\(^{207}\) To facilitate such territorial arrangements within British colonies, the Parliament had established a process for outlying districts intended “to remove those districts from beyond the pale of the law.”\(^{208}\) Tribes on both sides of the Durand Line continued to disregard it, and incessant tribal resistance prompted successive punitive expeditions. Even the semblance of order broke down with the Third Afghan War of 1919, when Afghanistan declared war, an effort joined by FATA tribes and Pashtun troops who deserted the colonial forces.\(^{209}\) This short war resulted in Afghanistan regaining control over its foreign affairs.\(^{210}\) However, the FATA tribes remained restive, and colonial efforts to quell incessant revolts included the first use of aerial bombardment in the history of India, laying waste to the country where local tribes had supported the invasion.\(^{211}\) The tribes maintained their traditional connections with Afghanistan while negotiating the new FATA dispensation.

When the Indian struggle for decolonization gained momentum in the early 20\(^{th}\) century, Pashtuns of “settled areas” quickly gravitated towards the movement.\(^{212}\) The struggle forced the British to take initial steps towards allowing natives to participate in political governance in 1920 under the Montagu-Chelmsford “reforms,” which envisaged an “advance towards self-government in stages.”\(^{213}\) The NWFP and FATA, however, were left out of the scheme on the grounds that, as the chief colonial administrator of the region put it, the Pashtuns “w[ere] not ready for . . . ‘responsible government.’”\(^{214}\) In response, Pashtuns gave their anti-

\(^{207}\) ELLIOT, THE FRONTIER, supra note 138, at 113.

\(^{208}\) BENTON, supra note 34, at 262. Legislation, together with policy and practice “created five kinds of legal territory: three kinds of territory in British India and two kinds of territory in native states, depending on the statutes and agreements determining exemptions from British enactments and jurisdiction.” Id. at 263.

\(^{209}\) See CHAPMAN, supra note 139, at 108; SPAIN, BORDERLAND, supra note 147, at 115–19; CAROE, supra note 147, at 397.

\(^{210}\) ELLIOT, THE FRONTIER, supra note 138, at 50.

\(^{211}\) Id. at 50–51. See also, CAROE, supra note 147, at 405–08. The first aerial bombardment of the area took place in 1915. SVEN LINDQVIST, THE HISTORY OF BOMBING 42 (Linda Haverty Rugg trans., New Press 2003) (2000). It is noted that “unlike other wars, Afghan wars become serious only when they are over; in the British times at least they were apt to produce an after-crop of tribal unrest.” CAROE, supra note 147, at 397.

\(^{212}\) See Stephen Rittenberg, Continuities in Borderland Politics, in PAKISTAN’S WESTERN BORDERLANDS, supra note 143, at 67.

\(^{213}\) REPORT ON INDIAN CONSTITUTIONAL REFORM, quoted in, YONG, supra note 159, at 243.

\(^{214}\) Lionel Curtis, quoted in, CAROE, supra note 147, at 425.
colonial movement an organized form aimed at braiding “factors of history, geography, culture, and language to transform the relatively backward, divided, and disorganized Pukhtuns into a national community.”

This movement, which came to be known as Surkhposh (Red-shirts), expressly adopted non-violence as a foundational principle of social and political action and became politically allied with the Indian National Congress, the spearhead of India’s independence movement.

When India’s anti-colonial struggle escalated into a civil-disobedience movement in the early 1930s, it had “only a marginal effect on the Punjab” thanks to the entrenched administrative, political, and social order in that “garrison province.” NWFP, on the other hand, proved receptive to the call, and in 1930 colonial authorities declared martial law in order to quell the civil-disobedience movement and to prevent armed tribes of FATA from making common cause with residents of the settled areas.

In 1935, the British enacted the Government of India Act in response to the ascending independence movement in India. This Act provided for increased political participation through an enlarged franchise to elect provincial legislative assemblies with broadened powers. When the first-ever elections took place in NWFP in 1937, the Indian National Congress, the secular nationalist party, won handily and formed the provincial government. Because the 1935 Act was applicable only to provinces, FATA, the “buffer to a buffer,” remained outside the ambit of constitutional reforms and the right to vote and representation.


216. The members of the movement called themselves Khudai Khidmargar (servants of God). They wore red brick-dyed attire and acquired the designation Surkhposh (Red-shirts). The leader of the movement, Abdul Ghafar Khan, is also know as the “Frontier Gandhi” due to his philosophy of non-violence and his personal and political association with India’s nationalist leader M. K. Gandhi. See Caroe, supra note 147, at 431–43. For a detailed account of politics in NWFP during this period, see Erland Jansson, India, Pakistan or Pakhtunistan: The Nationalist Movements in the North-West Frontier Province 1937–47 (1981); Mukulika Banerjee, The Pathan Unarmed: Opposition and Memory in the North West Frontier (2000).


218. Yong, supra note 159, at 183–86.


221. See Caroe, supra note 147, at 433.

222. See supra note 202–203 and accompanying text.
result was a spike in armed resistance in FATA, triggering more campaigns of “‘pacification’ by British and Indian troops.”\footnote{223} In 1947, “the tectonic plates of South Asian politics shifted abruptly.”\footnote{224} The British partitioned colonial India into two independent states—India and Pakistan—surgically dividing “Hindi majority” areas from “Muslim majority” ones, substantiating once again the wonderful artificiality of states,\footnote{225} and triggering “one of the great human convulsions of history.”\footnote{226} That Pashtuns, while overwhelmingly Muslim, had consistently voted for the secular Indian National Congress and helped it form the provincial government in NWFP, struck the colonial Viceroy’s office, which presided over the religion-based partition, as “a bastard situation.”\footnote{227} To bring NWFP in line with the designed partition, the colonial authorities bypassed the generally prescribed process of allowing elected representatives of provinces in their respective legislative assemblies to determine the future of the province. A referendum to choose between India and Pakistan was offered instead.\footnote{228} Most Pashtuns, including both the “Red Shirts” and the governing political party of the province, boycotted the referendum in protest against NWFP having been made an exception to the prescribed process, and because the substitute process of referendum did not offer a third option, namely, separate independent statehood.\footnote{229} This demand for a separate state for the Pash-
tuns, styled Pashtunistan, emerged as the partition of India became inevitable. In the end, NWFP was awarded to Pakistan following a controversial referendum. For FATA tribes, yet another mode to determine their fate was devised. In special tribal jirgas (tribal assemblies) orchestrated by the colonial administrators, hand-picked leaders of the FATA tribes were asked to signify their allegiance to Pakistan and received the assurance that monetary allowances and autonomous status of the tribes would continue undisturbed.

Decolonization and the partition of India drew into sharp relief the contested status of the Durand Line, which now became a disputed matter between Afghanistan and Pakistan. As soon as India was partitioned, Afghanistan renewed claims to the area between the Durand Line and the Indus. In 1947, Afghanistan joined the demand for Pashtunistan, opposed Pakistan’s admission to the United Nations, and later conditioned its recognition upon granting the right of self determination to the people of NWFP and FATA, who were caught in between. 

Thus, Pakistan started its postcolonial career as successor to a territorial dispute and with an ambivalent relationship with a section of the population located within its designated territorial bounds.

B. Great Game II: The Cold War and the Frontline State

The partition of India and inclusion of NWFP and FATA in Pakistan was, in no small measure, connected with the next phase of the Great Game—the Cold War. The British colonial authorities saw the partition

230. JALAL, THE SOLE SPOKESMAN, supra note 219, at 282. As partition loomed large, the British also flirted with the idea of a separate “Pathanistan” in the northwest. SARILA, supra note 229, at 304.


232. See CAROE, supra note 147, at 435. The status of the tribes at the time of partition of India has been termed a “legal curiosity.” Omrani, supra note 144, at 188.

233. See infra notes 245, 257–262 and accompanying text.


of colonial India as offering the possibility to remain in the northwest region “for an indefinite period . . . [with] British control of the vulnerable North-Western . . . frontiers.” The northwest region was envisaged as “the most suitable area from which to conduct the defense” of oil supplies of the Middle East, and “the keystone of the strategic arc of the wide and vulnerable waters of the Indian Ocean.” As the importance of oil from the Persian Gulf increased, Western powers called for a “close accord between the States which surround this Muslim lake, an accord underwritten by the Great powers whose interests are engaged.” The Western world “went east in search of oil—and found Islam.” Pakistan, the only state in the modern world created in the name of Islam, was to now be turned into a frontline state of the Cold War, with the Durand Line to serve as the frontline.

After cultivating close military ties with Britain and the U.S., Pakistan formally entered a Mutual Defense Agreement with the US and joined the Central Treaty Organization (“CENTO”) in 1954 and the Southeast Asia Treaty Organization (“SEATO”) a year later. It is important to note that British military officers retained control of Pakistan’s military, now seen as “the kingpin of U.S. interests,” for many years after decolonization. Pakistan provided the U.S. with military bases in the NWFP. All this helped Pakistan secure recognition by Britain and

237. Field Marshal Wavell, Viceroy of India, quoted in SARILA, supra note 229, at 220, 235.
238. Id. at 29, quoting an unsigned memorandum, The Strategic & Political Importance of Pakistan in the Event of War with the U.S.S.R. (May 19, 1948).
239. SARILA, supra note 229, at 21.
240. DREYFUSS, supra note 68, at 7.
241. As early as 1947, Pakistan raised the specter of “Soviet threat on its Western frontier” to seek financial assistance from the U.S. TARIQ ALI, THE DUEL: PAKISTAN ON THE FLIGHT PATH OF AMERICAN POWER 195 (2008). In 1949, when the Iranian nationalist government contemplated nationalizing Iran’s oil production, an effort was made to move Pakistani troops into Iranian oil fields to “lend a hand in case the British or Americans needed it.” AYESHA JALAL, THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN’S POLITICAL ECONOMY OF DEFENCE 122 (1990) [hereinafter JALAL, THE STATE OF MARTIAL RULE] (quoting General Gracey, British commander-in-chief of the Pakistan Army). For details of the consolidation of the military alliance between Pakistan and the US, see NAWAZ, CROSSED SWORDS, supra note 11, at 92–138.
243. CHRISTOPHE JAFFRELOT, A HISTORY OF PAKISTAN AND ITS ORIGINS 100 (Gillian Beaumont trans., 2002). The command of the army, navy, and air force was transferred in 1951, 1953, and 1957, respectively. MOHAMMAD WASEEM, POLITICS AND THE STATE IN PAKISTAN 98 (1989).
244. NAWAZ, CROSSED SWORDS, supra note 11, at 130, 185–86.
245. In June 1950, Britain declared that “Pakistan is in international law the inheritor of the rights and duties of [British colonial India] . . . and that the Durand Line is the
the U.S. of the Durand Line as a legitimate international border. As Pakistan consolidated its role in the anti-Communist military alliances of the Cold War, Afghanistan drew closer to the Soviet Union, hardened its position about the Durand Line, and again raised the issues of self-determination for the Pashtuns in Pakistan and the formation of Pashtunistan. In December, 1955, the Soviet Union declared support for the Afghan position regarding the Durand Line and Pashtunistan.

Pakistan’s assumption of the role as a frontline state in the Cold War had a profound impact on the political order within the country. This included ascendancy of the military as a political force, derailment of constitutional governance, and centralization of political power in defiance of the federal architecture of the state. This turn to praetorianism had a direct impact on the NWFP and FATA. In 1954, the same year that Pakistan formalized its partisan role in the Cold War, a “gang of four” representing the military-bureaucracy combine overturned the constitutional order in Pakistan, a step validated by a docile judiciary under the doctrine of state necessity. The new order then moved to erase the separate existence of NWFP in 1955, when the bureaucratic-military combine ruling Pakistan amalgamated all four provinces of the western wing of the country into the so-called “One Unit.” FATA, however, retained its status as a distinct federally administered zone. Afghanistan reacted sharply to the dissolution of NWFP and accelerated its demand for Pashtunistan, leading to a break in diplomatic relations.

In March 1956, the British again stated that it “fully support[s]” Pakistan’s “sovereignty over the areas east of the Durand Line” and regards “this Line as the international frontier.” In March 1956, the SEATO Ministerial Council declared that “their governments recognized that the sovereignty of Pakistan extends up to the Durant Line” and that the SEATO Treaty “includes the area up to that Line.”


249. Waseem, supra note 243, at 145.


blockades and border skirmishes followed. Relations remained seriously strained until 1963, when the King of Afghanistan removed his prime minister, Sardar Daud, a Pashtun and an ardent advocate of Pashtunistan. In the meantime, strengthened and emboldened by its Cold War alliances, Pakistan’s military formally usurped political power by declaring martial law in 1958, a move validated by the courts through a misapplication of Kelsen’s theory of revolutionary legality. In 1969, a mass-protest movement forced the removal of Pakistan’s military dictator. The new government dissolved the “One Unit” and restored NWFP as a separate province. FATA, however, retained its distinct dispensation.

A serious downturn in relations between Afghanistan and Pakistan came in 1973, when Afghanistan declared itself a republic, and Sardar Daud, now its new president, revived the issue of Pashtunistan. Pakistan immediately responded by giving sanctuary to Afghan dissidents and began training and arming disaffected Afghans to destabilize the new Afghan regime. From 1973-77, Pakistan trained an estimated 5,000 Afghan militants and channeled material support to groups inside Afghanistan. This was the beginning of Pakistan’s prolonged engagement in training and arming Afghan militants professing the establishment of an “Islamic order.” This also ushered in an era when the FATA, the “buffer to a buffer,” became the staging ground for Pakistani military’s involvement in Afghan militants’ operation across the Durand Line with its intelligence agency Inter Services Intelligence (“ISI”) taking the lead.

It is important to note that this engagement was choreographed by Pakis-


255. Nawaz, Crossed Swords, supra note 11, at 127.

256. Nawaz, Crossed Swords, supra note 11, at 367.


259. See Ahmad Rashid, Taliban: Militant Islam, Oil and Fundamentalism in Central Asia 13, 77–79 (Yale Univ. Press 2001) [hereinafter Rashid, Taliban].

260. For details of the involvement of Pakistan’s military, including raids into Soviet territory, see Mohammad Yousuf & Mark Adkin, The Bear Trap: Afghanistan’s Untold Story (1992) (giving an account of the Afghan war from the perspective of the director of the the Afgan Bureau of the ISI, whose role it was to train, arm, and plan Mujahideen’s operations). See also Seth G. Jones, In the Graveyard of Empires: America’s War in Afghanistan 23–40 (2009).
tan’s Prime Minister Z. A. Bhutto, a self-professed master of geopolitics, who held that “geography continues to remain the most important single factor in the formation of a country’s foreign policy. . . . Territorial disputes . . . are the most important of all disputes.”261 This was by no means the first instance of the use of FATA by Pakistan in its military strategies. As early as 1948, Pakistan had used sections of the FATA tribes in its campaigns in Kashmir.262

The Soviet invasion of Afghanistan in 1979 dramatically accelerated the decline of Afghan-Pakistan relations. During the 1979–84 Afghan “jihad,” FATA served as a “launching pad for the mujahidin” and as a “base for their covert operation[s].”263 The U.S. and Saudi Arabia poured in $7.2 billion in covert aid for the jihad, channeled through the ISI, and given primarily to the most radical religious groupings, thus bypassing the moderate Afghan nationalists.264 The Afghan jihad furnished a justification for the tacit support by Western powers for the consolidation of military dictatorship in Pakistan under General Zia ul-Haq, a development that initiated and entrenched the process of “Islamization” of Pakistan.265 After the Geneva Accord of 1984 to end the Afghan conflict, and subsequent withdrawal of Soviet forces, Afghanistan plunged into a civil war, with Pakistan and other regional powers supporting different factions.266 The relative disengagement of the U.S. during this period is now seen by the American policy makers as a “strategic mistake.”267

FATA continued to be used by the ISI and Afghan Islamist groups for their engagements in the Afghan civil war. By now, Pakistan’s military had developed the so-called doctrine of “strategic depth” with regards to Afghanistan, because it regarded India to the east as the primary military

262. See NAWAZ, CROSSED SWORDS, supra note 11, at 48–53.
263. HUSSAIN, FRONTLINE PAKISTAN, supra note 9, at 143.
265. See KHAN, supra note 251, at 647–67; RASHIDA PATEL, ISLAMISATION OF LAWS IN PAKISTAN? (1986); see also AYESHA JALAL, PARTISANS OF ALLAH: JIHAD IN SOUTH ASIA 278–301 (2008).
266. For details of the Geneva Accord, see MALEY, supra note 257, at 134–42. For the ethnic divides and post-1984 civil war in Afghanistan, see RASUL BAKIRISH RAIS, RECOVERING THE FRONTIER STATE: WAR, ETHNICITY, AND STATE IN AFGHANISTAN 27–86 (2008).
threat to Pakistan’s interests. In order to counter India, Pakistan, given its significantly smaller territorial size, sought a compliant Afghanistan on its western border. It was against this backdrop that Pakistan in effect created the Taliban in the early 1990s, a development that dramatically affected the Afghan civil war and, later on, the whole region. Pakistan’s military saw continued support for the Taliban as a strategic imperative. Pakistan’s desire to open trade routes to former Soviet Central Asian republics contributed to its patronage of the Taliban in Afghanistan. Having helped the Taliban capture power in Afghanistan in 1996, Pakistan was among the handful of states that quickly recognized the new regime, and for some time even paid the salaries of the Taliban administration in Kabul. Pakistan’s search for “strategic depth,” however, remained elusive. While Afghanistan is a multi-ethnic country, the Taliban were exclusively Pashtuns, who make up over 50% of the country’s population. Consequently, Pakistan’s patronage notwithstanding, the radical Islamic regime of the Taliban refused to accept the Durand Line as a legitimate international border or to drop Afghan claims over FATA and areas of NWFP east of the Line.

268. See Nawaz, Crossed Swords, supra note 11, at 439; Eqbal Ahmad, What After ‘Strategic Depth’?, in Selected Writings of Eqbal Ahmad 509–13 (Carollee Bengelsdorf, et al., eds., 2006); Johnson & Mason, No Sign, supra note 236, at 68; Raman Commodore Uday Bhaskar, director of the National Maritime Foundation, quoted in Ishaan Tharoor, India, Pakistan and the Battle for Afghanistan, Time (Dec. 5, 2009), http://www.time.com/time/world/article/0,8599,1945666,00.html.

269. See Hussain, Frontline Pakistan, supra note 9, at 28–30; Nawaz, Crossed Swords, supra note 11, at 478–80, 534–37, 542–44; Maley, supra note 257, at 219–26; Rashid, Taliban, supra note 259, at 17–40.


271. See Nawaz, Crossed Swords, supra note 11, at 479. During the Taliban regime from 1996–2001, Pakistan refurbished Afghan telephone systems and linked them with Pakistan’s domestic phone system. Id. at 480. For Pakistan’s involvement in Central Asia via Afghanistan, see Jaffrelot, supra note 243, at 141–45.

272. For planning, logistics, and military support of the Taliban by Pakistan including the use of air force, see Goodson, supra note 248, at 111–15. For salaries of the Taliban administration, see Rashid, Taliban, supra note 259, at 183.

273. Rais, supra note 266, at 29, 44–47.

274. See Rashid, Taliban, supra note 259, at 187; Hussain, Frontline Pakistan, supra note 9, at 30. In 2000, the military dictator of Pakistan stated, “Afghanistan’s majority ethnic Pashtuns have to be on our side. This is our national interest . . . . The Taliban cannot be alienated by Pakistan. We have a national security interest there.” Quoted in Rashid, Descent into Chaos: The United States and the Failure of Nation Building in Pakistan, Afghanistan, and Central Asia 50 (Viking Penguin 2008) [hereinafter Rashid, Descent].
Taliban’s brutal political and social order did not derail global geopolitics of energy supplies, when all neighboring states and many others, including the U.S., started “romancing the Taliban” during a “battle for pipelines” in the late 1990s. By the late twentieth century, global capital and its attendant state machinations had moved well beyond territorial colonialism to neo-imperial modes of exploitation and accumulation. The spatial dimension to the cycle of accumulation, however, remained indispensable. This is particularly true of the geopolitical imperatives of the global energy markets. The break-up of the Soviet Union triggered an intense competition between global oil companies and their sponsoring states, including the U.S. and Pakistan, to extract and transport oil and gas from Central Asia via Afghanistan. In immediate contention were two plans for alternative gas pipelines from Turkmenistan to run through Afghanistan: one would go to Pakistan, and the other would go to Iran and Turkey with a possible link to Europe. Alternatives to transport oil from Kazakhstan via the Caspian Sea further complicated the picture.

The events of September 11, 2001, dramatically transformed the geopolitical profile of the region. The very next day the U.S. demanded that Pakistan stop terrorist operatives in its border areas or “be prepared to be bombed back to the Stone Age.” Pakistan made its decision “swift-

275 See MALEY, supra note 257, at 218–50. Even ancient carvings of the Buddha on a mountain-side were not immune from the drive to enforce the Taliban’s version of Islam. Id. at 241.
276 RASHID, TALIBAN, supra note 259, at 157–82.
280 A U.S. corporation, UNICOL, and the Saudi corporation, Delta, signed an agreement with Turkmenistan that included construction of a gas pipeline through Afghanistan and Pakistan. UNICOL “went along with” Pakistan’s analysis of the Taliban, and termed the Taliban’s takeover of Kabul a “positive development.” Maley, supra note 257, at 244–45. The Taliban was also in negotiations with the Argentinean Company Bridas. See RASHID, TALIBAN, supra note 259, at 157–82; NAWAZ, CROSSED SWORDS, supra note 11, at 480.
282 PERVEZ MUSHARRAF, IN THE LINE OF FIRE 201 (2006).
ly...[and] agreed to all...demands,283 also making available airbases and transit facilities for supplies for U.S. forces in Afghanistan.284 However, Pakistan’s military continued its special relations with the Taliban across the Durand Line in Afghanistan. When the U.S. launched its attack on Afghanistan, the Taliban “escaped in droves into Pakistan, where they melted into their fellow tribesmen in the FATA.”285 After the now infamous “battle of Tora Bora,”286 Pakistani authorities “looked the other way as foreign fighters crossed over to the Pakistani side and many in the ISI arranged safe passage[s].”287 In collaboration with ISI, the borderlands became a “safe haven for the Taliban and other insurgent and terrorist elements.”288 FATA, long a sanctuary for fugitives from state law,289 now became a sanctuary and staging ground for Afghan militants resisting the U.S.-led war effort in Afghanistan.290

As Pakistan’s active support of U.S. war efforts increased, Afghan militants made common cause with religious militants among the Pashtun tribes of FATA.291 Pakistan’s military, designed for conventional warfare on its eastern border with India, was “ill-prepared to tackle this new kind of...conflict that slipped across its western border.”292 As a result, Pakistan vacillated between military operations against the militants and peace deals with them.293 In the meantime, militants started to extend their area of influence beyond FATA, the “buffer to a buffer,” into...
NWFP and beyond. In the midst of all this, Pakistan stood firm that the Durand Line be recognized and respected as an international border, while its military considered Afghanistan “within Pakistan’s security perimeter.” On the other hand, Afghanistan continued to reject the Durand Line because “it has raised a wall between the two brothers.”

This story of the Durand Line is a more than century-long saga of predatory colonialism, postcolonial insecurities, and incessant conflict. This is a tale of colonial cartography bequeathed to a postcolonial formation, bringing in its wake bitter fruits of oppression, violence, and war. This leads to the broader questions of the challenges colonial borders present to postcolonial states and the role of international law.

IV. COLONIAL BORDERS AND POSTCOLONIAL INSECURITIES

Every established order tends to produce . . . the naturalization of its own arbitrariness.

A. Inherited Borders and Postcolonial State-nations

Forged on the anvil of modern European history and enshrined in modern international law, modern statehood and sovereignty are deemed the preserve of differentiated “nations” existing within exclusive and defined territories. While “the struggle to produce citizens out of recalcitrant people accounts for much of what passes for history in modern times,” the prototype of the “nation-state” combines a singular nation-


296. Quoted in, Johnson & Mason, No sign, supra note 236, at 69.


298. Sankaran Krishna, Cartographic Anxiety: Mapping the Body Politic in India, in CHALLENGING BOUNDARIES: GLOBAL FLOWS, TERRITORIAL IDENTITIES 193, 194 (Michael
al identity with state sovereignty, understood as the territorial organization of unshared political authority. “The territoriality of the nation-state” seeks to “impose supreme epistemic control in creating the citizen-subject out of the individual.”299 “Inventing boundaries”300 and “imagining communities”301 work together “to naturalize the fiction of citizenship.”302 Modern international law underscores this schema. It extends recognition only to the national form, with acceptance attached to the ability to hold territory in tune with “Western patterns of political organization.”303 As a result, the “nation-state” is the dominant model of organized sovereignty today. This spatially bounded construct, one that frames both the geography of actualizing self-determination and the order of the resulting political unit, put in circulation a “territorialist epistemology.”304 Postcolonial formations had to subscribe to this Eurocentric grammar of state-formation to secure eligibility in the inter-state legal order.305 This statist frame precludes imaginative flowerings of self-determination in tune with the interests and aspirations of diverse communities both within and beyond received colonial boundaries.

Across the global South, colonial demarcations of zones of control and influence left in their wake political units lacking correspondence be-


299 See Ananya Jahanara Kabir, Territory Of Desire: Representing The Valley Of Kashmir 8–9 (2009).


302. Kabir, supra note 299, at 8. This project remains haunted by the foundational irresolution of the very construct of the nation. As Renan summed up the dilemma in his celebrated 1882 lecture, “[m]an is slave neither of his race nor his language, nor of his religion, nor of the course of rivers nor of the direction taken by mountain chains.” Ernest Renan, What is a Nation? (Martin Thom trans.), in Nation And Narration 20 (Homi K. Bhabha ed., 1990). See also Fitzpatrick, Modernism, supra note 39, at 111–45.


304. See supra notes 26–30 and accompanying text.

305. As Koskenniemi reminds us regarding the inclusion of non-Europeans into the international system, “everything depended on . . . the degree to which aspirant communities were ready to play by European rules.” Koskenniemi, supra note 43, at 135. Tagore observed that the entire East was “attempting to take unto itself a history which is not the outcome of its own living.” Rabindranath Tagore & Manabendra Nath Roy, Nationalism 63 (Renaissance Publishers Pvt. Ltd. 2004) (1917).
tween their territorial frame and the cohesion of culture and political identity.\(^{306}\) The colonial demarcations, with little regard for the history, culture, or geography of the region, often split cultural units or placed divergent cultural identities within a common boundary.\(^{307}\) As a consequence, the crisis of the postcolonial state stems from its artificial boundaries and the specter of the colonial still haunt the postcolonial nation.\(^{308}\) The “retrospective illusion”\(^{309}\) of nationalism remains “suspended forever in the space between the ex-colony and not-yet-nation.”\(^{310}\) Decolonization movements and postcolonial states adopted and retained the

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\(^{306}\) See Pakenham, supra note 62, at 669–80; Malcolm N. Shaw, Title to Territory in Africa 248–63 (1986); Edward Hertslet, The Map of Africa by Treaty (1894) (showing how by treaty or otherwise, parts of the African continent came under various European powers); Mark Frank Lindley, The Acquisition and Government of Backward Territories in International Law (1926) (exploring the law and practice of colonial expansion).


\(^{310}\) Krishna, supra note 298, at 195. As a result of cultural heterogeneity within fixed boundaries “the central difficulty of ‘nation-building’ in much of Africa and Asia is the lack of any shared historical mythology and memory on which state elites can set about ‘building’ the nation.” Anthony Smith, State-Making and Nation-Building, in States in History 258 (John A. Hall ed., 1986).
construct of a territorially bound “nation-state” even as they attempted to imagine the “nation” at variance from its European iterations. Impri

Prisoned in inherited colonial territorial cartographies, postcolonial formations inverted this grammar to produce state-nations. While conventional understanding assumes a preexisting nation that subsequently forms a state, post-colonial formations start with a territorial state that aims to constitute a homogenized nation.

Building state-nations generates conflicts about minorities, ethnicities, ethno-nationalism, separatism, and sub-state nationalism. “[T]he nation dreads dissent” and “the nation-state’s limits implicate its geographic peripheries as central to its self-fashioning.” In the process, a co-constitutive role of “nation and ethnicity” develops as a “productive and dialectical dyad.” It is by the construction of ethnicity as a “problem” that the “nation” becomes the resolution and the state incarnates itself as the authoritative problem solver. In this way often “the very micropolitics of producing the nation are responsible for its unmaking or unraveling.” Incessant rhetoric of endangerment and discursive production of threats to the nation render “nation-building” a coercive enterprise and facilitate the overdevelopment of the coercive apparatuses of the state.

While inherited boundaries represent the postcolonial state-nation’s “geo-body,” cultural and ethnic heterogeneity within induces “geo-piety.” It is no surprise, then, that most postcolonial states have as their raison d’etre the production, maintenance, and reproduction of the discourses and apparatuses of national security. The career of Pakistan

313. See Kabir, supra note 299, at 8–9.
315. Id. (emphasis added).
316. This phenomenon puts a postcolonial gloss over Weber’s classic definition of the state, namely that “a compulsory political organization with continuous operations . . . will be called a ‘state’ insofar as its administrative staff successfully uphold the claim to the monopoly of the legitimate use of physical force in the enforcement of its order.” Max Weber, Economy And Society: An Outline Of Interpretive Sociology 54 (Guenther Roth & Claus Wittich eds., 1978) (emphasis added).
317. Winichakul, supra note 26, at 129.
318. Yi-Fu Tuan, GeoPiety: A Theme in Man’s Attachment to Nature and to Place, in Geographies Of The Mind 11 (David Lowenthal & Martyn J. Bowden eds., 1976).
319. While the problem is accentuated in postcolonial formations, it is rooted in the very construct of modern nationalism. Nearly a century ago, Tagore identified “the spirit of conflict and conquest . . . at the origin and in the centre of Western nationalism,” and
as a postcolonial state circumscribed within an inherited territorial frame substantiates this political grammar.

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**Fig 3. Major Ethno-Linguistic Groups of Pakistan in relation to international boundaries of the region**

Pakistan, hailed as “the triumph of ideology over geography,” is literally caught and exists between lines drawn by colonial powers—the Durand Line (1893) in the northwest, the Goldsmid Line (1872) to the west, the Radcliffe Line (1947) in the east, and the MacMahon Line (1904) to the north. For good measure, in the northeast, a Line of Cautioned that “[i]t is like the pack of predatory creatures that must have its victims.”

TAGORE & ROY, supra note 305, at 22. He adds: “With all its heart it cannot bear to see its hunting—grounds converted into cultivated fields.” Id.

300. Titus, supra note 147, at 659.
301. ROSS MALLICK, DEVELOPMENT, ETHNICITY AND HUMAN RIGHTS IN SOUTH ASIA 150 (1998).
302. The Goldsmid Line was drawn between Persia and colonial Balochistan, with Baluchis on both sides. A.W. HUGHES, THE COUNTRY OF BALOCHISTAN 229–30 (1877). The Radcliffe Boundary Commission partitioned the Punjab and Bengal at the time of the
trol, “a sequence of ellipses” “[d]rawn and redrawn by battles and treaties . . . identifiable by traces of blood, bullets, watchtowers, and ghost settlements left from recurring wars,” provisionally divides Kashmir into areas held by India and Pakistan. The “state-building” and “nation-building” saga that unfolded between these lines since 1947 has produced what is variously characterized as the “viceregal system,” the “overdeveloped state,” the “hyper-extended state,” and the “praetorian” state. In efforts to constitute a state-nation, coercion always outweighed persuasion in claims of domination, in tune with a political grammar set in place by colonial rule. The project of “conjuring Pakistan,” that would envelop ethnic, linguistic, and cultural differences within inherited borders, necessitated deployment of “security as hegemony.” Festering territorial disputes with neighboring states furnished the primary justification for the military to consume a dispropor-

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324. Representing the unfinished business of the 1947 Partition of India, this Line was drawn in 1949 at the end of the first India-Pakistan war in Kashmir and was styled the “Cease Fire Line.” Following the 1971 India-Pakistan war, it was readjusted and renamed the “Line of Control” through the Simla Accord of 1972. See KABIR, supra note 299, at 7.


tionate share of resources and to play a leading ideological and political role.\textsuperscript{332} Denial of representation, suppression of federalism, and destruction of alterity are the hallmarks of the state since its inception. As successor to the colonial “garrison state” in the Punjab, a Punjab-centered military-bureaucracy oligarchy retains a dominant position in the ruling bloc.\textsuperscript{333} Denial of equal citizenship to the people of the provinces of Balochistan, East Bengal, NWFP, and Sind—even when they constituted the majority of the population—remains a defining feature of the state. Dissent and resistance were squelched by unbridled state violence, including repeated military actions—the most infamous being the one in 1971 that prompted the eastern wing of Pakistan to break off and establish a separate state of Bangladesh.\textsuperscript{334} Phases of coups d’
obetat, martial laws, abrogation of constitutions, and declarations of emergency rule constitute the “constitutional” history of the country. A docile judiciary serially deployed doctrines of “state necessity,” “revolutionary legality,” “constitutional deviation,” and de facto power to furnish legitimacy to repressive orders.\textsuperscript{335}

In building a postcolonial state-nation, the FATA, the colonial “buffer to a buffer,” retained its special status—approximating spaces of exception as invoked by Giorgio Agamben.\textsuperscript{336} Today, FATA is “a Massachu-
setts-sized wedge between Afghanistan and NWFP of Pakistan,” with a population of about 4 million, “virtually all of whom are Pashtuns.”337 Since 1901, this zone has been governed by a unique colonial-era administrative and judicial order—an indirect rule that combines modern technologies of power with instrumental use of customary norms and traditional power structures.338 The colonial design aimed to govern through selected tribal notables who would be loyal to the British in exchange for fixed monetary allowances. No taxes would be levied on the tribes, who would be left alone to manage their internal affairs through the customary Pakhtunwali code in their tribal jirgas, which has been characterized as “probably the closest thing to Athenian democracy that has existed since the original.”339 However, any matter that implicated the security killed with impunity because being outside juridical law, their lives were of no value to the community. For a lucid introduction to Agamben, see Jenny Edkins, Sovereign Power, Zones of Indistinction, and the Camp, 25 ALTERNATIVES 3 (2000). For a critical reading, see Peter Fitzpatrick, Bare Sovereignty: Homo Sacer and the Insistence of Law, in POLITICS, METAPHYSICS, AND DEATH: ESSAYS ON GEORGIO AGAMBEN’S HOMO SACER 49, 50 (Andrew Norris ed., 2005). See also GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Atell trans., 2005). Creation of a space on exception is a question of the boundaries and borders of law, in that, the sovereign “decision and the exception . . . are never decisively placed within or without the legal system, as they are precisely the moving border between the two.” Andrew Norris, The Exemplary Exception, 119 RADICAL PHIL. 6, 10 (2003) (emphasis added). The critical result is that those placed in the zones of exception are included as objects of power but excluded from being subjects. For a perceptive analyses of the relationship between sovereignty and zones of exception in the context of empire, see BENTON, supra note 34, at 279–99; NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 20–21 (2003).

337. Johnson & Mason, No Sign, supra note 236, at 45.


339. SPAIN, PEOPLE OF THE KHYBER: supra note 147, at 143.

A jirga in its simplest form is merely an assembly. Practically all community business both public and private, is subject to its jurisdiction...It exercises executive, judicial, and legislative function, and yet frequently acts as an instrument for arbitration or conciliation... The jirga, as it operates today, has three main functions. In its broadest and purest form, it regulates life at all levels within a tribal society requiring community attention, e.g., the choice of a site for a new mosque, punishment for domestic infidelity, settlement of a blood feud, or a decision to take up arms against a neighboring tribe. Secondly, the jirga provides a mechanism by which the decisions or opinions of the tribe
interests of colonial authorities was to be handled by a parallel system—a hybrid construct that retains the name *jirga*, but empties it of any semblance to “Athenian democracy” to make room for a process and a set of sanctions designed for harsh control and violent discipline to facilitate external domination.\(^{340}\) This system took the shape of the Frontier Crimes Regulation (“FCR”), originally formulated in 1858, and amended in 1872 and 1901, turning FATA into a constitutional and legal anomaly.\(^{341}\) Decolonization did not bring any change. Since 1947, FATA is formally a part of Pakistan.\(^{342}\) However FCR remains entrenched, and sets the FATA tribes apart from and unequal to other citizens of the country.\(^{343}\)

To enable this state and space of exception, Pakistan’s constitution reposes all executive and legislative authority for FATA in the President of Pakistan, who is given the authority to exercise his powers regarding FATA “as he may deem necessary.”\(^{344}\) Parliamentary enactments do not apply to FATA, unless the President so directs.\(^{345}\) FATA is placed outside the jurisdiction of the Supreme Court and High Courts that otherwise have extensive powers to guarantee fundamental rights.\(^{346}\) The Su…

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\(^{341}\) See *SHAHEEN SARDAR ALI & JAVAID REHMAN, INDIGENOUS PEOPLES AND ETHNIC MINORITIES OF PAKISTAN: CONSTITUTIONAL AND LEGAL PERSPECTIVES* 49 (2001).

\(^{342}\) JAFFRELOT, *supra* note 243, at 31.

\(^{343}\) See generally PESHAWAR CHAPTER, HUMAN RIGHTS COMM’N OF PAK., FCR: A BAD LAW NOBODY CAN DEFEND (2005) (summarizing the law that rules FATA and relating consultations in various communities); Shaheen Sardar Ali, *Minority Rights in Pakistan: A Legal Analysis*, 6 INT’L. MINORITY & GROUP RTS. 169 (1999) (discussing how the formation of the state and state structures cannot address and respect the needs of various groups resulting in gaping chasms).

\(^{344}\) PAK. CONST. 1973 art. 247(2).

\(^{345}\) Id. art. 247(3).

\(^{346}\) Id. art. 247(7). For fundamental rights enumerated by the constitution, see id. arts. 8–28. For jurisdiction of the Supreme Court and High Courts, see id. arts. 184–85, 199.
The Supreme Court has recognized these “special provisions” for the area “so that their inhabitants are governed by laws and customs with which they are familiar and which suit their genius.”

The FATA itself stands divided into 7 administrative units styled “agencies.” An evocatively titled “Political Agent” (“PA”), appointed in each agency by the federal government and backed by a para-military militia, is the locus of Pakistan’s authority. Besides exercising extensive executive, judicial, and revenue powers, the PA is also each agency’s development administrator. He is assisted by maliks, paid intermediaries from among tribal elders, who are appointed and removed at his discretion. Maintenance of order and suppression of crime are deemed the PA’s primary responsibilities. The PA may decide the matter himself, or refer it to a tribal jirga, consisting of tribal maliks chosen by the PA. The PA initiates cases, appoints the jirga, presides over trials, and the final decision is subject to his discretion. The jirga is supposed to decide the matter under FCR, supplemented by customary tribal norms. The PA retains the discretion to sentence the accused as determined by the jirga, refer the matter back to the jirga, or appoint a new jirga. The determinations of the PA are not subject to review by any court of law. The process is that of an inquiry rather than presenta-

349. See Tanguay-Renaud, supra note 340, at 563; Int’l Crisis Group, Pakistan’s Tribal Areas, supra note 293, at 3; Ali & Rehman, supra note 340, at 47–55; Omrani, supra note 144, at 187.
351. The Supreme Court of Pakistan rejected the application of the FCR “justice” system in Balochistan in 1993, stating that “mere existence of a tribal society or a tribal culture does not by itself create a stumbling block in the way of enforcing ordinary procedures of criminal law, trial and detention which is enforceable in the entire country.” Government of Balochistan v. Azizullah Memon, 341 PLD 361 (Pak. Sup. Ct. 1993). In this case, the Supreme Court could rule on FCR as the issue arose about its use in Balochistan, where it was outlawed by this judgment. FATA, however, remains beyond any court’s jurisdiction.
352. See Tanguay-Renaud, supra note 340, at 563–64; Int’l Crisis Group, Pakistan’s Tribal Areas, supra note 293, at 3; Ali & Rehman, supra note 341, at 47–55.
353. See Tanguay-Renaud, supra note 340, at 564.
354. See id.
355. See id. at 566; Int’l Crisis Group, Pakistan’s Tribal Areas, supra note 293, at 3.
tion of evidence and cross examination. Assistance of counsel is prohibited.356

Draconian sanctions under the FCR, executed at the discretion of the PA, include: detention and imprisonment to prevent crime or sedition; requiring “a person to execute a bond for good behavior or for keeping the peace;” expulsion from the agency of “dangerous fanatics” and those involved in blood feuds; removal or prevention of settlements close to the border; demolition of buildings used for “criminal purposes;” collective punishment of fines and blockade; and the “right to cause the death of a person” on suspicion of intent to use arms to evade arrest.357 The federal agency charged with overseeing FATA considers FCR an “effective ‘iron-hand’” whose withdrawal would create an “administrative vacuum.”358

In 1962, under a design of limited franchise, an electoral college of 35,000 tribal maliks, appointed by the PA, selected representatives to the national parliament.359 In 1996, direct election of representatives was introduced, though “politics and political parties are curse words in official circles.”360 Because the law prohibits political parties from extending their activities in FATA, only “non-party/independent” representatives can be elected. This makes for a unique political anomaly: FATA residents elect representatives to a legislature whose legislation does not extend to FATA. FATA also suffers from abysmal levels of poverty, illiteracy, and lack of health care.361 Analysts find FATA “a virtual prison for public-spirited and reform-minded individuals. Dissenting voices are quickly dubbed anti-state and silenced by imprisonment.”362 State functionaries, however, claim that the system in place for over a hundred years “suits the genius of the people and has stood the test of time.”363 It is more appropriate to characterize FATA as a zone where bodies and

357. See INT’L CRISIS GROUP, PAKISTAN’S TRIBAL AREAS, supra note 293, at 7. See also Omrani, supra note 144, at 187.
359. See INT’L CRISIS GROUP, PAKISTAN’S TRIBAL AREAS, supra note 293, at 3.
360. Id. at 11.
361. Per capita income in FATA is $250 a year, half that of the rest of Pakistan. 71% men and 97% women are illiterate. There is one doctor for every 6,762 people, compared to one for every 1,359 in Pakistan. INT’L CRISIS GROUP, PAKISTAN’S TRIBAL AREAS, supra note 293, at 9.
362. Id. at 12.
spaces are placed on the other side of universality, a “moral and legal no man’s land, where universality finds its spatial limits.”364

FATA, admittedly an extreme case, is symptomatic of the problem of reconciling territorial straitjackets with the principle of self-determination.365 For the territorial state, self-determination has always been a concept “loaded with dynamite.”366 In postcolonial formations, its explosive potential increases. The primary problem is not how to determine identities and desires of a people eligible for self-determination;367 the problem, rather, is how to reconcile realization of this right with existing territorial configurations. The unresolved questions surrounding the Durand Line, FATA, and Pashtun political identity persist because their resolution is sought within a territorial “nation-state.” Nesiah terms the imprisonment of postcolonial polities within modern territorial constructs of statehood “failures of the imagination.”368 A major hurdle in breaking free of this imprisonment is international law itself.

B. International Law and the Territorial Straitjacket

For many a postcolonial “contrived state”369 the crisis of identity and security “lies in its ‘artificiality.’”370 International law enforces the territorially-bound grammar of the “nation-state” upon postcolonial formations plagued by “cartographic anxiety inscribed into [their] very genetic code,”371 through the doctrine of uti possidetis. Based on a maxim of Roman law, the doctrine of uti possidetis ita possidetis (as you possess, so you possess), treats the acquisition and possession of a state’s territory as given, with no territorial adjustments allowable without the consent of the currently occupying parties.372 Applied to international borders, it


favors actual possession irrespective of how it was achieved, assumes that valid title belongs to current possessor, and does not seek to differentiate between the de facto and de jure possession. By recognizing legitimate title to de facto territorial holdings, it becomes an instrument to maintain the status quo and impedes imaginative resolutions of territorial conflicts.

The doctrine of uti possidetis was formulated in connection with colonialism in Latin America in the early nineteenth century when Spanish colonies agreed to apply the principle both in their frontier disputes with each other and in those with Brazil. During the decolonization era of the twentieth century, this norm was extended to the withdrawal of colonial powers from Asia and Africa. The principle mandated that “new States . . . come to independence with the same borders that they had when they were administrative units within the territory or territories of one colonial power.” This froze colonial boundaries and presented a challenge to postcolonial formations to imagine and manage a “nation” and “national identity” in the heterogeneity contained within inherited boundaries. In some instances, particularly in Africa, this attempt failed completely and ended in genocide and/or fracturing of the state.

373. The concept of uti possidetis de facto emerged in international law after the War of 1801 fought by Spain and France against Portugal to recognize the territorial results of the war. See The Minquiers and Ecrehos Case (Fr. v. U. K.), 1953 I.C.J. 47, 96–97 (Nov. 17) (separate opinion of Judge Carneiro).


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The ICJ\textsuperscript{379} and international tribunals\textsuperscript{380} were quick to put their imprimatur on the doctrine of \textit{uti possidetis} and its application to postcolonial states. The ICJ has designated it “a general principle, which is logically connected with the phenomenon of[] obtaining[] independence, wherever it occurs.”\textsuperscript{381} The ICJ went on to state that “[i]ts obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”\textsuperscript{382} The bottom line is that through “application of the principle of \textit{uti possidetis},” colonial “administrative boundaries” are “upgraded” and “transformed into international frontiers in the full sense of the term.”\textsuperscript{383}

The ICJ acknowledged that by giving fixity and legitimacy to colonial boundaries, the principle \textit{uti possidetis} “at first sight . . . conflicts outright with another one, the right of peoples to self-determination.”\textsuperscript{384}

\begin{quote}


382. \textit{Id.} at 566.

383. \textit{Id.} at 567. The Court was mindful of the dilemma of how this principle “has been able to withstand the new approaches to international law . . . where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law.” \textit{Id.} at 566–7. For an insightful analysis of the terms and the structure of the discourse of self-determination in international law, see Nathaniel Berman, \textit{Sovereignty in Abeyance: Self Determination and International Law}, 7 Wis. Int’l L.J. 51 (1988).
\end{quote}
the face of this dilemma, the ICJ fell back on pragmatism to claim that “maintenance of the territorial status quo” is essential to “preserve what has been achieved by peoples who have struggled for their independence.”385 The Court sought support for this claim with a gesture toward the practice of post-colonial states:

[t]he essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination.386

Here Nešiah rightly sees a “double bind” infecting the Court as it is committed to decolonization but “[t]erritorial integrity emerges here as a statist spatial representation intelligible to international law, and posited as indispensible to the self-determination of the postcolony.”387

As the saga of the Durand Line shows, colonial frontiers, boundaries, and borders fluctuated over time. This raises the question of the exact territorial bounds of postcolonial states. The ICJ injected an unequivocal temporal cut-off in this historically ambivalent temporal and spatial issue, by holding that:

[\textit{U}ti possidetis—applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the photograph of the territorial situation then existing. The principle of \textit{uti possidetis} freezes the territorial title; it stops the clock but does not put back the hands.388

As fashioned by the ICJ:

386. Id. (emphasis added). The Court also noted that the member states of the Organization of African Unity (“OAU”) had pledged in 1964 “to respect the frontiers existing on their achievement of national independence.” Id. at ¶ 19, quoting AGH/ Res. 16(1). The OAU Assembly of Heads of State and Government through Resolution 17(1) expressly affirmed the principle of \textit{uti possidetis} in 1964. A.C. Mcewen, \textit{International Boundaries of East Africa} 22 (1971). See generally Jeffrey Herbst, \textit{The Creation and Maintenance of National Boundaries in Africa}, 43 Int’l Org. 673 (1989) (arguing that the way boundaries are drawn in Africa is the only thing that could work given the constraints imposed by the structure of the continent); Ravi Kapil, \textit{On the Conflict Potential of Inherited Boundaries in Africa}, 18 World Pol. 656 (1966) (discussing conflicts over boundaries in Africa); Jefferey Herbst, \textit{States And Power In Africa: Comparative Lessons in Authority and Control} (2000) (examining the creation of African States and the problem of distributing governmental authority).
the critical date as a legal concept posits that there is a certain moment at which the rights of the parties crystallize, so that acts after that date cannot alter the legal position. It is a moment which is more decisive than any other for the purpose of the formulation of the rights of the parties in question.  

This freeze-framing of boundaries on the date of decolonization by one definitive gesture renders the issue of the history of these boundaries moot. The rationale appears to be that “freezing the carved-up territory in the format it exhibited at the moment of independence” will deter territorial disputes among post-colonial states. Pervasive postcolonial territorial and self-determination conflicts, however, reveal that such a mandated spatial fixity and temporal clarity of boundaries does not keep these conflicts in check.  

*Uti posidetis* combined with critical date as a legal concept trumps conflicting post-colonial assertion and exercise of effective authority as grounds for sovereign title under the doctrine of *effectivites*. Post-colonial *effectivites* has significance only if colonial practice fails to furnish definitive demarcation and thus trigger application of *uti posseditis*.  

The concern with order has been central to modern international law. Decolonization, coming on the heels of two World Wars, raised

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the specter of disorder. As a result, the norm of self-determination gave way to the caveat of order.\textsuperscript{395} Order trumped self-determination, deemed a concept “loaded with dynamite,”\textsuperscript{396} and the transition from colonialism to postcoloniality proceeded with the basic requirement that external boundaries remain in place. Managers of postcolonial formations were equally quick to subscribe to the doctrine, and international bodies like the United Nations were quick to give their imprimatur. The same 1960 UN resolution that affirmed that “[a]ll peoples have the right of self-determination,” also declared that “[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”\textsuperscript{397} As a way out of this contradiction, the United Nations contemplates the possibility of non-state modes of actualizing self-determination, by holding that “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination.”\textsuperscript{398} This contradiction points to the Janus-faced nature of the right of self-determination in a system of states with fixed and inviolable territorial bounds. The right has a “justifying, stabilizing, conserving effect and it has a criticizing, subversive, revolutionizing one.”\textsuperscript{399} International law and the practice of states have been content with the justifying, stabilizing, and conserving effect.\textsuperscript{400}

This bias in favor of existing states is augmented by a doctrinal lacuna, with profound political implications, that remains at the heart of the uti possidetis doctrine as reformulated by modern international law and endorsed by the ICJ. In \textit{jus civile}, rightful title via \textit{de facto} possession could only be acquired by a prescriptive claim of \textit{usucapio} established in good

\begin{footnotesize}
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\item[396.] Robert Lansing, The Peace Negotiations 97 (1921).
\item[399.] István Bibó, The Paralysis Of International Institutions And The Remedies 73 (1976).
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\end{footnotesize}
faith.401 Furthermore, in Roman law, *uti possidetis* is deemed an interim measure in contested vindication proceedings to determine title.402 A critical restrictive qualifier, *nec vi, nec clam, nec precario* (without force, without secrecy, without permission), limits the scope of the doctrine. Possession would ripen into good title only if possession did not run afoul of the limitations. Modern international law conveniently elides this critical limitation, perhaps because given the colonial modes of acquisition of territory, colonial boundaries run afoul of it.403 This gloss over the spatial history of colonialism, now bequeathed to post-colonial formations, by treating *de facto* control as rightful title is a foundational reworking of the original construct.404

The doctrine of *uti possidetis*, far from being grounded in any sound legal principle, is thus more a political instrument to legitimize existing state boundaries. The precarious status of the norm was underscored by the Beagle Channel Arbitration’s observation that it is “possibly, at least at first, a political tenet rather than a true rule of law.”405 Koskenniemi sees in the recognition of *uti possidetis* an acknowledgment that the ethical conception of international law cannot override the sociological.406 Demarcation of boundaries is, essentially, a political act. However, when reified by international law, these boundaries appear to have an identity separate from politics of the international system. The primary rationale for the adoption of the principle has been to avoid territorial conflict among post-colonial states, particularly in the light of international law’s primary role—preservation of order.407 While peace and order remain elusive in the global system, *uti possidetis* furnishes a cloak of legitimacy.

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402. Id. at 259–70.

403. See, e.g., Pakenham, *supra* note 62 (exploring the European rush to build empires in Africa, often involving forceful acquisition); Ali Mazrui, Cultural Forces in World Politics 1–27 (1990).

404. As Schwarzenberger posits, “Even so ‘obvious’ a loan from Roman law as the use of *uti possidetis* in the Latin American practice since the early nineteenth century is more indicative of the differences between this remedy in Roman law and its application on the inter-state level than of any supposed likeness between these institutions.” George Schwarzenberger, Title to Territory: Response to a Challenge, 51 Am J. Int’l L. 308, 309 (1957). See also McEwen, *supra* note 386, at 27–31.


407. See *supra* notes 380–390 and accompanying text.
over colonial disposition of territories of the global South by sidestepping the questions of the origins of these dispositions. By forcing disparate people to circumscribe their political aspirations within predetermined territorial bounds, uti possidetis reverses the vision of self-determination that seeks to protect vulnerable populations by allowing them political and territorial arrangements of their own. 408 Ian Brownlie is unequivocal in stating that “it is uti possidetis which creates the ambit of the pertinent unit of self-determination, and which in that sense has a logical priority over self-determination.”409 The problem is that this logical priority furnishes the grounds for actually giving territory priority over people when confronted with assertions of the right of self-determination.

C. Colonial Boundaries, Unequal Treaties, and International Law

Treaties between imperial powers and a variety of agreements between colonizers and native authorities played a key role in determining the spatial scope of spheres of control and influence.410 The Durand Line,


409. Ian Brownlie, Boundary Problems and the Formation of New States, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW 191 (David Freestone et al. eds., 2002).

410. See Charles Henry Alexandrowicz, The Role of Treaties in the European-African Confrontation in the Nineteenth Century, in AFRICAN INTERNATIONAL LEGAL HISTORY 27–68 (A. K. Mensah-Brown ed., 1975); Wm. Roger Louis, The Berlin Congo Conference, in FRANCE AND BRITAIN IN AFRICA: IMPERIAL RIVALRY AND COLONIAL RULE 167 (Prosser Gifford & Wm. Roger Louis eds., 1971). It is important to note that these agreements and treaties were between colonial powers and native power-holders, not native communities. This brings into relief the question about who consents to a treaty. Is it the state, a legal abstract, or the people and communities that exist within the bounds of a state? What are the implications of this choice for participatory democracy and for the emerging right to democratic governance? It has been argued that “international law must recognize that governments are agents of only a part of the communities they purport to represent at the international negotiating table.” Eyal Benvenisti, Domestic Politics and International Resources: What Role for International Law?, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 109, 114 (Michael Byers ed., 2000). See also Uwe Kischel, The State as a Non-unitary Actor: The Role of the Judicial Branch in International Negotiations, 39 ARCHIV DES VOLKERRECHTS 268 (2001); HILLARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000) (discussing how treaties are incorporated into the national politics and women’s participation); BALAKRISNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW (2003) (discussing territorial control as a basis of sovereignty); STEPHEN D. KRA NSER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).
like borders of most postcolonial states, is a legacy of such treaties, particularly the 1893 agreement between the Afghan Amir and the British. As disputes arise about the validity of these borders, questions about the legal status of the treaties that determined these borders surface. Most salient among these is the issue of unequal treaties. However, in tune with its gloss on the doctrine of *uti possidetis* to protect the *status quo*, modern international law has similarly resisted confronting the question of unequal treaties for the same purpose.

The Durand Line raises the question of the validity of the 1893 agreement dictated by the British to the reluctant Amir of Afghanistan, a vassal installed over a protectorate in all but name. While examining the validity of such arrangements, one is confronted with the fact that the question of unequal treaties appears to have “evaporated as an issue from the domain of international law,” and stands “consigned to the dustbin of ‘redundant ideas,’” deemed a mere “political” argument with scant legal valence. How does a question implicated in colonial territorial treaties that imprison the postcolonial world in arbitrary spatial cages become invisible to international law? It took a series of conceptual and institutional maneuvers to make it disappear from sight.

The status of unequal treaties in international law first arose in the nineteenth century in the context of treaties between Western powers and East Asian states and was rehearsed in the early twentieth century by

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411. See supra notes 188–193 and accompanying text.


416. The treaties with Asian states typically involved opening of ports to foreign trade, fixing of import duties, cession or lease of territory, immunities from local jurisdiction, extraterritorial jurisdiction of Western powers, right of navigation in inland waters, concessions for mining, railways and shipping, and overt non-reciprocity. See, e.g., Q.
Soviet jurists. Drawing on extra-textual contexts that animated the texts of colonial treaties, Asian states and Soviet jurists argued that because imperial powers had used their dominant military position to gain concessions through treaties forced upon weaker states, such treaties were invalid. Because these agreements were the products of coercion, they implicated questions of status of parties, the context in which agreements were secured, and the nature of consent involved. The issue of inequality arises both in terms of unequal bargaining power of the parties and the substantive lack of equilibrium with respect to benefits and burdens allocated by these treaties. Note here that in some instances, the harsh and humiliating terms of unequal treaties were instrumental in the rise of anti-colonial resistance and nationalism in Asia and unprecedented collective military action by Western powers to quell this resistance.

Indeed it was the coordinated military action in China by Western powers to put down the anti-Western Boxer Uprising of 1900 that fashioned a new and enduring stratagem of international politics—collective military action by the Western powers in the global South.

Faced with questions about the validity of unequal treaties, the initial Western response was that these treaties were necessary given the “backwardness” of Asian societies and legal orders, and that once those “shortcomings” are remedied, the treaties will lose their force by the ab-


sence of their raison d’être.\textsuperscript{420} By the late nineteenth century, international law’s turn to positivism, with its recognition of differentiated sovereignties, stepped in to acknowledge and accommodate a diplomatic practice rooted in culture and history as the primary source of norms.\textsuperscript{421} The contemporary Concert of Europe rested upon the Act of the Vienna Congress (1815), the peace treaty at the culmination of the Napoleonic Wars, and related agreements.\textsuperscript{422} Preservation of the Concert of Europe and the attendant distribution of power became a primary preoccupation of international law.\textsuperscript{423} Since peace treaties are unavoidably unequal in nature, international law now framed the question of sovereign consent as a purely formal one subject to overarching norms of preservation of order in the international system.\textsuperscript{424} The classic notion that validity of

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\item \textsuperscript{420} See, e.g., Lucius E. Thayer, \textit{The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States}, 17 Am. J. Int’l L. 207 (1923) (discussing the unequal rights of Americans in the Ottoman Empire); K. Chan, \textit{The Abrogation of British Extraterritoriality in China 1942–43: A Study of Anglo-American-Chinese Relations}, 11 Mod. Asian Stud. 257 (1977) (looking at why and how extraterritoriality had to be renegotiated); \textsc{John C. Vincent}, \textit{The Extraterritorial System in China: Final Phase} (examining the political and militaristic maneuvering of western powers in order to maintain their treaty interests) (1970).
\item \textsuperscript{421} See supra notes 46–56 and accompanying text.
\item \textsuperscript{422} See peace treaties and international law in European history 74 (Randall Lesaffer ed., 2004); 4 concert of europe, the new encyclopedia britannica (15th ed. 2005).
\item \textsuperscript{423} See Carty, supra note 44, at 66–67.
\item \textsuperscript{424} The Permanent Court of International Justice (“PCIJ”) was quick to jump on the positivist bandwagon: “The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.” Nationality Decrees in Tunis and Morocco Case, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, ¶ 38. Unequal peace treaties had to be honored because “welfare of society requires that the engagements entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territory by an enemy, should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party.” Wheaton, supra note 45, at 284–85. Peace treaties “were respected in an almost metaphorical way: they embodied the Concert of Europe.” David Bederman, \textit{The 1871 London Declaration, Ribus Sic Stantibus and a Primitivist View of the Law of Nations}, 82 Am. J. Int’l L. 1, 7 (1988). As for the inequality of peace treaties,

\begin{quote}
[\text{w}hile finding it morally outrageous that \{\} a treaty should be legally binding even if imposed at the end of a war by a victorious ‘aggressor’ on the victim of ‘aggression’ \{one has\} seen no way of rescuing mankind by legal precepts from this particular kind of outrage . . . . \{One can find no modalities\} whereby international law can summon sufficient power to defeat every victor at the moment of his victory.
\end{quote}

treaties rests upon consent by formally equal and sovereign states gave way to a positivist recognition that “[t]he obligation of treaties, by whatever denomination they may be called, is founded, not merely upon the contract itself, but upon those mutual relations between the two states, which may have induced them to enter into certain engagements.” Political realities trumped formal legal categories now deemed quaint. In this frame, unequal treaties of yesterday, however secured, furnished the grounds of the prevailing international order. To question their validity retrospectively raised the specter of unraveling the fragile order of things. With the question of state consent rendered a formal one, today any arguments based on consent to explain validity of treaties become “deceptively simple. . . . [because t]heir theoretical power lies in the suggestion that perhaps nothing really needs to be justified.”

International lawyers deployed the same line of reasoning to defang the classic doctrine of *ribus sic stantibus* (things thus standing), whereby a fundamental change of circumstances can justify unilateral termination of treaties. Unequal treaties are particularly vulnerable to this line of attack with the passage of time and changes in the post-Napoleonic European balances of power. When the issue arose within Europe in the late nineteenth century, international law’s response was that because sanctity of treaties is essential to the maintenance of order, even in the face of changed circumstances, termination or modification of treaty obligations requires the consent of other parties. As pressure for revision of treaty arrangements mounted, in light of a changed balance of power within Europe in the early twentieth century, international law’s turn to institutions to deal with problems of order, now seen as essentially political in nature, provided an opening—signaling “a movement from a moment of law to politics.” The doctrine of *ribus sic stantibus* was now read as embracing two separate issues to be framed and resolved along two separate tracks. The political issue of accommodating changes in the


425. Wheaton, supra note 45, at 40–41.


interests and powers of states was to be dealt with by the League of Nations under article 19 of its Charter. The legal issue was to be narrowly construed as one of clausula—the relationship between underlying consent and changed circumstances—deemed suitable for judicial determination by the Permanent Court of International Justice ("PCIJ"). As now enshrined in article 62 of the Vienna Convention, the doctrine of rebus sic stantibus stands confined within narrow limits as a legal question—a treaty is terminable only when unforeseen changes in the circumstances underlying the conclusion of the treaty transform radically the extent of the obligations still to be performed. In the end, rebus sic stantibus stands sacrificed at the altar of pacta sunt servanda (agreements must be kept).

International law deals with the issue of coercion, duress, and unequal treaties with institutional and interpretive moves. The Vienna Convention on the Law of Treaties addresses the issue through articles 51 and 52—making coercion and threat or use of force “in violation of the principles of international law in the Charter of the United Nations” grounds for voiding a treaty. With this iteration of a classic rule, “the problem has been legislated away.” The repackaging of what coercion, threat, or use of force is impermissible subtly altered the classic treaty law rule on duress that condemned all coercion. The prohibition on duress in the formation of a treaty now stands conditioned by the legal status of the coercion used. The qualifier “in violation of international law” on the

430. Some held the view that termination of unequal treaty was not a legal question at all but entirely a political question of what a party could secure through diplomacy and force. Albert H. Putney, Remarks at the 21st Annual Meeting of the American Society of International Law: The Termination of Unequal Treaties (Apr. 28, 1927), in 21 AM. SOC’Y INT’L L. PROC. 87, at 90.

431. PCIJ did indeed construe the doctrine narrowly to hold that a change in circumstances would warrant lapse of a treaty only if the circumstances in question involved were central to the intent of the parties at the time the treaty was entered into. Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.) 1932 P.C.I.J. (ser. A/B) No. 46, at 156–58 (June 7).

432. The ICJ has held that the changed conditions had to be “so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed.” Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 64 (Sept. 25).


434. Craven, supra note 413, at 46.
prohibition against the threat or use of force is to be read in the light of the U.N. Charter that does not outlaw use of force, only unlawful use of force. Consequently, with unequal treaties of the past, the question becomes not the exercise of coercion and duress, but one of the legal status of threat or use of force in the eye of international norms in place at the time the treaties were made. The imperial bent of international law in the colonial age already stood recognized and legitimated by the positivist turn that international law took. The implication is that any alleged use of force in treaties of the past may well have been lawful under contemporaneous norms. For good measure, the ICJ has held that any accusation of coercion to dispute the validity of a treaty must be accompanied by “clear evidence” that goes beyond, e.g., the mere presence of naval forces off the coast of the complaining party. This narrow definition of coercion is particularly troubling in today’s global order where effective instruments of economic coercion increasingly complement weapons of physical coercion in relations between states. In the face of these conceptual and institutional moves, any continuing expectation that international law as it stands may interrogate unequal colonial treaties to rescue territorially imprisoned postcolonial formations is futile. To those who may still raise the question of unequal treaties, Brierly has an unequivocal response: “we must not invent a pseudo-legal principle to justify such action. The remedy has to be sought elsewhere, in political, not in juridical action.” While the question of colonial unequal treaties stands brushed aside, what about contemporary treaties that reflect existing international relations of domination? Here, it appears that it is sufficient to acknowledge that “bargaining frequently takes place in a world of uneven resources and opportunity costs,” and move on.

435. See supra notes 415–426 and accompanying text.
436. See supra notes 45–61 and accompanying text.
438. See generally James Thuo Gathii, War, Commerce, and International Law (2010) (describing ways economic and physical coercion interact); Cheryl Payer, Lent and Lost: Foreign Credit and Third World Development (1991) (debunking some of the myths of the debt crisis and its role in holding back developing countries); Global Finance: New Thinking on Regulating Speculative Capital Markets (Walden Bello et al. eds., 2000) (proposing a new international financial system to respond to the needs of those for whom the international economy is managed—the people).
440. Brilmayer, American Hegemony, supra note 426, at 72. Perceptive analysts note, however, that “in view of the rather restrictive definition of ‘coercion’ in the classic law of treaties (as embodied in Art. 52 of the 1969 Vienna Convention), powerful states would still seem to enjoy a reasonably large freedom to press their claims.” Pierre Klein,
The history of unequal treaties underscores that “the history of the international system is a history of inequality par excellence.” International law’s posture towards legacies of colonialism has created a “legalized hegemony: the realization through legal forms of Great Power prerogatives.” The fleeting and ephemeral career of the unequal treaties doctrine in international law underscores an apparently foundational canon of the law: the specter of disorder necessitates defense of order, even an unjust order. This is in tune with Kant, author of the celebrated foundational injunction of the Enlightenment—“dare to know”—who declared that:

The origin of supreme power, for all practical purposes, is not discoverable by the people who are subject to it. In other words, the subject ought not to indulge in speculations about its origin with a view to acting upon them, as if its right to be obeyed were open to doubt . . . . Whether the power came first, and the law only appeared after it, or whether they ought to have followed this order—these are completely futile arguments for a people which is already subject to civil law, and they constitute a menace to the state.

International law, like modern law itself, is not so daring after all. It turns out that its primary function is to enable “[s]tates to carry on their day-to-day intercourse along orderly and predictable lines.” It is of little concern to it that the lines within which states have to exist in order “to carry out their day-to-day intercourse” are unstable, contested, and fruits of the exercise of imperial domination.

V. CONCLUSION

Modern colonialism was nothing if not an exercise in audacity. The global reach of colonial rule reordered subjects and reconfigured space. Fixed territorial demarcations of colonial possessions played a pivotal role in this process. Issuing from imperatives of colonial rule and compulsions of rivalries between colonial powers, these demarcations often cut across age-old cultural and historical social units. Postcolonial states inherited these demarcations and, with them, a host of endemic political and security afflictions. The unmistakable spatiality of the so-called...


Great Games, both old and new, brings into relief the continuing salience of space and territory in an age when the forces and processes of globalization had supposedly rendered them irrelevant.

Modern international law, which in its incipient stage lent license to colonial rule, today legitimates colonial cartographies, thereby accentuating postcolonial dilemmas and conflicts. This accords with the larger affliction that plagues international law: its refusal to squarely face its complicity in the process of empire building combines with its inability to break free of the shadow of a sordid past. The career of the Durant Line highlights that when addressing many of today’s intractable conflicts, the law as it exists is more of a problem than a solution. As humanity struggles to imagine political communities beyond the straitjackets of territorial states, a primary challenge is to clear the conceptual and doctrinal hurdles that remain in the way. This necessitates breaking free of imperial geographies and economies of knowledge that undergird modern legal constructs and international regimes. Albert Einstein cautioned us that “it is theory which decides what can be observed.” The first step in that direction is to align our inquiries and sights with the other side of the lines drawn by international law.
CONSUMER FINANCE AND INSOLVENCY
LAW IN INDIA: A CASE STUDY

Adam Feibelman∗

In February 2007, justices of the Supreme Court of India issued two remarkable opinions in the case of ICICI Bank v. Kaur.1 Prakash Kaur, the complainant in that case, had borrowed money from ICICI to purchase a truck. When Kaur failed to pay installments on the loan, agents hired by the bank took possession of the truck “by use of force.” 2 Approving a settlement of the parties’ claims,3 Justice Altamas Kabir wrote for the Court:

[W]e wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics.4

∗ Professor of Law, Tulane University. Thanks to Scott Baker, Lissa Broome, Adrienne Davis, Jef Feibelman, Elizabeth Gibson, Tom Kelley, Jayanth Krishnan, Eric Muller, Saule Omarova, Daniel Sokol, Sarah Kroll Weed, Mark Weisburd, Mark Weidemaier, Deborah Weissman, Todd Zywicki, faculty workshop participants at University of North Carolina School of Law and Vanderbilt Law School, participants in the international research collaborative, “Comparative Socio/Legal Approaches to Consumer Overindebtedness, Debt Adjustment and Insolvency,” at the 2007 annual Law & Society Association meeting, participants at the 2008 America Law and Economics Association annual meeting, and participants in the 2008 Junior Scholars Workshop on Banking Law and Consumer Finance at the University of Connecticut School of Law. Special thanks to Melissa Jacoby and Bill Whitford for their early encouragement with this project and to Jim Baker, Stephanie Horton, Amol Jain, and Alexander May, for their research assistance.


3. It appears that the court only approved the settlement reached by the parties and did not address the legal issues asserted by Kaur. A lower court found that Kaur’s initial petition alleged cognizable criminal offences by the Bank and its agents and that the police had violated the Indian Penal Code and the country’s Prevention of Corruption Act by failing to pursue the allegations. Id. at 712–14 (citing Kumari v. State (N.C.T. of Delhi) and Ors., (2006) 2 S.C.C. 677).

4. Id. at 714.
Justice A.R. Lakshmanan’s concurring opinion is even more pointed, describing recovery agents as “independent contractors hired by the banks both to trace the defaulters and to . . . physically, mentally and emotionally torture and force them into submitting their dues.”

Here the bank gets away with everything. Young and old members of the family are threatened on streets, [at] institutions and also at home at godforsaken hours by these agents who have the full support of their contractor bank . . . . [T]he method usually adopted by these institutions is to engage [a] thug/hooligan/gangster for recovery of the two-wheelers or four-wheelers. Many times even notice is not given to them. They seize the vehicles even in public places deliberately to cause embarrassment . . . . A recent incident has taken place when the recovery agent had gone and threatened a school-going child for the money due by the father.

These statements provide a dramatic window into broad economic and social transformations that have been taking place in India in recent decades. In particular, they reflect the rapid expansion of consumer financial markets in that country, the potential benefits of that expansion, and some of the regulatory challenges it has engendered. Like other countries, especially other emerging market countries, India is currently attempting a daunting regulatory balancing act: to promote the continued deepening of consumer financial markets while limiting the various social and economic costs of increased consumer indebtedness. The current global economic crisis may have slowed the growth in consumer finance in India, but it also underscores the growing importance of striking the right balance with respect to regulation of consumer finance in both developed and developing economies.

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5. Id. at 715 (Lakshmanan, J., supplementing).
6. Id. at 715–17 (Lakshmanan, J., supplementing). Justice Lakshmanan’s opinion does not provide the bases for these factual assertions about banks’ collection practices. It is not clear whether they are based on evidence presented to the court by the parties or based on judicial notice of personal, anecdotal knowledge. There is some evidence, however, that such activity does take place with some frequency in India, and that it is not as rare as one might hope. In addition to the experience of Ms. Kaur, there have been various news reports of abusive and/or harassing behavior by collection agents of ICICI and other banks. See, e.g., Ravi Bakshi, ICICI Personal Loan Customer Commits Suicide After Alleged Harassment by Recovery Agents, PARINDA, Sept. 19, 2007, available at http://www.parinda.com/news/crime/20070918/2025/icici-personal-loan-customer-commits-suicide-after-alleged-harassment-recov (noting other stories). Justice Lakshmanan’s opinion refers to “the enormous amount of litigation pending and being filed against the banks” arising from the action of their collection agents. ICICI Bank v. Kaur, (2007) 2 S.C.C. 711, 716 (Lakshmanan, J., supplementing).
7. See infra note 16.
Unfortunately for policymakers in India and in other emerging economies, legal scholars, social scientists, and development theorists have little guidance to provide in this regard. The otherwise voluminous literature on law, finance, and development has paid relatively little attention to the relationship between law, consumer finance, and development policy.8

Despite this relative lack of attention, there are good reasons to believe that the expansion of consumer financial markets can promote growth and development.9 It is less likely to do so, however, in the absence of a regulatory framework that effectively facilitates an increase in consumer lending while also limiting the associated costs of over-indebtedness.10 Such a framework is generally drawn from a wide variety of regimes, including banking law, general contract law, consumer protection, bankruptcy law, regulation of credit reporting, regulation of debt collection, property exemptions, and laws affecting foreign investment. Determining the possible combinations of legal regimes that can promote efficient expansion of consumer lending in emerging economies is a crucial if relatively unexplored project for scholars of law, finance, and development.

In previous work, I have argued that an effective consumer bankruptcy system can be an especially effective component of a regulatory framework that promotes growth and development in emerging economies.11

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9. Expanding access to consumer finance can enable individuals to increase basic consumption of goods and services (potentially expanding consumption of domestic goods and services), to obtain and accumulate household assets, to make investments in personal capital (especially health and education), and to fund nascent profit-making ventures. Furthermore, it may broaden popular support for development policies. See Feibelman, supra note 8, at 75–79.

10. See id. at 79–81.

This Article provides a case study of consumer finance and of the potential role for consumer bankruptcy or insolvency\(^\text{12}\) law in the context of contemporary India. In particular, it explores whether and how that country might benefit from reforming its existing consumer insolvency laws. As Part I describes, formal consumer financial markets in India have been growing at dramatic rates in recent years.\(^\text{13}\) It is not surprising that the expansion of these markets has coincided with impressive growth in the Indian economy, which averaged over 7% growth in gross domestic product per year between 1997 and the onset of the recent global economic crisis.\(^\text{14}\) In the years just before the crisis, that growth exceeded 9%.\(^\text{15}\) While the global crisis has adversely affected the country’s economy,\(^\text{16}\) India has suffered less than most countries and has been among the first to begin to regain stability.\(^\text{17}\) Barring an unexpected reversal, the country appears poised to enjoy growth rates of nearly 7% and 8% in the next two years, respectively.\(^\text{18}\)


12. Usage of the terms “bankruptcy” and “insolvency” creates much conceptual confusion. There is a tendency to use “bankruptcy” to refer to the financial affairs of individuals and “insolvency” to those of corporations. It is probably more accurate to distinguish “bankruptcy” as a legal process or procedure and “insolvency” as a financial state of affairs (for individuals as well as commercial entities). These distinctions are not important for present purposes, and the terms bankruptcy and insolvency are used interchangeably in this Article.

13. See infra notes 25–48 and accompanying text.


18. See id.
If the growth in India’s broader economy caused consumer financial markets in that country to expand, there are reasons to believe that causation flows in the other direction as well—that growth in consumer financial markets has contributed to broader growth in the Indian economy. In any event, policymakers in India have done much in recent years to support formal domestic markets for consumer finance. Part II describes some of these efforts and the main pillars of the legal and regulatory framework that currently applies to consumer financial markets in India.

As the Kaur opinion suggests, however, the country has done less to adopt reforms or policies designed to limit the costs of expanding consumer finance. As a result, there are signs that the Indian economy is currently experiencing, or is becoming increasingly vulnerable to, a variety of costs related to expanding consumer finance, especially consumer over-indebtedness. Limited available data suggest, for example, that loan default rates are increasing, that aggressive debt collection has become ubiquitous, and that debt-related imprisonment and debt bondage continue to plague Indian citizens. Among other things, these circumstances may dissuade some households from productive borrowing in the first place and may undermine popular support for broader development policies.

Against this background, Part III examines the current and potential role of consumer insolvency law in India. Unlike other major emerging economies—most notably, Brazil and China—India has had a formally comprehensive consumer insolvency regime in place throughout its independent legal existence. India’s existing insolvency laws were enacted during its colonial era and, at least on paper, provide a significant measure of protection and debt relief to individual debtors. They give courts relatively broad powers to stay enforcement and collection actions against debtors and allow for the discharge of an insolvent’s unsecured debts.

Yet the scope of consumer insolvency laws in India is subject to many formal and practical limitations. The requirements for protection under the laws are rather cumbersome and require a series of judicial determinations. Many of these determinations are subject to significant judicial discretion, which appear to make application of the laws unpredictable.

20. See id.
21. See, e.g., Feibelman, supra note 8, at 94–95 (arguing that the availability of debt relief may encourage consumers to borrow and may limit popular dissatisfaction with development policies).
As a practical matter, like most litigation in that country, insolvency cases in India proceed extremely slowly through the judicial system, a pace that is exacerbated by the number of judicial actions required to trigger protections and relief under the laws.

Despite these limitations, it appears that some debtors and creditors in India do employ the country’s insolvency laws. While there are no available systemic data on consumer and household insolvency proceedings in India, and while most insolvency proceedings are unreported, some consumer insolvency cases are decided by the country’s high courts each year and published. These decisions alone do not support reliable conclusions about the insolvency system in India, but they do provide an intriguing glimpse into that system. They indicate that India’s insolvency regime is, at least, a functioning part of that country’s legal system. They also suggest that consumer insolvencies may be more common than observers outside the system might anticipate. Nonetheless, beyond these relatively few reported decisions, there is little available evidence that India’s consumer insolvency laws are currently an important legal institution in that society. Thus, assuming that consumer insolvency or bankruptcy law can, in theory, promote the deepening consumer financial markets, it seems doubtful that it currently plays this role in India.

