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Separation of Powers in Intellectual Property Rights: Balancing Global Intellectual Property Rights or Monopoly Power in the Twenty-First Century by Competition Law

Kitsuron Sangsuvan*

Introduction

In the past decade, the concept of "globalization" was most often used in the context of international business or economic integration. Today, however, advanced technologies, such as the Internet, are changing the world and accelerating globalization. Intellectual property now represents a new era of globalization, increasing international trade and economic growth in many countries.[1] Some even suggest that intellectual property may dictate future success in the global economy.[2]

Global intellectual property involves the movement of products, services, science, and technology across borders. For example, global conglomerates like Coca-Cola, McDonald's, Apple, and Nike depend on intellectual property, particularly with regard to trademark enforcement.[3] Thus, the growth of global intellectual property requires strong intellectual property rights protection. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) created new, stronger intellectual property rights protection.[4] According to TRIPS, all members of the World Trade Organization (WTO) are required to adopt and enforce standards of protection. As a result, multinational corporations and developed countries gain the greatest benefits from stronger protection, and developing countries gain almost nothing.[5] Some commentators also believe that TRIPS will lead to large transfers of wealth

1. *See* Susan K. Sell, *Intellectual Property Rights*, *in* GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE 171–72 (David Held & Anthony McGrew eds., 2002) (discussing the changes that empowered intellectual property owners).

2. *See* GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 5 (2008) (stressing that intellectual property is key to international success and competitiveness); *see also* Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 WAKE FOREST INTELL. PROP. L.J. 104 (2009) (acknowledging the pivotal role of intellectual property in the global knowledge economy).

3. *See, e.g., Nike*, SEEKING ALPHA (October 17, 2012, 8:00 PM), http://seekingalpha.com/symbol/nke/description (describing Nike's global role, and particularly its entrance into the Chinese market).

4. *See* Mahurkar v. C.R. Bard, Inc., 2003 WL 355636, at *6 (N.D. Ill. Feb. 13, 2003) (outlining the history of the TRIPS agreement); *see also* Rotec Indus., Inc. v. Mitsubishi Corp., 215 F.3d 1246, 1251–52 (Fed. Cir. 2000) (stressing the differences before and after the TRIPS agreement).

5. *See* Stephen E. Bondura & Lloyd G. Farr, *Intellectual Property Rights Abroad and at Home After GATT*, S.C. LAW. Sept.–Oct. 1995, at 20 (noting that many developing countries contended that the TRIPS agreement was a result of succumbing to the demands of industrial nations); *see also* Jeffrey A. Divney & Gary J. Connell, *Intellectual Property Provisions of the GATT*, 23 COLO. LAW. 1069, 1069 (May 1994) (remarking that TRIPS requires less developed nations to adopt laws that are consistent with developed nations).

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from developing or least-developed countries to developed countries.[6] In addition, developed countries owning the most important intellectual property rights continue establishing rules for intellectual property protection, which will result in much stronger[7] intellectual property rights protection in the twenty-first century. It will also create a larger gap in inequality between developed and developing countries.[8]

This article will focus mainly on how to balance the distribution of global intellectual property rights and protection. Part I will examine the development of intellectual property rights protection from TRIPS and strong intellectual property protection to global inequality. Part II will address why and how intellectual property rights or monopoly power should be balanced. It will also discuss how the separation of powers should be used as a policy to balance global intellectual property rights and monopoly power. Part III will consider how competition law, especially under TRIPS, can balance intellectual property rights. It will also address Articles 7, 8 and 40 of TRIPS and how those provisions should be interpreted. In addition, it will discuss how domestic competition law can balance intellectual property rights and monopoly power.

I. TRIPS and Strengthening Intellectual Property Protection in the Twenty-First Century

A. TRIPS and the Development of Intellectual Property Protection

Intellectual property rights stimulate innovation and contribute to economic development.[9] They advance knowledge and information in the forms of new ideas, techniques, pro-

6. *See* GRAHAM DUTFIELD, INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES: A TWENTIETH CENTURY HISTORY 20 (2003) (stating that under TRIPS, developing nations will transfer massive wealth to the developed nations); *see also* Evelyn Su, Comment, *The Winners and the Losers*, 23 HOUS. J. INT'L. L. 169, 216–17 (2000) (explaining that developing countries argue TRIPS prevents their economic growth since they are economically disadvantaged in comparison to developed countries).

7. *See* William A. Kerr, *Trade Related Aspects of Intellectual Property: Enforcement Issues*, *in* HANDBOOK ON INTERNATIONAL TRADE POLICY 522 (William A. Kerr & James D. Gaisford eds., 2007) (illustrating that developed countries have strengthened their intellectual property rights to promote private sector investment in new innovative activities); *see also* Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 549 (2012) (illustrating the strategic use of TRIPS by developed countries to protect and strengthen their intellectual property interests).

8. *See* Paul Kuruk, *Goading A Reluctant Dinosaur*, 34 PEPP. L. REV. 629, 691 (2007) (emphasizing that many developing countries that have adopted strong intellectual property rights under TRIPS have experienced more costs than benefits); *see also* Rosemary Sweeney, Comment, *The U.S. Push for Worldwide Patent Protection for Drugs Meets the AIDS Crisis in Thailand*, 9 PAC. RIM L. & POL'Y J. 445, 454 (2000) (noting that TRIPS makes the inherent unequal bargaining positions of developed and developing countries apparent).

9. *See* Clyde D. Stoltenberg, *Intellectual Property*, *in* ENCYCLOPEDIA OF TECHNOLOGY AND INNOVATION MANAGEMENT 49, 49 (V. K. Narayanan & Gina Colarelli O'Connor eds., 2010) (defining intellectual property as a market-driven concept furthering innovation by granting economic incentives to authors, creators, and inventors); *see also World Intellectual Property Organization: An Overview*, WORLD INTELLECTUAL PROPERTY ORGANIZATION 3 (2010), http://www.wipo.int/freepublications/en/general/1007/wipo_pub_1007_2010.pdf (emphasizing how important a strong intellectual property system is to promoting innovative problem-solving services and devices).

cesses, and products with economic and commercial value.[10] New knowledge or ideas can provide the basis for creating products and sustaining business and enterprise competition.[11] However, the increase of scientific and technical knowledge demands greater intellectual property protection.[12] Intellectual property protection ensures that the owners of intellectual property or business firms can maintain their rights, manufacturing secrets, and other useful knowledge. Intellectual property protection can also attract foreign direct investment.[13] Without intellectual property protection, people can steal the rights of intellectual property creators, discouraging creativity and innovation, and investments from foreign firms or businesses.[14]

In order to establish international protection, intellectual property rights should be safeguarded in multilateral or bilateral treaties. International intellectual property treaties standardize protections and provide a global baseline of respect for intellectual property regardless of its origin.[15] Previous multilateral conventions governing intellectual property protection, including the Paris Convention for the Protection of Industrial Property, the Berne Convention, as

10. *See* Andrew Beckerman-Rodau, *The Problem With Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J.L. & TECH. 35, 45–47 (2010) (explaining that intellectual property law involves a balancing of innovators' rights to economically benefit from an innovation and the public's freedom of choice to use such innovations); *see also* Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J.L. & ARTS 277, 279 (2004) (illustrating that intellectual property rights are designed to incentivize creation, investment, and invention).

11. *See* NERMIEN AL-ALI, COMPREHENSIVE INTELLECTUAL CAPITAL MANAGEMENT 9 (2003) (comparing intellectual resources to raw materials that can be developed into new products through innovation); *see also Understanding the WTO: The Agreements—Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Mar 18, 2012) (declaring that ideas and knowledge are an important component of trade because they lead to new medicines and technology products).

12. *See* SHAHID ALIKHAN & RAGHUNATH MASHELKAR, INTELLECTUAL PROPERTY AND COMPETITIVE STRATEGIES IN THE 21ST CENTURY 1 (2d Ed. 2009) (arguing that new scientific and technological advancements create new challenges and opportunities in the protection of intellectual property); *see also* Daniel Chow, *The Role of Intellectual Property in Promoting International Trade and Foreign Direct Investment*, *in* 4 INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY, INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 187, 190 (Peter K. Yu ed., 2007) (suggesting that the technological revolution has made international intellectual property protection an issue for developed nations and global businesses).

13. *See* JAMES ANDREW LEWIS, INTELLECTUAL PROPERTY PROTECTION: PROMOTING INNOVATION IN A GLOBAL INFORMATION ECONOMY 23 (2008) (stating other factors like market size or costs may sometimes outweigh the risk to intellectual property); *see also* NUNO PIRES DE CARVALHO, TRIPS REGIME OF PATENT RIGHTS 203 (2010) (arguing that strong intellectual property protection, particularly in the fields of patents, increases confidence and may convince right holders to transfer confidential information to partners in other countries, as well as technology and training with respect to management, distribution, and all other aspects concerning the marketing of new products and services).

14. *See* VAN LINDBERG, INTELLECTUAL PROPERTY AND OPEN SOURCE: A PRACTICAL GUIDE TO PROTECTING CODE 15 (2008) (explaining that intellectual property law allows individuals to be compensated for the cost of creating knowledge and provides incentives to develop and share knowledge); *see also* Joseph Richard Falcon, *Managing Intellectual Property Rights: The Cost of Innovation*, 6 DUQ. BUS. L.J. 241, 251 (2004) (stating that intellectual property rights facilitate innovation by preventing third parties from misappropriating intellectual property without legal consequences).

15. *See* BENJAMIN BAEZ & JEFFREY C. SUN, INTELLECTUAL PROPERTY IN THE INFORMATION AGE: KNOWLEDGE AS COMMODITY AND ITS LEGAL IMPLICATIONS FOR HIGHER EDUCATION 99 (2009) (indicating that international treaties establish minimum standards that provide consistency in the protection of intellectual property rights); *see also* ROBERT C. BIRD & SUBHASH C. JAIN, THE GLOBAL CHALLENGE OF INTELLECTUAL PROPERTY RIGHTS 6 (2008) (asserting that international intellectual property treaties standardize protections among nations).

well as international intellectual property treaties under the World Intellectual Property Organization (WIPO), established minimum standards that signatory states had to uphold.[16] However, there were deficiencies in those intellectual property treaties.[17] Even though signatory states promulgated statutes to protect intellectual property, the laws and enforcement remained uncertain and unenforceable.[18] This was due, in part, to developing countries creating varying levels of protection and enforcement based on political preferences,[19] while developed countries favored strong and effective protection.[20] Consequently, developed countries believed that the intellectual property treaties were not sufficient to protect intellectual property because developing countries failed to provide enforcement, or imposed weak protection for intellectual property.[21]

An attempt to enforce the protection of intellectual property was achieved by the WTO, specifically TRIPS, which emerged from the Uruguay Round of Negotiations.[22] TRIPS integrates the systems of intellectual property rights into one single structure and strengthens intel-

16. *See* JOHN ZYSMAN & ABRAHAM NEWMAN, HOW REVOLUTIONARY WAS THE DIGITAL REVOLUTION? NATIONAL RESPONSES, MARKET TRANSITIONS, AND GLOBAL TECHNOLOGY 382–83 (1st ed., Stanford Business Books 2006) (citing various multilateral conventions that promulgated intellectual property protection rights); *see also* Deborah Mall, Comment, *The Inclusion of a Trade-Related Intellectual Property Code Under the General Agreement on Tariffs and Trade (GATT)*, 30 SANTA CLARA L. REV. 265, 274–75 (1990) (identifying the major treaties that contributed to protection of intellectual property rights).

17. *See* YIJUN TIAN, RE-THINKING INTELLECTUAL PROPERTY: THE POLITICAL ECONOMY OF COPYRIGHT PROTECTION IN THE DIGITAL ERA 27 (Routledge-Cavendish 2009) (arguing that the WIPO has an inherent institutional deficiency in enforcing treaties that it oversees); *see also* Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 275–77 (1991) (discussing the inadequate protections created by the intellectual property treaties).

18. *See* Peter K. Yu, Symposium, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 354 (2004) (explaining that difficulties arose in part because neither conventions contained an effective enforcement procedure); *see also* Andrea Morgan, Comment, *Trips to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court*, 23 FORDHAM INT'L L.J. 795, 803–04 (2000) (stating that Thailand, as a signatory state to the Berne Convention and WIPO, faced uncertainty in the management of intellectual property rights due to the lack of enforcement mechanisms).

19. *Understanding the WTO: The Agreements—Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (discussing the factors that contributed to the scope of intellectual property enforcement in developing countries); *see also* Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1, 5 (stating that due to the different policy considerations of developing nations, intellectual property infringement is unlikely to be high on the list, resulting in little interest by the judiciary to impose proper remedies).

20. The history of intellectual property rights protection shows that countries with low levels of technological capacity have generally used weak standards until they reached a level of development at which their industries could benefit from intellectual property rights protection. *See* Theresa Beeby Lewis, Comment, *Patent Protection for the Pharmaceutical Industry: A Survey of the Patent Laws of Various Countries*, 30 INT'L LAW. 835, 839 (opining that developing countries were less likely to support intellectual property protection because they were not major producers of intellectual property); *see also* Homere, *supra* note 10, at 285 (explaining that developed countries pushed for greater intellectual property protection in order to better protect their revenues in foreign markets).

21. *See* CAROLYN DEERE, THE IMPLEMENTATION GAME: TRIPS AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 48–49 (2009) (discussing the withdrawal of tariff concessions from developing countries with weak IP protection).

22. *See Understanding the WTO: The Agreements—Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (noting that TRIPS resulted from the Uruguay negotiations).

lectual property protection. More importantly, TRIPS establishes the minimum standards of intellectual property protection to be provided by member countries.[23] In addition, TRIPS establishes provisions dealing with domestic procedures and remedies for the enforcement of intellectual property rights.[24] It provides certain general principles applicable to all intellectual property right enforcement procedures.[25] It also creates a dispute settlement system of intellectual property rights.[26] Specifically, TRIPS covers five important issues: (i) how basic principles of the trading system and other international intellectual property agreements should be applied; (ii) how to give adequate protection to intellectual property rights; (iii) how countries should enforce those rights adequately in their own territories; (iv) how to settle disputes on intellectual property between members of the WTO; and (v) special transitional arrangements during the introduction period of the new system.[27]

TRIPS attempts to correct the deficiencies of the growing international system of protection of intellectual property under the WIPO's conventions.[28] Developing intellectual property protection has been based on the framework of existing intellectual property conventions.[29] TRIPS requires and ensures compliance with the substantive obligations of the WIPO conven-

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23. *See generally Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar 17, 2012) (stressing that nations are free to more extensive protection if desired); *see also* Pascal Lamy, *Trade-Related Aspects of Intellectual Property Rights—Ten Years Later*, 38 J. WORLD TRADE 923, 926 (2004) (noting that TRIPS took a varied rather than a standard approach in introducing a common core of minimum standards).

24. *See Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar 17, 2012) (highlighting provisions dealings with domestic procedures and remedies); *see also* KEVIN KENNEDY, INTERNATIONAL TRADE REGULATION: READINGS, CASES, NOTES AND PROBLEMS 241 (2008) (identifying domestic procedures and provisions as a main tenet of the agreement).

25. *See* Overview: the TRIPS Agreement, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar 17, 2012) (mentioning the existence of general principles applicable to all enforcement procedures); *see also* Evelyn Su, Comment, *The Winners and the Losers*, 23 HOUS. J. INT'L. L. 169, at 188 (2000) (identifying Part III of the TRIPS agreement as containing the general obligations governing enforcement procedures).

26. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 (1994) (addressing the need for rules concerning effective and expeditious settlements); *see also Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Oct. 19, 2012) (indicating that the three main features of the agreement are standards, enforcement, and dispute settlement).

27. *See* Kevin J. Nowak, *Staying Within the Negotiated Framework: Abiding by the Non-discrimination Clause in TRIPS Article 27*, 26 MICH J. INT'L L. 899, 903 (2005) (providing the five main issues addressed in the final TRIPS Agreement); *see also Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Oct. 19, 2012) (listing the five issues covered in the TRIPS Agreement).

28. *See* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and the Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 23 (2004) (discussing how TRIPS enhanced the substantive rules within agreements that were negotiated under WIPO).

29. *See* Susy Frankel, *WTO Application of "the Customary Rules of Interpretation of Public International Law" to Intellectual Property*, 46 VA. J. INT'L L. 365, 403 (2006) (noting that the framework of the TRIPS Agreement incorporates provisions of pre-existing international intellectual property instruments).

tions, the Paris Convention, and the Berne Convention.[30] Moreover, TRIPS includes additional obligations that the preexisting WIPO conventions did not properly address.[31] This means that member countries can impose the higher standard of protection provided in the Paris and Berne Conventions.[32] This is considered a combination of the preexisting conventions and TRIPS itself.[33] First, member countries have to provide the minimum standard of protection required by the previous treaties.[34] Second, if they are not satisfied with the minimum standard, TRIPS allows members to adopt higher standards of protection.[35]

The strong policy of protection in TRIPS seeks to promote greater innovation.[36] This policy anticipates that strong protection stimulates economic development and reduces distortions and impediments to international trade.[37] It will also safeguard the ability of individuals and companies to create new products.[38] Protecting intellectual property increases quality and stan-

30. *See* TRIPS Agreement, *supra* note 26 (requiring compliance with the Paris Convention and the Berne Convention); *see also Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Oct. 19, 2012) (explaining that the TRIPS Agreement sets the minimum standards of protection for each member by requiring compliance with the WIPO, the Paris Convention, and the Berne Convention).

31. *See Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar 17, 2012) (explaining the general purpose of the TRIPS agreement); *see also* Elaine B. Gin, *International Copyright Law: Beyond the WIPO & Trips Debate*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 763, 785 (2004) (comparing WIPO and TRIPS).

32. *See Summary of the Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Oct. 16, 2012) (outlining the effects of the Berne Convention on international intellectual property issues); *see also Summary of the Paris Convention for the Protection of Industrial Property*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Oct. 16, 2012) (summarizing how the Paris Convention influences intellectual property concerns internationally).

33. *See Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar 17, 2012) (detailing the protections of the TRIPS agreement); *see also* Robert A. Cinque, *Making Cyberspace Safe for Copyright: The Protection of Electronic Works in A Protocol to the Berne Convention*, 18 FORDHAM INT'L L.J. 1258, 1276–77 (1995) (describing how TRIPS incorporated preexisting conventions in its agreement).

34. *See* In re Rath, 402 F.3d 1207, 1213 (Fed. Cir. 2005) (noting the minimum standard under the Paris Convention); see also Ferris K. Nesheiwat, *The Adoption of Intellectual Property Standards Beyond Trips—Is It a Misguided Legal and Economic Obsession by Developing Countries?*, 32 LOY. L.A. INT'L & COMP. L. REV. 361, 394 n.1 (2010) (exemplifying the minimum standard requirement under TRIPS).

35. *See* Nesheiwat, *supra* note 34, at 394 n.1 (displaying the higher standard available under the TRIPS agreement).

36. *See* MICHAEL A. GOLLIN, DRIVING INNOVATION: INTELLECTUAL PROPERTY STRATEGIES FOR A DYNAMIC WORLD 58 (2008) (citing predictions about the practical benefits of international intellectual property protection).

37. It is clear from the Preamble to TRIPS that the protection of intellectual property rights is considered in the context of reducing barriers to trade and so ensure that enforcement of intellectual property rights does not result in "distortions and impediments to international trade." *See* Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) at preamble, 1869 UNTS 299, 33 I.L.M. 1197 (1994) (espousing the idea that intellectual property protection could help remove existing impediments to international trade).

38. Michael L. Doane, *TRIPS and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT'L L. & POL'Y 465 (1994). See Marie-Helene Bonin & Richard Elliot, *Patents, International Trade Law and Access to Essential Medicines, available at* http://www.umich.edu/~spp638/Coursepack/ipr-msf.pdf (last visited Oct. 15, 2012) (noting that TRIPS requires governments to recognize patents on products and processes in almost all fields of technology).

dards of labor force and capital stock within the country.[39] As a result, strong protection of intellectual property tends to: (1) create jobs in primary industries as well as supporting industries; (2) create a high-quality labor force through on-the-job training; (3) shift jobs to higher-productivity areas; (4) increase the capital stock of the country; (5) improve the quality of the capital stock through innovation; (6) improve the allocation of the capital stock; (7) expand those activities subject to economies of scale; (8) improve efficiency through a reduction in local monopoly element; (9) provide lower cost methods of production for existing products; and (10) provide new products.[40]

B. Strong Intellectual Property Protection in the Twenty-First Century

Since the establishment of TRIPS in the 1990s, intellectual property protection and enforcement remain a critical issue. Still, TRIPS has been successful in strengthening domestic protection of intellectual property rights.[41] Even though developing countries failed to fully embrace and implement TRIPS's terms[42] in the beginning, they later adopted their national policies and regulations to strengthen intellectual property protection and enforcement.[43] The panel report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, released by the Dispute Settlement Body, suggests that the success of TRIPS has contin-

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39. *See* Theresa Beeby Lewis, Comment, *Patent Protection for the Pharmaceutical Industry: A Survey of the Patent Laws of Various Countries*, 30 INT'L LAW. 835, 839 (opining that developing countries were less likely to support intellectual property protection because they were not major producers of intellectual property); *See generally Responsible Business Conduct in an Emerging Market Economy*, INTERNATIONAL TRADE ADMINISTRATION, *available at* http://ita.doc.gov/goodgovernance/adobe/bem_section_1/chapter_1.pdf (last visited Oct. 16, 2012) (asserting that protection of intellectual property rights is an essential component of a healthy market economy).

40. *See* Lewis, *Patent Protection for the Pharmaceutical Industry. See Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION, *available at* http*://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm* (last visited Oct. 16, 2012) (discussing the broad scale of benefits of protecting intellectual property rights on an international scale).

41. *See* Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT'L L. 1, 1–2 (2010) (assessing the strengths and weaknesses of the World Trade Organization for arguing intellectual property disputes); *see also* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and the Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 23 (2004) at 1–2 (discussing the merits of the TRIPS agreement for protecting international intellectual property rights).

42. *See* Christine Thelen, *Carrots and Sticks: Evaluating the Tools for Securing Successful TRIPS Implementation*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 519, 520 (2005) (describing the TRIPS agreement as a careful work in progress for the development of strong intellectual property rights); *see also WTO Agreements and Developing Countries—Problems With Implementation*, WTO, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/05impl_e.htm (last visited Nov. 14, 2012) (showing why countries with more difficult financial circumstances had a harder time implementing the TRIPS agreement).

43. *See* Third World Notebook, "Implementing TRIPS in Developing Countries," *available at* http://www.twnside.org.sg/title/ment-cn.htm (explaining how developing countries later implemented the TRIPs agreement but on a slower scale than other countries); *see also* World Intellectual Property Organization, "Advice on Flexibilities Under the TRIPs Agreement," *available at* http://www.wipo.int/ip-development/en/legislative_assistance/advice_trips.html (last visited Nov. 13, 2012) (explaining how developing countries could adopt the TRIPs agreement through flexible standards in the legislation).

ued into the twenty-first century.[44] This panel report related to the United States and China, the two largest economies in the world. It involved the establishment of a consistently enforced minimum set of intellectual property rights.[45] More specifically, this panel report dealt with the insufficiency of protection and enforcement of intellectual property rights in China under TRIPS.[46]

The panel report focused on three issues: (1) the high thresholds for Chinese criminal procedures and penalties in the intellectual property area; (2) the failure of Chinese customs authorities to properly dispose of infringing goods seized at the border; and (3) the denial of copyright protection to works that have not been authorized for publication or dissemination within China.[47] The three issues brought intellectual property protection under TRIPS to light. First, the United States claimed that China failed to include the high thresholds for criminal procedures and penalties in its intellectual property laws.[48] China argued that it had a unique alternative administrative enforcement system that did not have a parallel in most Western systems, including the U.S. legal system.[49] In China, because of a different socio-legal tradi-

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44. *See* James Mendenhall, *WTO Panel Report on Consistency of Chinese Intellectual Property Standards*, 13 ASIL INSIGHT 4, (2009) (reporting on the WTO's examination of Chinese intellectual property standards and whether they met requirements under the TRIPS agreement); *see also* WTO PANEL REPORT, CHINA—MEASURES AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS 40 (Jan. 26, 2009) (describing U.S. complaints against China and its enforcement of intellectual property rights under the TRIPS agreement).

45. *See* Mendenhall, *supra* note 44, at 4 (illustrating the core of the dispute dealing with whether Chinese intellectual property standards had been consistent with those of the United States and other treaty members).

46. *See* Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727, 727–28 (2011) (noting that the dispute was between the United States and China and that ultimately China amended its copyright laws to afford better protection of intellectual property); *see also* Amy E. Conroy, *The Gray (Goods) Elephant in the Room: China's Troubling Attitude Toward IP Protection of Gray Market Goods*, 36 BROOKLYN J. INT'L L. 1075, 1092–93 (2011) (discussing how the United States was concerned with the high standards China required before it imposed criminal sanctions on pirates and intellectual property violators).

47. *See* Yu, *supra* note 46, at 730 (highlighting the main issues that the United States requested consultations with China to discuss); *see also* Yoshifumi Fukunaga, *Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements*, 23 BERKELEY TECH. L.J. 867, 914–16 (2008) (describing the first claim as concern over the effectiveness of Chinese laws as a criminal deterrent, the second claim as uneasiness over Chinese administrative regulations allowing seized goods to re-enter the stream of commerce, and the third claim as alleging that Chinese copyright laws allow unauthorized persons to regularly infringe copyright protections without fear of prosecution).

48. *See* Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007) (expressing the United States' apprehension with China's high thresholds and lack of definitions to clarify the ambiguities contained in the Chinese statutes); *see also* Brewster, *supra* note 19, at 29–30 n.98 (explaining that the United States claimed that Chinese laws creating high thresholds for criminal prosecution violated the TRIPS agreement because China still allowed copyright infringement to occur on a commercial scale).

49. *See* Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, Annex B-1 ¶ 9, WT/DS362/R (Jan. 26, 2009) (explaining how China's system of justice is different since its administrative government authority is separate from its criminal government authority); *see also* Stephen McIntyre, *The Yang Obeys, but the Yin Ignores: Copyright Law and Speech Suppression in the People's Republic of China*, 29 UCLA PAC. BASIN. L.J. 75, 124–26 (2011) (describing China's system of copyright law and enforcement).

tion, criminal enforcement deals with serious cases (above the thresholds), while administrative enforcement deals with low-scale infringements (below the thresholds).[50] Although the United States provided evidence to define the term "commercial scale" based on its case law and negotiated free trade agreements, the panel found that such evidence was insufficient to demonstrate or constitute "commercial scale" in the Chinese marketplace.[51] Thus, China prevailed over this claim.

Second, the United States claimed that China introduced a compulsory scheme that took away its authorities' ability to order the destruction or disposal of infringing goods.[52] Therefore, the authorities could not destroy the infringing goods unless they found it inappropriate to donate the goods to charities, sell them back to the rights holders or auction them off after eradicating their infringing features.[53] China argued that the sequence merely expressed an official preference for disposition methods.[54] China's customs authority still had wide discretion to determine whether criteria were met. However, the panel disapproved of the way Chinese customs authorities auctioned off the infringing goods. Although China provided measures such as the solicitation of comments from rights-holders, the panel found that the measures did not create an effective deterrent to infringement.[55]

Third, the United States claimed that China failed to protect copyright-holders as required by the Berne Convention for the Protection of Literary and Artistic Works (Berne

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50. *See* Panel Report, *supra* note 49, at ¶ 7.476 (explaining China's attempt to clarify that commerce authorities investigate infringement on any scale while public authorities only deal with criminal violations); *see also* Kim F. Natividad, *Stepping It Up and Taking It to the Streets: Changing Civil & Criminal Copyright Enforcement Tactics*, 23 BERKELEY TECH L.J. 469, 493–95 (2008) (detailing how China's criminal enforcement system is limited to certain situations, so authorities rely on civil penalties through administrative procedures oftentimes instead).

51. *See* Panel Report, *supra* note 49, at ¶ 7.614 (holding that the United States failed to establish that the criminal thresholds were inconsistent with China's obligations); *see also* Donald P. Harris, *The Honeymoon Is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 141 (2008) (explaining that while the United States demonstrated significant commercial activity, it failed to demonstrate that the level of commercial activity was acceptable).

52. *See* Panel Report, *supra* note 49, at ¶ 7.197 (claiming that China gave authority for the destruction or disposal of infringing goods but not for the disposition of materials and implements); *see also* Brian J. Safran, *A Critical Look at Western Perceptions of China's Intellectual Property System*, 3 U. PUERTO RICO BUS. L.J. 135, 169 (2012) (recognizing the United States' belief that China failed to provide the common thresholds required by TRIPS regarding the disposal of infringing goods).

53. *See* Panel Report, *supra* note 49, at ¶ 7.369 (arguing that removing the infringing features requires a "simple" removal); *see also* Natividad, *supra* note 50, at 495 (noting that once a good's infringing features are removed, the goods are released in China and the infringing product continues to dominate that sector within China because of the maintenance of import restrictions for legitimate products).

54. *See* Panel Report, *supra* note 49, at ¶ 7.329 (noting that China gives its authorities discretion when dealing with infringing products); *see also* Peter K. Yu, *The Trips Enforcement Dispute*, 89 NEB. L. REV. 1046, 1071 (2011) (arguing that China has a "flexible arrangement" that allows customs authorities to determine whether the requisite criteria for infringing goods are met).

55. *See* Panel Report, *supra* note 49, at ¶ 7.373 (articulating that China's current measures did not deter infringement because the goods would inevitably be infringed again); *see also* Safran, *supra* note 52, at 170 (acknowledging that China's policies failed to deter infringement and that China realized its policies must comport with the rules of the international trading system).

Convention), which was incorporated by reference into TRIPS.[56] The claim focused on Article 4 of the Chinese Copyright Law denying copyright protection to works that are banned for publication or distribution.[57] The United States also claimed that China did not provide effective actions against infringement of those copyrighted works which had not passed the content review process.[58] China argued that Article 17 of the Berne Convention did not affect a country's right to control, or prohibit the circulation, presentation, or exhibition of any work or production. The provision limited all rights granted to authors under the Berne Convention and denied WTO jurisdiction in this area.[59] China also argued that the public regulations preempted private economic rights and that censorship laws offered more secure protection than copyright regulations.[60] If a work is banned for distribution, the ban applies to the copyright-owners and potential infringers. Nevertheless, the panel found that Article 4 of the Chinese Copyright Law was inconsistent with TRIPS.[61] Although China has a sovereign right to prohibit the publication or distribution of those works, it cannot deny protection of copyrighted works.[62] Moreover, the panel found that China failed to provide sufficient evidence that the rights-holders will gain greater protection through censorship regulations rather than copyright law.[63]

From this standpoint, TRIPS has been successful in accomplishing its objectives. This panel report confirms the importance of intellectual property rights protection and enforce-

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56. *See* Panel Report, *supra* note 49, at ¶ 3.1(c) (referencing the United States' executive summary to the panel, where the United States accused China of violations of the Berne Convention); *see also* Yu, *supra* note 54, at 1075 (stating the United States' claims that the Chinese Copyright Law was in violation of the Berne Convention).

57. *See* Panel Report, *supra* note 49, at ¶ 3.1(c) (introducing Article 4 of the Chinese Copyright Law which does not protect works that are banned from dissemination in China); *see also* Yu, *supra* note 54, at 1075 (explaining that the Chinese Copyright Law does not apply to banned works).

58. *See* Panel Report, *supra* note 49, at ¶ 7.145 (stating the United States' claim that the Chinese Copyright Law even excludes works not submitted for review in China, works awaiting content review, unauthorized versions of works that were approved for distribution, and works that have failed content review); *see also* Yu, *supra* note 54, at 1076–77 (reviewing the United States' arguments that the Chinese Copyright Law does not protect works still in the content review process, nor those that have never been submitted).

59. *See* Panel Report, *supra* note 49, at ¶ 7.120 (summarizing China's argument that Article 17 of the Berne Convention denies the WTO jurisdiction over China's censorship policies); *see also* Yu, *supra* note 54, at 1078-79 (summarizing China's argument that Article 17 partially codified a country's sovereign right to censor).

60. *See* Panel Report, *supra* note 49, at ¶ 7.137 (explaining China's argument that the economic rights to works are preempted by public prohibition); *see also* Yu, *supra* note 54, at 1078–79 (presenting China's argument that their public regulations and bans preempt private economic rights such as copyright).

61. *See* Panel Report, *supra* note 49, at ¶ 7.66 (acknowledging that it is illogical to think that a copyright would continue to exist after copyright protection has been denied); *see also* Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727, 727–28 (2011) at 728 (highlighting that China amended Article 4 of its copyright law in Spring 2012 which ended its TRIPS enforcement dispute with the United States).

62. *See* Panel Report, *supra* note 49, at ¶ 7.135 (recognizing that copyrights protect private interests and censorship protects public interests); *see id.* at 740 (noting that China's denial of copyright holders rights' contravened the Berne Convention).

63. *See* Peter K. Yu, *The US-China WTO Cases Explained*, MANAGING INTELL. PROP., October 2009, at 40 (continuing to explain that the alternative form of protection, censorship, does not mean that China does not need to comply with TRIPS obligations); *see also* First Submission of the United States of America, *China—Measures Affecting Protection and Enforcement of Intellectual Property Rights*, ¶ 11, WT/DS362 (Jan. 30, 2008) (positing that a work that is modified to meet censorship requirements is not protected by copyright law during that time).

ment.[64] It emphasizes the importance of having minimum standards and the treatment of intellectual property rights under TRIPS.[65] This panel report also resulted in the development of international intellectual property regimes.[66] This may encourage all countries, especially less developed countries, to strengthen protection of intellectual property.[67] Based on this panel report, it is reasonable to assume that strong intellectual property protection and enforcement still have a vital role in the twenty-first century.

Further evidence indicates that strong intellectual property protection in the twenty-first century comes from bilateral, multilateral, or regional trade agreements that create stronger standards of intellectual property protection than those implemented under TRIPS.[68] Developed countries, often pressured by their intellectual property–based industries, want the greatest protection of intellectual property,[69] so they use bilateral and multilateral treaties to increase intellectual property rights protection.[70] Most rules or terms negotiated under bilateral and

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64. *See* Peter K. Yu, *The US-China WTO Cases Explained*, MANAGING INTELL. PROP., October 2009, at 40 (quoting the acting trade representative regarding this case's significance).

65. *See* Peter K. Yu, *The US-China Dispute Over Trips Enforcement*, *in* THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION (Christoph Antons ed. 2011) (recognizing that the panel's report "underscores the importance of minimum standards and considers the TRIPS agreement to be a compilation of minimum standards").

66. *See* Daniel Gervais, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT'L L. 549, 553 (2009) (claiming that the case may have a broader impact in other countries currently developing intellectual property regimes).

67. *See* Yu, *supra* note 46, at 763–65 (encouraging less developed countries to benefit from the WTO dispute settlement process); *see also* Yu, *supra* note 54, at 1109–14 (listing all the benefits to the less developed countries resulting from the dispute between China and the United States).

68. *See* THE WORLD BANK, WORLD DEVELOPMENT INDICATORS 2010, 377 (2010) (exhibiting a dramatic increase in the number of trade agreements since the 1990s, including agreements between high-income economies and developing economies, and agreements among developing economies); *see also* James Thuo, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421, 424–25, 464–66 (2011) (emphasizing that bilateral and regional trade agreements create stronger intellectual property rights beyond TRIPS).

69. *See* Thelen, *supra* note 42, at 520 (noting that developed nations are more likely to enforce full protections of TRIPS due to pressures by their intellectual property-based industries); *see, e.g.*, Robert Weissman, *A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 25 U. PA. J. INT'L ECON. L. 1079, 1085–90 (2004) (illustrating how the pharmaceutical industry pressured U.S. policy makers to adopt restrictive intellectual property protections); *see generally* Jagdish Bhagwati, *What It Will Take to Get Developing Countries Into a New Round of Multilateral Trade Negotiations*, *in* DEP'T FOREIGN AFFS. & INT'L TRADE, TRADE POLICY RESEARCH 2001, 19, 21 (2001), *available at* http://www.iatp.org/files/What_It_Will_Take_to_Get_Developing_Countries_.htm (stating that TRIPS is used as a tool to collect intellectual property-related rents on behalf of multinational corporations).

70. *See* Laurence R. Helfer, *Regime Shifting in the International Intellectual Property System*, 7 PERSPS. POLS. 39, 40–43 (2009) (demonstrating that developed nations are relying on regional and bilateral treaties for additional intellectual property rights protections); s*ee, e.g.*, National Intellectual Property Law Enforcement Coordination Council, *Report to the President and Congress on Coordination of Intellectual Property Enforcement and Protection*, 46–55, https://www.hsdl.org/?abstract&did=35494 (indicating U.S. efforts to implement intellectual property right protections through multilateral and bilateral treaties).

multilateral agreements are considered outside the scope of TRIPS.[71] Thus, state parties have a higher burden on intellectual property protection and enforcement.[72] For instance, the United States entered into a free trade agreement with Singapore in 2004.[73] In that agreement, the United States included provisions extending the duration of copyrights.[74] As a result, Singapore adopted the provisions of the Digital Millennium Copyright Act.[75] This adoption increased the level of copyright protections in Singapore[76] and would likely benefit the U.S.[77]

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71. *See* Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT'L L. 79, 80 (2004) (providing examples of the European Communities' strategy of unilaterally seeking "TRIPS-plus" protection, that is, higher standards of intellectual property rights, beyond the minimum standards required by the TRIPS Agreement); *see also* Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 383–85 (2006) (explaining that the European Communities and the United States have used bilateral and plurilateral free trade agreements to strengthen their international intellectual property system outside the TRIPS agreement).

72. *See* Peter K. Yu, *The U.S.-China Dispute Over TRIPS Enforcement*, *in* INTELLECTUAL PROPERTY AND ASIAN VALUES (Christoph Antons ed., forthcoming 2012) (examining the dispute between China and the United States over intellectual property protection and enforcement, and discussing the inadequacies of the WTO process to render decisions on a country's non-implementation or non-enforcement of TRIPS); *see also Joint Statement on the United States-Ukraine Trade and Investment Relationship*, OFFICE OF U.S. TRADE REP. (July 31, 2012), http://www.ustr.gov/about-us/press-office/press-releases/2012/july/joint-statement-on-u.s.-ukraine-trade-investment relationship (discussing plans for protection and enforcement of intellectual property rights).

73. *See Free Trade Agreements*, OFFICE OF THE U.S. TRADE REP., http://www.ustr.gov/trade-topics/industry-manufacturing/industrial-tariffs/free-trade-agreements#U.S.-Singapore Free Trade Agreement (last visited Oct. 16, 2012) (providing the terms and conditions of the U.S.-Singapore Free Trade Agreement entered into force on January 1, 2004); *see also* Press Release, *Presidential Proclamation—U.S.-Singapore Free Trade Agreement*, OFFICE OF THE PRESS SECRETARY, (May 23, 2011), http://www.whitehouse.gov/the-press-office/2011/05/23/presidential-proclamation-us-singapore-free-trade-agreement (detailing a statement by President Barack Obama regarding the U.S.-Singapore Free Trade Agreement).

74. *See U.S. Free Trade With Singapore: America's First Free Trade Agreement in Asia*, EMBASSY OF THE UNITED STATES SINGAPORE (Dec. 13, 2002), http://singapore.usembassy.gov//121303.html (stating that Singapore agreed to extend the terms for copyrighted works consistent with U.S. standards and international trends).

75. *See* Declan McCullagh, *U.S.-Singapore Trade Pact Echoes DMCA*, CNET, May 6, 2003, http://news.cnet.com/U.S.-Singapore-trade-pact-echoes-DMCA/2100-1025_3-1000154.html (noting that language of the trade agreement between the United States and Singapore closely tracks the Digital Millennium Copyright Act, which the U.S. Congress enacted in 1998); *see also* Brandy A. Karl, *Enforcing the Digital Millennium Copyright Act Internationally: Why Congress Shouldn't Lock in the Current DMCA by Approving the Current Version of the U.S.-Singapore Free Trade Agreement,* FINDLAW (May 19, 2003), http://writ.news.findlaw.com/student/20030519_karl.html. (pointing out the consequences to the United States of demanding that signatories to Free Trade Agreements implement anticircumvention provisions similar to those of the Digital Millennium Copyright Act).

76. *See* Anne Hiaring, *What's New in the Neighborhood—The Export of the DMCA in Post-TRIPS FTAS*, 11 ANN. SURV. INT'L & COMP. L. 171, 186-87 (2005) (emphasizing that Singapore's adoption of the Digital Millennium Copyright Act provided additional legal protection and remedies for the removal of electronic rights management information); *see also* Warren B. Chik, *Paying It Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law*, 11 J. MARSHALL REV. INTELL. PROP. L. 240, 246-47 (2011) (noting that the Digital Millennium Copyright Act provides Singapore with increased protection against indirect and direct copyright infringement claims).

77. *See* Russell W. Jacobs, *Copyright Fraud in the Internet Age: Copyright Management Information for Non-Digital Works Under the Digital Millennium Copyright Act*, 13 COLUM. SCI. & TECH. L. REV. 97, 110 (2012) (explaining that Congress created the Digital Millennium Copyright Act to provide protection against new technologies); *see also* Dr. Mihály Ficsor, *The WIPO "Internet Treatises": The United States as the Driver; The United States as the Main Source of Obstruction—As Seen by an Antirevolutionary Central European*, 6 J. MARSHALL REV. INTELL. PROP. L. 17, 27 (2006) (stating that adoption of the Digital Millennium Copyright Act by foreign states has prevented disastrous scenarios by providing a response to the challenges presented by technology and the Internet).

Furthermore, a group of developed countries have recently tried to establish stronger international intellectual property enforcement and protection through the Anti-Counterfeiting Trade Agreement (ACTA). On October 1, 2011, eight ACTA negotiating partners, including Australia, Canada, Korea, Japan, New Zealand, Morocco, Singapore, and the United States, signed what will become the highest-standard multilateral agreement ever achieved concerning the enforcement of intellectual property rights.[78] Those countries agreed on the importance of an increasingly strong and effective global economy, with coordinated efforts against trademark counterfeiting, copyright piracy, and phenomena that undermine the culture, public health, and safety of all nations.[79] The ACTA will strengthen the international legal framework by effectively combating the global proliferation of commercial-scale counterfeiting and piracy.[80] In addition, the ACTA includes innovative provisions to deepen international cooperation and promote the enforcement of strong intellectual property rights.[81]

C. Inequality Between Developed and Developing Countries Under TRIPS

Effective global governance is based on fairness.[82] While globalization has grown, the principle of fairness has become a major concern for international relations.[83] Critics of globalization state that globalization does not really reduce poverty.[84] There is insufficient evidence to

78. *See* Anti-Counterfeiting Trade Agreement, art. 39 n.17, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (last visited November 18, 2012) (hereinafter ACTA) (listing the numerous state signatories to the Anti-Counterfeiting Trade Agreement); *see also* Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, AND TPP*, 18 J. INTELL. PROP. L. 447, 447 (2011) (declaring that the Anti-Counterfeiting Trade Agreement is the most comprehensive multi-national intellectual property agreement to date).

79. *See* ACTA, *supra* note 78, at pmbl. (expressing that the reason behind the creation of the Anti-Counterfeiting Trade Agreement was to address the problem of infringement of intellectual property rights); *see also* Ryan Rufo, *Below the Surface of the ACTA: The Dangers That Justify New Criminal Sanctions Against Intellectual Property Infringement*, 39 AIPLA Q.J. 511, 513 (2011) (acknowledging that the Anti-Counterfeiting Trade Agreement was created in an effort to provide international protection for intellectual property).

80. *See* ACTA, *supra* note 78, at art. 23(1) (outlining the various legal and judicial provisions available for enforcement of the Anti-Counterfeiting Trade Agreement); *see also* Daniel Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach Is Making Counterfeiting Worse*, 41 GEO. J. INT'L L. 749, 766 (2010) (affirming that the Anti-Counterfeiting Trade Agreement is an extremely important tool to effectively prohibit acts of counterfeiting).

81. *See* ACTA, *supra* note 78, at art. 7 (making available civil judicial procedures that allow rights holders to enforce their rights); *see also* Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT'L L. 247 (2009) (explaining that ACTA would usher in a new age of enforcement where criminal sanctions would increase for file sharing).

82. *See* RICHARD B. DAY & JOSEPH MASCIULLI, GLOBALIZATION AND POLITICAL ETHICS 402 (2007) (noting that global governance rests on material capability and knowledge on one hand and legitimacy and fairness on the other).

83. *See* Evelyn Su, Comment, *The Winners and the Losers*, 23 HOUS. J. INT'L. L. 169, 199–200 (2000) (stating that TRIPS unfairly disadvantages developing countries by not allowing the free flow of technology); *see also* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 351 (1995) (explaining that all countries have an understanding that will allow technological innovation).

84. *See* GEOFF MOORE, FAIRNESS IN INTERNATIONAL TRADE 153 (2010) (providing multiple arguments that globalization does not reduce poverty).

indicate a relationship between globalization and poverty reduction.[85] Developed countries are in a better position to obtain benefits through the global economy than developing countries who play a small role in raising global income inequality.[86] Even though the rules of globalization, shaped by international organizations such as the WTO, seek to establish equality in global society,[87] those rules are created and influenced by a powerful group of countries.[88] If the world fails to address the issue of fairness, it will cause greater inequality, feeding frustration and social stress.[89]

Strong protection under TRIPS is important in creating unequal distribution of benefits and the disparity between developed countries and developing countries. In theory, strong intellectual property protection would increase developing countries' incentive to engage in research and development,[90] promote foreign direct investment,[91] and encourage the transfer of technology.[92] Strong protection would also increase economic growth and development in

85. *See* MOORE, *supra* note 84, at 153 (citing one commentator for the proposition that the relationship between globalization and poverty reduction is inconclusive).

86. *See* Roda Mushkat, *Globalization and the International Legal Response: The Asian Context*, 4 ASIAN-PAC. L. & POL'Y J. 49, 52 (2003) (noting the international concern for the considerable obstacles developing countries face when attempting to participate in the global economy).

87. *See* Pascal Lamy, *The Place of the WTO and Its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969, 974 (2006) (stating the WTO's goal of establishing real equality among developed and developing States); *see also* Tracy Elizabeth Dardick, *The US-China Safeguard Provision, the GATT, and Thinking Long Term*, 6 CHI. J. INT'L L. 467, 467 (2005) (discussing the WTO's mission of creating equality in all international trade and the impact of U.S. action).

88. *See* Ngaire Woods, *Order, Inequality, and Globalization in World Politics*, *in* INEQUALITY, GLOBALIZATION, AND WORLD POLITICS 20 (Andrew Hurrell & Ngaire Woods eds. 1999) (contending that developing countries have little control over the development of global trade due to the influence and power of other nations' governments); *see also* World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All*, INTERNATIONAL LABOUR ORGANIZATION 20 (2004) (recognizing that the rules and policies of globalization are shaped by powerful countries).

89. *See* Vinay Bhargava, *Introduction to Global Issues*, *in* GLOBAL ISSUES FOR GLOBAL CITIZENS: AN INTRODUCTION TO KEY DEVELOPMENT CHALLENGES 21 (Vinay Bhargava ed. 2006) (exploring the potential economic consequences of continued inequality in global trade); *see also* Martha F. Davis, *Occupy Wall Street and International Human Rights*, 39 FORDHAM URB. L.J. 931, 953 (2012) (discussing the social consequences of economic inequalities).

90. *See* U.S. Department of Justice & the Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, at 4 (1995), http://www.justice.gov/atr/public/guidelines/0558.pdf (stating that intellectual property laws encourage innovation and consumer welfare); *see also* Robert Pitofsky, et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443 n. 38 (2002) (surmising that the promotion of intellectual property incentivizes innovation).

91. Llewellyn Joseph Gibbons, *Do as I Say (Not as I Did): Putative Intellectual Property Lessons for Emerging Economies From the Not So Long Past of the Developed Nations*, 64 SMU L. REV. 923, 945 (2011); Peter K. Yu, *Six Secret (And Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1043 (2011).

92. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Sec. 5, Pt. VI, Art. 66(2), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994); *see* Gibbons, *supra* note 91, at 928–29 (explaining that encouraging technology transfer was one of the reasons that developing countries agreed to enact stronger intellectual property protection).

developing countries.[93] However, in reality, strong protection under TRIPS is beneficial only for developed countries that own the main industry property.[94] As Shawkat Alam stated in "Sustainable Development and Free Trade," "TRIPS [] has instituted a 'one size fits all' system for intellectual property rights, in which high minimum standards are set for all countries, despite their differing levels of development."[95] Developing countries with limited inventive and innovative capabilities are net importers and users of technologies created by developed countries.[96] Developing countries gain only small benefits, or nothing at all, for committing themselves to global standards of strong intellectual property protection.[97] The protection of intellectual property rights under TRIPS places developing countries at a disadvantage in terms of access to technology and the modernization of existing technology.[98]

An example of inequality between developed countries and developing countries is the patent and the pharmaceutical industry. Patents on pharmaceutical products have been a highly controversial issue since the establishment of TRIPS.[99] This raises concerns about excessive

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93. *See* Andrew Jaynes, *Why Intellectual Property Rights Infringement Remains Entrenched in the Philippines*, 21 PACE INT'L L. REV. 55, 58 (2009) (discussing the belief that economic growth could potentially result from stronger intellectual property rights); *see also* Keith E. Maskus, *Intellectual Property Challenges for Developing Countries: An Economic Perspective*, 2001 U. ILL. L. REV. 457, 459 (2001) (acknowledging that stronger intellectual property rights might encourage economic growth).

94. United Nations Conference on Trade and Development, *Trade and Development Report*, 172, UNCTAD/TDR/2006 (2006) (declaring that TRIPS implies an asymmetry which favors producers and holders of protected intellectual property, mainly in developed countries); *see* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 500 (3d ed. 2005) (emphasizing that stronger enforcement of intellectual property rights causes developing countries to lose out).

95. *See* SHAWKAT ALAM, SUSTAINABLE DEVELOPMENT AND FREE TRADE: INSTITUTIONAL APPROACHES 90 (2007).

96. *See* KEITH E. MASKUS, KAMAL SAGGI & THITIMA PUTTITANUM, INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 265, 265 (Keith E. Maskus & Jerome H. Reichman, eds. 2005) (stating that developing countries have hope in the power of foreign technology to improve their economies' growth and productivity); *see also* O.A. Odiase-Alegimenlen, *Globalization, the World Trade Organization and Developing States; A View from the "South,"* 12 WTR CURRENTS: INT'L TRADE L.J. 24, 26 (2003) (indicating that development under TRIPS depends on technology ownership and production, something that most developing states do not have).

97. *See* Alam, *supra* note 95, at 90; *see also* Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT'L L. 247 (2009) at 248–49 (stating that as IP importers, developing countries knew they would suffer from the changes under TRIPS).

98. Alam, *supra* note 95, at 90; *see also* Joseph Straus, *The Impact of the New World Order on Economic Development: The Role of the Intellectual Property Rights System,* 6 J. MARSHALL REV. INTELL. PROP. L. 1, 3 (2006) (arguing that institutional mechanisms should be established to address the need of developing countries to have some technology transfer).

99. *See* Peggy B. Sherman & Ellwood F. Oakley III, *Pandemics and Panaceas: The World Trade Organization's Efforts to Balance Pharmaceutical Patents and Access to AIDS Drugs*, 41 AM. BUS. L.J. 353, 363 (2004) (discussing the conflict between simultaneously granting pharmaceutical patents and protecting public health through easier accessibility to medicines); *see also* Naomi A. Bass, Note, *Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century*, 34 GEO. WASH. INT'L L. REV. 191, 192 (2002) (indicating that post-TRIPS, those in developing countries no longer have access to low-cost pharmaceuticals through the generic drug market).

protection and the balance between the costs and benefits of patents on society.[100] Patents on pharmaceutical products are effectively controlled through TRIPS.[101] However, patents increase the market position of the patent-holder and prevent the general public from using the information and accessing the patented article for the duration of the patent right.[102] This permits pharmaceutical companies to manufacture and sell medicine free of competition from other manufacturers.[103] The patent-holder can set a price greater than the cost of production.[104] As a result, purchasers may be compelled to buy from pharmaceutical companies, which set the price at a profit-maximizing level.[105] This raises global concerns about the costs and benefits of patents, especially in developing countries.[106] Many developing countries cannot buy new medicines, nor do they have access to essential medicines, particularly to treat AIDS.[107] The World Health Organization (WHO) estimates that about one-third of the

100. *See Intellectual Property Summary,* GLOBAL TRADE NEGOTIATIONS: CENTER FOR INTERNATIONAL DEVELOPMENT AT HARVARD UNIVERSITY, http://www.cid.harvard.edu/ cidtrade/issues/ipr.html (last updated Jan. 2004) (arguing that patent protections reinforce inequality in the world, leading to larger divisions between rich and poor nations); *Pharmaceutical Patents and the TRIPS Agreement*, WORLD TRADE ORGANIZATION (Sept. 21, 2006), http://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm (indicating the tension between the need to provide incentives for research and development, and the need to increase availability of existing drugs).

101. *See* Michael R. Reich & Priya Bery, *Expanding Global Access to ARVs: The Challenges of Prices and Patents*, *in* THE AIDS PANDEMIC: IMPACT ON SCIENCE AND SOCIETY 334, 335 (Kenneth H. Mayer & H.F. Pizer eds., 2005) (explaining how the TRIPS Agreement provides comprehensive patent protection for pharmaceuticals); *see also* Bryan Mercurio, *Resolving the Public Heath Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines*, 5 NW. J. INT'L. HUM. RTS. 1, 6 (2006) (noting that TRIPS establishes minimum levels of patent protections).

102. *See* 35 U.S.C. § 154(a)(1) (2012); *see also* JAKKRIT KUANPOTH, PATENT RIGHTS IN PHARMACEUTICALS IN DEVELOPING COUNTRIES: MAJOR CHALLENGES FOR THE FUTURE 6 (2010).

103. GLOBAL HEALTH WATCH, GLOBAL HEALTH WATCH 2005–2006: AN ALTERNATIVE WORLD HEALTH REPORT 104 (2005); Uché Ewelukwa, *Patent Wars in the Valley of the Shadow of Death: The Pharmaceutical Industry, Ethics, and Global Trade*, 59 U. MIAMI L. REV. 203, 244–45 (2005).

104. GLOBAL HEALTH WATCH, GLOBAL HEALTH WATCH 2005–2006: AN ALTERNATIVE WORLD HEALTH REPORT 104 (2005); *see* Angela J. Anderson, *Global Pharmaceutical Patent Law in Developing Countries-Amending TRIPS to Promote Access for All* 4 (Berkley Elec. Press Legal Series, Working Paper No. 1109, 2006), *available at* http://law.bepress.com/expresso/eps/1109/ (alleging that under TRIPS pharmaceutical companies will be able to raise their prices because of patent protections).

105. *See* Symposium, *Global Intellectual Property Rights: Boundaries of Access and Enforcement: AIDS and the Developing World: The Role of Patents in the Access of Medicines*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 683, 699 (2002) (opining that exclusivity patents cause high-priced drugs to be too expensive for people in Thailand); *see also* Anderson, *supra* note 104, at 4 (arguing that higher drug prices cause millions of impoverished people to spend fortunes on pharmaceutical drugs).

106. *See* Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way From Seattle to Doha*, 3 CHI. J. INT'L L. 27, 28 (2002); *see Declaration on the TRIPS Agreement and Public Health*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (last visited Oct. 21, 2012) (acknowledging apprehension towards TRIPS because of its possible impact on prices).

107. *See Cheap Drugs: Our Duty to the Poor,* SYDNEY MORNING HERALD, July 23, 2007, at 11 (showing Thailand took a stand against pharmaceutical companies to make unaffordable life-saving medicines available to its people); *see also Getting to Zero AIDS-Related Deaths: TRIPS and the Potential Impact of Free Trade Agreements*, UNAIDS, http://www.unaids.org/en/resources/presscentre/featurestories/2012/june/20120601tripsftas/ (last visited Oct. 21, 2012) (reporting 60% of the Asian population lacks access to HIV treatment).

world's population lacks access to essential medicines.[108] This is a global concern, which creates deep inequality between developed countries and developing countries.[109]

One could argue that pharmaceutical patents do not create pricing power,[110] but that they give the patent-holder only exclusive rights for a limited period of time.[111] Though a patent has exclusive protection for twenty years from the filing date of the patent application, the pharmaceutical research and development process usually takes twelve of those years.[112] Therefore, a pharmaceutical product may be patent protected for only eight years after it is marketed.[113] However, during that time, a successful drug can profit billions of dollars.[114] After the eight years pass, generic competitors may enter the market and engage in price competition with the creator, which usually results in an overall lower price.[115]

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108. *See* WORLD HEALTH ORGANIZATION, THE WORLD MEDICINE SITUATION 61 (2004), *available at* http://apps.who.int/medicinedocs/pdf/s6160e/s6160e.pdf.

109. *See* KELLEY LEE, THE WORLD HEALTH ORGANIZATION 76 (2009) (showing the Declaration of Alma-Ata proclaimed the gross disparity in the health condition of people in different countries objectionable and a matter of international concern); *see also* Zita Lazzarini, *Making Access to Pharmaceuticals a Reality: Legal Options Under TRIPS and the Case of Brazil*, 6 YALE HUM. RTS. & DEV. L.J. 103, 106 (2003) (revealing inequity between countries by showing that in developed countries, HIV is a treatable sickness, while in developing countries it remains a mortal disease).

110. *See* Simone A. Rose, *Patent "Monopolyphobia": A Means of Extinguishing the Fountainhead,?* 49 CASE W. RES. L. REV. 509, 521 (1999) (arguing against the view that patents increase pharmaceutical prices by showing that patents create incentives for market competition).

111. *See* Contents and Term of Patent; Provisional Rights, 35 U.S.C.A. § 154 (2012) (setting the term of a patent from the date issued to twenty years from the issuing date); *see also* Eric Noehrenberg, *The Realities of TRIPS, Patents and Access to Medicines in Developing Countries, in* THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY 177 (Meir Perez Pugatch ed. 2006) (indicating that a patent lasts only 20 years).

112. *See* California Biomedical Research Association, *Fact Sheet: New Drug Development Process* (last visited Oct. 16, 2012), http://ca-biomed.org/pdf/media-kit/factsheets/cbradrugdevelop.pdf (asserting that it takes about 12 years from when research begins until a drug is available for consumers).

113. *See* Randy P. Boyer, Schering Corporation v. Geneva Pharmaceuticals, Inc.: *Requiem for the Recognition Requirement in the Law of Inherent Anticipation*, 14 FED. CIRCUIT B.J. 677, 692 (2005) (calculating that since a patent expires 20 years after filing, it leads to just eight years of market exclusivity for a pharmaceutical company); *see also* Jaceson Maughan, *How Long Does a Drug Patent Last*? LIFE 123, http://www.life123.com/career-money/business-law/patents/how-long-does-a-drug-patent-last.shtml (last visited Nov. 5, 2012) (informing that a drug patent may have only eight to ten years left once a drug hits the open market).

114. *See* FREDERICK M. ABBOTT, CHRISTINE BREINING-KAUFMANN & THOMAS COTTIER, INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 83 (5th ed. 2006) (indicating that commentators point to the billions of dollars that a drug may make in the years before generic entry to rebut the theory that the returns in the pharmaceutical companies are too low); *see also* Jack Hitt, *The Second Sexual Revolution*, N.Y. TIMES MAGAZINE, Feb. 20, 2000, http://www.nytimes.com/2000/02/20/magazine/the-second-sexual-revolution.html?pagewanted=all&src=pm (observing that Viagra sales topped $1 billion in the first year alone).

115. *See* Eric Noehrenberg, *The Realities of TRIPS, Patents and Access to Medicines in Developing Countries in* THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY 177 (Meir Perez Pugatch ed., 2006); *see also* Edward Wyatt, *For Big Drug Companies, a Headache Looms*, N.Y. TIMES, July 26, 2012, *available at* http://www.nytimes.com/2012/07/27/health/policy/drug-makers-deals-with-generic-rivals-may-face-justices-review.html (quoting Ralph G. Neas, who said that generic drugs had reduced the drug costs for Americans after being allowed to enter the market).

While pricing power should be limited to the twenty-year period a patent is valid for, it is not always the case. Pharmaceutical companies will often find ways to extend their period of exclusivity and monopoly power.[116] In practice, pharmaceutical companies continuously work to develop new formulas, by conducting more research and inventing new products.[117] They hire many scientists around the world and spend several billion dollars developing new drugs.[118] When one patent expires, companies produce new medicines and obtain new patents that are valid for twenty years.[119] This is a common business cycle for pharmaceutical companies.[120] Otherwise, all pharmaceutical companies would go out of business after producing their first medicine.[121] Thus, pricing power on patent-holders will continue to exist with new patented medicines.

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116. *See* JOHN R. THOMAS, CONG. RESEARCH SERV., PATENT "EVERGREENING": ISSUES IN INNOVATION AND COMPETITION 3 (2009), http://ipmall.info/hosted_resources/crs/R40917_091113.pdf (discussing the common pharmaceutical practice of "patent evergreening," or obtaining multiple patents that cover different aspects or improvements of the same product); *see also* Maughan, *supra* note 113 (explaining the pharmaceutical companies' practice of extending their exclusive rights by filing new patents on *improved* forms of drugss).

117. *See* WILLIAM N. KELLY, PHARMACY: WHAT IT IS AND HOW IT WORKS, 425 (2d ed. 2006) (remarking on the perpetual basic research phase of new and already approved drugs); *see also* David Stewart, *A Prophecy Whose Time Has Come*, OILS FOR LIVING (June 22, 2012), http://oilsforliving.com/ (illustrating that this endless research comes from the need to replace outdated medicine).

118. Pharmaceutical companies in the United States spent more than $25 billion developing and testing new drugs in 2000, equivalent to about 21% of sales, and twice as much as computer software companies. *See* MICHAEL C. WESTWOOD, MEETING THE PRESIDENT 27 (2004) (detailing these companies' research expenses due to clinical studies and high-salaried scientists, billed for both successful and failed drugs); *see also* Matthew Herper, *The Truly Staggering Cost of Inventing New Drugs*, FORBES (Feb. 10, 2012, 7:41 a.m.), http://www.forbes.com/sites/matthewherper/2012/02/10/the-truly-staggering-cost-of-inventing-new-drugs/ (indicating that pharmaceutical companies invested, on average, nearly $4 billion in research money for every drug approved).

119. *See* JOHN R. THOMAS, CONG. RESEARCH SERV., PATENT "EVERGREENING": ISSUES IN INNOVATION AND COMPETITION 3 (2009), *available at* http://ipmall.info/hosted_resources/crs/R40917_091113.pdf (discussing one way companies do so, i.e., "patent evergreening" where companies obtain patents on the multitude of uses a drug can have); *see also* Maughan, *supra* note 113 (explaining another way companies extend their exclusive rights to drugs by filing new patents on improved forms of a drug they developed).

120. *See* DONNA K. HAMMAKER & SARAH J. TOMLINSON, HEALTH CARE MANAGEMENT AND THE LAW: PRINCIPLES AND APPLICATIONS 314 (2010) (reporting on Congress's efforts to address the problem of companies seeking to extend their exclusive rights); *see also Drug Patents and Generics: When Can a Drug Be Produced?*, NEWS MED., http://www.news-medical.net/health/Drug-Patents-and-Generics.aspx (detailing common methods and practices used by brand-name pharmaceutical companies to extend their exclusive rights).

121. *See* Vijay Vaitheeswaran, *Generically Challenged*, THE ECONOMIST, Nov. 13, 2009, http://www.economist.com/node/14742621 (noting that prices of pharmaceutical shares have dropped because pharmaceutical companies have failed to come up with new drugs to replace older profitable drugs that are losing their patent protection); *see also Research and Develop*, THE ECONOMIST, Nov. 22, 2010, http://www.economist.com/node/17493432 (estimating that from 2008 through 2012 pharmaceutical companies lost $200 billion because they did not create new drugs to replace drugs losing their patent protection).

II. The Model of Separation of Powers and the Balance of Intellectual Property Rights

A. Separation of Powers

The "separation of powers" is considered a model for the governance of democratic states.[122] Charles-Louis de Secondat, Baron de Montesquieu, a political philosopher, successfully expanded upon Aristotle's idea in 1748.[123] The idea behind separation of powers is that when one single person or group has a large amount of power, that person or group will abuse the power.[124] This becomes dangerous and leads to the "end of everything."[125] One person will use his power to receive benefits at the expense of another. The separation of powers is a precaution set in place to prevent tyranny by the government that could potentially become all-powerful.[126] In other words, the separation of powers is a mechanism to prevent an individual or entity from holding absolute power, which may harm people or society, by allocating the power to different groups.[127] Thus, the separation of powers is used to prevent abuse by one particular branch of government.[128]

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122. *See* KENNETH JANDA, JEFFREY M. BERRY & JERRY GOLDMAN, THE CHALLENGE OF DEMOCRACY: AMERICAN GOVERNMENT IN A GLOBAL WORLD 62 (7th ed. 2009) (opining that the separation of powers established in the U.S. Constitution is well suited for a pluralist democracy); *see also* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513 (1991) (arguing that a separation of powers allows for the creation of a government with limited powers).

123. *See* Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 697 (2006) (noting that Montesquieu was one of the earliest advocates of separation of powers); *see also* Xiaohong Wei, *How the U.S. Constitution Separates National Power*, Archiving Early America, http://www.earlyamerica.com/review/2009_summer_fall/constitution-separates-power.html (last visited Oct. 14, 2012) (commenting that Montesquieu's influence can be seen in the separation of federal powers between the executive, legislative, and judicial branches).

124. *See* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 127 (1984) (arguing that an accumulation of power in one entity could result in tyranny); *see also* Samuel W. Cooper, Note, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 362 (1994) (commenting that the Founding Fathers, similar to Montesquieu, feared a tyrannical federal government and thus separated the federal powers among the three branches).

125. *See* CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS 181 (1st Am. from the 5th London ed. 1802); *see also* Cooper, *supra* note 124, at 363.

126. *See* Epstein, *supra* note 124, at 127 (describing Montesquieu's theory of establishing a government that protects individual liberties); *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 990–91 (2006) (discussing the familiar system of separating legislative, executive, and judicial powers to protect liberty and prevent tyranny).

127. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 404–05 (1996) (detailing the historical theoretical perspective of a separation of powers that encompasses checks and balances to prevent an abuse of authority); *see also* Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 12 (2003) (explaining that scholars and jurists generally agree that our government's most basic and most recognized feature is separation of powers).

128. *See* Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 668 (1990) (indicating that the Framers rejected a rigid separation of powers in favor of a concomitant system that allowed the branches to share some powers to prevent abuse); *see also* Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 708 (1997) (arguing for a formalist approach when analyzing the government's powers that involves each of the three branches vigilantly policing one another).

The separation of powers is based on the system of checks and balances.[129] The system is based on the separation of political powers into the legislative, executive, and judicial branches.[130] The powers of each branch are checked and balanced against the others in order to protect against abuse by any one of the three branches of government.[131] With the system of checks and balances, no branch can exercise the full authority of the state on its own.[132] Each branch acts independently as a restraint on the powers of the other two branches.[133] The separation of powers, or the system of checks and balances, is recognized worldwide in politics and jurisprudence,[134] and almost every country in the world requires the separation of powers in their state constitutions.[135]

The separation of powers was simply designed to prevent governments run by a single person,[136] and it was not designed to deal with the global community.[137] Even though there has been an attempt to shape international law and global society into three branches, the separa-

129. *See* JAGDISH CHANDRA JOHARI, COMPARATIVE POLITICS 526 (3d ed. 1982).

130. The legislative branch is responsible for enacting the laws of the state. The executive branch is responsible for implementing and administering the public policy enacted by the legislative branch. The judicial branch is responsible for interpreting the laws and controlling the executive branch. Pushaw, Jr., *supra* note 127, at 400–402 (listing the three different branches and the various powers each hold).

131. *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, at 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Press 1949) (1748) (declaring that the separation of judicial and executive power limits a judge's capacity to act with violence and oppression); *see also* Pushaw, *supra* note 127, at 495 (explaining how an abuse of power under the system of checks and balances meets rebuke and restriction from the other branches of government).

132. *See* MONTESQUIEU, *supr*a note 131, AT 152 (arguing that the separation of each branch prevents tyranny); *see also* Pushaw, *supra* note 127, at 434–35 (describing how the framers of the U.S. Constitution adopted the system of checks and balances to ensure that a strong national government would not threaten liberty).

133. THE FEDERALIST NO. 51, at 251 (James Madison) (Terrence Ball ed., 2003); *see* Doug Linder, *Separation of Powers*, EXPLORING CONSTITUTIONAL CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.htm (last visited Jan. 5, 2012) (stating that separation of powers allows each branch to fight off encroachment by the other two branches).

134. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23 2004) (noting that the U.N.'s mission to promote transitional justice and rule of law requires adherence to the doctrine of separation of powers); *see also* Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. MIAMI L. REV. 417, 441–52 (2008) (describing how international organizations like the OSCE and the African Union have recognized the importance of a commitment to principles of separation of powers).

135. *See* ECON. COMM'N FOR AFR., AFRICAN GOVERNANCE REPORT II 8 (2009) (noting that the core structures of the separation of powers are in place in almost all African countries). The U.S. Constitution is based on the concept of the separation of powers. The Constitution allocates the national government's power to each branch in Articles I, II, and III, each of which begins by "vesting" distinct powers to each branch of government. U.S. CONST. art. I, § 1 (conferring to Congress "legislative powers" to make general laws reflecting the electorate's policy preferences); U.S. CONST. art. II, § 1 (entrusting to the President "the executive Power" to administer the laws); U.S. CONST. art. III, § 1 (assigning to the federal courts "the judicial Power" to interpret existing legal rules).

136. *See* Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989) (explaining that the purpose of the separation of powers is to provide checks on the government).

137. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–45 (2011) (stating that the original intent of separation of powers was to balance the use of federal power).

tion of powers does not yet exist at the international level.[138] Separation of powers applies only to sovereign states that are governed by their citizens, and because a world government does not exist, the separation of powers does not apply to international law.[139] The world consists of several states that rely on the theory of separation of powers.[140] There is no international legislature capable of modifying and supplementing existing law or international law.[141] There is no executive or governing entity administering the global community.[142] Finally, there is no system of courts controlling the executive branch in the global society.[143]

B. Global Intellectual Property Rights and Monopoly Power

Global power may be defined as the authority of an individual or state to affect other entities in different countries or to influence world events.[144] TRIPS is a form of global power that

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138. *See The World Factbook, Field Listing: Government Type*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/2128.html (last visited Oct. 15, 2012) (displaying various government types recognized in the world and noting that many of them are not democratic).

139. *See* DORE GOLD, TOWER OF BABBLE: HOW THE UNITED NATIONS HAS FUELED GLOBAL CHAOS 27 (2005) (citations omitted) (stating that a world society does not exist).

140. *See* Scott D. Gerber, *The Court, the Constitution, and the History of Ideas,* 61 VAND. L. REV. 1067, 1089–90 (2008) (explaining that the separation of powers originated in Greece); *see also* Victoria Schwartz, *The Influences of the West on the 1993 Russian Constitution,* 32 HASTINGS INT'L & COMP. L. REV. 101, 122 (2009) (revealing that separation of powers was a factor that influenced the establishment of the presidency in Russia).

141. *See* Kent McKeever, *Researching Public International Law—Research Guide*, COLUM. U., http://library.law.columbia.edu/guides/Researching_Public_International_Law (last updated Jan. 2006) (stating that there is no international legislative body to create laws; rather, international law is taken from a variety of sources). Sources of international law come from treaties, custom, general principles of law, and judicial decisions. *See* 5 HERSCH LAUTERPACHT, INTERNATIONAL LAW: DISPUTES, WAR, AND NEUTRALITY 201 (Elihu Lauterpacht ed., 2004) (explaining that the lack of an international legislature, which would give effect to changing laws, is the reason why international claims are non-justiciable).

142. *See* William R. Youngblood, *Managing Non-Proliferation Regimes in the 1900s: Power, Politics, and Policies*, 9 EMORY INT'L L. REV. 329, 335 (1995) (stating that, since there is no global government to enforce international law, an "abstract framework" has developed). The United Nations is not an international government, but an international organization that facilitates cooperation in global society and activities. While the Security Council of the United Nations has a role in the maintenance of international peace and security, it is constrained by the veto power of its five permanent members. *See* Maury D. Shenk, *The United Nations Security Council Consultation Act: A Proposal for Multilateral Resolution of International Conflict*, 28 STAN. J. INT'L L. 247, 249–50 (1991).

143. *See* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 707–09 (2000) (illustrating that courts tend to give substantial deference to the executive branch). While the International Court of Justice plays a vital role in the function of dispute resolution, it cannot act as a check on executive power because there is no executive branch in international government. Therefore, the idea of three branches acting as checks on each other does not apply to global society. *See* Julian G. Ku, Sanchez-Llamas v. Oregon: *Stepping Back From the New World Court Order*, 11 LEWIS & CLARK. L. REV. 17, 26–27 (2007).

144. *See* Grafton Cushing, *Concentration and International Law*, 13 HARV. L. REV. 589, 591 (1900) (stating how dominant States have the ability to implement new international laws); *see also* Jonathan Paul Bracewell, Note, *Will It Float? The International Criminal Court Without the United States*, 6 REGENT J. INT'L L. 483, 489 (2008) (suggesting that powerful nations influence international policy).

affects the standard of intellectual property protection and people's lives around the world.[145] This global power is subject not only to regulations that indicate global conduct, but is an actual part of the apparatus making decisions, regulations, and policies.[146] Intellectual property rights can also have the effect of a global power when they influence people or entities in other countries.[147] This is a global expansion of protection for rights holders. The owners can prevent the unauthorized use of their intellectual property, or make more profits from their intellectual property rights in different countries.[148] These actions may occur through bilateral agreements or free trade agreements.[149] For example, the United States at the behest of non-generic pharmaceutical firms pursued a number of bilateral and regional intellectual property and investment agreements to the detriment of developing countries during the HIV/AIDS crisis.[150]

Monopolies are another form of power. A monopoly refers to exclusive ownership, possession, or control.[151] In economics, it is considered a monopoly when a single firm owns a key

145. *See* Chad M. Cullen, *Can TRIPS Live in Harmony With Islamic Law? An Investigation of the Relationship Between Intellectual Property and Islamic Law*, 14 SMU SCI. & TECH. L. REV. 45, 55 (2010) (stating that the goal of TRIPS is to strengthen international intellectual property rights); *see also* Jacqueline Nanci Land, Note, *Global Intellectual Property Protection as Viewed Through the European Community's Treatment of Geographical Indications: What Lessons Can TRIPS Learn?*, 11 CARDOZO J. INT'L & COMP. L. 1007, 1035–36 (2004) (stating that TRIPS has created intellectual property protection rights for its member nations' citizens).

146. *See* YADONG LUO, STRATEGY, STRUCTURE, AND PERFORMANCE OF MNCS IN CHINA 33 (2000); *see also* Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, CASE W. RES. J. INT'L L. 95, 102–03 (2004).

147. *See* Susan K. Sell, *What Role for Humanitarian Intellectual Property? The Globalization of Intellectual Property Rights*, 6 MINN. J. L. SCI. & TECH. 191, 207–08 (2004) (demonstrating that the expansion of intellectual property rights actually reduced autonomy of developing countries in regards to agricultural development); *see also* Adam L. Steltzer, Comment, *U.S. Biotechnology Intellectual Property Rights as an Obstacle to the UNCED Convention on Biological Diversity: It Just Doesn't Matter*, 6 TRANSNAT'L LAW. 271, 290–91 (1993) (showing how a general grant or limitation of intellectual property rights can affect the development of domestic industries).

148. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 567 (1985) (citations omitted) (holding that a party whose copyrights are infringed is entitled to lost profits).

149. *See* Jeffrey F. Levine, Note, *Meeting the Challenges of the International Brand Expansion in Professional Sports: Intellectual Property Right Enforcement in China Through Treaties, Chinese Law and Cultural Mechanisms*, 9 TEX. REV. ENT. & SPORTS L. 203, 214 (2007) (providing background information on the Berne Convention and how it made attempts to increase international intellectual property right protection); *see also* Matthew Turk, Note, *Bargaining and Intellectual Property Treaties: The Case for a Pro-Development Interpretation of TRIPS but not TRIPS Plus*, 42 N.Y.U. J. INT'L L. & POL. 981, 994 (2010) (discussing the advantage the United States has in negotiating intellectual property treaties).

150. *See* Susan K. Sell, *The Quest for Global Governance in Intellectual Property and Public Health: Structural, Discursive, and Institutional Dimensions*, 77 TEMP. L. REV. 363, 365 (2004) (documenting the argument that intellectual property rights should take public health issues into consideration); s*ee also* Zach Carter, *New Trade Deal Would Benefit Big Pharma at AIDS Programs' Expense*, HUFFINGTON POST (Dec. 5, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/10/05/aids-trade-regulations-patent-law_n_994940.html?view=print&comm_ref=false (showing the efforts of the administration to increase intellectual property rights of certain drugs at the expense of the efforts to cure AIDS).

151. *See* George J. Stigler, *Monopoly*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, LIBRARY OF ECON. AND LIBERTY (2008), http://www.econlib.org/library/Enc/Monopoly.html (explaining that a monopoly has the ability to achieve maximum profits); *see also Monopoly–Definition,* MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/monopoly (last visited Oct. 25, 2012) (defining monopoly as having exclusive ownership).

resource, and the government gives an exclusive right to own or produce a product.[152] Even though intellectual property laws do not directly confer a monopoly, intellectual property rights or exclusive rights created by intellectual property laws can confer a monopoly to an inventor over his invention.[153] In other words, intellectual property laws grant monopolies in order to provide an incentive for the creation of inventions.[154] These monopolies are then limited by the scope of intellectual property laws.[155] Creators or owners can legally exclude other people from production, expression, or symbols covered by intellectual property interest.[156] However, they cannot act outside the scope of the laws.[157] Therefore, monopoly power may arise when intellectual property laws give the owner exclusive rights to sell or produce his products.[158]

Because a monopoly is based on intellectual property protection, the level of intellectual property protection can strengthen or weaken the degree of monopoly power.[159] If intellectual property receives a high level of protection, the monopoly power will strengthen. On the other

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152. *See* Shane Hall, *What Is a Monopoly in Economics*, EHOW.COM, http://www.ehow.com/print/about_6601606_monopoly-economics_.html (last visited Oct. 18, 2012) (discussing the various powers a monopoly may assert on a market); *see also* Tom Lutzenberger, *What Is a Government Monopoly?*, EHOW.COM, http://www.ehow.com/about_5471337_government-monopoly.html (last visited Oct. 25, 2012) (discussing that the government has a monopoly when it is the sole provider of a good or service).

153. *See* MICHAEL A. GOLLIN, DRIVING INNOVATION: INTELLECTUAL PROPERTY STRATEGIES FOR A DYNAMIC WORLD 40–41 (2008) (citing predictions about the practical benefits of international intellectual property protection) (noting that although intellectual property rights may not create monopolies, they may lead to a decrease in competition); *see also* Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1205 (1998) (citations omitted) (asserting that intellectual property rights, such as copyrights or patents, give its owner monopoly rights).

154. *See* FABIO NAPPO, INTELLECTUAL PROPERTY MANAGEMENT IN A KNOWLEDGE-BASED SOCIETY 27 (2011) (discussing how intellectual property effects creativity); *see also* ASHWIN VAN ROOIJEN, THE SOFTWARE INTERFACE BETWEEN COPYRIGHT AND COMPETITION LAW: A LEGAL ANALYSIS OF INTEROPERABILITY IN COMPUTER PROGRAMS 101 (2009).

155. *See* James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 9 (2004) (analyzing intellectual property laws and how they produce "limited legal monopolies").

156. *See* van Rooijen, *supra* note 154, at 101 (detailing how a copyright holder has the power to inhibit another from copying the contents of the copyright).

157. *See* Sharon Brawner McCullen, Comment, *The Federal Circuit and Ninth Circuit Face-Off: Does a Patent Holder Violate the Sherman Act by Unilaterally Excluding Others From a Patented Invention in More Than One Relevant Market?*, 74 TEMP. L. REV. 469, 469 (2001) (examining the interface between patent protection and Sherman Act violations).

158. *See* Howard C. Anawalt, *International Intellectual Property, Progress, and the Rule of Law*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 383, 383–84 (2003) (explaining the different functions of patent, trademark, and copyright protections); *see also* Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L.J. 1693, 1700 (2008) (describing how intellectual property rights lead to monopolies on knowledge).

159. *See* Emanuela Arezzo, *Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared*, 24 J. MARSHALL J. COMPUTER & INFO. L. 455, 456–57 (2006); *see also* Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT'L L. 109, 130–31 (1998) (examining the impact of intellectual property rights on markets and attendant monopoly effects).

hand, a low level of protection can weaken monopoly power. This is why developed countries prefer strong intellectual property protection and TRIPS.[160]

C. Separation and Balance of Global Intellectual Property Rights or Monopoly Power

In the twenty-first century there is a stronger standard of protection,[161] so it is necessary to establish a mechanism for balancing global intellectual property rights or monopoly power. Separation of powers should still be used as a basic principle or policy to balance and control global intellectual property rights or monopoly power. However, separation of powers cannot fully balance or control intellectual property rights or monopoly power.[162] First, the power referenced by Montesquieu is the power of sovereign states or national governments that allows the administration of public resources, while monopoly power is an economic right that allows an owner to preclude unauthorized use.[163] Second, separation of powers allows each branch to balance and control each other.[164] The three branches cannot solely be used to balance intellectual property rights or monopoly power. For instance, the WTO has a dispute settlement mechanism for enforcing rules.[165] That mechanism functions merely as a dispute resolution

160. *See* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and the Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 61 (2004) (commenting on the United States' preference for encouraging compliance with TRIPS and TRIPS-plus standards in developing nations); *see also* Kevin W. McCabe, *The January 1999 Review of Article 27 of the TRIPS Agreement: Diverging Views of Developed and Developing Countries Toward the Patentability of Biotechnology*, 6 J. INTELL. PROP. L. 41, 46–47 (1998) (highlighting reasons why developed countries favor enhanced intellectual property protections).

161. *See* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 132–33 (2000) (explaining that the United States has pushed for a uniform system of intellectual property protection).

162. *See* Greg K. Venbrux, *When Two Worlds Collide: Ownership of Genetic Resources Under the Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 6 U. PITT. J. TECH. L. & POL'Y 5 (2005) (showing the conflicting views of developed and developing countries on the topic of intellectual property law); *see also* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1036–37 (2011) (observing that the intellectual property rules must strike the right balance in order to protect existing property as well as foster further innovation).

163. *See* David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1220 (1988) (arguing that resistance to monopoly power has structured political and economic theories).

164. *See* Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 475 (2011) (outlining the separation of powers that serve as a checks and balances system in the U.S. government); *see also* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 858 (2009) (noting that the Framers included the separation of powers to ensure that one branch would not control the others).