With effective reforms, however, consumer insolvency law may have the potential to play a more beneficial role in India. Part III proposes that even modest reforms to India’s insolvency laws could increase their role in regulating debt collection and providing consumer debt relief. While increasing the general capacity of the country’s legal system would likely improve the functioning of its insolvency laws, such improvements may not be necessary to meaningfully alter the role that consumer insolvency law plays in the Indian economy. Policymakers could, for example, streamline aspects of the insolvency regime to make some provisions—such as discharge and the stay on other proceedings—more automatic and to reduce the judicial functions required at each step of an insolvency case. Such improvements could, in theory, increase the insolvency returns to creditors, provide additional social insurance for consumers and households, and increase the demand for consumer finance.

To be clear, however, this Article does not advocate any particular reforms, nor does it suggest that Indian policymakers simply transplant rules or doctrines from other jurisdictions. Rather, this Article argues that India may provide an example of an emerging economy that could benefit from expanding and improving the role of its consumer insolvency

23. See infra notes 216–19 and accompanying text.
24. See infra notes 219–21 and accompanying text.
law. Thus, the primary goal of this Article is to help spur further study of India’s consumer financial markets and of the operation of its insolvency system to confirm or refute that hypothesis. If confirmed, that information might increase the demand for effective consumer insolvency law in India (and elsewhere). To be effective, India’s insolvency law must be sensitive to its particular context, including unique practical, cultural, sociological, and economic aspects of Indian society. In that regard, the fact that India already has a functioning, perhaps familiar, consumer insolvency system provides some reason for optimism that policymakers could transform the existing system into one that contributes more to social welfare in that country.

I. CONSUMER FINANCE IN INDIA

The concerns of Justice Kabir and Justice Lakshmanan in *ICICI Bank v. Kaur*\(^\text{25}\) should be read against a background of dramatic increases in consumer financial transactions in India over the past two decades. Before the 1980’s, non-agriculture-related consumer credit was available from some formal lenders, but it was relatively scarce. During that period, the overall amount of capital in the economy was modest, and credit allocation by financial institutions was largely directed by the state.\(^\text{26}\) Individuals and households could borrow from state-controlled lenders, but most borrowed from informal sources, especially from largely unregulated professional and informal moneylenders.\(^\text{27}\) Overall borrowing for non-agricultural purposes was quite modest, and much of it was used to fund lifecycle events, such as weddings, births, and deaths.

A formal market for consumer finance began emerging in India in the 1980’s, and it has expanded rapidly during the past decade.\(^\text{28}\) While information about consumer credit in India is far from comprehensive, there are two important sources of such data, both of which are illuminating. One of these, India’s National Sample Survey Organization (“NSSO”), conducts a survey of household assets and indebtedness every ten years.\(^\text{29}\) The last survey was conducted in 2002 to 2003. From these


\(^\text{26}\) See infra notes 54 & 63 and accompanying text.

\(^\text{27}\) See infra notes 41 & 102–06 and accompanying text.

\(^\text{28}\) See infra note 32 and accompanying text.

\(^\text{29}\) The NSSO, in the Ministry of Statistics and Programme Implementation, Government of India, conducts the All-India Debt and Investment Survey (“AIDIS”). This is a series of surveys, the most recent of which was conducted during January to December 2003. It is apparently the only information available about Indian household assets, liabilities and expenditures nationwide. Government of India National Sample Survey Organi-
surveys, we know that between 1981 and 2002, household indebtedness (existing and new borrowing combined) increased nearly 2000%, from Rs. 9,100 crore (approximately $2 billion) to Rs. 176,700 crore (approximately $40 billion).30 According to the NSSO survey, new borrowing, rural and urban, for the year 2002 to 2003 was Rs. 89,300 crore (approximately $20 billion).31

The other important source of data on consumer finance in India, the Reserve Bank of India, tracks yearly changes in household assets and liabilities for which formal institutions are counter-parties. According to Reserve Bank’s Handbook of Statistics, the yearly net increase in total financial liabilities of households in India grew nearly six-fold between 2000 and 2007.32 These figures suggest that total indebtedness was continuing to increase at a dramatic rate before the current economic crisis, as most borrowing in India is for the medium to long term.33 Not surprisingly, there are significant differences in the financial profiles of rural and urban households in India. As a general matter, rural households—both cultivators and non-cultivators—are more likely to have financial liabilities than urban households, and urban households with liabilities owe more than their rural counterparts.34 The percentage of urban households reporting indebtedness remained steady between 1981 and 2002, but the amount of those households’ indebtedness increased signifi-


34. As of 2002, 26.5% of rural households were indebted, and these indebted households had an average amount of debt of Rs. 28,449. Household Assets and Liabilities in India, supra note 30, at 30. In rural areas, cultivator households were more likely to be indebted than non-cultivators (29.7% to 21.8%) and they had more debt on average (Rs. 9,300 to Rs. 5,000, per all rural households). Id.
35. In 1981, 17.4% of urban households were indebted and the average amount of
debt per all urban households was Rs. 1,000. In 2002, 17.8% of urban households were
indebted and the average amount of debt per all urban households was Rs. 11,771. Id. at 35. Urban indebted households had a higher average debt (Rs. 66,129) than rural house-
holds (Rs. 28,449). Id. at 30. In urban areas, self-employed and nonself-employed urban
households were equally likely to be indebted and had roughly the same amount of aver-
age debt per urban household (Rs. 12,100 to Rs. 11,600, per all urban households). Id.

36. Household Indebtedness in India, supra note 33. As of 2002, rural households
represented 73% of national population and held 63% of total household debt; urban
households represented 27% of the population and held 37% of overall household debt.
Id.

37. As of 2002, approximately 60% of rural households are cultivators—i.e., farmers—and another 5% are artisans; approximately 36% of urban households are designated as “self-employed.” Household Assets and Liabilities in India, supra note 30, at 13. Approximately 25% of debt incurred by urban households and 53% of debt incurred by rural households is used for a business purpose. Household Indebtedness in India, supra note 33, at 39.

38. These figures include consumer debt used for housing finance, although it is im-
possible to determine precisely how much is borrowed for this purpose. As of 2002, 35% of
debt incurred by rural households and 58% of debt incurred by urban households was
used for “household expenditure,” a category which includes housing finance among
many other things. Household Indebtedness in India, supra note 33. There are reasons to
believe that much of this expenditure was related to housing finance. Roughly 22% of all
outstanding debt in 2002 was secured by a first mortgage on immovable property and
nearly the same amount of outstanding debt was secured by other mortgages on immova-
ble property. Id. at 39.

39. See, e.g. Akash Gupta & Rahul Agarwal, The Consumer Financing Business in
sales in India were being financed as of 2003).

40. Rakesh Mohan, Deputy Governor of the Reserve Bank of India, Address at the
Annual Bankers’ Conference, Hyderabad, Economic Growth, Financial Deepening and
Financial Inclusion, at 1–2 (Nov. 3, 2006), available at
http://www.bis.org/review/r061121e.pdf. From 2002 to 2006, retail credit grew by 46%;
retail credit share of all bank credit increased from 6% in 1991 to 25.5% in 2006. Id. at 3. 
Mohan suggests that the expansion of credit in recent years has been funded by banks
“unwinding their surplus investments in government securities.” Id.
As discussed below, professional and informal moneylenders continue to play a significant role in the nation’s economy. Yet much of the increase in consumer lending has been from banks and other non-bank financial institutions. The percentage of the debt of urban households held by institutional lenders increased consistently since 1981—totaling 60% of household indebtedness in 1981, 72% in 1991, and 75% in 2002. It appears that revolving consumer credit facilities, especially the use of credit cards, are helping to fuel this trend. International credit card companies like Visa and Mastercard and their related lenders have identified India as one of the most promising of emerging markets. Before the recent global economic crisis, there were 28 million credit cards in the

41. See infra notes 102–06 and accompanying text. When last measured, these lenders were responsible for 29.6% of credit extended to rural households and 14.1% of credit extended to urban households. The most common of these relatively informal lenders are pawnbrokers, followed in significance by input suppliers, “commission agents,” “kirana shopkeepers,” and “lenders against land.” RBI, Report of the Technical Group, infra note 98. They tend to lend for short terms, and the proceeds of their loans are often used for consumption, farming, and social obligations (e.g., weddings, births, deaths). See Household Indebtedness in India, supra note 33, at 32. Most of their loans are secured by jewelry and interests in land (including cultivation rights), but many are effectively unsecured. See id.

42. Household Indebtedness in India, supra note 33, at 25. The share of lending to rural households remained steady over this period and actually decreased in 2002 (61%, 64%, and 57% in 1981, 1991, 2002, respectively). Id. The most active lenders to Indian households include cooperative societies and cooperative banks (who hold 27.3% of debt owed by rural households and 20.5% of debt owed by urban households); commercial banks (24.5% and 29.7%); government entities (2.3% and 7.6%); non-bank financial institutions (1.1% and 7%); “agricultural money lenders” (10% and 9%); professional money lenders (19.6% and 13.2%); traders (2.6% and 1%); and relatives & friends (7.1% and 7.6%). Id. at 29. Poorer households tend to borrow from non-institutional lenders; richer ones tend to borrow from institutional lenders. Id. at 18–19. The rates that households pay for credit vary significantly, depending upon their demographic characteristics, income, and the type of creditor they borrow from. Most rural borrowers pay rates between 12% and 25%, and most urban borrowers pay less than that—between 6% and 20%. Id. at 34. Non-institutional lenders charge significantly higher rates—40% of non-institutional lenders charge 30% plus; 32% of non-institutional urban lenders charge rates in that range. Id.

country; after a sharp drop in cards in the Indian economy, the number of cards began to rise again, reaching 19.3 million.44

Despite these large numbers, however, credit card penetration rates are relatively low in India compared to other comparable developing economies, especially others in its region.45 This reflects the broader fact that while the overall amount of consumer borrowing has increased dramatically in recent years, the incidence of indebtedness among Indian households—the percentage of households that are indebted—is still relatively low.46 Furthermore, while debt-to-asset ratios for Indian households that report borrowing money are rising for all Indian households except self-employed urban households,47 they are also relatively low.48 The facts suggest that there is potential for significant expansion of consumer borrowing in India in the future, especially as the number of households at poverty level in that country decreases.

II. THE REGULATORY FRAMEWORK

A variety of legal and regulatory reforms, especially reforms made over the last decade or so, appear to have helped facilitate India’s general economic expansion and the growth of consumer finance in that country. This Part notes some of the most important policies and legal developments that have helped spur the expansion of consumer finance in that country. It also describes some of the policies and legal regimes that India has adopted to limit the costs of increasing availability of consumer finance, especially over-indebtedness. This Part concludes that Indian policymakers have thus far been more attentive to expanding consumer financial markets than to limiting the resulting costs of that expansion.

46. See supra notes 34–35 and accompanying text.
47. See Household Assets and Liabilities in India, supra note 30, at 40.
48. These ratios are 2.5% and 4.6% for cultivator and non-cultivator rural households, respectively; 2.2% and 3.4% for self-employed and non-self-employed urban households, respectively. Id. at 37. But broken down by asset class, this ratio gets much higher for poorer borrowers. Id. Not surprisingly, households with the most assets owe most of the country’s consumer debt. Id.
A. Liberalization of the Indian Financial Sector

As a number of writers have commented, India has followed a somewhat idiosyncratic path of economic development, and that country’s experience over the last few decades has indeed been uncommon in many respects. Unlike most other large post-colonial states, India emerged from British control with many institutions that development economists have identified as preconditions for economic growth.


was an advanced democracy with a relatively effective education system, experienced civil servants, a nationwide railroad system, and a functioning judiciary.\textsuperscript{51} Despite its enviable array of relatively advanced institutions, India did not enjoy strong economic growth in the decades after its independence.\textsuperscript{52} In this period, through the 1970’s, India’s rate of growth was not only disappointing given its institutional endowments, it underperformed compared to other developing countries with weaker institutions.\textsuperscript{53} The conventional explanation for this economic performance is that, post-independence, economic growth in India was hampered by rigid government controls over the economy.\textsuperscript{54}


\textsuperscript{51} Today, India is the world’s most populous democracy. With a population of just over one billion citizens, it has a constitutional, federal system of government. \textit{The World Fact Book: India}, supra note 14. India’s constitution provides for a federal government with separation of powers between legislative, judicial, and executive branches. \textit{Id.} The nation is comprised of twenty-eight states and seven territories, governed by a bicameral legislative body at the national level, and the separate states also have legislative bodies of their own. \textit{Id.} Like other legal systems based on the English model, India has a common law legal system, but also has extensive legislative schemes at the national and state levels. \textit{Id.} There is a national supreme court and each state has its own high court as well. \textit{Id.}


\textsuperscript{53} Kochhar et al., supra note 49, at 17 (noting that in the early 1980’s India did not use enough available labor and employed capital inefficiently). As an aside, India is often said to have experienced a “Hindu” rate of growth in this period. This phrase seems ill-chosen, and hopefully it will lose its currency.

\textsuperscript{54} Under the leadership of Jawaharlal Nehru and Indira Gandhi, India became a quasi-communist/socialist state. In 1954, India’s legislature explicitly committed the nation to socialism. See Williamson & Zagha, supra note 50, at 3. For an excellent general history of the country since independence, see \textit{Ramachandra Guha, India After Gandhi: The History of the World’s Largest Democracy} (2007). India’s policies in this era have been characterized as combining Soviet-style industrialism, British-style trade unionism and welfare-statism, and colonial socio-economic stratification. See generally Ramgopal Agarwala & Zafar Dad Khan, \textit{Labor Market and Social Insurance Policy in India: A Case of Losing on Both Competitiveness and Caring}, World Bank (1997), available at http://siteresources.worldbank.org/WBI/Resources/wbi37168.pdf. Others have described India’s socialism as similar to Fabian socialism, in contrast to Marxism, it “aimed not to destroy capitalism but merely to mitigate the social ills it caused.” Tarun Khanna & Yasheng Huang, \textit{Can India Overtake China?}, \textit{Foreign Policy}, July-Aug.,
In the 1980’s, India began a transformative period of liberalization. The initial round of reforms instituted by Indian policy-makers in the 1980’s was designed to make it easier to conduct business in the country by loosening at least some of the government’s controls on economic activity.\textsuperscript{55} The major reforms of that period allowed more imports and foreign investment; increased the number of goods that were subject to open licensing; liberalized access to credit; improved tax incentives for export ventures; relaxed licensing requirements for domestic industrial activities; and removed some price controls for commercial inputs (like cement and aluminum).\textsuperscript{56} This initial round of reforms was thus largely internally focused and was arguably the product of domestic political pressures.\textsuperscript{57} These seemingly modest reforms are often overlooked,\textsuperscript{58} but they appear to have been consequential—both in economic effect and in building political support within the polity for liberalization in general.\textsuperscript{59}

India experienced another important, and much more prominent, round of legal reforms in the 1990’s that further loosened government control of the economy.\textsuperscript{60} If the earlier reforms were pro-business, the reforms of

\textsuperscript{55} Kochhar et al., \textit{supra} note 49, at 18–19 (discussing India’s economic reforms of the 1980’s); Williamson & Zagha, \textit{supra} note 50, at 1, 7 (noting that contemporary Indian growth started in the 1980’s—additional growth in the 1990’s was modest). For a discussion of the conditions that led to the India reforms of the 1980’s, see Williamson & Zagha, \textit{supra} note 50, at 6–7 (noting that these reforms were made in the wake of a sizeable IMF loan and were the product of self-imposed conditionality for the IMF loan). \textit{See also} Praveen Chaudry, Vijay Kelkar & Vikash Yadav, \textit{The Evolution of ‘Home-Grown Conditionality’ in India: IMF Relations}, \textit{40 J. DEV. STUD.} 59, 59–81 (2004).

\textsuperscript{56} Kochhar et al., \textit{supra} note 49, at 18–19; Williamson & Zagha, \textit{supra} note 50, at 7. In the late 1980’s the transport/trucking industry was largely liberalized, which had far-reaching effects on the Indian economy. \textit{See id.}

\textsuperscript{57} \textit{See} Rodrik & Subramanium, \textit{Hindu Growth}, \textit{supra} note 52, at 25 (describing these reforms as “internal liberalization”).

\textsuperscript{58} \textit{See} Williamson & Zagha, \textit{supra} note 50, at 7 (observing that the growth normally associated with the reforms of the 1990’s actually began in the 1980’s).

\textsuperscript{59} \textit{See id.}

\textsuperscript{60} \textit{See} John Armour & Priya Lele, \textit{Law, Finance, and Politics: The Case of India}, \textit{LAW & SOC’Y. REV.} 491, 492 (2009); Kochhar et al., \textit{supra} note 49, at 18–19; Khanna & Huang, \textit{supra} note 54, at 77–78. These reforms were largely spurred by a near-financial crisis and a looming default on external obligations. This near-crisis of the early 1990’s was arguably the product of flaws in the development and reform policies of the 1980’s discussed above. \textit{See} Williamson & Zagha, \textit{supra} note 50, at 8.
the 1990’s were more generally pro-market. These reforms further dismantled industrial licensing requirements; eliminated public sector monopolies in certain industries; allowed for an increase in foreign direct investment and foreign portfolio investments; liberalized the terms of India’s trade abroad, including the lowering of tariffs and the elimination of import-licensing requirements; and, as discussed below, altered the regulation of financial services in various ways.62

Liberalizing the country’s financial services involved reversing the nationalization of the banking sector. In 1991, domestic public sector banks controlled nearly all of the country’s deposits, the government set interest rates, and banks’ use of funds was largely predetermined. In recent years, the market share of private banks has increased, and the state-controlled banks are now at least partly open to private investors. Banks also enjoy significantly more operational freedom than they did twenty years ago, and rates that banks can charge for credit have been largely deregulated.

The process of liberalization also included a set of reforms to allow more foreign participation in the financial sector. The Reserve Bank of India, which has regulatory authority over banks and other non-bank in-
stitutions, began to allow foreign bank branches in the early 1990’s. 68
Under pressure from abroad, it has committed to allow a handful of new foreign bank branches per year. As of 2009, thirty foreign banks were operating 273 branches in India, and thirty-four other foreign banks were operating representative offices in the country. 69 Foreign banks are now allowed to hold some modest ownership stakes in private and state-owned domestic banks. 70

While these actions reflect meaningful changes in the architecture of the country’s financial sector, 71 that sector is still subject to significant government controls, 72 it is still dominated by state controlled institutions, 73 and foreign participation in the sector remains relatively modest. 74 For example, foreign banks with domestic branches are prohibited

68. See INDIA COUNTRY FINANCE 2006, supra note 1, at 17.
69. INDIA COUNTRY FINANCE 2009, supra note 67, at 15.
70. See infra notes 75–76 and accompanying text.
71. See Khanna & Huang, supra note 54, at 78 (arguing that capital markets and legal systems are more advanced in India than in China).
72. INDIA COUNTRY FINANCE 2009, supra note 67, at 9 (“Domestic banks must devote at least 40% of their loan portfolio to designated priority sectors . . . and 12% to export financing . . . . Foreign banks are required to lend 32% of net credit to priority sectors . . . . ”); Roland, supra note 63, at 5.
73. INDIA COUNTRY FINANCE 2009, supra note 67, at 12 (noting that “[India’s] 28 state-owned banks . . . controlled 69.9% of assets in the [financial] sector . . . . ”).
74. These limitations on foreign investment in India’s financial sector reflect the relatively low rate of foreign investment in India in general. Although there was a flurry of increased foreign investment in the Indian economy in the 1990’s, see INDIA COUNTRY FINANCE 2006, supra note 1, at 5–6, the country still attracts relatively little foreign investment compared to other developing countries. See Raghbendra Jha, Recent Trends in FDI Flows and Prospects for India, 1–2 (Austl. Nat’l Univ. Working Paper, Aug. 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=431927; Rohit Sachdev, Note, Comparing the Legal Foundations of Foreign Direct Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context, 2006 COLUM. BUS. L. REV. 167, 168 (2006) (noting that China does better with FDI). See also Ablett et al., supra note 43, at 23. For a good summary of “incoming direct investment,” see INDIA COUNTRY FINANCE 2009, supra note 67, at 45. The United States is the largest investor in India. See Jha, FDI Flows, supra note 49, at 5. This relatively low rate of foreign investment is due in large part to direct legal constraints. India’s regulation of foreign investment continues to be robust and complex. Sachdev, supra note 74, at 169, 187–90. See also INDIA COUNTRY FINANCE 2009, supra note 67, at 45. For a good discussion of the regulatory role of the RBI and the Ministry of Finance, see INDIA COUNTRY FINANCE 2006, supra note 1, at 6–9. In fact, recent legislative acts in India appear to tighten some restraints on foreign investment, Sachdev, supra note 74, at 195–96, and the Congress Party appears to be slowing down some recent efforts to attract foreign investment. See INDIA COUNTRY FINANCE 2006, supra note 1, at 5. It is worth noting, however, that India’s relative insulation from international capital markets is credited for helping
from owning more than 5% of the equity of another bank. Foreign direct investment in domestic private banks is limited to 10% per investor (or related group) and total foreign direct investment in any domestic bank cannot exceed 74% of ownership. Largely due to these various limitations and strong competition from new private domestic banks, some foreign banks actually began leaving the market for financial services in India in the period before the current crisis. And, responding to the global economic crisis, the Reserve Bank of India stated in 2009 that it would temporarily halt efforts to increase foreign banks’ presence in the country.

India has also liberalized its financial sector by adopting a set of reforms that enable lenders in India to enforce their obligations more quickly and predictably. A growing body of scholarship supports the basic claim that effective legal protections for lenders and investors tend to promote economic growth. In the absence of such mechanisms, returns on investment are more uncertain, which increases the cost of capital or makes it altogether unavailable. Thus, legal regimes like bankrupt-

the country weather the recent global crisis. INDIA COUNTRY FINANCE 2009, supra note 67, at 3.

75. INDIA COUNTRY FINANCE 2006, supra note 1, at 14.

76. Id.

77. See INDIA COUNTRY FINANCE 2006, supra note 1, at 16. Twelve new private domestic banks have been licensed by the Reserve Bank since 1993. Id.

78. See id. at 15 (including chart of top 10 foreign banks).

79. INDIA COUNTRY FINANCE 2009, supra note 67, at 15.


cy law and related doctrines that protect, or at least clarify, lenders’ interests when their borrowers default or suffer financial distress, are considered particularly important for promoting lending and investment in a developing economy. But simply adopting a scheme of formal rules is not sufficient for this purpose, and a functioning judicial or administrative system is a basic precondition for enforcement of formal rules.

In 1993, the Indian parliament passed the Recovery of Debts Due to Banks and Financial Institutions Act, which created a system of debt recovery tribunals. Pursuant to that Act, domestic banks and non-bank financial institutions can file applications with one of the debt recovery tribunals to recover debts greater than one million rupees (approximately

82. See generally DAM, supra note 81; LaPorta et al., Law and Finance, supra note 81. A bankruptcy regime can help lenders, especially commercial lenders, in part by solving a collective action problem. By staying a race to collect assets from a troubled debtor, bankruptcy law can help avoid the liquidation of firms that have a relatively high going-concern value. See, e.g., THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 7-19 (Harvard University Press 1986). It can also hasten the resolution of a debtor’s liquidation, when necessary, so that assets are not wasted by a failing enterprise. Effective protection of creditors is widely thought to be particularly important for countries making a transition away from a planned economy. See, e.g., Alexander Biryukov, Ukrainian Bankruptcy Law in the Context of Regional and International Developments, 13 ANN. SURV. INT’L & COMP. L. 13 (2007); Charles Booth, Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam, 18 COLUM. J. ASIAN L. 93 (2004) [hereinafter Booth, Drafting Bankruptcy Laws]; Rupinder Singh Suri, The New Insolvency Regime: J. J. Irani Expert Committee Report with Special Emphasis on Reconstruction & Winding-up, at 67 (2005), available at http://www.insolindia.com/papers.htm.


84. There are twenty-nine debt-recovery tribunals and five appellate tribunals for bank and non-bank financial institution cases across the country. INDIA COUNTRY FINANCE 2006, supra note 1, at 12.

85. The designation of non-bank financial institutions is a bit confusing, because it seems to be used to refer to two different categories of institutions. The first category includes a handful of large institutions (the Financial Institutions), that provide a relatively large amount of credit to development projects across the country. These are generally state development banks. The Reserve Bank of India has apparently been trying to merge these institutions with existing banks. Another category includes many, much smaller, private companies that provide a wide range of financial activities other than taking deposits. These are most often described as non-bank financial companies. Both appear to be subject to regulation by the Reserve Board of India. The Reserve Bank of India recently required the NBFC’s to register with it.
While these tribunals appear to represent an improvement in the enforceability of obligations, they are still apparently quite slow and unpredictable. Responding in part to frustration with these newly created debt recovery tribunals, the Indian parliament adopted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Act of 2002 to enable banks and financial institutions to enforce security interests without court intervention in some circumstances. This Act applies to obligations greater than Rs.100,000 (approximately $2,200) for which over 20% of the obligation is unpaid.

The Indian legislature also recently reformed the country’s laws dealing with corporate liquidations and reorganizations by amending the country’s Companies Act and repealing the Sick Industrial Companies Act (“SICA”). The SICA had created a Board for Industrial and Financial Reconstruction to oversee reorganization of corporations facing financial distress. Despite that earlier reform, it was recently estimated that the average corporate insolvency process in India takes a decade. The new legislation, which has not yet taken effect, will replace the Board with a National Company Law Tribunal that will have authority to resolve both liquidations and reorganizations. Indian banks and the Reserve Bank of India have also created a voluntary corporate debt restructuring scheme.

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86. BATRA, THE INDIAN INSOLVENCY REGIME, supra note 80, pt. II. The Tribunal adjudicates claims and then executes judgments by selling a debtor’s assets pursuant to broad powers of attachment and injunction. Id.
87. Id.; Batra, Insolvency Laws In South Asia, supra note 80.
88. Pursuant to the Act, a secured bank or financial institution must give a defaulting debtor sixty days to satisfy its obligation; thereafter, the lender can, among other things, take over the asset, take over the borrower’s business, or appoint a manager for the assets. See Securitisation and Reconstruction of Financial Assets and Enforcement of Security Act of 2002, ch. 3, § 13, available at http://www.drat.tn.nic.in/Docu/Securitisation-Act.pdf. In such a case, the debtor can appeal to a debt recovery tribunal. See Gopalan krishna & Ravi, supra note 83.
90. BATRA, THE INDIAN INSOLVENCY REGIME, supra note 80, pt. II; Batra, Insolvency Laws In South Asia, supra note 80, § 1, at 4.
91. Batra, Insolvency Laws In South Asia, supra note 80, § 1, at 4. This Board effectively shares jurisdiction for corporate reorganizations with the national court. Id.
93. See World Bank, Doing Business, supra note 92, at 70. The Tribunal will sit in ten locations across the country.
94. See Singh, supra note 89.
While these various reforms should further improve the enforceability of obligations and thus promote lending, they have significant structural limitations. For example, banks and financial institutions with relatively small claims are not covered by the 1993 Recovery of Debts Act; they must still sue in the civil courts under the Civil Code to enforce their security interests. And creditors that are not banks or financial institutions must also resort to the civil courts of more general jurisdiction. Although the Civil Code was amended in 2002 to improve its efficiency, it appears that there is a serious backlog of cases in the civil courts, causing significant delays.

B. Effect of Liberalization on Consumer Finance

The broader liberalization of financial markets in India has presumably supported the recent growth in that country’s consumer financial markets. As an initial matter, some consumer transactions in India fall within the scope of the general reforms described above. In addition, policymakers in that country have adopted a variety of policies more directly designed to expand formal consumer financial markets. Perhaps most significantly, the Indian government recently established the nation’s

95. See Batra, The Indian Insolvency Regime, supra note 80, pt. II. These courts have many of the same powers as the debt recovery tribunals; it appears that they have larger caseloads than the tribunals, however, and may lack expertise in debt recovery or enforcement.

96. See Batra, The Indian Insolvency Regime, supra note 80, pt. II.


99. Empirical data about these reforms is not available, but there are reasons to believe that they have improved the enforceability of consumer obligations. Although they appear to have been directed at commercial lenders, both sets of reforms reach at least some consumer transactions. The debt recovery tribunals should be available for consumer loans greater than one million rupees. Banks and financial institutions that lend to consumers can enforce their security agreements without court intervention.
first credit bureau, the Credit Information Bureau of India ("CIBIL").

After a few years of operations, CIBIL has over 144 million records. 

Policymakers have also made various efforts to draw consumers and households into the formal economy and away from informal, largely unregulated sources of finance. A wide variety of "indigenous" lenders and informal financial institutions have long played a major role in the consumer economy. There is some evidence that, compared to more formal institutions, moneylenders are better able to serve certain borrowers and to recover obligations from these borrowers; as a result, they often have relatively lower costs of conducting business. Interestingly, moneylenders continue to thrive in India in part because they will lend for consumption purposes when formal lenders are less willing to do so. Some policymakers continue to be concerned, however, that borrowing from moneylenders is inefficient, that many moneylenders are unscrupulous, and that consumer lending should be conducted by entities subject to more rigorous regulation.

100. INDIA COUNTRY FINANCE 2006, supra note 1, at 9. CIBIL was incorporated in 2001 and was restructured in 2005; its ownership is currently divided between the State Bank of India, various other domestic and foreign banks, Dun & Bradstreet, and Trans Union International. Id. As reflected by the Credit Information Companies (Regulation) Act of 2005, India is trying to spur the development of additional credit reporting entities. See RBI, Annual Policy Statement 2007–2008, supra note 49, at 59; INDIA COUNTRY FINANCE 2006, supra note 1, at 9.


103. See id. at 25.

104. See id. at 34.

105. See, e.g., Mihir Shah, The Crowning of the Moneylender, THE HINDU, Sept. 1, 2007, available at http://www.thehindu.com/2007/09/01/stories/2007090155971000.htm. Unlike banks and other formal non-bank financial companies, moneylenders are generally not regulated by the Reserve Bank of India. In 2006, the Reserve Bank of India formed a "Technical Group" to review the economic function and the regulation of this group of lenders. See RBI, Report of the Technical Group, supra note 98, at 1. As described below, regulation of moneylending is primarily vested in the state governments. The Group discovered significant variation in the regulations that different states have adopted, but noted certain common regulatory approaches. These commonalities include licensing requirements for moneylending; accounting duties to borrowers; penalties for aggressive debt collection activities; and rate regulations. Id. at 17. Not all states impose rate ceilings, however. Id. at 19 n.46. Many moneylenders refuse to register or become licensed and therefore are truly part of the informal economy. See id. at 35–36. The Group proposed model legislation of moneylending for state governments to consider adopting. The model legislation includes, among other things, provisions to promote registration of lenders; rate regulations (in the form of adjustable ceilings set by the state governments); use of alternative dispute resolution processes (like Lok Adalat and Nyaya Panchayat) or
As a result of this ambivalence, policymakers have adopted various strategies toward moneylenders in recent decades, some designed to “mainstream” moneylenders and others apparently designed to drive them out of business. A primary strategy policymakers have employed to remove moneylenders from the market is to promote and subsidize more formal credit services to low-income households. Thus, for example, the Indian government has subsidized commercial banks to enable some institutions lending to rural households to offer credit at a relatively low rate of interest. Another example of this effort is the introduction of Kisan credit cards by state-controlled banks. These cards enable farmers to borrow for production on relatively generous terms.

Policymakers have also promoted the development and formalization of microfinance institutions to draw consumers away from money-

“fast-track” judicial procedures; and promotion of links between moneylenders and banks (by creating a category of “accredited loan providers”). Some commentators argue that policy-makers should promote links between moneylenders and the formal banking sector by encouraging banks to finance the lenders or use them as “loan providers.”

These proposals lean in the direction of drawing moneylenders into the formal financial sector, i.e., into the mainstream. See Shah, supra note 105 (criticizing the Group’s report).

106. See RBI, Report of the Technical Group, supra note 98, at 4 (quoting Dr. Manmohan Singh, Prime Minister of India, Address at the Second Agricultural Summit (Oct. 18, 2006)).

107. Id. at 9 (quoting Dr. Y.V. Reddy, Governor of the Reserve Bank of India, Lecture at the Center for Economic and Social Studies, Ameerpet, Hyderabad (Dec. 16, 2006)).

108. Id. at 8.

109. This Article distinguishes microfinance from formal consumer finance, which is generally provided to individuals who are already earning some income and/or already have some assets to pledge as security. This distinction is admittedly somewhat arbitrary and imperfect, and it is made here to delineate a particularly important phenomenon: the emergence of formal consumer financial markets in India and elsewhere. To be clear, however, most microfinance institutions are formal legal entities. Some in India are quite large; some of the largest are non-bank financial companies subject to regulation by the Reserve Bank of India while smaller microfinance institutions may be organized as trusts or cooperative societies. See RBI, Report of the Technical Group, supra note 98, at 9.

Because of India’s controls on ownership and investment in the financial sector, see supra notes 72–76 and accompanying text, and because non-banks are not allowed to mobilize deposits, most Indian microfinance institutions are funded by loans from larger commercial banks or from development banks. See Microfinance Information Exchange, Benchmarking Asian Microfinance 2005, at 6 (Nov. 2006), available at http://www.themix.org/sites/default/files/MIX_2005_Asia_Benchmarking_Report_EN.pdf. “[I]ndian microfinance providers [are] some of the most highly leveraged institutions globally.” Id. at 4. The National Bank for Agriculture and Rural Development is an im-
The government has sought to bring these institutions within the banking sector by linking them to formal institutions. The Reserve Bank of India, for example, increasingly encouraged banks and non-bank financial institutions to link with microfinance institutions and self-help groups to promote “financial inclusion.” Information about the actual scale and scope of microfinance in the country is incomplete at best. Many of these institutions do not reliably report their activities. According to one estimate, there were approximately 150,000 active borrowers in 2006, with nearly 110% growth in borrowers over the previous year.

Although they still represent a relatively small portion of the consumer credit market, there is evidence that where microfinance institutions operate, the relative amount of moneylending has dropped, though rates have not. This suggests that these entities may be acquiring some of the clients of moneylenders. If microfinance institutions are, in turn, linked with banks, their expansion represents a gain for the formal financial sector, one that banks might not be able to obtain through branch-

111. See RBI, Annual Policy Statement 2007-2008, supra note 49, at 55 (citing a study of microfinance). See also Mohan, supra note 40, at 15 (noting that microfinance can help expand rural credit). See also Smt. Usha Thorat, Speech at Pune, Financial Inclusion and Millennium Development Goals, (Jan. 2006), available at http://www.bis.org/review/r060126f.pdf (noting the growth of NGO’s, SHG’s and MFI’s and their increased links with banks). Historically, a predominant proportion of consumers of microfinance have been women in rural areas.
113. Thus, for example, a leading clearinghouse of information about microfinance in India disqualified survey responses by nearly 25% of respondent institutions to its 2004–05 survey. See Transparency and Performance in Indian Microfinance, supra note 112.
114. See id.
115. RBI, Report of the Technical Group, supra note 98, at 38. Interest rates charged to borrowers from self-help groups range from 18–24%; borrowers from microfinance institutions tend to pay 20–24%. Id. at 10.
ing. Furthermore, it appears that major Indian microfinance institutions are sustainable—approximately 80% of microfinance borrowers in the country are borrowing from arguably sustainable institutions.

C. Liberalization and Consumer Protection

If deepening of consumer financial markets can promote growth and development, there are also various costs associated with consumer credit—especially costs of over-indebtedness—that can undermine the benefits of expanding access to credit. As consumer financial markets continue to expand in India, such costs will likely become a more significant concern for policy-makers in that country. There is likely to be a significant amount of class mobility out of poverty in that country in coming years. If so, India’s consumer borrowers will increasingly be drawn from populations that had previously been quite poor and unaccustomed to consumer finance and discretionary consumption. These individuals may be particularly susceptible to taking on relatively high levels of debt. In fact, although relevant data is scarce, default rates in the country have increased in recent years. Additionally, there appears to be a significant psychological dimension to financial distress in India, as elsewhere. Most dramatically, many thousands of heavily indebted farmers, especially in the Indian states of Andhra Pradesh, Maharashtra, Karnataka, and Kerala, have committed suicide in recent years. Farmer suicides are not a new phenomenon in India, but they may reflect a general stigma associated with debt and default in India. Debt bondage

118. See Feibelman, supra note 8, at 79–81.
119. See Ablett et al., supra note 43.
121. See supra note 22 and accompanying text.
122. See, e.g., Somini Sengupta, On India’s Despairing Farms, a Plague of Suicide, N.Y. Times, Sept. 19, 2006, at A1 (noting that over 17,000 farmers committed suicide in 2003, the most recent official comprehensive statistic available). These farmers had borrowed to finance small-scale farming operations; slumping prices or unexpected crop losses had left them heavily, hopelessly indebted. See also Ablett et al., supra note 43, at 88.
and imprisonment for debt also appear to be continuing phenomena in India. At the very least, these continuing phenomena—debt-related suicide, bondage, and imprisonment—indicate the need for serious regulatory attention to the social and economic consequences of consumer indebtedness in India.

Although policymakers in India appear to have begun to address some of the consequences of increased consumer indebtedness, the regulatory framework remains much the same as it was before the current era of liberalization. This is especially true at the national level. There is a national usury act in India, the Usurious Loans Act of 1918 ("ULA"), which empowers courts to determine whether an interest rate is excessive "having regard to the risk incurred as it appeared . . . to the creditor at the date of the loan." As discussed below, many Indian states have adopted rate regulations as well. These rate ceilings, in turn, provide a benchmark for claims of excessive interest rates under the ULA. But, as with the difficulties creditors face in enforcing obligations, debtors may face hurdles in asserting rights under the ULA or under state law, which must be done in the civil courts.

Under the Banking Regulation Act of 1949, banks and some other financial institutions are exempt from the ULA and are subject instead to any rate regulations imposed by the Reserve Bank of India. Although the Reserve Bank no longer sets rate ceilings, it has explicitly stated

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124. In 1980, the Supreme Court of India found that imprisonment for debt was unconstitutional. See Jolly George Varghese v. Bank of Cochin, A.I.R. 1980 S.C. 470, 475. But this case only extends to cases in which a debtor acts innocently. Thus, if a debtor is found to act in bad faith with respect to a financial obligation, he or she may still be subject to imprisonment.

125. Statistical information on debt bondage and imprisonment for debt are scarce, and it is difficult to determine whether they have been significantly affected—either positively or negatively—by expanding formal markets for consumer finance or regulation thereof. Both are largely rural phenomena, so it is possible that they have not significantly increased as overall household indebtedness has grown. It is also possible that regulatory concerns about over-indebtedness have drawn attention to the underlying factors of debt-related suicides and bondage, leading to reductions in severity of both.


127. See infra notes 135–39 and accompanying text.


129. See supra notes 97–98 and accompanying text.

130. RBI, Report of the Technical Group, supra note 98, at 23.

131. See supra note 67 and accompanying text.
that rates can still be usurious or imprudent.\textsuperscript{132} And the Reserve Bank has recently issued statements expressing concern that some lenders are charging rates that are too high.\textsuperscript{133} This may suggest that there is serious potential for re-regulation of rates for at least some Indian financial institutions. In addition, the Bank recently has issued guidelines for credit card lenders that regulate the process by which credit card lenders set their interest rates.\textsuperscript{134}

In addition to this federal regulation, many states have adopted specific interest rate ceilings for moneylenders pursuant to their constitutional authority.\textsuperscript{135} At least five states effectively impose the Hindu rule of “damdupat,” which provides that “the amount of interest recoverable at any one time cannot exceed the principal.”\textsuperscript{136} Furthermore, states have adopted broader regulatory schemes affecting particular types of transactions. For example, Tamil Nadu (which includes Chennai, formerly Madras) has adopted a specific regime covering pawnbrokers\textsuperscript{137} and one regulating moneylenders that are not within the jurisdiction of the Reserve Bank.\textsuperscript{138} That state also recently adopted laws that made it a crime

\begin{footnotes}
\footnotetext[134]{\textsuperscript{134} Among other things, the new guidelines require banks to adopt rate ceilings. See Reserve Bank of India, Credit Card Operations of Banks, RBI Notification (2010) [hereinafter RBI, Credit Card Operations of Banks], available at http://rbidocs.rbi.org.in/rdocs/notification/PDFs/CCOB090710.pdf.}
\footnotetext[135]{\textsuperscript{135} The Constitution of India explicitly grants authority for regulating moneylending to the country’s state governments, most of which have adopted specific regulations. RBI, Report of the Technical Group, supra note 98, at 16.}
\footnotetext[136]{\textsuperscript{136} Id. at 23.}
\footnotetext[137]{\textsuperscript{137} Tamil Nadu Pawnbrokers Act, 1943, Tamil Nadu Act 23 of 1943. This Act requires, among other things, that pawnbrokers in the state be licensed, id. § 3; keep books and give receipts, id. § 10; and provide pawn tickets to panners, id. § 7. It also set limits on the interest and fees that they can charge. Id. § 6. See also Tamil Nadu Pawnbrokers Rules, 1943, § 5.}
\footnotetext[138]{\textsuperscript{138} Tamil Nadu Money-Lenders Act, 1957, Act No. 26 of 1957. Among other things, this Act creates a licensing scheme, id. § 4; requires that money-lenders keep books and records, id. § 9; authorizes the appointment of inspectors, id. § 10; and regulates rates that money-lenders can charge, id. § 7. The State of Tamil Nadu subsequently extended those regulations with the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003, Act No. 38 of 2003. That Act applies to all persons. Under the Money-Lenders Act, a}
for managers of a financial institution not regulated by the Reserve Bank of India to fail to return deposits to depositors. 139

Until recently, there have been few mandatory disclosure regimes under Indian law. The country has not adopted anything like the Truth In Lending Act, which applies to consumer credit transactions in the United States. 140 In 1986, India did adopt the Consumer Protection Act. The Act does not impose disclosure requirements, but prohibits various types of misrepresentations. 141 More recently, however, Indian policymakers have become more attentive to the benefits of disclosure, and they apparently believe that some disclosures must be mandated. The Reserve Bank of India has required the banking industry to adopt and promulgate a code of fair lending for banks and other financial institutions. 142 The code requires the institutions to disclose the terms of their various services. 143 The Bank has also issued guidelines for credit card lenders that include some disclosure requirements, including a requirement that banks dis-
close the annual percentage rate on credit card facilities. It is worth noting, however, that written disclosures face additional limitations where a significant number of potential consumers cannot read. The adult literacy rate in India was 64% in 2004.

Perhaps it is not surprising, then, that policymakers in India have made attempts to improve financial education for consumers. Although scholars and commentators increasingly question the effectiveness and the benefits of financial education in general, it is possible that such efforts can be especially valuable in a developing economy like India’s. If significant numbers of Indians will move from poverty into the lower-middle or middle-class in coming years, increased financial education may prove beneficial. In any event, the Reserve Bank of India appears to be strongly interested in promoting financial education. In particular, the Bank has explicitly adopted a policy in favor of expanding credit counseling. More generally, financial education is an important component of the Bank’s policies aimed at financial inclusion, as noted above, especially its efforts to encourage relationships between banks, microfinance institutions, and non-governmental organizations. At this point, however, it appears that the scale of financial education and financial literacy initiatives in India is still very modest. While increased financial education seems to pose few risks, the potential benefits may ultimately be limited. To be effective on any meaningful scale in India, it would need to be a rather massive, and potentially costly, program.

144. See RBI, Credit Card Operations of Banks, supra note 134.
148. See supra notes 102–17 and accompanying text.
150. See id.; Dr. Y.V. Reddy, Governor of the Reserve Bank of India, Lecture at the Center for Economic and Social Studies, Ameerpet, Hyderabad (Dec. 16, 2006), available at http://www.bis.org/review/r060921lb.pdf.
Given the limitations of policies aimed at the transactional stage of consumer finance, policies that regulate the subsequent relationships between debtors and creditors—regulation of debt-collection and debt-relief—arguably take on more importance. Indian policymakers have adopted some regulation of debt-collection outside of the bankruptcy context. For example, many Indian states apparently recognize the crime of molestation, which includes aggressive acts in the collection of debt. The Tamil Nadu Moneylenders Act, noted above, also provides: “Whoever molests or abets the molestation of any debtor for the recovery of any loan shall be punished with imprisonment” and, if the court chooses, with a fine as well. It is noteworthy that this provision is not limited to moneylenders. The Reserve Bank of India has also begun to exert some pressure on banks to avoid overly-aggressive collection activities. The fair practices code for lenders, noted above, includes this provision: “In the matter of recovery of loans, the lenders should not resort to undue harassment viz. persistently bothering the borrowers at odd hours, use of muscle power for recovery of loans, etc.” Similarly, the Bank’s guidelines for credit card lenders prohibit overly aggressive debt collection tactics. Finally, as the Kaur opinions indicate, courts in India may be increasingly inclined to find a basis for policing debt collectors who engage in egregious behavior.

It also appears that there are some limited forms of non-bankruptcy debt relief available in India. For example, the Federal Code of Civil Procedure provides that some forms of property are exempt from creditors’ enforcement of obligations. Perhaps more significant, the Reserve Bank of India recently instituted a settlement program for small non-performing loans, this is a form of debt-relief, and the stated goal

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152. See id. § 13. This section was added by amendment in 1979. See Tamil Nadu Money-Lenders (Amendment) Act, Act 41, 1979, § 9.
153. See supra note 143 and accompanying text.
154. RBI, Guidelines on Fair Practices Code for Lenders, supra note 143, at (V)(c). It is not clear, however, whether the Reserve Bank has taken any regulatory action against any institution for violating this provision of the code.
155. See Reserve Bank of India, Credit Card Operations of Banks, supra note 134.
156. See supra notes 1–6 and accompanying text.
157. See India Code Civ. Proc., No. 5 of 1908; India Code (1986) 18, 19. These exemptions are incorporated and expanded under India’s insolvency laws. See infra note 197 and accompanying text.
158. See Reserve Bank of India, One-Time Settlement Scheme for Small Borrowal Accounts and Eligibility for Fresh Loans, RBI Notification (2005), available at http://rbidocs.rbi.org.in/rdocs/notification/PDFs/67937.pdf. See also Reserve Bank of India, Guidelines for Compromise Settlement of Chronic Non-Performing Assets (NPAs)
of the program is to make consumers eligible for fresh finance. The program applies to loans under Rs. 25,000 (approximately $625) and does not “cover cases of fraud or malfeasance.” In addition to these measures, it appears that Indian states have occasionally enacted temporary debt-relief measures in times of general financial and economic stress.

D. Summary

In sum, the market for consumer finance in India has been expanding dramatically over the last twenty years. This growth in consumer lending appears to have been spurred, at least in part, by reforms that have liberalized the country’s financial sector. More importantly, there are good reasons to believe that this consumer lending has contributed to the country’s economic growth and development. Yet various costs associated with consumer lending probably serve as a drag on these beneficial effects and may even outweigh them. If so, they should be constrained. Consumer lending will likely continue to expand in India, even without additional reforms to further liberalize the financial sector. But moderating the negative effects of consumer lending will likely require more affirmative efforts. For a country in India’s position—perhaps facing a dramatic surge in domestic consumption and consumer borrowing—it would be encouraging to see an emerging regulatory commitment to aggressively addressing the potential costs of consumer finance, especially over-indebtedness. Doing so may dampen the expansion of consumer credit to some extent, but it would likely help ensure that any further expansion would be more efficient and productive.

III. THE ROLE FOR CONSUMER BANKRUPTCY LAW

As noted above, there are good reasons to believe that an effective consumer bankruptcy or insolvency regime can promote the efficient deepening of consumer financial markets in emerging economies like India. This Part notes some of the potential benefits of a consumer
bankruptcy or insolvency law. It then describes India’s insolvency regime as it applies to consumers, noting some of the formal and practical limitations of the current regime and proposing that, with even modest reforms, it might contribute more meaningfully to efficient expansion of consumer financial markets in India.

A. Bankruptcy Basics

While there is much variation in bankruptcy laws around the globe, there are some basic components of these regimes that arguably define the category. Most fundamentally, bankruptcy regimes provide a mechanism by which an insolvent debtor, or one experiencing some form of financial distress, can stay the collection efforts of its creditors and seek an orderly resolution or restructuring of its obligations. In the absence of an effective bankruptcy mechanism, creditors may face a collective action problem and race to collect from a struggling debtor, making insolvency returns unpredictable and, in some circumstances, reducing the creditors’ overall recovery.  

Bankruptcy law can also provide a timely resolution of claims and disputes to reduce the erstwhile wasting of assets. In theory, these aspects of bankruptcy law provide an ex ante benefit to borrowers by reducing the cost of credit.

The functions of bankruptcy law are somewhat different in the consumer and corporate context. Generally, consumer bankruptcy serves to stay collection of an individual’s obligations and then provide for a scheme of repayment and/or discharge of obligations. As with corporate bankruptcy, consumer bankruptcy ideally increases the insolvency-state return of creditors by enforcing security arrangements, providing for the orderly distribution of available assets to unsecured creditors, and by enforcing other inter-creditor obligations. Unlike business associations, consumers obviously cannot be liquidated. Thus, in addition to improving creditors’ insolvency returns, a primary goal of consumer bankruptcy law is to enable debtors to return to productivity and to reduce various collateral costs of the debtor’s insolvency. The availability of debt-relief in bankruptcy, which varies significantly across jurisdic-

163. See supra note 82 and accompanying text.
164. Thus, while such a regime may seem as if it is simply designed to protect insolvent consumers, it offers considerable potential benefits to creditors as well. In fact, consumer bankruptcy was historically understood to be a tool for creditors of insolvent consumer debtors. See, e.g., BRUCE MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 78 (2002).
165. A primary function of corporate bankruptcy law is to provide a procedural mechanism for choosing between liquidation and restructuring insolvent corporate debtors.
tions,\textsuperscript{166} is generally the most important tool for reducing the social costs of consumer finance. By providing a meaningful opportunity for debt-relief, a bankruptcy regime can effectively insure debtors against some of the effects of financial distress or insolvency.\textsuperscript{167} Borrowers presumably pay for this insurance in the form of higher interest rates, though it may also reduce the availability of credit to some borrowers. In addition to providing debtors with a “fresh start,” and supporting the smoothing function of credit, this insurance may also make individuals more inclined to borrow for productive purposes in the first place. For entrepreneurs, the availability of debt relief in bankruptcy can serve as a form of business-failure insurance.\textsuperscript{168}

The staying of creditors’ collection efforts under bankruptcy law can also reduce various costs of individuals’ financial distress. Most important, it gives debtors a tool to escape, at least momentarily,\textsuperscript{169} from collection efforts by their creditors. The benefit of the stay derives both from the fact that debtors can actually employ it by filing for bankruptcy and from the fact that they know they can do so if necessary. If consumers are susceptible to psychological stress caused by indebtedness and collection efforts, the ability to stay collection may save costs associated with such stress. Reducing some of the psychological and emotional burdens associated with financial distress may, in turn, make it easier for debtors return to productivity.

B. Consumer Insolvency in India

1. The Formal Scheme. India’s insolvency regime is approximately 100 years old, though it has even older antecedents.\textsuperscript{170} Although India modernized the framework for liquidating and reorganizing companies in recent years,\textsuperscript{171} the country’s consumer insolvency regime has not been

\begin{itemize}
  \item 167. To the extent that the right to discharge is mandatory, it effectively forces borrowers to insure against default, making it a form of social insurance. The increased cost of credit and potential rationing may push some high risk borrowers to illegal sources or to costly secured lending (or equivalents like pawnbrokers).
  \item 169. To be clear, however, any stay will presumably enable secured creditors to enforce their security without significant delay or have the right to compensation or protection for the delay. See, e.g., 11 U.S.C. §§ 361, 362(d)(1) (2006).
  \item 171. See supra notes 90–94 and accompanying text.
\end{itemize}
meaningfully altered since it was adopted at the beginning of the last century.\textsuperscript{172} The formal sources of this regime are two laws adopted in the early twentieth century—the Presidency Towns Insolvency Act and the Provincial Insolvency Act.\textsuperscript{173} The Presidency Towns Insolvency Act applies in what were formerly the Presidency Towns under the British Raj—Mumbai (formerly Bombay), Chennai (formerly Madras), and Kolkata (formerly Calcutta).\textsuperscript{174} The Provincial Insolvency Act applies in most of the rest of the country.\textsuperscript{175} For the most part, the basic substantive provisions of the acts are similar. For example, under both acts, an individual must be determined to be insolvent before the other substantive provisions of the acts apply.\textsuperscript{176} To be deemed an insolvent, one must be a “debtor,” a category that includes judgment debtors.\textsuperscript{177} The insolvency acts apply to both individual (i.e., consumer) and commercial debtors, but corporate debtors cannot be subject to involuntary petitions.\textsuperscript{178}

Both acts provide that creditors as well as debtors can petition to have a consumer debtor deemed an insolvent if a debtor owes at least 500 Rupees (approximately $11) and commits “an act of insolvency.”\textsuperscript{179} Acts of

\textsuperscript{172} This is not an uncommon pattern for emerging economies. China and Vietnam, for example, recently overhauled their corporate bankruptcy regimes but decided against reforming their consumer bankruptcy systems. Booth, \textit{Drafting Bankruptcy Laws}, supra note 82, at 111–16. This is probably a reflection of the fact that it is more important to develop commercial lending. But circumstances will probably make it necessary to address consumer bankruptcy law in these countries as well as in India. Until recently, China and Vietnam did not have much consumer finance, but today there is an emerging middle class in both countries. \textit{Id.} at 115.


\textsuperscript{174} See \textit{Bharihoke & Talwar}, supra note 170, at 2.

\textsuperscript{175} See \textit{id.} at 2.

\textsuperscript{176} See \textit{id.} at 4.

\textsuperscript{177} See \textit{id.} at 4–5.


\textsuperscript{179} See \textit{Bharihoke & Talwar}, supra note 170, at 5; Provincial Insolvency Act § 7; Presidency-Towns Insolvency Act § 12. A debtor filing voluntarily must have at least 500 rupees (slightly more than $10) in debts or have been imprisoned in order to execute a
insolvency include transferring all or most of one’s assets, taking action to “defeat or delay” one’s creditors, filing a petition of insolvency, giving creditors notice that one is not going to pay an obligation, having property sold in execution of a court decree, or failing to respond to a creditor’s notice of insolvency.\(^{180}\) A petition cannot be withdrawn without permission of the court,\(^ {187}\) and the court has authority to dismiss petitions filed by debtors or creditors that do not conform to the statutory requirements.\(^{182}\) Before being adjudged an insolvent, the debtor must provide the court with a full account of the debtor’s property, assets, and obligations.\(^{183}\) The court is generally required to dismiss the petition if it determines that the debtor has the ability to pay his or her obligations.\(^{184}\) It will also dismiss a petition if it finds that a creditor filed the petition to harass or intimidate the debtor.\(^ {185}\)

Once a debtor is adjudged to be an insolvent, he or she effectively ceases to have competency to conduct his or her financial affairs, among other disabilities.\(^ {186}\) A determination that a debtor is an insolvent can be annulled.\(^ {187}\) An annulment may benefit the debtor by removing some of the disabilities of being an insolvent. It may also benefit one or more of

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\(^{180}\) See Bharihoke & Talwar, supra note 170, at 6; Dhirendra Bhanu Sanghvi v. ICDS Ltd., 2003 C.R. 5 (Bom.) 161 (holding that an arbitral award is a decree that can be the basis for a creditor’s insolvency petition); Kishor K. Mehta v. HDFC Bank Ltd., 2008 MhLj 1 (Bom.) 451; In re Siddharth Srivastava, A.I.R. 2002 (Bom.) 494 (finding that a contempt order is not an order for purpose of Section 9).

\(^{181}\) See Bharihoke & Talwar, supra note 170, at 7; Presidency-Towns Insolvency Act § 14.

\(^{182}\) See Bharihoke & Talwar, supra note 170, at 9–10; Provincial Insolvency Act §§ 22, 25; Presidency-Towns Insolvency Act §§ 13(8), 15(2).

\(^{183}\) See Bharihoke & Talwar, supra note 170, at 53; Presidency-Towns Insolvency Act § 15; Provincial Insolvency Act § 22.

\(^{184}\) See Bharihoke & Talwar, supra note 170, at 49–50.

\(^{185}\) See id. at 57–58. The debtor can be awarded compensation from the creditor in such a circumstance. See id. at 58.

\(^{186}\) See Provincial Insolvency Act § 73; Presidency-Towns Insolvency Act § 103(A).

\(^{187}\) See Bharihoke & Talwar, supra note 170, at 110–17; Venkatachalam Chetty v. K. Pooya Gounder and Ors., 2000 (2) C.T.C. 288 (Mad.) (annulling an adjudication of insolvency).
the debtor’s creditors by removing obstacles to enforcing the debtor’s obligations.188

Indian insolvency laws allow courts to stay other related proceedings affecting an insolvent’s property and efforts to collect obligations of the insolvent. But the stay is not automatic upon filing of a petition.189 Under both acts, suits affecting the property of the insolvent are generally subject to stay only after the debtor has been adjudged an insolvent, though courts can authorize such suits thereafter.190 Courts also have authority to protect the insolvent from imprisonment for obligations within its jurisdiction.191 Once a petition is filed, however, courts do appear to have some discretion to enjoin efforts to move against a debtor or the debtor’s property, to appoint an interim receiver for the debtor’s property, and to order that the debtor be released from imprisonment.192

The Presidency Towns Act provides that the presiding court must hold a public examination of the insolvent debtor that “the insolvent shall attend thereat, and shall be examined as to his conduct, dealings and property.”193 Such an examination is not required under the Provincial Insolvency Act.194 Under both acts, creditors submit claims against the debtor,195 and the presiding court is given broad authority to determine the assets of the debtor that are available to creditors.196 The insolvency acts provide, however, that some property is exempt from recovery by creditors.197

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188. See Bharihoke & Talwar, supra note 170, at 111–14. Upon annulment, however, a court may provide that the debtor’s property does not revert to the debtor. See id. at 114.
189. See, e.g., Sudhandiran v. S. Krishnan, A.I.R. 2006 (Mad.) 10 (holding that filing an insolvency petition does not stay enforcement of an execution order “in the absence of an order or adjudication by said [insolvency] court”).
190. See Bharihoke & Talwar, supra note 170, at 12; Provincial Insolvency Act § 28; Presidency-Towns Insolvency Act § 18. These provisions apparently do not apply to proceedings that were already pending. See Bharihoke & Talwar, supra note 170, at 60; In re Official Receiver, Jhansi v. Jugal Kishor Lachhi Ram Jaina, Hyderabad and Ors., A.I.R. 1963 All. 459.
191. See Bharihoke & Talwar, supra note 170, at 12.
192. See id at 9, 58. The court can subsequently rescind such an order and order imprisonment, however. See id. at 59.
194. See Bharihoke & Talwar, supra note 170, at 64.
195. See Provincial Insolvency Act §§ 33, 34; Presidency Towns Insolvency Act § 46.
196. See Presidency-Towns Insolvency Act §§ 26, 36.
197. For the most part, these exemptions incorporate those under the Code of Civil Procedure. See Bharihoke & Talwar, supra note 170, at 81, 86–87. See also Provincial Insolvency Act § 28(5); Presidency-Towns Insolvency Act § 52(1). Both Acts incorporate the general exemptions of Section 60 of the Code of Civil Procedure, 1908. See
If a debtor is adjudged to be an insolvent, his or her unsecured property vests in the court or an official receiver/assignee. Similar to other bankruptcy regimes, the receiver/assignee often plays an extremely important role in the Indian regime. To protect creditors, a court can issue orders requiring security from an insolvent debtor or attaching the debtor’s property. In general, secured creditor’s rights are unaffected by a debtor’s being adjudged an insolvent. The debtor is given the opportunity to make a proposal of composition to his or her creditors; if accepted by the creditors, the debtor’s proposal must be approved by the court or by the receiver. Priority is given to government claims, certain administrative costs, and obligations owed to landlords. The insolvency acts provide for avoidance of fraudulent transfers and preferential payments.

India’s insolvency laws also provide for discharge of debts under some circumstances. Where the debtor’s assets cannot satisfy his or her obligations, the debtor can apply for a discharge of the remaining obligations. Discharge is not available under various circumstances. Some

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BHARIHOKE & TALWAR, supra note 170, at 91. For a discussion of the Code of Civil Procedure exemptions, see supra note 157.

198. See BHARIHOKE & TALWAR, supra note 170, at 11, 81. This includes most after-acquired property. See id. at 84–86.

199. See id. at 68–70, 72–75, 98–99. For an extended discussion of the importance of the official receiver in the Indian insolvency regime, see Mohammed Abbas Ali v. Masood Bin Mohammed Al-Khaili and Anr., 2007 A.L.D. 1 (A.P.) 60.

200. See BHARIHOKE & TALWAR, supra note 170, at 70–71.


202. See Provincial Insolvency Act § 38; Presidency-Towns Insolvency Act § 28.


204. Presidency-Towns Insolvency Act § 49.


206. See Provincial Insolvency Act § 41; Presidency-Towns Insolvency Act § 38.

The application shall be heard in open Court. (2) On the hearing of the application, the Court shall take into consideration any report of the official assignee as to the insolvent’s conduct and affairs, and, subject to the provisions of section 39, may (a) grant or refuse an absolute order of dis-
of these circumstances are relatively objective, including cases in which a debtor previously received a discharge. But others involve considerable judgment. For example, a debtor will not receive a discharge if the presiding court determines that the debtor “has brought on or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living or by gambling, or by culpable neglect of his business affairs.” Furthermore, there are a variety of non-dischargeable obligations, including debts to the government, debts incurred through fraud, or debts arising from criminal penalties. The presiding court generally holds a hearing on the question of discharge. The terms of discharge are subject to considerable judicial discretion, and courts have the ability to grant conditional discharges. The debtor is allowed to apply for a discharge within a stipulated period of time after being adjudged an insolvent. Such a discharge will be granted only if the debtor fully satisfies any requirements set by the court and/or the official receiver/trustee.

2. In Practice. If India has a long-standing formal scheme for consumer insolvency with an established body of case law, it is nonetheless extremely difficult to discern even the most general aspects of the operation of this scheme. There are no available data about insolvency cases in India—for example, no state-wide or country-wide data exists concerning how many cases are filed, who files these cases, how long these cases take, how many debtors are deemed insolvent, how many of these debtors receive a discharge of debts, and how much debt is discharged. In addition, the practical effects of a discharge in India are unclear. It is not clear if individuals who receive a discharge can effectively obtain credit thereafter. It does not appear that there is any regulation of reaffirmation charge, or (b) suspend the operation of the order for a specified time, or (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

Presidency-Towns Insolvency Act § 38.
207. See Bharihoke & Talwar, supra note 170, at 106–08; Provincial Insolvency Act § 42; Presidency-Towns Insolvency Act § 39.
208. See Provincial Insolvency Act §§ 41, 42(f); Presidency-Towns Insolvency Act § 39.
209. See Bharihoke & Talwar, supra note 170, at 105; Provincial Insolvency Act § 44; Presidency-Towns Insolvency Act § 45.
211. See Bharihoke & Talwar, supra note 170, at 14, 101–05; Provincial Insolvency Act § 41; Presidency-Towns Insolvency Act § 45.
212. See Bharihoke & Talwar, supra note 170, at 101.
of discharged debts, a common phenomenon elsewhere,\textsuperscript{213} and there is no available data on whether debtors in India do frequently reaffirm discharged obligations or not.

Furthermore, beyond a handful of authorities that describe the formal regime and a few selected important cases decided under the insolvency acts, there is basically no secondary literature on consumer or household insolvency in India. Consumer bankruptcy is not mentioned at all in the various reports of the Reserve Bank of India or the National Statistical Survey. This general silence creates a strong impression that commentators, scholars, and policymakers in India do not believe that the regime is a significant aspect of Indian society or of its economy. In fact, there are reasons to doubt that many debtors are inclined to utilize the regime or that they have reason to believe that it would be useful to do so. The consequences of being deemed an insolvent can be severe while the regime’s potential benefits to debtors and creditors appear uncertain and may be slight in many instances. As a threshold matter, it is conventionally understood that insolvency cases move extremely slowly through the judicial system. Furthermore, the substance of India’s insolvency law suggests that debt-relief or stays-of-collection are not readily available and that judicial outcomes under the laws are unpredictable.

The India Law Commission recently convened a committee with INSOL India to propose reforms to the consumer insolvency system. The committee was charged with “examin[ing] the existing laws relating to personal bankruptcy in India and the desirability of changes in existing laws in the backdrop of fast increasing and easy availability of credit from banks, financial institutions and other lenders to individuals for private, family or household purposes.”\textsuperscript{214} That committee concluded its work without making any recommendations. Yet the creation of this committee may provide evidence that India’s existing consumer bankruptcy system is dysfunctional and marginal in its contemporary context, failing to provide benefits to consumers or to the broader society. It also presumably indicates, however, that policymakers believed—at least initially—that there is something worth salvaging and reforming in the existing regime. It may also provide some indication that consumer insolvency law, however dysfunctional it may or may not be, is more salient in contemporary Indian society than the lack of commentary about it would indicate.


In fact, there are reasons to believe that the role of consumer insolvency in India’s society and economy is underestimated. Based on an informal review of the few dozen reported consumer insolvency-related opinions from the last decade available in Manupatra, a commercial legal database, it appears that a surprising number of consumer insolvency petitions are filed each year in India. Many of the published and reported insolvency cases involved involuntary petitions, i.e., those filed by creditors, but many also involve voluntary petitions. It is notable that many of the voluntary petitions appear to have been filed to protect the debtor from incarceration or otherwise aggressive debt collection. It also appears that many cases do take a shockingly long time to work their way through the judicial process. Yet there are some indications

that cases filed recently may be more likely to be resolved quicker than older cases, sometimes within a year or two.220

Because most insolvency proceedings do not result in published opinions, it is impossible to deduce reliable information about filing rates from these reported decisions, nearly all of which are appellate decisions. Yet these decisions provide an intriguing glimpse into the insolvency system. In one notable case from the state of Andhra Pradesh, Mohammed Abbas Ali v. Masood Bin Mohammed Al-Khaili,221 the high court requested clerks in every district of that state to report on the number of insolvency petitions pending at the time. The court stated that the district court clerks reported a total of 6,113 petitions pending. Andhra Pradesh, India’s fourth largest state, had a population of 75.7 million in 2001, so six thousand insolvency petitions is a small number per capita.

Nonetheless, this figure suggests that a non-trivial number of individuals—debtors as well as creditors—view it to be in their interest to employ the regime. It may also reveal that the existing legal regime plays a more significant role in Indian society than is currently understood. Assuming that a legal regime can have meaningful impact beyond the dis-


221. Mohammed Abbas Ali v. Masood Bin Mohammed Al-Khaili and Anr., 2007 A.L.D. 1 (A.P.) 60
putes and cases that are decided under it, India’s insolvency regime likely has a broader impact on that country’s consumer financial markets than is generally appreciated. Perhaps most significantly, it suggests that consumer insolvency may be salient enough in Indian society that effective reforms could have a meaningful impact.

C. Potential Reform

As the India Law Commission’s decision to convene a committee on consumer insolvency may reflect, India appears to be experiencing many of the factors that have influenced other countries to adopt or modernize their insolvency laws. These factors include rising incomes, general policies promoting entrepreneurship, deregulation of consumer financial transactions, increased consumer indebtedness, and weaknesses in other social insurance programs.222 As discussed above, India has liberalized and deregulated its credit markets in recent decades.223 Consumer borrowing in that country has grown dramatically,224 and there are various signs of growing household over-indebtedness.225 While India has a wide array of social insurance programs,226 these programs have many shortcomings,227 and they are arguably not keeping pace with the demands of a developing economy.228 Finally, there appears to be a growing commitment among Indian policy-makers to support innovative entrepreneurial activity.

222. See generally Efrat, supra note 166; Feibelman, supra note 8, at 95–97 & nn.128–30.
223. See supra notes 63–71 and accompanying text.
224. See supra notes 25–44 and accompanying text.
225. See supra note 121 and accompanying text.
226. In light of government policies of India in the first few decades of its independence, it should not be surprising that the country has a wide array of social insurance programs. It appears that most of these programs are based on national laws and are administered by the national government and, in some cases, state governments. The primary laws in this area include the Workmen’s Compensation Act, 1923 (“WCA”); the Employee’s State Insurance Act, 1948 (“ESIA”); the Employees’ Provident Funds Act, 1952 (“EPFA”); Maternity Benefit Act, 1961 (“MBA”); and the Payment of Gratuity Act, 1972 (“PGA”). Together, these major programs provide covered and eligible individuals in the labor force with death and disability benefits, retirement benefits, maternity benefits, and unemployment benefits. It appears that these programs are financed with public support, employer contributions, and, in some cases, direct employee contributions. Despite the broad scope of these programs, they are far from comprehensive. The coverage and eligibility requirements of these programs exclude large segments of the population. For an excellent discussion of social insurance programs in India, see Agarwala & Khan, supra note 54.
227. Id.
228. Id.
Assuming that India’s consumer insolvency regime is operational yet dysfunctional in many crucial respects, it is entirely possible that the regime could be markedly improved with carefully designed reforms. This Part does not argue that Indian policymakers should adopt any particular reform. Rather, it assumes that the role of consumer insolvency law in India can be enhanced, and it discusses some general approaches to reforming the regime that might help achieve this result. By posing possible avenues for reform, it aims to spur additional research into the threshold question of whether India’s insolvency regime can in fact play a more beneficial role in Indian society.

1. Procedural Reforms. For any consumer insolvency regime to meaningfully help address the costs of over-indebtedness and promote efficient expansion of consumer financial markets, it should be viable enough to influence consumer financial transactions ex ante and to affect the relationships between creditors and debtors ex post, especially their motivations to renegotiate. Assuming that timeliness and predictability could make India’s insolvency regime more appealing to at least some subset of creditors and debtors, such reforms could prove valuable even if the substantive rules of the regimes are otherwise suboptimal. One obvious way to make India’s insolvency system timelier is to make general improvements in the capacity of the Indian judicial system. But such an ambitious undertaking may be an unreasonable near-term goal. If so, policymakers in India might consider adopting an altogether new institutional mechanism. They could, for example, adopt a distinct and separate set of tribunals for consumer insolvency cases, perhaps making much of the consumer insolvency process more administrative in nature. Yet, previous efforts to create new debt and insolvency-related tribunals in India may provide reasons to be skeptical of such an approach.

More modestly, policymakers might be able to make meaningful improvements in the administration of consumer insolvency cases by addressing aspects of the existing regime that tend to slow cases down and make their resolution relatively unpredictable. At least some of these aspects of the existing regime could be replaced with rules that apply automatically or that require less judicial energy. For example, such reforms might eliminate the requirement that courts determine that a debtor


230. See supra note 92 and accompanying text. Cf. Galanter & Krishnan, supra note 229 (describing one innovative legal mechanism adopted in India in recent decades, the Lok Adalat, and expressing some skepticism about the success of this institution).
is insolvent before applying any other substantive rules. Instead, a debtor in bankruptcy (either voluntarily or involuntarily) could be considered presumptively insolvent unless a party proved otherwise. Similarly, rules allowing courts to stay other proceedings or to grant discharge of debts currently give presiding judges significant discretion. If these rules were reformed to allow less judicial discretion, this might increase the speed and the predictability of the insolvency regime.

Such reforms to consumer insolvency law in India would be consistent with some broad trends in consumer insolvency and bankruptcy regimes across the globe in recent decades. Consumer insolvency and bankruptcy laws have arguably been tending toward the more automatic and less discretionary, especially in the Anglo-American contexts. Long-term developments in United Kingdom (“UK”) insolvency law, the initial model for India’s regime, may provide a particularly useful point of comparison. The UK’s insolvency regime was meaningfully reformed, beginning in the 1970’s, to streamline the process of granting a discharge of debts. Before these reforms, judges had significant discretion in granting a discharge to debtors in bankruptcy. The process of obtaining a discharge generally involved a public hearing to determine whether the debtor was entitled to discharge. The reforms provided that first-time bankruptcy filers could obtain a more automatic discharge of debts after three years by turning over their non-exempt assets. That discharge process was subsequently reformed, enabling most debtors who file

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231. In the U.S. context, recent bankruptcy reforms were designed in large part to reduce the discretion of bankruptcy judges in deciding whether debtors should be able to file under Chapter 7 and how much debtors should be required to repay under Chapter 13. See, e.g., Lauren E. Tribble, Judicial Discretion and the Bankruptcy Abuse Prevention Act, 57 Duke L.J. 789 (2007). But see Hamilton v. Lanning, 130 S.Ct. 2464 (2010) (rejecting a rigid mechanical approach to these determinations under the recent reforms).


234. Id.

235. Id. at 88–89. During that period, at least some of the debtor’s post-petition income is available to creditors, and the debtor is subject to numerous disabilities. Id.

for bankruptcy to obtain a discharge within a year of filing.\textsuperscript{237} The foregoing points are merely illustrative—the experience in England may indicate that strategic reforms of India’s insolvency law can yield appreciable results. It is not meant to suggest that India should simply adopt the various reforms made to the English regime in recent decades.

If coupled with procedural reforms to improve the administration of insolvency cases, policymakers in India might also expand the role and functioning of the regime by making it easier for consumers to voluntarily file for bankruptcy and harder (perhaps impossible) for them to be forced into bankruptcy involuntarily. Again, if more consumers are willing and able to file a petition of insolvency, insolvency law will be more likely to affect consumer financial transactions ex ante and ex post.

Eliminating involuntary petitions might reduce the stigma associated with the regime. It may also help convey to debtors that insolvency law can serve their interests and that it is not simply a form of punishment or purely a debt-collection tool. Allowing for involuntary filing presumably protects creditors from debtors’ inclinations to waste assets or to transfer those assets to other parties. But creditors can effectively push debtors into bankruptcy by acting to enforce their obligations; and, ideally, they should be able to recover fraudulent transfers under insolvency and/or non-insolvency law. Reducing some of the formal disabilities associated with being an insolvent and reducing the occasions for public insolvency hearings might also reduce the stigma associated with insolvency. Finally, it is worth noting that completely eliminating imprisonment for debt may also help reduce the stigma associated with insolvency law; debtors would no longer have reason to be concerned that filing for insolvency would indicate that they were otherwise facing imprisonment.

Making insolvency more attractive may run the risk of giving debtors bad incentives to become over-indebted or to seek a discharge when they could actually repay. However, given the direct costs of bankruptcy, including legal fees and the impact on a debtor’s credit rating, as well as the strong likelihood that some degree of stigma will continue to be associated with insolvency, it is entirely possible that the opposite problem will occur—people who should file for bankruptcy will not do so. This is arguably the case in the United States, for example.\textsuperscript{238} And it is worth noting that, while there was a substantial increase in filings after the lat-

\textsuperscript{237} Ramsay, Functionalism and Political Economy in the Comparative Study of Consumer Insolvency, supra note 8, at 646; Kilborn, supra note 236, at 88–89.

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est round of reforms of bankruptcy law in England, filing rates are still relatively low in England compared to other countries with advanced economies.

2. Expanding Debt-Relief. Expanding the availability of substantive protections and the scope of potential discharge of debts might also increase the beneficial impact of insolvency law on economic growth and development in India. Like the procedural reforms discussed above, it would presumably make the regime more appealing to consumers in financial distress, potentially expanding the relevance of the regime in Indian society. Beyond that, however, it could have a more direct effect on consumer financial markets by influencing credit-granting decisions and reducing the costs of over-indebtedness. If utilized, a regime with more generous debt-relief could obviously reduce some of the direct ex post costs of over-indebtedness. Assuming that India’s social safety net is shrinking relative to the expanding economy, the social insurance function of consumer insolvency law might serve a vital role in reducing the numbers of individuals who fall back into poverty, thereby taxing the broader economy. It might also help build popular support for development policies more generally. Finally, it might promote entrepreneurship and other productive economic risk-taking within Indian society.

Less intuitively, broader measures of debt-relief might also prove especially beneficial in a context like India by disciplining the extension of credit to borrowers in that country ex ante. Increasing the scope and availability of discharge or increasing the amount of property exemptions would presumably encourage creditors to make efforts to lend to consumers who are more likely to be able to repay their obligations. It is important to note that this might prove disadvantageous to some consumers who are marginally creditworthy or who cannot establish their creditworthiness. It might also prove disadvantageous to lenders who do not have access to good information about their borrowers and might benefit moneylenders, who may have some informational advantages over formal lenders. If so, formal lenders would then have incentives to invest in more sophisticated credit reporting and credit scoring. The country’s new

239. See Ramsay, Functionalism and Political Economy in the Comparative Study of Consumer Insolvency, supra note 8, at 651.
240. See id. at 626. Ramsay argues that these reforms were aimed to help expand consumer financial markets more than to address consumer over-indebtedness. See id. at 646–47.
241. See supra note 226 and accompanying text.
242. See supra note 103 and accompanying text.
national credit bureau\textsuperscript{243} should prove especially valuable in this context. As conditions for the dissemination and evaluation of information improve in India, any advantage that moneylenders might currently have should diminish. Thus, for better or worse, one of the long-term effects of introducing a broader and more effective discharge provision might be to push some informal lenders out of the market.

3. Whither Demand for Reform? If reforming the procedural and/or substantive aspects of the Indian consumer insolvency regime is a good idea, it is fair to ask why Indian policymakers have not already implemented such reforms. The fact that the India Law Commission’s committee on consumer insolvency reform did not recommend any reforms may indicate that such reforms are actually not needed. Or it may reflect that such reforms, though needed, are not practically or politically feasible. Assuming that expanding the discharge is desirable in theory, implementing the reform would inevitably face significant practical challenges. It is probably not a coincidence that many countries with developing economies like India have resisted adopting or liberalizing bankruptcy relief.\textsuperscript{244} Creditors, always a powerful political force, are presumably wary of such reforms, policymakers might be conservative in their concerns about the effects of reform, or policymakers might have reasonable concerns about the administerability of a higher-energy bankruptcy regime.\textsuperscript{245} It is possible that Indian society is simply not prepared to embrace a different kind of consumer insolvency law. Finally, it is possible that regulatory actions by the Reserve Bank of India, including the new codes for lenders and the program for settlements of small loans, approximate some aspects of an effective consumer insolvency regime, lessening the need for bankruptcy reform.