165. *See* Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 50 (2000) (recognizing that the WTO has provided member states with a dispute resolution system since 1995).

under the WTO regime.[166] The WTO dispute settlement is not used as the judicial system to limit or balance intellectual property rights or monopoly power.[167]

Separation of powers may be applied to global intellectual property rights or monopoly power in that an individual will use his power as much as he can when he has a large amount of power. An individual will become dangerous to other people because of that power. The holders of monopoly power will likely use that power or right as much as they can to gain the greatest benefits. This would hurt a global society, especially developing and least-developed countries. For example, instead of fostering innovation and disseminating environmentally sound technologies to which least-developed countries have intellectual property rights, developed countries have further increased the industrialized world's grip on technology.[168] This may lead to "technological protectionism."[169] Furthermore, developed countries or pharmaceutical companies have used free trade agreements to increase intellectual property rights protection and monopoly rights in order to gain more benefits.[170] For example, pharmaceutical corporations have used free trade agreements to impose stricter rules preventing the manufacture and trade of generic drugs.[171] Developing countries under the free trade agreements must extend protection for branded drugs and limit parallel imports hampering the availability of

166. *See* Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2287 (1997) (noting that the Understanding on Rules and Procedures Governing the Settlement of Disputes gives teeth to the WTO's dispute resolution process by allowing it to punish countries who disobey their rulings).

167. *See Understanding the WTO: Settling Disputes*, WORLD TRADE ORG, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (opining that while much of the dispute resolution procedure is similar to a judicial system, the main purpose of the WTO is for concerned parties to discuss and negotiate an acceptable settlement to their problems). Under Article III of the Agreement Establishing the World Trade Organization, the WTO is required to administer the Understanding on Rules and Procedures Governing the Settlement of Disputes. *See Understanding the WTO*. Annex 2 of Understanding on Rules and Procedures Governing the Settlement Disputes describes the WTO's role in resolving trade disputes between member countries, and enforcing the rules. *See Understanding the WTO*. The dispute settlement does not restrain WTO Agreements. *See Understanding the WTO.* A dispute setting will take place when member countries violate an agreement or a commitment made in the multilateral trading system. *See Understanding the WTO*.

168. *See* SHAWKAT ALAM, SUSTAINABLE DEVELOPMENT AND FREE TRADE: INSTITUTIONAL APPROACHES 91 (2007) (noting that the TRIPS agreement was unable to look after developing countries and their interests); *see also* A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 875–76 (1987) (opining that protective trade measures will stunt free trade between countries and possibly have negative consequences on the developed countries' progress as well).

169. *See* ALAM, *supra* note 168 (arguing that global intellectual property laws neglect developing countries and strengthen the industrialized world's hold on modern technology); *see also* Oddi, *supra* note 168, at 833–35 (explaining "technological protectionism" as a policy whereby one country offers patent protection for the innovations made by another country in return for the same treatment).

170. *See* James Surowiecki, *Exporting I.P.*, THE NEW YORKER, May 14, 2007, *available at* http://www.newyorker.com/talk/financial/2007/05/14/070514ta_talk_surowiecki (observing that a U.S. free trade agreement with South Korea requires the adoption of the United States' definition of copyrights and patents in order to give American corporations greater protection against piracy); *see also U.S. Free Trade Agreements*, EXPORT.GOV, http://export.gov/fta/index.asp (last visited Oct. 14, 2012) (suggesting that one of the purposes of free trade agreements is to protect and enforce American intellectual property rights in the country that is partner to the agreement).

171. *See Intellectual Property*, BILATERALS.ORG, http://www.bilaterals.org/ spip.php?rubrique33 (last updated May 2012) (noting that companies seek to monopolize vital industries through intellectual property rights).

affordable generic medicines.[172] Pharmaceutical corporations may also raise their prices above that of the supplying market and impose a loss on society by reducing their output below the level which consumers would be willing to pay.[173] This fails to serve the millions of people in developing or least-developed countries.

There has been an attempt to create an approach to balance intellectual property rights.[174] The WIPO has tried to establish international legal norms and standards that promote a well-balanced international intellectual property system.[175] The World Bank[176] recognizes the need for intellectual property regimes to balance private incentives for the creation of knowledge against the social benefit of dissemination.[177] The WHO has tried to adopt such a balanced approach in its policies.[178] An official statement by the International Covenant on Economic, Social and Cultural Rights (ICESCR) also confirms that intellectual property rights must be

172. *See How the Trans-Pacific Partnership Agreement Threatens Access to Medicines*, DOCTORS WITHOUT BORDERS (Sept. 2011), http://www.doctorswithoutborders.org/press/2011/MSF-TPP-Issue-Brief.pdf (recognizing that intellectual property regulations, in the form of trade agreements from the United States and the European Union, pose a significant barrier for developing countries looking to strike a balance between protecting the public health and complying with TRIPs and TRIPs plus); *see also Intellectual Property*, BILATERALS.ORG, http://www.bilaterals.org/ spip.php?rubrique33 (last updated May 2012) (recognizing the negative consequences of free trade agreements).

173. *See* Arjun Jayadev & Joseph Stiglitz, *Two Ideas to Increase Innovation and Reduce Pharmaceutical Costs and Prices*, HEALTH AFFAIRS, Dec. 2008, *available at* http://content.healthaffairs.org/content/28/1/w165.full (noting that actions have been taken to limit the amount of profits a pharmaceutical company can make, which have allegedly decreased the incentive to invent). *But see* Prashant Yadav, *Differential Pricing for Pharmaceuticals*, U.K. DEP'T FOR INT'L DEV. (Aug. 2010), http://www.dfid.gov.uk/Documents/publications1/prd/diff-pcing-pharma.pdf (arguing that imposing a differential pricing system would assist low income countries in gaining access to medicines while simultaneously allowing pharmaceutical manufacturers to increase sales).

174. *See* Sisule F. Musungu, *Rethinking Innovation, Development and Intellectual Property in the UN: WIPO and Beyond*, QUAKER UNITED NATIONS OFF. (2005), http://www.quno.org/geneva/pdf/economic/Issues/TRIPS 53.pdf (recognizing the need to create balance in intellectual property rights). The Madrid Agreement, the Paris Convention, and the Berne Convention provide no provisions for a balance between intellectual property rights of the creators and the public interest. *See generally* WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE, Ch. 5 (2d ed. 2004), http://www.wipo.int/about-ip/en/iprm/pdf/ch5.pdf.

175. *See* Robin Gross, *World Intellectual Property Organisation (WIPO)*, GLOBAL INFO. SOC'Y WATCH (2007), at 65, *available at* http://www.giswatch.org/sites/default/files/gisw_wipo_0.pdf (recognizing that the WIPO was created to encourage intellectual activity while facilitating other goals).

176. The World Bank provides financial and technical support to developing countries worldwide. *See About Us*, *What We Do*, THE WORLD BANK, http://go.worldbank.org/7Q47C9KOZ (last updated Mar. 8, 2012).

177. *See* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2829–831 (2006) (highlighting the implications of globalization on the need to balance intellectual property rights).

178. *See Globalization, TRIPS and Access to Pharmaceuticals*, WHO POL. PERSP. ON MED. (World Health Organization, Geneva), Mar. 2001, at 6, http://apps.who.int/medicinedocs/pdf/s2240e/s2240e.pdf (emphasizing that the objective management of drug patents protects the interests of the patent-holder and ensures public access to essential drugs); *see also Public Health, Innovation and Intellectual Property Rights*, REP. OF THE COMM'N ON INTELL. PROP. RTS., INNOVATION AND PUB. HEALTH (World Health Organization) (2006) at 129, *available at* http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf (demonstrating the importance of allowing generic drugs to enter the market immediately after a medical patent expires).

balanced with the right to take part in cultural life and enjoy the progression of science and its applications.[179]

TRIPS recognizes the term "balance" in the context of intellectual property protection.[180] Articles 7 and 8 of TRIPS Agreement may be viewed as a means to establish a balance of interests in intellectual property.[181] Article 7 of TRIPS Agreement is the main provision relating to a balance of rights and obligations in intellectual property.[182] The balance under Article 7 is not used to reduce the levels of intellectual property protection below the minimum standards con-

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179. *See* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and the Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 50 (2004) (citations omitted) (explaining that intellectual property rights must consider the social right to scientific and cultural progress).

180. *See* TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) (hereinafter TRIPS Agreement) (citing that intellectual property rights must balance the rights of innovators with its obligation to social welfare).

181. *See* Denis Borges Barbosa, Margaret Chon & Andrés Moncayo von Hase, *Slouching Towards Development in International Intellectual Property,* 2007 MICH. ST. L. REV. 71, 92 (2007) (discussing how TRIPS allows member states to balance innovation and development goals). Article 7 of TRIPS (Objectives):

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 1869 U.N.T.S. 299.

Article 8 of TRIPS (Principles):

> 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
>
> 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade and adversely affect the international transfer of technology.
>
> *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 1869 U.N.T.S. 299.

182. *See* Brian Manning & Srividhya Ragavan, *The Dispute Settlement Process of the WTO: A Normative Structure to Achieve Utilitarian Objectives*, 79 UMKC L. REV. 1, 24–25 (2010) (noting that Article 7 articulates the importance of harmonizing the rights and obligations in intellectual property rights); *see also* J. Janewa Oseitutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639, 1676 (2012) (noting that Article 7 encompasses concern for social welfare).

tained in TRIPS.[183] The background of this provision was an awareness that excessive intellectual property protection conferred monopoly power, and thus its treatment at the multilateral level should be used in a way that balances the rights or power.[184] The negotiating group discussed this idea in July of 1988.[185] At this time, the negotiating group considered how the TRIPS Agreement could be structured to ensure that an appropriate level of intellectual property protection could be provided.[186] However, Article 7 is not an operational provision, because it is still inaccurate.[187] Member countries have never applied Article 7 to balance the rights and obligations in intellectual property.[188] Thus, it is reasonable to assume that Article 7 is used as guidance for the interpretation of TRIPS, and for controlling and balancing intellectual property rights and monopoly power.

Article 8 of TRIPS promotes technological innovation and transfer and dissemination of technology in the interest of producers and users of technological knowledge, social and economic welfare, and public health and nutrition.[189] Member countries can adopt measures to

183. *See* Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 4.30, WT/DS114/R (Mar. 17, 2000) (clarifying that the scope of intellectual property rights protected in TRIPS were not meant to be limited by Article 7); *see also* NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF ANTITRUST AND UNDISCLOSED INFORMATION 99 (2008) (asserting that Article 7 may not be used to "reduce the levels of intellectual property protection below the minimum standards contained in the Agreement").

184. *See Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, Submission from Brazil, ¶ 19, MTN.GNG/NG11/W/30 (Oct. 31, 1988) (arguing that providing excessive intellectual property protection can lead to monopolies and restrict trade); *see also* CARVALHO, *supra* note 183, at 89–90 (indicating that Article 7 was enacted to balance the creation of monopolies).

185. *See Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, Note by the Secretariat: Meeting of Negotiating Group of 5–8 July 1988, ¶ 10, MTG.GNG/NG11/8 (Aug. 29, 1988) (expressing concern about finding the appropriate level of intellectual property protection); *see also* CARVALHO, *supra* note 183, at 90, describing a meeting on the goal of the TRIPS agreement).

186. *See* CARVALHO, *supra* note 183, at 90 (discussing the balance sought in early discussions of the TRIPS agreement); *see also* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 984–85 (2009) (acknowledging the desired objective to prevent trade distortion resulting from a lack of intellectual property protection and enforcement).

187. *See* Barbosa et al., *supra* note 181, at 98 (citations omitted) (showing that the WTO has recognized the need to further explain Article 7); *see also* Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727, 770–71 (2011) (commenting that the WTO panel reports have failed to draw sufficient attention to the TRIPS Articles 7 and 8, which require further interpretation).

188. *See* Cynthia M. Ho, *Patent Breaking or Balancing?: Separating Strands of Fact From Fiction Under TRIPS*, 34 N.C. J. INT'L L. & COM. REG. 371, 390 (2009) (stating that there is a lack of consistency in the application of Articles 7 and 8); *see also* Yu, *supra* note 187, at 769 (noting that while some WTO panels have totally disregarded TRIPS Article 7 and 8, others have promoted their principles and objectives).

189. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (providing members with some discretion over how and whether to enforce the public interest matters considered in the TRIPS agreement); *see also* Walter O. Alomar-Jimenez, *Harmonizing EBAY*, 1 U. P.R. BUS. L.J. 17, 31 (2010) (noting that TRIPS Article 8 acknowledges public interest and seeks to encourage technological innovation).

prevent the abuse of intellectual property rights by rights-holders.[190] In addition to Article 7, Article 8 is considered another provision that balances or controls international property rights or monopoly power.[191] Nevertheless, Article 8 does not contain any legal principles, but rather clarifies how concessions made as a result of TRIPS negotiations may affect the freedom of WTO Members to handle matters of public policy.[192] Like Article 7, Article 8 is not operational and hortatory.

The balance of intellectual property rights under Articles 7 and 8 of TRIPS was discussed in the WTO Dispute Settlement.[193] In *Canada—Patent Protection of Pharmaceutical Products*, the European Union challenged the regulatory review and stockpiling exceptions in Canadian patent law as violations of TRIPS.[194] Canada argued that the government can adjust patent rights to maintain the balance with other national policies because of Articles 7 and 8.[195] Canada stated that "one of the key goals of TRIPS was a balance between the intellectual property rights created by the Agreement and other important socio-economic policies in question."[196]

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190. *See* TRIPS Agreement, *supra* note 189, at art. 8 (stating that Members to the treaty may adopt necessary measures to impede the abuse of intellectual property rights); *see also* Evelyn Su, Comment, *The Winners and the Losers*, 23 HOUS. J. INT'L. L. 169, 187 (2000) (discussing how members are free to determine how they will implement the treaty within their country's laws).

191. *See* TRIPS Agreement, *supra* note 189 at art. 8 (declaring that appropriate measures may be taken by members to promote public interest and technological development); *see also* Joel W. Rogers & Joseph P. Whitlock, *Is Section 337 Consistent with the GATT and the TRIPS Agreement?*, 17 AM. U. INT'L L. REV. 459, 508 (2002) (discussing how Articles 1, 7, and 8 balance competing interests between developed and developing nations with regards to intellectual property rights).

192. *See* TRIPS Agreement, *supra* note 189, at art. 8 (recognizing the rights of treaty members to adopt measures that further public policy interests); *see also* NUNO PIRES DE CARVALHO, TRIPS REGIME OF PATENT RIGHTS 223 (2010).

193. *See* Rogers & Whitlock, *supra* note 191, at 508 (establishing that the members' disputes are resolved through the use of the WTO dispute settlement); *see also* Overview: THE TRIPS AGREEMENT, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Oct. 16, 2012) (noting that the treaty was discussed in the WTO Dispute Settlement).

194. *See* Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 4.2, WT/DS114/R (Mar. 17, 2000) (hereinafter Canada Panel Report) (explaining the European Union arguments that Canada breached its obligations under the TRIPS Agreement by allowing the manufacturing and stockpiling of pharmaceutical products); *see also* Mary Atkinson, *Patent Protection for Pharmaceuticals: A Comparative Study of the Law in the United States and Canada*, 11 PAC. RIM L. & POL'Y J. 181, 205 (2002) (stating the European Union argued that Canada discriminated against the pharmaceutical patent holder by allowing acts of infringement that are not permitted against other types of inventions).

195. *See* TRIPS Agreement, *supra* note 189, at art. 7 (establishing that the protection and enforcement of intellectual property rights should be conducive to social and economic welfare, and to a balance of rights and obligations); *see also id.* at art. 8 (providing that members may formulate or amend laws and regulations to promote the public interest in sectors of vital importance to their socio-economic and technological development).

196. *See* Canada Panel Report, *supra* note 194, at ¶ 7.24 (explaining that Canada views TRIPS's goal to be to balance intellectual property rights and other socio-economic policies); *see also* Atkinson, *supra* note 194, at 198 (stating that the Canadian government has made great strides in establishing a more balanced system of patent protection for pharmaceutical companies).

The panel acknowledged that there was a basic balance in TRIPS.[197] Both the goals and the limitations stated in Articles 7 and 8 must be borne in mind when seeking to create this balance, along with the object and purpose of other TRIPS provisions.[198] However, the panel reserved any further discussion of the content and implications of Article 7, thereby leaving room for further interpretation.[199] In *Canada-Patent Protection of Pharmaceutical Products*, the Appellate Body did not determine the application of Article 7 and 8.[200] In its view, those two provisions still need interpretation.[201] In *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, the WTO panel did not address or interpret Articles 7 and 8.[202] Therefore, question remains as to the interpretation of the content, meaning, and application of the two provisions. Despite the lack of interpretation, however, these two cases still suggest that TRIPS recognizes and seeks to promote "balance" in intellectual property law.

Given this lack of interpretation of Articles 7 and 8, the question arises as to what instrument or model could be used to balance intellectual property rights or monopoly power without furthering their interpretation. Because intellectual property laws create intellectual property rights or monopoly power, the balancing and controlling mechanism should be a regulation. In other words, a law should balance or challenge another law. Thus, other WTO regulations, international laws, or national laws should be used to balance and control intellectual property rights or monopoly power. If a law can be used to balance another law, the next question should be what law should balance intellectual property rights or monopoly power.

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197. *See* Canada Panel Report, *supra* note 196, at ¶ 7.25 (acknowledging that the European Union did not dispute the TRIPS purpose of achieving a balance within the intellectual rights system between important national policies); *see also* Andrea M. Curti, Note, *The WTO Dispute Settlement Understanding: An Unlikely Weapon in the Fight Against AIDS*, 27 AM. J.L. & MED. 469, 483 (2001) (addressing the Panel's conclusion that the goals and limits in Article 7 and 8 would be a factor in its interpretation of other provisions in the TRIPS Agreement).

198. *See* Canada Panel Report, *supra* note 196, at ¶ 7.26 (addressing the Panel's determination that Articles 7 and 8 must be borne in mind when examining the scope of Article 30); *see also* Markus Nolff, *Compulsory Patent Licensing in View of the WTO Ministerial Conference Declaration on the TRIPS Agreement and Public Health*, J. PAT. & TRADEMARK OFF. SOC'Y 133, 136 (2002) (arguing that the Panel was imprecise when it stated that Articles 7 and 8.1 must be borne in mind when examining the scope of Article 30).

199. *See* Canada Panel Report, *supra* note 196, at ¶ 7.62 (explaining that the Panel reserved discussion on the implications of Article 7, thereby leaving room for interpretation); *see also* Chakravarthi Raghavan, *EC-Canada Patent Ruling Raises More Questions Over DSU,* THIRD WORLD NETWORK (Oct. 17, 2010), http://www.twnside.org.sg/title/raises.htm (arguing that the Panel has not explained why the ordinary meaning of the relevant TRIPS provisions are ambiguous).

200. *See* CARLOS CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 102 (Oxford Univ. Press 2007) (stating that the panel avoided elaborating on the implication of Articles 7 and 8.1); *see also* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1021 (2009) (quoting Carlos Correa).

201. *See* Panel Report, *Canada—Term of Patent Protection*, ¶ 101, WT/DS170/AB/R (Sept. 18, 2000) (admitting that Article 7 and Article 8 of the TRIPS Agreement still await interpretation).

202. *See* Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) (lacking interpretation of Article 7 or 8 in the TRIPS discussion); *see also* Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727, 765 (2011) (addressing the disappointment in the Panel's lack of attention to Articles 7 and 8).

III. Competition Law as the Model of Separation or Balance of Monopoly Power

Competition law is designed to promote competition or economic efficiency.[203] Competition law is a form of government intervention in the economy, intended to increase economic efficiency and increase the total economic welfare of society.[204] It prohibits anticompetitive conduct—that is, conduct that restricts or is likely to restrict output and increase price, impede market expansion or new entry, reduce product or service quality, or stifle innovation.[205] As a result, the characteristics and features of competition law regimes usually include the prohibition of: (1) anti-competitive (horizontal and vertical) agreements; (2) abuse of dominance or monopolization; and (3) mergers and acquisitions.[206]

A. Interaction Between Intellectual Property Law and Competition Law

The relationship between intellectual property law and competition law regulations is challenging. Intellectual property law protects the exclusive control and rights of owners, while competition policy represents government efforts to prevent oligopolistic industries from becoming or behaving like monopolies.[207] The question arises whether there is a conflict between intellectual property law and competition policy. Under intellectual property laws, creators or owners are granted exclusive rights to certain assets and their use.[208] Intellectual property laws protect the ability to earn a return on the inventions, so creators or owners are

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203. *See* United Nations Conference on Trade and Development, Geneva, 2004, *Competition, Competitiveness and Development: Lessons From Developing Countries* 28, UNCTAD/DITC/CLP/2004/1 (stating that competition law should enhance economic efficiency and further socio-economic goals).

204. *See* EUGENE BUTTIGIEG, COMPETITION LAW: SAFEGUARDING THE CONSUMER INTEREST 8 (2009) (claiming that the purpose of antitrust law is to improve efficiency of the economy); *see also* KATALIN JUDIT CSERES, COMPETITION LAW AND CONSUMER PROTECTION 3 (2005) (declaring that one of the main purposes of European competition law is to ensure that consumers benefit from the wealth generated by the economy).

205. *See* TERRY WINSLOW, OECD GLOBAL FORUM ON COMPETITION: PREVENTING MARKET ABUSES AND PROMOTING ECONOMIC EFFICIENCY, GROWTH AND OPPORTUNITY 75 (2004) (stating that competition law includes promoting and protecting the competitive process and promoting economic efficiency); *see also* COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY ENFORCEMENT IN THE EU AND NORTH AMERICA 178 (Abel Moreira Mateus & Teresa Moreira eds., 2010) (discussing how competition policy seeks to strike a balance between laws that punish competitive practices and stifle innovation and laws that protect intellectual property rights).

206. *See* EVOLUTION OF COMPETITION LAWS AND THEIR ENFORCEMENT: A POLITICAL ECONOMY PERSPECTIVE 20 (Pradeep S. Mehta ed., 2012) (illustrating that Hungary's competition laws put restrictions on horizontal restrictive agreements, abuse of dominant position, and the control of mergers and acquisitions); *see also* MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 13 (2010) (showing similarities of competition law regimes to include prohibitions of collusive behavior, restrictions of abuse of dominant position, and restrictions of firm mergers).

207. *See* THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY 37 (Steven D. Anderman ed., 2007) (recognizing that despite the potential clash between intellectual property and competition policy both help to achieve improvements in innovation and consumer welfare).

208. *See* U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, at 1 (2007) (stating that intellectual property laws create exclusive rights for creators of new products, providing incentives for innovation); *see also* Heba A. Raslan, *Shari'a and the Protection of Intellectual Property—The Example of Egypt*, 47 IDEA 497, 519 (2007) (noting that under intellectual property law, individuals are granted exclusive rights to what they create, allowing them to exclude others from unauthorized exploitation).

able to benefit from the exclusive rights or monopoly.[209] On the other hand, competition law protects a competitive process by ensuring that markets are not unfairly dominated by a single firm.[210] When a single seller enjoys a single position of economic power or strength, the seller may be able to harm competition and society. For instance, a single seller may charge a higher price, produce less output, reduce output quality, or prevent the entry of competitors into the market.[211]

Today, there is no conflict between intellectual property law and competition policy.[212] A modern theory of the relationship between the two principles is that there is no conflict between monopoly rights under intellectual property law and the existence of market power in competition law.[213] Competition law does not prohibit all types of monopoly.[214] Competition

209. *See* U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, at 1 (2007) (explaining that intellectual property laws allow individuals to earn returns on their necessary innovation investments); *see also* F.M. Scherer, *The Political Economy of Patent Policy Reform in the United States*, 7 J. TELECOMM. & HIGH TECH. L. 167, 201 (2009) (asserting that the ability to earn a return on necessary investments in innovation is protected by intellectual property laws).

210. *See* Alessandro Bertolini, *The Rise of Structuralism in European Merger Control*, 32 STAN. J. INT'L L. 13, 31 (1996) (finding that effective competition is restricted if it is the result of one firm's dominance); *see also* Wayne D. Collins, *The Coming of Age of EC Competition Policy*, 17 YALE J. INT'L L. 249, 253 (1992) (reviewing SIR LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET (1991) and finding it to suggest that dominant firms can disturb common markets thereby making competition law essential to accomplishing efficient allocation of resources and economic integration).

211. *See* Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969) (acknowledging that market power is usually defined as the capacity of a single seller to raise price and impede output, creating a serious concern of harm to competition); *see also* H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L L. 169, 195 (2006) (defining market power as the capability of a single seller to increase price and limit output, enabling those in a dominant position to hinder the maintenance of effective competition).

212. *See* Daniel J. Gifford, *Government Policy Towards Innovation in the United States, Canada, and the European Union as Manifested in Patent, Copyright, and Competition Laws*, 57 SMU L. REV. 1339, 1381–82 (2004) (recognizing that U.S. intellectual property laws have added their own competition policy concerns to their misuse doctrines, resulting in a reduction of possible disputes between intellectual property and antitrust laws). In the early twentieth century, the goals of competition law and intellectual property law were viewed as incompatible: intellectual property law's grant of exclusive rights was seen as creating monopoly that was in tension with competition law's attack on monopoly power. *See* Daniel J. Gifford, *The Antitrust/Intellectual Property Interface: An Emerging Solution to an Intractable Problem*, 31 HOFSTRA L. REV. 363, 364 (2002) (demonstrating that since the beginning of the twentieth century, antitrust laws and intellectual property laws have had inconsistent purposes, because intellectual property laws create exclusive rights that can reach the level of monopolies and antitrust laws foster competition to prevent the formation of monopolies).

213. *See* Kenneth M. Davidson, *Creating Effective Competition Institutions: Ideas for Transitional Economies*, 6 ASIAN-PAC. L. & POL'Y J. 71, 86–88 (2005) (noting the helpfulness of strong policies of intellectual property in fostering competitive market economies); *see also* Nitika Gupta & Gitanjali Shankar, *Intellectual Property and Competition Law: Divergence, Convergence, and Independence*, 4 NUJS L. REV. 113, 115–17 (2001) (analyzing the increasingly accepted theory that protection of intellectual property rights does not contradict free market competition).

214. *See* John Temple Lang, *"Potential" Downstream Markets in European Antitrust Law: A Concept in Need of Limiting Principles*, 7 COMPETITION POL'Y INT'L 106, 112 (2011) (establishing that in the European Union the mere potential for a monopoly does not preclude the licensing of an intellectual property right); *see also* Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 19 AM. U. L. REV. 769, 798–99 (maintaining that, under U.S. federal law, monopolization constitutes an offense only when the alleged monopoly achieved its status through illicit practices).

law usually prohibits monopolies illegally designed to exclude competition and monopoly abuse.[215] If a monopoly comes from special skills, efforts, and legal means it is lawfully acceptable under competition policy.[216] In intellectual property, exclusive rights do not create the type of monopoly that falls within the definition of a prohibited monopoly.[217] Monopoly power based on intellectual property rights comes from a special skill and lawful process.[218] It is sometimes considered a reward for a special skill and effort.[219] This monopoly power also exists when other people have tried to enter into an activity that is protected by barriers.[220] It helps creators or owners extract profits from people who want to use inventions.[221] Therefore, monopoly power based on intellectual property rights is not a type of monopoly that competition law prohibits.[222]

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215. *See* Standard Oil Co. v. United States, 221 U.S. 1, 16–17 (1911) (holding that the American Sherman Anti-Trust Act prohibits monopolies only when monopolization occurs at the cost of other companies' access to the marketplace); *see also* Tom C. Hodge, *Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101*, 3 WM. & MARY BUS. L. REV. 59, 72–73 (2012) (explaining that the likelihood of monopolies restricting competition and damaging the overall market is limited).

216. *See* Daryl Lim, *Copyright Under Siege: An Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works*, 17 ALB. L.J. SCI. & TECH. 481, 485 (2007) (demonstrating that it is possible for there to be a limited legal monopoly despite competition law); *see also* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 930−31 (2001) (explaining that it is legal under antitrust law to gain a monopoly via innovation, effort, and other lawful means).

217. *See* Emanuela Arezzo, *Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared*, 24 J. MARSHALL J. COMPUTER & INFO. L. 455, 477 (2006) (asserting that under American law intellectual property law confers a legal monopoly); *see also* Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 414−15 (2003) (arguing that the exclusive rights conferred by international property law do not constitute an unlawful monopoly, but rather a general property right).

218. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979) (postulating that the drafters of the Sherman act did not condemn monopolies that were the result of superior skill and intelligence); *see also* WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 6:5 (2012) (arguing that a monopoly that stems from being the most effective competitor should not be penalized).

219. *See* Meir Perez Pugatch, *Introduction: Debating IPRs*, *in* THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY 1, 4 (Meir Perez Pugatch ed., 2006) (listing the rewards of intellectual property: rewarding the inventor for making his work public and thereby allowing the society to access something that would otherwise have remained secret)*; see also What Is Intellectual Property?*, WORLD INTELL. PROP. ORG. (Oct. 13, 2012), http://www.wipo.int/freepublications/en/intproperty/450/wipo_pub_450.pdf (explaining that intellectual property law was designed to reward the inventor for making his work public and thereby allowing society to access something that would otherwise have remained secret).

220. *See* CONRAD M. SHUMADINE & MICHAEL R. KATCHMARK, ANTITRUST AND THE MEDIA 41 (Practicing Law Institute 2001) (highlighting Judge Posner's view that barriers are necessary for monopoly power)*; see also* WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 6:4 (2012) (affirming that in a market with high entry barriers, proof of a high percentage of total industry sales may be indirect evidence of monopoly power).

221. *See* Allan N. Littman, *Monopoly, Competition and Other Factors in Determining Patent Infringement Damages*, 38 IDEA 1, 14 (1997) (suggesting that a patent monopoly may give rise to a potential for profit). For example, people may have to purchase the intellectual property rights or obtain a license or other authority to use them. *See* KAREN A. BUTCHER, INTELLECTUAL PROPERTY ISSUES MARCH 2008 REVISION 5 (2008) (emphasizing that each country has its own requirements for assigning intellectual property rights and that they should work to minimize costs for the seller and buyer).

222. *See* U.S. CONST. art. I, § 8, cl. 8 (indicating that patents and copyrights give authors and inventors the exclusive right to their work); *see also* Arezzo, *supra* note 220, at 477 (asserting that the U.S. Constitution directly protects intellectual monopolies).

However, competition law may still be used to control or prohibit anti-competitive practices, activities, transactions, and agreements involving intellectual property rights.[223] Intellectual property laws protect creators or owners from other competitors who want to appropriate or use products protected by intellectual property rights.[224] By contrast, competition law protects competition by disciplining anti-competitive practices and preventing monopolies and abuse of monopolies.[225] Creators and owners are not allowed to exercise their monopoly power in a manner that abuses market power or has anticompetitive effects.[226] More specifically, creators and owners cannot illegally exclude all other competition.[227] For instance, if a patentholder unilaterally and unconditionally refuses to license its patent, it may be considered an abuse of monopoly power under competition law and cause harm to society.[228] Competition law should then be used as a mechanism for balancing and controlling the exercise of exclusive rights and monopoly power in particular activities or transactions.

B. Intellectual Property Licensing and Competition Law

Exercising intellectual property rights may affect competition law through the use of licensing agreements. A licensing agreement may constitute misuse under competition law even

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223. *See* Donna M. Gitter, *The Conflict in the European Community Between Competition Law and Intellectual Property Rights: A Call for Legislative Clarification of the Essential Facilities Doctrine*, 40 AM. BUS. L.J. 217, 220 (2003) (demonstrating that competition law wants to achieve economic efficiency by promoting competition rather than monopoly).

224. *See* Ian David McClure, *Commoditizing Intellectual Property Rights: The Practicability of a Commercialized and Transparent International IPR Market and the Need for International Standards*, 6 BUFF. INTELL. PROP. L.J. 13, 14 (2009) (adding that intellectual property laws afford rights to ideas, giving value to intangible assets in the legal system); *see also* Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, COLUM. J.L. & ARTS 317, 318 (2011) (noting that American intellectual property rights are grounded in incentive theory that allowing creators to profit from their work, gives them an incentive to create).

225. *See* Thomas K. Cheng, *A Convergence and Its Discontents: A Reconsideration of the Merits of Convergency of Global Competition Law*, 12 CHI. J. INT'L L. 433, 436 (2012) (stating that competition laws facilitate competition by prohibiting anti-competitive conduct by firms); *see also* Warren S. Grimes, *Wealth Distribution, Free Trade, and Competition Law*, 18 SW. J. INT'L L. 65, 68 (2011) (confirming that the goal of competition law is to protect against the distortions that powerful firms cause when they seek an unfair advantage).

226. *See* Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP,* GEO. L.J. 2055, 2059 (2012) (confirming that courts do not treat every intellectual property right as a monopoly but that the law recognizes the actual effects of such monopolies in conceiving remedies); *see also* Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L.J. 1693, 1700 (2008) (adding that intellectual property rights create monopoly power, but antitrust laws seek to curb the resulting abuses of such monopoly power).

227. *See* KARLA C. SHIPPEY, A SHORT COURSE IN INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS 2 (2001) (stating that laws intended to control monopolies have limited their activities instead of eliminating them).

228. *See* Atari Games v. Nintendo of America Inc., 897 F. 2d 1572, 1576 (Fed. Cir. 1990) (asserting that a patent should not be used improperly); *see also* Haris Apostolopoulos, *Refusal-to-Deal Cases of IP Rights at the Aftermarket in the US and EU Law: Converging of Both Law Systems Through Speaking the Same Language of Law and Economics*, 7 CHI.-KENT J. INT'L & COMP. L. 144, 146 (2007) (illustrating that the unwillingness of intellectual property rights holders to deal decreases competition).

though it contains no illegal terms.[229] The types of provisions in a license that may require the consideration of competition law include: (1) price restrictions or price minimums; (2) market division; (3) export restrictions; (4) product quantity limitations; and (5) compulsory assignment of improvements from a licensee to a licensor.[230] In addition, the requirement that licensee pay royalties even on goods not covered by intellectual property laws or, in unusual circumstances, a reciprocal licensing requirement, often raise competition issues.[231] Sometimes, a licensor imposes restrictions on the license beyond the scope of the intellectual property rights, presumably in lieu of monetary royalties, that raise competition concerns.[232] Further, the licensing agreement may contain provisions that prevent or discourage a licensee from developing, using, or selling any other program, or from competing in any other good or service other than in the use of the licensed program.[233] Competition concerns may also arise when the license forecloses access to competing technologies or facilitates market allocation, or price fixing for any product or service supplied by the licensees.[234]

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229. *See* Chris Marchese, C. Larry O'Rourke, Roger D. Taylor, *A Comparison of International Intellectual Property Licensing Guidelines in the United States and Japan*, 9 UCLA PAC. BASIN L.J. 104, 105 (highlighting that agreements with anticompetitive effects are outlawed by U.S. antitrust laws); *see also* Tim Wu, *Bad Uses of Good Laws*, N.Y. TIMES, Oct. 10, 2012, http://www.nytimes.com/roomfordebate/2012/10/10/does-the-law-support-inventors-or-investors/intellectual-property-law-works-until-it-is-stretched (explaining how patents threaten competition).

230. *See* Philip Mendes, WIPO, *What Competition Law Issues Are There in Licensing?, available at* http://www.wipo.int/sme/en/documents/pharma_licensing.html (listing various provisions in a license); *see also* Gregory J. Battersby, *Intellectual Property Under the Bright Lights of Broadway,* 67 N.Y. ST. B.J. 28, 30 (June 1995) (mentioning provisions that are important for license agreements).

231. *See* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations,* 90 CAL. L. REV. 1889, 1966 (2002) (noting that certain license terms have reciprocal agreements); *see also* Brandon M. Villery, Note, *The Transferability of Non-Exclusive Copyright Licenses: A New Default Rule for Software in the Ninth Circuit?*, 22 HASTINGS COMM. & ENT. L.J. 155, 169 (1999) (confirming owner reserves right to collect royalties).

232. *See* Nellie A. Fisher, *The Licensee's Choice: Mechanics of Success Fully Challenging a Patent Under License,* 6 TEX. INTELL. PROP. L.J. 1, 29 (1997) (exemplifying how licensors can also get the issuance of a preliminary injunction and escrow accounts); *see also* Meg Buckley, Note, *Licensing Intellectual Property: Competition and Definitions of Abuse of a Dominant Position in the United States and the European Union*, 29 BROOK. J. INT'L L. 797 (2004) (analyzing how refusal to license results in restriction of competition).

233. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.3, ex. 1 (1995) (demonstrating that license agreements may restrict the licensee from developing their own competing technologies); *see also* WORLD INTERNATIONAL PROPERTY ORGANIZATION, EXCHANGING VALUE: NEGOTIATING TECHNOLOGY LICENSING AGREEMENTS: A TRAINING MANUAL 1, (2005) (affirming that, in some license agreements, the licensee may be restricted from selling the licensed product).

234. *See* United States v. U.S. Gypsum Co., 333 U.S. 364, 389 (1948) (holding that industry-wide license agreements made with the intent to fix prices and control distribution are sufficient to establish a prima facie case of conspiracy); *see also* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.3, ex. 1 (1995) (suggesting that some license agreements force the price-fixing of the licensee's competitive product or service).

C. Competition Approach in Licensing Agreements Under TRIPS

Licensing agreements with developing countries have increased dramatically over past decades.[235] Licensing agreements play a major role in the relations of transnational corporations from developed countries and developing countries.[236] Most technologies or innovations that developing countries need for their economic development are in the hands of private firms in developed countries.[237] The transfer of technology to developing countries has been considered a fundamental and important area with respect to their relationship with transnational corporations.[238] However, domestic firms in developing countries have difficulty in terms of licenses, which leads to anticompetitive effects. Foreign licensors of intellectual property have market power per se and exercise their rights in a manner contrary to the interests of licensees.[239] Foreign licensors also create more restrictions than intellectual property laws provide, or impose a grant-back provision in the licensing agreements.[240] This may cause a negative impact on licensees and people in developing countries.

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235. *See* U.N. CTR. ON TRANSNAT'L CORPS., LICENSE AGREEMENTS IN DEVELOPING COUNTRIES, at 3, U.N. DOC. ST/CTC/78, U.N. Sales No. E.87.II.A.21 (1987) (stating that licensing agreements with developing countries have increased over the past decade); *see also* W.G. PARK & D. LIPPOLDT, INTERNATIONAL LICENSING AND THE STRENGTHENING OF INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES, OECD TRADE POLICY PAPER NO. 10, at 5 (2004) (confirming that developing countries with patent reform experienced a great increase in licensing agreements with developed nations in the past decade).

236. *See* U.N. DEP'T OF ECON. & SOC. DEV., WORLD INVESTMENT REPORT 1992: TRANSNATIONAL CORPORATIONS AS ENGINES OF GROWTH, at 140, U.N. DOC. ST/CTC/130, U.N. Sales No. E.92.II.A.19 (1992) (stressing that transnational corporations play a major role in developing countries); *see also* U.N. CTR. ON TRANSNAT'L CORPS., TRANSNATIONAL CORPORATIONS IN THE POWER EQUIPMENT INDUSTRY, at 6, U.N. DOC. ST/CTC/22, U.N. Sales No. E.82.2.A.11 (1982) (noting that transnational corporations have played a major role in developing countries through license agreements).

237. *See* U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD ECONOMIC AND SOCIAL SURVEY 2011: THE GREAT GREEN TECHNOLOGICAL TRANSFORMATION, at ix, U.N. DOC. ST/ESA/333, U.N. Sales No. E.2011.50.Rev.1 (2011) (asserting that most technologies that developing countries need are in the hands of private firms); *see also* NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF PATENT RIGHTS 163 (2008) (affirming that many developing countries established national laws to protect themselves from abusive licensing agreements with foreign licensors).

238. *See* U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, TRANSNATIONAL CORPORATIONS AND TECHNOLOGY TRANSFER: EFFECTS AND POLICY ISSUES, iii (1987) (noting that the transfer of technology is one of the most important benefits that developing countries seek to derive from their relationship with transnational corporations); *see also* Kabir-Ur-Rahman Khan, Comment, *Transfer of Technology Emerging International Responsibility of Transnational Corporations: Possible Impact of the Uruguay Round at the GATT*, 12 THIRD WORLD LEGAL STUD. 208, 213 (1993) (recognizing that the transfer of technology has had a positive function in international economic transactions).

239. *See* CARVALHO, *supra* note 240, at 163 (explaining that anticompetitive effects arise from the projection of the patentee's unilateral power onto some licensees or consumers with prejudice to others, which gives rise to a unilaterally imposed conspiracy or combination in restraint of trade); *see also* Keith E. Maskus, Symposium, *Taking Stock: The Law and Economics of Intellectual Property Rights: Lessons from Studying the International Economics of Intellectual Property Rights*, 53 VAND. L. REV. 2219, 2234 (2000) (addressing the need for tighter protection of intellectual property rights in foreign countries to reduce the cost of achieving licensing contracts and raise the incentive to license).

240. *See* Richard Gilbert & Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, 28 BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 283, 284–85, 323–24 (1997) (categorizing grantbacks as a specific licensing practice that is an anticompetitive restraint of trade in licensing agreements); *see also* Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 ARIZ. L. REV. 839, 845 (2007) (noting that grantbacks are part of a series of IP licensing practices that the Antitrust Division of the U.S. Department of Justice considers *per se* unlawful and likely to attract scrutiny).

During the Uruguay Round of Negotiation,[241] developing countries pressed for comprehensive authority to prohibit or control licensing practices.[242] As a result of mutual concession, TRIPS established provisions that reflect concerns regarding the potential anti-competitive effects of intellectual property rights, especially licensing practices.[243] TRIPS contains competi-

241. The Uruguay Round of Negotiations was a series of multilateral trade negotiations that concluded in December 1993 with the signing of an agreement in Marrakesh Morocco. The agreement established the World Trade Organization. *See* Dale E. McNiel, *The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imaging a Tariffying Bargain,* 22 YALE J. INT'L L. 345, 354 (1997).

242. *See* TERENCE P. STEWART, 5 THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986-1994): THE END GAME 570 (1999) (revealing that in the GATT negotiations, less developed countries pressed for comprehensive authority to prohibit or control licensing practices); *see also* Jennifer Suzanne Bresson Bisk, Note, *Book Search Is Beautiful?: An Analysis of Whether Google Book Search Violated International Copyright Law*, 17 ALB. L.J. SCI. & TECH. 271, 301 (2007) (acknowledging that the Uruguay Round of Negotiations of the General Agreement on Tariffs and Trade (GATT) has created regional and bilateral agreements to protect intellectual property rights as well as copyrights).

243. *See* Stewart, *supra* note 242, at 570 (reviewing article 40 of the TRIPS agreement, which allows member states to adopt appropriate measures to prevent or control licensing practices); *see also* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and the Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 23 (2004) (describing the TRIPS Council's efforts to conduct transparent reviews of national implementation measures, and provide members with a forum for consultations on compliance issues and a Dispute Settlement Body with the power to sanction treaty violations).

tion rules involving licensing practices in Articles 40[244] and 31(k).[245] Article 40 of TRIPS specifically deals with the control of anti-competitive practices in licensing agreement. Article 40(1) of TRIPS acknowledges that some licensing practices or conditions pertaining to intel-

244. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 40, *date of effect* January 1, 1995, 1869 U.N.T.S 299 (hereinafter TRIPS Agreement) (addressing the issues that arise from anti-competitive practices with regards to intellectual property, and what member states may do to prevent the adverse effects of these practices). Article 40 states:

> 1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
>
> 2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.
>
> 3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.
>
> 4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

245. *See* TRIPS Agreement, *supra* note 244, at art. 31 (discussing regulations of the agreement that are aimed to prevent the adverse effects that may be caused by anti-competitive practice). Article 31 states:

> Where the law of a Member allows for other use the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:
>
> (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.

lectual property that restrain competition may have adverse effects on trade and can impede the transfer and dissemination of technology.[246] Under Article 40(2), member countries may adopt appropriate measures to prevent or control licensing practices or conditions "that may in particular cases constitute an abuse of intellectual property rights having an adverse affect on competition in the relevant market."[247] Thus, member countries may adopt appropriate measures to prevent or control practices such as exclusive grant-back conditions, conditions preventing challenges to validity, and coercive package licensing. Article 40(3) of TRIPS also provides for consultations between member countries regarding intellectual property rights owners who "undertak[e] practices in violation of [the] requesting Member's laws and regulations" relating to anticompetitive practices.[248] In addition to Article 40, Article 31(k) acknowledges that compulsory licensing is a remedy available to correct such unilateral anticompetitive practice. Article 31(k) waives certain conditions in the event of compulsory patent licensing to remedy anticompetitive practices.[249]

The competitive approach prepared in Article 40 and Article 31(k) is used to remedy anticompetitive practices in licensing agreements. However, those provisions are not as effective as expected. The language of Article 40 is vague and likely to create disputes over competition regulation in intellectual property rights without providing for a means of disciplining abuses.[250] Article 40(1) does not indicate any consensus on appropriate competition law responses to intellectual property exploitation. Such an ambiguity would provide member countries with broad latitude to define the concept of "adverse effect on competition."[251] Although TRIPS allows member countries to restrain anti-competitive practice with appropri-

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246. *See* TRIPS Agreement, *supra* note 244, at art. 40(1) (stating the agreement's recognition that certain licensing practices may have adverse effects on trade and the dissemination of technology); *see also* Tu Thanh Nguyena & Hans Henrik Lidgard, *The CFI Microsoft Judgment and TRIPS Competition Flexibilities*, 16 CURRENTS: INT'L TRADE L.J. 41, 45 (2008) (discussing how article 40(1) of TRIPS recognizes that some licensing practices are anti-competitive).

247. *See* Walter O. Alomar-Jimenez, *Harmonizing EBAY*, 1 U. P.R. BUS. L.J. 17, 30 (2010) (noting that under article 40(2) of the agreement, WTO members can adopt measures to prevent practices that constitute abuses of intellectual property rights).

248. *See* TRIPS Agreement, *supra* note 244, at art. 40(3).

249. *See* Nguyena & Lidgard, *supra* note 246, at 44 (holding that in cases of compulsory patent licensing, Article 31(k) waives certain conditions); *see also* J. H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay Round*, 20 BROOK. J. INT'L L. 75, 103 (1993) (explaining that Article 31(k) exempts a compulsory license if it corrects an anti-competitive practice).

250. *See* KEITH EUGENE MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 24 (2000) (holding that the vague language of Article 40 can potentially create disputes over competition regulation without properly disciplining abuses); *see also* Jason A. Barron, Note, *Genetic Use Restriction Technologies: Do the Potential Environmental Harms Outweigh the Economic Benefits?,* 20 GEO. INT'L ENVTL. L. REV. 271, 293–94 (2008) (finding that the vague language of Article 40 raises questions regarding its scope).

251. *See* Daya Shanker*, Argentina-US Mutually Agreed Solution, Economic Crisis in Argentina and Failure of the WTO Dispute Settlement System*, 44 IDEA 565, 574 (2004) (stating that Article 40(2) of the TRIPS Agreement leaves it to the Member's discretion to identify what conditions constitute an abuse of rights that could adversely affect relevant market competition); *see also* Stephen Yelderman, *International Cooperation and the Patent-Antitrust Intersection*, 19 TEX. INTELL. PROP. L.J. 193, 216 (2011) (holding that member states are given great latitude in determining which practices constitute abuse of intellectual property rights).

ate measures under Article 40(2), no measures are established to guide member states on how to deal with such practices.[252] This provision attempts to address abuses using competition principles that developed countries normally recognize.[253] Article 40(2) also lists three examples of anticompetitive practices: (1) exclusive grant back conditions; (2) conditions preventing challenges to validity; (3) and coercive package licensing.[254] Member countries are still stuck in anticompetitive practices, however, because the list seems strictly illustrative. Moreover, Article 31(k) raises an issue concerning adequate requirements. The provision qualifies the requirement for adequate remuneration by providing that the need to correct anti-competitive practices may be taken into account by determining the appropriate compulsory licensing fee.[255] Nevertheless, it is not clear how to explain this provision or how to calculate remuneration paid to the patentee.[256]

D. Analysis of Competition Approach Under TRIPS

1. The Purpose and Objective of Article 40

Article 40 of TRIPS affirms the legality of controlling anti-competitive practices in contractual licenses.[257] This provision does not explicitly state the purpose and objective of control of anti-competitive practices in contractual licenses, which is probably why Article 40 is not effective or applicable. Therefore, it is necessary to clarify and understand the purpose and objective of Article 40, in order to apply it accurately and completely. In *Canada-Patent Protection of Pharmaceutical Products*, the panel affirmed that the goals and limitations in Articles 7

252. *See* SIMON WALKER, TRIPS SUSTAINABLE DEVELOPMENT AND THE PUBLIC INTEREST 18 (2001); *see also* Yelderman, *supra* note 251, at 217–18 (reasoning that any requirements or guidelines that actually do exist are extremely minimal, so the TRIPS requirement can easily be satisfied).

253. *See* CARLOS CORREA & ABDULQAWI YUSUF, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: TRIPS 322 (Aspen Publishers, Inc., 2008) (noting the TRIPS agreement enables countries to control anti-competitive practices); *see also* SIMON WALKER, THE TRIPS AGREEMENT: SUSTAINABLE DEVELOPMENT AND THE PUBLIC INTEREST 18 n.51 (IUCN Publications Services Unit, 2001) (explaining the TRIPS agreement guides states on how to deal with anti-competitive practices).

254. *See* KEITH E. MASKUS & MOHAMED LAHOUEL, COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES 602 (2000) (listing three examples of potentially abusive licensing practices under Article 40).

255. *See Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels,* CDIP/5/4 Rev. 155 (Aug. 18, 2010) (noting patentees shall be paid adequate remunerations to correct the anti-competitive practice); *see also* Joan Costa-Font & Aaron Burakoff, *An Overview of Progress in the International Regulation of the Pharmaceutical Industry*, 1 PIERCE L. REV. 103, 105–06 (2002) (stating the TRIPS agreement requires adequate remunerations to correct anti- competitive practices).

256. *See* LIBER AMICORUM & JOSEPH STRAUS, PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 123 (Josef Drexel et al. eds., 2009); *see also* Rojina Thapa, *Waiver Solution in Public Health and Pharmaceutical Domain Under TRIPS Agreement*, 16 KATHMANDU J. INT'L & PROP. RTS. 1, 2, 4 (2011) (recognizing the difficulty of calculating remunerations paid to patentee).

257. *See* Haris Apostolopoulos, *Anti-Competitive Abuse of IP Eights and Compulsory Licensing Through the International Dimension of the TRIPS Agreement and the Stockholm Proposal for Its Amendment*, 6 RICH. J. GLOBAL L. & BUS. 265, 267 (2007) (noting Article 40 addresses the anti-competitive practices and conditions of business practices); *see also* Sujitha Subramanian, *EU Obligation to the TRIPS Agreement: EU Microsoft Decision*, 21 EUR. J. INT'L L. 997, 1008 (2011) (explaining that Article 40 complements and elaborates the principal of recognizing and restraining anti-competitive conduct).

and 8, as well as other provisions of TRIPS, must be kept in mind when applying Article 40.[258] This assumes that Articles 7 and 8 may be used as a key for interpreting and implementing Article 40, and other provisions under TRIPS.

Furthermore, there is a strong connection between Articles 8(2) and 40(2) of TRIPS. Article 8(2) allows WTO Members to take appropriate measures to prevent the abuse of international property rights by right-holders, or resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology.[259] Article 40(2) allows member countries to adopt measures to prevent or control licensing practices that cause an abuse of intellectual property rights having an adverse effect on competition.[260] Because Article 40(2) is consistent with Article 8(2), it is possible to conclude that Article 40(2) acts as a substitute for Article 8(2) in order to balance and control the exercise of intellectual property rights or monopoly power, especially in licensing agreements. Thus, it is not surprising that both provisions share the same purpose and objective.[261]

If Article 40 is considered together with Articles 7 and 8, it could mean that Article 40's objective is to balance or control the exercise of intellectual property rights in licensing agreements. It could also mean that competition law may be used to balance and control the exercise of intellectual property rights in licensing agreements. Competition law is considered an instrument for preventing an adverse effect caused by the abuse of intellectual property rights.[262] However, it is important to note that competition law will not be used to reduce the level of intellectual property protection below the minimum standards contained in TRIPS. As a result, Article 40, which allows member countries to take measures to prevent anticompetitive abuses of intellectual property rights in the case of licensing agreements, should be considered a balance of intellectual property rights in the light of Articles 7 and 8.

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258. *See* Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.25 WT/DS114/R (Mar. 17, 2000) (comparing the objectives and purposes of Article 1.1 and Article 7); *see also* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 981 (2009) (noting that Articles 7 and 8 provide explicit objectives and principles that play important roles in the interpretation and implementation of the Agreement).

259. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 8(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (stating that the legal instruments included in Annex 4 are binding on all members); *see also* Lisa P. Ramsey, *Free Speech and International Obligations to Protect Trademarks*, 35 YALE J. INT'L L. 405, 446–47 (2010) (describing the discretion States have to use public interest provisions to limit intellectual property rights).

260. *See* TRIPS Agreement, *supra* note 259 at art. 40(2) (clarifying that the instruments are an integral part of the Agreement).

261. *See* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1017 (2009) (noting the close connection between Article 8 and Article 40); *see also* Marco Ricolfi, *The First Ten Years of the TRIPS Agreement: Is There an Antitrust Antidote Against IP Overprotection Within TRIPS?*, 10 MARQ. INTELL. PROP. L. REV. 305, 311–12 (2006) (discussing the interplay between Article 8(2) and Article 40(2)).

262. *See* Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 31–32 (2004) (describing the link between the abuse of intellectual property rights and domestic competition laws); *see also* Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 307–08 (1997) (noting that TRIPS provides mechanisms for preventing abuse of intellectual property rights by requiring states to consult each other on competition laws).

2. A List of Competition Practices

Article 40(2) contains a list of practices against which member states may legislate.[263] The question arises whether such a list should be exhaustive or indicative, and what practices should be treated as abuse. In order to address these concerns, it is necessary to consider both sentences in Article 40(2). The first sentence of Article 40(2) is the main provision that allows member countries to regulate licensing practices or conditions that constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.[264] The second sentence expands the scope of the first sentence by allowing members to adopt measures to prevent or control practices.[265] The interpretation of the second sentence must be based on the first sentence. In addition, a short illustrative list of practices treated as abuses in the second sentence includes exclusive grant-back conditions, conditions preventing challenges to validity, and coercive package licensing.[266] The language of the provision clearly states that the short list is used as an example of practices.[267] This suggests that the short list is indicative, rather than exhaustive. Member countries may then be able to establish appropriate measures outside the list in Article 40(2) as long as licensing practices create the abuse of intellectual property rights.

The list provided in Article 40(2) is merely a specific practice used to explain or support a general practice treated as an abuse. The further question is what are the general practices prevented under Article 40(2). This provision does not indicate what practices will be treated as abuses or specify remedial measures that must be taken. Since the second sentence is based on the basic rule in the first sentence, the licensing practices prevented by Article 40(2) are considered the exercise in contractual licenses that create the abuse of intellectual property rights, adversely affecting competition in the market. Further, Article 40(2) should be considered with Articles 7 and 8. Article 40(2) should be broadly interpreted in a way that balances or controls the exercise of intellectual property rights in licensing agreements. Practices under Article 40(2) should have a broad scope in order to cover the overall balance of intellectual property rights in licensing agreements.[268] With the broad scope of the application, abuse of intellectual property

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263. *See* TRIPS Agreement, *supra* note 259 at art. 40(2) (stating that members may legislate against grant-back conditions, conditions preventing challenges to validity, and coercive package licensing); *see also* Wendy N. Duong, *Ghetto'ing Workers with Hi-Tech: Exploring Regulatory Solutions for the Effect of Artificial Intelligence on "Third World" Foreign Direct Investment*, 22 TEMP. INT'L & COMP. L.J. 63, 98 (2008) (discussing the types of licensing provisions that Article 40(2) finds to be anti-competitive and restrictive).

264. *See* TRIPS Agreement, *supra* note 259 at art. 40(2) (articulating that some intellectual property rights restrain competition, which may have an adverse effect on trade).

265. *See id.* at art. 40(2) (stating that members may adopt measures to prevent or control abuse of intellectual property rights that adversely affect competition in the relevant market).

266. *See id.* at art. 40(2) (stating that the Agreement does not prevent legislation that may in some cases be considered an abuse of intellectual property); *see also* Rostam J. Neuwirth, *The Fragmentation of the Global Market: The Case of Digital Versatile Discs (DVDS)*, 27 CARDOZO ARTS & ENT. L.J. 409, 452 (2009) (noting that the list in Article 40(2) is a non-exhaustive list).

267. *See id.* at art. 40(2) (providing that Members may adopt appropriate measures that comply with relevant laws).

268. *See* Duong, *supra* note 263, at 98 (explaining that Article 40(2) gives deference to national standards and does not create an internationally agreed upon standard of what constitutes an anti-competitive practice); *see also* J.H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay* Round, 20 BROOK. J. INT'L L. 75, 107 (1993) (discussing that Article 40(2) allows states to prohibit licensing agreements that constitute an abuse of intellectual property rights and have adverse effect on competition).

rights should mean anything in licensing agreements that is illegal, unfair, or causes an adverse effect on competition. For instance, the term in an agreement that requires a licensee to purchase unpatented materials from a licensor are considered abuse of intellectual property rights and constitute a violation of competition law.[269]

The practices that should be viewed as anticompetitive include: (1) restricting a purchaser of a patented product in the resale of that product; (2) restricting a licensee's freedom to deal in products or services falling outside the scope of intellectual property; (3) agreeing to refrain from granting further licenses to any other person without the licensee's consent; (4) conditioning the license on the payment of royalties in an amount not reasonably related to the licensee's sale of products covered by intellectual property; (5) restricting a licensee's sale of products made by the use of patented process; and (6) requiring a licensee to adhere to any specified or minimum price with respect to the licensee's sale of licensed products.[270] Any of those six licensing practices is an anticompetitive restrictions and is likely constitute an adverse effect on competition.[271] Although they are not listed in Article 40(2), member countries should be able to adopt measures to prevent these anticompetitive practices. Thus, the broad scope of the

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269. *See* Silvia F. Faerman, *Argentina: The New Patent Law and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)*, 8 SW. J.L. & TRADE AM. 157, 169 (2001) (discussing the use of compulsory licenses in relation to the protection of intellectual property rights); *see also* John W. Schlicher, *Antitrust and Competition Law Limits on Licensing Practices in the European Union, Japan, and the United States*, 775 PRAC. L. INST. 305, 317 (2004) (noting that Article 40(2) allows member of the WTO to impose remedies on abusers of compulsory licensing).

270. This list is based on the "Nine No-Nos" list. In the 1970s, the Department of Justice exhibited an approach to licensing arrangements, identifying particular practices that it considered to be forbidden as the "Nine No-Nos" of intellectual property licensing. It is a list of certain types of licensing practices which may cause unreasonable harm to competition. It is also formalistic. However, some experts criticize that the "Nine No-Nos" show an excessive concern to safeguard competition and thereby offset the benefits of innovation. The "Nine No-Nos" were: (1) tying the purchase of unpatented materials as a condition of the license; (2) requiring the licensee to assign back subsequent patent (grantbacks) (3) restricting the right of the purchaser of the product in the resale of the product; (4) restricting the licensee's ability to deal in products outside the scope of the patent; (5) a licensor's agreement not to grant further licenses; (6) mandatory package licenses; (7) royalty provisions not reasonably related to the licensee's sales; (8) restrictions on a licensee's use of a product made by a patented process; and (9) minimum resale price provisions for the licensed products. *See* Bruce B. Wilson, Deputy Assistant Att'y Gen., Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions, Address Before the Fourth New England Antitrust Conference (Nov. 6, 1970); *see also* Howard Ullman, *The Nine "No-Nos" of Patent Licensing: Are You Committing a No-No?*, JD SUPRA (Mar. 5, 2012), http://www.jdsupra.com/legalnews/the-nine-no-nos-of-patent-licensing-a-53573.

271. *See* Richard Gilbert & Carl Shapiro, *Antitrust Issues in Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, *in* 283 BROOKINGS PAPERS: MICROECONOMICS 1997, 286 (1997) (noting the declaration by Bruce Wilson that certain licensing practices would lead to antitrust trouble because of their adverse impact upon competition); *see also* Suzanne Scotchmer, *Competition Policy in the Innovation Context*, *in* INNOVATION AND INCENTIVES 169, 171 (2004) (discussing anticompetitive practices regarding intellectual property rights).

licensing practices would effectively prevent anticompetitive conduct and balance intellectual property rights or monopoly power.

E. International Competition Law or National Competition Law in Article 40

Although intellectual property rights are regulated by both international treaties and national law, there is no specific international competition law, especially in the WTO.[272] However, there has been an attempt to establish such laws within the WTO regime. In 1996, the European Union formally proposed to a WTO Ministerial Conference held in Singapore that a WTO Working Group on the Interaction between Trade and Competition Policy should be created to study and clarify the WTO competition rules.[273] The Singapore Ministerial Declaration established the WTO Working Group with a mandate to study issues raised by WTO members relating to the interaction between trade and competition policy.[274] The issue of competition was also mentioned in paragraphs 23 through 25 of the 2001 Ministerial Declaration.[275] In the 2003 Ministerial Conference, the working group was still instructed to focus on the progress and the negotiating mandates for those issues.[276] In the July package, the issue of competition was dropped out of negotiations, however, and no work toward negotiations on competition occurred within the Doha Round.[277]

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272. *See* Susy Frankel, *WTO Application of "the Customary Rules of Interpretation of Public International Law" to Intellectual Property*, 46 VA. J. INT'L L. 365, 390 (2006) (discussing the object and purpose of the TRIPS agreement and its relation to international trade law and policy); *see also* Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097, 1101 (1995) (explaining the role and historical background of competition policy in the WTO).

273. *See* PETER HOELLER, NATHALIE GIROUARD & ALESSANDRA COLECCHIA, THE EUROPEAN UNION'S TRADE POLICIES AND THEIR ECONOMIC EFFECTS 83 (1998) (stating that it was a European initiative to create the Working Group in Singapore in 1996); *see also* ANESTIS S. PAPADOPOULOS, THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY 211 (2010) (explaining the reasons behind the European Union's proposal to include competition within the WTO framework).

274. *See* World Trade Organization, Singapore Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC (1996) (declaring that the Working Group shall study the interaction between trade and competition policy); *see also* INTERACTION BETWEEN TRADE AND COMPETITION POLICY, http://www.wto.org/english/tratop_e/comp_e/history_e.htm#singapore (last visited Mar. 17, 2012).

275. *See* World Trade Organization, Doha Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1 (2001) (addressing the issue of competition); *see also* WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY (WGTCP)—HISTORY, MANDATES AND DECISIONS, http://www.wto.org/english/tratop_e/comp_e/history_e.htm (last visited Oct. 16, 2012) (summarizing the Doha Conference's conclusions with respect to the relationship between trade and competition policy).

276. *See* World Trade Organization, Preparations for the Fifth Session of the Ministerial Conference, JOB(03)/150/Rev.2 (2003) (deciding that the Working Group would consider possible modalities for negotiation for the 2003 Ministerial Conference); *see also* Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?*, 14 DUKE J. COMP. & INT'L L. 1, 3–4 (2004) (acknowledging that the Doha Ministerial Declaration authorized the Working Group to negotiate on the interaction between trade and competition policy at the 2003 Ministerial Conference).

277. *See* TEXT OF THE "JULY PACKAGE"—THE GENERAL COUNCIL POST-CANCÚN DECISION, http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm (last visited Mar. 17, 2012) (stating that the interaction between trade and competition policy would not form part of the Work Program during the Doha Round); *see also* INTERACTION BETWEEN TRADE AND COMPETITION, http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited Oct. 16, 2012).

Article 40(2) explicitly states that member countries are allowed to specify their legislation licensing practices or conditions that may constitute an abuse of intellectual property rights having an effect on competition.[278] Based on the first sentence of Article 40(2), member countries can adopt any appropriate measures that refer to competition law to prevent or control anticompetitive practices in licensing agreements in light of their regulations.[279] The application of Article 40 requires the competition rules. The lack of the competition rules would make the application of Article 40 more difficult. The question arises whether Article 40 requires international competition laws. Nothing in this provision refers to international competition laws or WTO competition law. Instead, national competition laws are sufficient and appropriate to regulate and control the exercise of intellectual property rights or licensing practices under Article 40. Article 40(2) allows member countries to specify licensing practices in their legislation and adopt appropriate measures to prevent anticompetitive practices, meaning that member countries are free to determine and adopt their competition laws through their legislation.[280] International competition law or policy based on the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) may not fall into the specific purpose of Article 40.

One possible reason that Article 40 does not effectively work as the balance of intellectual property rights is that developing and least developed countries hesitate to adopt serious measures and policies preventing or controlling anticompetitive practices in licensing agreements.[281] Developed countries are still powerful and have strong influence over developing and least developed countries. Developed countries and foreign direct investment bring money, technology, and skills to host countries.[282] Developing countries want to have access to technology, knowledge, and medicines from developed countries.[283] Developing countries seek for-

278. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 40(2), Apr. 15, 1994, 1869 U.N.T.S. 299 (1994) (permitting Members to specify in their respective licensing practices or conditions what may constitute abuse of intellectual property rights that have an adverse effect on relative market competition).

279. *See id.* (providing examples of appropriate measures, including grant-back conditions and conditions preventing challenges to validity and coercive package licensing).

280. *See id.* (permitting Members to adopt measures to prevent anticompetitive practices through their respective legislation).

281. *See* Stephen E. Bondura & Lloyd G. Farr, *Intellectual Property Rights Abroad and at Home After GATT*, S.C. LAW. Sept.–Oct. 1995, at 20 (explaining that many developing countries contend that GATT, the predecessor to the World Trade Organization, exceeded its mandate by playing to developed nations' demands); *see also* Yu, *supra* note 186, at 980 (describing the dissatisfaction of developing countries with the interpretation and implementation of the TRIPS Agreement).

282. *See* Bhavani P. Dhungana, *Foreign Direct Investment and Technological Capability-Building in Least Developed Counties: A Case for Nepal*, *in* BUILDING CAPACITY FOR TECHNOLOGY TRANSFER FOR SMALL AND MEDIUM ENTERPRISES IN LEAST DEVELOPED COUNTRIES 4 (2003) (describing the benefits of foreign direct investments in host countries; *see also* Wolfgang Fikentscher & Hans Peter Kunz-Hallstein, *International Transfer of Technology: A Perspective on the Roles of Antitrust, Competition Law, and Trial*, 9 DEL. L. REV. 37, 48 (2006) (recognizing that some developing countries feel overpowered and exploited by the heavy-handed imposition of developed countries).

283. *See* JAMES ANDREW LEWIS, INTELLECTUAL PROPERTY PROTECTION: PROMOTING INNOVATION IN GLOBAL INFORMATION ECONOMY 23 (2008) (finding that foreign direct investment is a source of money, technology, and skills for the host country); *see also* Mićo Tatalović, *Poorer Countries Seek Assurances on Technology Transfer After Rio+20,* CHEMISTRY WORLD (July 2, 2012), http://www.rsc.org/chemistryworld/2012/07/rio20-leaves-poorer-countries-seeking-technology-transfer-commitments (detailing the struggle of developing countries to achieve assurances of the much-desired technology transfers).

eign direct investment, technologies, and special skills from developed countries because they will help them improve productivity and increase economic growth.[284] Many developing countries provide tax incentives[285] to attract foreign direct investment from developed countries.[286] Applying measures preventing anticompetitive practices in licensing agreements would discourage foreign investment from developed countries and provide less benefit for developing countries. Firms in developed countries may not want to invest or transfer their technology if they lose benefits, especially in their intellectual property rights. As a result, it is not surprising that developing countries prefer foreign investment and technology transfer to a competition approach under Article 40 of TRIPS.[287]

F. Application of National Competition Law to Intellectual Property Licensing Agreements

International competition law is probably not necessary to balance intellectual property rights. By contrast, national competition law is sufficient to do so. In the United States, the role of antitrust law (competition law) relating to intellectual property rights has been controversial for a long time.[288] Intellectual property gains special status from the U.S. Constitution. Article I, Section 8, Clause 8 of the Constitution provides that: "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[289] One hundred

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284. *See* United Nations Conference on Trade and Development, February 16–18, 2011, *Foreign Direct Investment, the Transfer and Diffusion of Technology, and Sustainable Development*, executive summary, http://unctad.org/en/Docs/ciiem2d2_en.pdf (explaining that recently, even the poorest developing nations are experiencing the benefits of foreign direct investment); *see also* Ellen 't Hoen, *Globalisation and Equitable Access to Essential Drugs*, THIRD WORLD NETWORK (Aug.–Sept. 2000), http://www.twnside.org.sg/title/twr120c.htm (detailing the conditions of developing countries, and their dependence on developed nations).

285. Tax incentives for foreign direct investment can take several forms including: (i) low tax rates for foreign investors; (ii) tax holidays; (iii) tax-free zones; (iv) reduction or elimination of withholding taxes; (v) special investment allowances; (vi) accumulation of tax-free reserves; and (vii) accelerated depreciation deductions for foreign investors. *See* Vito Tanzi & Howell Zee, *Tax Policy for Developing Countries,* INTERNATIONAL MONEY FUND (Mar. 2001), http://www.imf.org/external/pubs/ft/issues/issues27/ (discussing the strategy of using tax incentives to draw investors).

286. *See* ALEX EASSON & ERIC M. ZOLT, TAX INCENTIVES FOR FOREIGN DIRECT INVESTMENT 85 (2004) (observing that in 1996 103 countries offered tax incentives to for foreign direct investment); *see also* Zakia Afrin, *Foreign Direct Investments and Sustainable Development in the Least-Developed Countries*, 10 ANN. SURV. INT'L & COMP. L. 215, 217 (2004) (recognizing the growing importance of foreign investments to countries across the world).

287. *See* Nabil Md. Dabour, *The Role of Foreign Direct Investment (FDI) in Development and Growth in OIC Member Countries*, 21 J. ECON. COOPERATION 27, 28 (2000) (noting that nearly all developing nations seek the benefits of foreign direct investments); *see also Intellectual Property Summary,* GLOBAL TRADE NEGOTIATIONS HOME PAGE, http://www.cid.harvard.edu/cidtrade/issues/ipr.html (last visited Oct. 22, 2012) (addressing the negative reaction to TRIPS and its regulations by developing nations).

288. *See* U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition Issued by U.S. Department of Justice and the Federal Trade Commission 15 (2007), http://www.justice.gov/atr/public/hearings/ip/222655.pdf (emphasizing the subsequent resolution of antitrust and intellectual property after historic tensions were transcended); *see also* Susan Sell and Christopher May, *Moments in Law: Contestation and Settlement*, REV. OF INT'L POL. ECON. 467, 486–87 (2001) (synthesizing the history of how patent power was threatened as it became intertwined with antitrust law in the early twentieth century).

289. *See* U.S. CONST. art. 1, § 8, cl. 8.

years later, the government tried to deal with the growth of public concern over powerful business trusts by enacting the Sherman Act.[290] Section 2 of the Act provides that: "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."[291] This difference has created a tension in the enforcement of antitrust laws and intellectual property laws.[292] In recent decades, antitrust law and intellectual property law were viewed as incompatible.[293] In *SCM Corp. v. Xerox Corp.*, the Second Circuit held that the two laws are in conflict. The court found that antitrust laws proscribe unreasonable restraints of competition, and patent laws reward the inventor with a temporary monopoly that insulates him from competition.[294] However, the court concluded that the antitrust laws should be subordinate to principles of intellectual property law when the two are found to conflict.[295] Last, the court held that antitrust law cannot be used to require patent holders to forfeit their basic rights to exclude others from exploiting their patents.[296]

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290. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890); *see also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT X (1967) (discussing how the Sherman Antitrust Act's purpose of confronting monopolies has been difficult to realize despite the issue's simplicity and the Act's straightforwardness).

291. *See* Sherman Act at § 2 (1890); *see generally* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 697–98 (1975) (criticizing the application of Article 2 of the Sherman Antitrust Act in certain predatory pricing contexts).

292. *See* U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition Issued by U.S. Department of Justice and the Federal Trade Commission 1 (2007), http://www.justice.gov/atr/public/hearings/ip/222655.pdf (noting the contradictory aims underpinning antitrust versus intellectual property law); *see also* Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antirust and Intellectual Property*, 68 ANTITRUST L.J. 913, 913 (2010) (arguing that the century-old Sherman Antitrust Act lacks the dynamism to appropriately address modern intellectual property issues).

293. *See* U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition Issued by U.S. Department of Justice and the Federal Trade Commission 1 (2007), http://www.justice.gov/atr/public/hearings/ip/222655.pdf (remarking on the shift in view from the twentieth century that antitrust law and intellectual property law were incompatible); *see also* Adam Macluckie, Comment, *United States v. Microsoft: A Look at the Balancing Act Between Copyright Protection for Software, Intellectual Property Rights and the Sherman Antitrust Act*, 2 HOUS. BUS. TAX L.J. 415, 416 (2001) (stating that at first blush, antitrust laws and intellectual property rights go together like "oil and water").

294. *See* SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981) (holding that "[w]hile the antitrust laws proscribe unreasonable restraints of competition, the patent laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his patented art"); *see also* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, THE FEDERAL ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 3 (2d ed. 2002) (observing that "certain types of conduct with respect to intellectual property may have anticompetitive effects against which the antitrust laws can and do protect").

295. *See* SCM Corp. v. Xerox Corp., 645 F.2d at 1206 (holding "that where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws" and finding that this holding struck an acceptable balance).

296. *See* SCM Corp. v. Xerox Corp., 645 F.2d at 1203 (finding that "[w]here a patent in the first instance has been lawfully acquired, a patent holder ordinarily should be allowed to exercise his patent's exclusionary power even after achieving commercial success").

Recently, antitrust and intellectual property laws are properly perceived as complementary bodies of law that work together to bring innovation to consumers.[297] More specifically, the Department of Justice joined the Federal Trade Commission in issuing Antitrust Guidelines for the Licensing of Intellectual Property.[298] The purpose of the Guidelines is to provide a statement of the enforcement agencies' current antitrust policy with respect to the licensing of patents, copyrights, trade secrets, and know-how agreements.[299] These Guidelines state that antitrust laws and intellectual property laws are not in conflict, but share the common purpose of promoting innovation and enhancing consumer welfare.[300] They will be used reasonably and flexibly to determine the application of antitrust and intellectual property laws. The Guidelines embody three general principles: "(a) the Agencies regard intellectual property as comparable to any other form of property, for the purpose of antitrust analysis; (b) the Agencies do not presume that intellectual property creates market power in the antitrust context; and (c) the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally pro-competitive."[301]

Antitrust Guidelines for the Licensing of Intellectual Property are an important instrument for balancing and controlling the exercise of intellectual property rights or monopoly power imposed by those rights. The Guidelines offer the government's perspective on proper antitrust principles applicable to intellectual property licensing.[302] Based on the Guidelines, the

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297. *See* U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition Issued by U.S. Department of Justice and the Federal Trade Commission 1 (2007), http://www.justice.gov/atr/public/hearings/ip/222655.pdf (remarking on the shift in view from the twentieth century that antitrust law and intellectual property law were incompatible); *see also* Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990) (finding that "the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition").

298. *See* Julian von Kalinowski, *Antitrust and Intellectual Property: An Introduction*, *in* ANTITRUST LAWS & TRADE REGULATION (Matthew Bender & Co., Inc. 2d ed. 2012) (stating that the policy of the Department of Justice and the Federal Trade Commission for the enforcement of intellectual property licenses is set forth in the Antitrust Guidelines for the Licensing of Intellectual Property); *see also* Thomas L. Hayslett III, *1995 Antitrust Guidelines for the Licensing of Intellectual Property: Harmonizing The Commercial Use of Legal Monopolies With the Prohibitions of Antitrust Law*, 3 J. INTELL. PROP. L. 375, 376 (1996) (noting that the Federal Trade Commission and Department of Justice designed the 1995 Antitrust Guidelines to address the common goals of antitrust and intellectual property law).

299. *See* ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2 (1995), http://www.justice.gov/atr/public/guidelines/0558.pdf (recognizing that these Guidelines deal with technology transfer and innovation-related issues that typically arise with respect to patents, copyrights, trade secrets, and know-how agreements); *see also* RICHARD RAYSMAN, LICENSING: FORMS AND ANALYSIS (1999) (concluding that the Agencies' purpose in issuing the IP Guidelines was to provide a statement to the public of the agencies' enforcement policy with respect to the licensing of patents, copyrights, trade secrets and know-how).

300. *See* ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2 (1995), http://www.justice.gov/atr/public/guidelines/0558.pdf (explaining that the intellectual property laws and antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare).

301. *See id.*

302. *See* THE FEDERAL ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY: ORIGINS AND APPLICATIONS 2 (2d ed. 2002) (explaining that the Intellectual Property Guidelines offer the government's perspective on the proper antitrust principles applicable to intellectual property licensing); *see also* Ronald Katz & Adam J. Safer, *Why Is One Patent Court Deciding Antitrust Law for the Whole Country?*, SF37 ALI-ABA 219 (2000) (stating that the U.S. Government's Antitrust/Intellectual Property Licensing Guidelines apply the same antitrust principles to conduct involving intellectual property as they apply to conduct involving any other form of property).

agencies will focus on and consider the exercise of intellectual property rights in licensing agreement that may cause competition harm.[303] The Agencies will examine each licensing practice individually with particular focus on whether it harms competition among entities.[304] This will likely mean that intellectual property rights cannot be exercised in a way that causes competitive harm in society. However, the Guidelines cannot remove judgment and discretion in antitrust law enforcement.[305] The standards set forth in the Guidelines must be applied in unforeseeable circumstances.[306] It is also difficult to determine the exact results of the consideration because each case will be evaluated in light of its own facts.[307]

G. EU Competition Law and Intellectual Property Rights or Monopoly Power

The idea of balancing intellectual property rights or monopoly power in the European Union (EU) is more applicable than in other countries. "Perhaps, the competition law in the EU is the most powerful legal instrument, where sweeping enforcement deeply impacts not only on the cinema market structure but also on the cultural policies designed across Europe."[308] In order to balance intellectual property rights and monopoly power, the European courts have developed a distinction between the existence and exercise of intellectual property rights, so as to allow competition law to be brought to bear in circumstances where there has

303. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 3 (2d ed. 1995) (hereinafter Antitrust Guidelines) (observing that certain conduct related to intellectual property may be considered anticompetitive under antitrust laws); *see also* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 315–16 (2d Cir. 2008) (noting that anticompetitive agreements or practices are presumptively illegal under the Sherman Antitrust Act).

304. *See* Antitrust Guidelines, *supra* note 299, at 3 (describing how antitrust analysis considers the form of intellectual property's market circumstances in its evaluations); *see also* Dickson v. Microsoft Corp., 309 F.3d 193, 208 (4th Cir. 2002) (explaining that the plaintiff was not able to allege facts proving that the two licensing agreements at issue, considered individually, caused harm to competition).

305. *See* Antitrust Guidelines, *supra* note 299, at 1 (reinforcing the role of judgment and discretion in antitrust prosecution); *see also* John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies,"* 34 LOY. U. CHI. L.J. 749, 791 (2003) (discussing how antitrust litigation balances the prosecutorial discretion possessed by the Department of Justice with the judicial duty to determine the appropriate remedy).

306. *See* Antitrust Guidelines, *supra* note 299, at 1 (indicating the applicability of the Guidelines in all unforeseeable circumstances); *but see* Haris Apostolopoulos, *The Copyright Misuse Doctrine on Computer Software: A Redundant Doctrine of U.S. Copyright Law or a Necessary Addition to E.U. Copyright Law*, 24 J. MARSHALL J. COMPUTER & INFO. L. 571, 593 (2006) (implying that the Guidelines typically focus on two specific types of circumstances arising under licensing agreements).

307. *See* Antitrust Guidelines, *supra* note 299, at 1 (predicting how the Guidelines will be applied in future cases); *see also* Eichorn v. AT & T Corp., 248 F.3d 142, 143 (3d Cir. 2001) (emphasizing the fact-specific analysis required for antitrust cases).

308. *See* DAVID WARD, THE EUROPEAN UNION AND THE CULTURE INDUSTRIES: REGULATION AND PUBLIC INTEREST 54 (2008) (emphasizing that the benefits of EU competition law on national policies have been widely unrecognized); *see also* Andre Fieb, *The Introduction of European Union Competition Law and Policy in the New Member States*, 1 LOY. U. CHI. INT'L L. REV. 61, 63 (stating that EU competition policy often conflicts with national principles).

been activity which transcends the legitimate use of these monopoly rights.[309] Nevertheless, the balancing of intellectual property rights or monopoly power in the EU is not based on the Article 40 of TRIPS. Instead, it is clearly stated within the framework established in Article 101 of the Treaty on the Functioning of the European Union.[310] Agreements between two or more firms that restrict competition are prohibited by Article 101.[311] This provision covers a wide variety of anticompetitive behaviors such as cartels.[312]

Article 101(1) more specifically prohibits all agreements that may affect trade between member states and that prevent, restrict, or distort competition within the common market and in particular circumstances.[313] For example, this prohibition applies to agreements that directly or indirectly fix purchase or selling prices or limit or control production, markets, and intellectual property.[314] Then, the clauses in patent and know-how license agreements that prevent licensees from investing in innovative technology were considered in violation of Article 81 (Article 101).[315] Another example is a licensor who imposed an obligation on his licensee to sell complete products that did not include patented components. In this example, the court

309. *See* Meir Perez Pugatch, *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy in* THE REALITIES OF TRIPS, PATENTS AND ACCESS TO MEDICINES IN DEVELOPING COUNTRIES 177 (Eric Noehrenberg ed. 2006). *But see* Alan Devlin et al., *Success, Dominance, and Interoperability*, 84 IND. L.J. 1157, 1157 (2009) (describing how the EU at times places the welfare of the consumer over the protection of intellectual property rights).

310. *See* Consolidated Version of the Treaty on the Functioning of the European Union, tit. 7, art. 101(1), Mar. 30, 2010, 2010 O.J. (C 83) 47 (hereinafter TFEU) (setting forth regulations and restrictions upon competition in the European Union's internal market).

311. *See id.* (affirming that collusion between independent market operates with the intention to restrict competition is prohibited); *see also* Erika Szyszczak, *Controlling Dominance in European Markets*, 33 FORDHAM INT'L L.J. 1738, 1740–42 (2010) (noting that Art. 101 of the TFEU was a catalyst for European market liberalization).

312. *See* TFEU supra note 310 at art. 101(1) (highlighting EU competition policy applies to both horizontal and vertical agreements); *see also* Kfir Abutbul, *The U.S. and E.U. Approaches to Competition Law—Convergent Or Divergent Paths?* 17 COLUM. J. EUR. L. 101, 109 (2011) (claiming that the EU regulates larger firms heavier than smaller firms who enjoy less market control).