Yet there are good reasons to believe that India might prove relatively fertile ground for an expanded consumer insolvency or bankruptcy regime. As noted above,\textsuperscript{246} Indian society and its economy are experiencing many of the factors—like increasing consumer credit—that can make

\textsuperscript{243} See supra note 100 and accompanying text.
\textsuperscript{244} See Jose Reinaldo De Lima Lopes, Consumer Bankruptcy and Over-indebtedness in Brazil, in \textit{Consumer Bankruptcy in Global Perspective}, supra note 236, at 85, 86; Xian Chu Zhang, Development of Consumer Credit in China and Concerns About the Underlying Legal Infrastructure, in \textit{Consumer Bankruptcy in Global Perspective}, supra note 236.
\textsuperscript{245} See Feibelman, supra note 8. For an excellent study of the complex process of introducing and reforming corporate bankruptcy law in emerging economies, see Terence Halliday & Bruce Carruthers, \textit{Bankrupt: Global Lawmaking and Systemic Financial Crisis} (2009).
\textsuperscript{246} See supra notes 224–29 and accompanying text.
consumer insolvency law more beneficial. Furthermore, the country has had a formal insolvency regime—one including a discharge provision—for nearly 100 years. The widely-perceived pitfalls of efforts to “transplant” legal regimes, including bankruptcy laws, from one context to another largely reflects that unique domestic social and cultural factors are crucial to the success of legal development in any setting. In many instances, debt relief is simply an uncomfortable concept or institution for a society to embrace. Increasing the scope and role of consumer insolvency in India would not require introducing Indian society to the concept of debt-relief. Rather, it would require the society to make a shift in its conception of an existing institution. Finally, as the recent insolvency case law from India suggests, there is already some demand for consumer insolvency law in India among Indian citizens, and reforming that legal regime may release some additional pent-up demand. Such demand is likely a prerequisite for the success of any reform.

Indian policymakers appear to have some latitude, then, to strategically make important but modest reforms to that country’s insolvency regime and to do so in ways that respond to distinct characteristics of Indian society. Doing so might make individuals in financial distress more willing to employ the regime and might make the regime more effective when employed, promoting the long-term growth and development in that country. The more immediate question is whether there is sufficient concern among India’s consumers, its policymakers, or international actors with leverage in that country to more systematically explore the potential benefits of reforming that country’s consumer insolvency law.

IV. CONCLUSION

There are reasons to believe that improvements in the regulation of consumer financial markets in India can promote broader economic growth in that country. But the extent of that potential benefit depends on the ability of Indian policymakers to address and limit the costs associated with consumer over-indebtedness. A higher-energy consumer insolvency law regime may prove to be a valuable component of policies in India that are designed to facilitate expansion of consumer finance and to reduce the costs of consumer indebtedness. Although it appears that India’s consumer insolvency law regime is employed by tens of thou-

249. See Berkowitz et al., supra note 247.
sands of debtors and creditors each year, it also appears that the regime is dysfunctional in many respects. For the regime to better serve its potential functions, it may need to become more expeditious and predictable; it may also need to provide somewhat more generous relief to insolvent consumer debtors. These reforms need not be fundamental. Reforming a handful of provisions to reduce the judicial acts and decisions required by the current regime might significantly improve the role it plays in Indian society. If Indian policymakers succeed in making the country’s consumer insolvency regime at least somewhat speedier and more predictable, then the regime may not only help reduce the ex post costs of over-indebtedness, it may also improve the ex ante efficiency of consumer financial markets. Either effect might promote the continued deepening of consumer financial markets and, in turn, contribute to broader measures of growth and development in India.
JUSTIFYING COMPENSATION BY THE INTERNATIONAL CRIMINAL COURT’S VICTIMS TRUST FUND: LESSONS FROM DOMESTIC COMPENSATION SCHEMES

Frédéric Mégret, PhD*

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INTRODUCTION

The International Criminal Court (ICC) has been hailed as the first international criminal tribunal to give serious consideration to the role of victims. In particular, the Rome Statute proposes to set up a complex victim compensation system, involving the Court itself but also a more intriguing body, the Trust Fund for Victims (“TFV”). What should such a system be doing exactly, who will pay for it and, most importantly, what should be its rationale?

The Rome Statute stands for an unprecedented attention to this dimension of criminal justice, after much neglect internationally. The Court can, for the first time in the history of international criminal justice, order money and other property collected through fines or forfeiture to be paid to victims. This part of what the ICC can do, although novel by the standards of international criminal law, is perhaps the most familiar to both criminal and international lawyers. For international lawyers, issues of reparation evoke elements of thinking that have long been a hallmark of state responsibility. For criminal lawyers, the idea of the individual being ordered to pay reparations is evocative of an evolution towards restorative justice that has also become quite significant in many jurisdictions around the world.

3. Id. arts. 77.2, 79.2.
But the Rome Statute presents a system of victim compensation that goes far beyond simply allowing the Court to order reparation awards against those convicted. One might describe this complexity as a double hybrid. The system is hybrid, first, because the Rome Statute creates not one but two institutions, the Court and the TFV. Typically less attention has been paid to the TFV, a new institution that, though independent, bears many organic links to the Court. The TFV is headed by the Executive Director of the Secretariat, André Laperrière, and a five-member Board of Directors. It has been shrouded in relative mystery: its existence is anticipated by a single article in the Rome Statute, its regulations took a long time to be adopted by the Assembly of State Parties, and it has been quite discrete about its activities, to the point of keeping its “strategic plan” confidential for a long time.

Second, perhaps the core characteristic of the TFV is that it is itself a hybrid mechanism. On the one hand, it operates like an occasional adjunct to the ICC, whenever the Court will decide (and it need not always or often decide) that because not all victims have been identified, or because there are too many of them, it is more opportune to instruct the Fund to administer reparation orders. In that respect, the TFV acts as a sort of implementing agency, a para-judicial administration acting under close scrutiny of the Court. Its prevailing logic, as an adjunct of the Court, is that of reparations.

On the other hand, the TFV also has a very crucial autonomous role that is largely independent from the operation of the ICC. This role is characterized by a different source of monies, different beneficiaries, and a different logic for dispensation. The TFV receives “voluntary contributions from governments, international organizations, individuals, [and] corporations,” which are stored in a separate account from that of Court

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6. Rome Statute, supra note 2, art. 79(1) (“A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”).
directed reparation orders and which may be awarded at the Fund’s discretion.

This Article seeks to characterize the operation of the TFV in relation to victims when it comes to these autonomous resources emanating from the “international community.” Are they a form of charity? Or, do they represent an entitlement on the part of victims? On what grounds should victims be compensated internationally in addition to what the convicted may be able to pay? These issues are typically not treated in the literature on the ICC even though they raise very profound questions about the nature of international criminal justice. Studies of the Fund thus far seem driven by attention to details and a rush to answer concrete questions about operations (e.g., who should it compensate and by how much) rather than paying attention to the development of a solid theory of the TFV’s compensation regime. This arguably creates a risk of confusion, a confusion that may ultimately be paid by the frustration of victims, and various assorted problems for international criminal justice.

In practice, the TFV is promoted through a mixture of pragmatism and appeal to emotions. On the one hand, the TFV adopts the language of project management and good governance. On the other hand, such is the power of appeals to “victims” in international criminal justice that the Fund may be tempted to simply invoke the fundamental moral legitimacy of its work to defer theoretical inquiry. Talk of victims by TFV authori-

cpi.int/menus/icc/legal%20texts%20and%20tools/official%20journal/regulations%20of%20the%20trust%20fund%20for%20victims [hereinafter TFV Regulations].

10. For example, the website of the TFV cautiously outlines its immediate legal basis but little else. See Legal Basis, TRUST FUND FOR VICTIMS, http://www.trustfundforvictims.org/legal-basis (last visited Sept. 21, 2010).

11. The logic of emotions as one of the natural orientations of international criminal justice is highlighted in Leslie Vinjamuri & Jack Snyder, Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice (2004).

12. See, e.g., The Two Roles of the TFV, TRUST FUND FOR VICTIMS, http://www.trustfundforvictims.org/two-roles-tfv (last visited Sept. 21, 2010) (“TFV is learning valuable lessons about the unique role that a legal institution can play in addressing the needs of victims of genocide, war crimes, and crimes against humanity. Through regular monitoring and evaluation and targeted research, the TFV is documenting and sharing these lessons to inform its work.”).

13. This has long been apparent in domestic discussions on compensation schemes. For example, in parliamentary debates preceding the adoption of the British scheme, Lord Shawcross rejected the need for “an elaborate theoretical or philosophical speculation as to why the State should intervene in a matter of this kind” and recommended that one merely rely on “public instinct.” P.S. ATIYAH & PETER CANE, ATIYAH’S ACCIDENTS, COMPENSATION AND THE LAW 255 (5th ed. 1993).
ties is rife with emotion, in ways that seem to sidestep the need for fundamental justification.\textsuperscript{14}

In between managerial pragmatism and emotional empathy with victims, nonetheless, real questions arise that are not currently being addressed. For example, how different is the TFV from a variety of international institutions and NGOs involved in the transitional justice efforts and support to victims on the ground? To what extent should the Fund’s embeddedness in the apparatus of international criminal justice make it a specific institution whose mandate is like no others’? Why should victims of only certain international crimes benefit from the fund, or victims of crimes as opposed to a range of other catastrophic life events (say, natural catastrophes)? How and to what extent should victims be helped? These questions hold tremendous significance in an international system where millions suffer daily of various maladies from crass poverty to preventable diseases, and where it is unclear why victims of international crimes should “jump queue” (not to mention victims of certain international crimes rather than others). Neither pragmatist nor emotional appeals provide us with an understandable account of the construction of a “legitimate victim” and his/her relation to the international community.

This Article proposes to explore different, although not necessarily exclusive, rationales for the TFV’s work in an attempt to build one of the first theoretical frameworks of its work. Scattered emerging research on the TFV has explored two types of analogies.\textsuperscript{15} One has been collective claims processes,\textsuperscript{16} typically those related to the commission of mass crimes, such as Holocaust-related litigation. This is an interesting analogy but Holocaust claims were largely disconnected from the operation of


\textsuperscript{15} See generally \textsc{Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making} (Carla Ferstman, Mariana Goetz & Alan Stephens eds., 2009) (analyzing the implementation of reparations for victims through an examination of Holocaust and other mass claims in international and regional courts, as well as reparations schemes at the national level).

international or domestic criminal justice.\textsuperscript{17} The alternative route is to look at existing domestic and international trust funds occasionally created to deal with episodes of mass criminality or particularly horrid crimes.\textsuperscript{18} This can help capture the fact that compensation of the sort envisaged by the TFV is fundamentally donor driven and public in character, rather than a response to private litigation. However, unlike the TFV, these trust funds also operate largely outside the framework of criminal justice, and are themselves in need of better theoretical justification.\textsuperscript{19}

If one lets go of the intuition that the answer is to be found in the context of mass criminality and transitional justice, the better analogy is that the TFV takes its cue from what is in fact an already remarkable history—the development of domestic victim compensation schemes designed to deal with ordinary, particularly violent crimes. These schemes have existed for about half a century and are now a permanent feature of many justice systems.\textsuperscript{20} Furthermore, where the creation of the potentially far more ambitious TFV seems to give rise only to a muted and theory-deficient dialogue between NGOs, government, and international technocrats, the justifications proffered for domestic victim compensation schemes have often sparked passionate theoretical, jurisprudential, and practical discussions.

\textsuperscript{17} For example, litigation against Swiss banks was unconnected (at least directly) to the operation of the process of prosecuting Nazis for crimes after the Second World War. See Lawrence Collins, \textit{Reflections on Holocaust Claims in International Law}, 41 ISR. L. REV. 402, 404–408 (2008). In fact, most “Holocaust litigation” has been directed at states and corporations in ways that were largely dissociated from the criminal law. See generally id.


\textsuperscript{19} For example, it is often unclear whether they operate on the basis of recognition of responsibility or as charitable schemes—some of the same problems raised, as we will see, by the TFV’s existence.

and political debates. In particular, the emergence of compensation schemes raises fundamental questions about the relationship of crime to community and the very nature of community. These questions take on an even greater degree of relevance internationally, where notions of community are inherently problematic and where the emergence of a compensatory logic may be profoundly transformative and contentious.

The hypothesis, therefore, is that international criminal justice can draw inspiration from some of these domestic ideas. The challenge is to discern the extent to which domestic rationales for victim compensation can be transposed to the international sphere. This will, by necessity, be an exercise in reflection both on criminal justice and international law, a particular institution (the TFV) and others like it, and, ultimately, the nature of obligations to victims in any system. It requires one to draw on interdisciplinary tools at the intersection of criminal law, international law, criminology, victimology, jurisprudence, political theory, history, and international relations. Needless to say, the questions envisaged here are not only of considerable theoretical tenor, they also have a very concrete dimension. The theory on which any system bases compensation of victims will determine, in turn, what form that compensation should take, who should be responsible for it, and for what amount. For the TFV to develop, such a theory will be crucial to its success and its ability, among others, to convince donors to fund it generously.

The Article begins by briefly presenting the basic analogy between domestic compensation schemes and the ICC compensation regime, particularly as represented by the TFV (I). On the basis of long-running discussions on the proper rationale of domestic compensation schemes, it will then seek to highlight some of the better justifications for the nature of victim compensation by the TFV (II).


I. THE ICC AND DOMESTIC VICTIM COMPENSATION SCHEMES: BASIC ANALOGY AND ISSUES

A. The Emergence and Record of Domestic Victim Compensation Schemes

Although this has been little commented upon in the context of the ICC/TFV, the idea of domestic victim compensation schemes is in fact an ancient one. Some of its oldest antecedents include a mention in the Hammurabi code that if a person was robbed and the robber escaped, the victim could expect the city where the robbery occurred to compensate him. Grand Duke Leopold of Tuscany set up one of the earliest schemes in 1786. In the modern era, the idea of victim compensation schemes was rediscovered by utilitarians, keen on maximizing the utility of the criminal justice system. These utilitarians cautioned against a traditionally excessively retributivist focus in criminal justice and were naturally inclined to think that correcting the harm done to both society and victims should be a part of the process. Bentham, as a representative of that current, took up the idea in *Principles of Penal Law* by suggesting that “if the delinquent have no fortune,” satisfaction “ought to be made at the expense of the public treasure, because it is an object of public benefit; the security of all is concerned.” Italian 19th century criminologists endorsed the concept enthusiastically, and the issue was discussed in several international penological congresses.

Compensation schemes can be described as schemes involved in “[t]he granting of public funds to persons who have been victimized by a crime of violence and to persons who survive those killed by such crimes.”

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29. HERBERT EDELHERTZ & GILBERT GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME 3 (1974).
The important thing is that the funds are public; in other words, they come from a source external to the crime and are awarded on the basis of a particular account of the needs of victims or of the interest of the public good. Their emergence ranks as one of the most significant criminological developments in the Western world and beyond of the last four decades. The inspiration for the first experiments came from the UK, more specifically from a famous article first published in 1957 in the Observer by Margaret Fry, a member of the Howard League of Penal Reform. New Zealand enacted the very first comprehensive compensation scheme, which took effect in 1964. Almost simultaneously, similar schemes emerged in the UK (today, the world’s largest) and California, soon followed by New York. Today, all US states have one, and there is even a scheme at the federal level. In Canada, victim compensation prevails at the provincial level, such as the Province of Québec’s Loi sur l’indemnisation des victimes d’actes criminels and the

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30. For an early overview of such programs, see generally id.
Victims’ Justice Fund in Ontario.\textsuperscript{39} Sweden adopted a state compensation program, the Criminal Injuries Compensation Act, in 1978.\textsuperscript{40} Funds have also been created in France,\textsuperscript{41} Germany,\textsuperscript{42} Italy,\textsuperscript{43} and numerous other European countries.\textsuperscript{44} Indeed, the issue became a pan-European one with the adoption, first, of the Convention on the Compensation of Victims of Violent Crime in 1983 by the Council of Europe and, subsequently, of a European Union Council Directive of 2004.\textsuperscript{45} The directive contemplates that “[a]ll Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories.”\textsuperscript{46} A majority of Council of Europe states now implement this obligation.\textsuperscript{47} Some compensation funds now even have an extra-territorial reach, covering citizens who have suffered harm abroad, particularly as a result of terrorist attacks.\textsuperscript{48}

The United Nations also takes a strong stance in favor of victim compensation schemes. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power anticipates that “[w]hen compensation is not fully available from the offender or other sources, States

\textsuperscript{41} Id. at 218.
\textsuperscript{42} Id. at 220.
\textsuperscript{43} Id. at 224.
\textsuperscript{44} See id. at 211–45 (discussing regulations relating to victims in the member states of the Council of Europe).
\textsuperscript{46} Council Directive, supra note 45, art. 12, para. 2.
should endeavour to provide financial compensation.\textsuperscript{49} Indeed, the UN established some of its own victim compensation funds. The first was the UN Trust Fund for Chile, a voluntary fund “to receive contributions and distribute . . . humanitarian, legal and financial aid to persons whose human rights have been violated by detention or imprisonment in Chile.”\textsuperscript{50} This transformed into the UN Voluntary Fund for Victims of Torture, which is still active today and distributes funds to non-governmental organizations providing humanitarian assistance to victims of torture and their family members.\textsuperscript{51} The UN also maintains a Voluntary Trust Fund on Contemporary Forms of Slavery established by the General Assembly in 1991\textsuperscript{52} to, \textit{inter alia}, “extend, through established channels of assistance, humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of contemporary forms of slavery.”\textsuperscript{53}

Typically, funds emerged to compensate grave violent crimes, specific categories of crime, or even specific incidents. In the US, for example, special funds have been created to compensate victims of notorious “terrorist” acts such as the Iran Hostage Crisis of 1979,\textsuperscript{54} the Oklahoma City bombing,\textsuperscript{55} and most recently, the attacks of September 11, 2001.\textsuperscript{56} The


trend is towards general terrorism compensation funds, dissociated from any particular incident. For example, the Anti-Terrorism and Effective Death Penalty Act in the US allows for compensation of both international and domestic terrorism. The French Guarantee Fund has a special compensatory regime for victims of terrorist attacks. Moreover, some schemes have begun to appear that grant compensation for all serious violent offenses. The UK Criminal Injuries Compensation Scheme, for example, provides compensation to victims of violent crime, such as physical assault or sexual offenses.

Although victim compensation schemes have occasionally been criticized for inadequately compensating some victims or attending to too small a portion of their needs, there is also no doubt that they are well established, robust means of dealing with compensation, that distribute millions in compensation every year. In a sense, victim compensation schemes offer the best of both worlds in that they isolate the criminal process from the treatment of victims (thus ensuring that the interests of the victims do not compromise the fairness of the trial), but still allow for significant compensation. Indeed, the emergence of victim compensation schemes has considerable implications for the conceptualization of crime, criminal repression, and victimhood. They nudge criminal justice in a more restorative direction (where the satisfaction of the victim is

A.T.S.S.S.A. indicates that the purpose of this Fund is “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” Id. § 403. Further sections in the A.T.S.S.S.A. list criteria for eligibility and require the Fund to evaluate the harm to each claimant before determining the amount of compensation. Id. § 405; see also Lloyd Dixon & Rachel Kaganoff Stern, Compensation for Losses from the 9/11 Attacks 21 (2004).


seen as key), and they “socialize” the cost of crime where traditionally states were quite willing to simply pocket fines.

As with the TFV, one of the crucial tensions that nonetheless characterizes victim compensation schemes is between ideas of reparation, compensation, and assistance. Reparations are primarily owed by a legal subject found liable for harm caused. They are awarded on the basis of that harm, as a matter of right, and ideally, aim to put the victim in the situation in which she was before the crime was committed. Their amount is based on the gravity of the harm suffered, and they are typically awarded, once and for all, following a judicial decision. Although they can be part of orders made after a criminal verdict or even a sentencing, their fundamental logic is inspired by the law of torts. Compensation is often used to refer to a form of public complement or substitute to reparations. Authorities provide funds as a sort of “back up” solution whenever the guilty party is unable to pay the full amount ordered. The State (or society in general) therefore, act as “guarantors” of the right to reparation, and the amount offered in compensation is, in theory, the same as the amount of the original reparation order. Sometimes, as in the case of the ICC, victim compensation schemes act in close coordination with the justice system by implementing its decisions. At times though, compensation will become entirely dissociated from the criminal trial and reparations that might hypothetically be paid by the accused. In such cases, “there is a ‘victim of crime’ without the elements of a crime having been established by a criminal court.” In some cases, the funds may try to recoup the money from the accused or have at least part of it funded by fines or through a tax levied on prisoners, but this is not always the case. Providing compensation separate from a criminal trial

65. See, e.g., Regina v. Criminal Injuries Compensation Board, ex parte Lain, (1967) 2 Q.B. 864 at 876 (Eng.) (describing the Criminal Injuries Compensation Board of the UK as “a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown.”).
66. Deborah M. Carrow, Nat’l Inst. of Justice, U.S. Dep’t of Justice, Crime Victim Compensation 2 (1980); see also Chappell, supra note 60, at 299 (arguing against linkage between compensation and criminal courts).
68. Hoelzel, supra note 61, at 492–93.
signals a move away from strict reparatory logic and manifests a more
general departure from fault that is evident in other areas, such as prod-
uct liability or work safety, where old tortious remedies sometimes seem
unsuited to the problem.69 More specifically, this shift coincides with the
distancing of victim compensation schemes from the judicial system, so
that victims become victims of “crime” rather than any one particular
“criminal.” Thus, at least theoretically, compensation could function in
ways entirely unrelated to criminal justice or tortious liability.

Moving even further from the logic of reparations, some victim com-
ensation schemes do not offer compensation strict sensu as much as
“assistance” (although it is still sometimes confusingly referred to as
compensation). Typically, “assistance” is designed to help victims cope
with the consequences of crime, but not with a view to actually compen-
sate them for the occurrence of the crime. Assistance is provided to vic-
tims on the basis of their current needs, independently of an evaluation of
the actual prejudice they may have suffered as a result of the crime. It is
in essence palliative and can be awarded entirely independent of a judi-
cial decision. Assistance schemes are aimed at mitigating the experience
of victimhood, rather than repairing the consequences of crime. As has
been emphasized:

[T]he moral, psychological and financial support that can be provided
through the health and social services, and in particular through Victim
Support, offers genuine resources, at relatively little cost, for healing
the trauma caused by violent crime, and there is a strong case for say-
ing that generous provision of these services for victims is a better use
of public money than a system of monetary compensation that will sel-
dom have any real equivalence with the hurt actually suffered.70

The general feeling in such cases is that payment is not made as a re-
sult of the recognition of any strict legal obligation or responsibility.
Typical assistance measures include medical assistance, psychological
counseling, payment of lawyers’ fees, rehabilitation, etc. This assistance
trend is also evident internationally. The UN Torture Fund, for example,
which from its inception moved away from financial compensation for
victims of torture, prefers to fund NGOs that provide direct “psychologi-

69. John G. Culhane, Tort, Compensation, and Two Kinds of Justice, 55 Rutgers L.
70. John Haldane & Anthony Harvey, The Philosophy of State Compensation, 12 J.
cal, medical, social, legal . . . economic,” humanitarian, or other forms of assistance “to victims of torture and their families.”71

To make matters more complicated, closely tracking the distinction between reparation and assistance is the tension between funds that are conceived as based on a right to compensation and those whose operation is more discretionary. Reparation is typically considered a right (although not necessarily always a right that the state is supposed to guarantee), whilst assistance is typically seen as discretionary. However, it is not impossible to conceive of a “right to assistance” and, possibly, only a loose “claim” to reparation. This tension between reparation oriented models of victim compensation and assistance oriented ones, on the one hand, and rights and discretion based models, on the other, is crucial in shaping victim compensation schemes. It is particularly alive in the case of the ICC because all of these logics, potentially, coexist: the ICC can order reparations, the TFV can use some of its own resources to “guarantee” compensation as a substitute to convicted reparations, and it can engage in “assistance” that is not strictly compensatory. Which model a compensation scheme evolves towards, in turn, is dependent on its rationale. Of the many potential rationales for compensation funds, not all are likely to be equally useful in assessing potential scenarios for the TFV.

B. The Rome Statute’s Victims Compensation Regime: A Brief Overview

The ad hoc tribunals historically did little for victims of international crimes. At best, victims who also happened to be witnesses (a very small minority) were eligible for some degree of protection and assistance before, during, and to a lesser extent, after their testimony. The Nuremberg and Tokyo tribunals did not have an institutionalized witness and victims protection regime, although this situation was improved in the 1990’s with the setting up of specialized units at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”).72 For the most part, however, international criminal justice has long been considered by its leading practition-


ers to be, fundamentally, about the accused. This focus was justified either on retributivist grounds, invoking the importance of punishment over all else, or on liberal grounds, foregrounding the importance of liberties and, in particular, the presumption of innocence and assorted guarantees. The assistance that victims qua witnesses received was in no way directly connected to the harm they had suffered, nor did it have any reparatory ambition, except perhaps in terms of compensating for the trouble occasioned by the testimony itself. To put it crudely, it served to ensure that victims were fit physically and psychologically to withstand courtroom pressures or, at worst, to entice skeptical victims to testify. The weak and anecdotal reparations regimes of the ad hoc tribunals were hardly ever used, and “internationalized courts” fared little better.

The limits of a model interested only in victims for instrumental reasons began to appear in the 1990’s. Victim witnesses were confused when much needed material or psychological assistance was discontinued after they testified. More generally, victims’ associations in the Former Yugoslavia and, especially, in Rwanda clamored for the integration of a compensatory element in international criminal justice. At about the same time, as the excitement surrounding their creation had settled down, international criminal tribunals began to enter a crisis of legitimacy, which made a novel focus on victims an attractive possibility. The ICTR sought to make moves in this direction, for example, by giving limited assistance to some victim-oriented NGOs. However, with very limited funding, fear by donors of “mission-creep,” and no real legal mandate,


74. The sole means of reparation provided for by the ad hoc tribunals’ statutes involves restitution of stolen property. See, e.g., S.C. Res. 955, ¶ 23(3), U.N. Doc. S/RES/955 (Nov. 8, 1994); see also Rules of Procedure and Evidence of the Special Court for Sierra Leone, R. 104(C), 105(B), May 28, 2010, http://www.scs-l.org/LinkClick.aspx?fileticket=xTBQdsmEuic%3d&tabid=176 (addressing return of unlawfully acquired property and victim compensation). However, the tribunals have never actually made such an order. The individual victim of someone convicted by the ICTR or the ICTY was otherwise to claim reparations through the national courts, once the accused had been convicted and the judgment transmitted to the national authorities. See Rules of Procedure and Evidence, Int’l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, R. 106, Dec. 10, 2009, IT/32/Rev. 44. This method of potential redress seems to have had almost no impact in practice.


such efforts never truly flourished and, if anything, actually made things worse by creating a few privileged victims at the expense of the great mass of others.

The stage was set for a major change of attitude vis-à-vis victims at the Rome Conference in 1998,\footnote{See Fischer, supra note 18, at 195–97.} which manifested itself spectacularly in two respects. First, the Rome Statute proclaims, for the first time in the history of international criminal justice, a principle of victim participation \“[w]here the personal interests of the victims are affected.\”\footnote{Rome Statute, supra note 2, art. 68(3).} At every stage where their interests are implicated, victims are considered as participants, although not quite parties.\footnote{See id. arts. 15(3), 19(3), 53(1)(c), 53(2)(c), 65(4) & 68(3).} Second, and most importantly for our purposes, the Rome Statute marks the emergence for the first time in the history of international criminal justice of the ambitious regime of victim compensation that is the subject of this Article.

The ICC/TFV regime is quite unique in that it manages to combine all the different elements that exist in domestic victim compensation schemes. First, the regime has a strong reparations component, which flows from its fundamental judicial nature. Reparations can be awarded by the ICC where a person prosecuted by the Court has been found guilty.\footnote{See Rome Statute, supra note 2, art. 75(2); ICC Rules of Procedure and Evidence, supra note 8, R. 94–99.} Reparations are funded in large part through fines, forfeitures, and reparations ordered by the Court against convicted individuals.\footnote{See TFV Regulations, supra note 9, para. 21.} Contrary to the regime of the ad hoc tribunals, reparations are not outsourced to domestic courts but are very much centralized within the hands of the Court itself.\footnote{See Rome Statute, supra note 2, art. 75.} Although reparations raise all kinds of complex issues in and of themselves,\footnote{Frédéric Mégret, Of Shrines, Memorials and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice, BUFF. HUM. RTS. L. REV. (forthcoming 2010) (manuscript at 9–18), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403929; Marc Henzelin, Veijo Heiskanen & Guénaël Mettraux, Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes, 17 CRIM. L.F. 317, 338–43 (2006).} there is little doubt about their fundamental nature in the context of the ICC: they are ordered against the accused and for the benefit of his/her victims with a view to compensating the harm caused.
The regime is complicated by the fact that the Court, in its reparation-awarding function, can be seconded by the TFV. In that particular role, the TFV acts as the implementer of select reparations awards ordered by the Court. It is required to take a variety of factors into account when “determining the nature and/or size of awards,” such as “the nature of the crimes [and] the particular injuries to the victims.” The Board of Directors of the TFV must devise an “implementation plan” supervised by the relevant Chamber, even though the Board clearly retains a measure of autonomy. One stated rationale for this situation is that it would be impractical for the Court to take care of every detail of every reparations award, and that the TFV may be especially more suited to making collective awards. In that capacity, the TFV will very much be working under a strict reparations logic, under close judicial scrutiny. This regime would not in itself be exceptional if it were not complemented by a further dimension of the TFV. In addition to receiving funds to implement reparations awards on the Court’s behalf, the TFV receives voluntary contributions from governments, intergovernmental organizations, and non-governmental organizations. From the outset, it has been quite unclear as a matter of policy whether these funds can and, most importantly, should be set aside to fill-in for the lack of resources of the accused or whether they should be used for an entirely different purpose.

In a relatively surprising decision allowing the TFV to proceed with some of its assistance initiatives, an ICC pre-trial chamber held that “the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to Article 75 of the Statute.” This decision, which has been soundly criticized, seems in tension with the TFV’s own understanding of its role and may be challenged in the future. Relegating the TFV to

84. Rome Statute, supra note 2, art. 75(2).
85. See ICC Rules of Procedure and Evidence, supra note 8, R. 98.
86. TFV Regulations, supra note 9, para. 55.
87. See id. para. 57.
89. See TFV Regulations, supra note 9, para. 5.
90. Id. para. 56.
91. ICC, Decision on the Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund, at 2, ICC-01/04-492 (April 11, 2008).
92. Dannenbaum, supra note 18, at 247.
93. See TFV Regulations, supra note 9, para. 56 (“The Board of Directors shall determine whether to complement the resources collected through awards for reparations..."
that singular purpose pushes it in the direction of an orthodox compensation scheme, guaranteeing reparations rather than engaging in a program to more broadly assist crime victims. The TFV, up until now, set aside about a quarter of its budget for the purposes of future reparations.\footnote{See Financial Info, \textit{The Trust Fund for Victims} \cite[hereinafter \textit{Financial Info}]{footnote1}, http://www.trustfundforvictims.org/financial-info (last visited September 20, 2010) (Out of a budget of € 4.5 million, “a current reserve of € 1 million is available for potential reparations.”).}

However, it remains to be seen to what extent it is preemptively obliged to set aside money for reparations. The scenario raises many questions: what happens if it does not have enough funds? Should it always prioritize this function as opposed to any other possible uses of its funds?

As it happens, the ICC Rules of Procedure and Evidence provide for an alternative destination for the TFV’s own resources. These can “be used for the benefit of victims,”\footnote{ICC Rules of Procedure and Evidence, supra note 8, R. 98(5).} in particular whenever the Board of Directors of the TFV “considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families.”\footnote{TFV Regulations, supra note 9, para. 50(a)(i) (emphasis added).} Already, the TFV has been remarkably active and successful in spending funds towards assistance programs, sponsoring thirty four projects, and reaching more than 200,000 victims and family members in northern Uganda and the DRC.\footnote{Projects, \textit{The Trust Fund for Victims}, http://www.trustfundforvictims.org/projects (last visited Sept. 20, 2010).} These include a veritable hodgepodge of activities: community support, micro-credit, vocational training, counseling, social events, workshops, medical and orthopedic support, reconstructive surgery, reintegration, peace and reconciliation, shelters, etc.

Money spent as assistance to victims follows a regime quite distinct from reparations. TFV funded programs on behalf of victims may be disbursed before a verdict has been rendered or regardless of whether anyone is even prosecuted. Additionally, all victims of crimes falling within the jurisdiction of the Court, rather than only victims of crimes committed by individuals who have been found guilty, are eligible for assistance.\footnote{See TFV Regulations, supra note 9, para. 42. However, funds can only be given for victims of a crime within the jurisdiction of the Court and in relation to a “situation” investigated by the Prosecutor. See ICC Rules of Procedure and Evidence, supra note 8, R. 85; TFV Regulations, supra note 9, para. 42.} This is something that the TFV has already done by financing projects in Uganda and the DRC, even as prosecutions were pending (in-
deed, in the case of Uganda, before anyone was even arrested). The requirement that the TFV ask the Court’s permission to launch an assistance program does not change the fundamental character of what is at stake, nor is it an attempt by the court to fundamentally control when and where assistance money is spent; it merely reflects a concern with the risk that awarding assistance might affect the rights of the accused.

In other words, whilst the role of the Court in relation to reparations is quite clear, the role of the TFV is much more complex, at least when its hands are not bound by a Court order. The TFV’s ability to control funds of its own, in particular, gives it a unique potential to shape the overall ICC victim compensation regime. There is no doubt that the two models it could espouse are in tension—one is based on reparations and the other on assistance; one is backward-looking and guilt-oriented, the other more forward-looking and need-oriented. Specifically, their coexistence raises issues about what a proper theoretical justification for this dual system would look like and especially how one might best account for the attempt to “share” the costs of crime between the accused and society at large.

These problems are quite clearly reminiscent of earlier debates on the proper role of domestic victim compensation schemes. The challenge, of course, is that these debates, although clearly illuminating, were never conclusive domestically, and their transposition to the international plane creates an additional hurdle. The danger, if one is not careful, is to reason on the basis of a misleading “domestic analogy.” At the very least, the ICC and the TFV operate in an environment that is fundamentally different from that of domestic society, even as they may be part of an effort to emulate some of its features. The international system is traditionally one without sovereign that is arguably a society only in a loose sense, marked by a high degree of decentralization. The more ambitious forms of compensation schemes, by contrast, have often taken hold at the intersection of the late development of criminal justice and social welfare in advanced industrialized societies, exhibiting relatively high levels of social solidarity. The challenge, therefore, is to understand how the two—a

100. See TFV Regulations, supra note 9, para. 50(a)(ii)–(iii).
still largely decentralized system of states, on the one hand, and the institutional by product of highly solidaristic systems—can be paired together. The answer, as will become clear, may well be that the international system is in fact changing considerably, or at least that the ambition of a strong victim compensation regime before the ICC presumes that it has or will.

II. IN SEARCH OF A RATIONALE: WHAT IS THE TFV’S FUNDAMENTAL JUSTIFICATION?

The form a victim compensation scheme takes will often hinge on how it has been conceived and its fundamental purpose. But, apart from the fact that victims may be pleased to receive compensation, there is nothing obvious about the existence of such schemes. As one author put it, “since individuals are expected to bear the consequences of many kinds of misfortune,” proponents of compensation schemes need to adduce a proper rationale as to why victims of crime—indeed, of particular crimes—should see their harm partly absorbed by the collectivity.102 The same is arguably even truer at the international level, where it has long been evident that individuals suffer all kinds of misfortunes without so much as a minimal expectation that the international community should shoulder the cost of harm incurred. This makes it even more crucial to articulate a proper rationale for the existence of an international victim compensation scheme, and in particular, the TFV. This Part will explore a series of possible rationales for the role of the TFV taken from domestic experience, each in its own way problematic. These accounts are (A) criminal, (B) political, (C) consequentialist, (D) practical, (E) legal, (F) political theoretical, (G) charitable/humanitarian, (H) moral and equitable, or (I) welfare/solidarist. In the conclusion, the article suggests ways in which an overall account of the justification of victim compensation in the international context might one day be produced that draws on some of the above.

A. Criminal Justice Rationale: The TFV as a Corrective to the Limitations of Retributive Justice

The emergence of victim compensation schemes is often, first and foremost, conceptualized as a development endogenous to criminal justice, and the evolution of the place and role of the victim within the lat-

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As is well known, modernity gradually excluded the victim not only from the criminal process itself, but from any prospect for reparation as a result of the criminal trial. This is in contrast to the position in pre-modern days, where punishment and reparations had been confused and criminal justice and torts were little distinguished. In other words, harm was effectively conceived as committed primarily against the victim as opposed to “society” or “the state;” the role of the state consisted, at best, of mediating between the parties in an effort to avoid “blood feuds.” In ancient Romano-Germanic law, the “composition” (i.e. compensation) was typically paid either as “bot” to a victim who sustained injuries or as “wergild” (literally, a man’s value) to the family of a deceased victim. Punishment was only subsidiary, mandated in cases where the guilty could not afford to pay. This was consonant with a view of criminal justice as essentially a form of private justice in which even the apprehension of criminals was often left to the victims.

With heightened state centralization and the idea that the criminal law could serve to protect the public order, fines (as they became known) began to be paid to the state rather than victims. Victims might, of course, turn to civil remedies, but these were often neatly excluded from the criminal trial (except in European continental systems with a tradition of parties civiles, which allows victims to “piggyback” on the state’s prosecution as parties). Criminal justice became a branch of public

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104. ROBERT ELIAS, VICTIMS OF THE SYSTEM, supra note 20, at 20; see also Bruce R. Jacob, Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process, 61 J. C RIM. L., CRIMINOLOGY & POLICE SCI. 152, 155, 157 (1970).
106. See id. at 29.
law, one devoted to the protection of a certain minimum social order. It
developed a rich apparatus, including specialized courts, a highly specific
procedure and, of course, a powerful enforcement arm in the form of
professional police forces. Thus emerged what has sometimes been de-
scribed as the “modern ideology of criminal justice,” one in which “[t]he
victim is useful to the system primarily as an information source and a
witness, and his interests . . . are not important to the operation of the
system.”110 Thus, the State largely excluded the victim from participating
in criminal procedures and reaped the full fine levied against the crimi-

A slow effort to reverse this state of affairs emerged in the twentieth
century.112 In a classical criminal justice configuration, the operation of
the criminal system, for the most part, prevented the victim from making
a substantial recovery.113 However, if that system was to be broadly
maintained (to vindicate the state, to protect the rights of the accused),
the state owed it to victims who had been historically dispossessed of
their primary role in the process to provide them with an alternative.114
The problem was made worse by the fact that the state collected a fine
first, long before the victims obtained a remedy, thus making it even
more unlikely that they would obtain reparation. The state’s appetite for
punishment, in other words, deprived victims of a full chance for person-
al recovery, except through the pursuit of tort remedies at their own ex-

The classical Italian criminologist Ferri was prompt to point out that
often “the State cannot prevent crime, cannot repress it, except in a small
number of cases, and consequently fails in its duty for the accomplish-
ment of which it receives taxes from its citizens, and then, after all that, it

110. Paul S. Hudson, The Crime Victim and the Criminal Justice System: Time for a
111. In particular, victims can typically not effect a private settlement with the offen-
der in cases where public prosecutions have been launched, on the grounds that the prose-
cution is primarily in the interest of the state and public order, and only incidentally for
the benefit of the victim.
112. It should also be pointed out that the trend was not in equal need of reversal eve-
erywhere in the world. Many countries beyond the West had never developed such a rigid
distinction between public and private, criminal and tortious actions.
114. See David L. Roland, Progress in the Victim Reform Movement: No Longer the
REV. 599, 600 (1978).
accepts a reward."116 Schafer has also emphasized that there is something “absurd” about a system in which “the state undertakes to protect the public against crime and then, when a loss occurs, takes the entire payment and offers no effective remedy to the victim.”117 This situation is arguably made worse by the tendency of the state to criminalize areas traditionally occupied solely by torts, thereby further removing the prospect of reparation.118

Compensation schemes, in light of all this, are justified in that they correct the historical injustice resulting from states interposing between offender and victim.119 In recent decades, following substantial criminological and penological evolutions, the goal has increasingly shifted to a desire to ensure that the person who committed the crime is required to pay reparation (sometimes called “restitution” or “indemnification”).120 The notion that the offender should contribute to repair the harm caused is seen in the restorative justice movement as a progressive step that can help to mend some of the social bonds destroyed by crime121 and, ideally, restore a sense of moral equity between victim and offender. Those who emphasize victim participation in the design of remedies insist that it may foster a worthwhile sense of victim agency.122 Moreover, a particular line of thought specifically ties together restitution and offender rehabilitation,123 whilst some would even replace punishment entirely by


118. Galaway & Rutman, supra note 4, at 61–62.


121. Barnett, supra note 127, at 293–94 (1977); STRANG, supra note 62, at 17. But see Kate Warner & Jenny Gawlik, Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice, 36 AUSTL. & N.Z. J. CRIMINOLOGY 60, 73–75 (2003) (concluding that a system of compulsory compensation orders in Tasmania was ineffective as a restorative justice measure and acted more as a “political placebo for crime victims”); Chappell, supra note 60, at 299–300 (pointing out that the focus on restitution as punishment paradoxically continues to marginalize victims).


compensation and thus eradicate the distinction between crime and tort. 124 Some law and economics scholars have also made the case that the obligation to pay compensation might be a further deterrence to criminals, especially in cases where the amount of such compensation is significantly higher than the level of a fine. 125

The possibility of reparations in the context of criminal justice can thus be understood as a development internal to the fundamental physiognomy of the criminal justice process, moving from a retributive126 to a restitutive model of criminal justice (that is no longer so distinctly “criminal”). 127 This development is inherently linked to the more general increase in victim participation, and the ability for victims to weigh in on both procedure and sentencing.128

A similar argument can no doubt be made in the ICC context, where the Assembly of States Parties arguably has even less of a claim to collect fines for itself, even though it theoretically could have (at least for the Court’s operating budget). Historically, the international criminal justice system is certainly guilty of a preoccupation with the primacy of criminal justice, which sometimes obscured alternative mechanisms that might have been more victim centered. 129 Given the disparity of means between state parties and victims, an international criminal justice system that finances itself through fines and restitution might be hard to justify.

124 See generally Barnett, supra note 127 (arguing that adopting a paradigm of restitution in place of punishment would solve the crisis in the criminal justice system).


126 Although there is of course an argument that reparations add an element of punishment and prevent the criminal from enjoying the fruits of his crime. J. D. McClean, Reparation by the Offender, 34 Mod. L. Rev., 436, 436–37 (1971). Moreover, the retributive and restitutive effects can be tied up in certain systems where fines are partly or wholly paid to funds that guarantee compensation. See Office for Victims of Crime, Victims of Crime Act: Crime Victims Fund Fact Sheet, Nat’l Criminal Justice Reference Serv., http://www.ncjrs.gov/txtfiles/cvfund.txt (last visited Oct. 17, 2010) (noting that the federal Crime Victims Fund allocates a significant portion of its deposits to administrative costs and investigatory programs, in addition to victim compensation).


129 For example, international criminal justice is often thought to be in tension with mechanisms of transitional justice such as truth and reconciliation commissions that are often considered to be more victim compensation friendly. G. Stevens, Truth, Confessions and Reparations: Lessons from the South African Truth and Reconciliation Commission, A Journal of Injury and Violence Prevention 23 (2005).
Whilst the suggestion that offender restitution might have a deterrent effect internationally is clearly not convincing, the ICC compensation regime is certainly driven by a basic trend towards making international criminal justice more restorative in a way that is responsive to criticisms of its excessive retributivism. The Rome Statute indicates that fines may be paid to the TFV for the purposes of reparation. The Court itself emphasizes that its “restorative function, complementing its punitive function, is a key feature of the system established in Rome.”

In that respect, international criminal tribunals are in a productive tension with alternative mechanisms, such as truth and reconciliation commissions, and traditional justice mechanisms that offer a more explicitly restorative framework for transition. One cannot help thinking that the objective competition of such bodies may have helped gear the ICC itself in a more restorative direction. The idea that victims benefit from receiving reparations directly from the convicted, and that reparations may even be rehabilitative of the offender, also makes sense before international criminal tribunals. Such restorative inclination will certainly be seen as more in line with what many populations who have suffered from international crimes may come to expect from criminal justice.

130. Arguments based on deterrence are already the object of general skepticism in the international context. See David Wippman, Atrocities, Deterrence, and the Limits of International Justice, 23 FORDHAM INT’L L.J. 473 (1999) (outlining the obstacles to achieving deterrence through the international criminal justice system). Surely the prospect of having to pay reparations will not deter those who are not otherwise deterred by the prospect of long prison sentences.


132. Rome Statute, supra note 2, arts. 75(2), 79(2); ICC Rules of Procedure and Evidence, supra note 8, R. 98(2), 98(4).


135. See generally Peter Uvin & Charles Mironko, Western and Local Approaches to Justice in Rwanda, 9 GLOBAL GOVERNANCE 219 (2003) (describing the benefits of the Rwandan gacaca system as compared to the International Criminal Tribunal for Rwanda and the formal domestic justice system).

The problem of course, both domestically and internationally, is linked to the limitations of restitution and reparations. In an ideal world, the convicted person would indeed pay for the harm caused. It is he or she, after all, who has been found guilty of an offense which, although presented as an offense against the state throughout the history of criminal law, also remains a crime (or an intentional tort) committed against a particular victim.\(^{137}\) The biggest problem with relying on the accused for reparations, as highlighted in the 1950’s by Margery Fry, was that in many cases it was very unlikely that the person condemned would have the means to pay.\(^ {138}\) Moreover, given the prevailing rates of crime resolution and conviction, it was even less likely that the person responsible would ever be apprehended or convicted.\(^ {139}\) In addition, in the domestic context, persons who have committed significant violent crimes are often imprisoned for substantial lengths, making it even more implausible that they will gather the necessary resources.\(^ {140}\) Forcing the convicted to work and transferring the product of their labor to victims is a solution that is problematic in its own right and is only likely to be partial.

Problems associated with this model of relying on the accused are, if anything, magnified in the context of international criminal justice. Historically, many international crimes go unresolved, many accused never or very tardily get apprehended, and trials are very drawn out when they occur at all.\(^ {141}\) In addition, many of the accused before contemporary tribunals are indigent and the international community pays for their lawyers.\(^ {142}\) If lack of financial means was a problem domestically, then it is an even bigger one internationally. The ability and appetite of individuals to commit mass atrocities generally far outweighs their ability to pay for them. The ICC itself recognized that it will have an expectation management problem in relation to victims given the fact that “[t]he types of

\(^{137}\) Edward Veitch & David Miers, *Assault on the Law of Tort*, 38 MOD. L. REV. 139, 148 (1975) (“Patently, any victim of a crime of violence against the person is also a victim of an international tort to the person, but the traditional division between crime and tort seems to have obscured this elementary fact in the matter of compensation.”); see also Patrick Elias & Andrew Tettenborn, *Case & Comment, Crime, Tort and Compensation in Private and Public Law*, 40 CAMBRIDGE L.J. 230 (1981).

\(^{138}\) Fry, *supra* note 32, at 192.

\(^{139}\) Roland, *supra* note 114, at 42.


\(^{141}\) On the general problem of impunity for atrocities under international law, see *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* (Naomi Roht-Arriaza ed., 1995).

crimes dealt with by the Court cause loss and suffering on a massive scale” and that “[t]he resources of individuals that might be convicted of having committed crimes and of the Trust Fund for Victims will be limited in comparison.” Moreover, the ICC adds its own limitations in terms of reparations, not least of which is its extreme selectivity in terms of who it prosecutes. This risks creating a class of “super victims”—those select few who happen to be the victims of an individual condemned by the Court with, possibly, a special emphasis on those who choose and manage to participate in proceedings as victims of the accused. Finally, there may be a concern that international criminal justice will disrupt victims’ attempts to obtain civil justice; although, since there never was much of an avenue for that internationally or domestically, it is hard to argue that there has been a negative impact on international civil remedies.

What should the solution be? Should it be left to chance whether one is a victim of someone who happens to be known, found, convicted, and able to “repair” the harm done? The domestic solution to this problem, as incarnated by victim compensation schemes, is to externalize the cost of crime to the whole community—what Jeremy Bentham described as “subsidiary satisfaction at the public expense.” In other words, victim compensation schemes also emerged to remedy what was, in essence, or at least primarily conceived as, a deficiency of the criminal system. The general inspiration for the schemes is, almost by definition, recognition that the consequences of certain crimes should be “absorbed” by the community and the costs spread so that all victims end up being compensated. But this is truly a radical break from reparations that follow from guilt and this evolution cannot be entirely explained from within the dynamics of criminal justice, unlike offender/victim reparations.

143. Draft I.C.C. Strategy in Relation to Victims, supra note 133, para. 5.3.
144. TFV Regulations, supra note 9, para. 42 (indicating that TFV resources “shall be for the benefit of victims of crimes within the jurisdiction of the court”).
145. However, one might think that if anything the added enforcement power of international criminal tribunals might also mean that someone like Radovan Karadzic, against whom an important civil award had been obtained in New York, see Doe I v. Karadzic, No. 93 Civ. 0878, 2001 WL 986545 (S.D.N.Y. Aug. 21, 2000), could at least be arrested. This could in due course make him vulnerable to (at least partial) execution of the civil judgment. However, this is very indirect, and obviously in such a case reparation is not truly obtained as a result of the operation of international criminal justice.
147. See H. Donnie Brock, Student Comment, Victims of Violent Crime: Should They Be an Object of Social Effection?, 40 MISS. L.J. 92, 100–01 (1968).
Compensation schemes, although they draw on the reparatory intuition, also affect a fundamental shift away from reparations emanating from the accused to a more socialized mode of compensation.\textsuperscript{148} Identifying the basic justificatory core of compensation schemes as correcting some limitations of the criminal system tells us something about the internal coherence of criminal justice; however, it seems to presume something which cannot be taken for granted, namely that the cost of this deficiency should be borne by the community. There is nothing in the logic of criminal justice—in its simplest expression, that the guilty should answer for their crimes—that suggests a larger societal responsibility to victims.

It thus remains unclear why the state—not to mention the “international community” or any of its varied instantiations—should step in to provide compensation if the guilty cannot. The fact that the state proposes to do so is no substitute for a theory of why such a scheme is desirable, nor what form it should take. One argument is that lack of reparation, apart from being the fortuitous result of the impecunious nature of the guilty, is in a very specific way the state’s doing, since it is the state that displaced torts in creating criminal justice machinery geared towards retribution. Internationally, the argument might accordingly be that the “international community” or “state parties” have a responsibility to victims because the monopolizing thrust of international criminal justice displaces a variety of other efforts.\textsuperscript{149} This rationale is helpful, but far from conclusive. The mere fact that criminal justice displaces alternative modes of regulation of complex social problems does not by itself assign liability to the entity responsible for the displacement. After all, every social poli-

\textsuperscript{148} See Harland, supra note 64, at 67.

\textsuperscript{149} These include both other international law remedies and more restorative domestic ones. State responsibility in particular appears to be the big “loser,” although it is of course not excluded per se by the rise of international criminal justice. See generally Nina H. B. Jørgensen, The Responsibility Of States For International Crimes (Ian Brownlie ed., 2003); Markus Rau, State Liability for Violations of International Humanitarian Law—The Distomo Case Before the German Federal Constitutional Court, 7 German L.J. 701 (2006) (discussing a German court decision that “expressly adhered to the view that under international law as it stands today, there is no exception to immunity from adjudication that allows for private suits against foreign states for violations of international law”); Liesbeth Zegveld, Remedies for Victims of Violations of International Humanitarian Law, 85 Int’l Rev. Cross 497, 507–12 (2003). On the relationship of international criminal justice and traditional justice, see Erin Daly, Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda, 34 N.Y.U. J. Int’l L. & Pol. 355 (2002); Peter Uvin & Charles Mironko, Western and Local Approaches to Justice in Rwanda, 9 Global Governance 219 (2003); see also Bruce Baker, Popular Justice and Policing from Bush War to Democracy: Uganda 1981-2004, 32 Int’l J. Soc. L. 333, 333–48 (2004) (discussing the evolution and functioning of popular justice and policing methods in Uganda).
cy has costs, and the state is not obliged to compensate for every side-
effect of a shift in regulatory focus.

Domestically, such doubts have given rise to some of the most fertile
reflections about the limits of criminal justice, and clarification can only
be sought in further multi-disciplinary inquiries that locate criminal jus-
tice within a larger constellation of theories and institutions. Although
the international community has been slow to provide alternatives, there
is also a sense that international criminal justice and alternative modes of
reparation are not a zero sum game and that other avenues, including
domestic and international civil litigation,\textsuperscript{150} are being explored. If any-
thing, this makes the debate even more complex as the question becomes
why the TFV is the best mechanism, as opposed to any number of other
routes through which remedies can be obtained. Further, the ultimate
rationale for a victim compensation scheme, such as the TFV, must be
sought beyond the confines of criminal justice theory alone.

\textbf{B. Political Rationale: The TFV as a By-Product of Interest}

At a certain level, one can reduce the creation of domestic compensa-
tion schemes as well as the TFV, with its autonomous powers, to a man-
ifestation of the converging political will of various actors and constitu-
tuencies. Domestically, the rise of victims’ movements and certain
shocking episodes of criminality played a big role. For example, the New
York compensation scheme was created following the deadly stabbing,
in front of his wife and infant daughter, of Arthur F. Collins by a drunken
man after Collins tried to stop the man from bothering an elderly woman
on the subway.\textsuperscript{151} The perception that Collins acted as a Good Samaritan
and the particularly horrendous nature of the crime was instrumental in
the adoption of the 1966 Executive Law that set up the fund.\textsuperscript{152}

Public campaigns often launch to redress a perceived imbalance be-
tween the state’s treatment of the accused and of victims,\textsuperscript{153} sometimes

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\textsuperscript{150} See generally Beth Van Schaack, \textit{In Defense of Civil Redress: The Domestic En-
forcement of Human Rights Norms in the Context of the Proposed Hague Judgments
bring civil human rights cases in domestic courts); Donald Francis Donovan & Anthea
Roberts, \textit{The Emerging Recognition of Universal Civil Jurisdiction}, 100 Am. J. Int’l L.
142 (2006).

\textsuperscript{151} Edelhertz & Geis, supra note 29, at 21.

\textsuperscript{152} See Novack, supra note 36, at 724 & n.54.

\textsuperscript{153} See Andrew Karmen, \textit{Crime Victims: An Introduction to Victimology} 30–
31 (2nd ed. 1990).
\end{flushright}
with explicit, often conservative, political agendas. As has been pointed out, “[f]undamentally, programs designed to compensate persons injured by crimes of violence are attempts to placate a public opinion often unnerved and resentful of what is viewed as a rising tide of aggressive criminal activity.” Indeed, these regimes have even been rationalized as part of an effort by policy-makers to reduce the “demoralization costs” of leaving victims without compensation in a context where the perception is that the State ought to be involved. Some scholars also argue that compensation should be seen as part of a “labeling process” that designates and therefore constructs “proper” victims, possibly with a view to symbolically reject criminological ideas that seek to construct the offender himself as a victim. In a more critical vein, compensation schemes are also, arguably, a way of deflecting attention from real issues of crime and distributive justice. Finally, compensation funds may be created for much more immediate and mundane reasons, such as helping sustain affected industries.

Internationally, the emergence of the TFV might be considered a manifestation of a rising international victims’ rights movement, made possible by greater overtures by the international system to non-state actors. Undoubtedly, the Rome process and the evolution of the treaty institutions in its aftermath owe much to the increasing organization of transnational civil society. The existence of a very specialized NGO such as

155 Edelhertz & Geis, supra note 29, at 4.
157 David Miers, Victim Compensation as a Labelling Process, 5 VICTIMOLOGY 3 (1980).
160 For example, the September 11th Compensation Fund was created in no small measure to protect the airline industry against a cascade of litigation. Matthew Diller, Tort and Social Welfare Principles in the Victim Compensation Fund, 53 DePaul L. Rev. 719, 723–24 (2003). It was also “seen as a statement about the unity of the United States” in the face of terror. Id. at 724.
161 See generally Marlies Glasius, The International Criminal Court: A Global Civil Society Achievement (2006) (discussing the establishment of the ICC as a revolutionary example of the influence of global civil society on international decision-making).
the “Victims’ Rights Working Group” suggests a strong linkage between civil society and victims’ rights issues. 

Indeed, the TFV itself, in its operation, purports to work as a participatory institution, one that claims to be inspired in its day-to-day activities by encounters with victims.

A view of the TFV as somehow a manifestation of an international democratic ethos and the profound wishes of victims, however, is only partly convincing. Who is a “victim” is a contested terrain, and the notion is by and large constructed by international criminal justice rather than the other way round. There cannot be said to exist an international “victims’ rights movement” of the sort that has sprung up in the West during the last half-century and which is at the origin of most domestic victim assistance schemes.

Institutional groups such as the Victims’ Rights Working Group, a network of 300 civil society groups, speak on behalf of victims worldwide, rather than being composed of them. This may be because victims of international crimes belong to a category too vast and dispersed to ever see themselves as “international” victims, not to mention the sheer difficulty of organizing such a movement across borders. Rather, a group of mostly Western NGOs defended a focus on victims based on the transitional justice critique that international criminal justice was too retributivist and internationalist for its own good.

The actual level of participation of victims in TFV is difficult to assess given the paucity of information available, but the Fund is, ultimately, very much in charge of how it uses its funds.

State interest is, of course, an alternative paradigm to explain the emergence of the TFV. Domestically, victim compensation schemes serve definite political agendas of governments who are intent on portraying themselves as “victim-sensitive.” Similarly, the support of state parties was essential in the creation of the TFV and its fortunes may depend on how much it is deemed worthy of support by the Assembly of States Parties. Doubtless, some states likely see the TFV as a way of

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163. See Partners, Trust Fund For Victims, http://trustfundforvictims.org/partners (last visited Oct. 18, 2010) (“Our projects emphasize participation by victims in programme planning, sustainability of community initiatives, transparent and targeted granting, and accessibility for those who have traditionally lacked access to funding.”).
166. It is the Assembly that created the Trust Fund and which determines the criteria by which it is governed (article 79. 3 of the Rome Statute). This means that although
enhancing their liberal reputation through generous “donations,” which provide a high visibility vehicle for certain donor initiatives. However, the fact that states cannot earmark their donations also limits their ability to use the TFV for targeted political reasons. Moreover, it would be quite reductionist to suggest that the TFV was created merely to showcase donor generosity, even if that is one of its side-effects.

If there is a politics behind the TFV, it lies, rather, in the larger political needs of international criminal justice, from which it is inseparable. Perhaps more than a “victims’ movement,” there has been a political sensitivity in diplomatic circles to the role of victims in legitimizing a nascent institution like the International Criminal Court. Certainly, in an international system where societal interest still seems relatively thin (despite all aspirations to the contrary) and which is deprived of a global sovereign, the traditional criminal law appeal to “public order” as the backbone of international criminal justice has little resonance and would elicit strong adverse reactions. In a context where many claims about international criminal justice are routinely challenged (e.g., that justice leads to peace), and where victims may in fact also become collateral victims of its operation (e.g., where a state expels humanitarian organizations as a result of the head of state having been indicted by the Court), there is much need for symbolic counterweights. Although victims may conceivably be able to live with some of the international decisions that adversely affect them if they advance justice overall, it would add insult to injury if the Court were to further neglect them by not providing any compensation. A strong and visible stand for victims of international crimes may be the international community’s best bet at establishing a solid vantage point from which to promote international criminal justice.

More concretely, there is little doubt that the emergence of a relatively strong reparation regime results, at least partly, from the difficulties that international criminal tribunals encountered in the 1990’s. The ad hoc tribunals, especially, were seen as excessively focused on prosecutions, states certainly do not have a tactical hand in how funds are disbursed, they could exert some strategic control over the direction of the Fund if they so decide.

167. TFV Regulations, supra note 9, para. 27.


to the detriment of their larger transitional goals.\textsuperscript{171} Victim movements in Rwanda and Bosnia (in particular, Srebrenica) were often appalled by the way in which they were neglected, with often very dramatic consequences for the tribunals in terms of state cooperation.\textsuperscript{172} International criminal lawyers know that justice cannot afford to appear careless about victims. The argument that international criminal justice serves victims’ merely by prosecuting their tormentors will only go so far. A strong victim oriented regime, then, can be redeeming of the general abstraction of international criminal justice and may help dispel the perception of indifference to victims. The TFV might be conceived as, or turn into something, that helps reconcile local populations with international criminal tribunals. A cynic might therefore argue that a relatively strong victim compensation regime is the “acceptable face” of international criminal justice, a way of helping grease the wheels of the system by better “selling” it to its “stakeholders.”

There are several limitations with this explanation, however. To begin with, the TFV shows no sign of wanting to serve as the “acceptable face” of the ICC vis-à-vis victims. In fact, it seems quite keen to distance itself from the Court.\textsuperscript{173} The TFV, thus, cannot really be explained as a sweetener for the occasional bitter pill of international trials. Purely political explanations of why the TFV exists provide us with a context but fail to provide us with a normative account of its emergence, despite the fact that the victims’ reparations regime is clearly construed by many of the actors involved as a normative enterprise. The same sort of argument could be made about international criminal tribunals in general: although they may have been created for various circumstantial political reasons, they have typically evaded these reasons and have been justified by reference to certain fundamental legal principles. Thus, a purely political account is necessarily lacking and a more complete analysis of the rationale behind victims’ compensation regimes must delve into a more normative register.

C. Consequentialist Rationale: The TFV and Transitions

Another species of arguments about the creation of compensation schemes emphasizes, quite apart from the moral, legal, or social merit of

\begin{itemize}
\item \textsuperscript{171} See Alvarez, supra note 165, at 479–80.
\item \textsuperscript{172} See, e.g., Victor Peskin, International Justice in Rwanda and the Balkans 202–06 (2008).
\item \textsuperscript{173} There may be several reasons for this, including fears about security or even the risk of adversely affecting the work of the Court by impinging on the presumption of innocence. At any rate, the TFV seems keen to stress its independence and may appear as a quite distinct institution to victims on the ground.
\end{itemize}
granting something to victims, the extent to which such schemes have positive, secondary effects. These consequentialist arguments run the gamut from basic to sophisticated, but the underlying idea is utilitarian, going as far back as Bentham, that victim compensation is justified by—and therefore also awarded on the basis of—what it might achieve, rather than by an entitlement or by the strict degree of harm suffered.\textsuperscript{174} Can the TFV be explained in such terms? Traces in the emergence of the regime indicate that it may be designed not simply as the acceptable face of international criminal justice, but as something that is fundamentally conducive to certain goals of international law, for example, transitional justice.\textsuperscript{175}

The problem then becomes, as is often the case with consequentialist reasoning, how to determine what the “ulterior goals” of victim compensation should be. Perhaps one of the simplest lines of argument domestically is the idea that victim compensation schemes create a stake for victims in criminal justice and thus encourage them to cooperate with the judicial process in what might otherwise be a context of apathy or indifference, amplified by fears of “double victimization” at the hands of prosecutors and a careless criminal system.\textsuperscript{176} Some domestic systems even make compensation conditional upon cooperation with police and prosecuting authorities.\textsuperscript{177} Some law and economics scholars even argue that, given the right level of restitution or compensation incentive, victims might well invest their own resources to have the criminals apprehended.\textsuperscript{178} However, domestically, the results of this sort of simple eco-

\textsuperscript{174} See JULIA MIKAELSSON & ANNA WERGENS, REPAIRING THE IRREPARABLE: STATE COMPENSATION TO CRIME VICTIMS IN THE EUROPEAN UNION 176 (2001).

\textsuperscript{175} The TFV regularly touts its role in bringing about peace and reconciliation. See The Two Roles of the TFV, TRUST FUND FOR VICTIMS, http://trustfundforvictims.org/two-roles-tfv (last visited Sept. 25, 2010) (“Countries emerging from long-term violent conflict are troubled societies that may develop destructive social and political patterns. In such cases, fundamental psychological adjustments in individual and group identity—aided by reconstruction processes—are essential to reconciliation. If we do not get it right through justice, reparations and rehabilitation initiatives, we will not be able to secure peace, security and development for future generations.”).


\textsuperscript{177} MIKAELSSON & WERGENS, supra note 174, at 205–206 (“The 1983 European Convention states that the compensation may be reduced or refused on the ground of . . . [the victim’s] failure to report the crime to the police or to co-operate with the legal authorities”).

nomic incentive have been decidedly mixed in that the decision to cooperate with judicial institutions seems largely unrelated to prospects for compensation.

The experience of the international community in the 1990’s demonstrated that tribunals need to mobilize stakeholders, particularly witnesses, a process often fraught with difficulties and misunderstandings. Ideally, this may be accomplished by creating a rough quid pro quo, or at least a system of positive incentives to encourage cooperation. The strategy was attempted in the limited context of witness protection but, with the advent of the ICC, arguably extends to a vast number of victims seeking reparations or assistance. The eagerness with which victims participate in ICC proceedings thus far may have to do with a desire to be well positioned to make claims for reparation. The TFV, however, certainly does not go as far as to require cooperation by relevant victims, and assistance seems largely disconnected from even the existence of a proceeding. It is unlikely that the prospect of compensation would greatly change victim attitudes towards the judicial process in view of the fact that victims will most likely seek to participate on other grounds.

A second “ulterior goal” is that victim compensation is, essentially, a way of limiting violence by reducing victims’ feelings of despair and alienation. The reasoning is that un-assisted crime victimization will come back to haunt society by feeding a desire for vengeance and violence. Compensation money, then, is money well spent in that it can avoid breaches to public order and peace and is often seen as a form of

179. See William G. Doerner & Steven P. Lab, The Impact of Crime Compensation Upon Victim Attitudes Toward the Criminal Justice System, 5 VICTIMOLOGY 61, 62 (1980) (“The net impact of these [domestic] studies is to contradict the assertion that victim compensation programs have important macrolevel ramifications for the criminal justice system.”).

180. Shapland, supra note 34, at 140, 147 (pointing out that victims’ attitudes toward the criminal justice system are affected by the treatment they receive from its personnel, rather than by compensation); Deborah P. Kelly, Victims’ Perceptions of Criminal Justice, 11 PEPP. L. REV. 15, 17–18 (1984) (pointing out that some participation in the trial is what is most likely to make victims participate).


182. See ICC Rules of Procedure and Evidence, supra note 8, R. 89 (providing the opportunity for victims to apply to participate in proceedings). Talk of undeserving victims might conceivably one day be used to exclude those that were obstructionist in the proceedings, but there is no suggestion at this stage that this will be the case.

“crime prevention,” almost an auxiliary to the criminal justice system. A compensated victim is less likely to take justice in her own hands, or at least to seek alternative modes of justice. Ferri has already cautioned against the “law itself becom[ing] the breeding ground of personal revenge” if nothing is done for victims to break cycles of violence.

These arguments may, in fact, be more relevant in the sort of perilous transitional contexts that the ICC deals with than they ever were domestically. Domestically, after all, this idea that victim compensation will prevent mob justice is something of a fiction; for many centuries victims did not receive any compensation from the state, yet only in exceptional circumstances did they resort to extreme measures. In complex and volatile transitional contexts, however, the opposite may be true, and the temptation to take justice into one’s own hands is ever present, as shown by episodes of brutal transition involving summary executions and savage épuration. In this context, the TFV might be properly viewed as an institution devoted to the process of normalization of societies after atrocities by addressing needs of victims and ensuring that the system is not letting them down. Indeed, one might argue that in transitional contexts, criminal justice is never just pursued for its own sake, and its success is necessarily measured by how it helps to accomplish peaceful transitions. Victim compensation, then, might be seen as a prolongation of criminal justice, allowing it to truly deliver on its promise of pacification. For example, upon announcing a donation of 500,000 Euros by his government to the TFV, the Danish ambassador emphasized that:

[H]elp[ing] the victims of these crimes regain their dignity and enable them to return to a normal life . . . is an absolutely necessary element in ending a conflict and reconciling the different sides without which conflict will soon erupt again. In this way the Trust Fund for Victims, as a part of the overall framework of the ICC, complements the judicial

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186. Enrico Ferri, The Positive School of Criminology 106 (Ernest Untermann, trans., 1913).
activities of the Court and plays a very important role in ending impunity and preventing the most serious crimes.\textsuperscript{188}

Another interesting view on domestic compensation schemes emanating from a law and economics angle is that “if we make the government responsible for the losses incurred by victims of crime, the government will then have an incentive to make communities safer for its citizens.”\textsuperscript{189} The criminal justice system, albeit nominally in charge, is always a little suspect of wanting to combat crime “on the cheap.” In other words, the system never fully internalizes the overall cost of crime and is happy to leave its personal costs to victims, absorbing only a fraction of its overall social cost (the judicial trial and punishment). As a result, the state ends up treating the problem of victim harm as an unfortunate private one beyond its reach; the cost of crime is “dumped” on private citizens that end up indirectly subsidizing the state. Conversely, as one author pointed out in the 1950’s, if Margery Fry’s scheme was transposed to the US, social compensation of victims would cost “$20,000,000,000, or about seven percent of the national income of the United States”—surely an amount that would strikingly convey the actual cost of crime.\textsuperscript{190} In this interesting twist, it is not the victim/witness that is made to pay attention to the benefits of the criminal justice system, but the system itself which is forced to take into account the real cost of crime. There is probably some sense in suggesting that if the true cost of international crimes were to be factored into international policy (and at least the emphasis on the TFV supplementing reparation orders suggests this sort of direction), then it might create some renewed awareness by the international community of what is at stake and the urgency of bringing it to an end.\textsuperscript{191} However, in practice this is very theoretical since contributions to the fund are voluntary and donors can effectively refuse to shoulder the full cost of crime and still bask in the relative generosity of their donations.

The third and more sophisticated line of domestic arguments about what can be achieved through compensation emphasizes the extent to which crime “ruptures” faith in the institutions of the state, the law, and

\begin{footnotes}
\item [189] Smith, supra note 140, at 68.
\item [191] Interestingly, genocide prevention is sometimes discussed in terms of creating prohibitive costs to the use of genocide as a policy tool. \textit{See generally} Samantha Power, \textit{Raising the Cost of Genocide}, DISSENT, Spring 2002, at 85.
\end{footnotes}
society. Crime provokes alienation and undermines public trust. The rationale for providing either assistance or a complement to reparation, then, is to encourage respect for and trust in the criminal justice system and, additionally, in the institutions of the state. Crime, quite literally, shatters the bonds of society. As David Miers puts it, “to experience crime is to experience a failure in civic trust; that is, in the trust that citizens have (and are encouraged to have) in the capacity of the criminal justice system to protect them.” To the extent that crime is typically associated with a breakdown of society’s structures, the solidarity expressed through victim compensation schemes serves to reinstate society as organized, caring, and responsible. “Civic trust” in this context “may be thought to require that the law ought not only show a concern for the victim’s injury but also take concrete measures to restore the harm done to public trust and confidence.” The civic trust argument provides a justification for “special treatment” of victims by the state in that “unlike other forms of hardship such as those caused by road accidents, industrial accidents and diseases, congenital disabilities, or even another’s negligence, crime victims have, stereotypically, suffered injuries that were inflicted ‘deliberately,’ or more precisely, intentionally or recklessly.” This focus on victims as “the target of another’s ill-will and not just of another’s inadvertence” is what justifies state intervention to remedy a fundamental breach of trust in the institutions of society.

The last ulterior goal of setting up compensation schemes is less intuitive in the international context compared to the domestic setting, but it does yield some interesting suggestions. The starting point, one might argue, is startlingly different from the domestic setting in that the international community is in many ways marked by abysmal levels of civic trust. It is probably fair to say that after the failure to bomb the


194. Id.

195. Id.

196. Id.

197. Domestically, however, the theory has been challenged in practice on the grounds that victim compensation may have exactly the opposite effect and, in that it is “an admission of hopelessness and helplessness on the part of the authorities regarding their ability to protect citizens[,] . . . may contribute to social malaise.” Edelhertz & Geis, supra note 29, at 6.

Auschwitz railroad, the pulling out of UNAMIR in Rwanda, or UN peacekeepers helping Mladic sort out able men from the rest of the population in Srebrenica, victims’ expectations of the international community are rather low. Ad hoc international criminal tribunals, from Nuremberg to the Hague, have probably not made very good impressions on most victims.\textsuperscript{199} International society, one might argue, suffers chronically, not so much from a rupture of faith in its judicial institutions as from a permanent crisis of trust in them. Still, there is no doubt that international crimes have often left victims even further alienated from and profoundly disillusioned with the international society, more so probably than is the case domestically. The Inter-American Court of Human Rights (“IACHR”) emphasized that grave human rights violations are not like an ordinary tort in that they fundamentally alter a person’s belief in the possibility of a secure life.\textsuperscript{200} The fact that levels of international civic trust are generally low, then, militates in favor of trying to restore confidence in international institutions and the rule of law, and victim compensation can be a part of this process.

Finally, there is also a sense in which compensation in the context of atrocity serves a broader role that it need not serve domestically. Domestically, compensation has the goal of averting the alienation of victims but, aside from maintaining a certain public confidence in the notion of a just society, it is in no way meant to more generally reconstruct or mend societies from the ground up. Conversely, international compensation arguably has such a role in that it is more broadly about building the foundations of a lasting peace, based on the integrity of victims and the rule of law.\textsuperscript{201} TFV authorities are clearly quite aware that they are also, in assisting victims, striving towards this more long-term goal. The Fund’s draft strategic plan specifically emphasizes that “[t]he interna-


\textsuperscript{200} In the \textit{Loayza Tamayo v. Peru (Reparations)} decision, the IACHR pointed out that the very existence and conditions of the life of a person are altered by unfairly and arbitrarily imposed official actions taken in violation of existing norms and of the trust that is placed in the hands of public power, whose duty is to protect and provide security in order for individuals to exercise their rights and satisfy their legitimate personal interests. Loayza Tamayo v. Peru, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 150 (Nov. 27, 1998), available at http://www1.umn.edu/humanrts/iachr/C/42-ing.html.

tional community can and must help [victims] to consolidate peace, ensure justice and overcome the legacies of war.”

There is a sense that consequentialist rationales account for part of the existence of the TFV, but their normative status is open to question. Even though the TFV may achieve some or all of these goals, chances are that it will do so indirectly without specifically intending to. In other words, some of the results indicated above are results that would flow naturally from most dynamic compensation policies and that cannot be directly engineered. There is not much evidence that these rationales featured prominently when victim compensation was discussed in Rome and beyond, largely because reparations discourse dominated, emphasizing issues of principle rather than consequence. Consequentialist reasoning also does not help us much to understand the type of compensation that the Fund should engage in. It remains difficult, in fact, to envisage the TFV’s role in exclusively consequentialist, “spill-over” terms. If that were its fundamental rationale, then any number of alternative mechanisms might be up to the task and perhaps better suited to it. For example, reparations and assistance might be delegated to truth and reconciliation mechanisms that would have a more explicit mandates to facilitate transition. The TFV still needs to be able to make a claim that it will execute its functions better than these competing programs or mechanisms.

D. Practical Rationale: the TFV as a Substitute to Other Mechanisms

A fourth type of justification for domestic victim compensation schemes emphasizes the extent to which they are essentially filling a void and replacing faulty or insufficient alternatives. These arguments, which are often joined with others explored in this Article, are practical in that they do not deduce the need for compensation schemes from any principled higher ground. Rather, assuming the need for some sort of compensation, they point out the optimality of a socialized scheme given the dearth of alternatives. As previously mentioned, victim compensation schemes, almost by definition, aim to provide an answer to the limitations of the criminal-reparatory system in cases where the accused either cannot be apprehended or are insolvent. The case that still needs to be made is the extent to which compensation schemes also replace or complement other mechanisms that might conceivably step in to assist victims.

202. GLOBAL STRATEGIC PLAN, supra note 7, at 13.

Domestically, the classic argument is that compensation schemes are a substitute to two possible alternatives: insurance and torts. The first issue, insurance, might seem of largely theoretical interest in the international context, were the argument not made so strongly domestically. The idea is that the state, in providing victim compensation, substitutes for the absence or failure of insurance mechanisms when it comes to violent crime, for which specific insurance may not be available or accessible to everyone given its high cost. Even if insurance is theoretically available, the “argument is that the risk of injury from criminal attack is so remote that it would be impractical to insure against that risk.” Moreover, the fact that one may insure oneself against being a victim of crime but not against being guilty of one, limits, in contrast to civil liability, the extent to which economically optimal insurance schemes can be put in place.

One might thus analyze compensation schemes as a form of government intervention in a dysfunctional insurance market. Insurers have occasionally been required to form “risk pools” to guarantee against such events as terrorist attacks, for which ordinary insurance schemes may be of limited utility. The argument draws on the theory of “market failures”—9/11 provides the starkest example to date—to suggest that the state should intervene in cases where the market will not, of itself, provide adequate mechanisms. In cases of major catastrophes, the government will act as a reinsurer of risk through public-private partnerships that minimize the risk of default. In fact, victim compensation will sometimes be loosely referred to as “crime insurance” (although not

204. See Schafer, supra note 123, at 243 (“Present schemes are little more than tort (or insurance) law propositions placed into a criminal law environment.”).
206. ATIYAH & CANE, supra note 13, at 254.
207. Rianne Letschert & Karin Ammerlaan, Compensation and Reparation for Victims of Terrorism, in Assisting Victims of Terrorism 215, 249–50 (Rianne Letschert et al. eds., 2010); see generally Jeffrey Manns, Insuring Against Terror? 112 YALE L. J. 2509 (2003) (examining the Terrorism Risk Insurance Act and arguing that a strong economic argument can be made for this type of government intervention).
quite adequately, since it is not typically financed by specific individual contributions as much as general taxation, and the sums awarded will often not match what might have been obtained under insurance policies had they existed.  

When it comes to international crimes, insurance failure seems largely inadequate to rationalize the TFV. This is not only because there is a dearth of insurance (there will indeed most often be none at all) but that the TFV is not a substitute to a system that has failed, as much as its own, *sui generis* source of compensation. It may, in fact, be next to impossible to insure oneself against mass crimes in the first place, as a result, for example, of a quite widespread “war exclusion” in insurance contracts. In many cases, obtaining insurance against the risk of genocide or crimes against humanity might be the equivalent of obtaining a health insurance policy as one is showing the first signs of cancer. The outcome is that, as is the case domestically, those most likely to need crime insurance and least able to afford it will be those for whom it will be most expensive. Perhaps some states could, in theory, insure themselves and their population against the consequences of international crimes, although probably not many of those where mass crimes are likely to be committed will do so. Making insurance compulsory, moreover, does not seem like an option because the international community is obviously in no position to require it. There may also be something morally awkward about insuring or being made to insure oneself against genocide or crimes against humanity in the same way one might be expected to ensure oneself against car accidents, loss of work, or ill health (especially if the state is insuring itself). Asking individuals to insure themselves

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211. The absence of insurance, private or social, against crime in many countries has been emphasized as an element increasing the costs of victimization and the justifiability of an organ like the TFV. Jo-Anne Wemmers, *Reparation and the International Criminal Court: Meeting the Needs of Victims* 12 (2006).


213. Sidney I. Simon, *The Dilemma of War and Military Exclusion Clauses in Insurance Contracts*, 19 AM. BUS. L.J. 31, 31 (1981). I leave aside the issue of whether the crimes entering the ICC’s jurisdiction would fall under such a war exclusion, but it seems likely since most atrocities that the ICC will deal with will have some armed conflict element. The same issue typically affects victims of acts of terrorism, providing an interesting analogy for victims of other international crimes. See generally Daniel James Everett, *The “War” on Terrorism: Do War Exclusions Prevent Insurance Coverage for Losses Due to Acts of Terrorism*, 54 ALA. L. REV. 175 (2002).
against crime (even on a subsidized basis) might suggest a “normalization” of crime and even that the State has given up on preventing it (or that society has given up on the State).214

A second practical justification of victim schemes, which is more appealing in the international context, is that they are an alternative to civil remedies, which victims might otherwise have to seek and which are either unavailable, very hard to pursue, or generally inadequate to the needs of victims.215 In practice there is much evidence that victims of crime often never seek tortious remedies.216 The fundamental logic behind a scheme such as the UK victim compensation scheme, for example, is to “meet the gap between the ‘ideal world’ in which “it should be the offender who compensates the victim” and the “reality of the victim’s theoretical civil remedy.”217 Indeed, there seems to be almost universal agreement about the difficulty of collecting civil reparations in cases of crimes, for essentially the same reason that there is skepticism about the criminal system obtaining reparations from the convicted.218 The tendency to move beyond torts altogether through mechanisms “socializing responsibility” is one that has been considered seriously in limited areas, such as medical malpractice, environmental pollution, or automobile accidents.219

215. Ironically, it is the availability of these tort remedies that has often served as a justification for ignoring the needs of victims as part of the criminal justice process. See L. Shaskolsky Sheleff, Main Paper, The Victim of Crime, 1975 ACTA JURIDICA 192, 194 (1975).
217. Miers, Looking Beyond Great Britain, supra note 193, at 339.
218. See Allen M. Linden, Victims of Crime and the Tort Law, 12 CAN.B.J. 17, 17, 20–22 (1969); James Brooks, The Case for Creating Compensation Programs to Aid Victims of Violent Crimes, 11 TULSA L.J. 477, 492–94 (1976). If the convicted person is impecunious, there will be no more prospect of obtaining reparations from him in tort than there was as a result of a criminal conviction. In addition, in many countries fines take precedence over civil awards, so that the State stands a better chance of collecting money than victims do of collecting compensation.
Civil remedies are of little use when those responsible are either unknown or un-apprehended, as will frequently be the case. Moreover, many victims may simply be discouraged by the prospect of pursuing civil remedies (particularly because of costs), although such a problem is attenuated in jurisdictions that allow the possibility of victim participation in criminal proceedings (e.g., the institution of parties civiles in some continental-European legal systems) or where a criminal verdict binds civil jurisdictions. Compensation schemes are, thus, sometimes presented as expedients that save victims from the cost and effort of civil proceedings. In fact, opting into these schemes may render victims ineligible to sue those they consider responsible, as is the case under the Air Transportation Safety and System Stabilization Act. In cases where the victims choose to forgo suit in order to benefit from compensation, the public authority will then be subrogated to the rights of the victim against the perpetrator, thus ensuring that the victim does not doubly recover. These sorts of schemes fall under the “offender surrogate model” in that the state essentially pays the reparation that the convicted person might otherwise pay. Indeed, until 1996 the amount that one could claim under the British scheme used to be calculated on the basis of what one would have received in a successful civil action against the offender. Claims that one is the victim of a crime generally have to be proved on a balance or preponderance of probabilities, the civil stan-


221. The principle “le penal tient le civil en l’état” (criminal decisions bind civil courts) is well known in French law, but the common law often adopts the opposite view, requiring victims to sue in tort for the same acts for which someone has already been convicted.

222. A.T.S.S.S.A., supra note 56, § 405(c)(3)(B). In some cases the opposite may be true, in that victims may be encouraged to use some of the public compensation money they are awarded to press claims. However, this depends on whether the compensation was granted as substitute reparation or assistance, a distinction discussed at length in the following Sections of this Article.

223. Galaway & Rutman, supra note 4, at 70.

224. Miers, supra note 193.

In some cases the state or an agency in its name will seek to recover the expenses incurred from the convicted, for example in Florida and Illinois.

Nonetheless, even domestically the “compensation as substitute to tort” argument is not very convincing. Reluctance to engage in civil suits is a general problem (i.e., even outside situations of crime) that does not normally militate in favor of the state simply replacing private litigants. One still needs to explain why victims of certain torts should be treated differently, merely because these torts also happen to be crimes. There are plenty of social harms for which society offers no compensation, leaving it entirely to victims to shoulder the cost of either litigation in torts or the cost of the harm when legal redress is not possible. If anything, moving to a “no-fault” compensation scheme in case of crime is less likely than for other ordinary social harms, given the extent to which crime seems predicated on fault, a point that risks being lost when the state decides to shoulder a significant part of the harm.

On the other hand, looking at the experience and limitations of domestic and transnational litigation, one can see the merit of the “civil litigation alternative” in the international context. The international system is one where civil remedies hardly exist, especially if they are not available in the forum where the crimes were committed. The Alien Tort Claims Act (“ATCA”) is the only remedy of its kind internationally, allowing victims of violations of international law to seek compensation in the US regardless of where the harm was incurred. The number of victims of atrocities, at any rate, makes transnational civil remedies a very costly and long process to obtain reparations and has, in practice, raised all kinds of collective action problems. Maybe the exceptional lack of tort

226. Weeks, supra note 33, at 113; Garkawe, Enhancing the Role and Rights of Crime Victims in the South African Justice System—An Australian Perspective, supra note 183, at 139.
228. Atiyah & Cane, supra note 13, at 254. (“The [S]tate accepts no general obligation to make good the lack of a defendant worth suing.”).
remedies is an argument for the TFV, as a sort of substitute to protracted ATCA-type litigation or various other mass claims.231

But there is little evidence that the TFV will act as a substitute to non-existent tort remedies, or that it will be operating under the “offender surrogate model.” To do so, it would need to commit to systematically “complement” insufficient reparations by the convicted, something which at present does not seem likely.232 It is certainly not anticipated that the TFV will exercise any sort of subrogation rights against either the accused or any other entity (such as the state that committed the crimes) to recoup the sums expended in favor of victims. Nor is there any suggestion that the TFV contributing to reparation might disqualify victims from suing responsible parties, especially if they are other than the accused.233 Finally, the point remains that it is not obvious why the international community should fund compensation as an alternative to civil litigation, simply because civil litigation is complicated. Domestically, the argument might be that the state is answerable for some of the deficiencies and limitations of its own judicial system (so that compensation schemes are a way of correcting the inadequacy of civil remedies for a particular kind of “meritorious” victims). But this reasoning is harder to sustain internationally because the “international community” does not have a civil law system of its own and it is effectively relying on states’ judicial systems.

All of these arguments as to how victim schemes might act as a complement or substitute to alternative mechanisms help explain the environment domestically and internationally. However, that explanation is not entirely conclusive. The fact that neither insurance, nor tortious responsibility, nor state programs will be present or sufficient is certainly an argument for why the TFV, in most cases, will not be duplicating existing initiatives; but it does not explain why the “international community” should fundamentally assume the cost of the externalization of victim harm, nor does it tell us much about how it should do so, and according to what logic. The simple availability of funds and willingness of the “international community” to give is obviously something that makes the

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232. The Court is trying to push in that direction, but the TFV seems keen on using its own resources for assistance projects “here and now” for the greater number, rather than to “top” compensation for relatively smaller numbers in the future.

233. Although conceivably problems may arise if some victims have been very successful in obtaining awards before civil courts, given the limited resources of the TFV.
scheme conceivable, but not a very satisfactory answer as to why it exists in the form that it does.

E. Legal Rationale: The TFV as an Admission of Responsibility

Among the arguments militating in favor of the creation of victim compensation schemes domestically, some are clearly more law-oriented and suggest that victim compensation is based on, or at least owed, in cases where the public authorities have, or would have, incurred liability. Jeremy Bentham, one of the first persons to suggest the creation of victim compensation schemes, suggested that the state should compensate victims whenever “evils result[ed] from unintentional mistakes of the ministers of justice,” or in other words, when they acted negligently. In that case, Bentham argued:

[O]ught not the public to follow the same rules of equity which it imposes upon individuals? Is it not an odious thing that the government should exert its power to exact severely all that is due to it, and should avail itself of the same means to refuse the payment of its own debts?

This is clearly not as radical a concept now as it was when first suggested by Bentham. The basis, then, might be a form of liability for negligence. The state, in compensating victims, would be more or less formally acknowledging its status as a “tortfeasor where its negligence in preventing criminal activity causes citizens to be injured.” There have long been attempts in certain countries, despite doctrines of sovereign immunity, to bring cases against the authorities as “secondary tortfeasors” for failure to offer reasonable protection, at least in cases where the occurrence of crime is specifically tied to a police failure.

234. BENTHAM, THEORY OF LEGISLATION, supra note 146, at 320.
235. Id. at 321.
236. Miers, Looking Beyond Great Britain, supra note 193, at 339.
239. See generally Michael S. Vaughn, Police Civil Liability for Abandonment in High Crime Areas and Other High Risk Situations, 22 J. CRIM. JUST. 407 (1994); Laura S. Harper, Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After Deshaney v. Winnibago County Department of Social Services, 75 CORNELL L. REV. 1392 (1990); Elizabeth Handsley, Suits Against the Police for Failure to Protect Victims of Violent Crime: A Feminist Perspective on the Use of Dichotomies, 26 ANGLO-AM. L. REV. 37 (1997); Joseph M. Pellicciotti, Police Civil Liability for Failure to Protect: The Public Duty Doctrine Revisited, 8 AM. J. POLICE 37 (1989); Gerald P. Krause, Comment,
trend has only been reinforced in recent years by human rights discourse and is much more familiar to continental systems of law than to common law systems. Some have linked it explicitly to the emergence of victim compensation schemes.

However, when providing compensation schemes, most states do not view the program as preemptive of potential cases that might be brought against them, for example, pursuant to administrative law. Compensation funds typically do not have a mandate to examine the record of states’ behavior, even though dismal levels of protection of individuals may influence the amount of compensation given. There have been few suggestions that compensation schemes involve any change to doctrines of sovereign immunity. If there is to be a strong legal obligation to compensate, it seems, it will be only of the sort that states have assumed as a matter of political choice, rather than one that flows from recognition of responsibility. States will thus grant compensation even in cases where they are not at fault, and they will also resist attempts to specifically tie disbursements to a finding of fault. In fact, in some cases, victim schemes involve an explicit bypassing of the idea of state responsibility altogether: victims are often offered a quick settlement in exchange for waiving any attempt to sue the state or, indeed, a number of private third parties.


241. See Joan M. Covey, Alternatives to a Compensation Plan for Victims of Physical Violence, 69 DICK. L. REV. 391, 392–94, 404–05 (1965) (discussing municipal liability as one example of poor redress to victims and advocating state compensation programs as an alternative).

242. All compensation schemes, it seems, are based on a rejection of any strict state liability theory. See Brock, supra note 147, at 98, 113.


244. For example, by proclaiming a strong victims’ rights statute.

245. DAVID MIERS, STATE COMPENSATION FOR CRIMINAL INJURIES 4–7 (1997).

246. See, e.g., A.T.S.S.S.A., supra note 56, § 405. This is not to say that such an outcome is necessarily optimal from the viewpoint of the victims themselves. See, e.g., Gillian K. Hadfield, Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund, 42 LAW & SOC’Y REV. 645 (2008) (noting that
Responsibility in any strict sense is also largely unrelated to the TFV’s efforts. It is true that the failure by the international community to prevent genocide or crimes against humanity comes closest to the few traditionally actionable torts on a domestic level that involve the state in the field of protection from crime\footnote{\textit{See, e.g.}, Robert S. Ondrovic, \textit{Municipal Tort Liability for Criminal Attacks Against Passengers on Mass Transportation}, 12 \textit{Fordham Urb. L.J.} 325 (1984).} (such as failure to prevent a civil riot).\footnote{\textit{See generally} Susan S. Kuo, \textit{Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence}, 79 \textit{Ind. L.J.} 177 (2004).} Nonetheless, there is not a trace in the ICC/TFV regime of linking compensation to some sort of “international community responsibility” for failure to prevent international crimes. NGOs have cautioned against linking compensation to the notion of responsibility, out of fear that the latter may be hard to establish or perpetually unclear following mass atrocities.\footnote{SULIMAN BALDO & LISA MAGARRELL, \textit{Int’l Ctr. for Transitional Justice, Reparation and the Darfur Peace Process: Ensuring Victims’ Rights} 15 (2007), available at \url{http://www.ictj.org/images/content/8/8/886.pdf}.} This should not come as a surprise: the international community is merely a conceit, it does not have a legal personality, and it would probably benefit from a host of immunities if it did.\footnote{Although attempts to “sue” the international community via some of its representatives have existed, in a register that is perhaps closer to political agitation than serious litigation. \textit{See generally} OLIVIER RUSSBACH, \textit{ONU CONTRE ONU: LE DROIT INTERNATIONAL CONFISQUE} (1994).} If anything, the ICC and the TFV are generally represented by their supporters as heroic attempts to fly to the rescue of victims, not acts of penitent contrition by the international community for its faults in allowing victims to become victims.

Nor is there any suggestion that the TFV might have as one of its bases the liability of some states for failure to prevent international crimes. It is true that the idea of the “responsibility to protect” in international human rights law now increasingly makes states responsible not only for the acts of previous governments, but also for the harm inflicted by non-state actors which they failed to prevent.\footnote{For an application in the case of Sudan, see BALDO & MAGARRELL, \textit{supra} note 249, at 12–14.} The drafters of the Rome Statute swiftly excluded proposals that would have tied the TFV to findings of state responsibility,\footnote{SHELTON & INGADOTTIR, \textit{supra} note 16, at 26 n.32; Michael Bachrach, \textit{The Protection and Rights of Victims Under International Criminal Law}, 34 \textit{Int’l L.} 7, 18 (2000).} and there is at present no clear indication that
states should “assume any shortfall if perpetrators are insolvent.” The operation of the Court itself is entirely bound to the notion of individual criminal responsibility, and no link is anticipated with an institution of state responsibility such as the ICJ. The TFV clearly has no power to order states to pay compensation, and it is hard to see how “voluntary contributions” by such states to the TFV could be seen as an admission of responsibility unless—which is highly unlikely—a state were to explicitly say as much. In practice, were there to be suggestions that voluntary contributions are a back door to responsibility, states would probably do everything they could to dispel that idea. This, of course, does not exclude state or even international institutions’ responsibility, but these will have to be sought in other fora, and are distinct from what the Rome institutions are about.

If the issue were one of responsibility, the international community would most likely direct attention away from itself and towards the state that either committed international crimes or allowed them to be committed. In fact, it is already quite clear that responsibility has no more real role to play in compensation internationally than it did domestically. The ICC/TFV regime might even limit victim actions in responsibility (under tort, administrative, or international law) by providing them with enough compensation to take their attention away from the responsible state. What is striking is how small a role strictly legal principles seem to play in the genesis and functioning of the TFV.

F. Rights Rationale: The TFV and the Right to Reparation and/or Assistance

An alternative to seeing victim compensation based on some form of even implicit negligence liability is to see it as flowing from a “right,” even a human right. The reasoning is that regardless of fault, the state should act as the ultimate guarantor of a victim’s right to compensation. The focus is not on liability and the very complex problems it raises, but on the harm and the absolute need for some sort of remedy. The beauty of rights reasoning, therefore, is that it may open the way to an absolute

254. There is no provision in the Rome Statute that would allow the Court to discuss state responsibility for the crimes involved, even though dealing with former heads of state may indirectly have that effect.
255. If victims obtain a satisfying level of compensation from the TFV, one might expect that this would relieve some of the pressure bearing on the state, a somewhat strange situation given the statute’s position in favor of complementarity.
responsibility of the state (or whatever state substitute) to either guarantee reparations or provide assistance, whilst avoiding complex and politically sensitive issues of liability. Margery Fry notably relied on rights arguments to justify the implementation of victim compensation programs. Some scholars have argued that a “justice model,” emphasizing victims’ rights to compensation, is preferable to the voluntary “needs-based” approach. There is occasional talk of a “right not to be a victim,” and rights discourse has had powerful effect in shaping the political side of victims’ efforts at recognition.

Some jurisdictions—New Zealand and Northern Ireland, for instance—have compensation schemes that recognize a duty to compensate victims based on a victim’s rights. Some also argue that New Jersey, because of its Crime Victims Bill of Rights, is the state that comes closest to recognizing a right to a remedy against the state for the commission of crimes. Courts occasionally recognize that the fact that the

256. Fry, supra note 32, at 193–94.
state offers compensation creates a right to such compensation for victims who fit the criteria.\footnote{262}{Criminal Injuries Comp. Bd. v. Gould, 331 A.2d 55, 71 (Md. 1975); Elias, \textit{The Symbolic Politics of Victim Compensation}, \textit{supra} note 159, at 217, 220.} Moreover, some US states, such as Hawaii, anticipate an annual appropriation for awards already made, which again suggests something close to a guarantee.\footnote{263}{\textit{HAW. REV. STAT.} \textsection 351–70 (2010).} The fact that in some jurisdictions victim compensation schemes are administered by courts (e.g., Northern Ireland, Massachusetts, New South Wales, and Queensland), also reinforces the sense that public compensation is, by nature, an entitlement.\footnote{264}{See Duncan Chappell, \textit{The Emergence of Australian Schemes to Compensate Victims of Crime}, 43 \textit{S. CAL. REV.} 69, 69 (1970) (noting that at the time, New South Wales and Queensland were the only compensation jurisdictions with provisions for court administration).}

However, overall, rights-based approaches have not fared very well domestically and are considered to generally offer a poor rationale for compensation schemes.\footnote{265}{Smith, \textit{supra} note 140, at 63 ("Very few [American] states have adopted the rights theory as the basis of their compensation scheme. . . . [Perhaps] because the adoption of a rights theory as a rationale for a victim compensation program would not allow for the realities of implementing such a program."); Chappell, \textit{supra} note 264, at 76–82 (exploring critiques of the Australian rights-based compensation schemes).} As Kent Roach put it, rights discourse has been used “as both a rhetorical and a legal device,” but “the assertion of rights is not the whole or perhaps the most important part of recognizing and respecting crime victims.”\footnote{266}{KENT ROACH, \textit{DUE PROCESS AND VICTIMS’ RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE} 231 (1999).} States are often fearful of opening the floodgates and resist attempts to legally rigidify the grounds of compensation.\footnote{267}{Smith, \textit{supra} note 140, at 63.} Moreover, strong fears have been expressed, more generally, about framing the position of victims in the criminal justice system as one of rights,\footnote{268}{See Andrew J. Karmen, \textit{Who’s Against Victims’ Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice}, 8 \textit{ST. JOHN’S J. LEGAL COMMENT} 157 (1992) (examining the bases for opposition to a rights-based victims movement); Rachel King, \textit{Why a Victims’ Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims}, 68 \textit{U. CIN. L. REV.} 357 (2000) (arguing that a federal Victims’ Rights Amendment would be a step down a slippery slope back toward a system dominated by personal vengeance); Robert P. Mosteller, \textit{The Unnecessary Victims’ Rights Amendment}, 1999 \textit{UTAH L. REV.} 443 (1999) (arguing that a federal Victims’ Rights Amendment is both unnecessary and dangerous to essential procedural protections for defendants); Robert P. Mosteller & H. J. Powell, \textit{With Disdain For The Constitutional Craft: The Proposed Victims’ Rights Amendment}, 78 \textit{N.C. L. REV.} 371 (2000) (arguing that the federal Victims’ Rights Amendment is a poorly developed measure not worthy of}
is understood. “Assistance” is even less susceptible to analysis in terms of rights, although it is not inconceivable that some victims would come to see it as such.

Internationally, the situation, or at least the normative starting point, is different and, perhaps a little paradoxically, more dominated by notions of rights. This is because of the way in which the international victims’ regime was constructed: not so much as a prudent move towards recognizing the legitimacy of certain legislative claims based on available resources, as a full-blown trumpeting of a “right to reparation,” especially in cases of grave human rights violations (which international crimes generally entail). The UN, in particular, laid the groundwork for a strong international regime, recognizing a right to an effective remedy. One of the corollaries of such a right, outlined in several key UN soft law instruments, is an increasingly recognized right to reparation.

The question is, of course, who is to be the guarantor of that right to reparation? In a sense, it was relatively easy for international institutions to encourage the logic of a “right to reparation” since the duty to com-

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270. In this context “international victims’ regime” is meant to refer not only to victims of international crimes but also to victims of ordinary crimes and of human rights violations. See infra note 272.


pensate is assumed primarily by the state. However, proclaiming a right to reparation might also bind the international community when it creates its own institutions of international criminal justice, especially when the state most directly concerned defaults on its obligation. In the context of international criminal justice, if the convicted individual cannot pay the ordered reparation, a glaring gap appears that in theory, should be filled by the state that was involved in or tolerated the crimes. The problem is that the state is often not willing or able to prosecute the person in the first place, and is probably therefore also unwilling or unable to pay reparation to victims.273 Perhaps, having proclaimed reparation as a human right and set up an institution such as the Court that magnifies a sense of entitlement to reparation and assistance, pressure will come to bear on the state parties to the Rome Statute to guarantee that the right to reparation is not turned into a mockery by the cumulative indigence of defendants and unwillingness of the state concerned. At any rate, it may be difficult for an international institution like the TFV, which is immersed in all the best intentions of international law, to claim that it has no role in guaranteeing an internationally protected right.

The idea of the “international community” acting as a “super-guarantor” of a right to reparation, in the same way some domestic victim compensation schemes were originally conceived, is interesting but hardly the most plausible way to describe the TFV’s role. It is true that the TFV has provisioned money to complement reparations made by the convicted in order to respond to the full amount of the harm suffered by victims,274 in accordance with emerging ICC priorities. However, as has been pointed out, it is also difficult to see what the TFV will do if reparations are ordered which go far beyond monies provisioned for that purpose, or even beyond its budget. If the TFV does not consider itself bound to provide compensation on the basis of reparation logic, then it is probably even more unlikely that it would be willing to do so merely on the basis of rights. The argument in that case would probably be that the right should be exercised against the state normally responsible for guaranteeing rights. The idea that assistance, as opposed to reparation, might be a matter of right is even less convincing, especially given the absence of any recourse to victims if such assistance is denied. There is something too discretionary about the operation of the TFV to see it as a strictly rights-based institution.

273. On the rather perverse logic of relying on the state to effect compensation when the whole point of international criminal justice is that the state is not fulfilling its role, see Dannenbaum, supra note 18, at 295–96.

274. See supra note 94.
G. Political Theory Rationale: The TFV as Honoring a Social Contract

Given the failure, or at least the severe limitations, of a legal responsibility or rights-based theory of publicly funded compensation schemes, more general theoretical grounds for compensation have been sought. The advantage of seeking a ground for the obligation that is more abstract in nature is that it avoids the legal pitfalls inherent in framing the issue as one of responsibility or right. One common justification of this sort relies on social contract theory and the idea that the state, having bound itself to guarantee security within its borders, is liable for any breach of that contract.275 Given that “the king usurped the right of the citizen to restore equilibrium after a crime had been committed,”276 the state should endorse that responsibility to the fullest extent. The idea of the social contract as a foundation for security against crime is not purely theoretical since, for example, citizens pay taxes which in part go to essential aspects of fulfilling this contract, such as law enforcement.

It follows that the state should shoulder the costs of crime, regardless of whether actual negligence by it or its agents was involved, simply by virtue of having usurped alternative means of dealing with crime.277 Another way of looking at it is that the right to compensation, if it exists, results from a strong representation by the state about its ability to provide security. “After all,” suggests Margery Fry, “the State which forbids our going armed in self-defence cannot disown all responsibility for its occasional failure to protect.”278 The idea is that the state is liable for all its failures to provide security because otherwise, citizens might be better served by seeking justice themselves. It is perhaps no surprise that amongst the most enthusiastic defenders of victim compensation were nineteenth century Italian criminologists, who were little impressed by the emerging Italian state’s ability to protect society from crime.279

The argument is made more potent by the fact that provision of security against interpersonal violence goes to the heart of the state’s traditional significance. For example, the state is obviously not guaranteeing people against earthquakes or even against all forms of private criminality, but it might at the minimum be able to protect them against particular-

275. Childres, supra note 25, at 456; Hudson, supra note 110, at 31–32.
278. Fry, supra note 32, at 193.
279. See supra note 27 and accompanying text.
ly rampant forms of crime. This is because the state, having claimed a legitimate monopoly of the means to deal with violence, is in a sense always broadly “responsible,” even if by omission, for the occurrence of crime. For example, in the US context, Childres has pointed out as a justification for compensation schemes, “the remarkable unresponsiveness of American institutions to the causes of crime, whether they be minority group ghettos, other slums, dope-addiction, organized crime, or an irrational tradition of violence.” The move, for the purposes of compensation, to a notion of absolute liability for the occurrence of crimes in some contexts also suggests that one has moved away from a traditional liability model to the triggering of a sort of “guarantee.”

The European Convention on the Compensation of Victims of Violent Crimes, for example, introduces “the principle of State responsibility for crime” as one of its cornerstones, suggesting that “the State is bound to compensate the victim because . . . it has failed to prevent the crime by means of effective criminal policy” or “it introduced criminal policy measures which have failed.”

It should be noted that these arguments have been criticized as not necessarily implying anything like a right to remedy. As David Miers puts it, “[a]llowing that the state has an obligation to protect its citizens says no more than that it should provide a fair share of what might reasonably be allocated to such public goods . . . as law enforcement.” Moreover, one might make the argument that absolute liability goes too far and that the obligation can only be one of means (doing everything reasonably possible) and not one of result (guaranteeing that no crime is committed). In other words, the mere occurrence of crime does not imply a violation of the State’s basic duties in the absence of some significant shortcoming.

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283. For a discussion of several regimes making public authorities liable for crime and the link to victim compensation, see Aynes, supra note 258, at 110–15.
286. For example, the Home Office Working Party that investigated the creation of a British compensation scheme describes the idea as “a ‘fallacious and dangerous doctrine’ on the grounds that ‘the State could not possibly protect its citizens from attack at all times and all places.’” ATTYAH & CANE, supra note 13, at 253. Similarly, the British
relinquished means of private self-defense, and thus, the state does not particularly owe them anything. Still, broad brush social contractarian arguments in favor of compensation schemes do capture the unique political responsibility of those entities that purport to provide security to others.

Are such theories applicable to the international context and, specifically, that of the Rome institutions’ efforts towards victims? This is a slightly speculative matter, and one that must draw on the registers of both jurisprudence and policy. There is nothing obvious about the idea of an international social contract. One might even want to stay away from the idea as much as possible as smacking too much of the domestic, not to mention the problematic liberal, conceptual baggage. The difference from a domestic social contract argument (if one were to push it a little) is that the international community is obviously not a state and has not “taken over” in terms of security (at least far from comprehensively). Even if one could discern the contours of a theoretical contract (or, perhaps more precisely, a compact), one would still be faced with a distribution of power and responsibility that is much more complicated than the most complex of federal arrangements.

Still, one key element of the idea behind the social contract conceit is that a representation is being made to citizens that certain fundamentally harmful events will not happen, or at least that everything possible will be done to prevent them from happening. There are inklings that suggest the international community has made, over the years, such a representation. In addition to the UN Charter and the Universal Declaration of Human Rights and a resounding “never again” after the Holocaust, most states have made a solemn undertaking to “prevent and to punish” genocide and to “respect and ensure respect” of the Geneva Conventions.
Even if it is not, and does not want to be, a substitute for the state, the “international community” has arguably assumed a role as a last-resort guarantor of human security, especially (if not only) when it comes to international crimes.

This is increasingly evident in such internationally promulgated concepts as the “Responsibility to Protect” (“R2P”). The idea is that human beings’ fundamental security should not depend, ultimately, on the state one happens to be under the jurisdiction of, and that the international system will transcend its own reluctance to intervene in extreme circumstances where not to do so would lead to severe human destruction. The international community came close on several occasions to recognizing a form of systemic and residual responsibility for atrocities that were committed but could have been averted. The case is particularly strong where the general promise to avoid the commission of crimes was renewed to the victims themselves, sometimes on the ground, and where the international community grossly failed those who entrusted their security in its hands. It is made particularly dramatic if the victims, trusting the international community to intervene on their behalf, have relinquished other efforts to protect themselves from harm.

A link, nonetheless, needs to be established between something that the international community did or failed to do and the commission of international crimes. Can the mere occurrence of genocide or war crimes on a mass scale reflect, to use the language of Childres, something like a “remarkable unresponsiveness” by the international community? This is a


295. See, e.g., David Rohde, Endgame: The Betrayal and Fall of Srebrenica, Europe’s Worst Massacre Since World War II 46 (1997) (describing General Morillon’s famous promise to the Bosnians of Srebrenica in 1993 that they were “under the protection of the United Nations” and would “never [be] abandon[ed].”).


complex debate, but there is no doubt that the international community itself is deeply aware of its own limitations and responsibilities in the field of crime prevention\textsuperscript{298} and that genocides have occurred as a result of all sorts of contextual factors for which international criminal tribunals do not begin to do justice.\textsuperscript{299} The international community has, despite progress, failed in its meager efforts at both prevention and repression, and there remains a big gap between the theory and the reality of R2P.

It remains to be seen whether this sense of honoring a commitment to human security—defined minimally here as freedom from the worst type of crimes—will in any way frame contributions to the TFV. For example, if the Assembly of States Parties moved towards a more mandatory form of contribution (such as a fixed percentage of the court budget), then it might be seen as taking a step towards endorsing a notion of international communal responsibility. One can also imagine more subtle scenarios in which the state where the crimes were committed would, in the course of a transition, make a donation to the TFV that could be interpreted as the expression of a “moral obligation to contribute to the reparation of certain crimes” in a situation where it is nonetheless “not legally responsible under the Rome Statute.”\textsuperscript{300}

The truth, though, seems to be that the state parties, not to mention the international community at large, seem far from endorsing a strong commitment to guarantee reparation on the basis of some form of implicit global social contract.\textsuperscript{301} There has been no suggestion that donations should be anything but voluntary. If anything, despite its failings in Con-


\textsuperscript{299} It is quite clear that although no genocide is ever committed without the decisions of a few locally situated individuals, a larger societal and systemic responsibility always exists. For example Srebrenica might be seen mostly as the doings of Karadžić (ICTY), or of Serbia (ICJ), of the Dutch contingent (Dutch parliamentary commission), or of the UN, or of the international community at large.

\textsuperscript{300} SHELTON \& INGADOTTIR, supra note 16, at 19.

\textsuperscript{301} There is an increasing recognition of the international community’s responsibility in ensuring that grave crimes are prosecuted, but this is a sort of functional responsibility rather than one that is based on recognition of the role of the international community in allowing these crimes to happen in the first place.
go, the UN has acted quite defiantly towards the ICC and has not contributed anything to the TFV. The TFV does not, in fact, “guarantee” anything and the belief is that major crimes are committed first and foremost by individuals who are allowed to follow their course by particular states (rogue or collapsed), and the crimes are not the international community’s fault.

H. Humanitarian Rationale: the TFV as a “Public Charity”

Some victim compensation schemes can be seen as manifesting a compassionate ethos, not so different from that of a charitable agency. As one author put it in the Australian context, “The most satisfactory justification for a [victim compensation] scheme is a purely pragmatic one—that on humanitarian grounds the State should provide assistance to victims of crimes of violence, just as it helps the victims of other forms of misfortune.” It has also been said that “the basis . . . probably of all compensation plans, is a charitable impulse to assist those who suffer misfortune.” Early payments by compensation schemes were analyzed as “gratuities” or “public bounty.”

Such a humanitarian inspiration may draw on general feelings of empathy towards victims, particularly after much publicized crimes. Humanitarianism goes a little further than mere charity in that it typically involves a sense of moral obligation to those suffering. Victim compensation schemes inspired by a humanitarian rationale are most likely to distance themselves from a strict reparations logic, in that the idea that one is granted reparations on the basis of charity is a contradiction in terms. Humanitarian justifications of victim compensation schemes emphasize

302. For a discussion around some of the problems created by the UN’s reluctance to render certain information public in the context of ICC prosecutions, see Elena Baylis, Outsourcing Investigations, 14 UCLA J. INT’L L. & FOREIGN AFF. 121 (2009).
303. This is consonant with the view that the international “responsibility to protect” is only loosely so-called and does not create any actionable duty that would translate in something as concrete as guaranteed compensation. See Carsten Stahn, Note, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?, 101 AM. J. INT’L L. 99, 101–02 (2007).
304. Although generally deplored, the placement of victim compensation funds within welfare departments has often led to this perception. See, e.g., Gilbert Geis, Experimental Design and the Law: A Prospectus for Research on Victim-Compensation in California, 2 CAL. W. L. REV. 85, 89 (1966).
307. See id. at 541.
the moral obligation of donors, whether private or public. There is no
right to assistance, but it is good if some is provided.

It is plausible that some existing victim compensation schemes could
be described as primarily humanitarian in purpose. The argument is
sometimes made that “victims of crime quite frequently belong to a pop-
ulation stratum that can least afford the economic loss from crime.”308 In
particular, the less permanent schemes that receive funding on the basis
of an outpouring of empathy provide handouts based primarily on gener-
osity.309 Giving to victims is not seen as an obligation in any strongly
normative or formal sense, but as an act of virtue by donors. Some victim
compensation funds, such as the September 11th Fund (not to be con-
 fused with the September 11th Victim Compensation Fund) set up by the
New York Community Trust and United Way of New York City, col-
lected more than $500 million from more than two million donors and
could be described as essentially an outpouring of ad hoc charity.310 Res-
ponding to criticism that compensation following the July 7 attacks in
London was insufficient, defenders of the scheme argued that the sums
received should not be seen as representing the value of the lives lost but
as merely expressing “a token of public sympathy.”311 The fact that in
some cases judicial review of the awards given through compensation
schemes is excluded (e.g., in New York and Maryland) reinforces the
sense that contributions are ex gratia and not susceptible to challenges.312
Several US state legislatures have underscored that they hold, at most, “a
moral responsibility” to assist crime victims while rejecting any stricter
form of liability.313 Internationally, it is noteworthy that the preamble to

308. Mueller, supra note 190, at 234.
309. For example, several 9/11 initiatives were clearly charitable, see Dixon & Stern,
supra note 56, at 68–69, 78–79, although whether they can be construed as part of a
victim compensation paradigm is debatable.
same can be said of the London Bombings Relief Charity Fund, which attracted £8m. London Bombings Relief Fund Approaches £8m, Greater London Authority (Aug. 3, 2005), http://www.london.gov.uk/media/press_releases_mayoral/london-bombings-relief-fund-approaches-%22A38m.
313. See, e.g., Fla. Stat. Ann. § 960.02 (West, Westlaw through 2010 Second Regular Legis. Sess.) (“[I]t is the intent of the Legislature that aid, care, and support be
the UN Voluntary Fund for Victims of Torture “recogniz[es] the need to provide assistance to the victims of torture in a purely humanitarian spirit.”\textsuperscript{314} In a way, that provision seems designed to deny any sense of donor obligation.

The humanitarian rationale is, nonetheless, an insufficient characterization of most domestic compensation schemes. As one author put it “[c]haritable institutions have never adopted a consistent policy toward victims of crime and, in light of the competing demands for their funds, to expect them to provide an effective solution to the problem is optimistic.”\textsuperscript{315} Although victim compensation schemes may draw loosely on public generosity, they are not reducible to it. They are, to begin with, mostly publicly funded schemes and, therefore, integrated within the workings of the state. Although the public may support the work and think it falls within the duties of an empathetic state, compensation schemes are financed by taxation or public income, not donations from the general public. However incomplete compensation may be, and although it may not be quite what victims might expect, it is typically granted on the basis of rules that emphasize the equality of all victims and their equal claim in case of equal harm to the resources of the scheme. In other words, unlike in a purely charitable arrangement, there is an “air of entitlement” about the assistance given.\textsuperscript{316} In fact, suggesting that victims receive charity may be “demeaning, unreliable, and inequitable.”\textsuperscript{317} The existence of public compensation funds is also generally held to be in tension with private charitable initiatives, in those rare cases where the two co-exist.\textsuperscript{318}

The idea of charity is a more plausible explanation for the TFV than it is in the domestic setting, because naturally, it is less expected internationally for an entity to assume the role of the state in relation to the consequences of crime. First and foremost, contributions to the TFV are voluntary.\textsuperscript{319} There is no “international community” budget that would be

\textsuperscript{314} United Nations Voluntary Fund for Victims of Torture, supra note 51, pmbl. (emphasis added).

\textsuperscript{315} Lamborn, supra note 260, at 456.

\textsuperscript{316} See, e.g., Peter Burns & Alan M. Ross, A Comparative Study of Victims of Crime Indemnification in Canada: British Columbia as Microcosm, 8 U. BRIT. COLUM. L. REV. 105, 124 (1973); Weeks, supra note 33, at 119 (indicating that the New Zealand scheme is structured in part upon the principle of comprehensive entitlement).

\textsuperscript{317} ELIAS, VICTIMS OF THE SYSTEM, supra note 20, at 22.


\textsuperscript{319} See supra note 9 and accompanying text.
regularly set aside to compensate victims of atrocities. The fact, as discussed above, that it is hard to tie compensation to a theory of obligation (on the part of the donors) or entitlement (on the part of the victims), makes it tempting to characterize compensation as the expression of a fundamental generosity of donors and the TFV. The TFV falls quite close to a charity, moreover, by accepting donations from private individuals, donations which are probably not that different from the ones the same actors might make to, for example, UNICEF or Oxfam. The TFV is, for all intents and purposes, already profiling itself on the donor market and objectively competing with other aid distributors. The fact that private donors (unlike public ones) can earmark a third of their contributions for specific projects of the TFV suggests that donor priorities are given relatively strong recognition, a feature characteristic of charitable arrangements. Moreover, not only is donating to the TFV discretionary, but so are donations by the fund. The TFV has considerable discretion, which suggests it might emerge as a sort of benevolent but perhaps somewhat capricious patron.

However, there is something problematic about portraying the TFV as a “charity.” First, the TFV board is itself quite adamant that it is not a “charity.” What it means by that is not clear, but the impression is that the Board sees the Fund as more solemn, public, and institutional than a charity would be. Assistance by the TFV is, if not a right, given as a form of fundamental institutional recognition of harm. Moreover, it is granted


321. For example, there are countless NGOs in the Democratic Republic of Congo involved in transitional justice or humanitarian work that is geared, in part at least, at victims of international crimes. The work of these organizations may in practice be hard to distinguish from that of the TFV. Moreover, it was recommended early on that a fundraising officer be appointed to the Trust Fund’s Secretariat and that the Assembly of States Parties should make regular appeals to governments and other entities, a move very reminiscent of a private charity. Coalition for the International Criminal Court’s Budget and Finance Team Submission to the Second Session of the Assembly of States Parties (8-12 September 2003), COALITION FOR THE INT’L CRIMINAL COURT, ¶ 71–72, http://www.iccnow.org/documents/Budget_ASP_Paper_2003.FINAL.pdf (last visited Oct. 31, 2010).

322. By contrast, it is obviously not possible for tax payers to elect how their taxes are spent, except through the very general mechanisms of democracy.

by an institution that is embedded in (even as it is independent from) the functioning of international criminal justice.\textsuperscript{324} Although the Fund is typically discreet about whether it will use some of its funds to complement reparation awards, this remains a possibility that tinges its activities in a more rights oriented direction than the language of charity suggests. States themselves have not particularly framed their donations as charity (although it is true they have not framed their donations as much at all). Finally and perhaps most importantly, victims’ groups in various countries where the TFV operates typically do not see themselves as “begging,” but as expressing, in various complex ways, a loose entitlement to assistance even outside the legal framework of reparation.\textsuperscript{325} Had the TFV merely been created as a further means of manifesting international donor virtue, it would no doubt have met a certain amount of ambivalence by victims and NGOs alike. In fact, if the TFV were entirely viewed as a charity, then it might as well have been created entirely independently of the Court and its existence within the Rome Statute framework would be harder to justify.

I. Moral and Equitable Rationale: The TFV as Redresser of Imbalances

One traditional justification for the creation of victim compensation schemes is simply a “moral, realistic concern for the welfare of the injured citizen.”\textsuperscript{326} That argument is sometimes expressed, particularly by victims’ rights groups, as the need to redress the balance between the accused and the victims.\textsuperscript{327} Although that argument can sometimes be injected with a taint of demagoguery, it rests on quite solid conceptual foundations and does raise complex questions, especially in an environment where the victim is wholly ignored. As Adolphe Prins famously put it at the Paris Prison Congress in 1895:

The guilty man lodged, fed, clothed, warmed, lighted, entertained, at the expense of the State in a model cell, issued from it with a sum of money lawfully earned, has paid his debt to society; he can set his vic-

\footnotesize {\textsuperscript{324}} The TFV is formally an independent institution, but it has many organic links to the ICC. For example, the Fund may only disburse funds in relation to victims of crimes that fall within the jurisdiction of the Court and once the Prosecutor has opened an investigation. See TFV Regulations, supra note 9, para. 42.

\footnotesize {\textsuperscript{325}} For an analysis of victim attitudes to assistance generally, see Marlies Glasius, ‘We Ourselves, We Are Part of the Functioning’: The ICC, Victims, and Civil Society in the Central African Republic, 108 AFR. AFF. 49, 62–63 (2009).


\footnotesize {\textsuperscript{327}} See James E. Starrs, A Modest Proposal to Insure Justice for Victims of Crime, 50 MINN. L. REV. 285, 288–89 (1965).}
tims at defiance; but the victim has his consolation; he can think that by
taxes he pays to the Treasury, he has contributed towards the paternal
care, which has guarded the criminal during his stay in prison. 328

Typically, some victims protest that considerable resources are being
spent on behalf of the accused to ensure a fair trial, while only very mi-
nimal resources are being spent on them, except, for example, to the ex-
tent that their protection needs to be guaranteed for the purposes of the
criminal trial. 329 While victims may, more or less, gladly recognize the
needs of the criminal trial and therefore the legitimate expenses asso-
ciated with protecting the rights of the accused, they argue that this is no
reason to deny them various forms of compensation and argue in favor of
more equitable budget allocations. 330

Another more profound rationale in the context of reparation is that
there is no “moral merit” to having been the victim of a “rich” convict as
opposed to a “poor” one and that all victims are equally deserving of re-
paration. 331 The fundamental inequity of not receiving reparation because
one’s tormentor is insolvent suggests a strong ethical case for sharing
that burden to “smooth out” the differences that would result otherwise.
This is also an argument in favor of extracting the quest for reparation
from the tortious context, where victims’ hopes might otherwise lie. In
doing so, the system intends to signal that obtaining reparation for harm
suffered as a result of crime differs from seeking civil remedies for ordi-
nary harm. Rather than simply a private and relational issue between in-
dividuals, it involves more fundamental concerns of fairness, so that the
usual justifications for victims shouldering the cost of tort litigation do
not apply. As Garofalo once noted, “we are dealing here not with a ques-
tion of private law, but with a matter of justice and social security.” 332

Victims seeking compensation for crimes, in other words, are ent itled to
such compensation without having to go through the nuisance of litiga-
ting, as if their harm was a purely private issue.

328. STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME, at xiii
(Patterson Smith Publ’g Corp. 1970) (1960) (quoting PARIS PRISON CONGRESS, SUMMARY
REPORT (1895)).
329. See Are Crime Victims Neglected by the Penal System?, BBC (July 20, 2010,
330. Evelle J. Younger, Commendable Words: A Critical Evaluation of California’s
331. For a discussion of this rationale in the context of punishment, see generally Da-
vid D. Friedman, Should the Characteristics of Victims and Criminals Count?: Payne v.
332. BARON RAFFAELE GAROFALO, CRIMINOLOGY 434–35 (Robert Wyness Millar
trans., 1914).
Perhaps more fundamentally, being a victim means that one is, in most cases, innocent of anything that befell one. This fundamental innocence reinforces the moral case that the community should repair the inequity placed on a target of crime.333 Whoever else is responsible for a crime (apart from the accused or the state), it is certainly not the victims’ fault. The argument is further reinforced by the randomness of being a victim of violent crime (the “roulette” of crime).334 Violent crime is in the order of a calamity, one that could befall any of us, with potentially ruinous consequences. To suggest otherwise might lead to an implication that one somehow contributed to being victimized, which is, in most cases, unfathomable. Crime is, in other words, a cruel sort of lottery that is particularly bereft of any moral meaning, except that by not seeking to correct it the state, in a sense, ratifies the injustice and gives it a sort of imprimatur.

This reasoning paves the way to the so-called “shared risk” rationale for having victim compensation schemes. Advocates of this approach point out that “[r]ather than force individuals to pay for having been victimized . . . everyone should share the risk engendered by society’s ineptitude.”335 This position is sometimes analogized with the regime of products liability: “under modern products liability theory, the manufacturer is in the best position to absorb a loss by spreading it among all consumers by increasing prices. Similarly, the government is in the best position to disburse by taxation the losses incurred by victims of crimes.”336 More concretely, publicly financed victim compensation schemes might have a socially redistributive rationale in that they share the cost of crime with the whole of society where, in practice, certain groups are disproportionately vulnerable to it.337

Without going into any details, one could probably make a Rawlsian argument that behind a veil of ignorance (i.e., not knowing how susceptible to crime we might be), we would all opt for a system that compensated us for the consequences of crime.338 Moreover, the moral case for

333. Schultz, supra note 326, at 241–42.
334. Id. at 242.
335. Smith, supra note 140, at 67.
337. This is unlike tort litigation, which is often criticized for “deliberately reproducing] the existing distribution of wealth and income.” Richard L. Abel, A Critique of Torts, 37 UCLA L. REV. 785, 799 (1990).
compensation is made even stronger by the fact that whereas the harm to victims is considerable, the cost to spread across society is arguably not that great. 339 According to Bentham, for example:

This obligation of the public to furnish satisfaction is founded upon a reason that has the evidence of an axiom. A pecuniary charge divided among the mass of individuals is nothing to each contributor, in comparison with what it would be to an individual or a small number. . . . [I]t seems impossible to give too much extension to a means so ingenious, which renders real losses so slight, and which gives so much security against eventual evils. 340

These equitable arguments undeniably had an impact in the ICC/TFV context. If the disproportion between the resources expended on the accused at the expense of victims is glaring domestically, it is even more so internationally. Certainly, in the context of the ICC the ratio of spending is deeply skewed against victims, even in the context of the current, relatively progressive scheme. For example, the average budget spent by international criminal tribunals on one accused runs in the hundreds of thousands of dollars, 341 while the TFV recently proudly heralded that it had spent on average five dollars on each victim. 342 Equitable arguments are bound to be taken up more frequently internationally, especially as victims increasingly organize themselves and become better informed. The argument that there is no merit to having been a victim of a “poor” as opposed to a “rich” convicted person also militates in favor of the TFV occasionally supplementing reparation payments by the con-

341. See David Wippman, Note, The Costs of International Justice, 100 Am. J. Int’l L. 861, 862 & n.11 (2006) (“Dividing the ICTY budget by the number of trials concluded produces a figure of some $18 million per trial, but that figure omits the costs of proceedings related to individuals indicted but not tried and the costs related to cases now in progress.”).
342. See Int’l Criminal Court, Trust Fund for Victims (TFV) Background Summary 8–9 (2008), available at http://www.icc-cpi.int/NR/donlyres/E582AE21-D718-4798-97ED-C69F0D9B42D0/TFV_Background_Summary_Eng.pdf (“According to the total budget and number of direct and indirect victims reached—the total costs per victim is €44.”).
victed.\footnote{Victims Compensation and Participation: Judges’ Report of 13 September 2000, \textit{Int’l Criminal Trib. for the Former Yugoslavia}, ¶ 3, http://www.un.org/icty/pressreal/tolb-e.html (last visited June 4, 2009).} The TFV also clearly has an internationally distributive dimension, in a context where, so far, all of the ICC’s prosecutions center on Africa (which arguably suffers disproportionately from atrocity crimes) and the vast majority of state donors are Western countries.\footnote{See Financial Info, supra note 94.} Moreover, in the context of the ICC, the risk of such discrepancies also militates in favor of a policy of assistance rather than reparations-oriented compensation. Reparations have the disadvantage that they are only payable to the victims of the person convicted.\footnote{See Mina Rauschenbach & Damien Scalia, \textit{Victims and International Criminal Justice: A Vexed Question?}, 90 \textit{Int’l Rev. Red Cross} 441, 452–53 (2008).} For example, one author has already warned against the risk in Uganda that “[m]any victims . . . stand to be excluded from the ICC reparations process for having suffered the ‘wrong’ crimes, committed by the ‘wrong’ perpetrators or at the wrong time.”\footnote{Adrian Di Giovanni, \textit{The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?}, 2 J. Int’l L & Int’l Rel. 25, 27 (2005).} Alternatively, assistance can be distributed to victims of “crimes” entering the Court’s jurisdiction, rather than victims of criminals prosecuted by it.

Finally, the idea of the fundamental lack of victims’ blameworthiness for their fate is quite cardinal in the context of international criminal justice. The fact that one lives in a region of the world where mass crimes are committed is entirely irrelevant to assessing whether one “deserves” compensation. There is, furthermore, an extra moral argument in the ICC/TFV context, which has to do with the hyper-selectivity of the Court’s prosecutions and the fact that only very few accused will be tried.\footnote{For an in-depth analysis of this selectivity, see Robert Cryer, \textit{Prosecuting International Crimes: Selectivity and the International Criminal Law Regime} 191–326 (2005).} Needless to say, there is nothing particularly morally relevant about having been a victim of a person convicted by the Court as opposed to any other person. At least when it comes to its autonomous resources, the TFV will probably see itself as having a clear mandate to “equalize circumstances” that will militate in favor of providing assistance to the many rather than reparations to the few. Indeed, moves to use its relatively scarce autonomous resources to supplement reparation orders in favor of a minority of “super-victims” might create strong resistance.
There is merit to this “equitable” account of the rationale for the TFV, but there are also problems with it. The argument that too many resources are being spent on the accused as opposed to victims is problematic because it suggests a zero-sum game, one where money spent on the criminal process is money taken away from victims. In practice, the arbitrage is much more complex, and victims may understand that procedural safeguards afforded to the accused, however costly they may be, ultimately protect their own interests. If anything, to properly assess whether the international community’s distributive priorities are indeed skewed in favor of the accused, the right framework should be that of overall international spending. For example, one would need to compare judicial spending on the accused with the overall international and domestic spending related to victim welfare and dignity in the same context.\textsuperscript{348} The TFV itself, while it clearly seems to occupy a certain moral high ground (as exemplified, in particular, by the selection of a board composed of eminently respected individuals)\textsuperscript{349} does not particularly portray itself in equitable terms.

\textit{J. Welfarist Rationale: The TFV as an Expression of Solidarity}

In view of the fact that states are unlikely to recognize contributions to the TFV as a form of acknowledgment of responsibility or victim rights, or as a form of charity or moral compulsion, a middle ground rationale is the idea of welfare. Welfare is based on a sense of obligation, but one that results neither from the virtue of the donor or the complications associated with the language of legal responsibility. Rather, the fundamental logic of welfarist justifications might lie in an emphasis on the needs of victims.\textsuperscript{350} Welfare oriented compensation schemes, in other words, are typically more associated with assistance than with reparations. Perhaps the strongest argument in this respect is that although full reparations may be ideal in theory, victims of grave crimes often cannot afford to wait to obtain those and should therefore be given assistance earlier rather than later.\textsuperscript{351}

Domestically, there is no doubt that “social welfare theory” has featured strongly as a ground for compensating victims. It has been described by at least one author as “the most widely advocated basis for

\textsuperscript{348} In practice, the TFV is obviously not the only actor involved in victim support in the contexts where it operates.\textsuperscript{349} See Board of Directors, TRUST FUND FOR VICTIMS, http://www.trustfundforvictims.org/board-directors (last visited Nov. 2, 2010).\textsuperscript{350} See Schafer, Victim Compensation and Responsibility, supra note 276, at 60–61.\textsuperscript{351} See REIFF, supra note 113, at 162–63.
victim compensation.” It is typically anchored in a strong concept of social solidarity which expresses the idea that compensation derives from the idea of “living together” and a collective assumption of risks (“clubbing together” as Margery Fry described it; “communitarization” and “shared risk” as others have put it). After the oft quoted passage that compensation is ex gratia and the insistence on absence of responsibility, the authors of the 1964 British compensation program noted, “[t]he public does, however, feel a sense of responsibility for . . . the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation.” The European Convention speaks of “social solidarity” as a ground for compensation. The sense is that although the terms “responsibility” and “duty” may be used quite widely, “these responsibilities and duties derive from the conditions of modern society and the grace of the state, not from a legally recognized liability in the relationship between the state and its citizenry.”

At a certain level, this view of compensation can be seen as taking seriously the idea that crime is committed against the collectivity. Where criminal justice traditionally uses that idea to craft a notion of crime as primarily an offense against the state which marginalizes victims, one can reverse the reasoning to suggest that it is precisely because crime affects the whole of society that society owes compensation. As the British Home Office explained when the UK victim compensation scheme was being implemented, the focus of concern is upon the common good and the idea that in the person of the victim a harm is done to society which he or she has no duty to bear alone. Accordingly compensation is a means by which the loss

352. ELIAS, VICTIMS OF THE SYSTEM, supra note 20, at 25.
353. Fry, supra note 32, at 192.
354. Schultz, supra note 326, at 242 (“[C]ommon sense calls for grouping together for mutual protection through a system of shared risk in the area of victims of criminal violence.”).
355. HOME OFFICE, SCOTTISH HOME AND HEALTH DEPARTMENT, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, 1964, Cmnd. 2323, ¶ 8 [hereinafter HOME OFFICE].
357. Galaway & Rutman, supra note 4, at 63.
358. Interestingly, Jeremy Bentham identified one of the “cases in which satisfaction ought to be a public charge . . . [as] losses and misfortunes in consequence of hostilities.” He went on to argue that “[t]hose who have been exposed to the invasions of a public enemy have so much the clearer right to a public indemnity, since they may be considered as having sustained a shock which threatened all the citizens.” BENTHAM, THEORY OF LEGISLATION, supra note 146, at 320.
is distributed across society as a whole, so recognizing the reality of social existence and deepening a sense of community.359

This sort of rationale makes the most of an “embodied” concept of the common good, rather than considering that it always necessarily coincides with the interests of the state in having certain crimes punished.

Such a rationale is consistent with a view that sees crimes as an attack on society, but it then follows through by ensuring that all those affected (not personally, but as members of society) receive compensation (unlike traditional criminal law which used the conceit that crime was an attack on society and then avoided imposing any obligation on society in terms of assisting the victim). A central idea is that living in society involves risks that must be shared for the greater good of all. The welfare foundation of victim compensation schemes also draws on a quite different but related, paradoxical idea. This idea is that crime is not only meted against society but that it is in a sense also produced by social life itself—“the idea that to some considerable extent we as members of society make possible the conditions under which crimes are committed.”360 Ascribing the occurrence of crime to society in general sets aside the vexed problem of state agency (Was the state negligent? Should it be liable merely as a result of a “social contract”?). There is something awkward, anyhow, about the social contract idea that the state “causes” the criminality that it fails to prevent.

The “social” origin of crime is both more plausible and fairer as a construct. It is, of course, tempting to say that crime is only the product of criminally-minded individuals but, without going into the whole freedom/determinism quarrel, it is fair to say that in a very literal sense, crime is produced by the fact of man living in society in a condition of perpetual interaction. This is the “sociological view” of crime, one that sees crime as being “the fault of society in general.”361 If one endows society with a sense of agency, the claim becomes that in a fundamental sense, one “who suffers the impact of criminal violence is also the victim of society’s long inattention to equality and social justice.”362 The result is that compensation is not simply a humanitarian or moral duty, but is

359. HOME OFFICE, supra note 355, ¶ 8.
362. BHARAT B. DAS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 66 (1997); see also Childres, supra note 25, at 456.
more generally an expression of public interest—of a society that in caring for those who have been victimized, cares for itself.

The welfare argument also accounts for why victims of crime specifically should be taken care of by society, as opposed to other categories of the population who are typically not protected from the ordinary vicissitudes of life, such as natural catastrophes. Victims of crime stand in the company of a number of other special categories created by welfare ideology, be they veterans, the unemployed, or the aged, who have been deemed worthy of solicitude for a variety of reasons.\textsuperscript{363} An analogy is sometimes drawn, for example, between victim compensation schemes and worker compensation programs (“affording equal benefits to the man who falls from a ladder at work and the man whose enemy pushes the ladder from under him at home,” as Margery Fry reasoned with her characteristic wit).\textsuperscript{364} The idea may be that one is being compensated for a man-made disaster (crime, unemployment) for which society, unlike natural catastrophes, feels at least minimally responsible.

There are several signs that this welfare logic has been very significant domestically in the development of victim compensation schemes. This is reflected, first, in the nature of what is contributed to victims. As in the humanitarian logic, the emphasis in many domestic compensation schemes is on assistance rather than reparation. However, assistance is often of the sort associated with welfare rather than charity and relief, and might include rehabilitation, training, or loans.\textsuperscript{365} What matters is less the cause of the victim’s predicament (as with reparations), than the vulnerability of victims as persons, taking into account not just their present but also their future needs. In some cases, in a way reminiscent of many welfare schemes, compensation is “means tested,” so that the only victims who receive assistance are those facing, for example, “serious financial hardship.”\textsuperscript{366} The idea is to help victims cope with expenses arising out of injuries, for which they are not already covered by any existing welfare services.\textsuperscript{367} This also means that collateral recovery is generally prohibited so that one may not be compensated, for example,
through both a public scheme and insurance payments.\textsuperscript{368} This is quite different from the logic of reparations as of right, which are owed regardless of the means of the victim.

Second, the idea of welfare is also a ground for giving, which is not strictly humanitarian or compassionate. Victim compensation schemes stand somewhere between the idea of charity as a manifestation of donor generosity and reparation as a victim entitlement. Assistance flows neither from criminal, civil, or administrative responsibility, but from a sense of social obligation. Even though it will often be the case that “victims of crime do not have a substantive right to the benefits created,” they will typically have “an expectation of receiving those benefits” to the extent available.\textsuperscript{369} For example, the New Jersey Crime Victim’s Bill of Rights is typical in stating that a victim has a right to compensation “wherever possible.”\textsuperscript{370} Moreover, the tendency is for the community obligation towards victims to manifest itself in regular budgetary appropriations financed through some form of “involuntary” contribution, such as a tax.\textsuperscript{371} Margery Fry pointed out as early as 1957 that “the logical way of providing for criminally inflicted injuries would be to tax every adult citizen . . . to cover a risk to which each is exposed.”\textsuperscript{372} The state is in a unique position to absorb the cost of compensating victims through taxes, almost in the same way that under products liability theory the manufacturer will pass on the cost of liability through increased prices to consumers.\textsuperscript{373} Almost all victim compensation schemes are financed out of the state’s budget, whilst some are financed through direct levies. The French terrorist compensation fund (which is, characteristically, de-

\textsuperscript{368} “Collateral recovery” refers to the situation where a person recovers the same loss several times, under different schemes. See Michael R. McAdam, \textit{Emerging Issue: An Analysis of Victim Compensation in America}, 8 URB. LAW. 346, 364 (1976).


\textsuperscript{370} N.J. STAT. ANN. § 52:4B–36 (West 2009).


\textsuperscript{372} Fry, supra note 32, 193.

\textsuperscript{373} See Polish, supra note 336.
scribed as a fund “in the name of national solidarity”), for example, is financed by a levy on property insurance contracts.\footnote{374}

Third, compensation is, unlike a purely charitable scheme, awarded in a systematic and consistent way, characteristic of the welfare state. Funding in favor of victims may be made \textit{ex gratia}, but that does not mean it is capricious. Board members of the British scheme, for example, are “instructed and compelled to make payments to all who come within the ambit of the Scheme.”\footnote{375} The technocratic leanings of many schemes are reinforced by the fact that awards are typically limited and standardized, rather than following the exact amount of harm, as would be the case in civil suits.\footnote{376} Compensation is administered bureaucratically, for example, by a board rather than the courts,\footnote{377} and the trend has been towards severance of obvious ties with the judiciary.\footnote{378} Finally, the welfare orientation of several victim compensation programs is also underscored anecdotally by reference to programs in such terms. For example, certain federally supported victim programs are derogatorily referred to as “the Department of Justice ‘Food Stamp’ program,” and elicit the occasional hostility by those who see it as abrogating individual responsibility (e.g., to get insurance) and a “welfare attitude,”\footnote{379} or even creating a risk of “moral hazard” (i.e., that victims knowing that they will be compensated will put themselves in danger’s way more willingly).\footnote{380}

\footnote{374. Loi du 9 septembre 1986 relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l’État (Law of the 9 September 1986 on the fight against terrorism and attacks against the safety of the State).}

\footnote{375. CRIMINAL INJURIES COMPENSATION BOARD, FIRST REPORT AND ACCOUNTS, 1965, Cmd. 2782, ¶ 5 (Gr. Brit.).}


\footnote{377. See, e.g., CAL. GOV’T CODE § 13960 (West 2005).}

\footnote{378. For example, the State Attorney General’s office handled investigations in the early years of the California Victims Compensation & Claims Board, but since 1977 the process for obtaining compensation rests in the hands of the Board itself. \textit{Id.} § 13962.}

\footnote{379. See Fred E. Inbau, Comment on the Proposal, \textit{Compensation for Victims of Criminal Violence: A Round Table}, 8 J. Pub. L. 191, 202 (1959) (warning against the risk of “an abandonment of all notions of individual responsibility and a resort to complete dependence upon governmental paternalism”); Mueller, \textit{supra} note 190, at 231 (suggesting that “[c]rime loss insurance is the sedative of self-protection and an invitation to risk taking, especially in shady dealings”).}

\footnote{380. On the theory of moral hazard, particularly in the context of international crime prevention, see generally Kuperman, \textit{supra} note 296.}
The solidarist ethos, the idea that compensation is owed on the basis of a shared experience of living in society, is certainly an appealing ground on which to rest the foundation of the TFV compensation regime, not least because it lies somewhere at the intersection of advanced thinking about both criminal justice and the nature of the international system. Indeed, solidarity has been a buzz word in international legal circles for quite some time and was perhaps used most famously by Georges Scelle to describe the rising tide of international interdependence and its potential to change the nature of the international game. 381 Several authors writing in the international reparation field have begun using the term “solidarity” as describing what lies at the heart of compensation to victims.382

Solidarity also suggests a novel concept of international obligations towards victims, relevant when the international community cannot possibly be held directly liable, but where it is always at least a little responsible—whether by omission, acquiescence, or insufficient resolve. In many ways, international crimes are the very product of international society: whether it be the cover traditionally provided by sovereignty, support for criminal regimes, the legacy of colonialism, economic dislocation brought about by the international economic and financial architecture, or global indifference. International crime is both the antithesis of international society and a poisonous substance it seems to secrete at every turn. There is a very real way in which international crime is a consequence of international coexistence.

Contributions to the TFV, then, rather than being seen as simply “generous,” might be viewed as an expression of a radical form of supranational, transnational, and cosmopolitan solidarity—a recognition of how the fundamental interdependence of global social life also creates conditions for its undermining. Moreover, rather than being entirely sui generis, TFV efforts should be seen as a specialized and somewhat idiosyncratic part of a much larger trend towards international community provided “welfare” in various fields (development, health, food, water, environment, etc).383 The solidarity thesis seems the most adept at explaining how the TFV can derive resources not only from states and international

organizations, but also private entities whose contribution is hard to sub-
sume under anything resembling a responsibility model. This is conso-
nant with and reflective of the deeper logic presiding over international
criminal justice, namely that international crimes affect the whole of hu-
manity and not just, for example, the “international community” as a
loose, somewhat theoretical superstructure.\footnote{See David Luban, *A Theory of Crimes Against Humanity*, 29 Yale J. Int’l L. 85, 90 (2004).} It is thus morally and juris-
prudentially logical to allow not only states but also individuals, NGOs,
and IGOs to contribute in ways that express that basic solidarity.

The formulation of the TFV’s rationale in terms of welfare solidarity
suggests that there could be a legitimate expectation of assistance, within
the limits of the Fund’s resources, to cope with the consequences of
crime. In this context, conservative warnings of “governmental paternal-
ism” and the abandonment of “individual responsibility” may sound par-
ticularly hollow on a global level, where there is simply very little that
individuals could do to protect themselves from crime in advance. It may
be that TFV generosity, especially if it is badly implemented, will lead to
some of the negative effects that are at times associated with aid-
dependency (although the risk seems minimal given the ad hoc nature of
the compensation provided). But it is unlikely that an international victim
scheme would be fundamentally abused in the sense that people would
expose themselves to serious crime simply to obtain compensation.\footnote{This is distinct from the more administrative risk that in cases of mass crimes, individuals will come forward claiming to have been the victims of atrocities when they are not. Such a risk seems inevitable, but there are ways to alleviate it, for example by resorting to collective forms of compensation that minimize the risk of undue awards (a community is much less likely to be able to claim harm as a result of a crime fraudulent-
ly).} As to the idea of a “moral hazard,” while perhaps of marginal relevance in
the context of petty property crimes domestically,\footnote{Although even this has been challenged. See Samuel Cameron, *Victim Compensation Does Not Increase the Supply of Crime*, 16 J. Econ. Stud. 52 (1989) (concluding that there is no statistical evidence to support the claim that victim compensation schemes increase the level of crime).} it seems truly un-
likely internationally that someone would risk being a victim of genocide
because of an expectation of compensation.

There is some evidence that the TFV might be headed in a broad wel-
fare oriented direction. For example, it has been suggested by the Coal-
ition for the International Criminal Court that “[a]lthough the assistance
mandate is separate and different from the reparations mandate, a repara-
tions perspective must be applied in the design and implementation of
assistance projects by the Trust Fund.” In the same vein, it is sometimes suggested that “[a]s with reparations granted by the Court, the assistance received by the victim should, as far as possible, also be a recognition of their rights.” While this conclusion may be based on a simplistic analogy with reparation and is not very clear in its reasoning, it suggests, quite characteristically, that assistance is in the nature of an entitlement, something similar to its status in the welfarist model. It is also revealing that there were at least discussions as to the possibility of the Assembly of States Parties making regular donations to the Fund. This creates an interesting symbolic connection between the group of states from which most crimes entering the Court’s jurisdiction will emanate, and the issue of victim compensation.

The principal limitation of the TFV from the point of view of the welfare rationale is that unlike a proper victim welfare scheme, the international regime is not presently—nor does it seem that it will be any time


389. Unlike reparations, however, the entitlement is to be reasonably considered for assistance on the basis of equality, not an entitlement to a certain hypothetically fixed amount equal to harm suffered. It thus introduces much more leeway for those backing the compensation scheme.

390. See Preparatory Comm’n for the Int’l Criminal Court, Working Grp. on Rules of Procedure & Evidence Concerning Part 7 of the Statute, Proposal Submitted by France Concerning Part 7 of the Rome Statute of the International Criminal Court, on Penalties, PCNICC/1999/WGRPE(7)/DP.1 (Nov. 19, 1999) (“(X) per cent of the annual contribution of States Parties to the budget of the Court shall be transferred each year to the Fund established pursuant to article 79, paragraph 1.”) [hereinafter Proposal Submitted by France Concerning Part 7 of the Rome Statute]; Preparatory Comm’n for the Int’l Criminal Court, Working Grp. on Fin. Regulations & Rules, Proposal by France Concerning Regulation 5 of the Draft Financial Regulations Contained in Document PCNICC/2000/WGFINR/5.1, PCNICC/2000/WGFINR/DP.24 (Nov. 28, 2000) (“Each year, the Assembly of States Parties shall allocate a portion of the Court’s financial resources to the fund for victims referred to in article 79 of the Statute.”); see also Preparatory Comm’n for the Int’l Criminal Court, Report on the International Seminar on Victims’ Access to the International Criminal Court, 8, PCNICC/1999/WGRPE/INF/2 (July 6, 1999) (“With regard to the Trust Fund, consideration ought to be given to allocating to the Fund a percentage of the assessed State Party contributions to the Court.”).
soon—one that is financed on a compulsory or tax basis.\textsuperscript{391} This does not mean that there could not be a certain expectation that the “international community” would consistently rise up to the occasion and fund the TFV commensurate with the needs of victims of crimes entering the Court’s jurisdiction. But, failing that, the TFV’s financial fortunes risk uncertainty, perhaps resembling more a public charity than the manifestations of a global system of welfare security in the making.

CONCLUSION

One of the lessons of domestic victim compensation schemes is that while the first years are often spent in relative anonymity and free of polemic, the system invariably comes under pressure as the funds and the TFV’s mission became better known and demands for compensation grow.\textsuperscript{392} It is probably the case that the TFV is going through a rather blessed early period. But for all its victim-friendly mandate and efforts to portray it as such, there will come a point where the gap between available funds and existing needs, as well as the glaring disparities between different victim communities, will create calls for greater transparency and accountability. At that point, the TFV will have to rest its action on clearer theoretical footing than it has done so far.

In the foreseeable future, and partly as a result of pressures from various constituencies (the Assembly of States parties, donors, international and domestic victims rights’ organizations), the TFV will continue to fluctuate between the polar opposites of reparation and assistance, donor generosity, and victim entitlement—especially if a strong conceptual

\textsuperscript{391}. Interestingly, some scholars have already pointed out the possibility that the scheme could one day be “upgraded” to one based on a sort of international tax revenue. Jean-Baptiste Jeangène Vilmer, for instance, has suggested the financing of the TFV through a tax on weapons, in application of a sort of international crime equivalent of the “polluter pays” principle. See Jean-Baptiste Jeangène Vilmer, Réparer l’Irréparable—Les Réparations aux Victimes Devant la Cour Pénale Internationale 150 (2009). This is of course a little implausible in the international context (and there would be many other candidates for revenues if an international taxation system existed), but one can, along the lines of a French suggestion within the working group that adopted the TFV rules of procedures, imagine that a compulsory share of contributions to the Court could be attributed to the TFV. See Proposal Submitted by France Concerning Part 7 of the Rome Statute, supra note 390. Another, simpler, possibility is that the TFV would negotiate with states certain long term commitments to funding, with a view to stabilizing its budget.

\textsuperscript{392}. For example, in the UK the Criminal Injuries Compensation Authority came under attack after the July 7 suicide bombings in London for providing inadequate levels of payment. Crime Victim Compensation Changes Unveiled, INDEPENDENT (Dec. 7, 2005), http://www.independent.co.uk/news/uk/crime-victim-compensation-changes-unveiled-518508.html.
map remains absent. Neither of these polarities are exclusive in theory, of course, but it is open to question whether the TFV will ever have the funds to both complement reparation orders and develop an assistance policy worthy of that name. Moreover, although having the TFV is certainly an improvement over a regime with only reparations ordered by the Court, one of the lessons of even welfare-oriented victim compensation schemes is that these have not escaped some of the very criticisms that are levied at the judicial system, including selectivity in the choice of victims and lack of clarity in the logic of disbursements.393

This Article reviewed the emergence of domestic victim compensation funds in search of clues as to the proper theoretical foundation of the TFV. It concludes that some are clearly more relevant than others, but that ultimately, the TFV is very much a sui generis organ. Its justification should be understood as a mix of rationales, allowing for the fact that the TFV can, at this stage, engage in a variety of policies and strategies. The TFV, like domestic compensation schemes, is a reaction to limitations of the criminal system and is inclined towards restorative justice, even as it seeks to correct the fact that the convicted will often not have the capacity to compensate the harm caused by their crimes. The TFV is certainly a product of political forces and can be put to political uses, but that is a more factual than normative judgment. The TFV is a substitute to other mechanisms, such as insurance or tort, not so much because these might fail as because they do not seem to exist or have their place in the current international system.

At any rate, none of the above explains why the Fund and its international sponsors should take on the responsibility of compensating victims. The idea of “state” or “international community” responsibility as a ground for compensation is interesting, but the practice of the Fund suggests no assumption of responsibility for the occurrence of international crimes. Internationally, the idea of a “right to reparation” was certainly very influential in the emergence of a strong compensation regime and is important in the context of the ICC. It remains to be seen, however, whether the TFV will see its proper role as guaranteeing a certain level of reparation, as opposed to pragmatically distributing rehabilitative services to large victim groups. In practice, the TFV has already begun actively spending its meager budget on assistance and one wonders, given the present needs of victims, about the wisdom of provisioning funds to guarantee reparation awards beyond what the accused can pay. Reserving funds for reparations may have the effect of freezing them for substantial

amounts of time at the expense of projects that could be undertaken here and now.

Social contract theory provides a broad and elegant rationalization for compensation, but its transposition to the international plane is a conceptual stretch. The international community is certainly taking on more responsibilities in terms of guaranteeing a certain level of security, but it is difficult to say the failure to protect populations against certain international crimes now creates a political obligation to provide reparations and assistance. Humanitarian arguments make too much of the notion of charity, and victims are likely to want assistance in the wake of mass atrocities to be more than a manifestation of donor virtue. There is certainly some sense to the moral argument that victims should not shoulder the cost of crime alone, but this only explains how, not why, the TFV should spend its funds. Welfarist arguments are perhaps the most convincing, especially in understanding the sort of “assistance” provided by the Fund to victims, but are limited by the fact that for all intents and purposes, the States Parties to the ICC cannot be said to assume the role of a welfare state in relation to victims.

The resolution of the tension between these potential rationales for the work of the TFV will partly depend on evolving concepts of international criminal justice and compensation. From a criminal justice point of view, the TFV is the first international consecration of a rising domestic trend to take victims into account; at the same time, it also cruelly underlines the inherent limits of criminal justice and the extent to which both criminal and tortious responsibility are ultimately unsuited to the enormity of the reparatory task. The effort to uncover a satisfying rationale for the work of the Fund underscores a fundamental tension between reparations and assistance: the more law, justice, and rights oriented models see compensation as primarily about reparations; the more morality, politics, or welfare oriented models see compensation as primarily about assistance. Given the TFV’s mandate to engage in both, but mindful of the limits on its resources, choices will have to be made at some point in the Fund’s existence.

Beyond the issue of how the TFV should use its resources, the effort to uncover a rationale for its work also underscores the importance of who should give resources and on what basis. From the point of view of international justice, the TFV is a manifestation of, but also crucially dependent on, a feeling of international solidarity. The international community is somewhat stuck between an increasing assumption of powers and representation that it will guarantee a certain minimum public order devoid of mass crimes, yet tempted to see the issue of compensation as one of merely generosity. The TFV will test the international community’s
commitment to victims as one of the crucial indicators of successful international and transitional justice. Thinking about the proper rationale for compensation will be crucial to orient TFV practices in the right direction.
WHEN CUSTOMARY INTERNATIONAL LAW VIOLATIONS ARISE UNDER THE LAWS OF THE UNITED STATES

Introduction

One question that the United States Supreme Court has yet to decide is whether non-statutory, common law claims for violations of the law of nations, or customary international law, arise under the “laws of the United States” for purposes of both general federal question jurisdiction (28 U.S.C. § 1331) and Article III of the U.S. Constitution, the Article which sets the outer limits of federal judicial authority. A similarly unanswered question is whether, even if such claims fall within federal jurisdiction, federal courts can recognize and provide remedies for such claims as a matter of their common law power; in other words, whether a federal court can entertain a claim that is not based on a statutory cause of action. These questions are inextricably intertwined with another largely unsettled issue: the precise role of customary international law in our domestic legal system and, in particular, its specific status as federal common law. Scholars continue to debate whether federal

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1. The terms “law of nations” and “customary international law” are used interchangeably in this Article. The “law of nations” is generally equated with customary international law. The Estrella, 17 U.S. (4 Wheat) 298, 307–08 (1819) (referring to non-treaty-based law of nations as the “the customary . . . law of nations”); see also Flores v. Southern Peru Copper Corp., 414 F.3d 233, 237 n.2 (2d Cir. 2003).

2. 28 U.S.C. § 1331 (2010) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

3. Article III of the United States Constitution sets forth the outer limits of federal judicial power. Section 1 provides, in relevant part: “The Judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as Congress may from time to time ordain and establish . . . .” U.S. Const. art. III, § 2 (Federal judicial power shall extend to nine different categories, including: 1) to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; 2) all cases affecting Ambassadors, other public Ministers and Consuls; 3) to all cases of admiralty and maritime Jurisdiction; 4) to Controversies to which the United States shall be a Party; 5) to Controversies between two or more States; 6) between a State and Citizen of another State; 7) between Citizens of different States; 8) between Citizens of the same State claiming Lands under Grants of different States; and 9) between a State or Citizens thereof and foreign States, Citizens or Subjects.)
courts have the authority to incorporate customary international law as part of federal common law wholly, partially, piece-meal, or not at all.

This Article concludes that common law claims for violations of customary international law arise under the “laws of the United States” for § 1331 general federal question jurisdiction and within Article III, but only where such claims or defenses implicate uniquely federal interests, such as foreign relations. This position is not taken because the law of nations is, or historically has been, part of the “laws of the United States” for Article III and § 1331 purposes. On the contrary, the law of nations probably was not considered to be the “law of the United States” per se when Article III and § 1331 each were enacted.⁴ Rather, this position is taken for two reasons. First, certain enclaves of federal common law have developed over time to include certain norms and rules of customary international law, and federal courts have the judicial authority to continue to develop such law when uniquely national interests are at stake. This remains true even after Erie v. Tompkins.⁵ Second, federal common law has evolved to become “law of the United States” for purposes of both Article III and 28 U.S.C. § 1331.