313. *See* TFEU supra note 310 at art. 101(1).

314. *See* Commission Notice, *Guidelines on Vertical Restraints*, 2010 O.J (C 130/1), 130/45 (explaining resale maintenance as falling under Article 101(1)); *see also* JONAS KOPONEN, 1-1 EUROPEAN COMPETITION LAWS § 1.02 at 8 (recognizing that anything that distorts the normal setting of prices on the market or ultimately affects customers adversely represents a hard-core restriction).

315. *See* KLAUS JENNEWEIN, INTELLECTUAL PROPERTY MANAGEMENT 112–13 (2006) (discussing that employee know-how can expand and evolve for the benefit of further innovation, so to the extent that companies can try to limit the free flow of know-how it is through creating long-lasting labor agreements); *see also* Commission Notice, *Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements*, § 6.1 ¶ 121, 2004 O.J. (C 101/02) (explaining that the hardcore restrictions contained in Articles 4 and 5 of the TTBER are aimed at ensuring that block incentive agreements do not reduce the incentive to innovate).

may hold that such an obligation restricts competition in the market and violates Article 81 (Article 101).[316]

The idea of balancing intellectual property rights or monopoly power does not mean a complete restriction on monopoly power imposed by intellectual property rights.[317] This would discourage new innovation and creation.[318] Article 101(3) and the Technology Transfer Block Exemption Regulation (TTBER)[319] establish an exemption from the strict rule under Article 101(1), which reduces a strong level of balance or restriction. A flexible balance or restriction in Article 101(3) and TTBER would help and encourage innovation and invention

316. *See* Commission Notice, *Guidelines on the Applicability of Article 101 of the TFEU to Horizontal Co-operation Agreements*, ch. 4.3, 2011 O.J. (C 11/1) (discussing how joint productions agreements in an upstream market can raise prices in the downstream market and thereby force other upstream competitors out of the market); *see also* Commission Notice, *Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements*, § 2.5 ¶ 187, (2004 O.J. (C 101/02) (noting that in license agreements between competitors restrictions requiring a licensee to produce under the license only for incorporation into his own products prevents him from being a supplier of components, which can have serious negative effects on the market and therefore should be prohibited).

317. *See* Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1997) (holding that the decision to exclude others from using your intellectual property is a presumptively valid business judgment); *see also* Mark R. Patterson, *When Is Property Intellectual? The Leverage Problem*, 73 S. CAL. L. REV. 1133, 1138 (2000) (explaining that intellectual property rights grant the owner limited monopoly rights).

318. *See* U.S. CONST. art. 1, § 8, cl. 8 (granting Congress the power to grant exclusive rights to inventors for their discoveries in order to promote the progress of science and the useful arts); *see also* KAMIL IDRIS, INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH 3 (2004) (noting that intellectual property rights are a form of reward used as an incentive to create and invent new things).

319. The Technology Transfer Block Exemption Regulation, which came into force on May 1, 2004, and which is accompanied by a set of guidelines on the application of Article 81 (101) to technology transfer agreement. The TTBER also represented a more permissive approach on the part of the Commission to patent licensing agreements, allowing parties greater freedom. *See* Commission Regulation 772/2004, 2004 J.O. (L 123) 11 (explaining that Article 81(3) is aimed at simplifying the process to allow more innovation); *see also* Fiona Carlin & Stephanie Pautke, *The Last of Its Kind: The Review of the Technology Transfer Block Exemption Regulation*, 24 NW. J. INT'L L. & BUS. 601, 602 (2004) (explaining that the TTBER allows the member states of the E.U. the power to review agreements).

in intellectual property.[320] However, those provisions must be applied in a strict and narrow scope to maintain the full allocation and balance of monopoly power.

Conclusion

Based on the success of TRIPS, intellectual property right protection will be stronger in the twenty-first century. However, strong protection will increase inequalities between developed countries and developing countries. Without the limitation or balance of intellectual property rights or monopoly power, developed countries or multinational corporations can exercise their rights and power as much as they can to gain the greatest benefit. This may harm global economies and society. Separation of powers under Montesquieu's theory should be used as a policy to balance and control intellectual property rights or monopoly power.

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320. *See* Commission Regulation 772/2004, 2004 J.O. (L 123) 11 (explaining technology transfer how agreements can encourage innovation); *see also* Carlin & Pautke, *supra* note 323, at 603 (commenting that restrictive agreements will be valid and enforceable under Article 81(3) as long as "pro-competitive" advantages of the agreement outweigh anticompetitive effects).

The Responsibility to Preserve: A Road Map for Saving Ecuador's Yasuni Rain Forest

Joshua M. Alter*

Ecuador's Yasuni National Park is known for its extraordinary biodiversity, its state of conservation, and its natural heritage.[1] Yasuni is home to one of the world's highest concentrations of biodiversity,[2] the Yasuni-ITT Initiative,[3] which is one of the largest environmental conservations projects this century,[4] and indigenous tribes and uncontacted peoples living in voluntary isolation.[5] Yet beneath this modern Garden of Eden lies billions of dollars worth of oil that may soon be extracted unless the international community reaches an agreement to preserve Yasuni.[6]

This article analyzes Ecuador's domestic and international legal obligations to its indigenous peoples, its environment, and its natural heritage. It suggests that Ecuador, along with the international community, adopt a "Responsibility to Preserve" approach to complement the Yasuni-ITT Initiative. It concludes by demonstrating that a Responsibility to Preserve approach would benefit all Ecuadorian citizens, the environment, and the Ecuadorian government. It would also save the Yasuni rain forest.

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1. *See* United Nations Framework on Climate Change, Submission from Ecuador, *The Yasuni-ITT Initiative: Enhancing Cost-Effectiveness of, and Promoting, Mitigation Actions*, U.N. Doc. FCCC/AWGLCA/2011/Misc.4/Add.1 (Apr. 7, 2011).

2. *See* Elie Chachoua, *Turning Externalities Into Opportunities: The Case of Ecuador's Yasuni ITT Trust Fund*, *in* GETTING IT RIGHT: LESSONS FROM THE SOUTH IN MANAGING HYDROCARBON ECONOMIES 193 (U.N. Development Programme, 2011); *see also* Bryan Walsh, *Ransoming Paradise: Should the World Bribe Ecuador to Protect That Country's Rain Forests?*, CHI. TRIB. (Feb. 5, 2012), http://articles.chicagotribune.com/2012-02-05/news/ct-edit-ecuador-0205-20120205_1_yasuni-national-park-rain-forests-ecuador.

3. *See* Esme McAvoy, *Oil or Life? Ecuador's Stark Choice*, NEW INTERNATIONALIST, Apr. 1, 2011 (noting that the Yasuni-ITT Initiative is named for the oil wells that make up the block at the center of the controversy: Ishpingo, Tambococha, Tiputini).

4. *See* U.N. GAOR, 65th Sess., 19th plen. mtg. at 2, U.N. Doc. A/65/PV.19 (Sept. 27, 2010) ("The Yasuní Initiative . . . is not just symbolic. It is the most important initiative for our country and the entire planet."); *see also Ecuador's Initiative to Protect Rainforest Demonstrates Sustainable Development, Possible with Leadership, Creativity, Commitment, Says Secretary-General*, U.N. Doc. SG/SM/13843/ENV/DEV/1231 (Sept. 23, 2011) ("The Yasuní-ITT Initiative is a remarkable idea. . . . It is not often that a Government chooses sustainable development over easy money.").

5. *See* Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, 4th Sess., Mar. 15, 2006, ¶ 37, U.N. Doc. A/HRC/4/32/Add.2 (Dec. 28, 2006) (noting the history of the tribes living in voluntary isolation); *see also* PAMELA L. MARTIN, OIL IN THE SOIL: THE POLITICS OF PAYING TO PRESERVE YASUNÍ 9 (2011); *see also* Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and* Aguinda v. Texaco, 38 N.Y.U. J. INT'L L. & POL. 413, 431 (2006).

6. See Pamela L. Martin, *Global Governance from the Amazon: Leaving Oil Underground in Yasuní National Park, Ecuador*, 11 GLOBAL ENVTL. POL. 22, 22–23 (2011).

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I. Welcome to Paradise

Yasuni National Park is located in northeastern Ecuador.[7] It became a national park in 1979 and was designated as a Biosphere Reserve in 1989.[8] Yasuni is close to 10,000 square kilometers in size and sits at the intersection of the Andes, the Amazon, and the Equator.[9] The area has a high rainfall, a steady climate, and is one of the most biodiverse places on Earth.[10] Although Yasuni makes up only a fraction of a percentage of the Amazon basin, it contains the same number of insect species as the entire continent of North America.[11]

In addition to the thousands of species that call Yasuni home, the park is also home to the Huaorani tribe, a "relatively recently contacted Amazonian indigenous group with a long—and violent—history of protecting their territory from unwanted intruders."[12] Relatives of this tribe, known as the Taromenane and Tagaeri, are the last known uncontacted tribes inside Yasuni and live in voluntary isolation deep within the rain forest.[13]

The discovery of billions of dollars worth of oil now threatens the tribes and the species that call Yasuni home.[14] In 2006, the Ecuadorian-owned oil company Petroecuador[15] found massive oil fields containing nearly a billion barrels of oil in what is designated as Block 31 of Yasuni National Park.[16] However, these oil fields and the exploration block are on the territory

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7. *See* United Nations Framework on Climate Change, Submission from Ecuador, *supra* note 1; *see also* Matt Finer et al., *Ecuador's Yasuní Biosphere Reserve: A Brief Modern History and Conservation Challenges*, 4 ENVTL. RES. LETTERS 1, 7 (2009).

8. *See* Biosphere Reserve Information, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=ECU+02&mode=all (last visited Oct. 22, 2012); *see also* McAvoy, *supra* note 3 (noting that Yasuni was declared a World Biosphere Reserve by UNESCO in 1989).

9. *See* Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011; *see also* Walsh, *supra* note 2.

10. *See* United Nations Framework on Climate Change, Submission from Ecuador, *The Yasuní-ITT Initiative: Enhancing Cost-Effectiveness of, and Promoting, Mitigation Actions*, U.N. Doc. FCCC/AWGLCA/2011/Misc.4/Add.1 (Apr. 7, 2011) (noting that Yasuni is home to 593 recorded bird species, 80 bat species, 150 amphibian species, and 121 reptile species); *see also* McAvoy, *supra* note 3.

11. *See* Dave Gilbert, *Rainforest Home to Vast Treasury of Life*, CNN, Mar. 21, 2005, *available at* http://www.cnn.com/2012/03/05world/americas/rainforest-life/index.html.

12. Finer et al., *supra* note 7, at 1–2.

13. *See* Kimerling, *supra* note 5.

14. *See* Jonathan Watts, *World's Conservation Hopes Rest on Ecuador's Revolutionary Model*, THE GUARDIAN, Sept. 2, 2012 ("Yasuni . . . has moved to the frontline of a global battle between living systems and fossil fuels.").

15. *See* Gonzalo Escribano, *Ecuador's Energy Policy Mix: Development, Conservation and Nationalism with Chinese Loans—Analysis*, EURASIAREVIEW (Apr. 18, 2012), http://www.eurasiareview.com/18042012-ecuadors-energy-policy-mix-development-conservation-and-nationalism-with-chinese-loans-analysis/ (explaining that Petroecuador and Petroamazonas are Ecuador's two national gas and oil companies); *see also* Judith Kimerling, *Transnational Operations, Bi-National Injustice: ChevronTexaco and Huaorani and Kichwa in the Amazon Rainforest in Ecuador,* 31 AM. INDIAN L. REV. 445, 447 (2006) (noting that Petroecuador arose as a state oil company shortly after oil was discovered in the 1960s).

16. See Pamela L. Martin, *Global Governance from the Amazon: Leaving Oil Underground in Yasuní National Park, Ecuador*, 11 GLOBAL ENVTL. POL. 22, 24 (2011); *see also* John Vidal, *Ecuador: Four Months to Save the World's Last Great Wilderness From "Oil Curse,"* THE OBSERVER, Aug. 13, 2011, http://www.guardian.co.uk/environment/2011/aug/14/ecuador-oil-yasuni-national-park.

of the Huaorani peoples.[17] Ecuadorian President Rafael Correa stated that Ecuador would be willing to forgo drilling and leave Yasuni as it currently stands if the international community pays $3.6 billion over 13 years.[18] The oil in these unexplored fields is valued at over $7 billion.[19] Ecuador, at least in theory, is willing to forgo half the value of that oil in order to protect Yasuni and keep its pristine features intact.[20] This project is known as the Yasuni-ITT Initiative.[21]

Under the Yasuni-ITT Initiative, money from the international community goes into a capital fund administered by the U.N. Development Programme (UNDP) and earmarked for investment in renewable energy products and social development for indigenous communities.[22] The fund is governed and overseen by an eight-person Steering Committee, including representatives from the Ecuadorian government, contributing states' governments, Ecuadorian civil society, and UNDP members.[23]

II. The Legal Arguments to Save Yasuni

Under domestic and international law, Ecuador is required to protect Yasuni National Park and the indigenous peoples who live there. The 2008 Ecuadorian Constitution contains many provisions to protect the environment and indigenous peoples. Additionally, executive decrees have granted further protections to Yasuni. Finally, Ecuadorian courts have demonstrated that they are willing to play a part in protecting nature. Ecuador has also signed onto

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17. *See Campaign: Yasuni Depends on You, Arguments in Support of the Proposal*, http://www.sosyasuni.org/en/index.php?option=com_content&view=article&id=34:arguments-in-support-of-the-proposal&catid=15:campaign&Itemid=27 (last visited Oct. 22, 2012).

18. *See* Erin Sefloff, *Creating a Category Under the Kyoto Protocol Based on Non Emissions*, 18 HASTINGS W.-N.W. J. ENV. L. & POL'Y 379, 388–89 (2012) (clarifying that President Correa sought $600 to $700 million a year for 10 years to leave the oil underground); *see also* Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011.

19. *See* Esme McAvoy, *Oil or Life? Ecuador's Stark Choice*, NEW INTERNATIONALIST, Apr. 1, 2011 (estimating the amount at over $7 billion).

20. *See* U.N. GAOR, 65th Sess., 19th plen. mtg. at 2, U.N. Doc. A/65/PV.19 (Sept. 27, 2010) ("Ecuador . . . is making major efforts to achieve development. But, as an act of generosity . . . decided not to receive 50 percent of the income that the oil would generate."). Whether or not Ecuador would, or even be able to, stop drilling in its entirety is an important question. The Yasuni-ITT Fund's website claims that if for any reason drilling does occur in the future, any donations greater than $100,000 would be returned. *See generally* Patrick Wieland, *From Kyoto to Quito: Reassessing Oil Moratorium as an Effective Climate Change Policy from a Property-Based Approach*, 4 KY. J. EQUINE, AGRIC. & NATURAL RES. L. 93, 94 (2012) (arguing that "forgoing a country's oil reserves through a moratorium will prove to be ineffective climate change policy in the long-run because it represents a nonenforceable, unilateral promise, which is subject to the political pendulum").

21. *See* Ecuador Yasuni-ITT Trust Fund, http://mptf.undp.org/yasuni (last visited Oct. 22, 2012).

22. *See* Walsh, *supra* note 18 (Dec. 19, 2011).

23. *See* Yasuni-ITT FAQs, http://www.mdtf.undp.org/document/download/7500 (last visited Oct. 22, 2012); *see also* Elie Chachoua, *Turning Externalities into Opportunities: The Case of Ecuador's Yasuni-ITT Trust Fund*, *in* GETTING IT RIGHT: LESSONS FROM THE SOUTH IN MANAGING HYDROCARBON ECONOMIES 205 (U.N. Development Programme, 2011).

multiple multilateral treaties on topics ranging from indigenous peoples' rights, international environmental law, and protecting biodiversity. Thus, Yasuni may be saved under a combination of domestic and international obligations.

A. Domestic Legal Arguments

Ecuador's 2008 Constitution affords indigenous peoples and nature many important rights.[24] According to a 2011 Report by the United Nations Secretary-General, Ecuador's Constitution "states that the rights of nature should be taken into account in all planning activities, including: the right to have its existence respected in an integral manner, including the maintenance and regeneration of its cycles, functions and evolutionary processes; and the right to restoration."[25] Ecuador is in a unique position to enforce the rights of Yasuni, as well as its indigenous tribes. Executive, legislative, and judicial responses demonstrate the state's willingness to provide for the rights of its indigenous peoples and environment.

1. Constitutional Protections

Ecuador's Constitution provides important protections for indigenous peoples.[26] In Chapter Four, titled "Rights of Communities, Peoples and Nations," the Constitution lays out 21 collective rights.[27] In addition to these enumerated rights, Article 57 provides that:

> The territories of the peoples living in voluntary isolation are an irreducible and intangible ancestral possession and all forms of extractive activities shall be forbidden there. The States shall adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation and to ensure observance of their rights. *The violation of these rights shall constitute a crime of ethnocide, which shall be classified as such by law.*[28]

Aside from the 21 enumerated rights for all indigenous peoples, tribes choosing to live in isolation are afforded even greater protections.

Ecuador's 2008 Constitution also contains important protections for nature, and it affords Ecuadorian citizens the ability to defend these rights.[29] The 2008 Constitution declared that

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24. *See* Escribano, *supra* note 15.

25. *See* U.N. GAOR, 66th Sess., ¶75, U.N. Doc. A/66/302 (Aug. 15, 2011) (noting progressive protections for nature in Latin America).

26. *See* Gonzalo Escribano, *Ecuador's Energy Policy Mix: Development, Conservation and Nationalism with Chinese Loans—Analysis*, EURASIAREVIEW (Apr. 18, 2012), http://www.eurasiareview.com/18042012-ecuadors-energy-policy-mix-development-conservation-and-nationalism-with-chinese-loans-analysis/.

27. *See* CONSTITUTION OF THE REPUBLIC OF ECUADOR, Oct. 20, 2008, art. 57, *available at* http://pdba.georgetown.edu/Constitutions/Ecuador/ english08.html.

28. *Id.* (emphasis added); *see also* Francesco Francioni, Symposium, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209, 1212 (2004) (noting that the possibility of adding wording on "cultural genocide" to the Universal Declaration of Human Rights was ultimately rejected).

29. *See* Michelle P. Bassi, Note, *La Naturaleza O Pacha Mama de Ecuador: What Doctrine Should Grant Trees Standing?*, 11 OR. REV. INT'L L. 461, 461–62 (2009).

nature is considered a legal person.[30] In Articles 71–74, entitled "Rights of Nature," the Constitution provides protection against severe or permanent environmental impact,[31] extinction of species,[32] and harmful actions against persons, communities, peoples and nations.[33] Thus, Ecuadorians may vindicate their rights based on their own Constitution. Article 71 of Ecuador's Constitution further provides that "[a]ll persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature."[34]

2. Political Branches Protections

Ecuador's Executive Branch is also able to play a role in saving Yasuni. Presidential Decree 1572 indefinitely extended a prior decision to refrain from extracting oil, even though Ecuador had not received the funds required in order to refrain from drilling.[35] Ecuadorian law protects Yasuni and other lands endowed with important natural heritage. In 1999, an Executive Decree declared an "intangible zone" of 700,000 hectares of land within the national park's area.[36] However, it was not until 2007 that the boundaries were formally defined in a subsequent Executive Decree.[37] Nonetheless, Ecuador has laws and practices that demonstrate the importance of the Yasuni land.[38]

2. Judicial Protections

Ecuadorian courts have been involved in curbing the destruction within Yasuni and the entire Ecuadorian Amazon basin.[39] Recently, an Ecuadorian court found that Texaco polluted the Ecuadorian rain forest for 30 years by not properly disposing of toxic wastes and by causing

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30. *See* DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTIONS AND HUMAN RIGHTS 124 (2011) (discussing multiple provisions of the 2008 Constitution that protect nature).

31. *See* Constitution of the Republic of Ecuador, Oct. 20, 2008, art. 72.

32. *See id.* at art. 73.

33. *See id.* at art. 74.

34. *See id.* at art. 71.

35. *See* Esperanza Martinez, *Yasuní: The Last Chance or the First Step?,* AmazonWatch (Mar. 5, 2009), http://amazonwatch.org/news/2009/0305-yasun-and-iacute-the-last-chance-or-the-first-step.

36. *See* Constitutional President of the Republic, Decreto Ejecutivo No. 552 [Executive Decree No. 552], R.O. No. 121 (Feb. 2, 1999) (Ecuador); *see also* Esme McAvoy, *Oil or Life? Ecuador's Stark Choice*, NEW INTERNATIONALIST, Apr. 1, 2011 (describing how leaving Yasuni untapped is vital for the survival of the indigenous tribes).

37. *See* Constitutional President of the Republic, Decreto Ejecutivo No. 2187 [Executive Decree No. 2187] (Jan. 3, 2007) (Ecuador).

38. *See* Constitutional President of the Republic, Decreto Ejecutivo No. 552 [Executive Decree No. 552], R.O. No. 121 (Feb. 2, 1999) (Ecuador).

39. *See generally* Steven Donziger, Laura Garr & Aaron Marr Page, *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 HUM. RTS. BR. 8 (2010) (documenting the history of the litigation over Texaco's actions in the Amazon basin from the damage done forty years ago until the present day); *see* Jessica Lynd, *International Legal Updates: Latin America*, 18 HUM. RTS. BR. 44, 44–45 (2011) (noting a recent Ecuadorian decision in favor of the Ecuadorian plaintiffs).

widespread harm to the environment and to the humans in the area.[40] The court cited the Ecuadorian Constitution and the American Convention on Human Rights,[41] ratified by Ecuador in 1977 to provide a judicial opportunity for the plaintiffs, and ultimately held that Chevron was liable for $8.6 billion.[42]

B. International Legal Arguments

Those seeking to save Yasuni and its indigenous peoples may rely on three separate legal arguments to make a claim against the oil exploration that would ravish the national park and destroy its indigenous peoples: first, that greater protections are afforded to indigenous people; second, that indigenous peoples have a right to culture; third, that there is an obligation to preserve Yasuni. There is strong international and domestic political support behind the Yasuni-ITT Trust Fund. The United Nations Secretary-General supported the fund.[43] Ecuadorian politicians have offered to support the fund,[44] and internationally, other states have pledged, and continue to pledge, monies to the fund.[45]

1. Indigenous Peoples Protections

Yasuni National Park is home to the Tagaeri and Taromenane, two indigenous tribes that live in voluntary isolation.[46] As Ecuador determines whether or not oil drilling may start in the rain forest, it must be cognizant that its decision will have severe ramifications for the native tribes. The focal point for the rights of the indigenous peoples inside Yasuni is the United Nations Declaration on the Rights of Indigenous People.[47]

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40. *See* Lynd, *supra* note 39 (discussing the Court's finding in the *Chevron* matter); *see also* Simon Romero & Clifford Krauss, *Chevron Is Ordered to Pay $9 Billion by Ecuador Judge*, N.Y. TIMES, Feb. 15, 2011, at A4.

41. *See* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

42. *See* Lynd, *supra* note 39 at 45 (stating that "the decision can be seen as a step towards holding transnational companies accountable for the harms they cause").

43. *See Ecuador's Initiative to Protect Rainforest Demonstrates Sustainable Development, Possible with Leadership, Creativity, Commitment, Says Secretary-General*, U.N. Doc. SG/SM/13843 ENV/DEV/1231 (Sept. 23, 2011) ("It is not often that a Government chooses sustainable development over easy money.").

44. *See Ecuador: Statement Against Proposed Oil Exploration in Armadillo Block and Demands for Protecting of Indigenous People in Voluntary Isolation*, INDIGENOUS PEOPLES ISSUES & RESOURCES (2011), http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=11414:ecuador-statement-against-proposed-oil-exploration-in-armadillo-block-and-demands-for-protecting-of-indigenous-people-in-voluntary-isolation&catid=23&Itemid=56 (original version and unofficial English translation).

45. *See, e.g., Chile the First Country to Contribute to the Yasuni-ITT Initiative*, UNITED NATIONS DEVELOPMENT FUND NEWSROOM, (2010), http://content.undp.org/go/newsroom/2010/september/chile-the-first-country-to-contribute-to-the-yasuni-itt-initiative.en (noting Chile's initial contribution of US$100,000 to the Fund); *Spain to Contribute to Ecuador's Yasuni Initiative*, LATIN AMERICAN HERALD TRIBUNE, http://www.laht.com/article.asp?ArticleId=376994&CategoryId=14089 (commenting upon Spain's proposed USD $1,000,000 contribution to the Fund).

46. *See Yasuní ITT FAQs*, UNITED NATIONS DEVELOPMENT GROUP, 1, mdtf.undp.org/document/download/7500 (describing the indigenous groups living in seclusion within Ecuador).

47. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/en/drip.html (United Nations Declaration on the Rights of Indigenous People).

Ecuador has recently played a major role in protecting the rights of indigenous peoples. Ecuador is a party to the 1989 International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.[48] Ecuador also co-sponsored the United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007.[49] Furthermore, Ecuador has played an important role in the Organization of American States' working group responsible for the Draft Inter-American Convention on the Rights of Indigenous Peoples.[50] The Draft Inter-American Convention, for instance, provides protection for indigenous peoples and the environment by providing that "states shall not undertake, support or favor any policy of artificial or forced assimilation of indigenous peoples, destruction of a culture or possibly of the extermination of an indigenous people."[51]

According to the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, indigenous peoples "shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community."[52] Additionally, third parties "shall be prevented from taking advantage of [indigenous peoples'] customs or lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them."[53]

According to the United Nations Declaration on the Rights of Indigenous Peoples, these native tribes are afforded certain enhanced protections. One such protection is found in Article 8, which states, "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."[54] Although the Declaration is not legally binding, it should be treated as the Universal Declaration of Human Rights was in the 1950s, ideals we should strive toward.[55] The Universal Declaration of Human Rights led to the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic Social and Cultural Rights (ICESCR).[56] Similarly, the Declaration on the Rights

48. *See* International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (ILO Convention 169) (Sept. 5, 1991), *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169.

49. *See* Human Rights Council, National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Ecuador, 1st Sess., Apr. 7, 2008, at ¶ 141, U.N. Doc. A/HRC/WG.6/1/ECU/1 (2008).

50. *See Draft Inter-American Commission Declaration on the Rights of Indigenous Peoples*, DIPUBLICO.COM, http://www.dipublico.com.ar/english/draft-inter-american-commission-declaration-on-the-rights-of-indigenous-peoples; *see also* Human Rights Council, *supra* note 49.

51. *See* Draft Inter-American Commission Declaration on the Rights of Indigenous Peoples, DIPUBLICO.COM, at art. 5(2), http://www.dipublico.com.ar/english/draft-inter-american-commission-declaration-on-the-rights-of-indigenous-peoples.

52. *See* ILO Convention 169, *supra* note 48, at art. 17(2).

53. *See id.* at art. 17(3).

54. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 47.

55. *See* Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 4th Sess., Feb. 19, 2007, ¶ 38, U.N. Doc. A/HRC/4/35 (2007) (tracking the history of the Universal Declaration of Human Rights).

56. *See id.* at ¶ 36, U.N. Doc. A/HRC/4/35 (2007) (tracing the ICCPR and ICESCR's origins to the Universal Declaration of Human Rights).

of Indigenous Peoples should lead to the formation of a binding treaty protecting indigenous peoples' human rights.

The Declaration recommends that states provide effective mechanisms for prevention of and redress for:

> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;[57]
>
> (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;[58]

The Declaration is not concerned with motives or intent; rather, it regards all actions that have these effects equally. Although there is a chance the exploration or drilling would not deprive the indigenous peoples of the land they inhabit, this may very well be the reality.[59] Exploration and drilling would force those tribes to transfer locations, as those tribes that voluntarily choose to avoid the modern world would have to migrate.[60] Thus, Ecuador must carefully explore and drill for oil.

The indigenous peoples are fighting back, and their efforts are directed at the Ecuadorian government and transnational corporations.[61] Recently, the communities affected by the drilling and exploration sought redress for human rights abuses that have decimated indigenous groups. These groups have also addressed the broader, related questions of accountability and impunity.[62]

Their efforts may be starting to pay off as foreign courts start to become more open to the enforcement of such suits. In *Chevron Corp. v. Donziger*,[63] the Ecuadorian Lago Agrio court

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57. *See* United Nations Declaration on the Rights of Indigenous Peoples, at art. 8(2)(b).

58. *See* United Nations Declaration on the Rights of Indigenous Peoples, at art. 8(2)(c).

59. *See* Judith Kimerling, Symposium, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-national Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rain Forest in Ecuador*, 31 AM. INDIAN L. REV. 445, 449 (2006) (noting that the loss of indigenous peoples' ancestral lands has threatened their very survival).

60. *See* Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 860 (2011) (discussing what constitutes cultural genocide and noting that forced population transfers qualify as an example).

61. *See* Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, 4th Sess., Mar. 15, 2006, ¶ 38, U.N. Doc. A/HRC/4/32/Add.2 (Dec. 28, 2006) (noting the resistance of indigenous tribes to forced relocation).

62. *See* Steven Donziger, et al., *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 HUM. RTS. BR. 8 (2010).

63. 768 F. Supp. 2d 581, 600 (S.D.N.Y. 2011), *rev'd and remanded by Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012) (discussing the history of the Lago Agrio case). A certified translation of the Lago Agrio court's February 14, 2011 decision is available at http://chevrontoxico.com/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf.

imposed $8.646 billion in damages for reparation measures.[64] "Some of the most vulnerable indigenous groups and rain forest communities are moving ever closer to having their human rights claims resolved after years of struggle against one of the world's largest and most influential corporations."[65]

2. Cultural Rights Protections

There are also important rights to culture and cultural heritage that are implicated by the proposed oil drillings in Yasuni. Article 27(1) of the Universal Declaration of Human Rights affirms that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[66] The Universal Declaration on Human Rights was codified into treaties, and its ideals remain the goal for human rights advocates.[67] The United Nations General Assembly's Declaration illustrates that they believed that the cultural life of the community was an important right.[68]

The International Covenant on Civil and Political Rights also notes that where "ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[69] In conjunction with the Declaration on the Rights of Indigenous People, discussed above, minorities are given the right to enjoy their own culture.[70]

The International Covenant on Economic, Social and Cultural Rights states that member parties recognize the right of their inhabitants to take part in cultural life.[71] It also states that

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64. *See* Letter from Randy Mastro to Honorable Lewis A. Kaplan, dated Feb. 24, 2011. (Categories include: $600 million for groundwater remediation; $5.396 billion for soil remediation; $200 million to restore native flora, fauna, and aquatic life; $150 million to implement a potable water system in the allegedly affected areas; $1.4 billion to establish a health-care system to serve the general population of the allegedly affected communities; $800 million for a plan of health, including potential cancer treatments; and $100 million to rebuild ethnic communities and indigenous culture) (on file with author).

65. *See* Jessica Lynd, *International Legal Updates: Latin America*, 18 HUM. RTS. BR. 44 (2011) (noting the recent $8.6 billion award in Ecuador for the plaintiffs and against Chevron); *see also* Micaela L. Neal, Comment, *The Niger Delta and Human Rights Lawsuits: A Search for the Optimal Legal Regime*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 343, 370 (2011) (noting the recent Ecuadorian decision in the context of an emerging trend toward transnational oil corporations being held accountable for their activities).

66. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 27(1), U.N. Doc A/810 (1948).

67. See Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 4th Sess., Feb. 19, 2007, ¶ 36, U.N. Doc. A/HRC/4/35 (2007) (tracking the history of the Universal Declaration of Human Rights).

68. *But see* Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291, 303–04 (2000) (pointing out that stronger language to protect indigenous peoples was ultimately rejected).

69. *See* International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

70. *See id.*

71. *See* International Covenant on Economic, Social, and Cultural Rights, art. 15(1)(a), Jan. 3, 1976, 993 U.N.T.S. 3.

the member parties will take steps "to achieve the full realization of this right [including] those necessary for the conservation, the development and the diffusion of science and culture."[72]

The traditional view of intentional destruction of cultural heritage is informed by instances of destruction that occurred during hostilities.[73] One example is the Taliban's destruction of the Buddhas at Bamiyan in Afghanistan.[74] In that case, the Taliban destroyed the Bamiyan Buddhas because they were considered an affront to Islam.[75] Intentional destruction of cultural heritage took place during war in the former Yugoslavia.[76] The International Criminal Tribunal for the Former Yugoslavia[77] was established in response to ethnic and cultural genocide that occurred in the Balkans, and included crimes against cultural heritage in its statute.[78]

Yet intentional destruction of cultural heritage occurs in another important context. The intentional destruction of cultural heritage for profit is no different from the intentional destruction of cultural heritage for political reasons. In 2007, the Human Rights Council published a draft resolution stating that "[s]tates bear responsibility for intentional destruction or intentional failure to take appropriate means to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity."[79]

Intentional destruction of cultural heritage during armed conflict is governed by different rules than intentional destruction of cultural heritage during peacetime.[80] The former allows for a military necessity exception to the obligation to safeguard cultural property[81] while the

72. *See id.* at art. 15(2) (emphasis added).

73. *See generally* The Lieber Code of 1863, Instructions for the Government of Armies of the United States in the Field, Series III, Vol. 3, General Orders no. 100 (Apr. 24, 1863).

74. *See* Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 247 (2006); *see also* Corinne Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddhas' Destruction*, 29 SUFFOLK TRANSNAT'L L. REV. 237 (2006).

75. *See* Brenner, *supra*, note 74, at 252–53.

76. *See* Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

77. *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704 (1993).

78. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3(d), G.A. Res. 827 (25 May 1993), *amended by* GA Res. 1166 (13 May 1998), 1329 (30 Nov. 2000), 1411 (17 May 2002), 1431 (14 Aug. 2002), and 1481 (19 May 2005) (allowing prosecutions for "seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science"); *see also* Francesco Francioni, Symposium, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209, 1212 (2004) at 1219 (noting that ICTY jurisprudence also acknowledges "that deliberate destruction of cultural heritage of a given ethnic group may constitute evidence of the element of mens rea required for the commission of the crime of genocide").

79. *See* Human Rights Council Res. 6/L.33, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 6th Sess., U.N. Doc. A/HRC/6/L.33, (Sept. 26, 2007).

80. *Compare* Convention on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (1954 Hague Convention), *with* Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.N.T.S. 37 (World Heritage Convention).

81. *See* 1954 Hague Convention, *supra* note 80, at art. 4(2) (waiving obligations only in cases where military necessity imperatively requires such a waiver).

latter does not. Peacetime destruction is generally condemned, and the World Heritage Convention,[82] which applies during peacetime, states:

> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.[83]

Ecuador has a duty under the World Heritage Convention to preserve Yasuni for future generations. Article 4 envisions the Yasuni problem and its solution, which is international assistance and co-operation in the form of financial assistance.[84] The Yasuni-ITT Trust Fund is exactly the type of international cooperation the World Heritage Convention contemplates.

Yasuni was designated as a Biosphere Reserve in 1989 and, as such, qualifies as "cultural or natural heritage" under international law. Under the World Heritage Convention, natural heritage includes "geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation."[85] Additionally, Article 2 of the World Heritage Convention also states that "natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty" qualify as natural heritage.[86] One potential solution would be adding Yasuni to the World Heritage List in order to afford it even greater protections.[87]

3. Biological Diversity

Ecuador is also a party to the Convention on Biological Diversity.[88] The Convention on Biological Diversity's objectives include the "conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. . . ."[89] "Biological diversity" is defined as the "variability among living organisms from all sources. . . . [T]his includes diversity within species, between species and

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82. Ecuador acceded to the World Heritage Convention on June 16, 1975. *See* States Parties: Ratification Status, UNESCO, http://whc.unesco.org/en/statesparties (listing all state parties to the World Heritage Convention).

83. *See* World Heritage Convention, *supra* note 80, at art. 4.

84. *See id.*

85. *See id.* at art. 2.

86. *See id.*

87. *See* R. Douglas Fields, *Drilling for Oil in Eden: Initiative to Save Amazon Rainforest in Ecuador Is Uncertain*, SCI. AM. (Mar. 17, 2012), http://blogs.scientificamerican.com/guest-blog/2012/03/17/drilling-for-oil-in-eden-initiative-to-save-amazon-rainforest-in-ecuador-is-uncertain/ (noting that Ecuador has recently added the Galapagos Islands to the World Heritage List by Ecuador).

88. *See* Convention on Biological Diversity, 31 I.L.M 818 (June 5, 1992).

89. *See id.* at art. 1.

of ecosystems."[90] Although states have the sovereign right to exploit their own natural resources, they also have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states.[91] The Biological Diversity Convention obligates states to take effective national action to halt the destruction of species, habitats and ecosystems.[92]

Finally, international law also recognizes important rights relating to access to justice.[93] In the American Declaration of the Rights and Duties of Man, for example, people "may resort to the courts to ensure respect for his legal rights."[94] Should Yasuni be placed on the World Heritage List, one important question to consider is whether the approved oil exploration would constitute intentional destruction of cultural heritage under international law.

III. The Responsibility to Preserve

In addition to the indigenous peoples' rights and the right to culture and natural heritage, Ecuador should take this opportunity to implement a "Responsibility to Preserve." The Yasuni-ITT Initiative raises questions of international law. Foremost is whether the international community has a financial responsibility to help developing nations preserve nature.[95] Similar to the Responsibility to Protect[96] (R2P) during internal hostilities, this emerging trend would obligate the industrialized world to help developing nations preserve nature.

Developing countries should not bear the financial burden of protecting the Earth's most biodiverse forests.[97] Since the developed world benefits from the existence of Yasuni, they should support it.[98] In this context, Yasuni's biodiversity will lead to new medicines and scientific advancements for the *entire* world – but only if this treasured land survives the oncoming

90. *See id.* at art. 2.

91. *See id.* at art. 3.

92. *See* DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTIONS AND HUMAN RIGHTS 98 (2011) (describing features of the Biological Diversity Convention).

93. *See* Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc A/810 (1948); International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171; American Declaration of Human Rights and Duties of Man, art. 18, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

94. *See* American Declaration of Human Rights and Duties of Man, art. 18, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

95. *See* Rigoberta Menchú, *The Amazon or Oil?*, PROJECT SYNDICATE (Oct. 6, 2011), http://www.project-syndicate.org/commentary/the-amazon-or-oil-. (noting that Ecuador and the UNDP hope "to promote a spirit of global responsibility for Yasuni's preservation"); *see also* Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011.

96. *See* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007) (detailing the history of the Responsibility to Protect).

97. *See* Carlos Zorrilla, *The Role of the World Bank in Promoting Sustainable Development in Latin America*, 14 MICH. ST. J. INT'L L. 541, 547 (2006) (arguing that prior World Bank measures in Ecuador have greatly increased the "social, environmental, and economic risks as well as the burden for developing countries").

98. *See* Alister Doyle, *Ecuador Says Companies Join Novel Amazon Protection Fund*, REUTERS (Oct. 19, 2012) (noting that keeping oil below ground slows global warming).

oil rush.[99] Under Responsibility to Preserve, the international community must "recognize that Yasuni does not belong just to Ecuador, but to all of us, and that it is our responsibility to protect it for all time."[100]

One risk of allowing oil extractions is the loss of scientific and medical knowledge.[101] In one example, an anti-cancer fungus has recently been found to naturally eat away plastic waste.[102] From a scientific standpoint, this fungus will help eat away at a major source of pollution.[103] From a medical standpoint, this fungus contains taxol, the same enzyme used in conventional medicine to treat cancer patients.[104]

A benefit is that protection from oil extraction will help in the fight against deforestation.[105] Scientific studies have demonstrated that deforestation is occurring inside the National Park, especially where roads have been built.[106] Adding further infrastructure required to extract oil would harm the efforts to prevent deforestation even more.[107]

Yasuni's demise would have far-reaching consequences for the entire international community. It would lead to species loss and environmental degradation. It would also destroy natural heritage that is currently protected by UNESCO as a World Biosphere. Therefore, the international community should adopt a Responsibility to Preserve approach to save Yasuni. Similar to the responsibility to protect civilians during a humanitarian crisis,[108] states should be required to protect an ecosystem during an international environmental crisis. The first step would be for Yasuni to be designated a UNESCO World Heritage Site.[109] Under Article 11(3)

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99. *See* Dave Gilbert, *Rainforest Home to Vast Treasury of Life*, CNN, Mar. 13, 2012, (noting the hidden benefits of rain forests include medicines and chemicals used by the rest of the world); *see also* Menchú, *supra* note 95.

100. *See* Menchú, *supra* note 95.

101. *See* Dave Gilbert, *Rainforest Home to Vast Treasury of Life*, CNN, Mar. 13, 2012 (noting that forest plants are a source of chemicals and medicines).

102. *See* Jonathan Benson, *Anti-Cancer Fungus Found to Naturally Eat Away Plastic Waste*, NATURALNEWS (Feb. 28, 2012), http://www.naturalnews.com/035077_fungus_plastic_bioremediation.html.

103. *See id.*

104. *See id.*

105. *See generally* Jonathan Asher Greenberg et al., *Survival Analysis of a Neotropical Rainforest Using Multitemporal Satellite Imagery*, 96 REMOTE SENSING ENV'T 202 (2005), *available at* http://www.sciencedirect.com/science/article/pii/S0034425705000891; *see also* Doyle, *supra* note 98 (noting that keeping oil underground will avoid emitting 1.2 billion metric tons of carbon dioxide into the atmosphere).

106. *See* Greenberg, *supra* note 105, at 209.

107. *See* John Vidal, *Ecuador: Four Months to Save the World's Last Great Wilderness From "Oil Curse,"* THE OBSERVER, Aug. 13, 2011, http://www.guardian.co.uk/environment/2011/aug/14/ecuador-oil-yasuni-national-park (noting that drilling would make total destruction of Yasuni inevitable).