Thus, it is not customary international law per se that is law of the United States for purposes of Article III and 28 U.S.C. § 1331. Rather, it is federal common law, which incorporates some aspects of customary international law, that is considered “law of the United States” for purposes of Article III and § 1331. This is an important distinction because federal common law is now arguably “law of the United States” as contemplated by Article III and § 1331, whereas customary international law is not. Hence, claims alleging violations of customary international law that affect uniquely federal interests are properly characterized as federal common law claims, giving rise to federal question jurisdiction under current Supreme Court precedent of Milwaukee v. Illinois⁶ and Romero v. International Terminal Operating Co.⁷

Additionally, this Article maintains that federal courts have the common law power to recognize and thus provide remedies for customary

⁴ That the law of nations per se was not considered to be the law of the United States for Article III and 28 U.S.C. § 1331 purposes at the time each was enacted does not provide an answer regarding whether the federal courts have the power to incorporate aspects of customary international law into federal common law, or to use their federal common law power to recognize tort claims for customary international law violations, where such claims affect uniquely federal interests.
⁵ See Erie v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts did not have the judicial power to create general federal common law when adjudicating state law claims under diversity jurisdiction).
international law violations where the same uniquely federal interests are involved, notwithstanding the lack of a statutory basis for such claims. This is because Congress implicitly authorized such private claims due to its understanding when it enacted § 1331 that federal courts would use their common law powers to provide remedies for federal common law claims. Though the Supreme Court has expressed skepticism regarding whether federal courts have jurisdiction over customary international law claims under § 1331 analogous to that provided by the Alien Tort Statute, this Article concludes that the Court’s skepticism most likely relates to concerns about federal courts using their common law powers too broadly, thereby recognizing claims in a vast array of areas unrelated to uniquely federal interests or with regard to actions Congress never intended or understood when it enacted § 1331. Such broad and unintended use of federal common law powers would likely not be consistent with *Erie*. However, use of common law power to recognize and provide remedies only for those claims of customary international law violations that entail uniquely federal areas arguably would be consistent with *Erie*.

Part I of this Article provides an overview of the current debate regarding the role of customary international law within federal common law and whether customary international law is “Law of the United States” for purposes of Article III. This overview helps set the stage for the remainder of the Article. Part II of this Article addresses the unanswered question of whether claims for violation of customary international law “arise under” the Constitution or “laws” of the United States for purposes of Article III and § 1331. It concludes that Congress probably did not consider the law of nations *per se* to be law of the United States. However, federal common law, which did not exist when Article III was drafted and was only in its infancy when § 1331 was enacted in 1875, later developed to include aspects of customary international law.

Part III of this Article addresses a related, but ultimately distinct question regarding the common law power of federal courts to recognize private causes of action for customary international law violations consistent with the *Erie* decision.8 It also addresses the Supreme Court’s skepticism articulated in *Sosa v. Alvarez-Machain*,9 regarding whether federal courts are authorized to recognize claims for customary international law violations.

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8. This issue overlaps and is intertwined with the issue addressed *infra* Part II. As such, it is difficult to address each issue separately. However, whether a court has jurisdiction over such causes of action is ultimately a separate, albeit intertwined, question from whether a court has the power to recognize the claim and provide a remedy absent statutory authorization.

violations under § 1331 in the same manner as they would under the Alien Tort Statute.\textsuperscript{10}

\textbf{I. THE CURRENT DEBATE}

Although near consensus has emerged in the lower federal courts that customary international law is “part of the federal common law,”\textsuperscript{11} scholars disagree about its precise role in the U.S. legal system. In addition, although the Supreme Court in \textit{Sosa} may have agreed with the proposition that certain customary international law norms are actionable through federal common law claims, it did not specify its views regarding the contours of customary international law in our federal judicial system. The Court indicated only that “domestic law of the United States recognizes the law of nations.”\textsuperscript{12}

\textit{A. Role of Customary International Law within Federal Common Law}

Two predominant schools of thought have emerged regarding the role of customary international law within the domestic law of the United States: those who advocate the so-called “modern” position, and those who support the so-called “revisionist” position. Although there are slight differences among the modernist scholars’ positions, their general view is that federal law incorporates customary international law.\textsuperscript{13} Most modernists agree with the revisionists that customary international law was considered general common law early in this country’s history (the

\textsuperscript{10} Id. at 731 n.19 (holding that although the federal courts could use their common law power to recognize aliens’ tort claims for a limited set of violations of the “law of nations” under the jurisdictional Alien Tort Statute (“ATS”), “a more expansive common law power related to 28 U.S.C. § 1331” might not be consistent with the division of responsibilities between state and federal courts after \textit{Erie v. Tompkins}).

\textsuperscript{11} See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); In re Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); Igartúa-De La Rosa v. United States 417 F.3d 145, 177–79 (1st Cir. 2005). In addition, “customary international law is considered to be like common law in the United States, but it is federal law.” \textsc{Restatement (Third) of Foreign Relations, § 111 cmt. d} (1987).

\textsuperscript{12} Sosa, 542 U.S. at 729 (emphasis added).

concept of federal common law did not exist at the time). 14 However, modernists argue that federal common law later developed and came to incorporate customary international law, emerging as a clear enclave of federal common law after the Erie decision. 15 They do not believe that Congress has to explicitly authorize the federal courts to incorporate customary international law into federal law because federal courts already have the common law power to do so. 16

The revisionists argue that federal common law has never incorporated customary international law. 17 They further claim that after Erie, customary international law can only become part of federal common law when Congress specifically authorizes its incorporation. 18 The revisionists assert that the law of nations was historically part of the general common law, but unlike the modernists, they do not believe that the law of nations ever became part of federal common law. 19 To the degree that it did, they argue that the Erie decision ended the ability of federal courts to incorporate customary international law without explicit congressional authorization. 20

After the Sosa decision, two of the best known revisionists, Professors Curtis Bradley and Jack Goldsmith, along with Professor David Moore, wrote an article in the Harvard Law Review, arguing that the Supreme Court in Sosa agreed with the revisionists’ views. 21 This was evidenced, they argued, by the Court’s holding that either the legislative or the executive branch must authorize federal courts to apply customary international law before the courts can do so and that the Alien Tort Statute

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15. See, e.g., Goodman & Jinks, supra note 13, at 471–72; Stephens, supra note 13, at 436.
19. Id. at 823.
20. Id.
(“ATS”) provides the requisite authorization, albeit on a limited basis. Other scholars have been very critical of this position, claiming that Sosa held the opposite: that courts do not need explicit authorization to apply customary international law when adjudicating cases before them.

B. Whether Customary International Law is Part of the Laws of United States Under Article III of the U.S. Constitution

The revisionists argue that the framers did not intend Article III to include the law of nations, claiming that the law of nations was part of the general common law and not part of the “Laws of the United States” for purposes of Article III. Moreover, the revisionists emphasize the omission of the phrase “law of nations” from Article III. They compare this to the inclusion of the phrase in Article I, which states that Congress has the power to “define and punish . . . [o]ffences against the Law of Nations.” The revisionists argue that this inclusion in Article I demonstrates that the framers did not intend the law of nations to be within the purview Article III. They further note that Article III extends the federal judicial power to treaties and that Article VI declares treaties to be the supreme law of the land, though neither mentions the law of nations. Finally, they point out that an early draft of Article III would have ex-

24. See, e.g., Beth Stephens, Sosa, the Federal Common Law and Customary International Law, Reaffirming the Federal Courts’ Power, 101 AM. SOC’Y INT’L L. PROC. 269 (2007). In my view, the modernists are correct. The Court made it clear that no specific authorization was required for federal courts to incorporate certain aspects of customary international law as federal common law. Instead, the Court suggested that the necessary element was the authorization, albeit implicit, for plaintiffs to be able to seek a remedy. Such implicit authorization can be granted through Congress’s understanding that upon enactment of a jurisdictional statute, courts will use their common law power to recognize a claim and provide a remedy. See discussion infra Part III, pp. 37–39.
25. See, e.g., Bradley & Goldsmith, Customary International Law as Federal Common Law, supra note 17, at 823, 824; Bradley, Goldsmith & Moore, Sosa, Customary International Law, and the Continuing Relevance of Erie, supra note 21, at 875; Bradley, The Status of Customary International Law in U.S. Courts, supra note 17, at 812.
27. Id. at 819–20; U.S. CONST. art. I, § 8.
tended federal court jurisdiction to cases arising under the “Law of Nations,” but that the reference was deleted (although without any apparent explanation). 30

The debate concerning whether customary international law is part of the “Laws of the United States” under Article III also arises in the context of the constitutionality of the ATS when the defendant is an alien. 31

Revisionists, such as Professor Bradley, argue that claims for violations of the law of nations under the ATS do not fall under Article III’s “arising under” provision, but rather are encompassed under Article III’s alienage jurisdiction. 32 This would mean that claims brought by an alien under the ATS against another alien would not be constitutional under Article III. Bradley argues that Congress either mistakenly believed that Article III’s alienage provision extended to any suit involving aliens even where both parties were aliens, or Congress intended to limit suits to those where the defendant was a U.S. citizen. 33 Although Bradley sets forth evidence that supports both possibilities, he favors the latter. 34

Modernists take the opposite position, agreeing with the Second Circuit in the ground-breaking ATS case, Filartiga v. Pena-Irala, 35 which held that claims for violation of the law of nations brought pursuant to the ATS arise under the “Laws of the United States” for purposes of Article III jurisdiction. 36 Professor William Dodge cites numerous documents and certain federalist papers in arguing that, at the time Article III was drafted, Congress viewed the law of nations as “Law of the United States” for purposes of Article III, albeit not through what we now recognize as federal common law. 37

30. Id. at 820 n.82 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 157 (Max Farrand ed. 1911) (other internal citations omitted).
31. Claims brought pursuant to the ATS by an alien against a citizen would be constitutional under Article III given the alienage jurisdiction of Article III.
34. Id. at 627–28.
35. Filartiga v. Pena-Irala, 630 F.2d 876, 885–86 (2d Cir. 1980).
Professor Dodge also emphasizes the language difference between Article III and the Supremacy Clause of Article VI, noting that the latter refers to “This Constitution, and Laws of the United States which shall be made in Pursuance thereof,” whereas the former only discusses “Laws of the United States” without reference to “in pursuance thereof.” In addition, Professor Dodge argues that Congress deliberately struck the words “passed by the Legislature” from the text of Article III. Given this, he suggests that there must be a category of laws that are not made by Congress “pursuant” to the Constitution and yet are “Laws of the United States.” The most obvious candidate, he suggests, is the law of nations. Another leading scholar opines that the framers and early jurists believed that “all of the common law pertinent to the enforcement of the law of nations naturally attached to the federal government upon its creation.” Thus, the modernists clearly disagree with the revisionists about whether federal jurisdiction over claims for customary international law violations is consistent with Article III of the U.S. Constitution. The debate continues with no clear consensus on the horizon.

II. WHETHER COMMON LAW CLAIMS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW ARISE UNDER LAWS OF THE UNITED STATES FOR PURPOSES OF ARTICLE III AND 28 U.S.C. § 1331

A. Whether the Founders Considered the Law of Nations to be Law of the United States Under Article III

As described above, one major area of disagreement among scholars is whether members of the Constitutional Convention intended the “Laws of the United States” under Article III to include the law of nations. To be sure, compelling evidence exists to support both sides of this debate, suggesting there is no clear answer to this question. While there is significant evidence to support the contention that the founders viewed the law of nations as “Laws of the United States,” a close look at judicial opinions and other historical material reveals that Congress probably did not consider the law of nations per se to be law of the United States when it drafted Article III.

38. Id. at 704.
39. Dodge, Bridging Erie, supra note 13, at 102.
41. Id.
43. See discussion supra Section II.A.
1. Evidence Supporting the Contention that the Founders Viewed the Laws of Nations as “Laws of the United States”

Early prosecutions of federal common law crimes demonstrate that many of the framers viewed the law of nations as part of the common law of the United States and, in fact, exclusive to the federal judiciary. From the late 1700’s until the early 1800’s, the federal government prosecuted citizens for violations of the law of nations, such as piracy, crimes on the high seas, breaches of neutrality, and attacks on diplomats under the common law of the United States. In these cases, courts routinely stated that the law of nations was part of the law of the United States. These prosecutions came to an end in 1812 amidst increasing criticism of the idea that certain federal common law crimes existed that were not codified under a statute. The criticisms, however, were largely based on the concern that federal jurisdiction over federal common law crimes provided Congress with unlimited power over the states. That federal law encompassed the law of nations was not the concern.

Three Attorney General Opinions issued in the 1800’s, all of which stated that the law of nations is part of the law of the United States, further support the proposition that the framers and early jurists viewed the law of nations as part of the law of the United States. Moreover, federal courts throughout the 1800’s applied the law of nations when adjudicat-

44. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, supra note 42, at 136–38; see, e.g., Henfield’s Case, 11 F. Cas. 1099 (C.C.D. Pa 1793) (No. 6360).
45. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, supra note 42, at 131; Henfield’s Case, 11 F. Cas. at 1117 (because the law of nations is part of the common law of the United States, Henfield and others like him are subject to common law prosecution in federal court).
47. See, e.g., id. (“Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers.”).
49. Id.
50. 1 Op. Att’y Gen. 566, 570–71 (1822) (stating that the law of nations is part of “the laws of the country” and “our laws”); 7 Op. Att’y Gen. 495, 503 (1855) (“The laws of the United States [include] the Constitution, treaties, acts of Congress . . . and the law of nations, public and private, as administered by the Supreme Court, and Circuit and District Courts of the United States . . . .”); 11 Op. Att’y Gen. 297, 299 (1865) (“That the laws of the nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and authority.”).
ing civil cases, often stating that the law of nations is “part of the law of the United States.” For example, the Supreme Court in the 1815 case of The Nereide states, “[T]he Court is bound by the law of nations which is part of the law of the land.” In 1855, the Court in Jecker, Torre & Co. v. Montgomery, in deriving a rule from the law of nations in a prize case, also reinforces the view that the law of nations is part of the law of the United States.

Perhaps the most famous case discussing the law of nations as part of “our law,” is the 1899 case of The Paquete Habana, which states, “International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” These cases, along with the three Attorney General Opinions, provide evidence that many jurists throughout the 1800’s believed that the law of nations was part of the law of the United States.

2. The Law of Nations, Per Se, was Likely Not Considered Part of the Laws of the United States When the Framers Drafted Article III

a. The Law of Nations was Perceived as a Transcendent Body of Law, Applied by Both Federal and State Courts When They Otherwise had Jurisdiction

The case decisions and opinions referenced above, however, do not confirm that the framers believed that the law of nations was law of the United States, especially with respect to Article III’s jurisdiction provision. Most of the aforementioned decisions and opinions are too far removed temporally to provide much insight about whether the framers specifically intended Article III’s “Laws of the United States” to include the law of nations, and the judicial opinions arise in cases where the Court otherwise had jurisdiction on different Article III grounds, such as admiralty. Moreover, none of the judicial opinions specifically address Article III’s reference to the “Laws of the United States” with respect to the law of nations. In fact, the first case that specifically addressed whether the “law of nations” arises under Article III’s “Laws of the Unit-

52. Id.
55. The Paquete Habana, 175 U.S. 677, 700 (1899).
ed States” did not occur until 1871, and involved the Supreme Court’s appellate review (given that general federal question jurisdiction was not yet enacted). Rather, these statements likely reflected the courts’ views that the law of nations was a transcendent body of law (i.e., a type of general common law) that all courts, federal and state, could apply.

For example, when the federal courts already had jurisdiction on some other basis, such as admiralty, they applied the law of nations without any specific authority from Congress. Similarly, state courts throughout the 1800’s applied certain aspects of the law of nations to cases before them, typically tort cases that arose out of war. In addition, an 1802 Attorney General Opinion (issued prior to the afore mentioned Attorney General Opinions supporting the position that the law of nations was seen as federal law) stated that a violation against the “law of nations” did not contravene any “provision in the Constitution [or] any law of the United States,” and that the “the law of nations is considered as part of

57. General federal question jurisdiction was not enacted until 1875. Act of Mar. 3, 1875, Ch. 137, 18 Stat. 470.
58. See Skinner, supra note 51, at 57–58; see also Thorington v. Smith, 75 U.S. (8 Wall.) 1, 7–12 (1868) (where the Supreme Court applied the law of war, which it described as fitting within general principles of law, in holding that a contract for the payment of money in Confederate currency was valid because the contract at issue was used in the regular course of business and the currency was imposed on the community “by such irresistible force that the use of them had no purpose in furthering or aiding the rebellion.”); Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439, 449 (1872) (although referring to the law of war, the Court again applied principles of what it called “public law” in finding that a bond issued by the state of Arkansas used to fund the insurgency could not be considered as a matter of public policy); Dainese v. United States, 15 Ct. Cl. 64 (1879) (where the Court of Claims applied the law of nations to determine that a consul had judicial responsibilities, and thus was entitled to additional pay); United States v. One Thousand Five Hundred Bales of Cotton, 27 F. Cas. 325 (C.C. Tenn. 1872) (the Circuit Court applied the law of war to determine whether the proceeds from the sale of cotton used to aid the rebellion should be forfeited); United States v. Wong Kim Ark, 169 U.S. 649, 655–94 (1898) (applying international law to settle a question of immigration); Willamette Iron-Bridge Co. v. Hatch, 125 U.S. 1, 15 (1888) (where the Supreme Court did not apply international law per se, but noted that once a federal court has jurisdiction over the issue of whether states can erect bridges that obstruct waterways, it can apply international law. The Court cited The Wheeling Bridge Case, 54 U.S. (13 How.) 518 (1851), as an example where international law was applied. In addition, the Court distinguished between common law of the United States and international law, as separate rules of decisions or bodies of law to be applied.); Williams v. Bruffy, 96 U.S. 176, 185–90 (1877) (applying the laws of war extensively in holding that the Confederacy’s sequestering of a Pennsylvania citizen’s debts as alien enemy was void under the Constitution).
the municipal law of each State." The state court opinions, applying the law of nations and the 1802 Attorney General Opinion, support the view that the law of nations was simply part of the general common law, applied by courts in appropriate circumstances when they otherwise had jurisdiction.

Thus, as Professors Bradley and Goldstein have stated, the assertions about the law of nations being part of the law of the land was "likely nothing more than a mimicking of earlier statements by Blackstone," and are "perfectly consistent with the law of nations' status as general common law."61

b. In Article III, the Framers Provided for Federal Jurisdiction Over Specific Types of Cases That Would Implicate Foreign Affairs, not Wholesale Jurisdiction Over the Law of Nations

i. The Framers Agreed to Constitutional Limitations on Federal Jurisdiction

A close examination of the debate concerning federal jurisdiction that took place during the Constitutional Convention, combined with the omission of any reference to the "law of nations" in the final draft of Article III, suggests that the framers intended to provide federal jurisdiction over only those specific areas that they believed implicated federal interests, such as foreign relations. This decision was likely a product of the ongoing debate concerning the limits of federal power generally, as well as the limits of federal judicial power. Because the law of nations was perceived as transcendent, giving the federal judiciary jurisdiction over all cases involving the law of nations was likely viewed as an invasion of the states' rights.

The drafting of the Constitution, as one might expect, was subject to controversy regarding the role of the federal government, including the federal judiciary. At the Constitutional Convention of 1787, the founding generation was contemplating both the constitutional and initial statutory scope of a federal judiciary.62 One of the most significant issues was the extent of the national courts' constitutional authority to adjudicate cas-

60. 5 Op. Att'y Gen. 691, 692 (1802).
61. Bradley & Goldsmith, Customary International Law as Federal Common Law, supra note 17, at 850, 850 n.227 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769) (stating that the "law of nations . . . is held to be a part of the law of the land").
es—in one word, jurisdiction. Some opposed a strong central government and thus opposed a strong federal judiciary. Others wanted a strong central government and a strong federal judiciary, which they believed would not only offset tendencies toward “balkanization” of the states, but would guarantee that national interests would be protected and advanced.

One of the major points of disagreement at the Constitutional Convention was whether inferior federal courts should exist and limits on their jurisdictional scope. Some framers believed that it was unnecessary and undesirable to have lower federal courts, arguing that as long as state courts were subject to appellate review by the Supreme Court, the interests of the national government would be protected. Others, however, distrusted the “ability and willingness of the state courts to uphold federal law,” especially where there might be conflicting state and federal interests. They did not believe that the Supreme Court’s review of certain state court decisions would be adequate because they feared the number of such appeals would exceed the Court’s limited capacity to hear and adjudicate each case.

After much debate, the framers reached a compromise with Article III of the Constitution mandating the existence of the Supreme Court, outlining its original and appellate jurisdiction, and defining the outer limits of the federal judiciary’s subject matter jurisdiction. Congress could then later determine whether inferior courts would exist and the scope of their jurisdiction through enactment of statutes. As part of the compromise, the drafters also agreed to refrain from conferring the full extent of Article III jurisdiction—whatever that would be—to federal courts in their planned First Judiciary Act.

In outlining the constitutional limits on jurisdiction set forth in Article III, the drafters considered a variety of arrangements that would preserve local power and protect national interests. All of the drafters, even those supporting limited federal power, sought to ensure that foreign affairs and national security issues were placed within the powers of the

63. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, supra note 42, at 5.
64. See FINK & TUSHNET, supra note 62, at 5.
65. Id.
67. Id.
68. Id.
69. Id.
71. Id.
72. Id. at 12–15.
73. FINK & TUSHNET, supra note 62, at 3.
federal government. Thus, each of the draft judiciary plans, although significantly different in other areas, demonstrated a consensus to grant federal jurisdiction over cases involving foreign relations, which included admiralty, prize cases, and cases involving aliens.

After the Convention passed a resolution stating, *inter alia*, that “the jurisdiction of the national Judiciary shall extend to cases arising under the laws passed by the general Legislature, and *to such other questions as involve National peace and harmony*,” a five-person committee worked out a compromise and drafted Article III. The resulting draft of Article III created the Supreme Court and outlined nine different categories of cases that future federal courts could ultimately have jurisdiction over:

1) to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; 2) all cases affecting Ambassadors, other public Ministers and Consuls; 3) to all cases of admiralty and maritime Jurisdiction; 4) to Controversies to which the United States shall be a Party; 5) to Controversies between two or more States; 6) between a State and Citizen of another State; 7) between Citizens of different States; 8) between Citizens of the same State claiming Lands under Grants of different States; and 9) between a State or Citizens thereof and foreign States, Citizens or Subjects.

The compromise also granted the Supreme Court original jurisdiction over cases affecting diplomats as well as appellate jurisdiction over each of the nine types of cases outlined in Article III. Of course, these were the outer Constitutional limits, and Congress still needed to authorize federal jurisdiction through statutory enactments.

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75. See Fink & Tushnet, supra note 62, at 6–7; see also Casto, The Supreme Court in the Early Republic, supra note 42, at 7.

76. Casto, The Supreme Court in the Early Republic, supra note 42, at 7. Prize cases involved a court’s condemnation of property seized from commercial enemy vessels during time of war, and the court’s decision about whether such seizure was lawful. It was an important area of international law in the 18th century that was seen as implicating national security concerns.

77. Id.

78. Casto, The Supreme Court in the Early Republic, supra note 42, at 14 (emphasis added).

79. Id.


81. Id.
ii. Pursuant to the Compromise, the First Judiciary Act of 1789 Provided Lower Federal Courts with Jurisdiction Over Specific Types of Cases that Could Affect Foreign Affairs

The resulting Judiciary Act of 1789, while reflecting the agreed-upon limits on federal jurisdiction, ensured that the federal judiciary would have jurisdiction over every type of case likely to impact foreign relations. For example, the Judiciary Act reaffirmed the Supreme Court’s original jurisdiction over suits involving diplomats. With regard to the lower federal courts, Congress created alienage jurisdiction for claims over $500, provided exclusive jurisdiction of all civil cases involving admiralty and maritime matters, and provided concurrent jurisdiction for cases in which aliens bring tort claims in violation of the law of nations. The framers believed that it was critical to ensure federal jurisdiction over aliens’ claims for torts in violation of the law of nations—which at the time likely included piracy, attacks on diplomats, and safe

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83. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, supra note 42, at 27–31; see also Jay, supra note 74, at 1275.
85. Judiciary Act of 1789, ch. 20, §§ 11–12, 1 Stat. at 78–79 (The Act allowed for the removal of cases against an alien defendant for claims in excess of $500 from state to federal court. The $500 requirement for claims involving aliens was, like nearly everything else, the result of a compromise, which in this case involved the problem of British debt collections under the Treaty of Paris. By limiting jurisdiction over cases involving aliens to $500, a large majority of such litigation would be forced to proceed in state courts, which were much more sympathetic to U.S. citizens); CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, supra note 42, at 9. This alienage provision did not comport with Article III’s alienage provision, which required one party to be an alien and one party to be a citizen. See, e.g., Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Montalet v. Murray, 8 U.S. (4 Cranch) 46, 47 (1807); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 13–14 (1800). This section of the First Judiciary Act was soon deemed unconstitutional because it did not comport with Article III provisions. It has never been determined how and why Congress created this apparent inconsistency. See also Bradley, The Alien Tort Statute and Article III, supra note 32, at 590–91 (suggesting that this inconsistency was likely a legislative oversight).
86. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 76–77 (for a variety of reasons, admiralty jurisdiction in particular was an area over which there was little controversy because of the need for federal courts to have jurisdiction over prize cases); CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, supra note 42, at 40.
87. Id. (now referred to as the Alien Tort Statute).
passage—because those types of violations potentially “threatened serious consequences in international affairs.”

However, the founders did not include within federal jurisdiction—either within Article III or the First Judiciary Act—claims alleging general violation of the law of nations. As mentioned above, the law of nations had been included in earlier drafts of Article III, but it was ultimately removed without an explanation.

c. The Federalist Papers Indicate That the “Laws of the United States” Likely Did Not Include the Law of Nations

Another important source in determining the framers’ intent are the Federalist Papers—a series of 85 articles and essays likely written by James Madison, Alexander Hamilton, and John Jay, advocating the ratification of the new Constitution and outlining its philosophy and interpretation. In the Federalist No. 80, Alexander Hamilton, discussing federal jurisdiction, outlines six areas to which the judicial authority of the Union ought to extend:

[First], to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; [second], to all those which concern the execution of the provisions expressly contained in the articles of the Union; [third], to all those in which the United States are a party; [and fourth], to all those which involve the Peace of the Confederacy, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; [fifth], to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; [and] lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

After discussing each area in turn, Hamilton examines the draft Constitution, in particular Article III, arguing how each provision of the draft Constitution fits into the six areas outlined. First, he addresses the provision, “To all cases in law and equity, arising under the Constitution and

89. Id. at 715.
90. Bradley, The Status of Customary International Law in U.S. Courts, supra note 17, at 820 n.82.
92. The Federalist No. 80 (Alexander Hamilton); see also id., at 520–22.
93. The Federalist No. 80 (Alexander Hamilton).
the laws of the United States.** Hamilton states that this clause responds to the “two first classes of causes, which have been enumerated, as proper for the jurisdiction of the United States.”** He was clearly referring to the first two of the six areas that he outlined at the beginning of his paper. The first involves “all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation . . . .”** Thus, he was clearly referring to laws enacted by Congress, and not to a more broad conception of “law” that would include the law of nations.

It is also important to note that Hamilton did not find that the “laws of the United States” clause of Article III satisfied the fourth type of cases—those involving “the peace of the confederacy, whether they relate to the intercourse between the United States and foreign nations . . . .”** Had he concluded the opposite, a much stronger argument could be made that “law of the United States” was intended to include the law of nations. Rather, it was the provisions regarding all cases involving foreigners, as well as the cases involving treaties, that he believed satisfied the “keeping the peace” class of cases.** While the Federalist Papers clearly advocate that the federal judiciary should have jurisdiction over cases that might affect foreign affairs,** nowhere do the Federalist Papers suggest that Article III’s “Laws of the United States” language was intended to include, or viewed as including, the law of nations.**

Taking into consideration Federalist No. 80, the final wording of Article III, the extensive areas in which the framers did ensure federal jurisdiction, and the predominant view that the law of nations was similar to the general common law which both federal and state courts applied, it is more likely than not that the framers did not intend that the “Laws of the United States” provision of Article III would include the law of nations. It is unlikely that the framers intended to provide for federal jurisdiction over any and all claims involving the law of nations, especially where national interests would not be implicated by such claims. This is also consistent with the framers’ desire to limit federal judicial power.

94. *Id.*
95. *Id.*
96. *Id.* (emphasis added).
97. *Id.*
98. *Id.*
100. *See, e.g., Federalist Papers,* supra note 91. Notwithstanding the above, it is important to keep in mind that Federalist Paper No. 80 directly reflects the thinking of one man, Alexander Hamilton. It is possible that some of the framers intentionally removed the phrase, “passed by the Legislature” from Article III, knowing that it would leave room for future debate.
B. Whether Congress Considered the Law of Nations, Per Se, to be Law of the United States for Purposes of General Federal Question Jurisdiction

It is equally unclear whether Congress intended general federal question jurisdiction to include all cases involving the law of nations. There is little legislative history regarding 28 U.S.C. § 1331 and virtually no information about what types of claims Congress believed would arise “under the laws of the United States,” let alone whether the “laws of the United States” would include the law of nations or even federal common law. It does seem clear, however, that the manager of the bill establishing federal question jurisdiction and its likely author, Senator Mathew Carpenter, intended for § 1331 jurisdiction be the same as Article III’s jurisdiction provision. He declared, “The [Judiciary] [A]ct of 1789 did not confer the whole [judicial] power which the Constitution conferred . . . . This bill does . . . [t]he bill gives precisely the power which the Constitution confers—nothing more and nothing less.” He also stated that “[t]he present bill is intended to confer a jurisdiction just as it is conferred in the Constitution, without that limitation.”

There is no evidence that Senator Carpenter believed that Article III’s provisions per se included the law of nations. Moreover, it is improbable that he believed that the framers intended Article III to include “federal common law,” given that federal common law did not exist at the time that the Constitution was written. But, as discussed in the next Section of this Article, federal common law began to develop in the latter half of the 1800’s. As such, he and others in Congress probably understood the “arising under” provision of § 1331 to include claims involving certain aspects of the common law that implicated federal interests, such as foreign relations.

101. Donald L. Doernberg, There’s No Reason For It; It’s Just Our Policy: Why the Well-Pleased Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 Hastings L.J. 597, 603 (1987); see also Jay, supra note 74, at 1315; Chemerinsky, supra note 66, at 265.
102. Senator Matthew Hale Carpenter of Wisconsin sponsored and managed the Act of March 3, 1875, ch. 137, 18 Stat. 470, which, inter alia, established federal question jurisdiction, and was its likely author. See Romero v. Int’l Terminal Operating Co., 358 U.S. 354, 366 n.22 (1959), superseded in part by statute on other grounds 43 U.S.C.A § 59 (West 2010); 7 RPTS. OF THE WIS. ST. BAR ASS’N 155, 186 (1906).
104. 2 Cong. Rec. 4986–87 (1874).
105. Id. at 4986.
C. Federal Common Law Now Includes Claims Involving the Law of Nations Where Such Claims Implicate Federal Interests

There is agreement among scholars on both sides of the debate that in the late 1700’s and throughout most of the early 1800’s, the law of nations was considered to be general common law, applied by both federal and state courts. The concept of federal common law that we recognize today began to emerge in the late 1800’s.

1. Development of Federal Common Law in the Late 1800’s

Federal courts began developing their own common law in the 1800’s, during the time that Swift v. Tyson was decided in 1842. The development of federal common law took place not only in areas of obvious national interest, such as admiralty, but also in areas typically associated with state interests, such as contracts, agency, insurance, and torts. As some scholars have noted, the motivation behind recognizing and developing this type of federal common law was largely economic, with a desire to create uniform national law to help facilitate commercial transactions.

108. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), overruled by Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). In Swift, the Supreme Court held that in diversity cases, federal courts should apply “general principles and doctrines” where there was no state statutory or constitutional provision addressing the claim, thereby supplanting state common law. Swift, 41 U.S. at 12. In so finding, the Court held that the Rules of Decision Act (28 U.S.C. § 1652), which mandated that state law should apply unless the Constitution, a treaty, or an Act of Congress otherwise require, did not apply to claims involving contracts and commercial transactions. Id. In addition, the Court noted that “the true interpretation and effect” of the law in these cases should not be found in decisions of local courts, but in the “general principles and doctrines of commercial jurisprudence” as articulated by federal courts. Id. In effect, the Court ruled that the Rules of Decision Act, which stated that the laws of the state should apply in the absence of a federal constitutional provision, a treaty, or statute, did not apply to state common law. Id.
111. See Skinner, supra note 51, at 41; see, e.g., The Belgenland, 114 U.S. 355, 365 (1885); The Plymouth, 70 U.S. 20 (1865) superseded in part by statute, Extension of Admiralty Jurisdiction Act, 62 Stat. 496 (1948), as recognized in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); The Lamington, 87 F. 752 (D.C.N.Y. 1898).
112. Skinner, supra note 51, at 40; see also CASTO, supra note 42, at 162.
113. CHEMERINSKY, supra note 66, at 309.
Notwithstanding the development of common law by the federal courts in these various areas, the Supreme Court stated on numerous occasions throughout the 1800’s that there was no common law of the United States. However, it seems clear that those cases stand for the notion that the common law of England was not inherited by the federal government in the same way that it was inherited by each of the states. For example, in the 1798 case U.S. v. Worrall, the Supreme Court notes that the common law of England can be traced to the states but not to the United States as a national government. The Court continues, “The common law of England is the law of each State, [in] so far as each state has adopted it.” The Court further explains in the 1834 case Wheaton v. Peters that when English citizens came to the U.S., they brought with them the English common law and while each state adopted English common law as it saw fit, the federal government did not.

These cases indicate that the common law referred to in the opinions was the already-established common law of England. These opinions did not address whether the federal courts had power to develop common law in areas unique to the federal government. In fact, federal courts believed that they had the power to create their own common law to aid in interpreting the U.S. Constitution and federal statutes as well as other areas including commercial and immigration law.

Despite the continued development of common law by federal courts, many criticized the Swift decision and its progeny. This criticism reflected a tension between the rights of state courts to develop and apply their own common law in matters of local concern and the recognition that certain types of common law questions, namely those affecting the nation as a whole, should be decided by federal courts. This tension was on display in two U.S. Supreme Court cases in the 1870’s: the 1871 case

114. See Cunningham v. Neagle, 135 U.S. 1, 89 (1890); Bucher v. Cheshire R. Co., 125 U.S. 555, 583–84 (1888); Smith v. Alabama, 124 U.S. 465, 478 (1888); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834) (“It is clear, there can be no common law of the United States.”); United States v. Worrall, 28 F.Cas. 774, 779 (1798) (No. 16,766) (“the United States, as a Federal government, have no common law”).

115. Worrall, 28 F.Cas. at 779.

116. Id.


120. See, e.g., Stephens, supra note 13, at 430–31.
of Caperton v. Bowyer\textsuperscript{121} and the 1875 case of New York Life Insurance Co. v. Hendren.\textsuperscript{122} Both cases were more concerned with whether claims involving the law of nations provided for federal question jurisdiction rather than the development of federal common law \textit{per se} in situations where the federal courts otherwise had jurisdiction.\textsuperscript{123}

However, these cases provided the Court an opportunity, in the context of the law of nations as jurisdiction-creating,\textsuperscript{124} to hear debate about whether the law of nations was “law of the United States.”\textsuperscript{125} The Court also addressed the issues of whether the common law of the United States exists separate from general common law and whether it includes the law of nations.\textsuperscript{126} In \textit{Caperton}, the Supreme Court was asked to decide whether international law, and in particular the law of war, was included in “laws of the United States” and, thus, presented a federal question for purposes of the Court’s appellate review.\textsuperscript{127} Although the Court ultimately refrained from deciding the issue,\textsuperscript{128} both parties presented strong views. The defendant, a confederate provost-marshal sued in tort by a man whom he had thrown into prison during the civil war (Bowyer), raised defenses under the law of war.\textsuperscript{129} He proposed that his defenses gave rise to the Court’s appellate jurisdiction because “international law is a law of the United States, of the \textit{nation}, and not of the several states.”\textsuperscript{130} The defendant continued, “[t]his indeed must be the law, or the General Government is at the mercy, on a question of foreign relations, of the action of a State, or of its courts.”\textsuperscript{131}

The plaintiff argued that Caperton’s defenses, even if based on international law, did not provide the Court with appellate jurisdiction as “laws of the United States.”\textsuperscript{132} He argued that although both federal and state

\begin{itemize}
\item \textsuperscript{121} See Caperton v. Bowyer, 81 U.S. 216 (1871).
\item \textsuperscript{122} N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286 (1875).
\item \textsuperscript{123} Id.; Caperton, 81 U.S. at 216.
\item \textsuperscript{124} Both cases considered whether the law of nations was jurisdiction-creating under the Court’s appellate jurisdiction rather than general federal question jurisdiction.
\item \textsuperscript{125} N.Y. Life Ins. Co., 92 U.S. at 286; Caperton, 81 U.S. at 216.
\item \textsuperscript{126} N.Y. Life Ins. Co., 92 U.S. at 286; Caperton, 81 U.S. at 216.
\item \textsuperscript{127} See Judiciary Act of 1789 ch. 20, § 25, 1 Stat. 73 (The Act provided for Supreme Court appellate jurisdiction consistent with U.S. \textit{Const.} art. III, § 2, cl. 2, where “drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity . . .”); see Caperton, 81 U.S. at 216.
\item \textsuperscript{128} Caperton, 81 U.S. at 216.
\item \textsuperscript{129} Id. at 217, 225.
\item \textsuperscript{130} Id. at 225.
\item \textsuperscript{131} Id. at 226.
\item \textsuperscript{132} Id. at 228.
\end{itemize}
courts “recognize the law of nations as binding upon them . . . the law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States.” Notably, the plaintiff conceded that perhaps the Supreme Court should have appellate jurisdiction over cases affecting foreign relations because this is an area of responsibility for the federal government—a seeming concession that the development of jurisdiction-creating federal common law in the area of the law of nations affecting foreign relations might be appropriate. However, he argued that this particular case did not affect foreign relations.

In 1875, the Supreme Court directly considered whether a claim involving the law of nations presented a federal question for appellate jurisdiction and found that it did not. In *New York Life Ins. Co. v. Hendren*, the Supreme Court considered the effect of the Civil War upon insurance contracts. The Court held that no federal question was presented where the question rested on the general law of nations, unless it was contended that the general rules had been “modified or suspended” by the laws of the United States. The Court treated this question as one of general public law available to and applicable in all courts, but not as one creating a federal question.

The opinion drew a vigorous dissent by Justice Bradley, whose opinion supported an argument for the development of federal common law in the area of international law. He stated that “international law has the force of law in our courts, because it is adopted and used by the United States.” According to Justice Bradley:

> [T]he laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States . . . [whether these laws] be the unwritten international law . . . or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.

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133. *Id.*
134. *Id.* at 228–29.
135. *Id.*
137. *Id.* at 286–87.
138. *Id.* at 287.
139. *Id.* at 287–88 (Bradley, J., dissenting).
140. *Id.*
141. *Id.*
Justice Bradley also noted the importance of ensuring uniformity and the finality of decision by the national government in these types of matters.\textsuperscript{142}

Although the majority in \textit{Hendren} suggested that the law of nations is not jurisdiction-creating,\textsuperscript{143} it did not address whether federal common law might exist in the area of foreign affairs. Nor did the Court address any issues that could affect foreign affairs. The majority viewed the case as wholly domestic.\textsuperscript{144} Had the case impacted foreign affairs, one may wonder if the Court would have reached a different result.

Both the \textit{Caperton} and the \textit{Hendren} decisions demonstrate that whether the law of nations was included in the newly-developing federal common law was a live issue at the time Congress enacted federal question jurisdiction in 1875.\textsuperscript{145} The \textit{Caperton} case had been decided nearly four years earlier.\textsuperscript{146} \textit{Hendren} was decided in October of 1875,\textsuperscript{147} just a few months after the enactment of § 1331 in March of 1875.\textsuperscript{148} Although it is unclear when the oral argument was heard, certain members of Congress, including Senator Carpenter, were probably aware that the issue was presented before the Court. Senator Carpenter was recognized as one of the leading constitutionalists in the nation, having argued several significant constitutional cases before the Supreme Court.\textsuperscript{149} Given this fact, it is difficult to believe that he was unaware of the arguments surrounding whether the law of nations was federal common law or gave rise to federal appellate jurisdiction under the “Laws of the Unitis States.”

\begin{itemize}
\item \textsuperscript{142} Id. at 288.
\item \textsuperscript{143} Id. at 286 (majority opinion).
\item \textsuperscript{144} See id.
\item \textsuperscript{145} Id.; Caperton v. Bowyer, 81 U.S. 216 (1871).
\item \textsuperscript{146} See Caperton, 81 U.S. 216.
\item \textsuperscript{147} Id. at 286 (noting that the case was decided during the October term).
\item \textsuperscript{148} See 28 U.S.C. § 1331 (2010).
\item \textsuperscript{149} Mathew Carpenter argued his first case before the U.S. Supreme Court in 1862. In 1868, he acquired nationwide recognition in \textit{Ex Parte McCordle}, 74 U.S. 506 (1868), where he demonstrated his knowledge of complex jurisdictional issues, arguing that Congress had the power to remove the Supreme Court’s appellate jurisdiction over certain habeas corpus cases. His other well-known cases include his representation of the state of Louisiana in the famous \textit{Slaughter-House Cases} 83 U.S. 36 (1872) (where the Supreme Court adopted his argument that the Fourteenth Amendment’s privileges and immunities clause did not restrict the police powers of the state to centralize all slaughterhouses within the city of New Orleans in order to prevent dumping of remains in waterways.). He was eventually acknowledged to be the leading legal advocate for reconstruction policies. \textit{Dictionary of Wisconsin History, Carpenter, Matthew Hale, WISCONSIN HISTORICAL Soc’y}, http://www.wisconsinhistory.org/dictionary/ (follow “Browse People” hyperlink; then follow “Carpenter, Matthew Hale” hyperlink) (last visited Nov. 10, 2010).
\end{itemize}
Senator Carpenter gave no direct clues, but he indicated a belief that federal question jurisdiction should be interpreted broadly whenever uniquely federal or national interests were at stake. For example, a review of his speeches and writings at the time suggest that he opposed expansion of the federal government’s jurisdiction over state-related matters. However, he supported such expansion over the matters that could affect national interests, including foreign affairs. Thus, it is probable that he believed § 1331 should in fact include the developing federal common law, including the law of nations when foreign relations issues were involved. This is especially true given the likelihood of his knowledge and approval of the developing federal common law in areas of national interests.

2. Continued Development of Federal Common Law in the Area of International Law

Twenty years later, the courts addressed again the emergence of federal common law in the area of international law in the 1894 federal district court case Murray v. Chicago & N.W. Ry Co. Murray concerned an action to recover damages for freight transportation rates. The court held that federal courts are empowered to develop common law principles governing “matters of national control.” It pointed to international law in particular, stating that “[t]he subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations . . . are committed to the national government.” In 1901, the Supreme Court cited Murray approvingly in Western Union Telegraph Co. v. Call Publishing Co. — a case in which the Court held that it had jurisdiction over claims involving pricing, applying emerging federal common law to the case.

The above cases reflect a time in the 1800’s and early 1900’s in which federal common law was being developed by the courts. The cases demonstrate a struggle to define the federal courts’ proper jurisdiction and its power to create federal common law, especially after the trend toward strong federal power after the Civil War. The ultimate conclusion reached in 1938 by the Supreme Court in Erie v. Tompkins and its proge-
ny now seems so obviously simple: in areas of state concern, federal courts do not have the authority to develop federal common law.\(^{157}\) Thus, it naturally follows that in areas of uniquely federal interests, especially as set forth through the division of responsibilities of the Constitution, federal courts do have the ability to develop federal common law.


The 1938 Supreme Court decision of *Erie v. Tompkins*\(^{158}\) ended the expansion of general federal common law. In *Erie*, the U.S. Supreme Court declared that federal general common law no longer exists, and, in diversity cases, federal courts should apply state law except in matters governed by the Federal Constitution or acts of Congress.\(^ {159}\) *Erie* insinuated, however, that enclaves of federal common law still exist by stating that judicial action is permissible in matters the Constitution specifically authorized or delegated to the United States.\(^ {160}\)

Moreover, on the same day that the Court issued the *Erie* decision, it also issued another decision written by the same author, Justice Brandeis. The decision, *Hinderlider v. La Plata River & Cherry Creek Ditch Co*, states that the question of “whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law,’ upon which neither the statutes nor the decisions of either State can be conclusive.”\(^ {161}\) *Hinderlider* recognized that, notwithstanding the *Erie* ruling, federal common law continues to exist in certain important areas.\(^ {162}\) The Court acknowledged that prior Court decisions regarding whether controversies involving interstate boundaries, waterways, and compacts created a federal question were not uniform,\(^ {163}\) but ultimately found that such controversies were “federal common law” and should create a federal question.\(^ {164}\) In fact, as discussed below, this may be one of the very first cases that specifically lead to the notion that “federal common law” presents a federal question for jurisdictional purposes.

The *Hinderlider* decision confirmed what had been developing for some time: in matters affecting uniquely federal interests, federal courts can develop and apply their own common law—federal common law. It

\(^{157}\) See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

\(^{158}\) See *id.*

\(^{159}\) *Id.* at 78.

\(^{160}\) *Id.*

\(^{161}\) *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

\(^{162}\) *Id.*

\(^{163}\) *Id.* at 811 n.12.

\(^{164}\) *Id.* at 811.
since has been accepted that international law is one such area of federal common law.


Shortly after the \textit{Erie} decision, Professor Philip Jessup wrote a well-known law review article in which he argued that customary international law should be treated as federal common law. He stated:

Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. . . .

. . . .

It would be unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.

This prediction came to fruition in the 1964 case \textit{Banco Nacional de Cuba v. Sabbatino}. In \textit{Sabbatino}, the Court applied the Act of State Doctrine—an international law rule—as a matter of federal common law when it dismissed a claim by an American commodity broker against Cuba for title to sugar. The Court recognized that it had the authority to develop a common law rule because the doctrine is so important to foreign relations. In so doing, the Court notes that the “United States courts apply international law as part of our own in appropriate circumstances . . . .” The decision further states:

We are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules

\begin{itemize}
\item[166.] \textit{Id.}
\item[167.] \textit{Id.}
\item[168.] \textit{Id.}
\item[169.] \textit{Id.}
\item[170.] \textit{Id.}
\end{itemize}
like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins.* 171

It also notes, with approval, Professor Jessup’s proposition that rules of international law should not be left to divergent and perhaps parochial state interpretations, and that “[h]is basic rationale is equally applicable to the act of state doctrine.” 172 The *Sabbatino* case is especially important to the consideration of the issues addressed in this Article. There, the Court did not directly apply international law or the law of nations, but rather believed that it had the authority to develop federal common law where a case might impact foreign affairs. 173 In exercising this authority, it explored international law and recognized a customary international law rule in the development of federal common law. 174

Similarly, in the 1981 case of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Supreme Court confirmed that “international disputes implicating . . . our relations with foreign nations” is an area of law that continues to exist as an enclave of federal common law. 175 According to the Court in *Texas Industries*, courts can create federal common law either where there is specific Congressional authorization to do so or where it is “necessary to protect uniquely federal interests,” such as those areas “concerned with the rights and obligations of the United States” including “our relations with foreign nations.” 176 The Court continues:

In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control. 177

The U.S. Supreme Court in *Sosa* agreed that federal courts have the authority to create federal common law in certain areas. 178 The Court recognized that *Erie* allows “limited enclaves” in which federal courts may

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171. *Id.* at 425.
172. *Id.*
173. *Id.* at 423 (“The act of state doctrine does, however, have ‘constitutional’ underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.”).
174. *Id.* at 421, 428–29.
176. *Id.* at 640–41.
177. *Id.* at 641 (citing *Illinois v. Milwaukee*, 406 U.S. 91, 92 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)).
178. *See Sosa, 542 U.S. at 692.*
derive some substantive federal common law. The Sosa Court indicated that the law of nations or areas of federal relations is one such area.

The cases discussed in this Part, including Jecker, The Paquette Habana, Hinderlider, Sabbatino, Texas Industries, and Sosa, all suggest that federal courts have the authority to develop law in areas of uniquely federal interests, such as in cases affecting foreign relations. Further, the cases suggest courts may look to customary international law and incorporate it into federal common law when appropriate. This is true whether a court is recognizing a private claim for violations of federal common law, as Court’s decision in Sosa indicates is within federal court’s power, or applying a rule of decision in diversity cases where a judicial opinion may impact foreign affairs.

A close analysis of these cases also leads to the conclusion that the law of nations per se is not part of the “laws of the United States,” and customary international law is not wholly incorporated into our federal common law. Instead, when uniquely federal interests are involved, the federal courts have common law authority to adopt certain rules of customary international law, which in turn become federal common law.


If federal common law did not exist at the time when the Constitution was written, and was only coming into existence during the enactment of general federal question jurisdiction in 1875, the ensuing question is whether the “Laws of the United States” for Article III purposes include modern federal common law, which in turn incorporates some aspects of customary international law. A similar question is whether, given that Congress in 1875 probably intended to confer jurisdiction to federal courts through the enactment of federal question jurisdiction as expansively as allowed by Article III, arising under “laws of the United States” for purposes of § 1331 includes federal common law that incorporates, or recognizes, aspects of customary international law.

The Supreme Court has never clearly stated that federal common law can be the basis of “Laws of the United States” under Article III. How-

179. Id. at 729; see also id. at 729 n.18 (noting that Sabbatino “further endorsed the reasoning of a noted commentator who had argued that Erie should not preclude the continued application of international law in federal courts.”)

180. Id. at 729–30.

181. This is borne from the Court’s opinion in Sosa, which stated, “our federal courts recognize customary international law.” Sosa, 541 U.S. at 729 (emphasis added).

ever, the Court in *Milwaukee v. Illinois* did clearly state that federal common law could be the basis for § 1331 jurisdiction. Some commentators argue that *Milwaukee v. Illinois*, as well as two dissenting opinions in other cases written by Justice Brennan, lead to the logical conclusion that Article III’s “Laws of the United States” includes federal common law. The fact that the Court has accepted that § 1331 jurisdiction is more narrow than the jurisdiction provided for in Article III strengthens this view. Thus, if federal common law can provide jurisdiction pursuant to § 1331, it necessarily means that it provides for jurisdiction under Article III as well.

Significantly, the Supreme Court in *Erie* found that the term “laws of the several states” found in § 34 of the First Judiciary Act (also known as the Rules of Decision Act) included state common law when deciding what rules of decision should apply in diversity cases. As such, it follows that “laws of the United States” in both, Article III and 28 U.S.C. § 1331 should also include common law of the United States, i.e., federal common law.

Although the Supreme Court in *Sosa* did not address whether claims for violation of the law of nations under the ATS “arise under the Constitution or Laws of the United States” for Article III purposes, its decision indicates the Court’s belief that such claims arise under Article III’s “Laws of the United States” as federal common law. But because this issue was not raised or briefed by the parties, the Court did not have an

183. Illinois filed a lawsuit against four cities alleging that they were polluting Lake Michigan and creating a public nuisance, and asked the lower courts to abate the nuisance. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93, 100 (1972) (citing *Romero v. Int’l Terminal Operating Co.*), 358 U.S. 354, 393 (1959) (Brennan, J., concurring), which concluded that “laws” within the meaning of § 1331 embraced claims founded on federal common law).


186. Federal Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 92 (codified at 28 U.S.C. § 725 (1940)) (“The laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”).

occasion to consider it directly. As noted in Part I, when an ATS case is between an alien and a citizen, Article III’s alienage provision provides for clear Article III constitutionality. But when the case is between two aliens, as it was in *Sosa*, federal courts can exercise jurisdiction pursuant the ATS under Article III only if the claims meet the “arising under this Constitution, Laws of the United States” provision. It appears that the Court assumed that the ATS was constitutional under Article III, even when the case involves an alien bringing suit against another alien. This is due, in part, to the *Sosa* Court’s silence on this issue and its affirmation that federal courts have the power to recognize certain tort claims for violation of the law of nations. Moreover, the Supreme Court did not challenge the holding in the ground-breaking 1980 ATS case *Filartiga v. Pena-Irala*, which stated that the ATS was constitutional based on the “Laws of the United States” provision of Article III. Moreover, the Court cited *Filartiga* approvingly in other contexts. This silence with respect to the ATS’s constitutionality, coupled with the Court’s approval of *Filartiga* and its statement that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations,” creates a fair assumption that the Supreme Court most likely agrees that the ATS is constitutional as between two aliens under Article III’s “arising under the Laws of the United States” provision as federal common law.

Finally, as analyzed above, federal courts have the authority to develop federal common law in areas of unique federal interest, given the ordering of the Constitution’s division of powers. The Constitutional divisions of responsibility between federal and state government arguably provide for this implicit authorization. Where such implicit constitutional division of issues occurs (e.g., in areas of foreign affairs), federal courts should have the ability, when appropriate, to develop federal common law in those areas of federal responsibility. Where such occurs, federal common law should be considered law of the United States for purposes of Article III and § 1331.

188. *See discussion supra* Section I.B.
189. Article III also provides for federal judicial power when a case is between citizens of a state and citizens of a foreign state. Thus, for a case between two aliens to be constitutional under Article III, the case must arise under the Constitution or laws of the United States. U.S. CONST. art. III, § 2, cl. 2.
193. *Id.* at 729.
194. *See discussion supra* Section II.C.4.–II.D.
III. PURSUANT TO 28 U.S.C. §1331, FEDERAL COURTS HAVE THE AUTHORITY TO USE THEIR COMMON LAW POWER TO PROVIDE REMEDIES BY RECOGNIZING PRIVATE CLAIMS FOR CERTAIN VIOLATIONS OF THE LAW OF NATIONS.


To the degree that common law claims alleging a violation of customary international law arise under the laws of the United States for purposes of general federal question jurisdiction, federal courts can, and should, have the common law power to provide remedies by recognizing such private claims, even absent explicit statutory authorization. Although related to the question of whether claims involving the law of nations arise under the laws of the United States as federal common law, the courts’ authorization to invoke their common law powers to provide a remedy through recognition of the claim for such violations is a different issue. Generally, there is a consensus that some type of authorization is necessary for a federal court to provide a remedy for a violation of law through the recognition of a private cause of action.195 The issue is whether the authorization needs to be explicit, such as a statute, as some scholars suggest,196 or whether it can be implicit in light of Congressional intent, Congressional understanding, or the Constitution’s division of responsibilities.197

In Sosa, the U.S. Supreme Court determined that the ATS was a jurisdictional statute that did not itself create a cause of action, but held that federal courts, through their common law power, could provide remedies by recognizing aliens’ private claims for a limited set of violations of the law of nations198 as a matter of federal common law.199 In other words, the Court found that a private cause of action exists for certain international law violations but federal common law provides the claim in cases

198. The Sosa Court held that any claim brought today for violation of the law of nations under the ATS must “rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th Century paradigms” recognized at the time—attacks on diplomats, safe conducts, and piracy. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).
199. Id. at 714, 724–25.
brought under the ATS. The Court found that Congress had implicitly authorized the federal courts to use their common law powers to recognize these private claims because when Congress enacted the ATS in 1789, it did so with an understanding “that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations.”

The analysis employed by the Sosa Court is consistent with the Supreme Court’s prior holdings recognizing private causes of action where the Court could ascertain that such was Congress’ intent, either expressly or by implication. In addition, there have been occasions when the Court has recognized causes of action where it found that Congress assumed such remedies were available, or where the Court found an implied action existed because such private claims had been allowed previously. Although these occasions involved Congressional assumptions in enacting statutes, there is no reason the same analysis should not apply to common law claims. In fact, the analysis should be more applicable to claims arising from the common law. In those decisions where the courts found private claims to implicitly arise from the statutes, Congress had the opportunity when it drafted such statutes to create causes of action, but did not do so. With federal common law, Congress has had no similar opportunity.

The analysis regarding implicit authorization employed by the Sosa Court should also apply to § 1331, because it is a jurisdictional statute just like the ATS. Thus, the question of whether federal courts are authorized to recognize causes of action for common law claims brought under § 1331 should be whether Congress understood when it enacted the statute in 1875 that federal courts would use their common law power to recognize claims for common law tort violations.

Congress likely understood that federal courts would do so. As with the ATS, when Congress enacted 28 U.S.C. § 1331, it likely understood that federal courts would use their common law power to recognize tort claims brought under the ATS.

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200. Id. at 724 (“The jurisdiction grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”).

201. Id. at 714, 724, 731 n.19.


claims, including claims for violations of the law of nations where those claims implicated foreign relations.204 In fact, federal courts had been recognizing private, common law tort claims for nearly 100 years.205 Moreover, as the Supreme Court noted in Sosa, “torts in violation of the law of nations were recognized as part of the common law” even in the late 1700’s.206 Federal courts recognized private claims for violations of the law of nations in the late 1700’s,207 and in 1875, those cases were still good law. The Sosa Court cited two of these cases to support its position that Congress assumed that private claims alleging violations of the law of nations could be brought as part of the common law.208

A review of cases decided in the 1800’s demonstrates that during this time, federal courts recognized private claims for violations of common law generally, and law of nations specifically, without statutory authorization. The most common type of federal cases where private claims for violations of the laws of nations were recognized as a matter of common law was in the area of prize,209 over which the courts had jurisdiction in admiralty. Such cases included the 1855 case of Jecker v. Montgomery, where the Supreme Court entertained a private, common law claim,210 as well as the 1862 Prize Cases, where the Supreme Court entertained four common law private claims in which the plaintiffs alleged that their ships’ capture and seizure as prize was unlawful.211

Other instances where federal courts recognized private claims for torts as a matter of common law occurred in cases against military officers and against civilians who were obeying the orders of military officers during times of armed conflict. For example, in the 1849 case of Luther

204. See discussion supra Section II.C.2–II.C.3.
206. Sosa, 542 U.S. at 714, 724.
207. See Bolchos v. Darrel, 3 F.Cas. 810, 811 (1795) (the court assumed it had jurisdiction under the ATS in suit for damages brought by a French privateer against the mortgagee of a British slave ship); Talbot v. Janson, 3 U.S. 133, 156–57 (1795) (holding that Talbot, a French citizen who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship had acted in contravention of the law of nations and was liable for the value of the captured assets); Moxon v. Fanny 17 F.Cas. 942, 948 (1973) (suggesting that the claim could otherwise be heard even though the ATS was not the proper jurisdictional statute in a case involving owners of a British ship seeking damages for its seizure in U.S. waters by a French privateer because the suit could not be called one for a “tort only.”).
209. The Prize Cases—an area of tort in violation of the law of nations—were routinely brought before federal courts during the 1800’s. See Prize Cases, 67 U.S. 635 (1862); see also The Joseph, 12 U.S. (8 Cranch) 451 (1814); The Rapid, 12 U.S. (8 Cranch) 155 (1814).
211. See Prize Cases, 67 U.S. at 635.
the Supreme Court ruled that when martial law was imposed in Rhode Island after an insurgent uprising to overthrow the government, an officer could be held civilly accountable for acts willfully done to an individual with more force than militarily necessary. No specific authorization for a private claim was cited, rather, such appears to have been a matter of common law.

In the 1851 seminal case of Mitchell v. Harmony, a U.S. citizen who traded in Mexico during the U.S-Mexican War in an area under U.S. control, brought a claim in federal court for the common law torts of trespass and conversion against an officer in the U.S. Army who had seized and converted for his own use the plaintiff’s horses, mules, wagons, goods, chattels, and merchandise. After rejecting defendants’ arguments that he was justified to act under the law of war, the Court allowed the private claim to go forward as a common law claim.

A review of the above cases, among others, demonstrates that federal courts routinely recognized private claims, including claims for violations of the law of nations, without the need for any specific authorization during the era when Congress enacted federal question jurisdiction. It was assumed that the federal courts could use their common law power to recognize private, civil claims. Thus, when Congress enacted § 1331 in 1875, it understood that federal courts would use their common law powers to recognize private claims once they had jurisdiction over such claims. As argued above, Congress also likely understood that § 1331 would create jurisdiction over the newly-developing federal common law claims—i.e., those common law claims affecting uniquely federal interests, including those invoking the laws of nations which could affect foreign relations.

B. Response to the Sosa Court’s Skepticism Regarding § 1331

In response to Justice Scalia’s concurring opinion that the Court’s decision in Sosa would lead to federal question jurisdiction under § 1331 for claims of customary international law violations, the Court stated, “[o]ur position does not . . . imply that every grant of jurisdiction to a

213. Id. at 38.
215. In this case, the Court had jurisdiction due to diversity of citizenship. Id. at 137.
216. Id. at 115–16.
217. Id. at 133–35.
federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes of § 1350).”\footnote{221} Moreover, although the Court confirmed that “no development in the last two centuries has precluded federal courts from recognizing a claim under the law of nations as an element of common law,”\footnote{222} it stated that its opinion regarding the ATS was consistent with the division of responsibilities between federal and state courts after 
\textit{Erie},\footnote{223} but that the same might not be true for “a more expansive common law power related to 28 U.S.C. § 1331.”\footnote{224}

The Court’s skepticism regarding whether customary international law claims fall under § 1331’s jurisdiction likely relates to concerns about federal courts using their common law powers too broadly, recognizing claims in a vast array of areas unrelated to uniquely federal interests, or for actions Congress may never have intended or understood when it enacted § 1331. Such use of federal common law powers would likely not be consistent with \textit{Erie}. However, use of common law power is consistent with \textit{Erie} if federal courts only use their common law powers to recognize and provide remedies for those claims of customary international law violations that entail uniquely federal interests, such as foreign relations.

\textit{Erie} ultimately was about the tension between federal and state power. It contemplated and overturned the federal courts’ usurpation of state judicial power in matters of local (not federal) concern.\footnote{225} But the \textit{Erie} decision did not address whether federal courts could use their federal common law power to recognize claims in areas of clearly national interest. In fact, the \textit{Erie} decision allows for certain enclaves of federal common law.

Federal courts can and should be able to use their common law power to recognize claims for violation of the law of nations where the recognition of such claims may affect foreign relations. Such claims should fall within the jurisdiction of federal courts, even where the claim is brought by a U.S. citizen, given that such claims might impact foreign affairs either through the recognition of the claim, a finding that the claim is non-justiciable, or through definitions of customary international law. \textit{Erie} is not to the contrary.

\begin{footnotesize}
\begin{enumerate}
\item \footnote{221} \textit{Id.} at 731 n.19.
\item \footnote{222} \textit{Id.} at 724–25.
\item \footnote{223} \textit{See generally Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).}
\item \footnote{224} \textit{Sosa, 542 U.S.}, at 731 n.19.
\item \footnote{225} \textit{See Erie, 304 U.S. 64.}
\end{enumerate}
\end{footnotesize}
CONCLUSION

Claims alleging violations of customary international law that have the potential to impact foreign affairs or other national interests should fall within the jurisdictional grant of 28 U.S.C. § 1331 as federal common law claims, which arise under the “laws of the United States.” Similarly, such claims arise under the “Laws of the United States” for purposes of Article III, and thus, their justiciability is constitutional. Federal courts should also have the common law power to recognize and provide remedies for these claims, because Congress understood, when it enacted § 1331 in 1875, that federal courts would use their common law power to recognize newly-emerging federal common law claims, just as both federal and state courts routinely recognized common law tort claims. As long as this federal common law power is used to develop and recognize claims that affect uniquely federal interests, such as foreign affairs, and not claims affecting primarily state interests, this power is consistent with *Erie v. Tompkins* and its progeny.
LIVING DISCREETLY: A CATCH 22 IN REFUGEE STATUS DETERMINATIONS ON THE BASIS OF SEXUAL ORIENTATION

INTRODUCTION

Seventy six countries around the world criminalize homosexuality, maintaining severe punishments for consensual sexual activity between adults of the same sex.¹ Of these countries, five still punish homosexual acts with the death penalty.² Other countries have “morality laws” against “anti-social” or “immoral” behavior, “causing a public scandal,” etc., that are used by the police to persecute gay, lesbian, bisexual, and transgender individuals.³ Such laws enable law enforcement officials to invade private residences of individuals suspected of engaging in same sex activity;⁴ these morality laws can result in exemption from punishment for arbitrary arrests made by law enforcement on the basis of allegations and rumors with few, if any, consequences for mistreatment.⁵ Even when such laws are not implemented or enforced, they influence societal attitudes, constructing a social stigma that often legitimizes violence and abuse against people who identify as lesbian, gay, bisexual, transgender (“LGBT”), or anyone who engages in homosexual conduct.⁶ In fact, laws of this nature often encourage state and private actors to engage in violence against sexual minorities and enable impunity for such actions.⁷ Thus, escaping from their country of origin and seeking asylum may be the only option for victims facing these kinds of situations.

While political asylum may offer hope of refuge and protection, the asylum process has many problems, especially for those individuals ap-

² Id. at 45.
⁵ Id.
⁶ Id. at 7.
⁷ Id.
plying for refugee status on the basis of sexual orientation. The largest obstacle to overcome for any claimant in an asylum case is credibility, regarding whether or not the applicant will actually face persecution if returned to their country of origin. Because asylum seekers can only rarely corroborate the specific elements of their claim, refugee determinations often depend largely on the applicant’s word alone. For sexual minorities, overcoming this credibility burden is made even more difficult because sexual orientation is generally not a visible or obvious characteristic; unlike qualities of other oppressed groups, sexual orientation is one that must be voluntarily revealed. However, many lesbians and gay men are not openly homosexual, continuing to remain discreet in order to “pass” as heterosexual and avoid the danger that comes with disclosure of their sexual identity. Thus, the rejection of the discretion requirement—that sexual minorities could, and therefore should, aid in their own protection from persecution by being discreet about their sex-


12. Id.


15. The High Court of Australia rejected the widespread trend in earlier cases in which decision makers could expect sexual minorities to conceal their identities in order to avoid persecution. See Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs (2003), 216 CLR 473 (Austl.) [hereinafter Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs]. In this case, the court concluded that this discretion requirement was itself a form of persecution. Id. The UNHCR’s Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity has also made it clear that a requirement to hide one’s sexual orientation or gender identity may approximate persecution. See U.N. High Comm’r for Refugees [UNHCR], UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity. ¶ 25 (Nov. 21, 2008) [hereinafter UNHCR Guidance Note], available at http://www.unhcr.org/refworld/docid/48abd5660.html. In this Guidance Note, the UNHCR states that taking reasonable steps to avoid persecutory harm is never a precondition to protection. Id.
uality—of early cases has had minimal, if any, impact on the ability of LGBT claimants to succeed in sexual orientation based asylum claims.

Although courts have begun to move away from judicially mandated discretion, the reality is that many homosexual individuals continue to live discreetly because “societal homophobia” prevails. That in turn means that problems of credibility continue to prevail in asylum claims based on sexual orientation. Such problems are multiplied by stereotypical images of LGBT people, such as expecting a flamboyant or feminine demeanor in gay men, or masculine, butch demeanor in lesbian women. Misconceptions of this nature are further compounded by cultural misunderstandings of social context and conditions in the country of origin as well as the decision makers’ preconceived notions about sexual orientation influenced by the societal attitudes of their own country. Without a better, clearer understanding of sexual orientation and gender identity, decision makers will continue to deliver inconsistent and incoherent LGBT asylum claims.

This Note argues that the success rate of refugee claims based on sexual orientation will not improve, even as more countries begin to reject discretion reasoning, unless refugee decision makers can better understand the specific social contexts experienced by applicants in their home country and are better able to actively suppress their false assumptions in assessing credibility. Part I provides an overview on the rights and status of refugees and what is required of applicants to succeed in an asylum claim. Sexual orientation as a basis upon which to claim asylum generally, and in Australia and Canada specifically, is discussed. Part II examines the problem of discretion prevalent in earlier cases of asylum related to sexual orientation and gender identity. More specifically, it discusses an Australian case that rejected that notion and analyzes its

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21. Kagan, supra note 9, at 371–372. A refugee applicant’s personal and emotional impressions on an adjudicator and the adjudicator’s “gut feelings” can have a substantial impact on the outcome of a case. Id. at 374. In addition, social perceptions may not always capture the “true complexity of an individual’s identity.” Marouf, supra note 13, at 59.
22. Marouf, supra note 13, at 59.
Finally, Part III explains the causes of the issues in credibility assessment and what should or can be done to overcome them. In doing so, it briefly compares the cases in Australia and Canada to demonstrate that even Canada, the world’s leader in progressive asylum policies, cannot completely avoid reliance on stereotypical assumptions in adjudicating refugee claims based on sexual orientation and gender reliance.

I. BACKGROUND ON ASYLUM LAW

A. Overview of the 1951 Convention relating to the Status of Refugees

The 1951 Convention relating to the Status of Refugees\(^{25}\) and the 1967 Protocol relating to the Status of Refugees\(^{26}\) codify the rights and status of refugees.\(^{27}\) These international instruments define the term “refugee”\(^{28}\) and establish the non-refoulement principle\(^{29}\) that obligates signatory

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27. LaViolette, *The UNHCR’s Guidance Note on Refugee Claims*, supra note 8, at 1.

28. A “refugee” is “any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” 1951 Convention, supra note 25, art. 1 A(2).

states to refrain from returning a refugee to a country where his life or freedom would be threatened. Additionally, the Office of the United Nations High Commission for Refugees (“UNHCR”) produced a handbook that tries to coherently define the central provisions of these instruments, “offering the basis for intergovernmental consensus on many interpretation issues.”

The Convention does not protect all of the refugees around the world, regardless of the extent of their misery. Individuals “seeking asylum must satisfy two main legal tests [to succeed in a claim]: (1) they must demonstrate a well-founded fear of persecution; and (2) they must substantiate that the persecution they fear is on account of their race, religion, nationality, political opinion, or membership in a particular social group.” In addition, the asylum seeker must show that their home country is “unwilling or unable to offer protection.” Many countries have interpreted these provisions to include applicants claiming refugee status based on sexual orientation and gender identity. Since the early 1990’s, countries such as Canada, the United States, Australia, and New Zealand have granted refugee status to individuals who fear persecution based on their sexual orientation or gender identity. Most early asylum opinions

31. 1951 Convention, supra note 25, art. 33, ¶ 1.
34. Id. at 5.
35. LaViolette, The UNHCR’s Guidance Note on Refugee Claims, supra note 8, at 1; see also 1951 Convention, supra note 25, art. 1, ¶ A(2). “A ‘particular social group’ normally comprises persons of similar background, habits or social status. A claim to fear persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e., race, religion or nationality . . . Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.” UNHCR Handbook, supra note 32, ¶¶ 77–79.
36. LaViolette, The UNHCR’s Guidance Note on Refugee Claims, supra note 8, at 1–2.
38. Id.
relating to sexual orientation and gender identity in such jurisdictions addressed the question of whether LGBT individuals constitute a particular social group rather than whether homosexuals experience a well-founded fear of persecution in their countries of origin. In addition, in 1995 the United Nations High Commissioner for Refugees (“UNHCR”) recognized that gay men and lesbians formed a particular social group and could therefore be granted refugee status on that basis under the terms of the Convention. In particular, the UNHCR stated that “persons facing . . . serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees.” While the UNHCR’s statements are not binding on the courts, they may be useful in determining whether a person is a refugee as well as in interpreting the terms of the 1951 Convention and the 1967 Protocol. Accordingly, at least eighteen countries now recognize that sexual minorities make up a social group within the meaning of the Convention’s definition of refugee and are prepared to grant asylum

39. James C. Hathaway, The Law of Refugee Status 163–164 (1991); UNHCR Guidance Note, supra note 15, ¶ 32. While sexual orientation is now recognized as a particular social group, it should also be noted that LGBT refugees may also show that their persecution is based upon political opinion. UNHCR, Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation, ¶ 6 (Sept. 3, 2004) [hereinafter UNHCR Advisory Opinion], available at http://www.unhcr.org/refsworld/docid/4551c0d04.html. “For the purposes of the 1951 Convention . . . the term ‘political opinion’ [is] broadly interpreted to . . . include opinions on sexual orientation and gender identity.” UNHCR Guidance Note, supra note 15, ¶ 30. A claimant’s political opinion need not have been expressed while he/she was still living in his/her home country; it was sufficient to show that those strongly held beliefs would now subject him/her to persecution, if returned, because the opinion has come to the persecutor’s attention by implication from his/her escape from the country. See also UNHCR Handbook, supra note 32, ¶¶ 94–96 (describing the status of refugees that are sur place). Along these lines, it is possible that LGBT refugees could also seek asylum on the basis of religious persecution. See Ramanathan, supra note 29, at 5; UNHCR Guidance Note, supra note 15, ¶ 31.

43. Id.
to LGBT people, provided that they satisfy the Convention’s aforementioned legal tests.\(^{44}\)

**B. Sexual Orientation-Specific Claims of Asylum**

Both Canada and Australia have precedent which states that sexual orientation can form the basis for refugee protection.\(^{45}\) Decisions in these countries focus on the importance of social group eligibility.\(^{46}\) In Canada, the Federal Court Trial Division’s decision in *Timothy Veysey v. Commissioner of the Correctional Service of Canada* provided the foundation for eventually treating sexual orientation as an “immutable characteristic capable of defining a social group.”\(^{47}\) While this case did not involve refugee law, the court’s definition of “particular social group” in finding a violation of the equality rights provision of Canada’s Charter of Rights and Freedoms is applicable in this context.\(^{48}\) There, the court explained that the grounds, such as race or ethnic origin, identified in Section 15 of the Charter as prohibited grounds of discrimination, imply the characteristic of immutability, a characteristic that “would also clearly apply to sexual orientation, or more precisely to those who have deviated from accepted sexual norms.”\(^{49}\)

Canada eventually incorporated this idea into its refugee law in the Supreme Court’s 1993 decision of *Ward v. Canada (Minister of Employment & Immigration)* decision, which provided an expansive definition of the term “particular social group.”\(^{50}\) There, the court reviewed earlier

\(^{44}\) According to *Sexual Minorities and the Law: A World Survey*, supra note 37, last updated in July of 2006, the eighteen countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Latvia, Netherlands, New Zealand, Norway, South Africa, Sweden, the United Kingdom, and the United States. *Id.* It should be noted that some of these countries also allow applicants to claim transgender discrimination or persecution as the basis for their refugee status. *See id.*

\(^{45}\) Swink, supra note 20, at 252.

\(^{46}\) Ramanathan, supra note 29, at 13–19.

\(^{47}\) Hathaway, supra note 39, at 163. In this case, a man alleged a breach of his right to equality because prison officials refused to extend the conjugal visitation policy to homosexuals. *Id.*

\(^{48}\) *Id.* at 163–164.

\(^{49}\) *Id.* at 164. Another feature that is common to the grounds listed under the Charter which would also apply to sexual minorities is that the groups have been “victimized and stigmatized throughout history because of prejudice, mostly based on fear or ignorance.” *Id.*

\(^{50}\) *Ward v. Canada (Minister of Employment & Immigration)* [1993] 2 S.R.C. 689 (Can.). This case had nothing to do with sexual orientation based persecution. However, it provides an important comprehensive definition of what constitutes a particular social group in Canada. *See id.*
Canadian and American precedents and identified three possible categories of social groups:

1. groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3. groups associated by a former voluntary status, unalterable due to its historical permanence.

The court specifically noted that the first category encompasses individuals persecuted on the basis of sexual orientation or gender identity. This idea, that homosexuals constitute a particular social group, was considered by the courts as early as 1991, and became widely accepted after the highly-publicized 1992 decision *In re Inaudi*. In that case, an Argentine man was granted asylum on the grounds that he was a homosexual man and was thus a member of a particular social group that was subject to persecution. The court determined that “homosexuality is an immutable characteristic, [which] alone suffices to place homosexuals in a particular social group [and] [e]ven if homosexuality were a voluntary condition, it is one so fundamental to a person’s identity that a claimant ought not to be compelled to change.” In granting this kind of refugee status, Canada became the first North American jurisdiction to offer sex-

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51. Id. at 715.
52. Id. at 716.
53. In a 1991 case involving a Uruguayan gay man, only one of two Immigration and Refugee Board of Canada panel members accepted the notion that “homosexuals . . . are definable, and form a particular social group. It is their right of conscience or human dignity that these individuals should not be required to change their sexual preference if persecuted because of their sexual preference.” Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, 53 McGill L.J. 59, 62–63 (2008). However, this panel member agreed with the other in holding that the applicant did not qualify for refugee status. Id.
55. Ramanathan, supra note 29, at 14 (citing *In re Inaudi*, No. T91–04459, [1992] C.R.D.D. No. 47 (Apr. 9, 1992)). The court relied on an earlier German asylum case that recognized gay men as a social group to reach its conclusion that homosexuality denoted a social group within the refugee definition. Id.
56. *Refugee Appeal No. 1312/93 Re GJ*, supra note 54, at 52. It should be noted that there was a dissent in this case, but it questioned the credibility of the facts presented rather than questioning the issue of whether sexual orientation was an appropriate ground for asylum. Id.
ual orientation-based asylum, setting an important international precedent.

As in Canada, the earliest Australian refugee claims relating to sexual orientation and gender identity also dealt, for the most part, with the issue of social group qualification. Australia considered the concept of membership in a particular social group in Morato v. Minister for Immigration, Local Government and Ethnic Affairs, in which the Federal Court held that a person must “belong to or [be] identified with a recognizable or cognizable group within society that shares some experience in common” in order to be a member of a particular social group. Taking cues from Canada’s jurisprudence in this area, the court refers to the “relative immutability of sexual orientation” and the “stigmatization throughout history of those who depart from accepted sexual norms.”

The Australian Refugee Review Tribunal (“RRT”) extended this notion to include sexual minorities as a particular social group for refugee status determination purposes under the 1951 Convention. The RRT first granted an applicant asylum on the basis of sexual orientation in 1994. This case involved a homosexual Iranian male whose father had discovered his sexuality and threatened to report him. After concluding that homosexuals are capable of constituting a particular social group, the RRT granted the claimant refugee status.

The high court upheld the RRT’s approach to sexual orientation-based asylum claims in Applicant A v. Minister for Immigration and Ethnic Affairs. In that decision, the court expressed the view that a group can

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58. Canada was not the first country ever to grant asylum to homosexual claimants. Pischl, supra note 23, at 446 (citing Brian F. Henes, Comment, The Origin and Consequences of Recognizing Homosexuals as a “Particular Social Group” for Refugee Purposes, 8 TEMP. INT’L & COMP. L.J. 377, 383–385 (1994)). Before Canada, Germany and the Netherlands had offered refugee status to applicants claiming persecution on the basis of sexual orientation in the late eighties. Id.


63. Swink, supra note 20, at 253.


65. Id.

66. Applicant A v Minister for Immigration and Ethnic Affairs [1997] 190 CLR 225 (Austl.). It should be noted that this was not a sexual orientation-based claim for asylum.
constitute a particular social group under the Convention definition even if its distinguishing characteristics did not have a “public face.” It is “sufficient that the public [is] aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group.” The court further stated that “[i]f the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status.” The courts in Australia have since recognized, both implicitly and explicitly, that sexual minorities may be considered a particular social group for the purposes of refugee status determinations.

II. WELL FOUNDED FEAR AND THE PROBLEM OF DISCRETION

Recognizable as a particular social group, sexual minorities will be granted refugee status upon proving a well-founded fear of persecution as “only those who face a genuine risk of persecution in their country of origin are entitled to the protections established by the Convention.” In order to constitute persecution, the harm feared by the applicant must be serious. This kind of serious harm may involve grave human rights violations, including a threat to life or freedom, in addition to other kinds of formidable harm, “as assessed in light of the opinions, feelings and psychological make-up of the applicant.” While the requirement that harm be serious leads to the distinction between persecu-

Id. at 227–228. However, the court explored the definition of particular social group and discussed in dicta that homosexuals as a group could define a particular social group under the Convention. Id. at 249–250.

67. Id. at 250.
68. Id.
69. Id. The court also noted that it was not necessary for the group to have attributes that they are perceived to have. Id.
70. Walker, supra note 42, at 180.
71. Hathaway, supra note 39, at 65. “Well-founded fear” generally consists of two requirements: (1) the applicant must “perceive herself to stand in ‘terror of persecution’. . . [and] it must be an extreme form of anxiety that neither feigned nor overstated, but is rather sincere and reasonable” under the circumstances; and (2) “this perception of risk must be consistent with available information on the conditions in the state of origin, as only those persons whose fear is reasonable can be said to stand in need of international protection.” Id.
72. LaViolette, The UNHCR’s Guidance Note on Refugee Claims, supra note 8, at 2.
73. Hathaway, supra note 39, at 65.
74. LaViolette, The UNHCR’s Guidance Note on Refugee Claims, supra note 8, at 3.
75. UNHCR Guidance Note, supra note 15, at 7.
tion and discrimination,\textsuperscript{76} a pattern of discrimination could, cumulatively, reach the level of harm necessary to be considered persecution.\textsuperscript{77} Whether an applicant has sufficiently established a well-founded fear of persecution to succeed on an asylum claim under the Convention is a complex factual and legal issue.\textsuperscript{78}

Early cases of asylum claims based on sexual orientation engaged in “discretion reasoning.”\textsuperscript{79} This idea implemented a “reasonable expectation that persons should, to the extent that it is possible, cooperate in their own protection, by exercising self-restraint such as avoiding any behavior that would identify them as gay.”\textsuperscript{80} A common notion that was widespread among refugee decision-makers, especially those in Australia,\textsuperscript{81} was that displays of sexual behavior in public between members of the same sex could attract disapproval,\textsuperscript{82} thus inviting persecution;\textsuperscript{83} it was thought that, unlike other minorities targeted for persecution, lesbian women and gay men could avoid the harms of persecution because they have the “option” of being discreet about their sexuality.\textsuperscript{84}

This idea of discretion undermines the purpose of the Convention by putting the responsibility of protection on the applicant who is required to ensure their own safety by keeping important aspects of their lives

\begin{footnotes}
\item[76] LaViolette, \textit{The UNHCR’s Guidance Note on Refugee Claims}, supra note 8, at 3. Note that there has been a tendency for decision makers to distinguish between persecution and the less serious harm of discrimination as the situation of homosexual individuals has been changing—as some countries are becoming more accepting of deviations of the “norm,” others continue to severely repress sexual diversity. \textit{Id.}
\item[77] UNHCR Guidance Note, supra note 15, at 7.
\item[78] LaViolette, \textit{The UNHCR’s Guidance Note on Refugee Claims}, supra note 8, at 3.
\item[80] \textit{Id.} See also V96/05496 [1998] RRTA 196 (15 Jan. 1998) (stating that “the right to free expression of sexuality does not extend so far as a right to publicly proclaim one’s sexuality and consequently it is reasonable to expect a homosexual to be discreet, if necessary, in the sense of avoiding overt manifestations of homosexuality such as public embracing or the public proclamation of his sexuality,” while this might be “irksome and unjust,” it would not “infringe any basic human right”).
\item[81] See Applicant LSL v Minister for Immigration and Multicultural Affairs [2000] FCA 211 (Austl.); see also Applicant WABR v Minister for Immigration and Multicultural Affairs [2002] 121 FCR 196 (Austl.).
\item[83] Millbank, \textit{From Discretion to Disbelief}, supra note 79, at 3.
\item[84] Kendall, \textit{supra} note 16, at 717.
\end{footnotes}
secret, rather than putting the responsibility on the receiving country.\textsuperscript{85} In fact, any “decision that requires ‘discretion,’ . . . read silence and invisibility, in order to avoid abuse does little more than prop up those inequities that the Convention seeks to address and which are at the core of both homophobia and sexism.”\textsuperscript{86} By requiring discretion, the scope of protection offered under the Convention differs in relation to the five articulated grounds by “protecting the right to be openly religious but not to be openly gay or in an identifiable same-sex relationship.”\textsuperscript{87}

Discretion reasoning illustrates society’s so-called “proper place” of homosexuality, as something that is necessarily private and must be hidden rather than as something crucial to an individual’s identity.\textsuperscript{88} While the explanation for the development of this approach is understandable, discretion reasoning is seriously flawed\textsuperscript{89} and, therefore inappropriate in refugee status determinations.\textsuperscript{90} It leads to incorrect assumptions and the misrepresentation of country information on the objective risk of persecution for sexual minorities, making it almost impossible for claims to succeed.\textsuperscript{91} As “this line of reasoning assume[s] that applicants should and would conform to their culture or government’s oppressive regimes in order to avoid harm,” the decision-makers in these cases failed to assess the magnitude of the potential harm and balance that harm in evaluating whether there was a real risk of persecution if the person was returned to the country of origin.\textsuperscript{92}

\begin{itemize}
\item \textsuperscript{85} Millbank, \textit{From Discretion to Disbelief}, supra note 79, at 3. Requiring applicants to live discreetly imposes a burden on asylum seekers who fear persecution on grounds of sexual orientation that is not imposed on asylum seekers who fear persecution on other grounds. \textit{Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs}, supra note 15, at 475.
\item \textsuperscript{86} Kendall, \textit{supra} note 16, at 717. It should also be noted that requiring discretion essentially requires “the muzzling of a central aspect of a person’s identity.” \textit{Id.}
\item \textsuperscript{87} Millbank, \textit{From Discretion to Disbelief}, supra note 79, at 3. The five Convention grounds are race, religion, nationality, political opinion, or membership of a particular social group. See 1951 Convention, \textit{supra} note 25, art. 1, ¶ A(2).
\item \textsuperscript{88} Millbank, \textit{From Discretion to Disbelief}, supra note 79, at 3. “The discretion approach explicitly posited the principle that human rights protection available to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity.” \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} See \textit{UNHCR Guidance Note}, supra note 15, at 7 (explicitly stating that being forced to hide or renounce one’s sexual orientation and gender identity, “where this is instigated or condoned by the state,” may rise to the level of persecution).
\item \textsuperscript{91} Millbank, \textit{From Discretion to Disbelief}, supra note 79, at 4.
\item \textsuperscript{92} \textit{Id.} at 4. This approach precludes an assessment of risk to the “extent that on occasion there [i]s literally no assessment at all of the country situation and the risk of harm to someone who was identified as gay or lesbian.” \textit{Id.}
\end{itemize}
Especially prevalent in Australia, where the Refugee Review Tribunal denied refugee status based several times on the notion that sexual minorities are able to avoid persecution by living discreetly, discretion reasoning has been rejected by the High Court of Australia in its December 2003 decision Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs. In that case, two gay men from Bangladesh sought asylum based on membership of a particular social group and the interpretation of persecution was the central issue. Specifically, the question was whether it was valid law for decision makers to consider whether sexual minorities could be or should be required to be discreet and secretive in their home countries in order to avoid or lessen the risk of persecution. The Tribunal rejected their claims, and while it accepted that it is impossible to live openly gay in Bangladesh, it ultimately concluded that they were not entitled to refugee protection. Finding that the appellants had not suffered serious harm because of their homosexuality, the Tribunal expressly stated that they had “clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home.” On appeal, the High Court by a four to three majority, held that the tribunal had erred and flat out rejected the discretion reasoning approach as invalid. The court concluded that persecution does not cease to be persecution for the purpose of the Convention because those that are persecuted can and should eliminate the harm by taking action to avoid the harm within their country of nationality. The court further stated that

93. Kendall, supra note 16, at 716. The issue of discretion was first raised in Australia in the case of a gay Chinese man who had been married to a woman before fleeing. V93/00242 [1994] RRTA 1150 (10 June 1994). In that case, the Tribunal found that it was not unreasonable to require an exercise of discretion and that this limitation of his sexual expression did not constitute persecution. Id.


95. Id. at 482–486.

96. Id. at 476. The question ultimately comes down to whether the discretion requirement is so serious in nature that it is intolerable or whether a denial of civil rights is “so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity.” Id.

97. Id. at 480.

98. Id. Central to this finding was the assumption that homosexual men in Bangladesh will not be targets of persecution if they act discreetly. Id.

99. Id.

100. Id. at 485. In such situations, the requirement of well-founded fear of persecution is satisfied as that well-founded fear is the claimant’s fear that he or she will suffer harm unless that person takes measures to avoid the harmful conduct. Id. This is true because
whether the applicant disclosed his or her identity as a homosexual and attracted the attention of persecutors is immaterial; if the harm inflicted falls under a Convention reason and is serious enough to constitute persecution, the homosexual person is entitled to protection under the Convention.  

III. ISSUES OF CREDIBILITY LESSEN THE REJECTION OF DISCRETION REASONING’S IMPACT  

Discretion reasoning ultimately led to the failure of decision makers to consider whether there was a real chance of persecution of the person upon repatriation. This failure was particularly evident where the actions of the persecutors already caused the affected individual to modify his or her conduct by hiding his or her sexual orientation or gender identity. In such cases, “there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future.” Detracting from the “future-focused nature” of the well-founded fear test, discretion reasoning makes it almost impossible for a claim based on sexual orientation to succeed unless the applicants were able to demonstrate that they had been persecuted in the past. Thus, the Australian decision rejecting the idea of discretion reasoning in asylum determinations shows promise of providing a solution to a variety of flaws, not just in the discretion approach but in asylum determinations based on sexual orientation and gender identity in general. But while the case is a progressive step in the right direction, and case law since the decision has shown some positive impact, it does not address the issues of credibility that exist in making refugee status determinations based on sexual orientation and gender identity.

in the majority of cases, the applicants have acted and carried out their conduct the way they did only because of the threat of harm. \textit{Id.} at 486.

101. \textit{Id.} at 486.

102. \textit{Id.} at 485.

103. \textit{Id.}

104. \textit{Id.}


106. \textit{Id.}


108. See N04/49627 [2005] RRTA 7 (25 Feb. 2005) (stating that having to hide one’s homosexuality to reduce the risk of harm is itself persecutory); see also N05/50670 [2005] 88 (19 May 2005) (framing the hiding of one’s sexual orientation and thus living discreetly as leading a double life rather than a normal life).
Problems of credibility continue to arise in sexual orientation based asylum claims because many homosexual individuals continue to live discreetly and often times “pass” as heterosexual individuals due to the prevalence of heterosexuality as a societal “norm.” As the applicant’s personal stories are the basis of the claim and the “foundation of virtually all of the applicant’s evidence,” hearings in the refugee forum almost always consist entirely of the applicants’ personal narratives of their experiences. Thus, the assessment of credibility is inevitably susceptible to subjectivity as it requires one human being, the decision maker, to evaluate the credibility of another human being, the claimant. Decision makers are required to “assess cases that are constructed upon the frail foundation of human descriptions of extreme experiences.” In this context, “[e]motional impressions of a person and ‘gut feelings’ can have a substantial impact” on the outcome of a case. The problem lies in the decision makers’ false assumptions about the conduct and appearance of homosexual individuals. Because such preconceived notions about sexual orientation and gender identity are shaped by the societal attitudes of the decision makers’ home countries, it is crucial to educate and train them in what sexual identity is and how it comes to develop, especially in individuals who identify as homosexual.

A. Demeanor as a Poor Indicator of Credibility

The necessity for better training and guidelines to help decision makers make more informed, objective decisions is evident from the continued reliance on demeanor, including physical appearance and perception of manner. Evaluations of demeanor are poor indicators of truthfulness because they are extremely dependent on the decision maker’s and the
applicant’s personal and cultural temperaments. Influenced by stereotypical images of the effeminate gay man or the masculine, butch lesbian woman, decision makers often tend to make assessments such as “no signs of being gay,” or “looked gay.” Such statements in asylum opinions are problematic because society’s social perceptions often do not capture the “true complexity of an individual’s identity.” In fact, individuals have “multiple, dynamic social identities that vary according to context, and different aspects of identity may be more or less prominent in any given situation.” Thus, in a potentially nerve-wracking formal hearing, refugee applicants may be unable to confidently and accurately speak about their traumatic and painful experiences. 

Adding further complication is the fact that many homosexual individuals continue to live secret lives in order to avoid persecution in their countries of origin. In this reality, refugee applicants making claims on the basis of sexual orientation and gender identity still face an unsolvable dilemma in which it is unlikely that they will pass the demeanor test: on the one hand, acting discreetly, while no longer a requirement in assessing refugee status, helps applicants avoid a threat of persecution in their home countries, yet on the other, it inhibits them from “looking” gay as many have spent countless years “passing” as straight.

In addition, applicants in sexual orientation based claims are likely to find answering questions about their sexuality very difficult due to feelings of shame and self-hatred, particularly when the questions are

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120. Millbank, The Ring of Truth, supra note 10, at 3.
121. Id.
122. Marouf, supra note 13, at 59.
123. Id.
125. Berg & Millbank, supra note 11, at 197; Millbank, From Discretion to Disbelief, supra note 79, at 5–6.
126. Kendall, supra note 16, at 716. While the rejection of discretion reasoning is a “win” for LGBT individuals, there is still a long way to go before these individuals will be welcomed into their receiving countries. Id.
127. Berg & Millbank, supra note 11, at 197.
129. Berg & Millbank, supra note 11, at 197. Applicants from especially repressive societies may have only talked to a handful of people, or none at all, about their sexual orientation prior to making a claim. Id. at 198. Thus, the circumstances surrounding the interview will affect whether the applicant feels comfortable and safe in revealing his or her identity. Id.
sexually explicit and asked by an authority figure.\textsuperscript{130} Because decision makers often interpret hesitation or lack of detail in an applicant’s response to questioning as indicative of lying,\textsuperscript{131} this kind of demeanor evaluation will lead them to discredit the applicant’s stories.\textsuperscript{132} This problem is exacerbated when applicants need to speak through an interpreter, which disrupts the communication and severely impedes the translation of both verbal and nonverbal cues.\textsuperscript{133} Such inherent difficulties in evaluating an applicant’s demeanor and conduct make it easy for decision makers to fall back on assumptions, instincts, or generalizations in reaching their decisions, resulting in “a simplified impression” of the individual.\textsuperscript{135} Despite the unreliability of demeanor in assessing truthfulness,\textsuperscript{136} it continues to be recognized as an important aspect of credi-

\textsuperscript{130} Millbank, \textit{The Ring of Truth}, supra note 10, at 4. Refugee applicants from countries where homosexual persecution is sanctioned by the state or encouraged will find it especially hard to disclose their identities as it will be difficult for them to trust that “state officials could be anything other than hostile” to such a disclosure. Berg & Millbank, \textit{supra} note 11, at 198.

\textsuperscript{131} Millbank, \textit{The Ring of Truth}, supra note 10, at 4. The reason behind this presumption is that decision makers have “pre-formed” expectations of how homosexual identity is expressed and understood without taking into account the diverse range of backgrounds and cultures from which the refugee applicants come. \textit{Id. See also} Marita Eastmond, \textit{Stories as Lived Experience: Narratives in Forced Migration Research}, 20 J. REFUGEE STUD. 248, 251 (2007) (stating that narratives must be analyzed in the social and political contexts that influence the refugee applicants’ lives as they are not “transparent renditions of reality” but rather, require interpretation).

\textsuperscript{132} Millbank, \textit{The Ring of Truth}, supra note 10, at 4.

\textsuperscript{133} Guy Coffey, \textit{The Credibility of Credibility Evidence at the Refugee Review Tribunal}, 15 INT’L J. REFUGEE L. 377, 381 (2003). Asylum claimants come from countries with “norms of verbal and nonverbal expression[s]” that the decision makers are unfamiliar with, thus making an accurate evaluation of demeanor highly unlikely. \textit{Id. at 382. In Kathiresan v Minister for Immigration and Multicultural Affairs, Gray J stated that “it is all too easy for the ‘subtle influence of demeanor’ to ‘become a cloak, which conceals an unintended but nonetheless decisive bias.’” Id. at 381–382 (citing \textit{Kathiresan v Minister for Immigration and Multicultural Affairs} (unreported, Federal Court of Australia, 6, 4 Mar. 1998) (Austl.)). In fact, there are real “risks associated with making credibility assessments . . . on the basis of demeanor and conduct” as there is little empirical support that evaluators are able to reliably assess the truthfulness of an “individual’s claims on the basis of demeanor and manner of presentation alone.” Id.}

\textsuperscript{134} Marouf, \textit{supra} note 13, at 59. This is due to “the sheer complexity of social life, paired with an all-too-common lack of motivation or capacity to process others in a complex manner, [which] can lead to focusing on just one of the many available categorizations.” \textit{Id. at 59–60.}

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} Kagan, \textit{supra} note 9, at 373.
bility assessment since decision makers continue to rely upon it, thus demonstrating the need to educate decision makers.

B. Inconsistency Does Not Always Equal Fabrication

Consistency, or the lack thereof, is another aspect of credibility assessments that leads to problems and, in effect, minimizes the impact of the rejection of the discretion reasoning approach. Decision makers frequently state inconsistency as the reason for rejecting a refugee applicant’s claim. Inconsistencies often occur within an applicant’s personal statements about their experiences or between each re-telling of their accounts. Because adjudicators believe inconsistency “goes to the heart of whether a person’s account is coherent,” they often conclude that an inconsistency in evidence necessarily calls the applicant’s credibility into question. However, such an automatic conclusion fails to consider the fact that there are a number of perfectly legitimate possibilities other than deliberate falsification that may give rise to inconsistencies. An inconsistency or contradiction does not necessarily signify fabrication as if often results from an applicant’s repeated questioning; since such questioning is unlikely to occur the same way on each occasion during the course of an applicant’s claim, it is almost impossible

140. Kagan, supra note 9, at 379.
141. See e.g. V99/09946 [2000] RRTA 935 (29 Sept.r 2000) (concluding that the “inconsistencies between the applicant’s evidence attached to his application and his written and oral evidence submitted to the Tribunal” undermined his credibility). In addition, there is a presumption that people who are telling the truth and remembering events that really happened are able to accurately recollect them the same way each time. Kagan, supra note 9, at 379.
142. Jane Herlihy, Peter Scragg & Stuart Turner, Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study, 324 BRIT. MED. J. 324, 326–327 (2002). In fact, decision makers, themselves, recognize that contradictions are inevitable in every case. Millbank, The Ring of Truth, supra note 10, at 6 (citing Cecile Rousseau & Patricia Foxen, Constructing and Deconstructing the Myth of the Lying Refugee, in LYING AND ILLNESS 74 (Els van Dongen & Sylvie Fainzang eds., 2005)).
144. Id. The applicant may first submit a personal statement followed by an interview by the asylum office; the applicant may then have to testify and be cross-examined. Id. By the end, the applicant will have told his or her story, both orally and verbally, several times over a period of many months. Id.
for the applicant, or anyone else, to answer each question in exactly the same manner.\footnote{145} In addition, delayed revelation of information pertinent to claims of persecution plays a role in leading decision makers to conclusions of inconsistency, and, ultimately rejections of applicants’ claims.\footnote{146} While this kind of delay may raise serious questions about the credibility of an applicant,\footnote{147} it is important to remember, as the UNHCR constantly reminds,\footnote{148} that claimants who have suffered serious trauma and human rights violations may delay revealing their experiences.\footnote{149} As in the demeanor context, refugee applicants may fear authority figures, may want to avoid reliving painful experiences, or may feel uncomfortable revealing information about a very private aspect of their lives, particularly in an unfamiliar and unwelcoming setting.\footnote{150} Decision makers must understand that while delayed revelation of important facts may sometimes be the result of fabrication, it can also result from “hyperamnesia . . . the observation that people remember more details with repeated recalls.”\footnote{151} Given such a range of possible reasons for delayed revelation of relevant information, decision makers should not immediately draw adverse inferences, automatically assuming that delayed disclosure equals falsification.\footnote{152}

\footnote{145. Herlihy, Scragg & Turner, supra note 142, at 326–327. In this study, researchers interviewed participants, asking the same questions weeks and months later, and ultimately found disparities from the first to the last interview to exist for every participant. Id. Upon further examination, the researchers discovered that the discrepancies between interviews had most to do with peripheral details. Id. at 326. See also Juliet Cohen, Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers, 13 INT’L J. REFUGEE L. 293, 308 (2001) [hereinafter Cohen, Questions of Credibility] (conducting a review of cognitive memory research and concluding that “it is almost impossible to maintain absolute consistency, especially if it is a long time since the events to be recalled.”); Juliet Cohen, Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony?, 69 Medico-Legal Journal 25, 27–34 (2001) [hereinafter Cohen, Errors of Credibility] (showing that personal narratives may change, without necessarily being an indication of lying, because memory is affected and influenced by many factors).

\footnote{146. Kagan, supra note 9, at 380.}

\footnote{147. Coffey, supra note 133, at 382–385.}

\footnote{148. UNHCR Handbook, supra note 32, ¶¶ 196–199.}

\footnote{149. Coffey, supra note 133, at 382.}

\footnote{150. Id.}

\footnote{151. Cohen, Questions of Credibility, supra note 145, at 297.}

\footnote{152. Coffey, supra note 133, at 382–385.}
C. All Surrounding Circumstances Should be Considered in an Assessment of Whether an Individual’s Expression of a Homosexual Identity is Plausible

Difficulties arise in assessing whether an individual’s account of a homosexual self-identity is actually plausible because it is unclear as to what exactly constitutes a plausible expression of a homosexual identity.153 “Given the great diversity of human experience and understanding of sexual identity both within and across genders, cultures and other divides,”154 lesbians and gay men do not necessarily acknowledge and act on their sexual orientation in an identical manner.155 As a result, an assessment of plausibility is often derived from false assumptions of what is likely to be the “typical evolution”156 of an individual’s homosexual identity.157 Relying on inferences of how people would or should behave in certain situations, decision makers frequently make plausibility judgments that are based more on speculation rather than upon actual evidence.158 This problem is aggravated by a lack of objective evidence to prove a refugee applicant’s identification as a homosexual individual.159 As in the demeanor context, plausibility determinations are based on broad generalizations and stereotypes of gay culture.160 For example, in a 2004 Canadian decision, a court held that an applicant who engaged in a relationship with a woman after arriving in Canada could not be gay because it was implausible that a homosexual would carry on such a relationship.161 In other cases, decision makers have evaluated the truthfulness of applicants’ claims of homosexuality by testing their familiarity with the gay lifestyle and scene in the country to which they escaped.162 In that context, claimants are expected to know about the gay nightclubs and other publicly gay venues in their country of relocation as proof of

156. Berg & Millbank, supra note 11, at 204.
158. Id.
159. Millbank, Imagining Otherness, supra note 82, at 154. As already stated, an applicant’s claim is almost entirely based on his/her personal narrative of his/her experience. Id.
161. Krystych v. Canada, supra note 24; Berg & Millbank, supra note 11, at 199 (citing Krystych v. Canada [2004] RPDD No. 339 (15 April 2004)). In another case, the court found that it was not plausible for a woman to have her first lesbian relationship in her 50’s because “most people discover their sexuality at a much younger age.” Millbank, The Ring of Truth, supra note 10, at 10.
their “gayness.” Such expectations do not take into account the fact that many homosexual individuals live discreetly, adopting concealment and avoidance strategies to escape persecution and the stigma that comes with being labeled a homosexual. Because such strategies “involve selectively disowning their sexual orientation to themselves and to others,” it is highly likely that homosexual refugee applicants will continue to live their lives “passing” as straight by engaging in heterosexual relationships or simply choosing not to openly participate in the gay lifestyle. Thus, presumptions based upon inaccurate “rational perceptions” of what constitutes a plausible homosexual identity and how it is likely to be expressed make it even more apparent that decision makers must receive education and training before they are expected to adjudicate asylum claims based on sexual orientation.

CONCLUSION

Although more countries are likely to follow Australia in its explicit rejection of the discretion requirement, the success rate of refugee claims based on sexual orientation will not improve unless refugee decision makers can better understand the specific social contexts of claimants’ home countries and are better able to actively suppress their false assumptions in assessing credibility. The 2003 Australian decision rejecting the discretion reasoning approach in sexual orientation-based asylum determinations was a step in the right direction for sexual minorities, but

163. Id.
164. Id. These expectations involve a “two-fold assumption: this is what our gay people do, therefore your doing likewise is proof of gayness, and also: if you have come from a place of oppression/covert experience of your sexuality, then the inevitable outcome of relocating should be enthusiastic engagement in cultural manifestations of gayness, because that is how ‘freedom’ is expressed.” Id.
165. Millbank, Imagining Otherness, supra note 82, at 197.
166. Berg & Millbank, supra note 11, at 198. Another possible explanation is that “claimants who have really suffered as a result of their sexuality may find the prospect of publicly-identifiable gay venues appalling rather than liberating, they may be suffering from depression or PTSD as a result of their experiences such that clubbing is not high on their list of priorities, or they may find such venues inaccessible or unpleasant for many reasons.” Millbank, The Ring of Truth, supra note 10, at 9.
168. Id.
170. By finally addressing issues unique to sexual minorities in the asylum context and making it clear that discretion should never be a precondition to protection, the UNHCR’s Guidance Note will likely lead more countries to reach the same result. UNHCR Guidance Note, supra note 15, ¶ 25; LaViolette, The UNHCR’s Guidance Note on Refugee Claims, supra note 8, at 5–6.
it did not resolve all of the issues inherent in these types of asylum claims.171 By failing to address issues of credibility, that decision neglected the fact that hearings in refugee forums frequently consist almost entirely of the applicants’ personal stories.172 The assessment of applicants’ credibility is therefore inevitably subject to the decision makers’ preconceived notions about sexual orientation and gender identity as influenced by the societal attitudes of the decision makers’ home countries.173 Such overbroad generalizations and stereotypes combined with the fact that sexual minorities are not openly homosexual,174 make it especially difficult for homosexuals to overcome the credibility obstacle.175

Because refugee status determinations occur in a context where “emotional impressions”176 and “gut feelings”177 will most likely have a substantial impact,178 it is extremely important that decision makers are thoroughly trained and educated in what constitutes sexual identity and how it comes to develop, especially in individuals who identify as homosexual. They should be aware that difficulties arise in evaluating demeanor which makes it easy for them to fall back on oversimplified social perceptions and inferences in reaching their decisions,179 resulting in an inaccurate portrayal of the individual.180 Acknowledging such downfalls in using demeanor as a guide in credibility assessments should help decision makers understand that a single, uniform expression of homosexuality does not exist.181 Decision makers must also realize that inconsistencies in personal narratives are to be expected and should not automatically disqualify an applicant as incredible since there are a variety of explanations for inconsistent stories.182 Finally, decision makers must fully understand that sexual minorities may often continue to live their lives

171. Millbank, From Discretion to Disbelief, supra note 79, at 5.
172. Millbank, Imagining Otherness, supra note 82, at 154.
174. Marouf, supra note 13, at 65.
175. Berg & Millbank, supra note 11, at 198.
177. Id.
178. Id.
179. Marouf, supra note 13, at 59.
180. Id.
182. Cohen, Errors of Recall and Credibility, supra note 145, at 27–34. As previously mentioned, during the course of reviewing a claim, an applicant is questioned about his/her experiences more than once and because that questioning is unlikely to occur the same way on each occasion, it is almost impossible for the applicant, or anyone else to answer each question in exactly the same way. Kagan, supra note 9, at 377.
discreetly.\textsuperscript{183} and in turn remember that unfamiliarity with the gay culture of their receiving country or participation in heterosexual relationships in the past does not necessarily disprove their “gayness.”\textsuperscript{184}

This kind of education and training for the decision makers is crucial because many countries around the world continue to persecute sexual minorities and punish them for homosexual activity\textsuperscript{185} and escaping to seek asylum in another country may be the only option for the victims facing these kinds of situations. Credibility is already a difficult obstacle to overcome\textsuperscript{186} for any asylum claimant without the added complication that LGBT applicants face because homosexuality is an invisible, non-obvious characteristic.\textsuperscript{187} It is made even less visible because societal homophobia continues to exist, causing many homosexuals to continue to live discreetly.\textsuperscript{188} Thus, without training to educate decision makers on how to suppress misconceptions about homosexuality, refugee applicants making claims on the basis of sexual orientation will continue to face an unresolved dilemma.

\textit{Venice Choi}\textsuperscript{*}

\textsuperscript{183} This is true despite the ruling rejecting the notion that homosexuals should have to live discreetly and thus help in their own protection because of the continued existence of homophobia in many countries. Ottosson, \textit{supra} note 1, at 7–45.

\textsuperscript{184} Millbank, \textit{The Ring of Truth}, \textit{supra} note 10, at 9.

\textsuperscript{185} Ottosson, \textit{supra} note 1, at 7–45.

\textsuperscript{186} Kagan, \textit{supra} note 9, at 367–368.

\textsuperscript{187} Berg & Millbank, \textit{supra} note 11, at 197.

\textsuperscript{188} \textit{Id.}

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TALKIN’ ‘BOUT A HUMANE REVOLUTION:1
NEW STANDARDS FOR FARMING PRACTICES AND HOW THEY COULD CHANGE INTERNATIONAL TRADE AS WE KNOW IT

INTRODUCTION

What we eat and where it comes from matters.2 While over the past few decades animal activists have been advocating for the humane treatment of animals,3 the battle over farm animal welfare recently made its way onto the November 2008 California state ballot,4 in the form of Proposition 2 (“Prop 2”),5 the Prevention of Farm Animal Cruelty Act.6 This Act, while arguably “modest,”7 will prospectively improve living standards for farm animals by prohibiting conditions that do not allow animals to lie down, stand up, fully extend their limbs, or to turn around,8 thus banning in California three widely used agricultural

1. This title was inspired by Tracy Chapman’s song, “Talkin’ ‘Bout A Revolution.” TRACY CHAPMAN, Talkin’ ‘Bout A Revolution, on TRACY CHAPMAN (Elektra/Asylum Records 1988).
2. See, e.g., JONATHAN SAFRAN FOER, EATING ANIMALS 32 (2009) (“There is something about eating animals that tends to polarize . . . become an activist or disdain activists . . . . If and how we eat animals cuts to something deep.”).
5. See id.
6. The California Health and Safety Code’s Farm Animal Cruelty provision provides:

In addition to other applicable provisions of law, a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:

Lying down, standing up, and fully extending his or her limbs; and

Turning around freely.

confinement systems: the battery cage for egg-laying hens, the veal crate for baby male cows, and the gestation crate for pregnant pigs. Due to the nature of California’s agricultural industry, this Act prompted a fight between the egg industry and Prop 2 supporters. According to the agricultural trade magazine Egg Industry, animal activists’ efforts to bring Prop 2 to the California ballot was not something to be taken lightly; United Egg Producers (“UEP”) stated that it needed “all hands on deck” for what the magazine deemed possibly “one of the biggest and most important battles of U.S. egg industry history.” UEP was justified in its concern; on November 4, 2008 animal rights advocates around the U.S. celebrated at the expense of agribusiness as Prop 2 passed by


11. “[V]eal calves are confined in wooden stalls so small that the young animal cannot turn around.” Mariann Sullivan & David J. Wolfson, If It Looks Like A Duck . . . New Jersey, the Regulation of Common Farming Practices, and the Meaning of “Humane,” in Animal Law and the Courts: A Reader 94, 94 (Taimie L. Bryant, et al. eds., 2008).

12. “[B]reeding pigs spend nearly all of their three to four years on earth in metal stalls, generally able to take no more than one step forward or back, never able to turn around.” Id.

13. Prop 2 focused on the hens, because “California doesn’t have much of a veal or pork industry . . . California produces 6% of the nation’s eggs.” Julie Schmit, California Vote Could Change U.S. Agribusiness, USA Today, Nov. 6, 2008, at 4B.


15. UEP is an organization of egg producers that provides services to its members in “government relations, animal welfare, environment, food safety, industry coalition building, nutrition, egg trading, member service programs, and communications.” History and Background, United Egg Producers, http://www.unitedegg.org/history/default.cfm (last visited July 7, 2010).


17. It is important to note that not all animal advocates supported Prop 2. See, e.g., Gary L. Francione & Anna E. Charlton, Animal Advocacy in the 21st Century: The Abolition of the Property Status of Nonhumans, in Animal Law and the Courts: A Reader 7, 24 (Taimie L. Bryant, et al. eds., 2008) (in support of the “abolitionist approach” to animal advocacy: “As long as a majority of people think that eating animals and animal
63.2%,\textsuperscript{18} thus securing more humane treatment for farm animals raised in California.\textsuperscript{19}

The current American “farm” house, with thousands of animals in a large-scale, factory-type\textsuperscript{20} setting, is a relatively recent phenomenon.\textsuperscript{21} Although the U.S. Congress enacted the federal Animal Welfare Act\textsuperscript{22} in 1966 to provide federal protection for animals,\textsuperscript{23} it contains a specific exemption for farm animals.\textsuperscript{24} Thus, states retain the responsibility of protecting farm animals.\textsuperscript{25} Until the recent passing of Prop 2\textsuperscript{26} and similar products is a morally acceptable behavior, nothing will change.


\textsuperscript{19} Sullivan & Wolfson, supra note 11, at 95 (discussing how industrial farming methods that developed after World War II caused farm animal cruelty to become “embedded in the methods of production themselves, and the life of each individual animal has become much less valuable to the producers who raise them for food”).

\textsuperscript{20} Sullivan & Wolfson, supra note 11, at 96 (discussing how, since the U.S. does not have a federal law that protects and regulates the way that farmed animals are raised, the U.S. Department of Agriculture (“USDA”) cannot create regulations for farm animal welfare).

\textsuperscript{21} Sullivan & Wolfson, supra note 11, at 96. Additionally, egg sale regulation is considered to be a part of the state police power, and is valid so long as it is “intended to protect the public health against unwholesome eggs.” 35A AM. JUR. 2D Food § 35 (2010); see also Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670 (7th Cir. 1992). Egg sale production regulations must also be reasonable and cannot infringe on the U.S. Constitution’s Commerce Clause. 35A AM. JUR. 2D Food § 35 (2010). A law regulating the sale of eggs between states could be challenged under the U.S. Constitution’s Commerce Clause.
lar statutes,\textsuperscript{27} anti-cruelty statutes were the sole means of protection for farmed animals, but they were extremely ineffective due to exemptions for “customary” farming practices,\textsuperscript{28} such as battery cage housing for hens.\textsuperscript{29} While similar laws previously passed in Florida,\textsuperscript{30} Arizona,\textsuperscript{31} Oregon,\textsuperscript{32} and Colorado,\textsuperscript{33} Prop 2\textsuperscript{34} is the first to create minimum farm animal welfare standards for battery cage hens, and thus, is groundbreaking.\textsuperscript{35} In fact, \textit{Feedstuffs}, deemed “one of the largest agribusiness
newspapers in the country, states that Prop 2 will affect the production of livestock and poultry throughout the U.S., and possibly all of North America. Since its passing, Maine and Michigan passed similar laws, and Ohio negotiated an agreement between animal advocacy organizations, members of the agriculture industry, and its governor, to change industry practices. Laws are also pending before other state legislatures. Furthermore, the Humane Society of the United States (“HSUS”) announced a push for federal legislation prohibiting federal programs from contracting with suppliers who raise animals used for meat, egg, and dairy products, in conditions of extreme confinement.

However, it is still unclear how far these humane treatment laws will extend. For example, some farms contest what standards are deemed acceptable by Prop 2’s requirements; others speculate that, due to necessary cost-prohibitive renovations, they will have to “downsize or

36. Id.
39. For example, a bill similar to Prop 2 is currently pending before the New York State Legislature. Assemb. A08163, Reg. Sess. (N.Y. 2010).
Furthermore, the new laws for gestation and veal crates currently only apply to in-state agricultural producers, while the law regarding eggs was recently extended to prospectively cover the production methods of all whole eggs sold in California (regardless of the state where they were originally produced). The strong public support for Prop 2 begs the question—how much longer will American consumers continue to accept the production of eggs raised in intensive confinement systems?

Arguably one of the most significant implications of the increase in humane farming legislation in the U.S. is the potential impact on international trade. The U.S. has certain international treaty obligations that it must uphold when trading with other countries; these commitments can be found in the General Agreement on Tariffs and Trade (“GATT”), which is the World Trade Organization’s (“WTO”) agreement to re-


44. The strong public response was demonstrated by voter turn-out in California. See Proposition 2 - Standards for Confining Farm Animals, supra note 18. It was also demonstrated by Prop 2’s successful passage; see Californians Make History by Banning Veal Crates, Battery Cages, and Gestation Crates, HUMANE SOC’Y OF THE U.S. (Nov. 4, 2008), http://www.hsus.org/farm/news/ournews/prop2_california_110408.html; and subsequent similar bills in other states; see, e.g., Maine, supra note 27.


46. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW 102 (2008) (discussing how “[e]ach member of the WTO that undertakes an international trade obligation has a duty to transform and implement that obligation in its domestic legal order”). However, WTO agreements have been defined as “non-self-executing agreements,” which means they do not automatically take effect in U.S. law. Id. at 133, 137.


48. The WTO was created to “provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments.” Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. 2.
duce trade barriers for goods. According to the Vienna Convention, which contains rules governing treaty enforcement, treaties must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Furthermore, “[s]ince clarity and predictability are goals of the dispute settlement system, WTO [dispute settlement] Panels have consistently said that the Vienna Convention is the tool they use to interpret the GATT.”

Importantly, the GATT’s goal of reducing trade barriers through its various provisions, as interpreted by the Vienna Convention, could conflict with potential new animal welfare standards that lay out new expectations for both domestic and foreign producers. However, the fact that the U.S. and other countries are beginning to recognize and promote animal welfare standards, suggests that as countries begin to modify their own measures at home, they will demand similar measures from their trading partners as well. In turn, this may place pressure on the WTO to

49. See id.
51. See CHOW & SCHOENBAUM, supra note 46, at 9.
52. Vienna Convention, supra note 50, art. 31(1).
53. A WTO dispute settlement panel decides whether a nation has violated one of its obligations under the GATT. See CHOW & SCHOENBAUM, supra note 46, at 52–53. If so, the WTO recommends that the violating country “bring its non-conforming measure into compliance with the WTO.” Id. The WTO has also created an Appellate Body to review Panel decisions. Id. at 53.
56. See, e.g., Gaverick Matheny & Cheryl Leahy, Farm-Animal Welfare, Legislation, and Trade, 70 LAW & CONTEMP. PROBS. 325, 349 (2007) (citing Committee on Agriculture Special Session, European Communities Proposal: Animal Welfare and Trade in Agriculture, G/AG/NG/W/19 (June 28, 2000), available at www.wto.org/english/tratop_e/agric_e/ngw19_e.doc) (“Animal welfare standards . . . could be undermined if there is no way of ensuring that agricultural and food products produced to domestic animal welfare standards are not simply replaced by imports pro-
accept animal welfare standards as complying with GATT trading obligations. Further, this trend suggests that animal welfare may begin to play a role in determining trade rules between countries, or at the very least, may begin to have a presence amidst trade discussions, concerns, and objectives. However, when analyzing a dispute between nations, it is still unclear if a WTO dispute settlement panel would see a trade restriction such as a countrywide ban on the production and importation of battery cage eggs, as a violation of WTO obligations. The WTO should accept and recognize such a restriction as complying with the GATT, due to the fact that the purpose of such a measure coincides with the plain meaning and purpose of certain GATT provisions.

Part I of this Note analyzes the U.S.’s trade obligations under the GATT. Part II discusses the potential ability of various GATT provisions to support a trade measure banning battery cage eggs. Part III discusses the U.S.’s potential ability to create such an animal welfare provision, while upholding its obligations in the Agreements annexed to the GATT. The Note concludes that an appropriately tailored animal welfare measure banning battery cages for hens should be able to survive under the GATT and its annexed agreements.

I. CURRENT LAY OF THE LAND: AN ANALYSIS OF TWO WTO TRADING OBLIGATIONS

While seemingly removed from farm animal welfare issues, trade agreements have the ability to bring about significant animal welfare reform in the agricultural industry. Currently, the WTO can be seen as both a friend and a foe to initiatives seeking to improve animal welfare in the agricultural industry. The EU has begun to provide for animal welfare provisions in some of its free trade agreements. Improving Animal Welfare: EU Action Plan, POULTRY SITE (Jan. 2006), http://www.thepoultrysite.com/articles/511/improving-animal-welfare-eu-action-plan. Two examples of such agreements are between the EU and Canada, and the EU and Chile. Free trade agreements are permissible under the GATT, Article XXIV.4. GATT, supra note 47, art. XXIV.4.


58. See DAVID S. FAVRE, Agricultural Animals, in ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS 287, 315 (2008). The international trade problems surrounding a country’s decision to restrict imports that do not meet the country’s animal welfare standards, have already been contemplated. See Matheny & Leahy, supra note 56. However, their argument focuses more on the potential for change through consumer and retailer campaigns. Id.
farming practices. The GATT contains many obligations for member countries that restrict the way that products can be differentiated. For example, under Article I(1), the Most-Favored Nation (“MFN”) clause, and Article III(1), the National Treatment clause, a WTO member cannot treat “like” products from other WTO member countries less favorably than the same products from any other country, or less favorably than its own domestic products. These obligations limit WTO members’ abilities to create trade restrictions on battery cage eggs.

Article I’s MFN principle mandates that “any advantage, favour, privilege or immunity” granted by a WTO member to another country’s product “shall be accorded immediately and unconditionally” by that WTO member to any other WTO member’s like product. In essence, instead of permitting one country to bestow special treatment on another country, MFN requires equal treatment for all WTO members. Article III contains the National Treatment principle, which mandates that internal charges cannot be applied in a way “so as to afford protection to domestic production.” It is important to emphasize that in both MFN and National Treatment, the principles only prohibit discrimination against “like” products. While at first glance, it may appear that the differing

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59. Critics have focused on the WTO’s support of “industrial farming by virtue of reducing trade barriers for large farms. On the other hand . . . the WTO is focused on the eventual eradication of subsidies that make these horrific factory farms competitive with traditional animal farming, or indeed enable factory farms to continue operating at all.” Kyle Ash, Why “Managing” Biodiversity Will Fail: An Alternative Approach to Sustainable Exploitation for International Law, 13 ANIMAL L. 209, 221 (2007).

60. GATT, supra note 47, art. I.1.

61. Id. art. III.1.

62. An examination of whether products are “like” products is conducted case-by-case with several considerations, such as “the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature, and quality.” Report of the Working Party on Border Tax Adjustments, ¶ 18, L/3464 (Dec. 2, 1970).

63. GATT, supra note 47, art. I.1.

64. Id. art. III.1.

65. Id. art. I.1.


67. GATT, supra note 47, art. III.1. Through Article III, MFN also incorporates equal treatment for “internal taxes and other internal charges.” Id. art. III.2.

68. See, e.g. MATSUSHITA ET AL., supra note 66, at 150. What constitutes “like” products under the MFN principle is deemed case-by-case, but the analysis can include looking at the products’ tariff classifications, product end uses, physical characteristics, and consumer tastes. See id. at 150–1. What constitutes “like” products under the National Treatment principle is deemed case-by-case, and it can include the same analyses as MFN, as well as whether the two products are “directly competitive or substitutable
manner in which products are produced (such as eggs from battery cages and eggs from cage-free facilities) change them so that they are not "like" one another, these differences are considered to be "processes and production methods" ("PPMs"), which generally do not change a product's likeness to another product.

In The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare, Peter Stevenson cites two WTO Panel reports, the Tuna-Dolphin cases, that demonstrate how the WTO has held that two commodities (in this case, tuna caught in seine nets, which cause high mortality rates amongst dolphins ("non-dolphin-safe nets"), and tuna caught in nets designed to reduce dolphin mortality rates ("dolphin-safe nets")), are the same product, and cannot be distinguished from one another based on the way they are caught. Specifically, the first Panel held that Article III requires "a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product." GATT Panel reports like those from the Tuna/Dolphin cases articulate that a country cannot take into account the way that a product is produced when deter-
mining if it is “like” another product, because the production method does not change the end product. Furthermore, whether or not a product is “like” another product is “fundamentally, a determination about the nature and extent of a competitive relationship between and among products.” For example, tuna products caught in non-dolphin-safe nets are seen as directly competing in the marketplace with tuna products that are caught in dolphin-safe nets. Therefore, the WTO reasons that despite having different PPMs, these tuna products are “like” products. In fact, no GATT Panel has thus far allowed a country to distinguish “like” products based on differing PPMs (with the exception of differing PPMs that can cause severe health risks).

However, there is a strong argument that eggs produced by battery cage hens and eggs produced by cage-free hens undergo such vastly different production methods, that they should not be considered “like” products. The analysis of whether two products are “like” one another is dependent—at least in part—upon consumer preferences, since “consumers’ tastes and habits are one of the key elements in the competitive relationship between products in the marketplace.” Importantly, consumers who buy cage-free eggs do not see these two products as “like” one another, since they make the conscious decision to buy one product based on its more “humane” production method. Furthermore, if hens

76. See Stevenson, supra note 71, at 110; see also Catherine Jean Archibald, Forbidden By the WTO? Discrimination Against A Product When Its Creation Causes Harm to the Environment or Animal Welfare, 48 NAT. RESOURCES J. 15, 17 (2008) (discussing how the “Tuna/Dolphin I dispute panel held that an environmentally and animal-welfare motivated PPM distinction was forbidden by the world trading regime”).

77. See, e.g., Tuna-Dolphin I, supra note 72, ¶ 5.15.


79. Tuna-Dolphin I, supra note 72, ¶ 5.15.

80. See generally Asbestos, supra note 78.

81. See Stevenson, supra note 71, at 111.

82. See MATSUISHITA ET AL., supra note 66, at 151.

83. Stevenson, supra note 71, at 117; see also Asbestos, supra note 78, ¶ 117.

84. See Peter Singer & Jim Mason, Introduction: Food and Ethics, in THE WAY WE EAT: WHY OUR FOOD CHOICES MATTER 4 (2006) (discussing various reasons, for example, why consumers choose to purchase organic food, from “an ethical concern for the environment to a desire to avoid ingesting pesticides and the conviction that organic food tastes better than food from conventional sources”); see also Stevenson, supra note 71, at 111.

85. See Archibald, supra note 76, at 45–46 (discussing how “the words ‘like products’ should not refer to two products whose production methods result in vastly different ‘ecological footprints’ . . . . ”); see also Stevenson, supra note 71, at 120–121 (holding that in the future, the WTO could rule “that, despite being physically identical or similar,
are fed grass at pasture (as opposed to a seed diet in battery cages) they arguably produce a healthier egg. Since consumers treat these two products (battery cage and cage-free eggs) differently, the WTO should follow suit. However, past Panel decisions have given no indication that future Panels will consider PPMs as affecting products’ likeness to one another.

II. AN ANALYSIS OF THE GATT AGREEMENT AND ANIMAL WELFARE MEASURES UNDER THE EXCEPTIONS ARTICLE

Historically, the GATT treated measures made in pursuit of animal welfare goals unfavorably, however, some GATT provisions actually indicate that such measures should be protected. Even if a country’s trade measure violates a trading obligation, such as MFN or National Treatment, it may be upheld as a permissible exception under GATT Article XX, arguably one of the most important Articles in the GATT. This exceptions provision allows, in “certain circumstances, legitimate public policy considerations other than trade liberalisation to take prece-
dence over the free trade requirements of the main GATT articles.”

When analyzing a country’s trade measure under Article XX, the WTO must first look at the particular provision of the Article, to see if the measure appropriately fits under the provision’s described exception; then, the WTO analyzes the measure under the “chapeau” of Article XX to ensure that the measure is not “arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.” The chapeau is important for its role in helping to “rein in national abuse of the exceptions.” There are three different provisions within Article XX that could potentially be used to protect an animal welfare measure from violating the GATT.

A. Article XX(g): Exception for Exhaustible Natural Resources

Article XX(g) is most likely the weakest of the three potential provisions to support a battery cage ban. This provision allows WTO members to enact measures applying to both foreign and domestic products, in order to conserve “exhaustible natural resources.” However, it has been analyzed by GATT Panels and the Appellate Body in the Shrimp/Turtle cases in a way that is favorable for only some animal welfare measures. In Shrimp/Turtle I, the Panel recounts how the U.S. passed a regulation in 1987 that required shrimp trawling fishermen to use certain methods to decrease turtle mortality caused by traditional shrimp trawl-

92. Stevenson, supra note 71, at 128. “Increased trade liberalization may be the goal of the WTO, but the organization understands that competing interests should be recognized.” Colm Patrick McInerney, From Shrimps and Dolphins to Retreaded Tyres: An Overview of the World Trade Organization Disputes, Discussing Exceptions to Trading Rules, 22 N.Y. INT’L L. REV. 153, 158–9 (2009).
93. See, e.g., Asbestos, supra note 78, ¶ 155.
95. GATT, supra note 47, art. XX.
97. GATT, supra note 47, art. XX(g).
99. See, e.g., Shrimp/Turtle Malaysia I, supra note 98.
100. Shrimp/Turtle I, supra note 98, ¶ 2.6; see also 50 C.F.R. §§ 217, 222, 227.
In 1989, the U.S. passed Public Law 609, which prohibited the importation of shrimp products that had been harvested with fishing technology that adversely affected sea turtles. Malaysia, India, Pakistan, and Thailand challenged this law before the WTO and after an appeal, the Appellate Body found that the measure did not fit within any Article XX exception, due to the fact that it created “arbitrary or unjustified discrimination.” Consequently, the U.S. changed its law to mandate shrimping in a manner that was “comparable in effectiveness” (but not exactly the same) as that of the U.S. Malaysia again brought an action before the WTO in Shrimp/Turtle Malaysia I, but the Panel and subsequent Appellate Body (Shrimp/Turtle Malaysia II) found the revised U.S. law to be non-discriminatory. This holding significantly deviated from the previous cases in that it allowed the U.S. to restrict

101. The regulation required shrimp trawling fishermen to use Turtle Excluder Devices (“TEDs”) or tow time restrictions “in specified areas where there was a significant mortality of sea turtles.” Shrimp/Turtle I, supra note 98, ¶ 2.6. “A TED is a grid trapdoor installed inside a [shrimp] trawling net . . . to allow shrimp to pass to the back of the net while directing sea turtles . . . out of the net.” Id. n. 613. The WTO Panel noted that all marine turtles (which are migratory creatures), were considered to be endangered species by the Convention on International Trade in Endangered Species. Id. ¶¶ 2.3, 3.9(d).

102. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101–162 (codified at 16 U.S.C. § 1537 (1989)); see also Shrimp/Turtle I, supra note 98, ¶ 2.7. Public Law 609 did permit shrimp trawling measures taken by a nation if the nation had a comparable regulatory program and incidental take rate to the U.S., or if it had a fishing environment that did not “pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting.” Shrimp/Turtle II, supra note 94, ¶ 3. The U.S. subsequently passed guidelines in 1991 and 1993 which assessed how foreign regulatory programs compared to those of the U.S. Id. ¶¶ 3–4. After the US Court of International Trade (“CIT”) found the guidelines to be “contrary to law,” the U.S. modified them in 1996. Shrimp/Turtle I, supra note 98, ¶¶ 2.10, 2.11.


104. The countries argued that the law was not covered by Article XX(b) or XX(g) exceptions, and that the law effectively “nullified or impaired benefits” owed to the countries. Shrimp/Turtle I, supra note 98, ¶ 3.1.

105. Shrimp/Turtle I, supra note 98, ¶ 5.394.


107. However, the Appellate Body held that the U.S. needed to continue “ongoing serious, good faith efforts to reach a multilateral agreement” with other nations regarding how to protect the turtles. Shrimp/Turtle Malaysia II, supra note 106, ¶ 152; see also Archibald, supra note 76, at 46.
trade based on the objective of protecting a natural resource,\(^{108}\) albeit not in an unjustifiable or arbitrarily discriminatory manner.\(^{109}\)

Some argue that the *Shrimp/Turtle Malaysia II* decision should extend to future cases and the WTO should “interpret any ambiguities in the regime in a way that is favourable to protecting the environment and/or animal welfare.”\(^{110}\) The impact of *Shrimp/Turtle Malaysia II* should not be understated; it was the first time in GATT and WTO history that a “unilateral extraterritorial national measure was upheld on environmental grounds.”\(^{111}\) The *Shrimp/Turtle* decisions demonstrate that a country can restrict or ban foreign products to conserve “exhaustible natural resources”\(^{112}\) if the restriction is concurrent with similar domestic restrictions,\(^{113}\) and indicates that a country may be able to exert some control over PPMs.\(^{114}\)

However, the decision’s usefulness in relation to a battery cage egg ban may be limited. A dispute settlement panel would be unlikely to extend the *Shrimp/Turtle Malaysia II* holding, which affected an endangered species,\(^{115}\) to farm animals such as egg-laying hens that eventually

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109. *Shrimp/Turtle Malaysia II*, *supra* note 106; see also Archibald, *supra* note 76, at 48. Archibald stresses that if a country wants to create a measure restricting trade for the conservation of a natural resource, the country should ensure that the standards that the foreign country has to meet are “no harsher” than the domestic standards; that the country “attempt[s] to start . . . negotiations . . . ha[s] full transparency of the decision-making process . . . [and has flexible standards] so that a country . . . [can] meet the environmental or animal welfare goal through different methods than those used by the importing and restricting country.” *Id.*


111. *Id.* at 47; see also Andres Rueda, *Shrimp and Turtles: What About Environmental Embargoes Under NAFTA?*, in *RECONCILING ENVIRONMENT AND TRADE* 519, 537 (Edith Brown Weiss & John H. Jackson eds., 2001) (discussing how environmentally, “the Shrimp-Turtle decision is almost unprecedented. It allows for the imposition of unilateral sanctions for extraterritorial, process-related reasons, provided that certain basic conditions are met”).

112. GATT, *supra* note 47, art. XX(g).

113. Archibald, *supra* note 76, at 48. *But see* Gaines, *supra* note 96, at 804 (“By disqualifying under the Article XX chapeau any measure that has the result of applying the economic pressure of a trade restriction on other governments unless they change their resource conservation policies, the Appellate Body effectively nullified Article XX(g)").

114. See *Shrimp/Turtle Malaysia I*, *supra* note 98. For a criticism of the two *Shrimp/Turtle* decisions and the idea that “the latest [Shrimp/Turtle decisions] establish a WTO rule that imposes extraordinary preconditions on member governments before they resort to Article XX for environmental measures,” see Gaines, *supra* note 96, at 745.

will be killed for food.\textsuperscript{116} The fact that hens are nowhere near species exhaustion\textsuperscript{117} suggests that a dispute settlement panel may not interpret this provision to protect an animal welfare measure for cage-free eggs. However, the “exhaustible natural resources” provision\textsuperscript{118} applies to more than just endangered species. In fact, in compliance with the Vienna Convention’s treaty interpretation method, according to the ordinary meaning of the treaty’s words,\textsuperscript{119} a farm animal like a hen can be considered a “natural resource.”\textsuperscript{120} Furthermore, under XX(g), the measure does not need to be “necessary” for conserving the natural resource, as is the case for some other Article XX measures;\textsuperscript{121} it must simply “relate to” conserving the natural resource.\textsuperscript{122} In sum, XX(g) could still be an option, but other provisions may provide stronger support.

B. Article XX(b): Exceptions for Human, Animal, and Plant Health

Unlike Article XX(g), Article XX(b) may be more successfully used to uphold a trade measure differentiating between farm products that are produced more humanely than others. This provision allows WTO members to enact measures “necessary to protect . . . animal . . . health.”\textsuperscript{123} It is unclear whether a dispute settlement panel would interpret a measure banning battery cages for hens (in order to protect their welfare) as related to animal health; “the argument that animal health includes animal

\textsuperscript{116} Compare Archibald, supra note 76, at 50 (noting that the Shrimp/Turtle decisions “leave open the question as to whether a measure that protects the welfare of a non-endangered species would receive as much protection as a measure that protects an endangered species”), with Stevenson, supra note 71, at 141 (“One must be careful not to extrapolate too far from the latest Shrimp-Turtle decisions as that case involves an endangered species, seen by some as more worthy of protection than non-endangered animals”).

\textsuperscript{117} See Sullivan & Wolfson, supra note 11 (“It is hard to comprehend the number of animals killed for food in the United States. More than ten billion animals (excluding fish) die every year”).

\textsuperscript{118} GATT, supra note 47, art. XX(g).

\textsuperscript{119} Vienna Convention, supra note 50, art. 31(1).

\textsuperscript{120} “Natural resource” is defined as “[a] material source of wealth, such as timber, fresh water, or a mineral deposit, that occurs in a natural state and has economic value.” Renewable Energy Program: Definitions, BUREAU OF OCEAN ENERGY MGMT., REG., & ENFORCEMENT: OFFSHORE ENERGY & MINERALS MGMT., http://www.boemre.gov/offshore/RenewableEnergy/Definitions.htm (last visited Sept. 9, 2010).

\textsuperscript{121} See, e.g., GATT supra note 47, arts. XX(a), XX(b).

\textsuperscript{122} Stevenson, supra note 71, at 127; GATT, supra note 47, art. XX(g).

\textsuperscript{123} GATT, supra note 47, art. XX(b).
welfare . . . has not yet been fully established or accepted.” Additionally, previous GATT Panels have seen Article XX(b) as relating solely to “animal life and health” and not animal welfare. This ambiguity, as to whether the WTO intended animal “health” to encompass animal “welfare,” could lead some critics to allege that this provision was not meant to protect the welfare of all animals. This sentiment is illustrated by the fact that some countries, like the U.S., have federal laws purporting to protect the welfare of all animals, but these laws specifically exempt farmed animals from their protection. Traditionally, the WTO limits its recognition of animal health provisions to those regarding disease prevention and food product safety for humans.

Additionally, it is unclear if a panel would interpret Article XX(b) as permitting Country A to enact a trade measure that would protect the welfare of hens in Country B (based on the idea that the eggs will eventually be imported into Country A). In Tuna-Dolphin I, the Panel held

124. Favre, supra note 58. However, at least one international body believes that there is a link between animal health and animal welfare. See The OIE’s Objectives and Achievements in Animal Welfare, World Org. for Animal Health (Sept. 9, 2009), http://www.oie.int/Eng/bien_etre/en_introduction.htm [hereinafter The OIE’s Objectives].


   ... (g) The term “animal” means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal ... but such term excludes . . . .

   ...

   (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber . . . . “

See also Mariann Sullivan & David J. Wolfson, What’s Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States, 70 Law & Contemp. Probs. 139, 139 (2007) [hereinafter What’s Good for the Goose] (discussing how “laws [in the U.S.] that govern the welfare of these animals have been altered to exempt cruel common practices or, when it comes to such practices, [they] are simply ignored”).

127. Thomas, supra note 125, at 618; see also Matheny & Leahy, supra note 56, at 350. In his article, Peter Stevenson does make the argument, though, that Article XX(b) should be expanded so that measures can be adopted for animal welfare. Stevenson, supra note 71, at 135–36.

128. “One major problem with Article XX is the ‘rule’ on extra-territoriality. The general position is that a WTO member nation may act to protect animals within its own territory but, generally, not those located outside its territorial jurisdiction . . . [however, this position is not] clear-cut and absolute.” Stevenson, supra note 71, at 122.
that Article XX(b) should be interpreted to allow a country to protect health only inside its own borders, because if a country was allowed to protect health outside of its borders, “each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”129 Further, a measure protected by Article XX(b) must be deemed “necessary”130 in order to be upheld—this is a difficult standard to meet, since “any number of hypothetical policies could fulfill a social objective without trade restrictions, even if such policies are unrealistic.”131

However, regardless of these problems, a future Panel should find that Article XX(b) can uphold a battery cage ban. While “‘[w]elfare’ is a broader term than ‘health,’”132 the International Office of Epizootics (“OIE”)133 sets international standards for The Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”),134 which is annexed to the GATT (and discussed in Part III of this Note),135 and has deemed the terms to be interconnected.136 As will be discussed, the connection between Article XX(b) and the SPS Agreement,137 as well as the current enhancements being made to the SPS Agreement, strengthen the case that animal welfare is related to animal health (and thus an animal welfare measure should be protected by Article XX(b)). Additionally, research has been conducted to show that battery cages prohibit hens from engaging in their normal behaviors and cause them to have

129. Tuna-Dolphin I, supra note 72, ¶ 5.27; see also Archibald, supra note 76, at 32.
131. Matheny & Leahy, supra note 56, at 350.
132. Stevenson, supra note 71, at 136.
135. See discussion infra Part III.A.
137. See SPS, supra note 134, Annex A(1).
health and psychological problems. Also, based on the ordinary meaning of Article XX(b), there is no indication of an intention to only allow a country to protect animal health within its borders, and throughout history, countries have enacted trade measures which have the effect of controlling production in other countries. Finally, a battery cage ban is “necessary” to protect animal welfare, since the battery cage production method itself has a detrimental effect on hens.

However, a dispute settlement panel may give great weight to the monetary burden that such a production change would place on another country, particularly a developing country. Two disputes brought before the Appellate Body, one using Article XX(b) successfully as a defense and another using Article XX(g) successfully as a defense, demonstrate that a country may place a high value on the economic consequences of a policy change.

Cages prevent hens from performing the bulk of their natural behavior, including nesting, perching, dustbathing, scratching, foraging, exercising, running, jumping, flying, stretching, wing-flapping, and freely walking. Cages also lead to severe disuse osteoporosis due to lack of exercise. Alternative, cage-free systems allow hens to move freely through their environment and engage in most of the behavior thwarted by battery-system confinement. All caged hens are permanently denied the opportunity to express most of their basic behavior. The science is clear that this deprivation represents a serious inherent welfare disadvantage compared to any cage-free production system. Barren, restrictive environments are detrimental to the psychological well-being of an animal.

Id.

See also Stevenson, supra note 71, at 136.


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Id.

See also Stevenson, supra note 71, at 136.

139. See, e.g., Archibald, supra note 76, at 32 (arguing that “[t]he plain reading of [Article XX] sets no limits and instead lets each country decide which life or health it wishes to protect”); see also GATT, supra note 47, art. XX(b).

140. See Archibald, supra note 76, at 32 (discussing how throughout history, before GATT negotiations, “countries were using trade bans to protect the environment . . . beyond their borders . . .”).

141. See, e.g., Shields & Duncan, supra note 138.

142. In Brazil—Measures Affecting Imports of Retreaded Tyres, the Appellate Body “stated that when a complaining member presents an alternative measure, the responding member must have the capabilities to enact it.” McInerney, supra note 92, at 200; see also Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, ¶ 156, WT/DS332/AB/R (Dec. 3, 2007).

143. In Shrimp/Turtle Malaysia II, the Appellate Body states that a country’s trade measure that is protected under Article XX “should take account of differing technology
strate that the WTO will seriously consider the implications of a trade restriction on a developing country, even if it is otherwise appropriate under Article XX. In both cases, the Appellate Body considered the greater difficulty that developing countries may have in implementing animal welfare trade measures, but ultimately, concluded that the trade measures could succeed, as long as they were not too constrictive.\(^{144}\)

With a battery cage ban, the alleged “costs” may not be as constrictive as critics assume. For example, developing countries may be better equipped to implement animal welfare standards than even some developed countries, due to the fact that more humane production methods are generally more “labor-intensive”\(^{145}\) and developing countries tend to have cheaper labor costs than developed countries.\(^{146}\) If the U.S. was to enact a trade measure that only sanctioned certain types of egg production for animal welfare-related reasons, it would need to acknowledge developing countries’ abilities to implement and enforce such a measure, and consequently would need to be flexible due to these differing abilities. If the U.S. created a battery cage ban with these considerations in mind, Article XX(b) should be able to defend such a measure.

C. Article XX(a): The Public Morals Exception

Article XX(a), which allows WTO members to create measures “necessary to protect public morals,”\(^{147}\) should also support a battery cage egg ban. While this provision has only been used on rare occasions,\(^{148}\) trade restrictions in favor of more humane practices may be covered\(^{149}\) as a result of society’s views on the need to treat animals humanely.\(^{150}\)

\(^{144}\) See generally Brazil—Measures Affecting Imports of Retreaded Tyres, supra note 142; Shrimp/Turtle Malaysia II, supra note 106, ¶ 149.

\(^{145}\) Matheny & Leahy, supra note 56, at 353 (discussing how “less-abusive production methods tend to be more labor-intensive while [common intensive farming] systems are more capital-intensive).

\(^{146}\) Id. (discussing how cheaper labor could give developing countries “a comparative advantage in satisfying the demand for welfare-enhanced meat, eggs, and milk”).

\(^{147}\) GATT, supra note 47, art. XX(a).

\(^{148}\) See, e.g., Shapiro, supra note 91, at 215.

\(^{149}\) See, e.g., Gaines, supra note 96, at 799 (discussing how Article XX(a) may allow “a country to protect its ‘public morals’ against the effects of trade—most likely imported products—that undercut its own moral preferences within its borders . . . .”).

fact, the public morals provision may soon be invoked with regard to two recent requests for WTO dispute settlement consultations launched by Canada and Norway (non-EU members)\textsuperscript{151} against the EU for its ban on imported seal products, which began in August 2010.\textsuperscript{152} Canada and Norway allege that the ban violates the EU’s trade obligations under the WTO.\textsuperscript{153} The EU defends its ban based on public outrage over the cruelty associated with seal slaughtering practices;\textsuperscript{154} in his expert submission to the European Parliament’s Committee on the Internal Market and Consumer Protection, Jacques Bourgeois said, “It is fairly easy to demonstrate that the inhumane killing and skinning of seals is a matter of [European] public morality.”\textsuperscript{155} However, to meet XX(a)’s standards, the EU’s ban must also be “necessary” to the protection of public morals and must meet the chapeau’s requirements.\textsuperscript{156} Humane Society International


\textsuperscript{153} Id. Presumably, Canada and Norway will challenge the ban based on GATT Article XI, which prohibits restrictions on a country’s number of imports. See Robert Galantucci, Compassionate Consumerism Within the GATT Regime: Can Belgium’s Ban on Seal Product Imports Be Justified Under Article XX?, 39 CAL W. INT’L L. J. 281, 286 (2009).

\textsuperscript{154} See, e.g., EU Ban Looms Over Seal Products, BBC NEWS EUROPE (May 5, 2009), http://news.bbc.co.uk/2/hi/europe/8033498.stm (quoting MEP Arlene McCarthy as saying that the majority of Europeans “are horrified by the cruel clubbing to death of seals and this law will finally put an end to the cruel cull.” Furthermore, “anti-hunt campaigners say some seals are skinned while still conscious. Hunters typically shoot the seals with rifles or bludgeon them to death with spiked clubs.”).


\textsuperscript{156} GATT, supra note 47, art. XX(a); see also Sarah Stewart & David Thomas, Comments on the Council’s Legal Service’s Paper On the WTO Compatibility of Measures Regulating the Seal Products Trade, HUMANE SOC’Y INT’L & RESPECT FOR ANIMALS (Mar. 23, 2009), available at http://www.hsus.org/about_us/humane_society_international_hsi/seal_trade_ban/learn_more/wto_compatibility.html. (discussing how the Appellate Body in Asbestos upheld
(“HSI”) alleges that a total ban on seal products meets the “necessary” requirement because no alternative measures will produce the same desired effect,\textsuperscript{157} that the ban meets the requirements of the chapeau since it applies to all seal products (and does not discriminate against one country’s products over another’s), and that it is not a disguised restriction on trade because it does not favor the EU’s seal products over foreign products.\textsuperscript{158}

However, the dispute settlement panel may also consider the costs such a trade measure will impose on countries like Canada and Norway.\textsuperscript{159} As previously acknowledged, higher animal welfare standards typically translate into increased production costs.\textsuperscript{160} In this case, the EU is not proposing an alternative method of seal slaughter so the costs are even more significant, since the countries selling seal products will no longer have access to the EU market. Thus, such a measure may be seen as a trade barrier\textsuperscript{161} that directly conflicts with the WTO’s overall mission to promote trade liberalization.\textsuperscript{162} However, a dispute settlement panel France’s total ban on asbestos, based on France’s desire to protect the public from health risks associated with the product; this demonstrates that a total ban, in some instances, can be deemed appropriate and legal under the chapeau’s “flexibility” test, and, as in Shrimp/Turtle Malaysia II, the EU has engaged in attempts to create a multilateral agreement regarding welfare issues in seal hunting).

\textsuperscript{157} Neither of the two alternatives to a complete seal ban, (products from “humanely killed” seals or labeling to give purchasers information about the slaughter method), would work, because “[c]ommercial seal hunts, particularly in the environments in which they take place, cannot be consistently humane,” and because the seal hunt is the type of event “when moral sensibility demands that trade in an inhumanely produced product is banned . . . that public morality is offended by the very presence on the market of something which is inhumanely produced.” Stewart & Thomas, supra note 156.

\textsuperscript{158} Id.

\textsuperscript{159} See, e.g., Shrimp/Turtle Malaysia II, supra note 106, ¶ 149 (discussing how a successful trade measure needs to take into account any other country’s “specific conditions”); see also Archibald, supra note 76, at 48 (discussing how a country’s trade measure must be flexible enough so that another country is able to successfully meet the measure’s requirements through other methods).

\textsuperscript{160} See, e.g., D. Bowles et al., Animal Welfare and Developing Countries: Opportunities for Trade in High-Welfare Products from Developing Countries, 24 REV. SCI. TECH. OFF. INT. EPZ. 783, 783 (2005), available at http://www.oie.int/boutique/extrait/bowles783790.pdf (discussing how “there is often a cost consequence from improving [animal welfare] standards”).

\textsuperscript{161} One example of a trade barrier that the WTO is concerned with is “internal government regulations and practices that impede imports or discriminate against foreign goods.” CHOW & SCHOENBAUM, supra note 46, at 348.

\textsuperscript{162} The GATT states that the WTO members chose to enter into agreements “directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.” GATT, supra note 47, pmbl.
should ultimately view these costs, even in the case of a total elimination of a market, as less important than the fact that the animal welfare measure meets all of the requirements of Article XX(a), as it is a necessary measure for the protection of public morals that does not violate the chapeau.

If the seal product ban is successful in defeating a WTO violation claim, it should open the door to use Article XX(a) to defend other animal welfare-driven measures. Seal slaughter may be considered “inherently cruel” because of the weather conditions and its isolated nature, while farming conditions can be controlled and changed. However, it is difficult to see how the seal hunt’s practices are any more inhumane than those common to intensive farming practices, such as battery cages. Further, intensive confinement practices continue for the farm animals’ entire lives; this fact could offend public morals even more than an abhorrent seal slaughter technique. According to 2003 survey data, 96% of Americans believe that animals should have “at least some protection from harm and exploitation” and 62% of Americans support the passage of “strict laws concerning the treatment of farm animals.” As shown by these statistics, conventional intensive farming techniques that cause severe harm to animals are offensive to the American public. Fur-

163. Although, especially in the case of banning certain practices in agriculture, it may be more difficult to succeed under the “necessary” section of Article XX. Unlike the slaughter of seals, which occurs on isolated ice floes, U.S. slaughterhouses are regulated by the Department of Agriculture. See, e.g., Slaughter Inspection 101, DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., http://www.fsis.usda.gov/Factsheets/Slaughter_Inspection_101/index.asp (last visited Aug. 19, 2010); see also HUMANE SOC’Y INT’L, A COMPLETE BAN ON SEAL PRODUCTS IS JUSTIFIED UNDER THE WORLD TRADE ORGANIZATION (WTO) AGREEMENTS (2009), available at http://bansealtrade.files.wordpress.com/2009/10/hsi-seals-wto-handout.pdf (“commercial seal hunting occurs in uncontrolled field settings plagued by . . . moving ice floes, extreme weather conditions, poor visibility, and high ocean swells. These conditions prohibit hunters from . . . consistently applying humane slaughter methods designed to protect animal welfare and avoid pain and suffering . . . and preclude authorities from adequately monitoring . . . and enforcing regulations”).

164. Canada, Norway, supra note 152.

165. See, e.g., Michael Hlinka, Money Talks: Michael Hlinka: EU Ban on Seal Products Outrageous, CBC NEWS, (May 7, 2009), http://www.cbc.ca/money/moneytalks/2009/05/michael_hlinka_eu_ban_on_seal.html (“We’re supposed to believe that there’s a heightened sensitivity to animal welfare on [the European] continent . . . [b]ut there’s no mention of the treatment of geese for foie gras, or the killing of baby calves for veal . . . this particular bill is just so selective in its outrage . . .”).


167. Id.
thermore, as previously discussed relevant to Article XX(b),\textsuperscript{168} a total ban on battery cages would meet the “necessary” requirement of Article XX(a),\textsuperscript{169} because the intensive production methods would need to be eliminated in order to reduce the harm to animal welfare. The ban would satisfy Article XX’s chapeau, since it would apply to all battery cage eggs from all countries, including those within the U.S. Additionally, a battery cage ban would not be a total trade barrier for eggs, since battery cage eggs could be replaced by cage-free eggs. Based on all of these factors, a dispute settlement panel should deem a battery cage ban protected under Article XX(a).

III. POSSIBLE OPPORTUNITIES FOR ANIMAL WELFARE MEASURES UNDER THE SPS AGREEMENT AND THE AGREEMENT ON AGRICULTURE

Additionally, two Agreements annexed to the GATT should provide support for the legality of a trade measure such as a battery cage ban. First, the SPS Agreement was created to give WTO members “the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health,”\textsuperscript{170} and is meant to be an elaboration of certain GATT provisions, “in particular the provisions of Article XX(b).”\textsuperscript{171} Second, the Agreement on Agriculture (“AoA”)\textsuperscript{172} was created to “strengthen[] multilateral rules for trade in agricultural products and require[] WTO members to reduce protection against imports, trade-distorting domestic support programs, and export subsidies.”\textsuperscript{173} It also allows countries to create “non-trade-distorting,” or Green Box, subsidies.\textsuperscript{174} The SPS Agreement and the AoA should be used to defend an-

\begin{footnotesize}
\begin{enumerate}
\item[168.] See supra Part II.B.
\item[169.] GATT, supra note 47, art. XX(a).
\item[170.] SPS, supra note 134, art. 2(1).
\item[171.] Id., art. 2(4). For the argument that the SPS Agreement only applies to Article XX(b), see Shapiro, supra note 91, at 201–02.
\item[173.] OFFICE OF THE USTR, THE URUGUAY ROUND AGREEMENTS ACT STATEMENT OF ADMINISTRATIVE ACTION, AGREEMENT ON AGRICULTURE, (Sept. 27, 1994), available at 1994 WL 761603. The AoA is necessary because “[t]rade in agricultural products is the area of international trade most subject to government intervention and other protectionist measures that distort free trade.” CHOW & SCHONBAUM, supra note 46, at 457.
\end{enumerate}
\end{footnotesize}
imal welfare trade measures and programs, respectively, to incentivize the more humane treatment of farm animals.

A. The SPS Agreement and OIE International Standards

The SPS Agreement, especially when coupled with GATT Article XX(b), should provide protection for an animal welfare measure banning battery cages. Although the SPS Agreement applies to sanitary and phytosanitary measures to protect food safety or human, animal, or plant life or health, the connections made between animal health and animal welfare suggest that measures concerning animals who produce food products (such as egg-laying hens), are relevant under this Agreement. The SPS Agreement’s “principal objective . . . is to promote the harmonization of national standards,” measures that “conform to international standards, guidelines, or recommendations” are automatically deemed “necessary” for the protection of human, animal or plant life. In connection with this goal of harmonization, the OIE, which is seen as “the primary source of . . . international health standards” on animal health issues, is mandated by the SPS Agreement “to safeguard world trade by publishing health standards for international trade of animals and animal products.” The OIE’s Terrestrial Animal Health Code (“Terrestrial Code”) contains a chapter with Animal Welfare provisions.

175. See, e.g., Matheny & Leahy, supra note 56, at 352.
176. SPS, supra note 134, Annex A(1).
177. See, e.g., The OIE’s Objectives, supra note 124.
179. SPS, supra note 134, art. 3.2; see also Shapiro, supra note 91, at 204 (discussing how SPS measures that follow international standards have a “presumption of compliance with the GATT because they are presumed to satisfy GATT Article XX(b)”).
180. FAVRE, supra note 58, at 316.
181. What Is the OIE?, WORLD ORG. FOR ANIMAL HEALTH (Feb. 2, 2010), http://www.oie.int/eng/normes/A_standardisation_activities.pdf (last visited July 31, 2010) (discussing how even when following an OIE-prescribed standard, a risk assessment may be necessary, to “link[] the hazards identified for the specific commodity, the disease statuses of the exporting and importing countries, and the recommendations in the [OIE-prescribed] Codes”).
182. TERRESTRIAL ANIMAL HEALTH CODE, supra note 136. The Code includes standards “to assure the sanitary safety of international trade in terrestrial animals.” Id., forward, available at http://www.oie.int/eng/normes/Mcode/en_preface.htm#sous-chapitre-
but the chapter focuses on transporting animals by sea,\textsuperscript{184} land,\textsuperscript{185} or air;\textsuperscript{186} slaughtering animals;\textsuperscript{187} killing animals for controlling disease;\textsuperscript{188} guidelines on how to control stray dog populations;\textsuperscript{189} and guidelines for using animals for research or education purposes.\textsuperscript{190} The Code references the importance of animal welfare by stating that humans who use animals have an “ethical responsibility” to ensure animal welfare “to the greatest extent practicable,”\textsuperscript{191} and also that higher animal welfare can often improve food safety.\textsuperscript{192}

While the OIE’s current statements do not set international standards that easily translate to animal welfare measures,\textsuperscript{193} there are signs that this may soon change. The OIE publicly vocalized its commitment to setting standards for animal welfare;\textsuperscript{194} the organization further defined the link between animal health and welfare by declaring that “animals managed in accordance with the OIE recommendations on animal welfare may be more productive, with associated benefits for food security

\textsuperscript{184} Id., ch. 7.2: Transport of animals by sea, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.2.htm.
\textsuperscript{185} Id., ch. 7.3: Transport of animals by land, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.3.htm.
\textsuperscript{186} Id., ch. 7.4: Transport of animals by air, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.4.htm.
\textsuperscript{187} Id., ch. 7.5: Slaughter of animals, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.5.htm.
\textsuperscript{188} Id., ch. 7.6: Killing animals for disease control purposes, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.6.htm.
\textsuperscript{189} Id., ch. 7.7: Guidelines on stray dog population control, available at http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.7.htm.
\textsuperscript{190} Id., ch. 7.8: Use of animals in research and education, available at http://www.oie.int/eng/normes/mcode/en_chapitre_1.7.8.htm.
\textsuperscript{191} Id., art. 7.1.2.6, available at http://www.oie.int/eng/normes/mcode/en_chapitre_1.7.1.htm.
\textsuperscript{192} Id., art. 7.1.2.7.
\textsuperscript{193} However, the Terrestrial Code does acknowledge the “five freedoms” (“freedom from hunger; thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour”) and how they provide “valuable guidance in animal welfare.” Id., art. 7.1.2.2.
\textsuperscript{194} The OIE’s website states that it intends to “elaborate recommendations and guidelines covering animal welfare practices, reaffirming that animal health is a key component of animal welfare.” The OIE’s Objectives, supra note 124; see also Matheny & Leahy, supra note 56, at 351; Michael Bowman, “Normalizing” the International Convention for the Regulation of Whaling, 29 Mich. J. Int’l L. 293, 341 (2008).
An ad hoc Animal Welfare Group convened to develop new chapters for the Terrestrial Animal Health Code, which may be used to help uphold animal welfare measures in the future. The Agreement’s main purpose is to create international standards. The Agreement specifically gives the OIE the power to create those standards for animal safety, and through the OIE’s creation of a new chapter, it will formally recognize that animal welfare is interrelated with animal health. At the same time, the OIE’s animal welfare chapter could just result in minimum standards. Further attention should be paid to ensure that the OIE’s standards do not become the de facto setting (and that countries are allowed to create higher animal welfare standards than those prescribed by the OIE).