108. *See* Stahn, *supra* note 96, at 99 (detailing the history of the Responsibility to Protect).

109. *See* http://whc.unesco.org/en/list (indicating which cultural heritage sites are part of the UNESCO World Heritage List).

of the World Heritage Convention, Ecuador may request its addition.[110] Once Yasuni is added to the World Heritage List, it would enjoy the protections of being a Biosphere Reserve and a World Heritage List site. Ecuador, having taken the first step, should be able to rely on the international community and a corresponding responsibility to preserve.[111] Ecuador's actions would signal its intent to be bound to conservation, thus alleviating the international community's fears that Ecuador may take the money and use it to drill.[112]

A Responsibility to Preserve approach would be a coalition between states, transnational corporations, and indigenous peoples. It would allow for safe drilling that does not have drastic effects on the environment. It would bring much needed financial assistance to developing states. It would maintain the integrity of the indigenous peoples in a manner consistent with the United Nations Declaration on the Rights of Indigenous Peoples. In addition, it would ensure that the funds received and the benefits conferred would go toward the Ecuadorian people.

For Responsibility to Preserve to achieve its goal, states and transnational corporations must make certain strategic choices. Both groups should support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technologies. These standards that are required of states under international environmental law are readily applicable to transnational corporations.[113]

First, states and transnational corporations should support a precautionary approach to environmental challenges.[114] The precautionary principle's purpose is "to anticipate and avoid environmental damage before it occurs. This preventive measure, which is novel in many ways, would ultimately serve to lower mitigation costs of resultant environmental damage."[115] As dis-

110. *See* Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 11(3), Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 ("The inclusion of a property in the World Heritage List requires the consent of the State concerned.").

111. *See* Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Protection of Cultural Heritage as an Important Component of the Promotion and Protection of Cultural Rights*, ¶ 5, U.N. Doc. A/HRC/6/L.33 (Sept. 26, 2007) ("States bear responsibility for intentional destruction or intentional failure to take appropriate measures to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity, to the extent provided for by international law.").

112. In response, the Yasuni-ITT Initiative has a provision whereby monies over a certain amount are automatically refunded in the event that the target is not met or if Ecuador one day decides to drill for oil. *See Yasuni ITT FAQs*, http://mdtf.undp.org/document/download/7500 (referring to Yasuni Guaranty Certificates which allow for contributions above $50,000 to be refunded).

113. *See generally* UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org (last visited Oct. 21, 2012).

114. *See* UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/principle7.html (last visited Oct. 21, 2012).

115. *See* Mary Stevens, *The Precautionary Principle in the International Arena*, 2 SUSTAINABLE DEV. L. & POL'Y 13, 13 (2002).

cussed above, Yasuni is home to countless flora and fauna that have yet to be classified. Were Yasuni to be destroyed today, the international community would miss the opportunity to analyze these unknown plants and animals because of its short-term obsession over oil. It would be in the pharmaceutical companies' best interests to push for more time to fully understand the scientific advantages we would gain by preserving Yasuni.

Second, transnational corporations should undertake initiatives to promote greater environmental responsibility.[116] States associated with environmental responsibility can experience higher rates of foreign direct investment and other "carrots" in the international community.[117] Companies associated with environmental responsibility can experience an upswing in brand reputation for environmental friendliness.[118] As seen with the precautionary principle, it is in the best interests of transnational corporations to hold off on drilling until they understand the ramifications of their actions completely. The Texaco oil spill in the 1960s[119] is an example of the negative effects of shirking environmental responsibility; Chevron is still tied up in the litigation from actions that took place more than 50 years ago.[120]

Transnational corporations should encourage the diffusion of environmentally friendly technologies.[121] One of the simplest ways to do this is to continue developing technology for safer oil extraction. It is in the best interests of these corporations to cause as little collateral damage to Yasuni as possible. Aside from safer oil extraction, these corporations should determine what is absolutely needed to safely extract oil and do no more harm than necessary. One example of an environmentally friendly technology would be to use helicopters to bring teams to and from the oil extracting sites instead of building roads.[122] Yasuni already has a few roads, and studies conducted on those roads show a loss of biodiversity as well as illegal logging and other ills.[123]

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116. *See* UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/principle8.html (last visited Oct. 21, 2012).

117. *See id.*

118. *See* Alister Doyle, *Ecuador Says Companies Join Novel Amazon Protection Fund*, REUTERS (Oct. 19, 2012) (noting that a dozen corporations, including Coca-Cola, have recently donated money to the Yasuni-ITT Initiative).

119. *See* Chevron Corp. v. Camacho Naranjo, 667 F.3d 232, 235 (2d Cir. 2012) (providing background details for the 1964 oil spill).

120. *See* Ecuador v. Chevron Corp., 638 F.3d 384 (2d Cir. 2011).

121. *See* UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/principle9.html (last visited Oct. 21, 2012).

122. *See* R. Douglas Fields, *Drilling for Oil in Eden: Initiative to Save Amazon Rainforest in Ecuador Is Uncertain*, SCI. AM. (Mar. 17, 2012), http://blogs.scientificamerican.com/guest-blog/2012/03/17/drilling-for-oil-in-eden-initiative-to-save-amazon-rainforest-in-ecuador-is-uncertain/ (noting that other oil corporations "use helicopters to fly workers and drilling equipment to the sites instead of cutting roads, and they lay flexible oil pipelines to circumnavigate sensitive vegetation.").

123. *But see* E. Suarez, et al., Oil Industry, *Wild Meat Trade and Roads: Indirect Effects of Oil Extraction Activities in a Protected Area in North-Eastern Ecuador*, 12 ANIMAL CONSERV. 364, 370–71 (2009) (noting the efficiencies related to hunting caused by road construction and the better access to markets).

Ultimately, "as the need for economical growth intensifies, developing countries are increasingly turning to aggressive exploitation of natural resources in order to supply their economic needs."[124] This conflicts with conservation of protected areas, a fact demonstrated by the apparent willingness of Ecuador to allow drilling in Yasuni. At the very least, however, a responsibility to preserve would mean learning from previous mistakes.[125] Extracting oil should not bring about a mess in the rain forest and in courtrooms.[126] Ecuador should take a leading role in this Responsibility to Preserve movement in order to protect its lands. There is a recent trend in the global South toward protection of natural assets from the global North, and Ecuador has a strong interest in pushing forth with such a movement.[127]

IV. Strangers in Paradise: How a Responsibility to Preserve Would Assist Ecuadorians in Realizing Their Human Rights

The people who bear the costs of oil development have neither reaped the benefits of this discovery nor have they been invited to participate in the decisions that affect this area.[128] Ecuador has announced that the ITT Fund is expected to yield significant benefits, especially to the indigenous peoples.[129] Whether or not Ecuador's actions will be in line with their words remains to be seen.[130]

Anywhere from one-third to one-half of Ecuadorians live below the poverty line.[131] Whereas the beginning of this article addressed the indigenous tribes living in Yasuni, the focus now shifts to all of Ecuador's citizens and the human rights issues faced by them when dealing

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124. *See id.* at 364.

125. *See* James Rochlin, *Development, the Environment and Ecuador's Oil Patch: The Context and Nuances of the Case Against Texaco*, 28 J. THIRD WORLD STUD. 11, 11 (2011) (discussing the history of Ecuador's economic development).

126. *See* Aguinda v. Texaco, 638 F.3d 384, 387 (2d Cir. 2011) ("For nearly seventeen years, in litigation spanning two continents and numerous courtrooms, a group of Ecuadorian citizens . . . have sought relief for environmental devastation allegedly caused by . . . Texaco Petroleum Company's . . . oil exploration and drilling operations in the Ecuadorian rainforest.").

127. *See* Michael T. Klare, *America, the New Saudi Arabia*, SALON (Apr. 2, 2012), http://www.salon.com/2012/04/02/america_the_new_saudi_arabia/.

128. *See* Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413, 446 (2006).

129. *See* Economic & Social Council, Permanent Forum on Indigenous Issues, *Information Received from Governments: Ecuador*, ¶ 2 U.N. Doc. E/C.19/2010/12/Add.11 (Mar. 16, 2010) ("These measures are undertaken in implementation of the provisions of the United Nations Declaration on the Rights of Indigenous Peoples.").

130. *See* Judith Kimerling, Symposium, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 449 (2006) ("Ecuador has previously turned a blind eye to its indigenous peoples in the name of profit.").

131. *Compare* Rigoberta Menchú, *The Amazon or Oil?*, PROJECT SYNDICATE (Oct. 6, 2011), http://www.project-syndicate.org/commentary/the-amazon-or-oil-; *with* R. Douglas Fields, *Drilling for Oil in Eden: Initiative to Save Amazon Rainforest in Ecuador Is Uncertain*, SCIENTIFIC AMERICAN (Mar. 17, 2012), http://blogs.scientificamerican.com/guest-blog/2012/03/17/drilling-for-oil-in-eden-initiative-to-save-amazon-rainforest-in-ecuador-is-uncertain/ (noting that Health Minister Carina Vance claims 50% of Ecuadorian citizens live below the poverty line).

with Yasuni. Ecuador's $58.9 billion GDP is among the smallest in Latin America, and although foreign corporations have been enriched by exporting raw materials, that wealth has not trickled down to the Ecuadorian citizens.[132]

The most financially lucrative option for Ecuador is to extract the oil.[133] Over the past few years, President Correa has used petroleum production to advance his social welfare campaigns.[134] This was evident when Correa gave the international community a deadline to come up with at least $100 million for Ecuador to refrain from drilling inside Yasuni.[135] An important issue is how such money (if collected) can help the Ecuadorian people achieve their human rights.

The most difficult question Yasuni faces is how to balance the rights of the indigenous peoples and the environment with the rights of Ecuador's other citizens. Since Ecuador has one of the smallest GDPs in Latin America, the value of extracting oil could push Ecuadorians out of poverty and lead to a realization of their human rights. The International Covenant on Economic, Social and Cultural Rights provides the right "to an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions.[136] The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[137] However, the question of whether Ecuador owes its other citizens the money from oil exploration arises. Ecuador must figure out how to strike an appropriate balance between these competing interests in an equitable way for both the indigenous people and the general Ecuadorian population.

Statistics in Ecuador vary, but between one-half and one-third of its citizens live below the poverty line.[138] Ecuador is not realizing obligations to its citizens at its current level. By drilling for oil beneath Yasuni, however, Ecuador can make the argument that it is fulfilling its obligations under the International Covenant on Economic Social and Cultural Rights to provide its citizens with an adequate standard of living. The money may be invested in renewable energy products, helping Ecuador reduce its dependency on oil and funding community projects.

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132. *See* Fields, *supra note* 32.

133. *See* Erin Sefloff, *Creating a Category Under the Kyoto Protocol Based on Non Emissions*, 18 HASTINGS W.-N.W. J. ENV. L. & POL'Y 379, 388–89 (2012) (clarifying that President Correa sought $600 to $700 million a year for 10 years to leave the oil underground); *see also* Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011.

134. *See* Rochlin, *supra* note 125, at 23 ("petroleum production had bankrolled President Correa's populist platform. It has represented the golden egg from which redistributive fruits can be drawn to cultivate and maintain support from the majority poor population. . . .").

135. *See* Walsh, *supra* note 133.

136. *See* International Covenant on Economic, Social, and Cultural Rights, art. 11(1)(a), Jan. 3, 1976, 993 U.N.T.S. 3.

137. *See id.* at art. 11(1) (emphasis added).

138. *Compare* Menchú, *supra* note 131 *with* Fields, *supra* note 132 (noting that Health Minister Carina Vance claims 50% of Ecuadorian citizens live below the poverty line).

However, not everyone is optimistic that drilling in Yasuni would have trickle-down effects for Ecuadorian citizens.[139] Many believe that this would merely enrich transnational corporations, leaving the Ecuadorian people without Yasuni and without any money. One Ecuadorian described this by saying that "the reality is that oil has not brought development. It has brought immense contamination and environmental destruction. . . . Pollution and deforestation bring problems everywhere the oil is. Oil has not solved the problems of Ecuador."[140]

Ecuador's Oil Minister Wilson Pastor-Morris understands that the oil industry inevitably attracts corruption, violence, and social problems when it works in poor countries such as Ecuador.[141] Thus, not only would drilling for oil violate the rights of the indigenous peoples and possibly violate international law, but it may also cause *greater* human rights violations in Ecuador, against people who currently enjoy comparatively better human rights. One example would be if an oil drilling station was built and an Ecuadorian citizen, who currently works on his own farm, takes a job with a transnational oil drilling company. This Ecuadorian citizen may then be subjected to human rights violations.

Even before balancing the competing interests of all Ecuadorians' human rights versus the rights of indigenous peoples, it is imperative to decide whether Ecuadorians would even achieve an upswing in human rights based on the money received from the Yasuni drilling. If not, it would be difficult to argue that the drilling should occur. Therefore, should the Ecuadorian government use human rights rhetoric in the debate over drilling in Yasuni, then all monies that come in through the process should be transparently recorded. Contracts should be open to public bidding and leaders should be accountable. The only bigger tragedy than destroying the Yasuni ecosystem would be if the result of this tough environmental decision did not benefit the people it was intended to.

Ecuadorian President Correa stated that "the way to advance conservation is to make sure that poor countries benefit from conservation."[142] Correa should also understand that the way to advance conservation is to make sure that the poor Ecuadorians benefit from conservation. However, another issue that must be addressed is at what point do conservation and ecology become luxuries that must give way to basic necessities?[143] Ecuadorians, along with the rest of the world, would benefit immensely from keeping the oil buried deep underneath Yasuni. If the Yasuni-ITT Initiative is successful, Ecuador would prevent the emission of 407 million tons

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139. *See* Kimerling, *supra* note 130, at 448 ("[T]he benefits of oil development have not been well distributed and the percentage of Ecuadorians living in poverty remains stubbornly high.").

140. *See* John Vidal, *Ecuador: Four Months to Save the World's Last Great Wilderness From "Oil Curse,"* THE OBSERVER, Aug. 13, 2011, http://www.guardian.co.uk/environment/2011/aug/14/ecuador-oil-yasuni-national-park.

141. *Id.*

142. *See* Bryan Walsh, *Ransoming Paradise: Should the World Bribe Ecuador to Protect that Country's Rain Forests?*, CHI. TRIB., Feb. 5, 2012, http://www.articles.chicagotribune.com/2012-02-05/news/ct-edit-ecuador-0205-201220205_1_yasuni-national-park-rain-forests-ecuador.

143. *See* R. Douglas Fields, *Drilling for Oil in Eden: Initiative to Save Amazon Rainforest in Ecuador Is Uncertain*, SCIENTIFIC AMERICAN (Mar. 17, 2012), http://blogs.scientificamerican.com/guest-blog/2012/03/17/drilling-for-oil-in-eden-initiative-to-save-amazon-rainforest-in-ecuador-is-uncertain/ (quoting an Ecuadorian biologist arguing that these "luxuries" must give way when people need to eat).

of carbon.[144] Thus, Ecuador would take a leading position in the fight against climate change, and Ecuadorians would enjoy cleaner air.

V. Paradise Lost: Transnational Oil Corporations and a Responsibility to Preserve

Transnational corporations have a long history in Ecuador, and no transnational corporations are more blameworthy than oil companies like Chevron.[145] Texaco was accused of polluting the Amazon from the 1960s to the 1990s.[146] Chevron, which now owns Texaco,[147] continues to litigate a $27 billion case over the damages from those allegations.[148] This case has taken "nearly seventeen years, in litigation spanning two continents and numerous courtrooms."[149] This is one of the largest environmental cases ever to be litigated. No matter the outcome, incidents such as this have caused damage to Chevron's reputation, both in Ecuador and abroad.[150] Not only are environmentalists and human rights activists upset, but Chevron

144. *See* U.N. GAOR, 65th Sess., 19th plen. mtg. at 1, U.N. Doc. A/65/PV.19 (Sept. 27, 2010) (remarks of Ecuadorian Vice President, Mr. Moreno Garcés).

145. *See* Chevron Corp. v. Camacho Naranjo, 667 F.3d 232, 234 (2d Cir. 2012) ("The story of the conflict . . . must be among the most extensively told in the history of the American federal judiciary."); *see also* Han Shan, *Chevron in Ecuador*, *in* THE TRUE COST OF CHEVRON: AN ALTERNATIVE ANNUAL REPORT 36 (May 2011), *available at* http://truecostofchevron.com/2011-alternative-annual-report.pdf ("There is no disputing that oil operations by Texaco—now Chevron—ravaged a sprawling, once-pristine rainforest region of Ecuador, devastating Indigenous communities, and creating a severe public health crisis for many thousands of residents.").

146. *See* Chevron Corp. v. Camacho Naranjo, 67 F.3d 232, 235 (2d Cir. 2012); *see also* Judith Kimerling, Symposium, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 445–46 (2006) (discussing the checkered history of Texaco in the Ecuadorian Amazon).

147. *See* Ecuador v. Chevron Corp., 638 F.3d 384, 387 n.1 (2d Cir. 2011) ("Chevron Corporation merged with TexPet's parent company, Texaco, in 2001 to form Chevron Texaco, Inc. In 2005, ChevronTexaco changed its name back to Chevron Corporation.").

148. *See* Bryan Walsh, *Rain Forest for Ransom*, TIME, Dec. 19, 2011.

149. *See* Ecuador v. Chevron Corp., 638 F.3d 384, 387 (2d Cir. 2011); *see also* Chevron v. Naranjo, Docket Nos. 11-1150-cv(L) 11-1264-cv(CON) (2d Cir. Jan. 26, 2012) ("The story of the conflict between Chevron and residents of the Lago Agrio region of the Ecuadorian Amazon must be among the most extensively told in the history of the American federal judiciary.").

150. *See* Mitch Anderson, *Chevron's Amazon Disaster: Ecuadorians Tour Europe, Find Investors Concerned*, S.F. CHRONICLE, Apr. 19, 2012, http://blog.sfgate.com/manderson/2012/04/19/chevrons-amazon-disaster-ecuadorians-tour-europe-find-investors-concerned/.

shareholders are also beginning to question decision making by Chevron's Board.[151] The issue of corporate liability for internationally wrongful actions is one that continues to be heavily litigated.[152] Chevron, the successor to Texaco in the litigation, has been accused of strong-arming the judicial process and acting in bad faith throughout the entire litigation.[153]

Ecuador's human rights obligations require it to use all appropriate means to ensure that actors operating within its territory or otherwise subject to its jurisdiction comply with national legislation designed to give effect to human rights.[154]

Transnational corporations are one such group that must abide by legislation that seeks to ensure that human rights violations do not occur.[155] The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights[156] recognize that although states are primarily responsible for human rights, "transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing human rights."[157]

According to the United Nations Global Compact's three environmental principles: (i) businesses should support a precautionary approach to environmental challenges; (ii) businesses should undertake initiatives to promote greater environmental responsibility; and (iii) businesses should encourage the development and diffusion of environmentally friendly technologies.[158]

Transnational corporations' obligations regarding cultural rights and environmental rights are spelled out in Articles 12 and 14 of the Norms on the Responsibilities of Transnational Corporations. In Article 12,

> [t]ransnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and con-

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151. *See id.* (noting that Chevron stockholders have written letters expressing their concern regarding Chevron's decision not to settle before the Ecuadorian judgment against the corporation for $18 billion).

152. Kiobel v. Royal Dutch Petroleum Co. 456 F. Supp. 2d 457 (S.D.N.Y. 2006) (a pertinent case on corporate liability that the Supreme Court of the United States was scheduled to decide this term, has been postponed until the October 2012 term so that the parties may brief additional issues for the court); *see generally* Lyle Denniston, Kiobel *to Be Expanded and Reargued*, SCOTUSBLOG, http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/ (detailing the circumstances that required postponing the decision until Fall 2012 term).

153. See Steven Donziger et. al., *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 HUM. RTS. BR. 8, 9–10 (2010).

154. *See* HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1388 (3d ed. 2008).

155. The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries. *See* Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, at art. 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) (Norms on the Responsibilities).

156. *See id.*

157. *See id.* at Preamble.

158. *See Environmental Principles*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/Issues/Environment/ (last visited Oct. 23, 2012).

> tribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.[159]

Similarly, in Article 14,

> [t]ransnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, and administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.[160]

As discussed earlier, Ecuadorian law is clear on what actions taken by transnational corporations violate domestic law.[161] Transnational corporations must abide by the provisions laid out in Ecuador's Constitution and executive decrees.[162] Aside from the transnational corporations personal liability for certain actions, states are also responsible for the actions of transnational corporations. The Human Rights Committee has explained:

> [T]he positive obligations on State Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by State Parties of those rights, as a result of State Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[163]

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159. *See* Norms on the Responsibilities *supra* note 155.

160. *See id.*

161. *See generally* Constitucion Politica de Republica del Ecuador art. 57, 71–74 *available at* http://www.pdba.georgetown.edu/Constitutions/Ecuador/english08.html (unofficial version); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (ratified by Ecuador in 1977).

162. *See* DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTIONS AND HUMAN RIGHTS 577 (2011) (noting that under Ecuadorian law all surface minerals are the property of the State).

163. *See* Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on State Parties to the Covenant, Art. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

Transnational corporations face greater legal hurdles when they attempt to destroy cultural heritage as opposed to when they attempt to destroy unprotected lands. The United Nations Educational Scientific and Cultural Organisation's (UNESCO) 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage requires states to identify, protect, conserve, present, and transmit to future generations the cultural and natural heritage located within their territory.[164] Where the state works in close proximity with transnational corporations, it may be held liable under international law for such actions. In fact, the recent Chevron litigation offers hope that this will be a step toward holding transnational corporations accountable for the harms that they cause to peoples and to environments.[165] Transnational corporations must be cautious of the effects that their policies have when they interact with indigenous local communities.[166] Steps taken in Ecuador are a step in the right direction, although not many states have been quick to adapt progressive measures against transnational corporations.[167]

We know that left to their own devices, transnational oil companies will ignore the indigenous tribes and do as they please.[168] In one sad example, a subsidiary of the Italian company Eni convinced a group of Huarorani Indians to permit oil access over their lands and to sign away any right to sue in the future in exchange for a paltry amount of goods.[169] These tactics continue today, as PetroAmazonas "has promised villagers from the Kichwa indigenous group that they will get cash, new schools, a new eco-lodge, better healthcare and university education for their children if they accept plans for a seismic survey" that will grant exploration rights to the oil company near Yasuni.[170]

VI. Other Yasunis

Ecuador is not the only state that faces this severe problem. Other states have an incentive to treat Yasuni with great care, as they may face this exact problem in the near future.[171] One

164. *See* World Heritage Convention, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, Nov. 23, 1972, 27 U.N.T.S. 37 at art. 4.

165. *See* Jessica Lynd, *International Legal Updates: Latin America*, 18 HUM. RTS. BR. 44 (2011).

166. *See* E. Suarez, et al., *Oil Industry, Wild Meat Trade and Roads: Indirect Effects of Oil Extraction Activities in a Protected Area in North-Eastern Ecuador*, 12 ANIMAL CONSERV. 364, 370 (2009).

167. *See* Micaela L. Neal, Comment, *The Niger Delta and Human Rights Lawsuits: A Search for the Optimal Legal Regime*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 343, 370 (2011) (noting the Netherlands as another example of a progressive State regarding transnational liability).

168. *See* Judith Kimerling, Symposium, *Lands, Liberties, and Legacies: Indigenous Peoples and International Law: Regional Issues in the International Indigenous Rights Movement: Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 450–51 (2006) (noting that although laws have been on the books in Ecuador since at least 1971 to protect the environment, oil companies have ignored those laws and the Ecuadorian Government has failed to enforce any such laws).

169. *See* Erin Sedloff, *Creating a Category Under the Kyoto Protocol Based on Non Emissions*, 18 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 379, 389–90 (2012) (describing that the "deal" included "medicine, food, a $3,500 schoolhouse, plates, cups, an Ecuadorian flag, two soccer balls and a referee's whistle.").

170. *See* Jonathan Watts, *Shaman and British Wife Embark on Rainforest Campaign Against Oil Threat*, THE GUARDIAN (Oct. 16, 2012).

171. *See* Dave Gilbert, *Rainforest Home to Vast Treasury of Life*, CNN, Mar. 13, 2012, (noting that Brazil and Indonesia have also recently began programs to protect their tropical rain forests from destruction).

example where there is a similar problem is in the Democratic Republic of Congo. A Ministerial Order, signed on September 1, 2011, gave South Africa Congo Oil (SOCO) a Certificate of Environmental Accessibility in order to exercise an oil exploration campaign by acquiring data in Virunga National Park.[172] Virunga National Park is a UNESCO World Heritage Site, and its parallels to Yasuni are worth noting. Both cases deal with oil exploration within important natural heritage sites. Although one is in South America and the other in Africa, the lessons that have been learned from the former should be used in the latter.

Virunga National Park, located in the Democratic Republic of Congo, is Africa's oldest and most biodiverse national park.[173] Because Virunga has additional World Heritage Site protections, it seems that SOCO International, the oil company at issue, would violate international law if it began exploring for oil within the protected portions of the park. Yet SOCO has recently released details for its exploration of Block V, home of mountain gorillas and Lake Edward.[174] Advocates of protecting Virunga National Park would be remiss not to take lessons from Ecuador and its struggle to maintain its rain forests in the pressure of big transnational oil corporations.[175] Although outside the scope of this article, an important distinction is that Virunga lacks the uncontacted indigenous peoples and strong domestic legal protections that are found in the Yasuni example.

VII. Concluding Remarks

Time is slipping away in the bid to save Yasuni. Although President Correa continued the initiative for another year, he merely delayed the inevitable showdown that must take place.[176] Ecuador must act quickly to save its citizens and its natural resources, and should therefore adopt a Responsibility to Preserve approach that would protect its indigenous peoples and Yasuni, while at the same time helping lift Ecuadorians as a whole out of poverty.

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172. *See World Heritage Centre Expresses Concern Regarding Aeromagnetic and Aerogravimetric Explorations at Virunga National Park* (DRC), UNESCO (Mar. 13, 2012), http://whc.unesco.org/en/news/849.

173. *See Virunga—Africa's Prized Park Needs Protection From New Oil Threat*, WORLD WILDLIFE FUND (Mar. 30, 2012), http://www.wwf.org.uk/news_feed.cfm?5868/Virunga-Africas-prized-park-needs-protection-from-new-oil-threat.

174. *See* Kevin Heath, *SOCO International Prepares to Survey for Oil in Gorilla Park*, WILDLIFE NEWS (Mar. 31, 2012), http://wildlifenews.co.uk/2012/soco-international-prepares-to-survey-for-oil-in-gorilla-park/.

175. *See id.* ("Exploration for oil within the Virunga National Park would be very difficult to do legally as the park is protected by both national and international treaties. The park itself is a World Heritage Site and Lake Edward is a designated RAMSAR wetland.").

176. *See Ecuador: President Correa Gives Ecuador's Yasuni-ITT Initiative A Positive Evaluation*, INDIGENOUS PEOPLES ISSUES & RESOURCES (Jan. 7, 2012, 2:33 p.m.) (noting that Correa extended the Yasuni-ITT Initiative into 2013).

Ecuador should advocate the formalization of the Draft Inter-American Commission Declaration on the Rights of Indigenous Peoples, which provides more protection than the similar U.N. declaration. Article XIII, titled "the right to environmental protection," provides more stringent standards to protect Yasuni. The Draft Declaration would punish toxic waste dumping[177] and would require informed consent of indigenous peoples living within Yasuni before natural resource development began.[178] In addition to protecting Yasuni from oil extraction, it would also protect the Park from other natural resource extraction.[179]

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177. *See* Draft Inter-American Declaration on the Rights of Indigenous Peoples, at art. XIII(6).

178. *See id.* at art. XIII(7).

179. *See Ecuador Indians Protest Mining Plans*, FOX NEWS LATINO (Mar. 22, 2012), http://latino.foxnews.com/latino/lifestyle/2012/03/22/ecuador-indians-protest-mining-plans/.

The Post-*Morrison* Challenge—The Growing Irrelevance of a Transaction-Based Test in an Interconnected World: An Analysis of the Extraterritorial Application of Section 10(b) of the Securities Exchange Act of 1934 and the International Comity Implications in the Wake of *Morrison*

Christina M. Corcoran*

Introduction

The challenge of protecting investors is complex in nature and international in scope. U.S. issuers have been the beneficiaries of a "voracious appetite" for their securities among foreign investors, who held approximately $2.8 trillion (13.0 percent) of public U.S. equity securities as of 2007.[1] At the same time, U.S. investors have looked to international investments for growth and diversification of their portfolios in the face of an unstable U.S. economy, investing $4.8 trillion in foreign equity securities as of 2007.[2] Recognizing the potential for transnational securities fraud, courts inferred that Congress "would not have wanted wrongdoers offshore to be free to cause harm in the United States, or for the United States to be used as a base for fraudulent schemes directed at foreigners, even if the actual transaction affected by the fraud took place overseas."[3]

In an attempt to honor congressional intent, the Second Circuit applied a two-prong test consisting of an "effects test" and a "conduct test" (conduct and effects tests) to determine the extraterritorial reach of section 10(b) of the Securities Exchange Act of 1934.[4] The standard was in place for more than 40 years, and variations of it have been followed by many circuits in deference to the Second Circuit's expertise in the field of securities law.[5] As the name implies, the "conduct test" focused on "the nature of [the] conduct within the United States"[6] in an

1. ALAN PALMITER, SECURITIES REGULATION: EXAMPLES AND EXPLANATIONS 561 (5th ed. 2011).

2. *Id.*

3. U.S. Securities & Exchange Commission, Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 10 (2012) (hereinafter SEC Study on Private Right of Action Under 10(b)).

4. *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 208–09 (2d Cir. 1968) (establishing the "effects test" and holding that although transactions in treasury shares took place in Canada, they affected the value of common shares publicly traded in the United States); *see also* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336–37 (2d Cir. 1972) (articulating the "conduct test" and holding that the Securities Exchange Act is intended to protect against fraud in the sale or purchase of securities, whether or not they are traded on organized United States markets or issued by Americans).

5. *See* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2880 (2010) (pointing to evidence of deference to the Second Circuit in light of its preeminence in the field of securities law); *see also* Joshua L. Boehm, Note, *Private Securities Fraud Litigation After Morrison v. National Australia Bank: Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 HARV. INT'L L.J. 249, 253 (2012) (emphasizing the profound impact of the Second Circuit on securities fraud jurisprudence).

6. Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983).

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effort to proscribe fraudulent domestic behavior if it harms investors—irrespective of whether the victims of the fraud or the purchases and sales were overseas.[7] Unsurprisingly, circuits were split on what level of domestic conduct warranted section 10(b) protection. Some courts required U.S. activity to satisfy all elements of a securities violation,[8] while others required only "some activity" that was "significant" to the fraudulent scheme.[9] The "effects test" extended section 10(b) protection to foreign conduct that "cause[s] foreseeable and substantial harm to interests in the United States."[10] This standard was consistently adopted, reflecting the well-established view that countries have a strong sovereign interest in redressing domestic injuries.[11]

In 2009, the U.S. Supreme Court granted certiorari in *Morrison v. National Australian Bank*, a "foreign-cubed" case on the fringes of the conduct test.[12] In *Morrison*, plaintiffs brought a class action on behalf of foreign investors who had purchased the common stock of National Australian Bank, a foreign corporation, on a foreign exchange.[13] Plaintiffs sought relief under section 10(b) of the Exchange Act, arguing that the defendants had made materially misleading statements based on false financial figures generated by the bank's wholly owned subsidiary in Florida.[14] The district court held, and the Second Circuit affirmed, that the conduct test was not satisfied.[15] However, the Supreme Court leveraged the opportunity to

7. *See* Europe and Overseas Commodity Traders, S.A. v. Banque Paribas, 147 F.3d 118, 126 (2d Cir. 1998) (holding that the conduct within the United States was too minimal to find that U.S. jurisdiction existed); *see also* IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (hypothesizing that Congress did not intend to allow the United States to be a base for fraudulent security activities, even if such activities affected only foreigners).

8. *See* Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998) (allowing an action to proceed when the conduct forms a substantial part of the alleged fraud and is material to its success); *see also* Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 31 (D.C. Cir. 1987) (suggesting the Second Circuit's rule that jurisdiction will lie in American courts when the domestic conduct comprises all elements of a defendant's conduct necessary to establish an antifraud violation).

9. *See* Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983) (finding that the misrepresentations in the case were significant with regard to the allegations and furthered a fraudulent scheme); *see also* Cont'l Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) (determining that the defendants' conduct within the United Sates was in furtherance of a fraudulent scheme and significantly related to its end); *see also* SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) (explaining that federal securities laws extend jurisdiction in transnational cases where at least some activity aimed to further a fraudulent scheme occurs within the United States).

10. Mak v. Wocom Commodities Ltd., 112 F. 3d 287, 289 (7th Cir. 1997).

11. *See* SEC Study on Private Right of Action Under 10(b), *supra* note 3, at 12 (recognizing that the implementation of section 10(b) of the Securities Exchange Act of 1934 was in line with the view that states can take action when foreign actors cause substantial harm to its own population); *see also In re* European Aeronautic Defence & Space Co. Sec. Litig., 703 F. Supp. 2d 348, 357 (S.D.N.Y. 2010) (noting that the effects test furthered Congress' interest in providing locals recourse against a foreign transactional scheme).

12. Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2869 (2010).

13. *Id.* at 2876.

14. *Id.* at 2875–76 (stating that the plaintiffs alleged fraud when defendant manipulated its financial statements to give its mortgage-servicing right more value then what it actually had).

15. *In re* Nat'l Austl. Bank Securities Litigation, 2006 WL 3844465, *8 (S.D.N.Y. 2006) (noting that plaintiff failed to prove that damages were incurred as a result of the alleged fraud); Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167 (2d Cir. 2008) (ruling that plaintiffs failed to meet their burden under the conduct test).

strike down the conduct and effects test and replace it with a new bright-line "transactions" test.[16] Under the new test, recovery under section 10(b) and rule 10b-5 "reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on a[n American] stock exchange, and the purchase or sale of any other security in the United States."[17] "[I]t is the foreign location of the transaction that establishes (or reflects the presumption of) the [Exchange] Act's inapplicability. . . . [W]e reject the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad."[18]

The Supreme Court's decision in *Morrison* emphasized a "presumption against extraterritoriality," a canon of statutory interpretation requiring a clear indication that Congress intended a statute to have extraterritorial application.[19] Despite over 40 years of congressional inaction to curtail courts' cross-border application of federal securities laws, the Supreme Court found no "affirmative indication" in the language of the Exchange Act that section 10(b) applies extraterritorially.[20] The decision also rested on a variety of policy arguments. In true Scalia fashion, the opinion criticized the current conduct and effect tests as "complex in formulation and unpredictable in application."[21] The opinion also touched upon issues of international comity, speculating that "the probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'"[22]

The *Morrison* decision raised the issue of legislative intent, and Congress broke its silence almost immediately with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[23] Section 929P(b)(2) of Title IX of Dodd-Frank essentially reinstated the

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16. *Morrison*, 130 S. Ct. at 2888 (creating a new bright-line transactional test in place of the conducts and effects test); Dona Szak & Courtney Scobie, Note, *Will Rule 10b-5 Go Global? The Status of Private Rights of Action After Morrison v. National Australia Bank*, 59 THE ADVOC. (TEXAS) 35 (2012) (noting that the Court in *Morrison* created a new transactional test for securities fraud).

17. *Morrison*, 130 S. Ct. 2869 at 2888.

18. *Id.* at 2885.

19. *Id.* at 2877 (holding that unless a Congress intends to the contrary, its legislation applies only within the territorial jurisdiction of the United States); *see* STEVEN WOLOWITZ, JURISDICTION: EXTRA-TERRITORIAL APPLICATION OF U.S. REGULATIONS 6 (3d ed. 2011) (noting that the Exchange Act does not apply to plaintiffs in foreign markets).

20. *Morrison*, 130 S. Ct. at 2874; James E. Berger & Charlene C. Sun, *Emerging Issues in Alien Tort Statute Litigation*, 33 NO. 2 CAL. TORT REP. 1 (2012) (discussing that the Court in *Morrison* did not apply section 10(b) of the Securities Exchange Act to foreign markets).

21. *Morrison,* 130 S. Ct. at 2873; *see* Daniel S. Kahn, *The Collapsing Jurisdictional Boundaries of the Anti-fraud Provisions of the U.S. Securities Laws: The Supreme Court and Congress Ready to Redress Forty Years of Ambiguity,* 6 N.Y.U. J. L. & BUS. 365, 419 (establishing that the presumption against extraterritoriality encompasses deference to the legislature as well as a deference to foreign legal regimes).

22. *Morrison*,130 S. Ct. at 2885 (establishing that the court rejects that the Exchange Act reaches conduct or transactions abroad).

23. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat.1376 (2010) (codified as amended at 18 U.S.C.A. § 1514A(a) (West 2000 & Supp. 2011))(hereinafter Dodd-Frank); *see* Symposium, *Perspectives on Dodd-Frank Wall Street Reform and Consumer Protection Act,* 7 J. L. ECON. & POL'Y 307, 314 (2010) (arguing that because there is no legislative history or committee report on Dodd-Frank, there is nothing authoritative to define congressional intent).

conduct and effects tests for SEC and Department of Justice enforcement actions. The legislation provides U.S. district courts with jurisdiction over Commission and DOJ enforcement actions if the fraud involves

> (1) conduct in the United States that constitutes a significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors[;] or
>
> (2) conduct [occurring] outside the United States [that] has a foreseeable substantial effect within the United States.[24]

In light of *Morrison*'s call for an affirmative indication of Congress' intent, the question remains: Should Congress extend the Dodd-Frank conduct and effects tests to a private right of action under section 10(b)? Although the Supreme Court intended to create a more simple, predictable standard in the transactional test, it arguably "raised as many questions as it answered."[25] Courts have struggled to apply the transactional test in unconventional contexts, including over-the-counter American Depository Receipts (ADRs), derivatives contracts, and securities not listed on a U.S. or foreign exchange. The split in authority demonstrates larger questions underlying the bright-line rule: Where does a securities "transaction" take place, and is that an appropriate basis for the extraterritorial application of U.S. securities laws? Moreover, the opinion in *Morrison* makes a passing reference to concern regarding conflicts with the laws of other nations, but do those conflicts justify significantly curtailing investor protection?

Part I of this article will examine how courts have applied section 10(b) of the Securities Exchange Act of 1934 to cross-border securities claims under the *Morrison* transactional test. It will focus on the exchange-based first prong of the standard and highlight some of the resulting gaps in investor protection. Part I will also address the trend of cross-border consolidation of stock exchanges and its relevance to the extraterritorial application of federal securities laws. Part II will take a critical look at how courts have applied *Morrison* to non-exchange-listed cross-border securities transactions, highlighting recurring issues in its application. It will demonstrate how courts' results-oriented approach in these cases reveals the inherent shortcomings of the transactional test. Part III will argue that the conduct and effects tests are a more effective safeguard. It will analyze the international comity concerns of extending the Dodd-Frank conduct and effects tests to a private right of action and argue that those concerns are overstated. Finally, this article will conclude that effective investor protection should trump any inconvenience foreign companies may incur in calculating liability under the antifraud provisions of U.S. securities laws.

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24. Michael D. Mann et al., *Enforcement Initiatives, in* CORPORATE GOVERNANCE—A MASTER CLASS 2011, 479, 490 (PLI Corporate Law and Practice, Course Handbook Ser. No. 28853).

25. Peter J. Hennings, *Pursuing Foreign Fraud Claims on American Soil,* NY TIMES DEALBOOK (Apr. 17, 2012, 2:09 PM), http://dealbook.nytimes.com/2012/04/17/pursuing-foreign-fraud-claims-on-american-soil.

I. The Transactional Test: Cross-Border Trends and Gaps in Investor Protection

A. "The Oddity of the Result Should Give Pause"

—Victims of Fraudulent Conduct and Effects in the United States

Justice Stevens's concurring opinion offers a compelling example of the significant gap in investor protection created by the *Morrison* transactional test.[26] By cutting off liability for securities purchased on foreign exchanges, *Morrison* opens the door to significant injustice for U.S. investors seeking international investment opportunities beyond those listed on U.S. exchanges.[27] In his concurrence, Justice Stevens described an American investor induced to purchase common shares of a foreign company listed on a foreign exchange by executives of the company's American subsidiary—a combination of both substantial wrongful conduct and injurious effect in the United States.[28] Justice Stevens wrote, "The oddity of that result should give pause. For in walling off such individuals from § 10(b), the Court narrows the provision's reach to a degree that would surprise and alarm generations of investors—and, I am convinced, the Congress that passed the Exchange Act."[29]

The facts of *Morrison* reiterate that fraud emanating from U.S. subsidiaries is not a far-fetched scenario. Furthermore, as the trend of globalization continues and the world becomes increasingly interconnected, opportunities for transnational securities fraud will only continue to grow.[30] And while the potential for unnecessary litigation does exist at the fringes of the conduct and effects tests, courts have routinely rejected cases that are not sufficiently connected to the United States.[31] *Morrison* is a perfect example of this; both the district court and Second

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26. *See Morrison*, 130 S. Ct. at 2888 (discussing the issue of transnational securities fraud failing to fall within the scope of the statute); *see also* Joshua L. Boehm, Note, *Private Securities Fraud Litigation After Morrison v. National Australia Bank: Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 HARV. INT'L L.J. 249, 285 (2012) (addressing the enforcement gaps existing under the transactional test).