However, even without OIE-prescribed international standards, the SPS Agreement should provide a safe-haven for animal welfare measures. While SPS Article 2 mandates that a sanitary or phytosanitary measure be “based on scientific principles and [that it] is not maintained without sufficient scientific evidence,” it also recognizes that there may not be relevant evidence available. In that case, under Article 5.7, a WTO member may “provisionally adopt” measures “on the basis of available pertinent information,” but must thereafter try to acquire more information in order to make a “more objective assessment of risk” and to review the measure “within a reasonable period of time.” However, in European Communities—Measures Concerning Meat and Meat Products, the Appellate Body found that the European Community’s (“EC”) ban of meat from cattle that had received growth hormones was inconsistent with the requirements of the SPS Agreement. In that case, the EC created a measure which was more stringent than international standards and failed to ensure that its measure was based on an appro-

196. The OIE’s Objectives, supra note 124.
197. SPS, supra note 134, arts. 2.2, 5.7.
198. Id. art. 5.7.
200. Id.
201. WTO members are able to create measures higher than the international standard, “if there is a scientific justification,” or if they conform with the risk assessments found in Article 5. See SPS, supra note 134, arts. 3.3, 5.
priate risk assessment.\textsuperscript{202} Thus, even measures such as the EC’s, which “were previously regarded as purely internal policy measures,” now must be justified to fit under the SPS Agreement’s protection.\textsuperscript{203}

Nevertheless, this case should not undermine the use of the SPS Agreement to defend a battery cage ban. Nations are generally given wide latitude “in setting their own food safety standards . . . [and] nearly all bona fide attempts to protect food safety will be consistent with the SPS Agreement.”\textsuperscript{204} In \textit{EC—Measures Concerning Meat}, the available scientific evidence specifically did not support the EC’s allegation that a hormone ban was necessary.\textsuperscript{205} Additionally, in the case of a battery cage ban, there is little data on current intensive confinement practices’ detrimental effects on animal health and welfare,\textsuperscript{206} and much of the present data in the U.S. may be inaccurate since it is based on research funded by agribusiness.\textsuperscript{207} It is clear that more studies need to be conducted by neutral third-parties; however, a few studies not funded by agribusiness do exist, which show the detrimental effects of battery cages on hens’ wel-

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202. \textit{EC—Measures Concerning Meat}, supra note 199, \S\ 208. The EC invoked the “precautionary principle” in connection with SPS Article 5.7, which allows a WTO member to adopt SPS measures on a provisional basis when there is insufficient scientific evidence (however, WTO members must still follow Article 5.7 guidelines). \textit{Id.} \S\ 13; SPS, supra note 134, art. 5.7. However, the Appellate Body “rejected this argument . . . the precise bounds of the precautionary principle remain unsettled . . . [but] [i]t appears that the precautionary principle may be used to justify time-limited SPS measures, but [it] is not an alternative to risk assessment and scientific evidence for a definitive standard.” MATSUSHITA ET AL., supra note 66, at 500.

203. Victor, supra note 178, at 923.

204. \textit{Id.} at 872.


206. See, e.g., Crumb, supra note 19 (discussing how the USDA is funding a three-year study to determine how battery cage practices affect hens, but animal welfare groups contend that this is a “delaying tactic” to banning cages; another study funded by the American Egg Board “weighs several issues involving caged chickens, including their welfare and impact on the environment and human health as well as food quality and safety”); see also Steven M. Wise, \textit{An Argument for the Basic Legal Rights of Farmed Animals}, 106 Mich. L. Rev. FIRST IMPRESSIONS 133, 135 (2008) (“We do not know much about the cognitive abilities of farmed animals, because those who make billions of dollars exploiting them have never bothered to conduct significant research into what sorts of beings they are”).

207. See, e.g., \textit{What’s Good for the Goose}, supra note 126, at 163 (discussing how U.S. animal welfare science is controlled by agribusiness, in contrast to Europe, where animal welfare science “appears to have developed in a relatively objective manner”); see also F. Bailey Norwood & Jayson L. Lusk, \textit{The Farm Animal Welfare Debate}, CHOICES MAGAZINE (2009), http://www.choicesmagazine.org/magazine/article.php?article=89 (“Industry groups, especially the United Egg Producers . . . assert that their welfare standards are based on ‘sound’ science . . . but there are many studies backing HSUS’s claim that cage-free eggs are superior to cage eggs in terms of animal welfare . . . ”).
Farming Practices and International Trade

Furthermore, in terms of human health risks, the Council for Agricultural Science and Technology (“CAST”), with help from the OIE, issued a 2005 report concluding that modern day intensive confinement systems have created a world in which “global risks of disease are increasing.” In the meantime, the U.S. should be able to enact a measure on a provisional basis under SPS Article 5.7, while alleging insufficient available scientific evidence. Under this measure, the U.S. could allege that on the basis of available information, intensive confinement severely reduces animal health and welfare, which is directly correlated to sanitary and phytosanitary issues, and it could cite the EU’s recent Directive banning battery cages to show that other countries are similarly concerned and are passing similar measures.

Of course, an SPS measure such as a battery cage ban could also be seen as a trade barrier due to the fact that it would affect a country’s production costs. However, a GATT Panel should give these costs less weight considering the fact that the SPS Agreement was created, in part, to protect animal health, which OIE has proclaimed to be connected to animal welfare. Therefore, if the welfare of a hen is compromised, so is her health. Additionally, as shown through a recent OIE study, even some developing countries demonstrate an interest in animal welfare concerns and organic food production, which can lead to increased animal welfare, thus illustrating that both developed and developing

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208. See, e.g., Shields & Duncan, supra note 138.
209. CAST is a non-profit organization that is dedicated to publishing reports of science-based information, regarding issues of “animal sciences, food sciences and agricultural technology . . . .” About CAST, CAST, http://www.cast-science.org/about.asp (last visited Aug. 1, 2010).
211. CAST, supra note 210, at 6; see also FOER, supra note 2, at 142.
212. SPS, supra note 134, art. 5.7.
213. See, e.g., Shields & Duncan, supra note 138.
215. See CHOW & SCHOENBAUM, supra note 46, at 348.
216. See The OIE’s Objectives, supra note 124.
217. See, e.g., Bowles, supra note 160, at 784 (“Good agricultural practices and traceability systems are being implemented in Namibia, Botswana, South Africa and Zimbabwe”).
218. See, e.g., id. at 787 (“In both Argentina and Thailand, organic production is being promoted with government support . . . [g]rowth within the organic foods market is expected and will continue to allow many exporters in developing markets to access markets . . . organic production . . . can bring benefits for animal welfare”).
countries can still successfully produce products under an appropriately constructed animal welfare trade measure. Based on support from Article XX(b), the SPS Agreement, the OIE’s acknowledgment of the link between animal health and welfare, and its plan to create animal welfare international standards, a battery cage ban should be upheld under the SPS Agreement.

B. The Agreement on Agriculture: Green Box Subsidies

There should also be an opportunity for the AoA to support animal welfare measures. The AoA creates limits on a country’s ability to give subsidies to its domestic agricultural producers “depending on how much [the subsidies] distort production and trade.” Subsidies that are “highly trade-distorting” are called “Amber Box;” “minimally trade-distorting” subsidies are called “Blue Box;” and “non-trade-distorting” subsidies are called “Green Box.” The AoA allows countries an unlimited allowance of Green Box subsidies, provided that the subsidies are in the form of “publicly-funded government program[s] . . . not involving transfers from consumers” and provided that they do not “have the effect of providing price support to producers.” An example of a program which would affect production is the Biomass Crop Assistance Program, which “provides direct payments to farmers for establishing crops that can be converted to biomass.” However, if properly devised, Green Box subsidies should provide an opportunity for countries to create farm animal welfare programs to increase humane treatment.

219. See The OIE’s Objectives, supra note 124.
221. Id. at 877. However, Green Box subsidies must meet the “minimally trade-distorting test,” otherwise they risk reclassification or limitation. Id. See also Stacey Willemsen Person, Note, International Trade: Pushing United States Agriculture Toward A Greener Future?, 17 GEO. INT’L ENVTL. L. REV. 307, 327 (2005) (“[E]ven green box programs can have a trade-distorting effect if done on a large scale.”).
222. See AoA, supra note 172, Annex 2.1.
223. Id.; see also Chow & Schoenbaum, supra note 46, at 459 (discussing how Green Box subsidies include “programs for research, pest and disease control, training, extension and advisory services, marketing and promotional services, domestic food aid, insurance schemes, regional assistance, environmental programs, structural adjustment assistance, and income support payments ‘decoupled’ from agricultural production”).
225. See Erin Morrow, Agri-Environmentalism: A Farm Bill for 2007, 38 TEX. TECH. L. REV. 345, 363 (2006) (discussing how concessions such as Green-Box Subsidies are a result of “the AoA recognizing that countries have a legitimate interest in protecting nontrade commodity benefits . . . [such as] environmental protection[] and animal wel-
theny and Cheryl Leahy’s article, *Farm-Animal Welfare, Legislation, and Trade,*226 argues that subsidies to agricultural producers “for more animal-friendly housing, equipment, training, and certification” may meet Green Box requirements.227 However, Green Box subsidies for animal welfare payments have not yet been “explicitly allowed” by the WTO228 and “[b]ecause Green Box payments mean extra costs for governments, they must have widespread political support”229 to rationalize those costs being passed on to taxpayers. Furthermore, some countries within the WTO are pushing to place limits on Green Box subsidies, alleging that they need to be amended to better reflect the concerns of developing countries.230 For example, some developing countries argue that any type of subsidy causes trade distortions, because “[g]overnments in developing countries simply do not have the financial resources needed to subsidize their own farmers at the same levels that farmers in developed countries are being subsidized.”231

However, the U.S. asserts that animal welfare subsidies should be considered as Green Box subsidies.232 Furthermore, while a country must notify the WTO of its new Green Box programs, it has “a broad amount of discretion in the calculation and classification of [its] own domestic support programs.”233 Given the degree of leeway permitted through self-fare”); see also Gerrit Meester, *European Union, Common Agricultural Policy, and World Trade*, 14 KAN. J.L. & PUB. POL’Y 389, 410 (2005) (discussing how in order for European agriculture to remain competitive worldwide and maintain EU animal welfare standards, it might need “to aim for policies that stimulate and reward the ‘public functions’ of agriculture in a way that does not distort trade”).

226. Matheny & Leahy, supra note 56.
227. Id. at 352.
228. Id.
229. Id. at 352–53.
230. See INT’L CENTRE FOR TRADE AND SUSTAINABLE DEV., AGRICULTURAL SUBSIDIES IN THE WTO GREEN BOX: ENSURING COHERENCE WITH SUSTAINABLE DEVELOPMENT GOALS: INFORMATION NOTE 16, 13 (Sept. 2009), available at http://ictsd.org/downloads/2009/10/green-box-web-1.pdf (discussing how during the Doha round of trade negotiations, several developing countries have worked to reduce Green Box subsidies, while developed countries such as Japan, Norway, Switzerland, the EU and the U.S. have argued against Green Box reform).

231. Person, supra note 221, at 327. Some developing countries believe that even green box subsidies “may cause irreparable injury . . . [because the developing countries] cannot compete against foreign treasuries.” Id.


reporting, countries should be able to experiment with new programs with little oversight. However, this could lead to an abuse of power, as a subsidy program can affect production decisions. If a farmer uses the subsidy to create a more humane production system, the long-term labor costs associated with humane production, which are passed on to consumers in the form of higher prices, may affect the farmer’s decision to produce more or less in the future.

On the other hand, if a Green Box subsidy program is created to give farmers financial and technical assistance or “income compensation for loss of competitiveness” due to making animal welfare improvements, these changes can be viewed as comparable to U.S. environmental conservation programs that have already been deemed to meet Green Box requirements. For example, the Conservation Technical Assistance program, which “provides technical assistance to farmers and ranchers who implement soil and water conservation and water quality improvement,” is considered a Green Box program, as is the Conservation Reserve Program, which “provides technical and financial assistance to farmers and ranchers in complying with Federal, State, and tribal environmental laws . . . .” Like farmers who utilize these types of environmental conservation subsidies in order to conserve resources, farmers should be able to make their animal production systems more humane without having to sacrifice their market share. Furthermore, a program that provides support for animal-friendly housing should serve as a helpful tool for egg producers to use in order to comply with the new laws in the U.S.; the U.S. should welcome such measures, given the recent increase in concern over animal welfare, as evidenced by statutes like Prop 2.

CONCLUSION

Animal welfare is connected to public morals, animal health, and food safety—issues that are all acknowledged in GATT Articles XX(a),

236. Id.
238. See, e.g., Person, supra note 221, at 322 (citing CHARLES H. HANRAHAN ET. AL., CONG. RESEARCH SERV. REP. FOR CONG., AGRICULTURAL TRADE ISSUES IN THE 108TH CONGRESS, 15 (Apr. 3, 2003)) (discussing how the “Conservation Reserve Program” is considered a Green Box subsidy).
Therefore, the WTO should recognize animal welfare measures such as the battery cage bans that countries are beginning to enact. Although there are costs involved in implementing a battery cage ban given that producers will have to create new production systems, WTO dispute settlement panels should find that any potential costs to a country will be outweighed by the fact that the measure is not discriminatory and it truly goes to the heart of Articles XX(a), (b), or the SPS Agreement. Finally, the U.S. should develop and offer Green Box subsidies to incentivize producers to create more humane agricultural production systems, especially given the recent outpouring of public support for the more humane treatment of animals.

Public sentiment in the U.S. looks longingly back at traditional farming practices, when animals were perhaps treated more like sentient beings, and less like egg making machines. Yet, at the same time, factory farms still dominate the agricultural landscape. Globalization has and continues to change the way that our food is produced, yet current agricultural methods will need to be revised to comply with demands for more ethical practices. While the WTO traditionally left animal welfare out of trade negotiations, the changing tide of public concern suggests that it is time to take a practical look at the interrelatedness of trade and animal welfare. As Steven Wise so succinctly stated, “There is only one reason not to determine what rights farmed animals are due and recognize them. That is the reason that once justified human slavery: powerful economic interests are arrayed against it.” More humanely produced foods are in real demand, “based on consumers’ common sense understanding that such practices as gestation crates, veal creates and battery cases are not humane.” One day, economics and animal wel-

239. See GATT, supra note 47, art. XX; see also SPS, supra note 134.
240. See, e.g., G.L. Bagnara, Main Lecture at the Poultry Welfare Symposium: The Impact of Welfare on the European Poultry Production: Political Remarks, (May 18–22, 2009), (discussing how some EU farmers, particularly in Italy and Hungry, do not have the financial means to modify their production systems to comply with the EU battery cage phase-out, and that in Poland, the agricultural ministry “will support the egg producers to ask for a delay to apply the [new production methods]”).
241. See, e.g., Maine, supra note 27; Record-Breaking, supra note 27.
242. See, e.g., Meester, supra note 225, at 409. Meester makes a compelling argument about emerging clashes between globalization and consumer demands, and how it is predicted that in the future, “four or five supermarkets will operate worldwide. In the food processing industry around ten large producers will dominate . . . . This, together with a new kind of consumer who is increasingly critical about quality and production methods, mean that primary agriculture become [sic] much more dependent on demands in the chain . . . .” Id.
243. Wise, supra note 206, at 137.
244. Sullivan & Wolfson, supra note 11, at 122.
fare will need to strike a balance, and both interests will need to be preserved within international trade negotiations. Though it may not be today, we are moving in the right direction.

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IN THE HOT HOUSE: WILL CANADA’S WTO CHALLENGE SLAUGHTER U.S. COOL REGULATIONS?

INTRODUCTION

It has been a long time coming, but when you enter your grocery store these days, you might be able to figure out where your meat came from. The United States Department of Agriculture’s (“USDA”) mandatory Country-of-Origin Labeling (“COOL”) system requires retail labels on muscle cuts and ground beef, lamb, goat, pork, and chicken, among other things. COOL is intended to provide consumers with information about the origin of their purchases.

Origin labeling is common to many products we buy. It is a reflection of the Tariff Act of 1930, as amended (19 U.S.C. 1304), that requires, unless otherwise specified, the origin of all imports to be conspicuously labeled. Consumers are probably familiar with such labels on things like cars and clothes. Prior to COOL, many agricultural products were exempt or became products of the U.S. through additional manufacturing or

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processing. COOL requirements now ensure that all of your ground meat (and many other foodstuffs) at the meat counter has an origin label, too. Despite a long history of labeling, Canada has challenged COOL at the World Trade Organization (“WTO”), saying it is inconsistent with obligations the U.S. has committed to under a number of international trade agreements.

This note argues that COOL is a proper measure for providing consumers with desired information, but that it creates an inappropriate restriction on international trade in violation of U.S. obligations to the WTO. Part I explains why the U.S. finally created labeling regulations, exploring the different mechanisms considered, but not adopted, and illustrating the type of regulation COOL embodies. This background Section details the requirements of COOL, walking through the changes made to the final rule in an attempt to clarify what COOL means for domestic producers and importers. Part II expands upon what COOL does for interested consumers and makes a case for the recognition of consumers’ right to know as a legitimate objective. Part III gives a brief explanation of U.S. WTO obligations and attendant agreements, and Part IV argues that COOL is inconsistent with a number of those provisions, thus compromising the validity of the regulation.

I. BACKGROUND

This Section strives to put forth the reasoning behind the new U.S. legislation. The first Part begins with an explanation of the increased concern over the safety and source of our foodstuffs. It reviews the power of consumer preferences and willingness to pay principles that make labeling an attractive option of conveying source information to the consumer. The second Section describes the types of labeling and the issues involved in each scheme. The final Section explains COOL requirements.

A. Consumer knowledge and power

A number of Latin terms, scientific codes, and acronyms have been splashed across newspapers lately: H1N1 (formerly called swine flu) on the subway, Salmonella in your peanut butter, E. coli with your fresh

7. Id.
spinach, or *bovine spongiform encephalopathy* (also known as mad cow disease) on your beef. These outbreaks have become so numerous and frequent that a recent study by the Center for Food Integrity showed food safety as the highest ranked non-economic issue among consumers. Labels do not curb the incidence of disease, but they can help consumers make informed choices about what they purchase. Labels give consumers

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the option of avoiding meat from places experiencing outbreaks. Better identification and tracking can also help governments take swift and effective action in case of an outbreak. There have been numerous studies showing that consumers overwhelmingly support country of origin labels on their meat. There are many ways information can be conveyed to consumers, and different labeling schemes work for different situations; these systems are briefly explored below.

B. Labeling

Product packages convey various kinds of information to the consumer. Food packages now convey information about nutrient content, possible allergens, and methods of preparation, among other things. Some packages are so loaded with tiny print that a consumer cannot be expected to understand the intended message, let alone read the entire box. Some of what is found on packaging is intended for marketing purposes, but an increasing portion of it is in response to consumer demands. The following Sections explain the different types of labeling systems, illu-

strating the purposes of each type of system, and lay out the reasoning behind COOL’s formulation.

1. Types of labeling systems

Although there are many different labeling programs, they can generally be categorized into three groups: “(1) mandatory government-sponsored schemes; (2) voluntary government-sponsored schemes; and (3) voluntary private-sponsored schemes.”

Mandatory government-sponsored schemes are those that require packages to contain certain information. Negative-content labeling schemes warn consumers about a product’s adverse environmental or health effects. One example is warning labels on cigarettes. In contrast, positive-content labeling schemes illustrate the benefits of a particular product over its competitors, like dolphin-safe tuna labels. The theory behind positive labeling is that when consumers are aware of the impacts of their purchases, they will create demand for more friendly or healthy products. In turn, those friendly and healthy products will benefit by gaining market share. Neutral labeling schemes disclose information to the consumer that the government has deemed important to their decision-making, like fuel efficiency ratings on new cars sold in the U.S.

Governments often play a role in voluntary labeling schemes as well. As long as their products fulfill the predetermined conditions, producers may opt to use these labels because of market pressure. Government-based voluntary schemes provide: “(1) consistency in criteria; (2) balance of views of the different parties; (3) greater accountability to the public; and (4) greater program transparency.” For instance, U.S. producers may elect to label their products “grass fed” through an application for certification by the USDA and submitting documentation and


17. See Staffin, supra note 15, at 211.
20. See id.
21. Id. at 604; Emslie, supra note 16, at 495.
23. Id.
24. Id.
testimony for review. The government creates the standards producers must meet, such as defining "grass fed," after accounting for various interests. The proposed marketing agreement for leafy greens is another example of a voluntary labeling program.

Voluntary labeling schemes supported by private sponsors have shown up on many grocery shelves. There is no government oversight or participation in these schemes. Private voluntary systems may be organized by third party independents. The American Heart Association offers a "heart healthy" stamp of approval for products that have whole grains, are low fat, or are high in fiber. "Smart Choices" is another such labeling system that indicates a product is a healthy choice. Producers pay to be a part of such labeling schemes.

Private voluntary systems can also be based on self-assessment—i.e. claims the producers make about themselves. According to guidelines put forth by the International Standards Organization, producers can add any label to their goods if there is no definition or criteria for it yet, though they must be sure to be specific and not misleading. The recycling symbol, seen on the bottom of many packages indicating recyclable content, is a widely recognized self-declaration label.

26. See id. However, the certification program is also voluntary which means that producers may use the label without submitting their documentation for review. This makes the label itself open to the subjective interpretation of the producer who may choose to use it as a marketing tool. The value of such a label for consumer interests is therefore negligible.
30. See id.; Okubo, supra note 15, at 607.
34. See Emslie, supra note 16, at 497.
35. See Okubo, supra note 15, at 608–609.
36. See id. at 609.
2. COOL: A Mandatory Labeling System

Country-of-origin labels are an example of neutral government-mandated schemes. They do not provide the consumer with any suggestive information; COOL seeks only to help the consumer make an informed decision.37 Yet, these labels may induce positive or negative responses depending on a consumer’s own interests. Some companies voluntarily affix country-of-origin labels such as ‘made in America’ or ‘product of USA’ to appeal to consumer desires to support American manufacturing.38 Often, origin is an integral part of the value of the good itself. For instance, people may be willing to pay more for a leather bag or shoes made from Italian leather, because they believe Italian leather products are superior.39 It is this perceived value of a “product of USA” label that led Canada to denounce COOL as a protectionist measure.40

U.S. lawmakers suggested a voluntary program, which may have had more traction in the WTO, but ultimately, the mandatory scheme became law.41 Prior to final implementation of the regulation, labeling was voluntary, though few producers complied.42 It was said that the costs of labeling outweighed consumers’ willingness to pay more for the labeled product, but the USDA believes that the costs and benefits will balance out.43 The costs to producers are a concern only to the extent to which it

39. Personal interview with Amy Handler, student and avid shopper (Nov. 16, 2009). Geographic indicators, although a trademark issue, not a matter of country-of-origin, illustrate this point as well. Appellations such as Champagne and Roquefort are stringently protected in France lest they be used in such a way as to devalue the name. See Jim Chen, A Sober Second Look at Appellations of Origin: How the United States Will Crash France’s Wine and Cheese Party, 5. MINN. J. GLOBAL TRADE 29, 32–33 (1996).
41. See FMI Backgrounder, supra note 40.
restrains trade and, to that end, whether the consumers’ right to know justifies that infringement. Before going any further into the rights of the public and the requirements of international agreements, it is important to know what COOL demands and how it differs from prior regulations.

**C. COOL: The new U.S. food labeling requirements**

“[U]nder the Tariff Act of 1930, 19 U.S.C. §§ 1202-1681b, nearly every item imported into the United States must indicate to the ultimate purchaser its country of origin.” 44 The “ultimate purchaser” under this act was the importer, the grocer; origin information was passed to the last person receiving “the article in the form in which it was imported.” 45 So, the information was only passed on to consumers if the good was imported in packages ready for retail. 46 If the product was slated for additional processing, the U.S. manufacturer was considered the ultimate purchaser. 47 In practice, an article that underwent a “substantial transformation”—a manufacturing or combining process that results in a change of name, character, or use of the item—would be deemed to originate in the country in which it was last substantially transformed. 48 Additionally, many items, such as fruits, vegetables, nuts, and animals (dead or alive) were exempt from this labeling requirement. 49 The Farm Security and Rural Investment Act of 2002 (“2002 Farm Bill”) shifted the labeling requirements of the 1930 Tariff Act to require indication of country of origin at the point of final sale to the consumer. 50 Whereas under the old law, a grocery received shipments with an origin stamp on the box, now the consumer will get origin information not just on pre-packaged goods, but also on goods in the produce department and at the butcher counter.

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47. BECKER, supra note 45.


49. See NAT’L AGRIC. LAW CTR., supra note 44. According to customs, substantial transformation occurs when the manufacturing process changes the name, character, or use of the product. 19 C.F.R. §§ 134.35, 134.33.

In effect, the 2002 Farm Bill, and provisions of the “2008 Farm Bill[] amended the Agricultural Marketing Act of 1946 (Act) to require retailers to notify consumers of the country of origin of covered commodities.”51 COOL creates new labeling requirements, mandating labels on many commodities formerly excluded and labeling those products until they actually get to the consumer instead of just stopping with the importer/retailer/wholesaler.52 The implementation of COOL was delayed twice, and only became effective on March 16, 2009.53 In its ultimate form, COOL covers country of origin labeling for beef, pork, lamb, chicken, perishable agricultural commodities, macadamia nuts, pecans, peanuts, and ginseng.54 The rule goes on to explain that no matter how the commodity is offered for sale, whether in bulk, cluster, or individual package, it must contain a country of origin label.55

The USDA has laid out acceptable labeling terms for all covered commodities. For muscle cuts of meat born, raised, and slaughtered in the U.S., the label may say “Product of U.S.(A).” or simply “U.S.(A).”56 For those animals born elsewhere but raised and slaughtered in the U.S., the label must contain every location in which the animal has been, but it does not matter in what order they are listed.57 Animals that have been imported into the U.S. for immediate slaughter must be labeled “Product of Country X and U.S.(A).”58 Muscle cuts of meat that have been comingled during production with cuts of different categories, i.e. varying degrees of production in the U.S., must include all countries from

51. Id. at 2658 (emphasis added).
52. See supra notes 44–51 and accompanying text.
53. 7 C.F.R. § 65. This note will only discuss the regulations as they pertain to meat; for brevity’s sake it does not dwell on the rules about fish and shellfish (7 C.F.R. §60, effective as of April 2005), and largely disregards those regarding perishable agricultural commodities, nuts, and ginseng (7 C.F.R. § 65).
54. 7 C.F.R. § 65.100.
55. 7 C.F.R. § 65.300(a). For the label itself, there are no requirements as to size or placement; the only requirement is that all designations are legible and conspicuous. See COOL, 74 Fed. Reg. at 2662. As long as the location is reasonably known, state or region may be designated instead of country for perishable commodities and nuts. See 7 C.F.R. § 65.400(f). For all covered commodities, abbreviations approved by the United States Postal Service or the United States Customs and Border Patrol are permitted for use because these are unmistakable indicators of country of origin. See COOL, 74 Fed. Reg. at 2673.
57. Id. § 65.300(e)(1).
58. Id. § 65.300(e)(3).
whence the meat came, but may do so in any order.\textsuperscript{59} For ground meat the label must list all countries that may have contributed meat to the product.\textsuperscript{60} This scheme has come under scrutiny; a director of the Canadian Cattlemen’s Association suggests instead that the label reflect the place in which the product undergoes its last substantial transformation.\textsuperscript{61}

Two important exceptions in COOL are for food service establishments and for processed food items.\textsuperscript{62} The first applies to all facilities engaged in the business of selling food to the public, both salad bar types of establishments and those providing ready-to-eat foods.\textsuperscript{63} On one hand, granting exemptions to all restaurants indicates that COOL’s primary concern is about what consumers are bringing into their own kitchens, not necessarily what they are consuming in general. However, Canada may use these exceptions to illustrate the willingness of U.S. lawmakers to make some exceptions, and thereby compromise the U.S. position on the consumers’ right to know, since consumers presumably want to know origin information for all food wherever it is eaten.

The exemption for processed food items created quite a bit of controversy domestically.\textsuperscript{64} Under the final rule, “products . . . subject to curing, smoking, broiling, grilling, or steaming” are not covered.\textsuperscript{65} Products

\textsuperscript{59} Id. § 65.300(c)(2).
\textsuperscript{60} Id. § 65.300(h).
\textsuperscript{61} Interview by Brian Allmer with John Masswohl, Director of Gov’t & Int’l Relations, Canadian Cattlemen’s Association, Briggsdale, Colo (Oct. 8, 2009) [hereinafter Interview with John Masswohl], available at http://brianallmerradionetwork.wordpress.com/2009/10/08/10-08-09-canada-files-wto-challenge-on-cool/ (last visited Oct. 26, 2009). Doing so would basically be a reversion back to the policy the U.S. had since 1930 that COOL sought to change.
\textsuperscript{62} 7 C.F.R. §§ 65.125, 65.145.
\textsuperscript{63} See COOL, 74 Fed. Reg. at 2660.
that are combined with different covered commodities are exempt, meaning large portions of purchases remain off the map. 66 The Agricultural Marketing Service believes the rule establishes a bright line test. 67 Yet, others have argued that the definition is too broad and contravenes the intent of the regulation: a bag of frozen peas must be labeled, but a bag of frozen peas and carrots need not be. 68

Much has been said about the increased cost of maintaining separate production lines and records to satisfy COOL requirements. Some believe the cost of COOL will easily pass to the consumer, while others think the cost of compliance will be so high that some will simply use a multiple origin label rather than maintain separate records. 69 Studies on willingness to pay have shown mixed results, consumers express opinions about theoretical preferences, but according to objective choices in

66. For example, a bag of mixed vegetables. COOL, 74 Fed. Reg. at 2667. See Waldrop, supra note 63; COOL, 74 Fed. Reg. at 2660–61 (listing the types of items that will be exempt). See also Land Stewardship Project, supra note 64. See generally New Consumer Research Unveiled at the Annual Meat Conference, American Meat Institute (Feb. 19, 2007), http://www.meatami.com/sites/amif.org/ht/d/ReleaseDetails/i/2833 (explaining that some 70% of U.S. consumers buy their meat from conventional supermarkets).

67. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 73 Fed. Reg. 45106, 45115 (Dep’t of Agric. Aug. 1, 2008) (Interim final rule with request for comments) [hereinafter Interim final rule]. The rule uses the same definition as was used in the seafood regulation to create consistency. 7 C.F.R. § 60. The Food Marketing Institute supports the exemption because it provides for ease of use by creating a single standard across the board. See Letter from Deborah R. White, Senior Vice President, Food Marketing Inst., to COOL Program Administrators (Sept. 30, 2008), available at regulations.gov (search “Country of Origin Labeling”; then search within search for “Food Marketing Institute”; then follow “AMS-LS-07-0081-0801” hyperlink under Docket ID).

68. Waldrop, supra note 63. Some have gone so far as to say that consumers will become distrustful of the labeling system that acknowledges the origin of a raw whole chicken but not a roasted chicken. Land Stewardship Project, supra note 64; Iowa Citizens for Community Improvement, supra note 64.

the supermarket, origin is not always the motivating concern. It is worth noting that although U.S. consumers have indicated a preference for U.S. products, COOL will not necessarily bring any added economic benefit to U.S. producers if the cost of compliance is not offset by increased sales or higher prices. However, even if there is no measurable economic benefit, consumers are the ones who bear the cost, and therefore, they are the ones whose concerns should be appeased by providing the desired labels.

II. CONSUMER RIGHT TO KNOW

Numerous studies show that consumers support country of origin labels on their meat. A 2007 study by Food & Water Watch, a consumer group, found that eighty-two percent of respondents supported COOL. A study conducted in that same year by Consumers Union showed that ninety-two percent of respondents believed country of origin labels should be affixed to all imported foods. Respondents to a poll conducted by Zogby International said they did not just want to know where their food was coming from; ninety-four percent believed it was their right to know the country of origin of their purchases. With such overwhelmingly popular support for COOL, comfort should be taken in the fact that political bodies are responding positively to the public’s demands. Nevertheless, policy-making is about striking a balance between numerous interests and obligations; one of those obligations is to uphold promises made to the international community. So the question becomes: does the consumer have the right to know? And does that right

70. See generally Wendy Umberger, Dillon M. Feuz, Chris R. Calkins & Bethany M. Sitz, Country-of-Origin Labeling of Beef Products: U.S. Consumers’ Perceptions, 34 J. FOOD DISTRIBUTION RES. 103–16 (2003) [hereinafter Umberger, Country-of-Labeling] (finding that the amount people were willing to pay depended upon a number of concerns regarding food safety, preference for different sources, quality perceptions, and desire to support U.S. farmers); Maria L. Loureiro & Wendy Umberger, Assessing Consumer Preferences for Country-of-Origin Labeling, 37 J. OF AGRIC. & APPLIED ECON. 49 (2005) (finding respondents were concerned about food safety and therefore wanted their meat certified U.S. but were not willing to pay nearly enough to cover the cost of COOL).
71. See Kojo, supra note 46, at 304.
72. Id. at 305.
73. See Press Release, Food Labeling, supra note 13.
74. Consumer Reports, supra note 13.
75. Zogby Poll, supra note 13.
76. See Press Release, Food Labeling, supra note 13; Consumer Reports, supra note 13; Zogby Poll, supra note 13.
justify restrictions on international trade that are otherwise in violation of international obligations?

In the context of labeling, the concept of a “right to know” is that consumers have an interest in any fact that they “deem[] important about a food or commodity before being forced to make a purchasing decision.” The issue has cropped up in a number of different areas, most notably, in the EU, where labeling for genetically modified foods was driven by “the principle of informed consumer choice.” Previously, U.S. Courts have supported the Food and Drug Administration’s (“FDA”) position that it is not authorized to issue labeling requirements based solely on consumer demands. However, since Congressional action authorized the promulgation of COOL as a way to inform consumers—reflecting the public desire to have the information—it will therefore be upheld in U.S. Courts.

While barriers to passing the bill have already been overcome, COOL may now create a barrier to international trade. Country-of-origin labels are not new, and thirty-four of fifty-seven U.S. trading partners have some type of origin labeling law to cover imported cut and ground

77. See Frederick Degnan, The Food Label and the Right to Know, 52 FOOD & DRUG L.J. 49, 50 (1997).
79. See Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 179 (2000); Stauber v. Shalala, 895 F. Supp. 1178, 1193 (W.D. Wis. 1995) (holding that “the use of consumer demand as the rationale for labeling would violate the Food, Drug, and Cosmetic Act” in support of the FDA decision not to mandate labels for milk from cows treated with synthetic hormones); Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 73 (2d Cir. 1996) (The court held that consumer concern alone was an insufficient state interest to justify restriction on constitutionally protected rights to free speech. The right upheld here is to be free from mandatory labeling requirements that are not deemed material to prevent the consumer from being misled.). See also Degnan, supra note 77, at 56–57; Tupman Thurlow Co. v. Moss, 252 F. Supp 641, 645 (D.C. Tenn. 1966) (the court struck down a state requirement to label meat as “foreign origin” or “domestic,” in an attempt to protect consumers against fraud and deception, as a violation of the Commerce Clause). Nonetheless, these cases only indicate that in the past, consumer interest has not been enough to convince the court to hold a federal agency responsible for creating labeling requirements. There is nothing prohibiting a federal agency from creating mandatory labels within the language of their authorizing statute.
80. In fact, a recent case brought against the USDA to enjoin COOL was dismissed, because there was no showing that the action was arbitrary and capricious. See Easterday Ranches Inc. v. U.S. Dep’t of Agric., 2008 WL 4426004 (E.D. Wash. Sept. 25, 2008).
meat.\textsuperscript{81} The EU origin labeling requirements are much more extensive than in the U.S., requiring all beef to be labeled by country of birth, fattening, slaughter, cutting, and deboning.\textsuperscript{82} "None of these long-standing requirements have ever been challenged as barriers to trade."\textsuperscript{83} Apparently, COOL has made a significant enough impact on trade that Canada feels it is necessary to challenge its validity. Whether or not the consumer’s right is strong enough to justify an infringement upon international trade will likely be the crux of the challenge the U.S. will have to overcome.

III. WTO DISPUTE AND RELEVANT AGREEMENTS

The USDA said it considered international trade obligations in developing the COOL regulations, yet Canada filed a complaint with the WTO on December 1, 2008, before the rule was finalized.\textsuperscript{84} Canada alleges that COOL regulations are inconsistent with a number of obligations under the Agreement on Technical Barriers to Trade ("TBT" Agreement) or the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS" Agreement), the General Agreement on Trade and Tariffs 1994 ("GATT 1994"), and Article 2 of the Agreement on Rules of Origin.\textsuperscript{85} This Section explains the WTO dispute process, the method of treaty interpretation, and the relevant agreements at issue in Canada’s allegations.

\textsuperscript{81} U.S. GEN. ACCOUNTING OFFICE, COUNTRY-OF-ORIGIN LABELING: OPPORTUNITIES FOR USDA AND INDUSTRY TO IMPLEMENT CHALLENGING ASPECTS OF THE NEW LAW, 23–24 (2003) [hereinafter GAO, COOL].


\textsuperscript{85} Request for Panel, supra note 8. There is no WTO agreement that directly deals with food labeling laws. Food safety rules are under the purview of the SPS Agreement, which relies on scientific support. Because COOL is premised upon consumer protection, it is unlikely to fall under SPS Agreement obligations. However, because food safety issues, like mad cow disease, played a major role in pushing this legislation forward, SPS Agreement obligations may very well apply. See generally Steve Keane, Can a Consumer’s Right to Know Survive the WTO?: The Case of Food Labeling, 16 TRANSNAT’L L. & CONTEMP. PROBS. 291, 315–19 (2007).
A. Dispute process and treaty interpretation

The 1994 Dispute Settlement Understanding ("DSU") provides a forum in which members may bring claims against one another for non-compliance with any WTO agreement.\(^{86}\) The parties are to engage in a series of consultations in an attempt to settle their differences by mutual agreement.\(^{87}\) Upon request, a panel is convened to hear arguments and issue a binding report that is reviewable by a standing appellate body.\(^{88}\) Pursuant to the DSU, a Panel was convened on November 19, 2009 to address Canada’s complaints against the U.S. in regards to COOL.\(^{89}\)

The DSU requires agreements to be interpreted "in accordance with customary rules of interpretation of public international law."\(^{90}\) "[C]ustomary rules," the Appellate Body has explained, are those laid out in the Vienna Convention on the Law of Treaties ("Vienna Convention").\(^{91}\) The Vienna Convention requires that a treaty...be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose."\(^{92}\) The body of reports that have been issued in accordance with these DSU provisions serve as guidance to the interpretation of the following agreements raised in Canada’s complaint.

B. The Agreement on Technical Barriers to Trade

The TBT Agreement governs technical regulations and standards, including both mandatory and voluntary labeling requirements, to avoid the creation of unnecessary obstacles to trade or discrimination between


\(^{87}\) Id. art. 4.

\(^{88}\) Id. arts. 4, 8, 11, 12, 16, 17.


\(^{90}\) DSU, supra note 86, art. 3.2.


\(^{92}\) Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Context includes any additional text about and any agreements made between all parties of the dispute, taking into account any subsequent agreement and practice the parties have developed.
countries. Article 2.1 states that “products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.” Therefore, among WTO members, all “like products,” whether imported or domestic, must be treated equally with respect to taxes, charges, and regulations.

TBT Agreement Article 2.2 requires that technical regulations not “creat[e] unnecessary obstacles to international trade . . . [and] shall not be more trade-restrictive than necessary to fulfill a legitimate objective . . . .” The agreement lists a number of objectives that would be considered legitimate, the most pertinent to COOL is the prevention of deceptive practices. Members are supposed to account for the risks that non-fulfillment, like not preventing deception, would create based on “available scientific and technical information . . . [and] intended end-uses of products.”

Article 2.4 requires that relevant international standards be used as a basis for technical regulations whenever available. Canada alleges that the Codex General Standard for the Labelling of Prepackaged Foods is one such standard. The Codex requires prepackaged food to be labeled

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94. TBT Agreement, supra note 93, art. 2.1. This requirement is a reflection of GATT obligations Most Favored Nations and national treatment. But, as stated in its preamble, the TBT Agreement grants an exception allowing members to take measures necessary to protect security. See id.

95. The term “like products” will be more fully discussed as it is used in the GATT Art. III:4 see infra text accompanying notes 114 to 122.


97. TBT Agreement, supra note 93, art. 2.2.

98. Id. The others include national security requirements, protection of human health or safety, animal or plant life or health, or the environment.

99. Id.

100. Id.art 2.4.

with the country-of-origin “if its omission would mislead or deceive the consumer.”\footnote{102} While this requirement applies to all prepackaged foods being sold to the individual consumer, it does not apply to unpackaged foodstuffs.\footnote{103}

C. The Agreement on the Application of Sanitary and Phytosanitary Measures

Any food labeling requirements directly related to food safety must fulfill the obligations of the SPS Agreement.\footnote{104} Under the agreement, members may take sanitary and phytosanitary “measures necessary for the protection of human, animal or plant life[,] or health,” as long as the measure is based on scientific principles and is not simply protectionism in a disguised form.\footnote{105} The measures may not “arbitrarily or unjustifiably discriminate between Members . . . .”\footnote{106}

The SPS Agreement excuses trade restrictions that protect food safety, animal health, or plant health.\footnote{107} However, SPS measures must be based on assessed risks and should restrict trade as little as possible to achieve the appropriate level of protection, “taking into account technical and economic feasibility.”\footnote{108} Further, for such measures to be justified they must be “based on scientific principles” and supported by “sufficient scientific evidence.”\footnote{109} Exceptions are made when scientific evidence is insufficient if Members can show their measures are comparable to other Member’s measures and based on available information from relevant international organizations.\footnote{110} Measures are “based on” evidence produced through a risk assessment, if there is a “rational relationship” be-

\footnote{102. Codex Alimentarius: Food Labelling—Codex General Standard for the Labelling of Prepackaged Foods, CODEX STAN 1-1985 (Rev. 1-1991) ¶ 4.5.1.}
\footnote{103. Id. ¶¶ 1–2.}
\footnote{104. SPS Agreement, supra note 101.}
\footnote{105. Id. art. 2.1.}
\footnote{106. Id. It is worth mentioning that, although the SPS Agreement has higher standards for measures affecting food safety, there are no provisions explicitly requiring the principles of most favored nation or national treatment be met, as there are in the TBT Agreement.}
\footnote{107. See Keane, supra note 85, at 316.}
\footnote{108. SPS Agreement, supra note 101, art. 5.}
\footnote{109. Id. art. 2.2.}
\footnote{110. See SPS Agreement, supra note 101, art. 5.7.}
tween the SPS measure and the risk assessment itself. Generally, if the measures substantially differ from international standards and will significantly impact trade, early notice must be given so others may become acquainted with the new measures while amendments and comments are still being considered.

D. General Agreement on Tariffs and Trade 1994

The principle of national treatment colors Canada’s entire allegation. The 1947 GATT supplies that no internal taxes or charges of any sort may be applied “to imported or domestic products so as to afford protection to domestic production.” National treatment, under GATT, requires imports from member countries be treated “no less favorably” than like products of domestic origin. What is considered a like product is determined on a case-by-case basis, but its determination is vital to the analysis. If products are not found to be “like,” then there are no further requirements of equal treatment. If products are considered like they may still be treated differently; the focus of a WTO inquiry is whether the different treatment results in unequal conditions of competition. The following four factors may be used to analyze likeness:

(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits—more comprehensively termed consumers’ perceptions and behavior—in respect of the products; and (iv) the tariff classification of the products.
Article IX speaks to marks of origin, requiring countries to minimize any difficulty or inconvenience a measures may put on exporters. Further, no law or regulation on marking imports may require “seriously damaging the products, or materially reducing their value, or unreasonably increasing their costs.” There is no jurisprudence or decision of the WTO dispute Panel over the interpretation or application of Article IX. This is likely attributable to the fact that the Agreement on Rules of Origin was created at the same time, which provides much broader detail.

E. The Agreement on Rules of Origin

Although the Canadian complaint alleges violation of the Agreement on Rules of Origin, it is not entirely clear that the dispute panel will address these concerns because the Agreement is still in provisional stages. Therefore, this note will not address the possible application of the agreement. However, the following is a rough outline of what a panel may look for should they address the issue.

“Rules of origin are not [to be] used as instruments to pursue trade objectives directly or indirectly.” The Panel looks to the objective purposes of the measure as may be determined from its design, architecture, and structure. The measure may not create “restrictive, distorting, or

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119. GATT, supra note 113, art. IX.2.
120. Id. art. IX.4.
124. See Panel Report, United States—Rules of Origin for Textiles and Apparel Products, ¶ 6.37, WT/DS243/R (June 20, 2003) [hereinafter US—Origin Rules]; see also Dispute Settlement Commentary on US—Origin Rules 3, WORLDTRADELAW.NET, www.worldtradelaw.net/dsc/panel/us-originrules(dsc)(panel).pdf (last visited Aug. 29, 2010) [hereinafter Dispute Settlement Commentary]. Canada may complain that country of origin determination should be based on the place in which a product was “substantially transformed” as their own laws dictate. But, Art. 2(b) does not require the use of any particular rule, and so Members are free to create them as they see fit. See COOL, 74 Fed. Reg. at 2658.
disruptive effects on international trade."125 This does not prohibit the restrictive or disruptive impacts commercial policy measures may have, but rather speaks directly to whether the rules are administered in such a way as to create additional distortion.126 Although the causation need not be deliberate, there must be a “causal link” between the rules and the alleged grievance to constitute a violation of Article 2(c).127 The Panel has not definitively outlined the scope of the term “effects on international trade.” Yet, adverse effects on one member’s trade are not necessarily sufficient evidence to prove effects on international trade, since in the marketplace some lose and others gain.128 Still, no showing of actual effects is required if the rules create the conditions to restrict, distort, or disrupt competition.129 Whatever the effects, the rules must be administered impartially.130

IV. ANALYSIS OF COOL COMPLIANCE WITH WTO OBLIGATIONS

A. Basis of Canada’s allegation

The WTO is exactly what it says it is—a world trade organization. Simply stated, its main goal is to liberalize trade by breaking down barriers to entry.131 However, during the sixteen years since the formal development of this rules-based system of coordinating global trade, there have been numerous conflicts with the desires of domestic industries and public preferences.132 This appeal is just one more illustration of that

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125. Agreement on the Rules of Origin, art. 2(c). The allegations are only made with regard to Article 2, which apply during the transition period, since the Agreement has not yet been adopted.

126. US—Origin Rules, supra note 124, ¶ 6.136. See also Dispute Settlement Commentary, supra note 124, at 7.


128. Id. ¶ 6.148.

129. Id. ¶ 6.149 (Panel agrees with India’s argument set forth in their Second Written Submission ¶ 2(c)(iii)).

130. Agreement on Rules of Origin, supra note 123, art. 2(d).


132. WTO Agreements are not self-executing, meaning they must be turned into domestic law by Members to have any effect. Decisions of the Panel similarly have no effect unless incorporated at the domestic level. For instance, a decision finding U.S. prohibition on the import of tuna fish not caught using dolphin-safe technology was not adopted by the pre-WTO dispute settlement procedure (which was based on consensus). For more information see GATT, supra note 113, art. XXIII. Instead, the U.S. committed
conflict; the question being whether or not American consumers have the right to know where their food comes from. At stake are the echoes of protectionism: the struggle between sovereignty and compliance.

Canada alleges that, as applied, COOL results in less favorable treatment for Canadian beef, pork, and livestock. The director of government and international relations for the Canadian Cattlemen’s Association, John Masswohl, says that both cattle and hog exports have fallen by one third since the enactment of the regulation and that COOL unfairly discriminates against Canadian producers. He says that meat packers are refusing to buy Canadian animals instead of taking on the added costs of segregating and labeling their livestock supplies. The effect of the labeling regulation may be particularly hard on Canadian producers because sixty-five percent of U.S. cattle imports and thirty three percent of U.S. beef imports were from Canada in 2008. Yet, disparate effects alone do not necessarily amount to a violation of WTO obligations.

The SPS and TBT agreements are two WTO agreements that directly bear upon food labeling requirements, although neither considers the


133. There has been a noticeable shift in WTO decisions. In the Tuna/Dolphin case the panel found that the ban could not be justified because the harvesting techniques did not affect tuna as a product. See Panel Report, United States—Restrictions on Imports of Tuna, ¶¶ 5.10–5.15, DS21/R-39S/155 (Sept. 3, 1991). But now, the WTO is increasingly concerned with process and production methods, evidenced by the implementation of the TBT and SPS Agreements, which are concerned with safety standards. Under U.S.—Shrimp/Turtle, the WTO has allowed for restrictions on shrimp imports that do not employ mechanisms for turtles to escape, as long as the restrictions are not arbitrary and unjustifiably discriminatory. See Daniel C.K. Chow & Thomas J. Schoenbaum, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 507–09 (2008). It is possible then that moral concerns, like giving consumers the information to make a choice about where their meat comes from will have more leverage in the WTO than previously assumed. For a discussion of the history and possibility of moral exceptions, see Steve Charnovitz, The Moral Exception in Trade Policy, 38 VA. J. INT’L L. 689 (1998).

134. Request for Panel, supra note 8.

135. Interview with John Masswohl, supra note 61.

136. Id.

consumer’s right to know. 138 While both agreements have provisions for non-discrimination, consistent application, and assurances that the measures are not more trade restrictive than necessary to achieve a legitimate goal, “a measure will not fall under both agreements simultaneously.” 139 Determining which agreement applies is important because the SPS Agreement does not have national treatment provisions. 140 The TBT Agreement does have these provisions and would therefore prohibit certain forms of trade discrimination that might be permitted under the SPS. The following Sections break down the possible analysis a Panel would undertake to determine COOL’s compliance with each agreement Canada alleges is violated. A measure will be found to violate a country’s WTO obligations if any one element of an applicable agreement is not met. As the following analysis shows, COOL complies with most of the requirements, but ultimately, the regulation’s survival hinges upon a finding of a legitimate objective in order to overcome the infringement it causes upon international trade.

B. Application of the SPS Agreement

In all likelihood, the WTO Dispute Panel will find that the SPS agreement does not apply to COOL, because the USDA has explicitly stated that the regulations are not intended to, and do not, address food safety concerns. 141 Whether the SPS Agreement is even applicable is a question

138. See Keane, supra note 85, at 315.
139. Michele M. Compton, Applying World Trade Organization Rules to the Labeling of Genetically Modified Foods, 15 PACE INT’L L. REV. 359, 374 (2003); TBT Agreement, supra note 93, arts. 1.5, 2; SPS Agreement, supra note 101, art. 5. See also Kevin C. Kennedy, Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions, 55 FOOD DRUG L.J. 81, 91 (2000). But see Joanne Scott, European Regulations of GMOs and the WTO, 9 COLUM. J. EUR. L. 213, 228–31 (2003) (arguing that GMO labeling regulations would fall under the purview of both the SPS and TBT Agreements). The EC—Biotech panel dismissed Canada’s argument that some of the safeguard measures could be considered under the TBT Agreement in addition to the SPS Agreement. The panel said that the measures were entirely SPS measures and were not in part covered under the TBT agreement. Panel Report, European Communities—Measures Affecting the Approval & Marketing of Biotech Products, ¶ 7.3412, WT/DS291, 292, 293/R (Sept. 26, 2006) [hereinafter EC—Biotech].
140. Appleton, supra note 96, at 571.
141. See COOL, 74 Fed. Reg. at 2677. The agency explained that the intent of the law . . . is to provide consumers with additional information on which to base their purchasing decisions. COOL is a retail labeling program and as such does not provide a basis for addressing food safety. Food products,
of whether COOL is a sanitary or phytosanitary measure that directly or indirectly affects international trade. The SPS agreement covers measures intended to protect against risks from diseases, pests, disease causing or carrying organisms, contaminants, toxins, or additives. Unlike disputes over hormones given to dairy cows or genetic modification of genes in plant life, country-of-origin labels do not directly implicate any unknown aspects of science so the SPS agreement may not apply to COOL. According to the EC—Biotech Panel, one looks to the objective of the measure, its form, and its nature to determine if it is an SPS measure. The USDA claims the measure is intended solely to provide “consumers with additional information about the source of food products and to help[] producers differentiate their products.” Thus, this marketing measure does not have the purpose characteristic of an SPS measure. Admittedly, COOL does have the form and nature of an SPS measure because the regulation is a mandatory requirement created by an administrative agency. But, such a finding is irrelevant because it is lacking the “purpose to protect” that invokes the SPS Agreement in the first place.

Should the Panel hold otherwise and seek to determine whether COOL fulfills the obligations of the SPS agreement, the U.S. will be hard pressed to prove compliance. The SPS agreement relies upon scientific evidence to justify the imposition of regulation. When relevant scientific evidence is insufficient, a Member may take measures on the basis of available and relevant information, drawing on international standards and measures applied in other countries. The U.S. has not made any claims about the relative health and safety of meat from Canada, or anywhere in particular, since it is not a question of insufficiency of scientific evidence.

both imported and domestic, must meet the food safety standards of the FDA and FSIS.

Failure to comply with this law will not trigger any recall of meat products, as violations of FDA and FSIS food safety standards would. COOL, 74 Fed. Reg. at 2677–78.

142. EC—Biotech, supra note 139, ¶ 7.2552.
143. See SPS Agreement, supra note 101, at Annex A(1)(a)–(d); Norbert L. W. Wilson, Clarifying the Alphabet Soup of the TBT and the SPS in the WTO, 8 DRAKE J. AGRIC. L. 703, 720 (2003).
144. EC—Biotech, supra note 139, ¶¶ 7.1333–34.
146. SPS Agreement, supra note 101, art. 2.2 (“measure is applied to the extent necessary to protect human, animal or plant health or life, is based on scientific principles and is not maintained without sufficient scientific evidence”). See also EC—Biotech, supra note 139, ¶ 7.1424.
147. SPS Agreement, supra note 101, arts 2.2, 3.1, 5.7.
proof. The regulation is not based on science, but rather on the consumers’ right to know where their food is coming from.\textsuperscript{148} 

Article 5.1 requires, when read together with Article 2.2, that results from a risk assessment reasonably support the measure based on objective evaluation.\textsuperscript{149} The measure should only be adopted after evaluation of the risks and likelihoods of adverse effects on human and animal health.\textsuperscript{150} The risks must be ascertainable in order to serve as the basis for a restriction on trade.\textsuperscript{151} Looking at the recent history of imports, the proportion of beef and veal imports from Canada parallel the total beef and veal consumption in the U.S.\textsuperscript{152} Cattle imports from Canada dipped after 2003 because of a case of mad cow disease but have rebounded since.\textsuperscript{153} It does not seem that the regulations were based on any statistical risk or effort to protect U.S. meat eaters. The U.S. would gain no traction arguing that the circumstances of food safety concerns elsewhere require origin-labeling regulation; there is no apparent relationship between the mandatory labeling laws and any evidence of risks associated with human, animal, or plant health based on where the food originates. COOL does not serve as a replacement for food safety standards or traceability efforts and will not be a substitute for countries that may not have as stringent regulations as the U.S.\textsuperscript{154} Therefore, if the SPS Agreement is applied, COOL will not have met its requirements and the panel will find the U.S. to have violated its WTO obligations.

C. Application of the TBT Agreement

Given the nature of the regulation, COOL is likely to fall under the scrutiny of the TBT Agreement. The TBT Agreement is intended to protect against unnecessary obstacles to international trade as a result of un-

\textsuperscript{148} It would be inappropriate to explore the contours of a science-based argument for these measures because the rationale would probably be found in Member’s differences in standards for control, inspection, and permitted inputs like fertilizers and feeds.

\textsuperscript{149} EC—Hormones, supra note 111, ¶ 189.

\textsuperscript{150} See also Dispute Settlement Commentary on EC—Biotech (2006), \textit{WORLDTRADELAW.NET}, at 74, \texttt{www.worldtradew.net/dsc/panel/ec-biotech(dsc)(panel).pdf};

\textsuperscript{151} Appleton, supra note 96, at 572.

\textsuperscript{152} See \textit{USDA Beef and Cattle Industry}, supra note 137; \textit{Briefing Room—Cattle: Trade}, U.S. Dep’t of Agric. Econ. Research Serv., \texttt{http://www.ers.usda.gov/Briefing/Cattle/trade.htm} (last visited Aug. 29, 2010) [hereinafter \textit{Briefing Room—Cattle: Trade}].

\textsuperscript{153} See \textit{USDA Beef and Cattle Industry}, supra note 137; \textit{Briefing Room—Cattle: Trade}, supra note 152.

\textsuperscript{154} See COOL, 74 Fed. Reg. at 2679.
justifiable or arbitrarily discriminatory technical requirements.\textsuperscript{155} It applies to all mandatory provisions that deal with packaging, marking, or labeling requirements related to a product’s characteristics, production, or processing method.\textsuperscript{156} A WTO Panel explains, “a document that lays down a requirement that a product label must contain a particular detail, in fact, lays down a product characteristic.”\textsuperscript{157} Thus, the mandatory COOL requirements, which are not designed for food safety purposes, apply to a product’s characteristics as covered by the TBT agreement.\textsuperscript{158}

The agreement requires any technical regulation to be justified by a legitimate objective.\textsuperscript{159} One such legitimate objective is the prevention of deceptive practices, which may be broad enough to include allowances for a consumer’s right to know but has not yet been interpreted by a panel.\textsuperscript{160} The idea of market transparency, of giving the consumer all of the information the retailer knows, has not been questioned in disputes over labeling preserved sardines or creating dual retail outlets for imported and domestic beef.\textsuperscript{161} Many nations have origin labeling requirements, including the EU,\textsuperscript{162} which implemented extensive meat labeling regulations in 2000 with the express purpose of “strengthening consumer con-

\textsuperscript{155} See TBT Agreement, supra note 93, at pmbl.

\textsuperscript{156} See id. at Annex 1.1.


\textsuperscript{158} See TBT Agreement, supra note 93, art. 1.5. The TBT Agreement does not apply to sanitary and phytosanitary measures, which according to the definition of such measures in the SPS Agreement includes those directed at food safety.

\textsuperscript{159} See id. art. 2.2.

\textsuperscript{160} See id. The European Court of Justice held that in order to protect the authenticity and quality of a product granted a protected geographic indicator, conditions can be placed on the slicing and packaging of the product. Although geographic indicators are a trademark issue that falls under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”), and therefore are distinct from country-of-origin, the restrictions on the use of the protected label is instructive. The risk of consumers wrongfully attributing a product to a particular place could change the value of the product in the mind of the consumer. See Case C-108/01 Consorzio del Prosciutto Di Parma v. Asda Stores, 2003 E.C.R. I-5121. With country-of-origin labels there is no inherent value in a product from Canada versus a product from the U.S., but the consumer might wish to exercise his/her purchasing power and have other considerations in mind when deciding between ground beef from different sources. See SUPPAN, supra note16.

\textsuperscript{161} See Appellate Body Report, European Communities—Trade Description of Sardines, ¶¶ 269–83 WT/DS231/AB/R (Sept. 26, 2002) [hereinafter EC—Sardines]; Korea—Beef, supra note 116, ¶¶ 133–35 (both measures were found to violate various WTO requirements despite having legitimate objectives).

\textsuperscript{162} GAO, COOL, supra note 81, at 24.
fidence in beef and [to] avoid misleading them." Although in the past the U.S. has resisted implementing labeling regulations on the basis of consumer interest alone, Congressional support legitimizes the consumer’s right to know as an objective. It is possible, at least at this stage of the inquiry, that consumer’s right to know the origin of their meat will be considered a legitimate objective.

If providing consumers with information is a legitimate objective in and of itself, the measure must still meet a number of other criteria to be compliant with the TBT agreement. First, imported products must be treated no less favorably than “like products” of domestic origin. Although it seems obvious that a rack of lamb from an animal born in the U.S. is no different than one born in Canada, it is first necessary to determine what constitutes “like products.” Because so little jurisprudence under the TBT agreement exists, determinations made under GATT Article III:4 inform this analysis. A “like product” refers to products in a competitive relationship. The Panel describes four factors to look to

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164. The WTO is not a self-executing agreement; instead it relies on its Members to implement agreements through domestic law. In order to gain legitimacy and effectiveness, it must have the support of the major nations. Support from major players, like in any international setting, is key to moving an agenda forward. In this instance, a policy goal may be deemed legitimate simply because it is held by a number of, or at least a powerful few, Members. See generally Joost Pauwelyn, The Transformation of World Trade, 104 MICH. L. REV. 1, 6 (2005) (discussing the evolution of international trade agreements resulting in law rather than resulting from politics).
165. The idea of a legitimate objective will be analyzed again under the GATT where I will argue that the consumer’s right to know will not be enough to support the infringement COOL creates upon international trade.
166. Although it is unlikely to be a legitimate objective, this Note will consider the rest of the elements necessary under the TBT Agreement to show that COOL would otherwise comply with WTO obligations. For an excellent argument that consumer information and, in particular, origin labeling is a legitimate objective, see Letter from Terence P. Stewart & Elizabeth J. Drake, Law Offices of Stewart and Stewart, on behalf of the U.S. Cattlemen’s Ass’n & the Nat’l Farmers Union, to Daniel Brinza, Assistant U.S. Trade Representative for Monitoring & Enforcement, Office of the U.S. Trade Representative (Jan. 8, 2010), available at regulations.gov (search “Elizabeth Drake”; then follow “USTR-2009-0004-0017” hyperlink under ID)).
167. TBT Agreement, supra note 93, art. 2.1.
168. See Okubo, supra note 15, at 616. Interpretations of similar clauses in the GATT will serve as guidance in this Note to determine the scope and meaning of the TBT Agreement.
when evaluating “like products:” nature and quality of the products, end uses of the products, tariff classification of the products, and consumer perceptions as indicated by their habits and behavior. In the case of COOL, it is clear that meat products affected by the labeling requirements would meet the first three factors of this test. The quality and nature of the products should be the same, as they all need to follow the rules and standards of the FDA and USDA’s Food Safety and Inspection Service (“FSIS”). The end use of muscle cuts and ground meat are for consumption in one way or another, no matter their origin. The goods will be classified according to the appropriate label under the Harmonized Tariff Schedule, where no distinction is made for country of origin.

In spite of this, these products may not be “like” based on consumer perceptions and behavior. Consumers cannot differentiate products based on origin or processes without additional information, but a number of studies have shown that some people are willing to pay more for products based on where they are from. People’s perceptions and behavior have changed since the recent food scares, and they want to be able to choose whether or not to buy meat from countries with food safety problems. To those people, there may not be competition between products.

170. EC—Asbestos, supra note 118, ¶ 101.
171. In EC—Asbestos the panel noted that a prior panel had looked at end uses and consumers’ taste as ways of analyzing likeness. Id. ¶ 85. This statement does not mean that similar cuts of meat will have the exact same fat to protein ratio, or similar marbling patterns. These distinctions are governed under other FDA and USDA regulations and grading systems.
173. Umberger, Country-of-Origin Labeling, supra note 70. Not to belittle expert taste buds, but to the average consumer, a hamburger made from cattle raised in Montana will be no different from that made from cattle raised four miles across the border in Canada, yet they will pay more for one than the other. See id. (finding people are willing to pay a premium for steak labeled as USA Guaranteed born and raised); Jutta Roosen, Jason L. Lusk & John A. Fox, Consumer Demand for and Attitudes Toward Alternative Beef Labeling Strategies in France, Germany, and the UK, 19 Agribusiness: An Int’l J. 77 (2003) (determining European consumers’ preference of origin indications over other product attributes).
There is a distinction to be made: given the information, these consumers would exercise their purchasing power to buy a preferred good. This is the underlying argument for the consumer’s right to know. But, just because a consumer would prefer one type over another does not indicate that the products are not “like.” In fact, it probably only boosts the argument that they are directly competitive. On balance, it is likely a Panel could justifiably find that the products regulated under COOL are “like.” If they are found not “like,” then they may be treated differently, and Canada’s claim under the TBT Agreement should fail. Yet, given the relative weakness of the consumer perception argument, the next question becomes whether COOL discriminates between “like” products.

Article 2.1 requires that imported products be treated “no less favourably than . . . like products of national origin.” At first glance, COOL regulations are facially neutral. All retailers must “notify their customers of the country of origin of covered commodities.” No distinction is made between imported or domestic commodities; each must have the requisite label. The rules do distinguish between “commodities” and “processed food items.” A wide range of foodstuffs are not covered by the statute and therefore are excluded from the labeling requirements. Is this exclusion grounds for finding discrimination within the meaning of the TBT agreement? Under the final rule, a “processed food item” is “a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component.”

175. For example, different colored fresh bell peppers. One may have a preference for yellow bell peppers over orange but the tariff classification for both of them is 0709.60.40 with further classification granted based upon where the peppers are grown, not their color. Harmonized Tariff Schedule of the United States, Section II: Vegetable Products, United States International Trade Commission, available at http://hts.usitc.gov/ (last visited Aug. 31, 2010), also published in looseleaf format. U.S. International Trade Commission. Washington, D.C., 1987.
176. TBT Agreement, supra note 93, art 2.1.
178. Id. at 2660.
179. 7 C.F.R. § 65.220. The rule carves out those foods that have added components such as water, salt, or sugar, “that enhances or represents a further step in the preparation of the product for consumption.” It gives an incomplete list of processing methods that would result in a change of character “includ[ing] cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding).” Id. in the summary of changes from the interim rule, to the final rule the USDA gives examples of what would be included and excluded as follows:
tially means that bacon need not be labeled while ham does, and beef patty mix need not be labeled while hamburger does. A consumer who looks at the origin label on a hamburger would also care to know the origin of beef patty mix. However, according to COOL, if in fact these products are different, requiring labels on one but not the other is not discriminatory since they are not like products and can, thus, be treated differently. COOL’s exception for processed food items, although harmful to the legitimate objective argument, does not create a violation of the TBT Agreement as long as a Panel agrees that they are not like products.

Canada alleges that COOL is applied in a manner that results in less favorable treatment to beef, pork, and livestock from Canada than that from the U.S., evidenced by a precipitous drop in exports since the measure went into effect. Once again:

a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer.

As examples of processing steps that are considered to further prepare product for consumption, meat products that have been needle-tenderized or chemically tenderized using papain or other similar additive are not considered processed food items. Likewise, meat products that have been injected with sodium phosphate or other similar solution are also not considered processed food items as the solution has not changed the character of the covered commodity. In contrast, meat products that have been marinated with a particular flavor such as lemon-pepper, Cajun, etc. have been changed in character and thus are considered processed food items.


180. See COOL, 74 Fed. Reg. at 2666. Ham must be labeled unless it has been cured, and beef patty mix is not a covered commodity because it likely includes a number of binders and extenders that the USDA believes will be too costly and burdensome to segregate and identify.

181. Ground beef marketed as hamburger is allowed to have added fat, whereas beef patty mix may contain beef heart meat and tongue meat. The USDA “believes that the costs associated with this segregation and identification” of variety meats is overly burdensome and thus are not included as covered commodities. Id.

182. See Request for Panel, supra note 8.

183. The Canadian Cattlemen’s Association says that cattle and hog exports to the U.S. have fallen by one-third since the measure went into effect. See Interview with John Masswohl, supra note 61.

The Canadian Cattlemen’s Association said the decrease in Canadian meat imports to the U.S. is because of the costs associated with separating and labeling meat from different sources. However, since the measure requires labels on all meat no matter the source, it seems Canada is complaining about a shift in U.S. consumer demand, rather than any shift in producer’s supply.

Beef imports from all sources increased by 12.5 percent comparing a six-month period in 2008 to the same period in 2009. In that timeframe, imports from Canada dropped by 2.84 percent. If the issue were cost disparity to packers who must segregate and label supplies, one would expect a unilateral drop in imports, but the evidence shows otherwise. Yet, there is no reason to believe it costs packers any more to segregate and label beef from Canada than it does beef from Australia or New Zealand. The disparate impact on Canadian imports seems to be an expression of consumer preference rather than discriminatory effects. As such, the WTO could find that imported products are not treated any less favorably than domestic products, and thus, COOL does not violate the TBT Agreement on this account.

Under Article 2.2, the TBT Agreement requires three things. First, COOL may not be, or create the effect of, an unnecessary obstacle to trade. Second, it must be the least restrictive measure possible to achieve the desired effect. Finally, it must fulfill a legitimate objective. These items are cumulative; if the measure does not meet any one of these obligations it will be inconsistent with the obligations of the agreement.

The TBT Agreement allows for measures that encroach upon trade as long as they are the least restrictive measures possible to achieve a legitimate purpose. The stated objective, to provide consumers with information about the origin of the food they are buying, is probably not enough to justify the labeling requirements. Still, if the Panel finds

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185. Interview with John Masswohl, supra note 61.
187. Id.
188. TBT Agreement, supra note 93, art 2.2.
189. Id.
190. Id.
191. Id.
192. See supra notes 72–82 and accompanying text; Degnan, supra note 77.
otherwise, labeling is the most effective means of providing the information to consumers.

The complaining party, Canada, likely has the burden of proving there are less restrictive measures available to achieve the same objectives.\(^\text{193}\) Canada has suggested linking the label requirements to where the product takes on the form in which it will be consumed, rather than citing where it was born, raised, and slaughtered.\(^\text{194}\) Canada’s food labeling rules follow that theory, requiring the label only to mention the place where the food was last processed.\(^\text{195}\) This method is based on the principle of substantial transformation, which refers to the place where the item acquired its name, character, or use.\(^\text{196}\)

While using this standard of determining origin would bring the regulation in line with the existing U.S. marking and classification rules for things like optical fiber connectors and toner cartridges, it contravenes the purpose and intent of COOL.\(^\text{197}\) Since 1938, the U.S. has required labels to include information about ingredients, weight of the food, shelf life, and the name and address of the manufacturer.\(^\text{198}\) Customs regulation requires most imports to be marked with the country of origin, as discussed above.\(^\text{199}\) But COOL was not intended to restate what these rules already require; it was intended to go a step beyond and provide

\(^{193}\) The Panel has not yet ruled on the burden of proof involved in TBT Agreement art 2.2, but will likely apply the same standard of burden of proof as was applied in art 2.4 in the EC—Sardines case, where the complaining party bears the burden of proving that the Codex standards are applicable and are an effective means of fulfilling the legitimate objective. EC—Sardines, supra note 161, ¶ 272. See also Okubo, supra note 15, at 614 (arguing that under the test for TBT Art 2.2, the member challenging the measure has the burden to prove it is more trade-restrictive than necessary. It is up to the challenger to show that “there is another measure which is not only reasonably available to fulfill the legitimate objectives of the government, but is also significantly less restrictive to trade”).

\(^{194}\) Interview with John Masswohl, supra note 61.


\(^{196}\) See Re: County of Origin Marking of Insulated Electrical Conductors, HQ 561392 (June 21, 1999), available at 1999 WL 549175.


\(^{199}\) See Tariff Act of 1930, 19 USCA § 1304 (1999). For a complete discussion please refer to text accompanying notes 46–78.
consumers with information on the source of the food they purchase. Labeling origin only as the last place of substantial transformation would not be an adequate means of transferring information to the consumer. With this suggested method, Canada would not be able to make a case that there are less restrictive alternatives to COOL since it would not accomplish the stated goal.

The U.S. must show that the legitimate objective it seeks to address is serious enough that a voluntary program is not enough to correct the problem. Manufacturers may resist voluntary labels, because they give competitors an opportunity to use misleading labels. After COOL was first enacted into legislation in 2002, labeling was voluntary, but few processors and packers elected to participate. Besides, consumers do not have much trust in voluntary country-of-origin information and prefer mandatory labeling. Despite the success of voluntary certification programs for some food products, voluntary COOL would not be an adequate alternative to fulfill its desired purpose in the eyes of consumers. Voluntary measures would be a reasonable alternative to provide more information to consumers only if mandatory COOL fails to show a legitimate objective.

200. Letter from Ron Sparks, The Nat’l Ass’n of State Dep’ts of Agric., to COOL Program Administrators (Sept. 29, 2008) [hereinafter Letter from Ron Sparks], available at www.regulations.gov (search “Country of Origin Labeling”; then search within search for “Ron Sparks”; then follow “AMS-LS-07-0081-0760.1” hyperlink under ID).

201. See Okubo, supra note 15, at 615. The USDA is careful to point out that the regulation allows for flexibility in implementation, leaving recordkeeping requirements and methods of identification up to the producer. See Letter from Ron Sparks, supra note 200.

202. Keane, supra note 85, at 305 (one example of this resistance is illustrated by a dispute between manufacturers complaining when their competitors place labels on their product advertising that they do not contain hormones, implying that products that contain hormones are bad).


204. See id.; Keane, supra note 85, at 303 (citing to two domestic cases in which consumers challenged the FDA’s decision not to require labeling of milk treated with synthetic growth hormones or genetically modified foods).

205. Kosher certification serves as one example of successful independent voluntary labeling programs. The public is willing to pay the cost to obtain the products they desire and so companies are willing to pay for the certification to tap into the kosher market. See Michael Abramson, Mad Cow Disease: An Approach to its Containment, 7 J. HEALTH CARE L. & POL’Y 316, 359–61 (2004). There is more regulation surrounding voluntary certification for organic foods. Benjamin N. Gutman, Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food, 108 YALE L.J. 2351, 2370–71 (1999).
The TBT Agreement requires that where “relevant international standards exist or their completion is imminent, Members shall use them” to craft their technical regulations. When measures are inconsistent with international standards, it offends the spirit and purpose of the WTO to harmonize and facilitate trade. Canada asserts that the Codex General Standard for the Labelling of Prepackaged Foods provides a relevant international standard for measures like COOL. The Codex requires country-of-origin labels on prepackaged food; there are no requirements therein for unprocessed, non-packaged food, such as the meat products covered by COOL. In fact, no international standard exists regarding the products under COOL. Thus, while COOL must be constantly revisited to ensure compliance with any new standards that may be adopted, it is not inherently inconsistent with Article 2.4 of the TBT Agreement. Nevertheless, even if the U.S. can show compliance with one or more elements of the TBT Agreement, COOL must comply with every element and therefore the measure will still be found inconsistent if the consumer’s right to know is not a legitimate objective.

D. Application of the GATT Agreement

Where applicable, the TBT Agreement is the preferred standard of assessing a measure because of its specificity, whereas the GATT only sets forth general obligations. This Section will only address those issues not otherwise covered under the TBT Agreement.

Canada alleges that COOL does not minimize the “difficulties and inconveniences” the regulation causes and, therefore, is inconsistent with the requirements of GATT Article IX:2. Although there is no jurisprudence to help distinguish the scope of this requirement, it is likely that it will be the complaining party’s burden to show that there are alternatives that would reduce the burdens imposed by the measure. There are already a number of other labels applied to these commodities, so it may not be an intolerable burden to add the product origin. If no alterna-
tives are proven that could further minimize the difficulties and inconveniences, the measure will be in compliance with the requirements of GATT Article IX:2.

Canada alleges that COOL violates the requirements of GATT Article IX:4 by “materially reduc[ing] the value of imported livestock.” Asserting compliance with this measure will depend upon the interpretation of “materially.” Using the Vienna Convention to interpret the term, the first step is to look to its ordinary meaning. The dictionary meaning of “materially” is substantial effect, meaning that the reduction in value that COOL causes must be a significant proportion of the value of the good.

COOL will affect the entire supply chain, because information will need to be maintained and transferred throughout. Packers have a number of options to obtain origin information on livestock already in place, limiting the burden upon them. The cost of implementation and compliance with COOL will be absorbed by the entire supply chain, hitting intermediaries and retailers the hardest. Only a small part of the cost will be passed on to consumers. Cost of the regulation to producers is estimated to be $9 per head of cattle and $1 per hog. These estimates are industry-wide, and there is no showing that the costs will affect Canadian livestock differently than livestock from any other origin except with regard to whatever choices consumers may make armed with the power to discern the origin of their meat. Though these figures


213. Request for Panel, supra note 8.
214. Vienna Convention, supra note 92, art. 31(1).
217. See id. at 2676.
218. Id. at 2680.
219. Id. at 2683.
220. Id. at 2687.
221. Meat labeled solely as from the U.S. may be able to pass on more of the cost of labeling to consumers, since there is some evidence to support that consumers are willing to pay more for meat designated as such. See Umberger, CHOICES, supra note 43. It is also worth noting that processors may have different implementation costs if they only handle one type of meat—be it from a single country or origin or multiple-origin—than those who handle both types. The USDA suggests that
suggest no violation of Article IX: 4, ultimately the determination will be based on the economic evidence the parties submit, and that information is not available at the time of this writing.222

The GATT does provide a small window through narrow exceptions in Article XX for measures that do not otherwise comply with its obligations. It is through these exceptions that the U.S. could hope to prove COOL meets the legitimate objective requirements of the TBT Agreement. The relevant provisions to “save” COOL are found in Article XX(d). This Article authorizes governments to apply otherwise illegal measures when “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the prevention of deceptive practices.”223 Once a specific provision is found, the measure must be “further appraised . . . under the introductory clauses of Art. XX.”224

In Korea—Beef, the Panel held the dual retail system for domestic and imported beef secured compliance with legislation against deceptive practices and, thus, deterred butchers from “misrepresent[ing] less expensive foreign beef for more expensive domestic beef.”225 Likewise, a Panel could find COOL secured compliance with legislation to inform

[p]rocurement costs also may be unaffected in this case, if the processor is able to continue sourcing products from the same suppliers. Alternatively it is possible that a processor currently sourcing products from multiple countries may choose to limit its source to fewer countries. In this case, such cost avoidance may be partially offset by additional procurement costs to source supplies from a narrower country of origin. Additional procurement costs of a narrower supply chain may include . . . higher acquisition costs due to supply and demand conditions for products from a particular country of origin, whether domestic or foreign.

COOL, 74 FR at 2685.

222. Suppan, supra note 16.

223. GATT, supra note 113, art. XX(d). It must be presumed that because each term is given its full meaning, the clause requiring measures to be consistent with the provisions of the agreement is not intended to rule out any application of the exception. See Andrew Kelly, Comment, The GATT Obstacle: International Trade as a Barrier to Enforcement of Environmental Conservation on the High Seas, 12. FLA. J. INT’L L. 153, 165 (1998). See also Salman Bal, International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT, 10 MINN. J. GLOBAL TRADE 62, 92 (2001) (proposing that “GATT inconsistent measures are authorized if they are linked to the enforcement of obligations under laws or regulations consistent with GATT provisions”).


consumers of the origin of their food purchases, encouraging producers to maintain records and separate processing lines.

Whether a measure is necessary to secure compliance is not so narrowly defined as that which is “indispensable or absolutely necessary.”226 There is a whole range of what can be considered necessary from “indispensable” to that which “makes a contribution to” securing compliance.227 It is up to the Member to decide what it considers necessary, but it is up to the Panel to weigh the degree to which the measure contributes to the goal and the degree to which it restricts trade.228 The Panel generally looks to see if there is an alternative measure that has less trade restrictive effects.229 The U.S. has a strong case that COOL is necessary to convey origin information to consumers, given the conspicuous lack of data showing labeling was widely adopted during the seven year period when COOL was still voluntary.230

Although the measure can be provisionally justified through Article XX(d), it must still meet the procedural requirements stated in the introductory clauses, or the “chapeau,” of the Article: a measure may “not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.”231 The “chapeau,” is intended to reign in measures that are provisionally justified to ensure that, in effect, they are not any more trade restrictive than absolutely necessary.232

COOL does not create unjustifiable discrimination; it holds imports from all Members where the same conditions prevail to the same labeling requirements. The numerous changes from the initial rule to the final rule reflect information gleaned from consultations between the USDA and various affected parties.233 Essentially, through consultations, the USDA showed a good faith effort to create a measure in compliance with WTO obligations.234

228. Id. ¶¶ 162–64, 176.
229. Id. ¶ 167.
231. U.S.—Gasoline, supra note 91, at 22; GATT, supra note 113, art. XX.
234. See id. at 2678–79.
In application, COOL may result in arbitrary discrimination. The regulation creates numerous exceptions to labeling requirements for processed foods and food service establishments and allows for mixed origin labels. These exceptions are so broad that they undermine the goal of the regulation. The information will be displayed on such limited types of consumer goods that consumers will not know when to look for it or not. Such uneven application allocates the burden of labeling in a way that may seem arbitrary.

Finally, it may be difficult for the U.S. to disprove that the measure is a disguised restriction on international trade. At its core, COOL is a marketing act, enabling producers to capture a higher price for goods labeled “product of the U.S.” Despite an obvious desire to support U.S. producers, COOL does not make any effort to treat imported or domestic goods differently. Marketing interests do not restrict international trade. Rather, Canada will claim that the decrease in Canadian imports to the U.S. is evidence enough of restrictive effects. Should the Panel find COOL to be arbitrary or unjustified discrimination, or a disguised restriction on trade, Article XX will not excuse COOL from WTO obligations.

V. CONCLUSION: OUTCOMES & ALTERNATIVES

COOL has the support of the people, the USDA, and the current administration; it is a shame that it has to come under the scrutiny of the WTO. The DSU Panel’s inquiry will hinge on whether the consumers’ right to know can justify COOL’s imposition on international trade. Given the limited success of GATT Article XX exceptions thus far, the U.S. Trade Representative ought to re-double efforts to make assurances to Canada that trade will resume its normal flows as soon as processors adjust to the separation and tracking systems necessary to uphold the spirit of the measure. Should the U.S. fail to convince Canada (and the Panel) otherwise, the Panel will likely find COOL violates the TBT Agreement and GATT obligations requiring measures not be any more trade restrictive than necessary to fulfill a legitimate objective.

While a Member gets to decide the level of protection it wants, it is up to the Panel to determine what degree of enforcement is necessary to
meet the desired goal.\footnote{Korea—Beef, supra note 116, \S\S 162–64, 176.} For instance, France was able to say they wanted absolute protection from the health hazards of exposure to asbestos, but it was still up to the Panel to determine if this goal warranted an absolute ban.\footnote{EC—Asbestos, supra note 118, \S\S 168, 175.} Perhaps more analogous to the case at hand is that of Korea—Beef, where the dual retail system for domestic and imported beef was found to violate WTO obligations. The Panel looked at numerous other instances of misrepresentation in the markets for pork and seafood, as well as an exemption from separating restaurants that serve imported and domestic beef, and found it was unfair to restrict trade in one market when the same problems plagued other markets as well.\footnote{Korea—Beef, supra note 116, \S 168.} COOL creates exemptions for processed foods and food service, despite consumer desire to know the origin of meat in any situation. These inconsistencies weaken the validity of the measure.

Upon a finding of a violation, the U.S. has a number of options it may choose to pursue. The U.S. can simply ignore the Panel’s finding. Since decisions by the Panel have no effect on domestic law, it will take political will to make changes. But ignoring the decision hurts the strength of the WTO and the reputation of the U.S. as a part of the global trade community. Moreover, if the U.S. fails to take action, Canada can retaliate with the authorization of the WTO.\footnote{DSU, supra note 86, art. 22.} Acknowledging the violation and switching to a voluntary system might better serve the U.S. By the time the Panel makes its report, the labeling system will already have been in place for some time. The upfront costs will already be fully invested, and consumers will have grown accustomed to having origin labels. Therefore, it would be in producers’ best interest to keep up with consumer confidence and maintain voluntary labeling practices.

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SOVEREIGNTY-BASED DEFENSES IN
ANTITRUST CASES AGAINST CHINESE
MANUFACTURERS: MAKING ROOM FOR
DIPLOMACY

INTRODUCTION

Two-thousand eight was a year of firsts for the Chinese government. China hosted the Olympics for the first time; its first comprehensive competition legislation (the “Anti-Monopoly Law”) took effect; and a U.S. court refused to dismiss the first U.S. antitrust suit against Chinese manufacturers, despite the Chinese government’s first appearance as amicus curiae before a U.S. court on the manufacturers’ behalf. These last two “firsts” are particularly important since they may signal an incoming tide of U.S. antitrust suits against Chinese manufacturers in response to China’s increasing dominance in many global industries.

Antitrust suits against Chinese exporters present U.S. courts with special challenges due to China’s continuing transition from a centrally planned to a market economy and the resulting upheavals in the country’s legal, economic, and regulatory systems. Chinese policymakers have recently begun to accept the principle that competition is a necessary engine of economic growth, as evidenced by China’s newly enacted Anti-Monopoly Law (“AML”). Furthermore, as part of an effort to reduce government control over many sectors, China has removed some powerful ministries from direct administration by the state and replaced them with so-called “trade associations” or “chambers of commerce,” groups that play an important role in influencing the pricing decisions of otherwise private entities.

While China instituted these reforms in the name of increased competition, a deeply embedded economic culture of price coordination and skepticism about the merits of competition is unlikely to be upended so easily. For instance, while the term “trade association” may signify an independent industry-run organization in the United States, the Chinese trade associations retain close ties to the official state apparatus. Thus,

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2. See id. at 240; see also Jonathan Palmer, China’s Landmark Anti-Trust Law, LEXISNEXIS EMERGING ISSUES ANALYSIS, July 19, 2008, at 5, available at LEXIS, 2008 Emerging Issues 2558 (noting the common practice of trade associations to become enmeshed in the pricing decisions of their members).
there is potential for much confusion over the nature of the trade associations, and whether pricing decisions of their members, ostensibly private entities, are truly voluntary. Against this complex regulatory backdrop, Chinese manufacturers have steadily gained a stronger foothold in world markets. Perhaps unsurprisingly, this success recently attracted the filing of several prominent U.S. antitrust cases alleging that Chinese manufacturers and their trade associations participated in price-fixing schemes aimed at inflating prices for the U.S. market.3

The ambiguities in China’s changing regulatory structure and the state’s involvement in pricing decisions open the door for Chinese manufacturers to test the use of special defenses based on respecting the sovereignty of foreign states—namely, the doctrines of Act of State, Comity, and Foreign Sovereign Compulsion. Whether U.S. federal courts will give broad latitude to such defenses in a trial on the merits remains to be seen, but a preliminary decision in a case against vitamin C manufacturers, *In re Vitamin C Antitrust Litigation*, could be an important predictor of the success of a new wave of antitrust cases against Chinese manufacturers. This Note argues that in cases where the Chinese government’s role in anti-competitive acts is at least ambiguous, U.S. courts should construe sovereignty-based defenses broadly in order to make room for diplomacy and serve important policy considerations.

Part I of this Note discusses the changing nature of China’s antitrust regime from a regulatory and legal standpoint. Part II provides an overview of the Act of State, Foreign Sovereign Compulsion, and Comity doctrines. Part III reviews the assertion of these doctrines as defenses and their treatment by a federal district court in *In re Vitamin C Antitrust Litigation*. Part IV analyzes the various policy considerations that should inform a court’s decision about whether to allow such defenses in ambiguous cases. Finally, Part V attempts to highlight lessons learned from the current litigation and suggests best practices for Chinese manufacturers, the Chinese government, and the federal courts going forward.

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I. CHINA’S CHANGING ANTITRUST REGIME

In the late 1970s, China began a historic transformation from a centrally planned, socialist economy to a more open, market-oriented economy.4 Under the centrally planned system, government ministries for each major industry coordinated production schedules and set prices, and no real “competition” occurred since all the industries were comprised of state-owned enterprises (“SOEs”).5 During the reform period, the government retained SOEs in certain critical industries, but relinquished ownership of others that were deemed less important for the government to control directly.6 In these newly privatized industries, China established “trade associations” or “chambers of commerce” with regulatory and coordination authority to replace the government ministries.7 However, this attempt at deregulation was not completely successful in separating the private sector from government control. As one commentator put it, “in reality many of the [trade] associations thus organized are little more than government ministries in disguise,” which “often sanction anticompetitive practices by their members.”8 Although confusingly designated as “social organization[s]” under Chinese law, the trade associations did not spring up at the election of private industry, as the term might suggest.9 Rather, the trade associations are mandated and largely controlled by the government, making them, in practice, more akin to government instrumentalities.10

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6. Owen, Sun & Zheng, China's Competition Policy Reforms, supra note 1, at 240 (stating that industries deemed “essential” to the economy and development of the nation include “electricity, petroleum, banking, insurance, railroads, and aviation”).
7. Id.
10. See id. at 9 (“The Ministry’s authority over the Chamber [of Commerce] is plenary: covering such aspects as the Chamber’s selection of its leaders, its personnel management system, its budget and accounting systems and its salary structure . . . . In short, the Chamber is the instrumentality through which the Ministry oversees and regulates the business of importing and exporting medicinal products in China.”).
To accompany this rapid economic restructuring, China soon recognized that laws addressing competition and monopolization would be necessary under a more open system. The piecemeal institution of the initial laws and administrative rules, however, failed to have a pervasive effect on curbing anticompetitive practices, due in part to a lack of implementing mechanisms and irregular enforcement dispersed among various government agencies. In the early 1990’s, economic reforms really began to gather speed following the Communist Party’s official declaration that its “central goal” was to “establish a ‘socialist market economy.’” Thus, the fledgling private sector began rapidly gaining market share in the absence of cohesive antitrust laws or predictable enforcement. In 1994, China sought to remedy the inefficiencies, inconsistencies, and gaps in the existing patchwork of rules by actively pursuing the drafting of its first comprehensive competition law, the AML.

Drafting the AML proved a difficult and lengthy task given the highly controversial nature of “competition” as a policy goal in the eyes of many Chinese policymakers. These policymakers and academics believed that the main problem with the economy was “excessive” competition, not a lack of competition. This view was fueled by the experience of several domestic industries in which intense competition led private enterprises to cut prices below costs, sometimes via illegal tactics. Skeptics of competition law feared—perhaps understandably—

11. See Li & Du, supra note 4, at 184. Previously, the economy was made up of SOEs whose production was determined by government plan, rather than the rules of supply and demand. Id. at 183. Therefore, the “socialist planned economy left no room for the competitive process to operate in general, and competition law was irrelevant.” Id.

12. See id. at 184; see also Owen, Sun & Zheng, China’s Competition Policy Reforms, supra note 1, at 236 (“China’s antitrust laws and regulations prior to the AML were fragmented, vague, and repetitive, and the effectiveness of antitrust enforcement was hampered by the existence of multiple enforcement agencies authorized by different laws.”).


14. Id.

15. Id. at 232.


18. Id. Some examples include travel agencies resorting to paying customers to use their services, maritime shipping companies operating at a loss, and dairy producers using illegal cost-cutting measures that resulted in health risks. Id. Arguably though, these acts are not “excessive” competition at all, but rather “competition going awry. Common to
that this type of race to the bottom competition among domestic entities would prevent the new Chinese private sector from being a strong player in the international market. Fears about excessive competition also extended to China’s export sector, where excessive competition is often blamed for the fact that recently, “Chinese products have been the number one target of antidumping investigations initiated by members of the WTO.”

To deal with this widely perceived problem of excessive competition, the government imposed “industrial self-discipline” and “advance approval” requirements on private enterprises. Trade associations helped to introduce “industrial self-discipline” as a way to help achieve their mandate of stabilizing markets in the newly privatized sectors, but in 1998 the practice became “officially sanctioned by the government.”

Industrial self-discipline requires “the major companies in an industry [to] reach price agreements or other agreements to limit competition.” This coordination is now achieved “under the direct supervision of the government.” In 2003, the Chinese government imposed an additional “advance approval” requirement for certain goods in an effort to avoid antidumping investigations and duties imposed on its exporters by foreign governments.

Under the advance approval system, trade associations must sign off on export contracts before those goods can be released for export.

Scholars have recognized that “policies such as ‘industrial self-discipline’ and ‘advance approval,’ to a large degree, function simply as
government-sponsored price cartels.” Consequently, these practices form the basis of the U.S. antitrust suit In re Vitamin C Antitrust Litigation, discussed, infra, in Section III. The irony, of course, is that while U.S. antitrust plaintiffs now claim that Chinese manufacturers are conspiring to keep prices artificially high, it seems that this coordinated pricing grew largely out of a desire to avoid U.S. antidumping suits where the complaint was that Chinese export prices were artificially low. Thus, while coordinating and enforcing a floor for export prices under these policies might have helped exporters to avoid dumping allegations, it also exposed Chinese exporters to U.S. antitrust suits based on the anticompetitive act of price-fixing.

Although practices like industrial self-discipline and advance approval show China’s enduring impulse to intervene in the market, the passage of the AML represented a significant coup for pro-competition policymakers. After thirteen years of drafting, negotiations, and revisions, the National People’s Congress (“NPC”) finally adopted the AML on August 30, 2007. The law took effect on August 1, 2008. While it is certainly a big step toward modernizing China’s approach to curbing anticompetitive practices, the AML is considerably less nuanced than the advanced antitrust regimes it ostensibly sought to emulate, perhaps reflecting China’s continuing ambivalence toward Western conceptions of “competition.” Thus, many of the key decisions regarding implementation and enforcement of the AML are only now beginning to come to light.

27. Id. The authors note that “in implementing those policies, the government apparently was unconcerned about their antitrust implication in domestic markets” until lawsuits were actually filed in the U.S. in 2005 and 2006. Id. This perhaps shows how strongly the government was focusing on avoiding dumping investigations by ensuring export prices were not lower than home market prices, even if it meant getting the government involved in pricing. Prior to the privatization of some SOEs, the government had little reason to become adept at anticipating antitrust enforcement in the U.S. because the government and its SOEs would likely be entitled to immunity from suit under the Foreign Sovereign Immunities Act (“FSIA”).

28. Bush, supra note 16, at 1. The process was infused with new urgency upon China’s accession to the WTO in 2001, since many experts felt that China would need a comprehensive law in order to meet its WTO obligations. Id.

29. See id.

30. Id. at 2 (noting that the vagueness of the law as written “provid[es] ample textual hooks for serving alternate policy goals.”). Indeed, the enunciated aims in the AML vary from ‘promoting ‘efficiency’ and ‘consumer interests’ to advancing ‘fair market competition,’ ‘the public interest,’ and ‘the healthy development of the socialist market economy.’” Id. These goals can hardly be considered an unambiguous endorsement of Western-style antitrust goals.
through implementing regulations and the case-by-case decisions of judicial or administrative authorities interpreting AML provisions.31

The AML covers the three basic areas of competition law common to modern jurisdictions: merger control, monopoly agreements, and abuse of dominance.32 Prohibited horizontal monopoly agreements among peer firms include “price fixing, market division, bid-rigging, joint boycotts, technology restrictions, and other restrictive agreements.”33 However, Article 15 of the AML provides for broad exemptions from these restrictions, including potentially worrisome “exemptions for crisis cartels, export cartels, and unspecified ‘public interests’” that could leave room for some anticompetitive practices to continue uninhibited.34

In addition to these typical antitrust provisions, the AML deals with several contentious competition issues that are specific to the Chinese context, including the role played by the trade associations.35 The sections covering trade associations were last-minute additions to the AML aimed at addressing concerns over recent price-fixing and market division scandals.36 Article 11 specifically calls upon trade associations to “strengthen the self-discipline of industries and to lead undertakings within their respective industries to carry out lawful competition and to protect the market competition order.”37 This provision seems to envision the continuation of the trade associations as market stabilizers, but throws in the word “lawful” to temper what those stabilization efforts may encompass. Even more explicitly, Article 16 provides that “industry associations shall not organize undertakings within their industries.”

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31. Id. at 2. See also Owen, Sun & Zheng, Antitrust in China, supra note 5, at 127 (noting that vagueness in initial antitrust statutes is not uncommon, and allows for the interpretation of the law to develop over time). In the U.S., the Sherman Act became nuanced through the development of the common law in accordance with economic theory over half a century. In China, it is possible that “administrative agencies can develop policies and procedures which, if made public and followed consistently, can provide guidance equivalent to case law.” Id.

32. Palmer, supra note 2, at 1. With regard to agreements, the AML prohibits private enterprises from engaging in three types of conduct: “anticompetitive ‘monopoly agreements,’ abuses of dominant market positions, and concentrations that are likely to eliminate or restrict competition.” Bush, supra note 16, at 2.

33. Palmer, supra note 2, at 1.


35. Palmer, supra note 2, at 1. (“[I]ssues of specific concern in China [covered in the AML include]: (1) the abuse of administrative power; (2) protection of the state-owned sector; (3) protection of intellectual property rights; and (4) the role of trade associations.”).


37. Id. (internal quotation marks omitted).
way that would violate the AML provisions on monopoly agreements.\(^{38}\) The AML thus seems to acknowledge that although “China’s policymakers see a positive role of the government-agencies-turned-trade associations in regulating market order,” there remains the “risk . . . that the trade associations may cross the line and impose undue restrictions on competition or, in some cases, function as outright price cartels.”\(^{39}\)

Penalties authorized by the AML “for entering monopoly agreements and abuses of dominance include confiscation of illegal gains, fines of one percent to ten percent of the offenders’ total turnover from the preceding year, and orders to cease the offending conduct.”\(^{40}\) Enterprises have some incentive to self-report misconduct and provide evidence in exchange for a reduction in or immunity from the imposition of penalties by administrative enforcement agencies.\(^{41}\)

In sum, the AML contains many of the features one would expect from a modern competition statute, as well as some promising attempts to address problems unique to the Chinese economy and system of government, but the ultimate test of its efficacy will be in its implementation and enforcement. Thus far, enforcement under the AML has focused almost solely on merger clearance, and already the main critique is a tendency to use the AML to protect domestic competitors.\(^{42}\) It remains to be seen how the Chinese enforcement agencies and courts will treat price-fixing and other horizontal restraints on trade that may involve questioning the role of the government ministries and the trade associations in market activity.\(^{43}\) It will certainly take time for the Chinese economy and private sector to adjust to the recent constraints imposed by China’s first comprehensive competition law.

\(^{38}\) Id. (internal quotation marks omitted).

\(^{39}\) Owen, Sun & Zheng, China’s Competition Policy Reforms, supra note 1, at 250.

\(^{40}\) Bush, supra note 16, at 11.

\(^{41}\) Id. Depending on how it is utilized, this provision may be similar to the highly successful leniency programs in the U.S. and elsewhere, which have facilitated many antitrust prosecutions. Id.


\(^{43}\) One commentator has called the failure to enforce the AML against cartels the “elephant in the room.” Id.
II. OVERVIEW OF SOVEREIGNTY-BASED DEFENSES: ACT OF STATE, FOREIGN SOVEREIGN COMPULSION, AND COMITY DOCTRINES

The common thread tying together the Act of State, Foreign Sovereign Compulsion, and Comity doctrines is reluctance for the U.S. Judicial Branch to impinge on the sovereignty of other independent states. When used as a defense in federal antitrust cases, each of these doctrines requires the court to engage in some type of threshold analysis aimed at determining how far it may venture into the area of international affairs while maintaining the utmost respect for the sovereign acts of other states. Thus, for the purposes of this Note, the three doctrines are referred to as the “sovereignty-based defenses.” Each doctrine, and its role as a defense in U.S. federal litigation, is considered in turn.

A. Act of State Doctrine

The common law Act of State doctrine provides grounds for dismissal of a private antitrust action if the “claim for injury . . . results directly from acts or decisions of a foreign sovereign and only indirectly from the defendant’s unlawful anticompetitive activities.” The effect of asserting the doctrine as a defense is that it “generally precludes federal courts from inquiring into the validity of public acts which a recognized foreign sovereign power commits within its own territory and consequently prohibits federal antitrust suits predicated on the acts of a foreign sovereign, even where the acts are procured by private parties.”

The most important aspect of the doctrine is the focus on “validity”—U.S. courts avoid deciding any case that turns on questioning the validity

44. WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 8:10 (2008).
45. 48 C.J.S. International Law § 31 (2009). Note however, that the Act of State doctrine, like the other doctrines discussed in this Note, is a generally applicable defense and therefore is not confined to use in antitrust cases.
46. 23 FED. PROC., L. ED. § 54:140 (2009). However, there are some exceptional circumstances under which the doctrine is inapplicable as a defense, i.e. where the government allegedly acted in a purely commercial capacity. Id. The non-invoking party may also question whether the challenged act should qualify under the doctrine. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 (1987) (“The act of state doctrine applies to acts such as constitutional amendments, statutes, decrees and proclamations, and in certain circumstances to physical acts . . . . An official pronouncement by a foreign government describing a certain act as governmental is ordinarily conclusive evidence of its official character. An action or declaration by an official may qualify as an act of state, but only upon a showing (ordinarily by the party raising the issue) that the official had authority to act for and bind the state.”).
of a state action. As traditionally stated in American law, the Act of State doctrine is rooted in the principle that:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Thus, the doctrine is rooted in both respect for the sovereignty of independent nations and in the notion of separation of powers that is at the core of the American system of government.

The leading modern case in this area of the law is Banco Nacional de Cuba v. Sabbatino, which recognized that the judge-made Act of State doctrine developed, at least in part, out of a “strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.” The case, dealing with the expropriation of private property resulting from a Cuban decree, established that the Act of State doctrine applies even when the state act involved would constitute a violation of international law. The Court reasoned that the Executive Branch has at its disposal numerous diplomatic channels through which to address grievances on behalf of all its citizens in response to the acts of another sovereign, while the Judicial Branch can only afford piecemeal relief based on the individual facts and actors that happen to be before it. The Court concluded that decisions declaring a foreign sovereign’s acts invalid would be “likely to give offense . . . since the concept

47. See Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." (internal quotation marks omitted)).
49. See Thomas V. Vakerics, Antitrust Basics § 12.05 (2009); In re Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 550 (E.D.N.Y. 2008); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421–23 (1964) (noting that “historic notions of sovereign authority” show the wisdom of the Act of State doctrine, while the separation of powers system gives rise to the doctrine).
50. Sabbatino, 376 U.S. at 423. However, the Court also notes, without elaborating, that some scholars disagree about the scope of the rule and the policy considerations that underpin it. Id. at 424.
51. Id. at 431.
52. See id.
of territorial sovereignty is so deep seated [that] any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders.\textsuperscript{53}

Any judicial disposition on the validity of an act of state would undoubtedly, in the Court’s view, impinge on the ability of the Executive Branch to negotiate optimal relations and agreements with other states.\textsuperscript{54} If the court declares a sovereign state’s act invalid, this could undermine a carefully calibrated response (or non-response) by the Executive Branch.\textsuperscript{55} If the court declares the act valid, this approval may give the sovereign state leverage in negotiations with the Executive Branch, or may undermine the authority of the Executive Branch if it has already officially expressed disapproval.\textsuperscript{56}

Thus, in order to effectively assert the Act of State doctrine as a defense, a defendant must allege that the outcome of the case requires the court “to declare as invalid the official act of a foreign sovereign where that act was performed within that sovereign’s own territory.”\textsuperscript{57} Unlike the doctrine of sovereign immunity, the Act of State defense may be raised whether or not the foreign government has been named as a defendant in the case, and is a “policy of judicial abstention” rather than one of exception or immunity from the court’s jurisdiction.\textsuperscript{58} This means that a defendant need not be a state actor or agent to raise the defense, and the court may dismiss the case despite having one or more valid grounds for exercising jurisdiction.

As clarified by the U.S. Supreme Court in \textit{W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International}, the proper procedure is to first determine the availability of the Act of State doctrine and only then to consider whether the circumstances in the case warrant its appli-

\textsuperscript{53} Id. at 432.
\textsuperscript{54} See id. at 432–33.
\textsuperscript{55} See id. at 432.
\textsuperscript{56} See id.
\textsuperscript{57} VAKERICS, supra note 49, § 12.05.
\textsuperscript{58} HOLMES, supra note 44, § 8:10; see also VAKERICS, supra note 49, § 12.05; Int’l Ass’n of Machinists & Aerospace Workers v. Org. of the Petrol. Exporting Countries, 649 F.2d 1354, 1359 (9th Cir. 1981) (Noting that while foreign sovereign immunity is a jurisdictional principle of international law, the Act of State doctrine is a “prudential” American legal principle arising out of the separation of powers system. Rather than going to jurisdiction, therefore, the doctrine allows courts to avoid acting in a politically sensitive area of foreign relations that is better suited to the political branches of government.)
cation. The Act of State doctrine is not technically available to the court as a ground for dismissal until it becomes unavoidably necessary to rule on the validity of a state action. The court must then decide whether to apply the doctrine based on the degree to which the case implicates the policies underlying the doctrine, including “international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations.” While a high probability of embarrassment or insult to a foreign state provides support to an argument in favor of applying the Act of State doctrine, it is not an element the defendant is required to prove in order to assert the defense, nor is it sufficient on its own to warrant dismissal of a case on Act of State grounds. After Kirkpatrick, it appears that the court may decide not to apply the Act of State doctrine, even where it is technically available, if the balance of considerations weighs against deferral to the political branches. However, the only example the Court provided to illustrate when the balance might weigh against invoking the doctrine was when the sovereign act was that of a now defunct government.

B. Foreign Sovereign Compulsion Doctrine

The Foreign Sovereign Compulsion doctrine may be considered an adaptation of the Act of State doctrine, in that it also operates as a shield for private defendants where the acts of a foreign sovereign are directly

60. Id. at 406.
61. Id. at 408.
62. Id. at 409.
63. Id. (citing with approval the Court’s suggested balancing approach as outlined in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)). In Sabbatino, the Court suggested that the balance might shift against application of the doctrine if: (1) the case does not involve important implications for the nation’s foreign relations, (2) “the government which perpetrated the challenged act is no longer in existence[,]” or (3) there is a great “degree of codification or consensus concerning [the] particular area of international law.” Sabbatino, 376 U.S. at 428.
64. W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int’l, 493 U.S. at 409. Presumably, the rationale is that deciding the validity of such an act would have no chance of interfering with the Executive Branch’s role in foreign affairs. However, it is possible to imagine many situations in which ruling on the validity of a former government’s acts would still impinge on current relations among sovereigns. For instance, key figures from a former regime may also be part of a current government; or there may be similar ideologies underlying both governments; or the act of the former government may be one that carries particular significance to an ongoing national or international conflict.
involved in the claim of injury. However, the Foreign Sovereign Compulsion defense only becomes available to the defendant in an antitrust suit if the “record demonstrates that the actions alleged to constitute the antitrust violations were in fact compelled by a foreign sovereign.” The underlying theory is that “where conduct is compelled by a foreign government, the corporate conduct, in effect, is the same as if it were the act of the foreign government itself. As a result, conduct compelled by a foreign sovereign is immune from antitrust prosecution.”

U.S. courts first recognized Foreign Sovereign Compulsion as a separate defense in the context of an antitrust suit, Interamerican Refining Corp. v. Texaco Maracaibo, Inc. In that case, which involved boycotting the sale of Venezuelan crude oil, the U.S. District Court for the District of Delaware granted the defendant supplier’s motion for summary judgment on the basis that the Venezuelan government had prohibited all oil suppliers and traders doing business in Venezuela from providing the

65. See 54 AM. JUR. 2D Monopolies and Restraints of Trade § 334 (2009); see also Vakerics, supra note 49, § 12.05; Holmes, supra note 44, § 8:10 (noting that while “articulated as a separate defense, [foreign sovereign compulsion] has probably been subsumed within the act of state doctrine” given the Supreme Court’s construction of the defense in W.S. Kirkpatrick & Co., Inc.).

66. 54 AM. JUR. 2D Monopolies and Restraints of Trade § 334 (2009).

67. Vakerics, supra note 49, § 12.05. As set forth by the American Law Institute, the defense of Foreign Sovereign Compulsion encompasses the following:

(1) In general, a state may not require a person

(a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or

(b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.

(2) In general, a state may require a person of foreign nationality

(a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or

(b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.


plaintiff with crude oil.\(^6^9\) In allowing Foreign Sovereign Compulsion, the court recognized that:

Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce. . . . Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.\(^7^0\)

Relying on the Act of State doctrine, the court in Interamerican Refining Corp. also explicitly held that it would be irrelevant and improper for the court to explore whether or not the compulsion itself was a valid or legal action under Venezuelan law.\(^7^1\)

Thus, the Foreign Sovereign Compulsion defense provides relief for the rare situation when a defendant is caught between a rock and a hard place, in that the laws of one state obliged the defendant to take the action that is illegal in the United States.\(^7^2\) It applies only narrowly, however, because the foreign law must be “obligatory” rather than only “permissive” of the defendant’s actions.\(^7^3\) Thus, a defendant is not automatically able to assert the defense just because the foreign government somehow was involved in or approved of the conduct.\(^7^4\)

Furthermore, the U.S. Supreme Court made clear in Hartford Fire Insurance Co. v. California that the defendant must do more than claim that the foreign law conflicted with U.S. law to obtain the Foreign Sovereign Compulsion shield.\(^7^5\) In that case, the London-based defendant reinsurers argued that although U.S. law prohibited its conduct in fixing commercial insurance policy terms, the same acts were “perfectly consis-

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69. See id. at 1296.
70. Id. at 1298 (citations omitted).
71. See id. at 1298–99.
72. HOLMES, supra note 44, § 8:10. See generally Boscariol, supra note 67 (highlighting the difficulties faced by Canadian companies where U.S. law restricted trade with Cuba, while Canadian law prohibited compliance with the U.S. restrictions). One politician memorably characterized the conflicting laws situation as giving companies a “choice between being hit with a bat or a brick.” Id. at 484 (internal quotation marks omitted).
73. VAKERICS, supra note 49, § 12.05.
74. Id.
75. HOLMES, supra note 44, § 8:10 n.15.
“tent” with British laws. The Supreme Court held that the compulsion defense does not apply merely upon a showing of a facial conflict in the laws; rather, the defendant had to show that the foreign law required it to violate U.S. law, and that it could not possibly have complied with both laws.

A defendant in a U.S. antitrust action may thus assert a Foreign Sovereign Compulsion defense only if “the foreign sovereign has compelled the very conduct that the U.S. antitrust law prohibits.” According to U.S. enforcement agencies, the defense only applies when three criteria are fulfilled:

First, the foreign government must have compelled the anticompetitive conduct under circumstances in which a refusal to comply with the foreign government’s command would give rise to the imposition of penal or other severe sanctions . . . . Second, . . . the defense normally applies only when the foreign government compels conduct which can be accomplished entirely within its own territory. . . . Third . . . the order must come from the foreign government acting in its governmental capacity.

77. Id. at 799. The arguments in Hartford were couched in terms of the comity doctrine. Id. However, given the focus on conflict of laws and the overlap between the two doctrines, commentators have recognized the importance of the case in identifying a limit to the foreign sovereign compulsion doctrine as well. Holmes, supra note 44, § 8:10 n.15.
79. Id. The enforcement agencies use these criteria to determine, before instituting a public antitrust suit, whether the facts of the case support a foreign sovereign compulsion defense. If the criteria are fulfilled so that the defense is implicated, the “[a]gencies will refrain from enforcement actions on the ground of foreign sovereign compulsion.” Id. Thus the Executive Branch has built deference to foreign sovereign decision-making into its enforcement policies as a threshold matter, so that a colorable foreign sovereign compulsion claim is probably far less likely to show up in a public antitrust litigation. As an expression of Executive Branch policy, therefore, the guidelines should be instructive, although not binding, for courts hearing antitrust cases brought by private plaintiffs, who have absolutely no obligation to consider these factors prior to instituting a suit. In a private suit, the court would be wise to look to these guidelines and related jurisprudence (sua sponte, if necessary) so as to ensure that the court’s exercise of jurisdiction does not impede on the Executive Branch’s domain.
80. Id.
If the facts indicate that all three criteria are met, the Foreign Sovereign Compulsion doctrine applies so as to provide defendants with a “predictable rule of decision,” and foreign governments with “due deference to [their] official acts” as equal sovereigns. Thus, the doctrine is based on fairness to corporate actors who make business decisions under the laws of a foreign sovereign but who are subject to U.S. jurisdiction and antitrust laws based on the effects of that business decision or conduct.

C. Comity Doctrine

As the U.S. Supreme Court characterized it over 100 years ago, the doctrine of Comity is

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Like the Act of State doctrine, Comity is a doctrine of judicial abstention based on respect for sovereignty. Rather than requiring automatic dismissal whenever the facts of a case implicate significant interests of a

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81. Id.
82. While an in-depth discussion of extraterritorial antitrust jurisdiction is beyond the scope of this Note, the general idea is that “[a]nticompetitive conduct that [substantially] affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.” Id. § 3.1. Chinese manufacturers, for example, may conduct all of their business in Chinese territory subject to Chinese law but become subject to U.S. jurisdiction based on significant exports to or market effect in the United States.
83. The doctrine is interchangeably referred to by courts and scholars as “comity,” “international comity,” or “comity of nations.” See, e.g., Hilton v. Guyot, 159 U.S. 113, 165 (1895) (referring to the debate over whether “comity” or “comity of nations” are appropriate or adequate terms for the doctrine); 44B AM. JUR. 2D International Law § 8 (2009). The notion of comity can also be used to refer to the mutual respect for the sovereignty of the domestic states of the United States, in that the courts of the forum state will usually apply the substantive law of another state to claims that arise in that state. 44B AM. JUR. 2D International Law § 8 (2009). International Comity encompasses this same conflict of laws approach, but may be “best understood as a guide for the court, in construing a statute, where the issues to be resolved are entangled in international relations.” Id.
foreign sovereign, however, the Comity doctrine allows the court to analyze and weigh all relevant factors to determine whether it should “defer to the laws or interests of a foreign country and decline to exercise the jurisdiction [it] otherwise [has].”

According to U.S. antitrust enforcement agency guidelines on Comity, which closely mirror the factors established by the Ninth Circuit in the landmark case *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, relevant factors to the Comity analysis in the antitrust context include:

1. the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;
2. the nationality of the persons involved in or affected by the conduct;
3. the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;
4. the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
5. the existence of reasonable expectations that would be furthered or defeated by the action;
6. the degree of conflict with foreign law or articulated foreign economic policies;

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86. *Id.; see also* Animal Sci. Prods., Inc. v. China Nat’l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842, 864 n.17 (D.N.J. 2008) (“[T]he legal doctrine of international comity is . . . a judicial tradition based on respect for sovereignty, a discretionary power of the court to decline jurisdiction in international cases out of respect for the actions and laws of another nation, which are weighed against United States international convenience and duties.”).

87. These factors are considered as a matter of course in international antitrust enforcement activities by agencies of the Executive Branch, and thus, a suit brought by a public enforcement agency is usually taken as an indication that U.S. interests in enforcement outweighed comity concerns. See ANTITRUST ENFORCEMENT GUIDELINES, supra note 78, § 3.2. In private antitrust disputes involving international issues the U.S. courts must engage in a very similar analysis to determine whether to exercise Sherman Act jurisdiction. See, e.g., *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (noting that in private suits the court’s comity analysis becomes even more important because “there is no opportunity for the executive Branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed.”).
7. the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and

8. the effectiveness of foreign enforcement as compared to U.S. enforcement action.88

Thus, Comity is clearly at issue whenever there is a direct conflict between U.S. law and the laws of a foreign sovereign, and thereby overlaps with the doctrine of Foreign Sovereign Compulsion, discussed supra in Section II.B.89 More importantly, however, Comity under the Timberlane balancing approach encompasses broader considerations of respect for the sovereignty of independent nations that allow the court to consider dismissal even in the absence of a direct conflict of laws.90 Conversely, the balancing analysis also gives the court discretion to exercise jurisdiction despite the presence of significant Comity considerations “if it finds that the extension of comity would be contrary or prejudicial to the interest of the United States.”91 Courts using this balancing approach are thus essentially asking whether asserting jurisdiction would be reasonable given the specific circumstances in the case.

The decision in Hartford Fire, discussed supra, could be construed as rejecting the balancing approach and limiting the Comity defense to situations where there is a “true conflict” between U.S. and foreign law such that Comity and Foreign Sovereign Compulsion would become indistinguishable.92 However, many scholars have criticized the decision, noting that the modern trend seems to be moving in the direction of the more

88. Antitrust Enforcement Guidelines, supra note 78.

89. See id. (noting that direct conflicts are defined according to the Supreme Court’s decision in Hartford Fire, 509 U.S. at 799, and that these direct conflicts occur increasingly less frequently in the antitrust context as nations continue to coordinate in the design of their respective competition laws).

90. Id.

91. 44B Am. Jur. 2d International Law § 8 (2009); see also Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 613 (9th Cir. 1976) (indicating that a weighing of comity concerns is one required part of a tripartite test to determine whether the court should exercise extraterritorial jurisdiction in an international antitrust case, but that comity may be outweighed by other factors), superseded by statute, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246, as recognized in McGlinchy v. Shell Chem. Co., 845 F.2d 802, 814 n.8 (9th Cir. 1988) (noting that while the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) now governs the reach of extraterritorial jurisdiction in cases brought under the Sherman Act, Congress specifically expressed that the passage of the FTAIA would not change the ability of the courts to exercise principles of international comity).

robust interpretation of comity supported by Justice Scalia’s dissent in Hartford Fire.93 Even the majority opinion in Hartford Fire explicitly refused to address “other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.”94 The decision can therefore be construed more expansively to indicate that “litigants are free to make comity arguments relying on the other factors outlined in the cases and the Restatements, but may not rely upon the conflict between national policies, unless the conflict rises to the level of outright compulsion.”95 Additionally, the Supreme Court’s strong emphasis on Comity considerations in refusing to exercise jurisdiction over a foreign plaintiff’s antitrust claims in a more recent case, F. Hoffman-Laroche, Ltd. v. Empagran, supports this interpretation and signals a return to the balancing approach embodied in Timberlane and Justice Scalia’s dissent in Hartford Fire.96

III. RECENT APPLICATION OF SOVEREIGNTY-BASED DEFENSES IN A FEDERAL ANTITRUST CASE: IN RE VITAMIN C ANTITRUST LITIGATION

In late 2008, the U.S. District Court for the Eastern District of New York denied a motion to dismiss on grounds of the three sovereignty-

93. See id. (“The Court ignored any requirement of reasonableness in the exercise of jurisdiction and then quoted the Third Restatement out of context to support a flawed argument that only foreign compulsion can create a true conflict justifying abstention on comity grounds.”); Joseph P. Griffin, E.C. and U.S. Extraterritoriality: Activism and Cooperation, 17 FORDHAM INT’L L.J. 353, 367–68 (1994) (Scalia, writing for four dissenters, “stated that ‘rarely would [the factors set forth in the Restatement (Third) of Foreign Relations] point more clearly against application of United States law. The activity . . . took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business . . . outside the United States . . . I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable’” in such circumstances (quoting Hartford Fire Ins. Co., 509 U.S. at 818).); Siddharth Fernandes & F. Hoffman-Laroche, LTD. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide, 20 CONN. J. INT’L L. 267, 279 (2005) (noting that “though Hartford Fire still stands, it seems to have been severely cabined by the [subsequent enactment of the] FTAIA and subsequent decisions” such as Empagran that give comity considerable weight in interpreting the reach of U.S. extraterritorial antitrust jurisdiction).
95. Waller, supra note 92, § 6:21.
96. See Fernandes, supra note 93, at 279–84.
based defenses the consolidated private antitrust claims brought against four Chinese manufacturers of vitamin C by U.S. purchasers. The plaintiffs’ claims stem from the defendant manufacturers’ swift rise to dominance of the world market for vitamin C in recent years—a situation plaintiffs allege was aided by collusive, anticompetitive horizontal price-fixing among the defendants. Chinese vitamin manufacturers started to gain control of the vitamin C market after a European manufacturer price cartel (which had until then controlled the market) broke up in 1995. Plaintiffs allege that in December 2001, the defendant manufacturers formed their own cartel with the help of their trade association, the Chamber of Commerce of Medicines and Health Products Importers & Exporters (“the Chamber”), and agreed “to control prices and the volume of exports for vitamin C.” This collusion allegedly caused an 84 percent increase in the average price per kilogram for vitamin C in 2002, with prices “in the United States [increasing] from approximately $2.50 per kilogram . . . to as high as $7 per kilogram.” Prices spiked as high as $15 per kilogram in 2003, a result of “the combination of the cartel’s supply restrictions and increases in world demand . . . attributable . . . to

98. See generally id.
99. See id. at 549 (“[D]efendants’ sales constitute approximately 60 percent of the worldwide vitamin C market and virtually 100 percent of the manufacturers who can produce vitamin C for a cost below $4.50 to $5 per kilogram.”) (internal quotation marks omitted).
100. See id. at 548 (noting that the European cartel disbanded after being sued for conspiring to “suppress competition and fix prices”); Kate Fazzini, Antitrust Suit Proceeds Against Chinese Vitamin C Makers, LAW.COM (Nov. 13, 2008), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202425997056 (“In the late 1990s and early 2000s, vitamin price-fixing cases were brought against European manufacturers, leading to multi-billion dollar settlements with the U.S. government, European Commission and other entities, including businesses and retailers.”).
101. Plaintiffs’ complaint apparently calls this group the “Western Medicine Department of the Association of Importers and Exporters of Medicines and Health Products of China.” In re Vitamin C Antitrust Litig., 584 F. Supp. 2d at 549. However, in its amicus brief, the Chinese Ministry of Commerce asserts that the correct name is the “Chamber of Commerce of Medicines and Health Products Importers & Exporters.” Id. at 552. Given the difficulties with translation in complex international litigation and the lack of transparency in the Chinese system, for consistency’s sake this Note will defer to the Chinese government’s name for the group.
102. Id. at 549.
103. Id.
the outbreak of SARS.”104 Subsequent cuts in prices by individual cartel members were allegedly reined in at an “emergency meeting” called by the Chamber in late 2003, where Chamber members, including defendants, “devised plans to rationalize the market and limit production levels and increase prices.”105 Defendants purportedly dealt with 2004 price declines by agreeing to “shut down production for equipment maintenance in order to boost prices back toward their 2003 high, [and to] restrict exports to the United States to further stabilize prices.”106

In response to these allegations, defendants moved to dismiss the complaint by invoking the Act of State, Foreign Sovereign Compulsion, and Comity doctrines, insisting that “their actions were compelled by the Chinese Ministry of Commerce” (“the Ministry”).107 In its first ever amicus curiae appearance before a U.S. court, the Chinese government (through the Ministry) submitted and argued an amicus brief in support of defendants’ position.108 The Ministry asserted that the Chamber was established in 1991 “as an entity under the Ministry’s direct and active supervision [and] plays a central role in regulating China’s vitamin C industry” as a social organization “imbu[ed] . . . with governmental regulatory authority.”109 Essentially, once Chinese market-oriented reforms reduced the number of directly regulated SOEs in the early 1990s, the state handed over the regulatory reins for many industries to the Ministry, which in turn created entities such as the Chamber to “[step] into the shoes of the state-owned national exporting entities.”110 In this way, “chambers of commerce in China have played a central role in China’s shift from a command economy to a market economy.”111

According to the Ministry, in 1997 the Ministry and the State Drug Administration (“SDA”) responded to tough competition on the global market for vitamin C by ordering the Chamber to establish a group “to coordinate with respect to [the] vitamin C export market, price and customers, and to organize the enterprises in contacting foreign entities.”112

104. Id.
105. Id.
106. Id.
107. Id. at 550.
108. See id. at 552. The Ministry represents the Chinese government in its capacity as “the highest administrative authority in China authorized to regulate foreign trade, . . . the equivalent . . . of a cabinet level department in the U.S. governmental system.” Id. (internal quotations omitted).
109. Id. at 552–53.
110. Id. at 552.
111. Id.
112. Id. at 553 (internal quotation marks omitted).
The Ministry left it to the Chamber to determine “the specific method for coordination” and to file that method with the Ministry.113 Subsequently, and presumably to comply with the order, the Chamber formed and received Ministry approval for a “Vitamin C Sub-Committee” made up of major vitamin C exporters.114 According to the charter for the sub-committee, only its members would “have the right to export [v]itamin C and are simultaneously qualified to have [v]itamin C export quota.” Members of the sub-committee were required to “voluntarily adjust their production outputs according to changes of supplies and demands on international markets . . . and strictly execute [the] export coordinated price set by the Chamber and keep it confidential.”115 The penalties for non-compliance included “warning, open criticism and even revocation of . . . membership,” and ultimately a suggestion “to the competent governmental department, through the Chamber, to suspend and even cancel the [v]itamin C export right of such violating member.”116

The regulatory framework for Chinese exports changed to a “price verification and chop” method in 2002 in response to China’s accession to the World Trade Organization ("WTO").117 Under the new system, chambers of commerce have to verify all export contracts and approve the specific price and quantity before shipments can be released by Customs.118

In response to the defendants’ and Ministry’s contentions, the plaintiffs argued that (1) none of these facts “pointed to a single law or regulation compelling a price or price agreement,” (2) the claimed collusion did not occur until years after the establishment of the sub-committee that supposedly compelled price-fixing, and (3) records of the Chamber and sub-committee referring to self-restraint measures and hand voting evidenced the voluntary nature of the agreements to fix prices.119

In ruling on the motion to dismiss, the court held that the Ministry’s brief, while “entitled to substantial deference, [was] not conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry’s position.”120 The court then denied the motion in order to al-
low further factual development on the issue of compulsion. The court hoped further discovery would resolve ambiguity in the record as to “whether defendants were performing government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens.”

IV. REEXAMINING IN RE VITAMIN C ANTITRUST LITIGATION: WHY U.S. COURTS SHOULD CONSTRUE SOVEREIGNTY-BASED DEFENSES BROADLY WHERE CHINA’S ROLE IS AMBIGUOUS

The district court in In re Vitamin C Antitrust Litigation took a conservative, wait-and-see approach to the assertion of sovereignty-based defenses due to a record it deemed “simply too ambiguous to foreclose further inquiry into the voluntariness of defendants’ actions.” However, reexamination of the court’s reasoning and the facts of the case reveals a strong argument rooted in both policy and case law for construing sovereignty-based defenses broadly at the pre-trial stage in ambiguous cases. An expansive construction is especially prudent where a foreign sovereign like the Chinese Ministry of Commerce makes an official statement expressing its interest or explaining its role in the subject of the litigation.

The court’s reasoning in In re Vitamin C Antitrust Litigation masks the strength of the sovereignty-based defenses by failing to examine each of them in turn, even though they are conceptually distinct and successful establishment of any one of them could warrant dismissal. While the court delineated the rules of each of the three doctrines asserted by the Chinese manufacturers, it focused its analysis on the authority of the Ministry’s brief and the Foreign Sovereign Compulsion defense, arguably the narrowest of the three. Therefore, the following Sections reexamine the applicability of the three sovereignty-based defenses in turn and suggest why a broad construction may be warranted by the factual circumstances of this litigation.

121. Id. at 559.
122. Id.
123. Id.
124. See id. at 557–59. The court begins its legal analysis by stating that “the issue at this stage of the case is whether there is a factual dispute as to the alleged compulsion,” which seems to gloss over the more nuanced analysis warranted by the Act of State and Comity defenses raised in the case. Id. at 557.
A. Act of State Doctrine

Pursuant to the two-step Act of State analysis established in *Kirkpatrick*, the court should have initially examined whether the success of the plaintiffs' complaint would require a ruling on the validity of a Chinese state action.\(^{125}\) The court seemed to accept that any involvement by the Chinese government in price-fixing constituted a public, rather than commercial, state act, thereby removing any speculation that a commercial activity exception may apply where export regulation is concerned.\(^{126}\) Therefore, the denial of the motion to dismiss implies that some doubt remained as to whether it was necessary to rule on the validity of a state action.

In *Hunt v. Mobil Oil Corp.*, the Second Circuit made clear that plaintiffs cannot escape the application of the doctrine through skillful pleading that avoids explicitly questioning the validity or legality of the government's acts. Rather, the doctrine still applies as long as a nexus with the state action is at the heart of the plaintiff's claim, such that the court has to look at the act and the government motivation behind it.\(^{127}\) In so deciding, the *Hunt* court indicated that pleadings do raise issues of the legality or validity of state acts if they characterize government actors as "co-conspirators."\(^{128}\)

Here, the allegations in the complaint implicitly required the court to look at the Chinese government’s export policies for vitamin C and determine whether the government’s motivation was to fix prices in restraint of trade. The plaintiffs characterized the Chamber as a "co-conspirator" in the complaint and referred numerous times to the role the Chamber played, under Ministry direction, in instigating and coordinating the price-fixing meetings that form the crux of the complaint.\(^{129}\) Plaintiffs alleged that they were harmed by an increase in prices for vi-

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126. See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 550 n.4 ("[D]efendants and the Ministry have made a compelling argument for why the Chinese government’s involvement—to the extent it exists—in defendants’ price-fixing scheme amounts to a public, rather than commercial, act.").
127. See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 76–77 (2d Cir. 1977).
128. *Id.* at 76.
129. See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 549 ("According to the complaints . . . defendants and their *co-conspirators* formed a cartel;" "At a meeting of the [Association, a.k.a. the Chamber,] . . . defendants and the Association . . . reached an agreement;" "The complaints further allege that the agreements of the cartel members were facilitated by the efforts of their trade association;" "Plaintiffs allege that the Association called an ‘emergency meeting’ . . . to rationalize the market." (emphasis added)).
tamin C that was caused “as a result of the meetings and other efforts by cartel members,” which they took pains to point out were accomplished at each step under the auspices of the Chamber. The acts of the Chamber and the defendant manufacturers were inextricably intertwined in the allegations to the extent that ruling on defendants’ liability would amount to passing judgment on the Chamber’s actions as well.

The court’s focus on the factual dispute over compulsion failed to acknowledge the broader scope of the Act of State doctrine, which is not necessarily dependent on government compulsion. The parties strongly disputed the voluntariness of the defendants’ specific pricing decisions, but did not challenge the Ministry’s detailed explanation, in its amicus brief, of China’s overall export control system, fear of excessive competition and antidumping duties, and delegation of regulatory authority to the Chamber as a key facet in its transition to a market-oriented economy. The amicus brief submitted by the Ministry outlined these practices (including serious penalties for noncompliance) in great detail and represented the Chinese government’s official characterization of the Chamber as a “government-mandated price and output control regime.”

Regardless of whether the Ministry and Chamber actually compelled price-fixing in this instance, the causal link alleged by plaintiffs between defendants’ and the Chamber’s acts necessarily required the Court to examine the motivations and actions of the Chinese government in setting up such a system.

Furthermore, to rule on plaintiff’s request for an injunction (whether granting or denying it) would be tantamount to either sanctioning China’s means of regulating its domestic industry, or instructing the government that it must “alter its chosen means of regulating domestic conduct.” China’s status as a non-market economy and major U.S. trading partner further exacerbate the potential impact of such a ruling on political relations between the two countries. This is precisely the situation of judicial overreaching into foreign affairs that the Act of State doctrine is intended to avoid. Thus the Act of State doctrine is, at a minimum, technically available to the court in this case.

Under Kirkpatrick, technical availability does not ensure dismissal but merely indicates that the court may exercise discretion in deciding whether to apply the doctrine based on the policies that underlie it, such

130. Id.
131. See generally Ministry Amicus Curiae Brief, supra note 9.
132. Id. at 3.
133. Id. at 22–23 (citing Int’l Ass’n of Machinists & Aerospace Workers v. Org. of Petrol. Exporting Countries, 649 F.2d 1354, 1361 (9th Cir. 1981)).
as comity, the location of the acts, and potential conflict with the Executive Branch. In this case, comity considerations are strongly implicated, as is discussed infra in Section IV.C. All acts which could be attributed to Chinese sovereign entities took place in China’s territory. Finally, there is a high possibility for conflict with, or embarrassment to, the Executive Branch in its conduct of foreign relations.

This last factor is supported by the depth of the Chinese government’s interest in the outcome of the case and its willingness to come forward and unambiguously state—for the first time in a U.S. court—that it is responsible for the price-fixing that occurred here. Clearly, such a statement suggests that China views this price control system for exports as a necessary part of its shift to a market-oriented system. Additionally, the acts at issue occurred during a time of great transition in China’s economy—it acceded to the World Trade Organization in 2001, a momentous event but one that made the government’s concerns over excessive competition and foreign anti-dumping suits all the more acute. Furthermore, China has since taken steps to curb such activities through the enactment of the AML with its specific prohibitions against illegal price-fixing through trade associations.

The U.S. Executive Branch has a considerable interest in cooperating with other nations in antitrust enforcement against global cartels. However, there is a significant possibility that these cooperation efforts could be hampered by the exercise of U.S. jurisdiction over Chinese manufacturers despite a mea culpa from the Chinese government. This is the

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135. In re Vitamin C. Antitrust Litig., 584 F. Supp. 2d at 552 (“The Chinese government’s appearance as amicus curiae is unprecedented. It has never before come before the United States as amicus to present its views. This fact alone demonstrates the importance the Chinese government places on this case.”).
136. See Ministry Amicus Curiae Brief, supra note 9, at 14 (The Ministry introduced the price “verification and chop” system for exports in 2002 “in order to accommodate the new situations since China’s entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China’s exports, promote industry self-discipline and facilitate the healthy development of exports.” (internal quotation marks omitted)).
137. See id. at 22 (“[T]he conduct alleged to have been violative here was compelled by the Chinese government . . . in its oversight of its foreign trade regulation. Any determination by this Court into the conduct . . . will necessarily invoke an inquiry into the legitimacy of China’s foreign policy concerning the manufacture and export of vitamin C. To permit the validity of the policy-making decisions of China to be reexamined and perhaps condemned by this court would very certainly imperil the amicable relations between the two governments and vex the peace of nations. It cannot be denied that the
first time U.S. plaintiffs have subjected Chinese manufacturers to a U.S.
antitrust suit and the possibility of treble damages that go along with it. A zealous application of extraterritorial jurisdiction in the face of the Ministry’s admission of state responsibility could prompt China to enact clawback or blocking legislation to protect its domestic manufacturers from such suits in the future. Since the price control system at issue here was enacted partly as a protective measure in response to foreign anti-dumping suits, it seems likely that China would react just as strongly to the possibility that this case would set off a deluge of antitrust suits targeting Chinese industry leaders, this time carrying the possibility of treble damages. Therefore, deeming these acts to be invalid or illegal could significantly interfere with the Executive’s ability to decide how to calibrate cooperation with China on antitrust enforcement and could significantly hamper foreign relations with China, one of the United States’ most important trading partners. If the Executive Branch wants to challenge the legitimacy of China’s policy, it can do so in a carefully calculated fashion through diplomatic channels or the WTO dispute resolution system. Indeed, the United States Trade Representative has since initiated dispute proceedings at the WTO to challenge China’s “export restrictions applied to nine raw materials used as inputs for the steel, alu-

possibility of insult to China is significant—the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of regulating domestic conduct.” (internal citations omitted)).


139. See VAKERICS, supra note 49, § 12.04 (“Efforts to obtain evidence located in foreign countries may be frustrated by the invocation of blocking statutes. Blocking statutes have been enacted in countries such as the United Kingdom, France, Canada, and Australia. As the name implies, blocking statutes are designed to prevent plaintiffs in the United States from obtaining evidence located in foreign countries. . . . Satisfaction of a treble damage award may be further complicated by the government of the foreign based defendant’s home country having enacted a ‘clawback’ statute. Pursuant to a clawback statute, a foreign defendant may file suit against a plaintiff that has obtained a treble damage award in order to recover from the plaintiff all damages paid by the defendant beyond actual or compensatory damages.”).

140. For instance, the quota and export licensing system and the price verification and chop procedure were likely violative of Article XI of the WTO Agreement, which provides that “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
minum and chemicals industries [as violative of] China’s 2001 WTO accession agreement.”141 Since WTO disputes address only state actions, this is a critical sign that the U.S. Executive Branch considers China’s export constraints a matter controlled by Chinese government and law. Thus the balance of considerations warrants dismissal on Act of State grounds, even without adopting a “broad” construction of the doctrine.

B. Foreign Sovereign Compulsion Doctrine

The Foreign Sovereign Compulsion doctrine is the narrowest of the three defenses, but it is at the heart of the defendant’s and the Ministry’s arguments for dismissal in this case. In the United States, horizontal price-fixing is a per se violation of the Sherman Act, so it is clear that, barring jurisdictional constraints, fixing export prices for vitamin C constitutes a violation of U.S. law. The alleged conduct occurred wholly on Chinese territory. Furthermore, Chinese regulations make severe penalties, including revocation of the export license for vitamin C, imposable on manufacturers that fail to comply with price coordination.142 Therefore, the key consideration remaining in the compulsion analysis is whether the defendants’ acts in fixing prices were just permitted or truly compelled by the Chinese government.

Arguably, the establishment of penalties itself should be sufficient evidence that the government compelled price coordination. The court’s focus on voluntariness seems misplaced if Chinese policy made severe sanctions possible. For example, the court indicated that the plaintiffs’ voluntariness argument would be stronger if discovery showed that Chinese manufacturers actually adhered to a pricing scheme only after they achieved market power, despite an earlier mandate to do so by the Chamber and subcommittee.143 However, once a governmental mandate is issued, it should hardly matter whether or not the defendants managed to avoid sanction for previous noncompliance. A failure to penalize does not dilute the legal force of the mandate itself.144 The court seems to ac-

142. See Ministry Amicus Curiae Brief, supra note 9, at 10–11.
144. For instance, a person may cheat on or fail to pay their taxes over a period of years and not be audited, but ignoring the law and getting away with it does not mean that
knowledge as much earlier in its decision, where it cites *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.* as a clearer case for dismissal where the Colombian government suddenly “began enforcing a series of cargo reservation laws it had passed years before.”

Even though the defendants in that case allegedly *engineered* the renewed enforcement of the protectionist laws, the court dismissed on Act of State grounds. Similarly here, the fact that implementation, enforcement, and penalties for failure to conform pricing may have been unevenly applied early on should not negate the compulsory nature of the state regulation. Nonetheless the court found *O.N.E. Shipping Ltd.*, where laws had gone completely unenforced for years, to present a clearer case of compulsion.

The real difference between the compulsion analyses in these cases, then, seems to be the uncodified nature of much of the Chinese regulatory system. The court likely was not comfortable hanging a dismissal on the circulars and notices typically used in the Chinese system of regulation, as opposed to the codified statutes typical of a U.S. or European style system. Indeed, the court distinguishes this case from others relied upon by defendants by stating that those dismissals “involved much clearer examples of government compulsion,” but the increased clarity seems to be only a function of the U.S.-style codification of the laws in those cases.

For instance, the court asserts that while *Trugman-Nash, Inc. v. New Zealand Dairy Board* was dismissed based on sovereignty-based defenses, the case involved “a formally codified New Zealand law” providing guidance to the Dairy Board on the granting of export licenses. However, the facts of *Trugman-Nash* were arguably even less clear-cut on compulsion than those in the *Vitamin C* case. The New Zealand statute, in the *Trugman-Nash* court’s view, was “not a model of clarity” and “cast in permissive terms” that gave the Dairy Board at least facial discretion over whether protectionist factors warranted a denial of an export the law prescribing payment of taxes was not compulsory during those years, or has ceased to legally bind the person to pay taxes in future.

145. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 558.
146. *Id.* (“[T]he court held that the plaintiff’s allegations ‘make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on.’” (quoting *O.N.E. Shipping Ltd v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449 (2d Cir. 1987))).
147. *Id.*
148. *Id.*
license.149 In fact, it was only upon reconsideration of the case after an initial denial of defendants’ motion to dismiss that the court was finally convinced that the Act actually compelled the denial of export licenses (and thus, price competition) for the United States.150 The court reasoned that although the “mandate is not cast in the terms of a Biblical commandment, ‘Thou shalt not,’ . . . the statute’s practical effect is the same.”151 Contrary to the Vitamin C court’s assertion, then, it would seem that Trugman-Nash provided ample persuasive authority to dismiss on foreign sovereign compulsion grounds based on fair inferences about the practical effects of a regulation lacking transparency.

For reasons described under the Act of State analysis, supra, Section IV.A, if the court faced any ambiguity on this front it should have deferred to the Ministry’s official statement detailing how defendants were compelled by Chinese regulations to join the subcommittee, coordinate an industry-wide price, and limit production, all under penalty of severe sanctions.152 The court cited Karaha Bodas Co., LLC v. Pertamina for the proposition that “[w]here a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas.”153 The court then concluded that, while the Ministry’s brief was entitled to “substantial deference,” it did not constitute “conclusive evidence of compulsion.”154 However, it appears that the court’s subsequent analysis failed to accord “substantial deference”—or even any additional weight—to the Ministry’s detailed brief characterizing its own law and instead relied on the plaintiffs’ expert on Chinese law.155 This analysis strikes against the “substantial deference” standard the court announced, and a broader construction of the Foreign Sovereign Compulsion doctrine was warranted in this instance of ambiguity regarding a foreign law.

In addition, the court’s own compulsion analysis seems to indicate a lack of understanding of the Chinese system of regulation, which is

150. Id.
151. Id.
152. See Ministry Amicus Curiae Brief, supra note 9, at 17.
154. Id.
155. Id. at 555.
somewhat inexplicable considering the careful explanation provided in the Ministry’s brief.\footnote{See Ministry Amicus Curiae Brief, supra note 9, at 5–14.} For example, the court based its decision against dismissal largely on Ministry records boasting that the price agreements were “self-restraint measures” taken “without any government intervention,”\footnote{In re Vitamin C Antitrust Litig., 584 F. Supp. 2d at 554.} evidence of “hand voting” to decide on specific prices, and the fact that “Chinese law is not as transparent as that of the United States . . . [since] rather than codifying its statutes, the Chinese government apparently frequently governs by regulations promulgated by various ministries.”\footnote{Id. at 559.} All of these factors are easily explained by the system of government and policy of “industrial self-restraint” employed by the Chinese government, discussed supra, and are indicated as such in the Ministry’s brief.\footnote{See Ministry Amicus Curiae Brief, supra note 9, at 17–18.}

The court’s focus on “hand voting” to decide on specific prices, for instance, seems misplaced. This method is not surprising or ultimately even important, since the Ministry mandated that defendants fix a price through industry coordination within the Chamber. Thus, when the Ministry boasted that the export restraints were achieved without intervention, this refers to the fact that the Ministry and Chamber did not have to impose any of the available sanctions in order to achieve compliance. In fact, the defendants’ membership in the subcommittee and participation in these “self-restraint” agreements were prerequisites to their right to export vitamin C out of China at all. It is unclear how the Chamber would have the right to decide that only its members could export vitamin C if it were not authorized to do as part of a government regulation.

Thus, it would be impossible for the manufacturers to comply with U.S. law and Chinese law at the same time—their home jurisdiction required them to come to an agreement on a price in order to “prevent disorderly competition” and avoid antidumping suits in the U.S. and elsewhere, while the same conduct constitutes a per se antitrust violation in the U.S.\footnote{Id. at 20.} It seems unsatisfying for the court to indicate that because these measures are not laid down in statutes, they are not transparent, since the implication is that government law applied through coordination with and pressure on the private sector (common in East Asian economies) is somehow less deserving of deference than a western-style
Moreover, the Ministry’s brief should cure any lack of transparency about the practice of governance and industry self-regulation administered through the Ministry/trade association system. Thus the court should have gone further in its analysis of the practical effects of the regulatory system on pricing— even if it ultimately did not agree with the Ministry’s final conclusions about whether these practices constituted compulsion.

Although the court reserved decision on the Foreign Sovereign Compulsion defense pending further discovery, prolonging the litigation is itself a kind of penalty for the defendant manufacturers. U.S. antitrust cases, with their expansive discovery rules, are expensive and time-consuming, particularly for foreign defendants who face additional travel and translation costs in order to appear before the court. Thus, in the face of strong evidence of compulsion and an official statement by a foreign sovereign, the court should construe this defense broadly if doing so is necessary to preserve the fairness considerations at the heart of the doctrine. Such a rule would also promote predictability while maintaining respect for the sovereignty of foreign nations, two underlying policies of the Foreign Sovereign Compulsion doctrine.

C. Comity Doctrine

The Comity doctrine provides support for a dismissal under either of the other two doctrines, even in the event the court is unwilling to decide the motion on comity alone. As described by Scalia in the dissent to Hartford Fire, a comity analysis in the context of a motion to dismiss requires the court to consider whether exercising jurisdiction would be reasonable in light of several factors. One important factor is the degree of conflict between the foreign and U.S. law, discussed in the Foreign Sovereign Compulsion analysis supra Section IV.B. Other factors, had the court seen fit to examine them in detail, would also militate in favor of abstaining from exercising jurisdiction. For example, all of the acts took place within the territory of China, and the defendants are all of Chinese nationality and have their principal place of business in China. Additionally, the actions appear to have been aimed at avoiding dumping

161. See In re Vitamin C Antitrust Litig., 584 F. Supp. 2d at 559 (“Chinese law is not as transparent as that of the United States or other constitutional or parliamentary governments.”).


163. See Griffin, supra note 93 and accompanying text.
allegations, and not at harming the U.S. market per se. Finally, the Chinese government indicated through its appearance as amicus its strong interest in regulating the activity in question.

The sole factor in the comity analysis that might give the court pause is whether China can be considered to have a comprehensive regulation and enforcement scheme for price-fixing, since the AML was not in place at the time of the conduct at issue here and its efficacy is still being tested. Whether courts in future cases against Chinese manufacturers will consider the newly enacted AML as evidence of a strong interest in regulating horizontal price-fixing schemes of this nature remains to be seen.

Regardless of how the court comes out on the enforcement scheme, however, the overall balancing of factors in the Comity analysis point toward an abstention from jurisdiction in order to respect the sovereignty of China.

V. ALTERNATIVE APPROACHES EMERGING IN THE FEDERAL COURTS

While In re Vitamin C Antitrust Litigation was a first for U.S. federal courts, pre-trial decisions have since been issued in two nearly identical price-fixing cases against other Chinese manufacturers in the Western District of Pennsylvania, Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp., and the District of New Jersey, Resco Products, Inc. v. Bosai Mineral Group Co., Ltd.164 In both cases, the district court considered the Ministry briefs filed in the In re Vitamin C Antitrust Litigation case and arrived at a decision favorable to defendant manufacturers. Each of these decisions deserves some attention, as they represent alternative approaches to this factual scenario that exhibit greater deference to sovereignty considerations.

After considering essentially the exact same allegations and sovereignty-based defenses as those explored in In re Vitamin C Antitrust Litigation, the court in Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp. arrived at an opposite conclusion. Plaintiff consumers of magnesite-based products brought a price-fixing putative class action against seventeen “Chinese business entities involved in the sale of magnesite-based products.”165 The magnesite manufacturers allegedly fixed prices and engaged in other anticompetitive ac-

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tions through the auspices of their trade association, the “Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters” (“CCCMC”). Rather than rely only on the parties’ submissions on these claims and the sovereignty-based defenses, however, the court actively researched evidence from four other proceedings that might bear on the foreign sovereign compulsion doctrine.

The first such proceeding, a decision in the European Union, “set aside a prior EU determination refusing market economy treatment” and hence lower antidumping duties, to an individual Chinese exporter that established it successfully avoided substantial government intervention in its pricing decisions. However, due to the degree of difference in the proceedings and the lack of clarity in the EU decision, the Animal Science Products, Inc. court found it would be improper to accord judicial notice to this proceeding.

Second, the Animal Science Products, Inc. court considered statements made by one of the plaintiffs in a countervailing duty petition on Chinese magnesite before the International Trade Administration, and found these statements amenable to judicial notice. Specifically, plaintiff Resco Products, Inc. alleged that the Chinese government subsidizes magnesite products via preferential loans, export quotas, and imposition of a “minimum acceptable export sales price,” in addition to a bidding system that awarded export licenses to those manufacturers with the highest export prices. Essentially, in its countervailing duty petition Resco blamed the Chinese government for the same conduct for which Resco’s antitrust complaint now alleges the defendants alone were responsible.

Third, the Animal Science Products, Inc. court took judicial notice of the proceedings against bauxite manufacturers in the Western District of Pennsylvania, which it noted contains plaintiffs’ arguments that are nearly a substantive carbon copy of the magnesite case, only featuring a different product. Given that court’s decision to stay proceedings pending the outcome of a U.S.-initiated WTO proceeding against China on export constraints for bauxite, the Animal Science Products, Inc. court found it “logical to . . . consider the CCCMC’s treatment of its entire bauxite sec-

166. Id. at *50.
167. Id. at *53.
168. Id. at *56–57.
169. Id. at *58.
170. Id.
171. Id.
172. Id. at *59–61.
tion as an indication of the CCCMC’s general *modi operandi* with regard to all members of the CCCMC, including Defendants."^{173}

Finally, the court in *Animal Science Products, Inc.* took judicial notice—and quoted and discussed at considerable length—the court’s decision and Ministry briefs submitted in the “strikingly similar” *In re Vitamin C Antitrust Litigation* case.^{174}

The *Animal Science Products, Inc.* court construed defendants’ act of state argument as “a mislabeled argument seeking abstention on the basis of government compulsion,” and went on to consider each element of the compulsion defense in considerable detail.^{175} At each step of the analysis, the court used the evidence it had taken the initiative to gather from other proceedings to inform its decision-making process.^{176} Significantly, the court considered that “a foreign sovereign’s admission of legal compulsion of its subjects might warrant a high—often, nearly binding—degree of deference, even if the admitted compulsion was based on what might be deemed, in American jurisprudence, a form of ‘unwritten law.’”^{177} The court considered “the MOFCOM’s interpretations [of its own directives] the final authority unless the Court detects a Chinese legal provision or an alternative MOFCOM’s [sic] statement that clearly and convincingly establishes the incorrectness of these interpretations.”^{178} Ultimately, the court was convinced by the totality of the evidence that the CCCMC constitutes a government entity, and that “the Chinese government indeed compelled compliance with ‘a’ minimum price, which—in turn—means that defendants’ conduct prompted by *that particular* compulsion warrants this Court’s abstention.”^{179}

The decision in *Resco Products, Inc. v. Bosai Mineral Group Co., Ltd.* exhibits considerable deference to separation of powers and sovereignty considerations, while maintaining at least temporary jurisdiction over the case. Plaintiff purchasers in this case alleged that Chinese manufacturers of bauxite fixed prices on bauxite exported to the U.S.^{180} Defendants as-
asserted the three sovereignty-based defenses in a motion to dismiss, pointing to the Ministry brief in the *In re Vitamin C Antitrust Litigation* case and arguing that “price coordination and supply limits were mandated by China’s export control regulations and policies” through the CCCMC.\(^{181}\) Rather than consider the merits of these arguments, however, the court decided to stay the proceedings to await the results of a WTO dispute proceeding initiated by the USTR "concerning China’s export restrictions on various raw materials, including bauxite."\(^{182}\) The court noted that the issues in the two proceedings were very similar in their allegations, but only differed over “what entity is responsible for the price arrangements—the Chinese government or defendants.”\(^{183}\) Thus, the result of the panel has the potential to provide strong persuasive support for the act of state allegations brought by the defendants.\(^{184}\) Over plaintiffs’ objections, the court found that

To advance discovery now without a final determination in the pending WTO proceeding could lead the court to resolve the pending motion to dismiss or future dispositive motions in a manner that may be inconsistent with the position of the USTR and the eventual decision rendered by the WTO panel. While not dispositive, the WTO panel’s report may implicate separation of powers concerns, which would be appropriate for this court to consider in determining whether a decision by this court would interfere with the [E]xecutive [B]ranch’s conduct of foreign policy.\(^{185}\)

Based on these considerations and a careful weighing of judicial economy, prejudice to plaintiffs, and potential alleviation of discovery burdens on defendants, the court stayed antitrust proceedings “until a final report is released by the WTO panel” and denied the motions to dismiss without prejudice to renew them after the lifting of the stay.\(^{186}\)

Together, these two decisions indicate that perhaps the federal districts, and eventually circuits, will adopt conflicting approaches to sovereignty-based defenses as applied to Chinese manufacturers accused of price-fixing through trade associations. As more of these cases make their way through U.S. courts, it will be important to monitor and evaluate the different approaches that emerge in order to see which best serves private

\(^{181}\) *Id.* at *2–4.
\(^{182}\) *Id.* at *1.
\(^{183}\) *Id.* at *6.
\(^{184}\) *Id.*
\(^{185}\) *Id.*
\(^{186}\) *Id.* at *8.
interests in competition while maintaining respect for the sovereignty of other nations.

CONCLUSION

The In re Vitamin C Antitrust Litigation decision is an important indicator of the special challenges that courts, governments, and Chinese exporters alike will face in what is likely to be a rising tide of antitrust suits against Chinese enterprises as they come to prominence on the world economic stage. The case illustrates several key lessons for the treatment of sovereignty-based defenses by U.S. courts.

First, courts should not shy away from a nuanced analysis of sovereignty-based defenses applying the facts of the case and considering the context of the regulatory system employed by the foreign sovereign, even if (and perhaps especially if) the system is markedly different from an American-style, traditionally market-oriented structure. Decisions should be based on rigorous analysis of the underlying policy considerations at stake rather than over-reliance on rhetoric. Well-reasoned, thoughtful analysis will help avoid stepping on the toes of important trading partners and inviting backlash against harsh or unexpected impositions of U.S. jurisdiction, particularly when these steps become increasingly likely due to a crisis or downturn in the global economy. The court in In re Vitamin C Antitrust Litigation can hardly be faulted for adopting a wait-and-see approach in light of the complex factual and policy considerations involved and the fact that this was the first such suit against Chinese manufacturers. However, a broader construction of sovereignty-based defenses is available to courts at the motion to dismiss stage. Adoption of a broad construction may be particularly favorable where a foreign sovereign accepts responsibility for the disputed behavior, where the Executive Branch is actively pursuing diplomatic avenues to address the alleged conduct, and where further discovery would saddle a defending party with unusually high costs.

Second, Chinese manufacturers should take note of the expense and rules of U.S. antitrust lawsuits when structuring their international business transactions. The more they achieve dominance in the private sector, the more likely they are to become the object of complex antitrust suits,\textsuperscript{187} rather than the blunter and legally straightforward antidumping

\textsuperscript{187} See Pietrzak, Mitnick & Ding, supra note 162, at 66 (“China’s economic growth has turned Chinese industries into attractive U.S. litigation targets, both because these industries are finding themselves in a thicket of unfamiliar Western commercial rules and because they have increasingly deep pockets.”).
suits to which they are more accustomed. Therefore, these manufacturers should take advantage of the newly enacted AML and its prohibitions against price-fixing through trade associations to advocate with the Chinese government for clearer policies and implementing regulations to enforce these restrictions. Pushing for a more transparent regulatory framework will help them to avoid becoming ensnared between conflicting competition laws in the future. Manufacturers should take note that after the imposition of the AML, it will become harder to argue that they were compelled by their government to fix prices—even if this is de facto occurring behind the scenes.

Finally, the Chinese government should continue to express strong opinions through an amicus role in order to educate U.S. courts about its transitioning system and its different views on the role and importance of “competition” to its socialist market economy. At the same time, it should seek more cooperation with the U.S. and other countries on antitrust enforcement in order to head off future clashes that may negatively impact its burgeoning private sector. If the AML proves an effective framework for enforcement, possibilities for coordination with advanced antitrust regimes may even include signing bilateral agreements on “positive comity” that allow enforcement and prosecution of ambiguous cases in home jurisdictions. Only through more experience regulating and enforcing its new AML will China be able to take its place among the top competition law authorities in the global economic sphere.

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