27. *See* SEC Study on Private Right of Action Under 10(b), *supra* note 3, at iii (detailing the threat of arbitrary outcomes produced by the transactional test); *see also* Pamela Woodford, *Johnson Finance Professor's Research Guides SEC in Important Report to Congress*, CORNELL ENTERPRISE ONLINE (May 8, 2012), http://www2.johnson.cornell.edu/alumni/enterprise/fall2011/index.cfm?action=inside&inside_id=8&page_id=2524 (noting that investors are exposed to more risk and less protection).

28. *Morrison*, 130 S. Ct. at 2895.

29. *Id.* at 2895 (Stevens, J. concurring).

30. *See* Eric D. Peterson, *Transnational Securities Fraud Jurisdiction Under Section 10(b): The Case for a Flexible and Expansive Approach*, 47 WASH & LEE L. REV. 637 (1990), http://scholarlycommons.law.wlu.edu/wlulr/vol47/iss3/7 (noting the increase in transnational securities transactions); *see also* John W. Hamlin, Comment, *Exporting United States Law: Transnational Securities Fraud and Section 10(B) of the Securities Exchange Act of 1934*, 3 CONN. J. INT'L L. 373 (1988) (emphasizing the dramatic increase in investments and trading in foreign securities).

31. Morrison v. Nat'l Australia Bank Ltd., 547 F.3d 167, 177 (2nd Cir. 2008) (denying subject matter jurisdiction because the fraudulent statements emanated from the company's Australian headquarters and had little or no effect on America); *In re* NovaGold Res. Inc. Sec. Litig., 629 F. Supp. 2d 272, 305–06 (S.D.N.Y. 2009) (holding that the court does not have subject matter jurisdiction because no culpable conduct occurred in the United States, and the pleading failed to show that the conduct within the United States caused the harm).

Circuit found that the facts of the case were insufficient to warrant section 10(b) protection under the conduct and effects tests, even though the American subsidiary was directly involved in the fraud.[32]

B. Inequitable Results—Cross Listed Companies

Despite the cooling market for Initial Public Offerings in the United States, many foreign companies still seek to list in the United States to achieve the greatest possible liquidity for their shareholders.[33] Investor relations experts note that foreign companies benefit from the comparatively tightened U.S. securities regulations and the associated protections and transparency offered to shareholders.[34] There is also an element of perceived legitimacy in listing in the United States. Companies make the decision to subject themselves to heightened disclosure requirements and often reconcile their accounting standards from international standards to U.S. Generally Accepted Accounting Principles (GAAP).[35]

Despite these benefits, *Morrison*'s holding means that investors could be induced to invest in a cross-listed company by fraudulent reporting in the United States, or even by fraudulent conduct in the United States, but their ability to recover would depend upon the location of the exchange where the transaction was executed.[36] The arbitrary nature of this distinction is augmented by the fact that many investors are unaware of where their transactions are exe-

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32. Morrison v. Nat'l Australia Bank Ltd., 547 F.3d 167, 176 (2d Cir. 2008) (finding that the actions taken in Australia were more directly responsible for the fraud than the actions taken in Florida); *In re* Nat'l Australia Bank Sec. Litig., 2006 WL 3844465, *8 (S.D.N.Y. 2006) (holding that the conduct in the United States was not in itself securities fraud; rather, it was "a link in the chain of an alleged securities fraud scheme that culminated abroad").

33. *See* 1 HANDBOOKS IN FINANCE, HANDBOOK OF CORPORATE FINANCE: EMPIRICAL CORPORATE FINANCE 292 (B. Espen Eckbo ed., 2007) (hereinafter Corporate Finance Handbook) (noting that cross-listing in the United States allows foreign firms to raise equity capital at more attractive terms); *see also* FLETCHER SCHOOL'S HITACHI CENTER FOR TECHNOLOGY & INTERNATIONAL AFFAIRS AT TUFTS UNIVERSITY, FINANCIAL INNOVATIONS AND THE WELFARE OF NATIONS 129–30 (Laurent L. Jacque & Paul M. Vaaler eds., 2001) (showing that foreign firms believe listing in the United States will increase their prestige and increase trading liquidity).

34. *See* CORPORATE FINANCE HANDBOOK, *supra* note 33 (showing that although the United States has stricter regulations than most countries, many firms cross-list in the United States because it allows them to raise equity capital at more attractive terms); *see also* FRANK B. CROSS & ROBERT A. PRENTICE, LAW AND CORPORATE FINANCE 62 (2007) (stating that many corporations cross-list in the United States despite its stricter regulations in order to show the companies' quality).

35. *See* FLETCHER SCHOOL'S HITACHI CENTER FOR TECHNOLOGY & INTERNATIONAL AFFAIRS AT TUFTS UNIVERSITY, *supra* note 33 (revealing that Japanese and Korean firms believe cross-listing in the United States leads to more prestige); *see also* Anuparma J. Naidu, Comment, *Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate Into Costs to the United States*, 18 EMORY INT'L L. REV. 271, 275 (2004) (noting the strict requirements imposed on foreign issuers for the use of non-GAAP accounting principles and reconciliation requirements).

36. *See* Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 178–79 (S.D.N.Y. 2010) (asserting that a purchaser's residency has no bearing on where a transaction occurs, and location of harm is independent of where the securities transaction that produced the harm occurred); *see also* Genevieve Beyea, Morrison v. National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 562 (2011) (contemplating section 10(b) application with respect to transactions listed on domestic exchanges).

cuted.[37] This reality was emphasized in a comment letter to the SEC from a group of 69 foreign pension funds, which argued "the *Morrison* test fails to recognize the realities of today's modern trading environment, and is punitive to investors who often do not know whether their respective securities transaction was ultimately executed on a U.S. or foreign exchange."[38]

Other comment letters to the SEC emphasized that ADRs are not an adequate replacement for executing trades directly on a foreign exchange, as they "are often less liquid than the underlying foreign securities, it may be impractical for large funds to purchase or sell the desired volume of ADRs within a time frame that is consistent with the funds' needs or investment objectives."[39]

The Southern District of New York rejected a plain reading of *Morrison*, which would apply section 10(b) when an issuer purposefully avails itself to U.S. securities law by listing on an American exchange, regardless of where the plaintiff executed his or her purchase.[40] For example, in *In re Alstrom SA Securities Litigation*, the district court dismissed plaintiffs' claims, even though they purchased common shares of a French company from the United States that was listed on the New York Stock Exchange (NYSE).[41] Ultimately, plaintiffs were barred from recovery because the transaction took place on the French exchange instead of on the NYSE.[42] In a similar case, the district court stated "the idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States is simply contrary to the spirit of Morrison."[43]

The district court's distinction makes sense in a foreign-cubed case like *Morrison*, where a foreign issuer purchases foreign securities on a foreign exchange. However, it makes less sense where the purchase comes from an investor who was induced by the company's reporting in the

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37. SEC Study on Private Right of Action Under 10(b), *supra* note 3, at 42 (expressing that investors may not know where their securities transaction occurred); *see* Letter from AGEST Superannuation Fund et al., to Elizabeth M. Murphy, Securities and Exchange Commission (Feb. 18, 2011) (on file with author), http://www.sec.gov/comments/4-617/4-617.shtml (explaining that investors are often not aware of which stock exchange their transaction is directed through because some securities are listed on more than one stock exchange).

38. SEC Study on Private Right of Action Under 10(b), *supra* note 3, at 42.

39. *Id.* at 45; *see* Letter from Peter Mixon, General Counsel, California Public Employees' Retirement System, to Elizabeth M. Murphy, Securities and Exchange Commission (Feb. 18, 2011) (on file with author), http://www.sec.gov/ comments/4-617/4-617.shtml (remarking that the California Public Employees' Retirement System usually does not buy ADRs because of the added trading costs); *see also* Letter from G. Andrew Karolyi, Professor of Finance and Global Business, Cornell University, to Elizabeth M. Murphy, Securities and Exchange Commission (Feb. 18, 2011) (on file with author), http://www.sec.gov/comments/4-617/4-617.shtml (finding that pricing on the ADR market is typically more expensive and involves more risks than buying on the "local" market).

40. *In re* Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 335–36 (S.D.N.Y. 2011); *see* Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 11 (2011) (showing that the Supreme Court's holding in *Morrison* conflicts with the notion that the Court applies section 10(b) to all securities listed on an American exchange, even when the transaction occurred outside of America).

41. *In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469, 472–73 (S.D.N.Y. 2010).

42. *Id.* at 471.

43. *Royal Bank of Scot.*, 765 F. Supp. 2d at 336.

United States or other fraudulent conduct in the United States directed at its residents, regardless of that purchaser's nationality and the exchange where the transaction ultimately took place.

C. Transnational Exchange Consolidation and Regulatory Harmonization

Although it was ultimately blocked by European Union regulators, the recently attempted merger of NYSE Euronext and Deutsche Börse, the operator of the Frankfurt Stock Exchange, raises the question of whether the transactional test will continue to be relevant as exchanges around the world consolidate on a global scale.[44] International competition within capital markets for the business of issuers and investors has led stock and derivatives exchanges to change their business models to demutualized corporations run for the benefits of shareholders.[45] Further, although securities regulations are still governed on a national basis, the barriers that kept stock exchanges national, such as the costs of communication and technology, have become negligible.[46]

Regulators around the world have recognized the need for cross-border cooperation in securities regulation and international harmonization of disparate policies.[47] In 1983, the leading regulatory bodies in the United States, United Kingdom, France, Belgium, the Netherlands, and Portugal became members of the International Organization of Securities Commissions (IOSCO), which was established for international regulation of securities markets.[48] In May 2003, IOSCO published the *Objectives and Principles of Securities Regulation*, which set out 30 principles derived from three main objectives for securities regulation.[49] The

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44. *See* Jacob Bunge, *SEC Approves NYSE Deal But a Looming Block by Europe Could Still Scuttle Merger*, WALL ST. J., Jan. 19, 2012, at C7 (describing the failed merger of NYSE Euronext and Deutsche Börse).

45. *See* Caroline Bradley, *Demutualization of Financial Exchanges: Business as Usual?*, 21 NW. J. INT'L L. & BUS. 657, 664–65 (2001) (elaborating on the emerging business model that embraces demutualized corporations geared toward promoting the interests of shareholders); *see also* Bo Harvey, Note, *Exchange Consolidation and Models of International Securities Regulation*, 18 DUKE J. COMP. & INT'L L. 151, 151 (2007) (explaining the increase of demutualized corporations in the global economic community).

46. *See* Eric C. Chaffee, *Twenty-Third Annual Corporate Law Symposium: The Globalization of Securities Regulation, Competition or Coordination?: Contemplating the Endgame: An Evolutionary Model for the Harmonization and Centralization of International Securities Regulation*, 79 U. CIN. L. REV. 587, 589 (2010) (positing that regulatory fragmentation creates a race to the bottom in securities law, and that the world should adopt more cohesive international securities law); *see also* Sara M. Saylor, Note, *Are Securities Regulators Prepared for a Truly Transnational Exchange?*, 33 BROOKLYN J. INT'L L. 685, 687 (2008) (stating that the laws governing securities are problematic because national boundaries no longer limit capital flow).

47. *See* Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207, 208 (confirming that the national regulation of security markets creates a regulatory disharmony in terms of an integrated international market); *see also* Tzung-bor Wei, *The Equivalence Approach to Securities Regulation*, 27 N.W. J. INT'L L. & BUS. 255, 255–56 (2007) (proposing that the main argument for harmonization of securities regulations is that it reduces transactional costs).

48. IOSCO Historical Background, INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, http://www.iosco.org/about/index.cfm?section=background (stating that IOSCO is the primary institution that promulgates international standards for security regulations); Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 338–39 (2010).

49. Objectives and Principles of Security Regulation, INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, http://iosco.org/pubdocs/pdf/IOSCOPD323.pdf.

three guiding principles are (1) "[t]he protection of investors"; (2) "[e]nsuring that markets are fair, efficient and transparent" and (3) "[t]he reduction of systemic risk."[50] Moreover, there were bilateral agreements signifying movement toward harmonization.[51] For example, in the wake of the NYSE merger with Euronext, the SEC, and the College of Euronext Regulators signed a Memorandum of Understanding in order "to facilitate cooperation in market oversight."[52] The 2007 agreement signifies an important step toward the global convergence of regulations, collaboration, and cooperation with respect to oversight.[53]

Some legal scholars suggest that consolidation between stock exchanges, particularly those of the magnitude that the NYSE Deutsche Börse merger would have been, is compelling support for the restoration of a private cross-border right of action.[54] Others have rejected the argument that this trend complicates the application of *Morrison*, noting that despite the potential for shared electronic trading platforms, it would still be clear whether the securities were trading on a U.S. or foreign exchange.[55] Nevertheless, exchanges will continue to be regionally regulated in the foreseeable future. However, there is a clear trend toward international consolidation of exchanges and increased collaboration among regulators.[56] This suggests a gradual move toward the international harmonization of securities regulations and with it, the declining importance of where transactions take place.

II. Non-Exchange Listed Securities and Private Placements

While the exchange-based prong of the *Morrison* test is easy for courts to apply, the second prong, which limits recovery under section 10(b) to "domestic transactions in other

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50. *Id.*

51. Pierre-Hugues Verdier, *Mutual Recognition in International Finance,* 52 HARV. INT'L L.J. 55, 83 (2011) (emphasizing that the SEC is shifting from "universal regulatory convergence" toward a bilateral approach).

52. Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight (Jan. 25, 2007), http://www.sec.gov/news/press/2007/2007-8_ mou.pdf.

53. *See* Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 INT'L LAW 1121, 1123 (2007) (explaining that mergers allow easier access to the world's capital markets); *see also* Anuj Gangahar, *NYSE and Euronext Recast an International Dynamic*, FIN. TIMES, Dec. 23, 2006, http://www.ft.com/cms/s/0/cb74a180-9229-11db-0000779e2340.html#axzz29VWeokB0 (highlighting that the merger's approval sends a signal that isolationism is an unworkable system).

54. *See* Comments by Forty-Two Law Professors, submitted jointly to Elizabeth M. Murphy, Securities and Exchange Commission, SEC File No. 4-617 (Feb. 18, 2011), http://www.sec.gov/comments/4-617/4617-28.pdf; *see also* Michael J. De La Merced, *NYSE Euronext and Deutsche Börse to Merge in $10 Billion Deal*, N.Y. TIMES, Feb. 16, 2011, http://dealbook.nytimes.com/2011/02/15/new-york-and-german-exchanges-seal-deal/ (stating that this merger is "the biggest example of the consolidation among financial markets").

55. Hannah L. Buxbaum, *Access to Justice: Investor Suits in the Era of the Roberts Court: Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 LAW & CONTEMP. PROBS. 161, n. 24 (2012).

56. WILLIAM M. PRIFTI, 24A SECURITIES: PUBLIC AND PRIVATE OFFERINGS § 8.25 (2d ed. 2012); Christina D. Cress, Note and Comment, *The Failed NYSE Euronext-Deutsche Börse Group Merger: Foreshadowing Future Consolidation of the Global Stock Exchange Market?*, 16 N.C. BANKING INST. 375, 375 (2012) (confirming that there is a current trend toward international consolidation of stock exchanges and that trend requires approval from antitrust regulators).

securities," has created some confusion.[57] Non-exchange listed securities like ADRs and derivative contracts often trade over the counter in the United States but actually represent shares of foreign-issued securities.[58] Courts have developed a number of different approaches to determine whether a transaction in these securities is considered "domestic" and therefore worthy of section 10(b) protection under *Morrison*.[59] The disparities among the courts' approaches and the challenges courts face in characterizing transactions as "domestic" or "foreign" are telling; a closer analysis demonstrates the inherent problem with applying the transactional test in an increasingly interconnected world. This occurs where international investment opportunities are abundant and easily accessible, and where the "closing" of a transaction is just one step in a longer track record of conduct in the offer and acceptance process.

A. American Depository Receipts (ADRs)

An ADR is a negotiable certificate representing an ownership interest in a certain number of ordinary shares of a foreign issuer.[60] They are the economic equivalent of shares traded on foreign exchanges, but they trade on domestic exchanges or over the counter in the United States.[61] Foreign private issuers contract with U.S. banks, which act as depositories of issuers' securities and distribute them to U.S. investors.[62] ADRs trade in the United States like any other market-traded U.S. security, with pricing based on the prices of the underlying foreign securities.[63] Prior to *Morrison*, some courts characterized transactions in ADRs as "more foreign" than domestic, despite the fact that the securities actually traded on U.S. exchanges.[64]

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57. *In re* Royal Bank of Scot. Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 335 (S.D.N.Y. 2011); *see* Alex Reed, *But I'm an American! A Text-Based Rationale for Dismissing F-Squared Securities Fraud Claims After* Morrison v. National Australia Bank, 14 U. PA. J. BUS. L. 515, 516 (2012) (stressing that the Court's vague language in the *Morrison* decision led to great confusion).

58. *International Investing*, SEC: OFFICE OF INVESTOR EDUCATION AND ADVOCACY, http://www.sec.gov/investor/pubs/ininvest.htm (last modified Aug. 14, 2012) (asserting that ADRs are instruments traded on the U.S. markets that represent stocks of foreign entities); Mark A. Saunders, *American Depository Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 FORDHAM INT'L L.J. 48, 49 (1993) (stating that ADRs represent the ownership of a foreign security).

59. *See* Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 62 (2d Cir. 2012) (confirming that there is ambiguity over the definition of a domestic transaction); *see also* 6 TREATISE ON THE LAW OF SECURITIES REGULATION § 17.4 (2012) (maintaining that the idea of a domestic transaction is vague).

60. City of Harper Woods Emps. Ret. Sys. v. Olver, 589 F.3d 1292, 1295 (D.C. Cir. 2009) (explaining that an ADR equates to ownership in a security owned by a foreign entity).

61. *See* Joseph J.M. Orabona, *There's a New Sheriff in Town—Will the New SEC Chairman Allow Issuers of American Depository Receipts to Use International Accounting Standards to Satisfy Listing Requirements on U.S. Exchanges?*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 223, 225 (2002) (claiming that ADRs are a convenient way for investors to get involved in the international market because it provides a limited currency risk).

62. ALAN PALMITER, SECURITIES REGULATION: EXAMPLES AND EXPLANATIONS 579 (5th ed. 2011); *see* Orabona, *supra* note 61, at 225–26 (explaining that upon the purchase of an ADR by a U.S. investor, the investor will get dividends from the depository).

63. Pinker v. Roche Holdings Ltd., 292 F.3d 361, 367 (3d Cir. 2002) (noting that ADRs are not only capable of being traded the same way as other American registered securities, but they also may be traded over the counter); *see* PALMITER, *supra* note 62, at 579.

64. *See* Cornwell v. Credit Suisse Grp., 666 F. Supp. 2d 381, 395 (S.D.N.Y. 2009) (noting that an ADR purchased on the New York Stock Exchange may still be thought of as a predominantly foreign transaction); *see also In re* SCOR Holding (Switz.) AG Litig., 537 F. Supp. 2d 556, 561 (S.D.N.Y. 2008).

Since *Morrison*, courts have consistently held that ADRs traded on U.S. exchanges are covered by section 10(b) under the first prong of the transaction test.[65] However, it is unclear how courts will treat over-the-counter ADRs. If the Southern District of New York is a bellwether, domestic transactions in ADRs may be treated as foreign securities transactions, despite the clear domestic aspects of the transaction, and the United States' incentive to regulate them. In *In re Societe Generale Securities Litigation*, the Southern District held that the U.S. plaintiff's transactions in over-the-counter ADRs of a French company whose stocks were traded on the Euronext Paris stock exchange did not qualify for section 10(b) protection.[66] The court reasoned that purchasing ADRs over the counter is a "predominantly foreign securities transaction" occurring "in a less formal market with lower exposure to U.S.-resident buyers than a formal securities exchange."[67]

In *Societe Generale*, the court's characterization of ADR trading as a "predominantly foreign securities transaction" is taken out of context from pre-*Morrison* cases. In those cases, courts were describing the trading of ADRs on the New York Stock Exchange.[68] Their characterization of ADRs as "predominantly foreign" was the first step in the analysis of whether or not courts have subject matter jurisdiction over the transaction.[69] Once characterized as "predominantly foreign," courts would then apply the conduct and effects tests to determine the bounds of the extraterritorial application of U.S. antifraud provisions.[70] However, those cases did not analyze whether or not ADR transactions should be considered "domestic" for the purposes of the transactional test. To the contrary, those cases held that ADRs traded on the NYSE were not protected by section 10(b) under certain circumstances, an outcome that plainly contradicts the first prong of *Morrison*.[71]

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65. *See In re* Elan Corp. Sec. Litig., 2011 U.S. Dist. LEXIS 40989, at *2–3 (S.D.N.Y. Mar. 18, 2011) (finding that *Morrison* altered the governing law); *see also In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 526–27 (S.D.N.Y. 2011) (explaining that section 10(b) applies to transactions on a U.S. stock exchange and transactions in the United States); *see also* Stackhouse v. Toyota Motor Co., 2010 WL 3377409, at *1 (C.D. Cal. 2010).

66. *In re* Societe Generale Sec. Litig., 2010 WL 3910286, at *5 (S.D.N.Y. Sept. 29, 2010).

67. *Id.* at *6.

68. *Cornwell*, 666 F. Supp. 2d at 385 (S.D.N.Y. 2009) (discussing the purchase of Credit Suisse Group shares through ADRs on the New York Stock Exchange); SCOR Holding, 537 F. Supp. 2d at 561 (noting that Converium ADRs were bought on the New York Stock Exchange).

69. *In re* European Aeronautic Defence & Space Co. Sec. Litig., 703 F. Supp. 2d 348, 356 (S.D.N.Y. 2010) (examining the court's use of the "conduct test" and the "effects test" to decide if the court has subject matter jurisdiction of predominantly foreign securities transactions); *see SCOR Holding*, 537 F. Supp. 2d at 561 (stating that in determining whether the court had subject matter jurisdiction over the transaction, the court made the assumption that the purchases were predominantly foreign).

70. *European Aeronautic Defence*, 703 F. Supp. 2d at 356; E.ON AG v. Acciona, S.A., 468 F. Supp. 2d 537, 546–47 (S.D.N.Y. 2006).

71. *See* Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173, 1252 (2012) (stating that the first prong of the *Morrison* test would extend to any ADR purchase of a foreign security on a U.S exchange, whether it was made by a domestic or foreign investor); *see also* Joshua L. Boehm, Note, *Private Securities Fraud Litigation After Morrison v. National Australia Bank: Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 HARV. INT'L L.J. 249, 269 (2012) (denying plaintiff's argument that a security purchased in a foreign exchange and listed on the U.S. exchange survives *Morrison*).

The decision in *Societe Generale* has been criticized as "difficult to square with the *Morrison* test."[72] Foreign issuers create ADR programs to allow U.S. investors to trade in foreign securities[73] and in a sense avail themselves to U.S. regulation if there is any fraud inflating the value of those securities. Because ADRs are the economic equivalent of foreign shares,[74] one might argue that the foreign regulatory interests should govern. However, the strict application of *Morrison*'s transaction test to over-the-counter ADRs looks for "the purchase or sale of any other security in the United States."[75] Unless the ADRs at issue are being traded outside of the United States, it is unclear how domestic transactions in ADRs could be viewed as foreign under the transactions test. As an initial step, a foreign issuer contracts with U.S. depository institutions. As a secondary step, investors in the United States purchase securities from U.S. depository institutions or each other.[76] The inconsistencies in these lines of cases demonstrate the challenges courts face in applying the transactional test, as well as the arbitrariness of some of the results.

B. Derivatives Contracts

Derivative contracts, like swaps, are another area of "economically equivalent" securities that receive mixed treatment from courts under *Morrison*. Swaps are customized contracts that are traded in the over-the-counter market between private parties.[77] The agreements involve the exchange of sequences of cash flows for a set period of time.[78] In scenarios relevant to *Morrison*, at least one of these cash flow series is determined by the price of a foreign equity security, which is uncertain at the time of the agreement.[79] The market for these contracts is significant;

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72. Hannah L. Buxbaum, *Access to Justice: Investor Suits in the Era of the Roberts Court: Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 LAW & CONTEMP. PROBS. 161, 167 (2012).

73. Pinker v. Roche Holdings Ltd., 292 F.3d 361, 365 (3d Cir. 2002).

74. Brian P. Murray & Maurice Pesso, *The Accident of Efficiency: Foreign Exchanges, American Depository Receipts, and Space Arbitrage*, 51 BUFF. L. REV. 383, 389 (2003) (explaining that the only difference between an ADR and a domestic entity's stock is the country of origin).

75. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010).

76. *See* V.S. SOMANATH, INTERNATIONAL FINANCIAL MANAGEMENT 727 (2011) (presenting two possible methods of sourcing new ADRs either through certain depositary banks or by buying existing ADRs in another market).

77. *See* Harold S. Novikoff & Karen W. Lin, *Special Bankruptcy Code Protections for Derivative and Other Financial Market Transactions*, SS029 ALI-ABA 239, 255–57 (Apr. 28–29, 2011) (establishing the various agreements that are within the definition of a swap agreement).

78. *See* MARK RUBINSTEIN, RUBINSTEIN ON DERIVATIVES: FUTURES OPTIONS AND DYNAMIC STRATEGIES 1 (1999) (detailing that the gain or loss from a derivative contract depends on factors such as the date and underlying variables); *see also An Introduction to Swaps*, INVESTOPEDIA (Apr. 18, 2012), http://www.investopedia.com/articles/optioninvestor/07/swaps.asp#axzz1uiFvypXs (noting that cash flows can be affected by a variety of variables including interest rates and equity prices).

79. *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, OVER-THE-COUNTER DERIVATIVES MARKETS AND THE COMMODITY EXCHANGE Act 4 (Nov. 1999) (stating that cash flows can be based on interest rates, currencies, commodities, securities, or other asset categories); *see also Certain Investments in Debt and Equity Securities: Accounting Standards Codification* 320, FINANCIAL REPORTING DEVELOPMENTS: A COMPREHENSIVE GUIDE (Ernst & Young), Oct. 2011, at 16 (explaining that the cash flows are linked to the movement of interest rates, foreign exchange rates, commodities prices, prepayment rates, or other variables).

as of mid-2006, the swaps market was estimated to exceed $250 trillion worldwide, which is more than 15 times the size of the U.S. public equities market.[80]

Since *Morrison*, courts seem to have adopted a results-oriented approach in applying the transactional test to these investments, describing the connections between the purchase and sale of the swap itself and the foreign issuer as tenuous. For example, in *Elliot Assocs. v. Porsche Automobil Holding SE*, plaintiffs were hedge fund investors who entered into security-based swap agreements in New York.[81] The contracts were "short sales" of Volkswagen shares, which are essentially bets that the price of Volkswagen shares would fall.[82] Plaintiffs brought a suit in the Southern District of New York against Porsche, a German company, for hiding its intent to take over Volkswagen and causing the stock to rise by buying the vast majority of the company's shares.[83]

The court rejected the plaintiffs' argument that swap agreements were "domestic transactions" despite the fact that plaintiffs were New York investment managers and all of the necessary steps to transact the swap agreements were carried out in the United States, including the signing of confirmations for the swaps.[84] The court held:

> In light of *Morrison's* strong pronouncement that U.S. courts ought not to interfere with foreign securities regulation without a clear Congressional mandate, I am loath to create a rule that would make foreign issuers with little relationship to the U.S. subject to suits here simply because a private party in this country entered into a derivatives contract that references the foreign issuer's stock. Such a presumption would turn *Morrison's* presumption against extraterritoriality on its head.[85]

While the court's rationale makes sense from a policy perspective, it does not fit squarely within the guidelines of *Morrison*'s transaction-based test, which applies section 10(b) to "the purchase or sale of any other security in the United States."[86] Derivatives transactions are treated as securities, and their purchase and sale in the United States are made in reliance on information and are just as vulnerable to fraud.[87] In fact, in 2000, Congress expanded section

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80. *See* Katy Burne, *Complex Financial Bets Rise Ahead of Overhaul*, WALL STREET J., Nov. 16, 2011, http://online.wsj.com/article/SB10001424052970204190504577040372556074142.html (providing that in 2011, the over-the-counter derivative market was valued at $708 trillion).

81. Elliott Assocs. v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469, 471 (S.D.N.Y. 2010).

82. *Id. (*noting that under the contracts, plaintiffs lost money as Volkswagen's stock price rose); *see* Hannah L. Buxbaum, *Access to Justice: Investor Suits in the Era of the Roberts Court: Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 LAW & CONTEMP. PROBS. 161, 169 (2012). (mentioning that the swap agreements at issue referenced Volkswagen's share price).

83. *Elliott Assocs.,* 759 F. Supp. 2d at 472; Buxbaum, *supra* note 82, at 169 (describing the allegation that Porsche covered up its plan to take over Volkswagen while simultaneously accumulating Volkswagen stock).

84. *Elliott Assocs.,* 759 F. Supp. 2d at 476.

85. *Id.*

86. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010).

87. Ownership Reports and Trading, Securities Exchange Commission Release No. 17991, 48 SEC Docket 216 (Apr. 4, 1991).

10(b) of the Exchange Act to allow "current and future anti-fraud rules [to] apply to swap agreements to the same extent as they do to securities."[88]

By focusing on the fact that foreign issuers in these cases have "little relationship with the United States," courts are inadvertently reverting to a fundamental tenet of the conduct and effects tests.[89] Fraud in connection with swap transactions is not necessarily caused by foreign issuers in the United States.[90] Derivatives are secondary agreements without a strong link to a foreign issuer's conduct in the United States.[91] This differs from secondary trades on U.S. exchanges, which are commenced by an initial public offering by foreign issuers and informed by subsequent filings in the United States,[92] and ADRs, which require a foreign issuer to contract with U.S. depository institutions and also involve transmission of information to the United States.[93] However, the derivative transactions do take place in the United States and are considered protectable securities under the Exchange Act.[94]

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88. *Elliot Assocs.*, 759 F. Supp. 2d at 475 (asserting that Congress expanded the reach of anti-fraud measures under the Exchange Act to swap agreements).

89. S.E.C. v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 158 (S.D.N.Y. 2012); *see* Buxbaum, *supra* note 82, at 170–71 (arguing that decisions after *Morrison* have found foreign issuers' conduct in the U.S. irrelevant by applying a conduct test).

90. *See* Plumbers Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 171, 173 (S.D.N.Y. 2010) (providing an example of fraud that occurs outside the U.S. by foreign issuers in swap agreements); *see also* SEC Study on Private Right of Action Under 10(b*), supra* note 3, at 35–36 (implying that fraud can be the result of conduct by foreign issuers outside of the United States by stating that section 10(b) of the Exchange Act does not apply in those situations).

91. *See Elliot Assocs.*, 759 F. Supp. 2d at 471 (detailing how foreign issuer transactions occur and describing the gap between a foreign issuer and investor); *see also* John Labatt Ltd. v. Onex Corp., 890 F. Supp. 235, 238, 246 (S.D.N.Y. 1995) (evidencing the lack of a link between the foreign issuer's U.S. conduct and the derivatives agreement).

92. *See* Jorge Gonzalez, Jr. & Christopher D. Olive, *Foreign Issuer Disclosure and Accounting Compliance in US Public Offerings and Securities Listings*, 1 NAFTA: L. & BUS. REV. AM. 39, 60–61 (1995) (stating that a public offering subjects a foreign issuer to the ongoing reporting requirements of the Exchange Act); *see also* Michael A. Schneider, Note, *Foreign Listings and the Preeminence of U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards?*, 3 MINN. J. GLOBAL TRADE 301, 314–15 (1994) (indicating that conducting a public offering will give a foreign investor access to U.S. capital).

93. Ira Press, *Jurisdiction Over ADR Sponsors: Don't Take Anything for Granted,* 6 NO. 2 WALLSTREETLAWYER.COM: SEC. ELEC. AGE 11 (2002). *See* Mark A. Saunders, *American Depository Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 FORDHAM INT'L L.J. 48, 50–53 (1993) at (indicating that ADRs offer the opportunity to own foreign securities through a mechanism that affords similar advantages given by U.S. issuers).

94. *See* Timothy E. Lynch, *Derivatives: A Twenty-First Century Understanding*, 43 LOY. U. CHI. L.J. 1, 12–13 (2011) (indicating that derivatives regulation in the United States involves a multiplicity of state and federal laws, as well state and federal agency functions); *see also* Rebecca Leon, Note, *The Regulation of Derivatives and the Effect of the Futures Trading Practices Act of 1992*, 3 J.L. & POL'Y 321, 328–29 (1994) (stating that derivative securities are regulated by the Securities and Exchange Commission).

C. Other Transactions Not Listed on a U.S. or Foreign Exchange

While transactions in ADRs and swap agreements reference other underlying securities, many transactions lack a clear place of origin.[95] Determining whether these securities transactions are "domestic" under *Morrison* is a complicated, fact-intensive question. A deeper look into the facts of these cases reveals that the difference between the conduct and effects tests and the transactional test is not straightforward, and the Supreme Court's attempt to facilitate predictability and clarity may have missed the mark. The transactional test may create uncertainty and, sometimes, counterintuitive results.

Investment transactions often involve contact with multiple countries,[96] and without the centralization of an exchange, it can be unclear how a transaction should be characterized. A balancing of factors supporting the "domestic" nature of the transaction may paint a very different picture than a myopic look at the transaction's close. Such factors include (1) the issuance in the United States of notes evidencing the purchase of securities;[97] (2) the dissemination of offering materials in the United States;[98] (3) the solicitation of investors in the United States;[99] (4) the wiring of money to the United States;[100] and (5) the location of the transaction's closing.[101] The *Morrison* opinion does not offer much guidance as to the standard beyond

95. *See International Investing*, SEC: OFFICE OF INVESTOR EDUCATION AND ADVOCACY, http://www.sec.gov/investor/pubs/ininvest.htm (last modified Aug. 14, 2012) (warning investors to conduct a review of their holdings to determine if they are investing internationally without their knowledge); *see also* Edward L. Pittman, *Economic and Regulatory Developments Affecting Mortgage Related Securities*, 64 NOTRE DAME L. REV. 497, 544 (1989) (stating that the complexity of new mortgage securities has made informed investing difficult for even sophisticated institutions).

96. *International Investing, supra* note 95 (warning that even if one invests only in U.S. stocks, she may have international exposure in her investment portfolio).

97. *In re* Optimal U.S. Litig., 813 F. Supp. 2d 351, 373 (S.D.N.Y. 2011) (holding that contract notes can serve as evidence of a U.S. transaction under the Exchange Act); Hannah L. Buxbaum, *Access to Justice: Investor Suits in the Era of the Roberts Court: Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 LAW & CONTEMP. PROBS. 161, 168 (2012).

98. Cascade Fund, LLP, v. Absolute Capital Mgmt. Holdings Ltd, No. 08-cv-01381-MSK-CBS, 2011 WL 1211511, at *7 (D. Colo. Mar. 31, 2011) (concluding that offering memoranda and other investment materials are insufficient evidence of a domestic transaction); *see* S.E.C. v. Ficeto, 839 F. Supp. 2d 1101, 1115–16 (C.D. Cal. 2011) (describing parties' failed attempts to use offering memoranda as a factor to establish a domestic transaction under the Exchange Act).

99. S.E.C. v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 164–65 (S.D.N.Y. 2011) (declaring that solicitation of offers from New York to Germany through e-mail and telephone calls was sufficient to prove that a transaction was domestic); Richard D. Bernstein, James C. Dugan & Lindsay M. Addison, *Closing Time: You Don't Have to Go Home, But You Can't Stay Here*, 67 BUS. L. 957, 964–65 (2012) (stating that solicitation from New York to Germany was a domestic transaction under the Exchange law).

100. *See* Buxbaum, *supra* note 97, at 168 (naming "the wiring of money to the U.S." as a factor used to evidence domestic transactions).

101. Quail Cruises Ship Mgmt. Ltd. v. Agencia De Viagens CVC Tur Limitada, 645 F.3d.1307, 1312–13 (11th Cir. 2011) (concluding that a property sale closing in Florida was sufficient proof of a U.S. transaction); JONATHAN K. YOUNGWOOD, THE LIMITS OF BRIGHT-LINE RULES AND THE CHALLENGES OF DEFENDING CLIENTS IN A CONSTANTLY CHANGING LEGAL ENVIRONMENT, RECENT DECS. IN SECS. LAW 4 (2012) (reiterating the Eleventh Circuit's holding that a property closing creates a domestic transfer suitable under *Morrison*).

"whether the purchase or sale is made in the United States,"[102] and courts have implemented different tests for making the determination.

Some courts presume that securities transactions take place in more than one jurisdiction, which requires an examination of the entire transaction to determine if any of the critical steps occurred domestically.[103] In cases where "an offer is made in one state and accepted in another," these courts consider the transaction to have taken place in both jurisdictions.[104] Other courts, in an attempt to emulate the first prong of *Morrison*, have expressly rejected standards that look at "the entire selling process" or that apply a presumption that purchases by U.S. residents are domestic transactions.[105]

Another approach taken by courts is to extend section 10(b) protection where parties incurred "irrevocable liability" to complete the transaction in the United States.[106] Despite how much of the transaction occurred in the United States, if it became irrevocable in another state, plaintiffs would have no remedy.[107] For example, courts may disregard evidence of transactional steps occurring in the United States to the extent that the parties still "retained the right to accept or reject the transaction."[108] Other courts find the standard satisfied where securities are "issued" or "title is transferred."[109]

Recent case law demonstrates the difficulty courts face in interpreting the vague *Morrison* standard, and how even minor variances of interpretation can be outcome determinative. For example, in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, the Second Circuit expanded its criteria for characterizing domestic transactions under *Morrison*, adding the "transfer of title"

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102. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2886 (2010).

103. *See In re* Nat'l Century Fin. Enter., 755 F. Supp. 2d 857, 879–88 (S.D. Ohio 2010) (establishing that the laws of different states control transactions when there is a nexus between the "sale" and the state); *see also* Dona Szak & Courtney Scobie, Note, *Will Rule 10b-5 Go Global? The Status of Private Rights of Action After Morrison v. National Australia Bank*, 59 THE ADVOC. (TEXAS) 35, 38 (2012) (maintaining that the Second Circuit emphasizes the location where liability arises).

104. *Nat'l Century Fin. Enter.*, 755 F. Supp. 2d at 879–88 (recognizing that more than one jurisdiction can control a transaction when more than one state's interests are involved).

105. *See* S.E.C. v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 158 (S.D.N.Y. 2011) (finding that an examination of the "entire selling process" has no bearing on whether to apply the *Morrison* test); *see also In re* Merkin, 817 F. Supp. 2d 346 n.10 (S.D.N.Y. 2011) (dismissing an argument that the *Morrison* rule does not apply just because the plaintiffs are U.S. citizens); *see also* Youngwood, *supra* note 101, at 2 (2012) (establishing as immaterial the investor's legal status or the place of purchase).

106. *See* Basis Yield Alpha Fund v. Goldman Sachs Grp., Inc., 798 F. Supp. 2d 533, 537 (S.D.N.Y. 2011) (discussing the necessity of showing irrevocable liability was incurred within the United States for section 10(b) to control).

107. *See id.* (discussing that under the Exchange Act, a plaintiff must allege that the parties incurred irrevocable liability within the United States); *see also* Anwar v. Fairfield Greenwich, Ltd., 728 F. Supp. 2d 372, 405 (S.D.N.Y. 2010) (finding that the securities exchange in this case occurred and irrevocable liability was formed within the United States); *but see In re* Kingate Mgmt. Ltd. Litig., 2011 WL 1362106, at *8 (S.D.N.Y. 2011) (criticizing *Anwar* for taking an overly complex view of when fraud coincides with the purchase of a security).

108. Cascade Fund, LLP v. Absolute Capital Mgmt. Holdings Ltd., 2011 WL 1211511, at *7 (D. Colo. 2011) (holding that a deal is formed when and where final acceptance has been made).

109. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 68 (2d Cir. 2012) (reasoning that a sale of securities is formed when an issuing or transfer of title has occurred).

standard to the existing "irrevocable liability" test.[110] At the district court level, the Southern District of New York had dismissed the section 10(b) claims of nine foreign hedge funds based in the Cayman Islands that were suing over private transactions in the securities of U.S. penny stock companies.[111] Although the companies were registered with the Securities and Exchange Commission, the securities were not traded on a U.S. exchange.[112] The District Court held that this "appear[ed] to be precisely the type of case the Supreme Court had in mind when it issued *Morrison.*"[113] The Second Circuit disagreed, finding that both the place of "irrevocable liability" and the "location in which title is transferred" may mark the place of "purchase" and "sale" of securities under the language of the Exchange Act.[114]

The new Second Circuit standard may change the outcome of many cases, but has also called into question the validity of recent district court decisions. For example, the SEC is seeking reinstatement of securities fraud claims against Fabrice Tourre, the Goldman Sachs executive charged in the Abacus subprime-mortgage transaction.[115] Even with an expanded standard, it remains unclear whether title actually passed in the United States because more than one transaction occurred.[116] The issue of which "transaction" is relevant will likely continue to divide district courts in the wake of *Ficeto*, underscoring another fundamental problem with the *Morrison* transactional test.

Another area of uncertainty under the transactional test is whether foreign securities transactions trigger the protection of U.S. securities laws when they are "in connection with" the purchase or sale of a security listed on an American stock exchange or unlisted domestic securities transaction.[117] The issue is particularly complicated where investors seek investment vehicles that bundle more than one type of security. For example, a recent case in the Southern District of New York held that foreign investors in the Optimal Strategic U.S. Equity Fund, which invested 100 percent of its assets in Madoff's firm, were unprotected by section 10(b).[118]

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110. *Absolute Activist Value Master Fund*, 677 F.3d at 68.

111. *Id.* at 62–63.

112. *Id.* at 63.

113. Absolute Activist Value Master Fund Ltd. v. Homm, No. 09 CV 08862 (GBD), 2010 WL 5415885, at *5 (S.D.N.Y. Dec. 22, 2010).

114. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d at 68.

115. *See* Memorandum of Plaintiff Supporting Reinstatement at 2012, Sec. & Exch. Comm'n v. Tourre, No. 10 CV 03269, 2012 WL 2263357, at *5–*6 (S.D.N.Y. June 14, 2012) (hereinafter Plaintiff's Memo Supporting Reinstatement) (citing *Ficeto* as grounds for reinstatement as that case now allows transfer of title to securities within the United States to prove a *Morrison* claim).

116. *See id.* at *10–*11 (S.D.N.Y. June 14, 2012) (arguing that title to underlying notes passed in New York). *But see* Memorandum of Law of Fabrice Tourre in Opposition to the SEC's Motion for Partial Relief From the Court's June 10, 2011 Partial Dismissal Order, Sec. & Exch. Comm'n v. Tourre, No. 10-cv-3229, 2012 WL 2384405, 7–8 (S.D.N.Y. June 19, 2012) (arguing that even if the underwriter transaction closed in New York, the lawsuit is based on the subsequent transaction, which did not close in the United States).

117. *See* S.E.C. v. Compania Int'l Financiera S.A., No. 11 Civ. 4904 DLC, 2011 WL 3251813, *6 (S.D.N.Y. July 29, 2011) (holding that section10(b) can be applied to insider trading conducted outside the United States when in connection with the purchase or sale of a security listed on U.S. stock exchange); *see also* Plaintiff's Memo Supporting Reinstatement, *supra* note 115, at *7 (arguing that the alleged domestic purchase or sale of securities was in connection with Tourre's fraud).

118. *In re* Optimal U.S. Litig., No. 10 Civ. 4095 (SAS), 2012 WL 1988713, *2 (S.D.N.Y. June 4, 2012).

In that case, the court found that the relationship between mutual fund shares and NYSE-listed stocks was too attenuated because the fund's strategy also permitted investments in commercial paper, CDs, bankers' acceptances, and shares in money market mutual funds.[119] The court acknowledged that many district courts have grappled with the issue, which "requires further guidance from appellate courts."[120]

Furthermore, while the case law on this area is still relatively limited, it is easy to see how following the transactional test could yield absurd results because it allows savvy parties to circumvent U.S. securities laws by manipulating a transaction's close. For example, say a British company enters into a private placement agreement to invest in a U.S. company. Under the *Morrison* transactional test, if the negotiations took place in the United States at the company's headquarters, but the deal was signed and irrevocable liability was incurred in the United Kingdom, it would be absurd to think that U.S. antifraud rules would not apply. In such cases, there is no justification for stripping foreign investors of U.S. antifraud protection merely because the deal was finalized in the United Kingdom.

Based on precedent applying the transaction test to ADRs and swaps, courts may be inclined to hold that the transaction is "predominantly domestic." However, that would be an outcome determinative approach based on policy and would not align with *Morrison*'s focus on the location of the transaction or the "irrevocable liability" standard applied by many courts.

III. Congress Should Extend Dodd-Frank's Conduct and Effects Standard to Private Causes of Action

International comity has been cited as a concern in transnational securities regulation for obvious reasons;[121] cross-border securities transactions often involve issuers and investors from different countries, and elements of the transaction can easily transcend borders.[122] However, even if the Supreme Court were to resolve the division of authority created by *Morrison* in favor of an "irrevocable liability" transactional standard, there are strong arguments that Congress should take the opportunity to extend Dodd-Frank's conduct and effects tests to a private right of action under section 10(b) of the Exchange Act.

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119. *Id.* at *3 (distinguishing the instant case from SEC v. Compania Int'l Financiera S.A., where the court found that the Securities Exchange Act of 1934 may reach contracts in connection with U.S. listed stocks).

120. *Id.* at *4.

121. *See* Norimasa Murano, *Extraterritorial Application of the Antifraud Provisions of the Securities Exchange Act of 1934*, 2 INT'L TAX & BUS. LAW 298, 307 (1984) (stating that, because of section 10(b)'s silence on its extraterritorial reach, courts often consider international comity when deciding section 10(b) cases).

122. *See* Ian Talley & Tom Barkley, *Appetite for Bonds High*, WALL ST. J., Sept. 18, 2012, http://online.wsj.com/article/SB10000872396390443995604578004021605901796.html (estimating that foreigners accounted for $67 billion in long-term U.S. securities transactions in July 2012); *see also* Ian Talley & Tom Barkley, *UPDATE: China Net Buyer of U.S. Treasurys in July, Remains Top Holder*, WALL ST. J., Sept. 18, 2012, http://online.wsj.com/article/BT-CO-20120918-705753.html (citing data published by the U.S. Treasury department indicating that China and Japan accounted for the largest foreign holders of U.S. treasuries).

The antifraud standard in section 10(b) creates the potential for conflict to the extent that it is a more favorable standard for investors than many foreign standards.[123] To succeed in a private cause of action under section 10(b), a plaintiff must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[124]

Despite any variations between domestic and foreign standards, the conduct-and-effects-based test is a more reliable safeguard for investor protection and, in a balancing of comity considerations, these benefits arguably outweigh countervailing interests of specific countries. The Supreme Court's emphasis in *Morrison* on the presumption against extraterritoriality would not be lost; but Congress should take the opportunity to acknowledge the inappropriateness and misapplication of the transactional test and extend Dodd Frank's cause-and-effects test to a private cause of action under section 10(b).

A. Foreign Regulatory Interests

The Court's opinion in *Morrison* referenced the "obvious" potential for conflicts with applicable laws of other countries but did not specifically reference those issues and balance them with competing U.S. regulatory interests.[125] The British, French, and Australian governments filed briefs in the *Morrison* case, which outlined their concerns with respect to conflicts with U.S. legislation.[126] There is no real consensus, but each emphasized its own nation's approach to regulation and litigation, and highlighted areas where differences represent policy choices and sovereign interests that the United States should consider and respect.[127] However, one clear takeaway is that these countries were most concerned with foreign-cubed scenarios, like the facts of *Morrison*, and preferred a bright-line standard with respect to purchases by foreigners on foreign exchanges,[128] a scenario that can be minimized by strict application of a conduct and effects test, perhaps with a strong presumption that foreign-cubed cases are not subject to the protection of U.S. securities laws.

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123. Nathan Koppel & Ashby Jones, *Securities Ruling Limits Claims of Fraud*, WALL ST. J., Sept. 28, 2010, at C1, http://online.wsj.com/article/SB10001424052748703694204575518301351548676.html (arguing that plaintiffs stand a better chance for recovering in securities actions in U.S. courts as opposed to foreign courts).

124. Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j.

125. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2885 (holding that Congress would have explicitly addressed foreign application if it intended it because incompatibility of the United States' law with foreign law is evident); *see also In re* Vivendi Universal, 765 F. Supp. 2d 512, 526–27 (S.D.N.Y. 2011) (criticizing the Supreme Court's attempt to create a bright-line rule in *Morrison*, which is just as difficult to apply as the previous rule).

126. SEC Study on Private Right of Action Under 10(b), *supra* note 3, at 24–25.

127. *Id*. at 23–25.

128. *See id.* (stating that the British and French governments supported a bright-line standard under which section 10(b) private action would not extend to frauds involving foreign plaintiffs); *see also* Genevieve Beyea, Morrison v. National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 554 (2011) (noting that Australia, the United Kingdom and France all submitted amicus briefs to the Supreme Court advocating a limit on the application of section 10(b) to foreign-cubed cases).

1. Foreign Concern Regarding a Private Right of Action Was Focused on Foreign-Cubed Cases

The British government's main argument was that a private right of action should not be available to purchasers of securities on a foreign exchange who are injured by misleading statements or omissions made outside of the United States by a foreign issuer.[129] On the other hand, the British government approved of the SEC's enforcement actions, which permitted the opportunity for cooperation and conversation with foreign regulators that would limit the risk of conflicts and duplicative foreign litigation.[130]

Similarly, the French government supported a bright-line standard that would not permit private actions to extend to foreign-cubed scenarios.[131] It argued that allowing foreign investors to sue foreign companies for losses resulting from transactions on foreign exchanges would promote "international forum shopping" by "foreign plaintiffs who believe they can obtain a better result in the United States."[132]

The Australian government was the most liberal of the three. It supported a conduct standard to the extent that it would require a tight factual nexus between the U.S. conduct and the alleged injury.[133]

2. Concerns Regarding Substantive Legal Differences

In addition to the debate regarding whether a private right of action is appropriate, the foreign governments' briefs also raised issues of substantive differences in disclosure standards. The United Kingdom pointed to conflicts regarding what information may be considered "material."[134] The United States looked at information that "may affect the desire of investors to buy, sell, or hold the company's securities."[135] In contrast, the British government emphasized that it has statutory formulations for disclosure obligations which vary based on the type

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129. Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 3 & n.7, *Morrison*, 130 S. Ct. 2869 (No. 08-1191) (explaining that the policy interests of the United Kingdom would be best served by adoption of this rule).

130. *See id.* (distinguishing situations involving SEC enforcement action from those of private suits).

131. Brief for the Republic of France as Amicus Curiae in Support of Respondents at 29, *Morrison*, 130 S. Ct. 2869 (No. 08-1191) (arguing that nothing in the principles of [*forum non conveniens*] precluded the drawing of a bright line with respect to foreign-cubed securities actions).

132. SEC Study on Private Right of Action Under 10(b), *supra* note 3, at 25 n. 88; *see* Brief for the Republic of France as Amicus Curiae in Support of Respondents at 29–30, *Morrison*, 130 S. Ct. 2869 (No. 08-1191) (showing that France believed that if foreign plaintiffs believe they have a better chance to win, this will result in forum shopping).

133. Brief for Australia as Amicus Curiae Supporting Respondents at 31–32, *Morrison*, 230 S. Ct. 2869 (No. 08-1191).

134. Brief for the United Kingdom as Amicus Curiae Supporting Respondents at 16, *Morrison*, 230 S. Ct. 2869 (No. 08-1192).

135. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968).

of corporate statement.[136] Other potential areas of conflict included differences in proving elements of a violation, pointing to the United States' comparatively lax "fraud on the market theory" for proving reliance[137] as compared to the heightened U.K. requirement of showing "actual reliance" with respect to fraud in periodic reporting requirements.[138]

3. Foreign Issuers' Desire for Predictability and Reduced Litigation Risk

Realistically, the main concern underlying foreign governments' regulatory interests revolves around their desire to avoid unpredictable regulatory environments for their issuers. It has also been argued that the United States' approach to private class-action suits imposes unnecessary economic risks upon these foreign issuers.[139] As a result, the U.S. legal environment is viewed as "expensive and unpredictable, comprised of litigious participants forcing the securities industry to bear a significant chunk of the associated costs."[140] The British government, in particular, advocated for a bright-line standard to "allow issuers to plan their global affairs and assess their potential legal exposure with greater confidence."[141]

B. The United States' Regulatory Interests

1. The United States Has a Compelling Interest in Protecting Investors From Fraud Directed at Them

Perhaps the most obvious U.S. regulatory interest that is underserved by the transaction test is protecting U.S. investors from fraudulent conduct directed at the United States. At the extreme, U.S. investors may be the victims of fraudulent conduct and effects in the United

136. Brief for the United Kingdom as Amicus Curiae Supporting Respondents at 16, *Morrison*, 230 S. Ct. 2869 (No. 08-1192); *see* Uri Geiger, *Harmonization of Securities Disclosure Rules in the Global Market—A Proposal*, 66 Fordham L. Rev. 1785, 1808 (1998) (stating that disclosure depends on different information disclosed by companies).

137. *See* Basic v. Levinson, 485 U.S. 224 (1988) (affirming a test for proving reliance in fraud cases); *see* also Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2181 (2011) (showing that a plaintiff can demonstrate reliance by showing that he was merely aware of a company's statement and engaged in a relevant transaction based on that statement).

138. *See* Int'l Fund Mgmt. S.A. v. CitiGroup Inc., 822 F. Supp. 2d 368, 388 (S.D.N.Y. 2011) (stating that under the United Kingdom's common law of deceit, actual reliance must be proven despite a claim that an inference of reliance would suffice); *see also* Brief for the United Kingdom as Amicus Curiae Supporting Respondents at 27, *Morrison*, 230 S. Ct. 2869 (No. 08-1192) (specifying that the United Kingdom requires a heightened standard of proof to avoid unmeritorious claims and encourage defensive reporting).

139. Kara Baquizal, Note, *The Extraterritorial Reach of Section 10(B): Revisiting Morrison in Light of Dodd-Frank*, 34 FORDHAM INT'L L.J. 1544, 1555 (2011) (explaining that each additional regulatory or legislative action creates another obstacle that foreign companies must consider before listing their company on an American stock exchange).

140. *See id.* (stating that even New York, the country's financial center, attributes the decline in international financial leadership to the United States' complex financial regulatory system); *see also* Howard E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence From Europe—Part II*, 3 VA. L. & BUS. REV. 207, 240 (2008) (stating that in certain instances European issuers changed their capital offering plans in order to avoid U.S. legal requirements).

141. U.S. Securities & Exchange Commission, Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 at 25.

States but will be unable to recover in the event that the securities transaction is considered to have been executed outside of the United States or on a foreign exchange.[142] Moreover, investors in ADRs and derivative agreements in the United States may be precluded from recovery under the second prong of the transactional test, where the transactions are considered "predominantly foreign," regardless of whether they are executed in the United States or whether foreign issuers included materially misleading statements or omissions in reports filed with the SEC or otherwise attempt to defraud U.S. investors.[143]

Although Dodd-Frank took an important step toward protecting investors from that conduct, it has long been acknowledged that the SEC is underfunded and incapable of adequately policing the range of cross-border securities violations that will arise.[144] Congress has recently recognized, in the Private Securities Litigation Reform Act of 1995, that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action.[145] Such private lawsuits promote public and global confidence in our capital markets and help deter wrongdoing."[146] It makes little sense to criminalize fraud in the United States yet simultaneously prohibit private investors from seeking civil relief from fraud merely because our laws differ from those of other countries. To the extent that other countries permit fraud, the United States is not obligated to restrict U.S. investors from vindicating their own rights in U.S. courts.

2. The United States Has a Compelling Interest in Closing Arbitrary Gaps in Investor Protection

As far as investor protection is concerned, the United States has a compelling interest in eliminating unnecessary loopholes that would arbitrarily bar an investor from relief. For example, a party engaging in private placement may manipulate the execution of an agreement in a foreign country to meet the irrevocable liability standard and escape U.S. antifraud liability.[147]

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142. *See Morrison*, 130 S. Ct. at 2888 (Stevens, J., concurring) (announcing a new transactional test based on the statutory language of the Securities Exchange Act, which applies only to domestic security transactions and domestic exchanges); *see also* Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.2d 60, 66 (2d Cir. 2012) (acknowledging that *Morrison* limited section 10(b) of the Securities Exchange Act to apply only within the territories of the United States).

143. In re Royal Bank of Scot. Grp. PLC Secs. Litig., 765 F. Supp. 2d 327, 335 (S.D.N.Y. 2011) (stating that trade in ADRs is considered to be a predominantly foreign securities transaction not protected by section 10(b) of the Exchange Act); In re Societe Gen. Sec. Litig., 2010 WL 3910286, *6 (S.D.N.Y. 2010) (indicating that stocks not traded on an official American securities exchange but, instead, on a less formal market and not directed toward U.S. residents, was predominantly foreign for purposes of section 10(b)).

144. *See* Luis A. Aguilar, *Statement by Commissioner: Defrauded Investors Deserve Their Day in Court* at 3, Apr. 11, 2012 (discussing the inability of the SEC to address problems confronted by investors who are defrauded by companies overseas).

145. H.R. CONF. REP. 104-369, H.R. Conf. Rep. No. 369, 104TH Cong., 1st Sess. 1995, 1995 U.S.C.C.A.N. 730, 1995 WL 709276 (Leg.Hist.); *see* Aguilar, *supra* note 144.

146. H.R. CONF. REP. 104-369, H.R. Conf. Rep. No. 369, 104TH Cong., 1st Sess. 1995, 1995 U.S.C.C.A.N. 730, 1995 WL 709276 (Leg.Hist.); *see* Aguilar, *supra* note 144 (addressing how the U.S. legal system works to legitimize global investment from Americans).

147. Liberty Media Corp. v. Vivendi Universal, 2012 WL 1203825, at *4 (S.D.N.Y. Apr. 11, 2012) (stating that irrevocable liability is met when a merger agreement is executed and is binding); *see* Youngwood, *supra* note 101, at 2 (explaining the ways in which certain plaintiffs' attorneys have been able to evade the *Morrison* holding).

Courts applying a myopic approach that looks solely to the close of the transaction and ignores the rest of the conduct would arbitrarily bar investors from recovering in such a case, despite the United States' clear interest in protecting those foreign investors.

It has also been suggested that certain loopholes under the transactional test may lead to international regulatory arbitrage.[148] Particularly in situations where there is trading in categories of "economically equivalent instruments," such as ADRs, it makes little sense to allow investors in exchange-traded securities to recover while simultaneously barring investors trading in economically equivalent securities.[149]

Moreover, legal scholars have suggested that the existence of dual standards in a single market produces significant disequilibrium pricing effects that potentially harm many of the SEC's missions.[150]

3. Congress Chose a Conduct and Effects Standard in the Wake of *Morrison*

In evaluating the United States' regulatory interests, it is important to recall that Congress directly rejected the transactional test through the Dodd-Frank legislation only three weeks after the *Morrison* opinion was issued.[151] Specifically, section 929P(b)(2) of Title IX of Dodd-Frank essentially reinstated the conduct and effects tests for SEC and Department of Justice enforcement actions.[152] Recalling Justice Scalia's words from the *Morrison* opinion, "the probability of incompatibility with the applicable laws of other countries is so obvious" that Congress must have considered the potential for conflicts in passing legislation.[153] However, despite Scalia's speculation, Congress did not directly address the subject of conflicts with foreign laws in procedures in the legislation itself. Dodd-Frank was concerned with domestic investor protection, and Congress found that the United States had a compelling interest in regulating fraudu-

148. Joshua L. Boehm, Note, *Private Securities Fraud Litigation After Morrison v. National Australia Bank: Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 HARV. INT'L L.J. 249, 285 (2012) (arguing against the transactional test of Morrison because it bars some cases with more substantial U.S. involvement from litigation and while allowing other cases with less U.S. involvement).

149. Comments by Forty-Two Law Professors, submitted jointly to Elizabeth M. Murphy, Securities and Exchange Commission, SEC File No. 4-617 (Feb. 18, 2011), *available at* http://www.sec.gov/comments/4-617/4617-28.pdf; *see also* Boehm, *supra* note 148, at 285 (arguing for a reliance requirement for allowing U.S. investors to bring lawsuits on foreign companies).

150. *See* Comments by Forty-Two Law Professors, *supra* note 149 (recommending that the SEC should examine the benefits of a test based on factors applied in *Morrison v. National Australian Bank*); *see also* James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200, 1237–44 (1999) (maintaining that the most troubling aspect of dual standards in a single market is the effect it will have on the enforcement of the SEC); *see also* James D. Cox, *Coping in a Global Marketplace: Survival Strategies for a 75-Year-Old SEC*, 95 VA. L. REV. 941, 967–70 (2009) (discussing the securities regulator's role in deterring fraudulent securities offerings in a dual standards approach).

151. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified as amended at 18 U.S.C.A. § 1514A(a) (West 2000 & Supp. 2011)); *see* Jennifer Wu, Comment, Morrison v. Dodd-Frank*: Deciphering the Congressional Rebuttal to the Supreme Court's Ruling*, 14 U. PA. J. BUS. L. 317, 318 (2011) (discussing the effects of the Dodd-Frank Act, specifically extraterritoriality in the field of securities law and evaluating the application of both the "conduct and effect" and "transactional" tests concerning private shareholders and the SEC).

152. Wu, *supra* note 151, at 335–37.

153. Morrison v. Nat'l Australia Bank, 130 S.Ct. 2869, 2885 (2010).

lent securities-related conduct directed at or impacting the United States, regardless of where the transaction took place.[154] As such, the decision of whether or not to extend a private right of action is really a strategic one, as Congress already determined that the U.S. interests in regulating through a conduct-and-effects-based standard outweighs countervailing foreign interests.[155]

C. The Overstatement of International Comity Concerns

As discussed above, different nations have distinct legal approaches to securities regulation that affect both substantive and procedural rights of parties. In the world of international investments, the United States is typically viewed as an attractive forum for investors; it has an active plaintiff's bar, economies of scale through class action, and a favorable reliance standard in section 10(b) claims.[156] In light of the inevitable areas of contention between domestic and foreign law, the question is how do we balance these competing concerns?

In *Morrison*, the Supreme Court cited international comity as a concern supporting the move away from the conduct and effects tests.[157] The SEC also generally references international comity as a policy concern in its study regarding a cross-border private right of action pursuant to Dodd-Frank.[158] However, neither the Supreme Court nor the SEC offers any *specific* arguments for allowing foreign interests to overtake U.S. interests. Critics advocating against a private right of action generalize, without support, that the United States' comparatively complicated financial regulatory framework has contributed to London's takeover of New York's role as the world's leading financial center because U.S. regulation does not adequately deter frivolous litigation.[159]

Petitioners in *Morrison* and SEC Commissioner Luis A. Aguilar have argued vehemently that there is no "single instance where private securities fraud litigation has actually interfered

154. *See* Meny Elgadeh, Note, Morrison v. National Australia Bank*: Life After Dodd-Frank*, 16 FORDHAM J. CORP. & FIN. L. 573, 593–98 (2011) (arguing that the Dodd-Frank Act has not effectively revised foreign-cubed litigation, since the law did not address the extraterritoriality issues regarding U.S. securities law).

155. *See* Yaad Rotem, *Economic Regulation and the Presumption Against Extraterritoriality—A New Justification*, 3 WM. & MARY POL. REV. 229, 248–49 (2012) (suggesting that a rationale "for the presumption against extraterritoriality" is that Congress is more concerned with domestic issues than foreign interests).

156. *See* Hannah L. Buxbaum, *Access to Justice: Investor Suits in the Era of the Roberts Court: Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 LAW & CONTEMP. PROBS. 161, 161–64 (2012) (describing conflicts between the United States' approach to class action litigation and the approaches of other jurisdictions); *see also* Baquizal, *supra* note 139 (discussing the extraterritorial application of U.S. securities laws); *see also* Nathan Koppel & Ashby Jones, *Securities Ruling Limits Claims of Fraud*, WALL ST. J., Sept. 28, 2010, at C1, http://online.wsj.com/article/SB10001424052748703694204575518301351548676.html (stating that the U.S. courts have a reputation for being plaintiff-friendly).

157. Morrison v. Nat'l Australian Bank, 130 S. Ct. 2869, 2887 (2010).

158. SEC Study on Private Right of Action Under 10(b), *supra* note 141, at 9–10.

159. Baquizal, *supra* note 139, at 1554; *see* Joshua Zumbrun, *World's Most Economically Powerful Cities*, FORBES, July 15, 2008, *available at* http://www.forbes.com/2008/07/15/economic-growth-gdp-biz-cx_jz_0715powercities.html (naming London, not New York, as the world's most economically powerful city).

with a non-U.S. sovereign's ability to independently regulate its own securities market."[160] U.S. courts seem to agree; over the last 40 years, courts extending section 10(b) to cross-border private rights of action have never declined to apply U.S. law due to conflicts with other nation's laws governing securities transactions.[161]

1. Cross-Border Securities Transactions Implicate Regulatory Interests of Both States

Morrison's bright-line transaction test effectively concedes complete regulatory power to the state where the transaction was finalized without the balancing of interests that took place under the Second Circuit's conduct and effects tests. However, the challenges that U.S. courts have faced in the wake of *Morrison* demonstrate the reality that cross-border securities transactions implicate the regulatory interests of more than one state. Specifically, the division in authority among courts applying *Morrison* to non-exchange listed securities demonstrates the inherent difficulty in drawing that bright line.[162] When there is not a clear marker like a stock exchange to artificially separate interests, many courts were hesitant to ignore the numerous elements of a cross-border securities transaction.

Furthermore, the United States' interest in deterring fraud directed at its residents goes beyond the mere implication of our regulatory interests. "Comity does not require that the United States tolerate or protect fraudulent conduct that emanates from or has significant effects within its borders."[163] In fact, it would be an abdication of the U.S. government's responsibility to protect its citizens, as well as foreigners transacting within the state, for the United States to concede those interests for the sake of judicial clarity, administrative convenience or tenuous foreign policy implications. To the extent that foreign conduct is directed at the United States, we have an arguably superseding interest in regulating it regardless of the place where the transaction is finalized.[164]

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160. *See Morrison*, 130 S. Ct. at 2879 (stating that foreign nations can adeptly regulate and enforce their financial markets on their own); Luis A. Aguilar, *Statement by Commissioner: Defrauded Investors Deserve Their Day in Court* at 3, Apr. 11, 2012.

161. *See* Microsoft v. AT&T, 127 S. Ct. 1746, 1758 (2007) (explaining that American conflict of laws analyses account for foreign sovereign interests); *see also* TianRui Grp v. Int'l Trade Comm'n, 661 F.3d 1322, 1332–33 (2011) (disagreeing with the contention that conflict with Chinese law precludes the application of domestic trade secret law).

162. *See* Genevieve Beyea, Morrison v. National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 554–55 (2011) (highlighting that cost will become a major problem when multiple countries begin to regulate the same conduct based on effects jurisdiction); *see also* Geoffrey B. Goldman, *Crafting a Suitability Requirement for the Sale of Over-the-Counter Derivatives: Should Regulators "Punish the Wall Street Hounds of Greed?,"* 95 COLUM. L. REV. 1112, 1118 (1995) (explaining that the complexity and unpredictability of OTCs, a type of non-exchange securities, make them more difficult to regulate).

163. Comments by Forty-Two Law Professors, submitted jointly to Elizabeth M. Murphy, Securities and Exchange Commission, SEC File No. 4-617 (Feb. 18, 2011), *available at* http://www.sec.gov/comments/4-617/4617-28.pdfat 8.

164. *See* Hanna L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 22 (2007) (deducing that the rationale for U.S. regulation is the need to protect U.S. investors from international fraud occurring in their own country).

2. The Doctrine of International Comity Is Implicated Only in the Event of a "True Conflict"

Looking to the conflicting regulations cited by foreign governments, there does not appear to be a "true conflict" between domestic and foreign law warranting a conflicts analysis. According to U.S. case law, the doctrine of international comity is implicated only where there is a true conflict between U.S. law and the law of a foreign jurisdiction.[165] The Supreme Court found there is no conflict for comity purposes "where a person subject to regulation by two states can comply with both laws."[166] In determining whether comity is implicated, courts will look to whether the respective laws or policies contradict each other, not to whether one set is stronger or more effective in achieving similar objectives.[167]

While there are clear substantive distinctions between domestic and foreign securities regulations, section 10(b) is an antifraud provision that should not *directly* conflict with foreign law.[168] Certainly U.S. securities law does not mirror the law of foreign nations; it has more extensive disclosure requirements and arguably policies that are inconvenient or less favorable to foreign issuers.[169] However, a true conflict with foreign law would only be implicated if fraudulent disclosure is required or the laws of other nations expressly prohibit certain mandated disclosures.

Comity concerns are mitigated in securities transactions when foreign companies choose to subject themselves to U.S. law by conducting business in the United States and actively reaching out to U.S. investors. Moreover, the scienter requirement in section 10(b) suits requires plaintiffs to prove more than mere negligence of foreign issuers in failing to meet disclosure requirements; to reach the level of fraud, companies must knowingly make materially misleading misstatements.[170] Regardless of any discrepancies between U.S. and foreign disclosure regimes, raising the bar with respect to materially misleading information would not create a serious burden on most foreign issuers, much less create a true conflict with foreign laws.

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165. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993) (holding that the Sherman act does not apply to foreign trade unless it has a direct and foreseeable effect on domestic commerce).

166. *See id.* (citing Restatement Third Foreign Relations Law, Section 403); see also Kevin J. Christensen, *Of Comity: Aerospatiale as lex Maritima*, 2 LOY. MAR. L.J. 1, 36 (2003) (deducing that the first question courts ask under a comity analysis is whether there is a true conflict).

167. *In re* South African Apartheid Litig., 617 F. Supp. 2d. 228, 283 (S.D.N.Y. 2009).

168. *See* Aguilar, *supra* note 160 (discussing the limitations that have recently been placed on the application of section 10(b) in overseas fraud cases).

169. Robert P. Austin, *Regulatory Principles and the Internationalization of Securities Markets*, 50 L. & CONTEMP. PROBS. 221, 230–31 (1987); *see generally* TANJA BOSKOVIC, CAROLINE CERRUTI & MICHAEL NOEL, WORLD BANK, COMPARING EUROPEAN AND U.S. SECURITIES REGULATIONS: MIFID VERSUS CORRESPONDING U.S. REGULATIONS, 33–34 (2009), *available at* http://siteresources.worldbank.org/ECAEXT/Resources/258598-1256842123621/6525333-1263245503321/European_US_SecuritiesRegulations.pdf (discussing the similarities and differences between U.S. and European securities regulations).

170. *See* Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j (2006) (stating that it shall be illegal for any person to contrive manipulative advice in order to effectuate a securities sale); *see also* Ernst v. Hochfelder, 425 U.S. 185, 197 (1976) (holding the words "manipulative" and "deceptive" as used in section 10(b) suggest that it intended to encompass willful misconduct).

3. Investor Protection Should Outweigh Countervailing Interests in Predictability

The existence of a true conflict with another country's laws would not end the analysis. Ultimately, courts would conduct a balancing test to determine which state has the more powerful regulatory interests.[171] Such conflicts do not require the United States to forgo its own objectives for the sake of harmony. For example, conflicts often arise with respect to disclosure in discovery proceedings where countries like China and Switzerland have laws actually forbidding disclosure.[172] In those cases, U.S. courts apply a five-factor balancing test to determine whether discovery of documents should be compelled.[173]

Even if we were to balance countervailing regulatory interests, there is a strong argument that domestic interests in investor protection should prevail over conflicting interests of specific countries. As discussed above, the SEC does not have sufficient resources to effectively enforce the antifraud provisions, and there are trillions of dollars' worth of cross-border investments at stake.[174] Furthermore, as courts applying the conduct and effects tests for more than 40 years recognized, the United States has a strong interest in preventing "wrongdoers offshore" from causing harm in the United States, as well as in proscribing conduct within the United States aimed at defrauding foreign investors—even if the actual transaction took place overseas.[175]

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171. *See* Tiffany v. Qi Andrew, 276 F.R.D. 143, 151, 160–61 (S.D.N.Y. 2011) (applying the balancing test to decide that the interests of a Chinese bank far outweighed those of the U.S. movant trying to compel the disclosure of financial statements); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987) (stating that a conflict of laws is resolved by evaluating the importance of documents, the requested specificity level, the information's origin, alternatives to disclosure, and the U.S. interests).

172. *See* Courtney Morgan, Recent Case, Tiffany LLC v. Qi Andrew: *Do Principles of International Comity Shield Chinese Bank Records from Discovery?*, 2 ST. JOHN'S J. INT'L & COMP. L 103, 106 (2012), http://www.stjohnslawjicl.org/images/pdf/StJohns JICL-cases-1-Morgan.pdf (contending that laws against disclosure encourage people involved in illegal activities to solicit offshore banks in order to hide their unlawful conduct); *see also Swiss Banking Secrecy: Don't Ask, Won't Tell*, THE ECONOMIST (Feb. 11, 2012), http://www.economist.com/node/21547229 (discussing the problems that have surfaced between the United States and Switzerland due to Swiss privacy laws aiding American tax evasion).

173. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987) (outlining the five-prong balancing test that should be applied); *see also* Morgan, *supra* note 172, at 106–07 (examining a case where the balancing test tipped in favor of the banks when forced disclosure of Chinese financial statements would have violated the domestic law of the People's Republic of China).

174. *See* U.S. Gov't Accountability Office, GAO-07-830, Security and Exchange Commission: Additional Actions Needed to Ensure Planned Improvements Address Limitations in Enforcement Division Operations (2007) (recommending new and more efficient procedures for SEC investigations); *see also* Albert Dandridge, III, *United States: SEC's Whistleblower Rules Are Now Effective*, Mondaq Bus. Briefing, Aug. 18, 2011 (reporting on whistleblower rules that combat fraud by rewarding individuals who report public companies' securities violations).

175. *See* SEC Study on Private Right of Action Under 10(b), *supra* note 141 (stating that courts applied the conduct test and the effects test to determine the global reach of antifraud provisions); *see also* NAPPA *MORRISON* WORKING GROUP, LIVING IN A POST-*MORRISON* WORLD: HOW TO PROTECT YOUR ASSETS AGAINST SECURITIES FRAUD, 2 (2012), http://www.nappa.org/docuserfiles/files/3_Living%20in%20A%20Post-Morrison%20World.pdf (arguing that section 10(b) of the Securities and Exchange Act punishes any deceptive conduct connected with a security registered on a U.S. national security exchange).

Moreover, the United States' effort to enhance investor protection actually supports international interests, as suggested in the principles of securities regulations set forth by the International Organization of Securities Commissions.[176] And while the United States and the SEC have been the target of criticism for the ambiguity of some of its rules and regulations, the more than 5,000 publicly traded companies in the United States successfully manage the challenge of predicting securities liability for their own firms.[177] Although foreign companies would clearly prefer bright lines to more effectively calculate fraud-related liability, it seems that international interests of transnational investor protection would outweigh such inconveniences.

Conclusion

The Supreme Court's opinion in *Morrison*, like many of the cases that have followed, seemed to take an outcome-determinative approach to delineating the bounds of extraterritoriality. With the ultimate objective of drawing bright lines, the exchange-focused first prong of the transaction test was a no-brainer. It can be argued that purchases and sales of securities listed by foreign issuers on foreign exchanges represent purposeful availment, both of the issuer to the national regulatory regimes governing exchanges, as well as of the investor—who makes the decision to buy or sell on a foreign market and may be justly considered to have assumed the risks of exposing oneself to foreign laws and regulations. However, the Supreme Court did not anticipate the messiness or inequity that would result from applying *Morrison* to non-exchange-based securities transactions, which make up a significant portion of cross-border securities transactions.

Perhaps because the facts of *Morrison* involved a "foreign-cubed" scenario, where competing policy interests are clearer, the Supreme Court did not explicitly consider how to determine if a purchase or sale of a security occurred in the United States, thereby qualifying it as domestic and worthy of section 10(b) protection.[178] And the confusion among courts and competing

176. *See* THE INT'L ORG. OF SEC. COMM'N, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION 6 (2003), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf (arguing that investor protection is closely linked to the maintenance of fair-trade markets); *see also* INT'L ORG. OF SEC. COMM'NS TECHNICAL COMM., REPORT OF THE TASK FORCE ON COMMODITY FUTURES MARKETS, http://www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/ioscocommodityfuturesmarketsr.pdf (suggesting that setting forth standards of practice in the delivery of future markets actually helps build an effective market integrity program).

177. *See* James D. Agresti, *National Debt Facts*, JUST FACTS (Apr. 26, 2011), http://www.justfacts.com/nationaldebt.asp#accrual1 (arguing that the SEC's establishment of standards for financial reporting facilitate disclosure of publicly traded companies' accounting statements).

178. *See* Luke Archer, Comment, *Section 10(b) of the Securities Exchange Act Applies Only to Transactions Involving Securities Traded on Domestic Exchanges or Transactions Where the Sale of the Securities Occurred in the United States.* Morrison v. Nat'l Australia Bank Ltd., 12 TRANSACTIONS: TENN. J. BUS. L. 218, 220 (2011) (stating that section 10(b) does not cover securities outside the United States that were not sold in the United States); *see also* Daniel Zinn, *Commentary: The "Foreign Cubed" Equation*, TRADER'S MAGAZINE (June 22, 2010), http://www.tradersmagazine.com/news/foreign-cubed-supreme-court-securities-law-sec-morrison-1059951.html?pg=1 (recognizing that U.S. investors who acquire securities on U.S. exchange markets should be protected by U.S. law).

approaches in the wake of *Morrison* demonstrates that the transaction-based approach does not always adequately protect investors; to the contrary, it sometimes creates arbitrary gaps in investor protection that are exploitable by parties in over-the-counter transactions.[179]

A strong argument can be made that Congress should close these gaps in investor protection by extending Dodd-Frank's conduct and effects standard to private causes of action under section 10(b) of the Securities Exchange Act of 1934. Despite any variations between domestic and foreign standards, the conduct and effects-based tests are more reliable safeguards for investor protection. And, given the numerous regulatory interests at stake, the mere existence of the "probability of incompatibility with the applicable laws of other countries," as Justice Scalia admonished, should not, without more, deter the United States from legislating in its own interests.[180]

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179. Hannah Buxbaum, *VJIL Symposium: Hannah Buxbaum Comments on "Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court's 'Transactional Test,'"* OPINIO JURIS (Apr. 13, 2012), http://opiniojuris.org/category/online-symposia/vjil-symposium-vol-52-no-1-and-no-2/ (arguing that uncertainty still remains despite the bright-line transaction-based test, causing many to lose the protection of securities fraud law); *see* Letter from Nat'l Ass'n of S'holder & Consumer Attorneys to Elizabeth Murphy, Sec'y of SEC, (Feb. 18, 2011), http://www.sec.gov/comments/4-617/4617-18.pdf (claiming that the transaction-based test does not protect American investors because of the difficulty in its application to worldwide trading).

180. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2885 (2010) (concluding that the Exchange Act's scope does not encompass conduct in the United States affecting exchanges abroad).

Gordon v. City of New York Police Department, 84th Precinct

2012 U.S. Dist. LEXIS 44154 (E.D.N.Y. Mar. 29, 2012)

The U.S. District Court for the Eastern District of New York held that under the Vienna Convention on Consular Relations, denial of a detained foreign national's request of consulate notification does not provide an individual right to damages.

I. Holding

In *Gordon v. City of New York Police Department, 84th Precinct*,[1] the U.S. District Court for the Eastern District of New York (EDNY) held that the Vienna Convention on Consular Relations (VCCR)[2] contains neither an express nor an implied provision allowing for enforceable individual rights. The court dismissed the plaintiff's claim that he had a right to individual damages when the defendants denied his request to contact his consular office following his arrest.

II. Facts and Procedural History

On November 2, 2007, Officer Carlos Peralta of the New York Police Department (NYPD), 84th Precinct, arrested Christopher Gordon, a citizen of Trinidad and Tobago, for alleged check fraud.[3] After his arrest and processing, the NYPD failed to inform Gordon of his right to contact his consular office. Gordon later requested and was denied the right to contact the Trinidadian consular office. That case was dismissed on November 4, 2007.[4]

Gordon was rearrested on the same charges a year later.[5] While he was detained, he was interrogated by Agent Boyce from Immigration and Customs Enforcement (ICE). Again, Gordon claimed the agent failed to inform him of his rights under the VCCR and thus denied him the opportunity to contact his consular office.[6]

After his conviction, Gordon was transferred to the Ulster Correctional Facility and interviewed by Agent Santiago, another ICE agent.[7] Gordon was again denied the opportunity to contact the consulate and was subsequently deported.[8]

Gordon filed suit pro se in the Eastern District against the NYPD, Officer Peralta, the U.S. Department of Homeland Security Immigration and Customs Enforcement, Agent

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1. 2012 U.S. Dist. LEXIS 44154, at *1 (E.D.N.Y. Mar. 29, 2012).
2. Art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, entered into force in the United States Nov. 24, 1969.
3. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *2.
4. *Id.*
5. *Id.*
6. *Id.* at *2–3.
7. *Id.* at *3.
8. *Id.*

Boyce, and Agent Santiago, pursuant to the VCCR, the Alien Tort Statute (ATS),[9] and 42 U.S.C. § 1983. Gordon alleged that the lack of consular access inhibited his ability to challenge his arrests, prosecution, and deportation[10] and sought $3 million in compensatory damages.[11]

The defendants moved to dismiss on the grounds that the plaintiff failed to state a claim, arguing that the VCCR does not create an individual right to damages.[12] Because the defendants' arguments for dismissal were substantially identical, the district court addressed them together.[13]

III. Discussion

A. Standard of Review

In determining the sufficiency of a complaint under Rule 12(b)(6), the court must determine whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[14] In order to determine whether the complaint is sufficient, the Supreme Court has set out a two-pronged test for courts to follow.[15] First, courts can identify any conclusory pleadings.[16] Pleadings that are no more than conclusions are not entitled to the assumption of truth.[17] Second, once the conclusory pleadings have been stripped from the complaint, the court can identify whether the complaint "plausibly give[s] rise to an entitlement to relief."[18] The complaint is deemed facially plausible when its factual pleadings allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[19]

Because the plaintiff filed his claim pro se, the court held the complaint to a less stringent standard than would be expected from a complaint filed by a lawyer.[20] As a result, the court construed Gordon's complaints to raise the strongest arguments that they suggested.[21]

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9. 28 U.S.C. § 1350
10. VCCR, Art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.
11. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *3.
12. *Id.*
13. *Id.*
14. Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009).
15. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *5 (citing *Iqbal*, 556 U.S. at 680).
16. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *5.
17. *Id.*
18. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *5 (quoting *Iqbal*, 556 U.S. at 664).
19. *Id.*
20. Gordon v. City of New York Police Dep't 84th Precinct, 2012 U.S. Dist. LEXIS 44154, at *6 (E.D.N.Y. Mar. 29, 2012).
21. *Id.*

B. The Vienna Convention on Consular Relations

Gordon claimed that the defendants denied him access to his consular office in violation of Article 36 of the VCCR. He filed suit directly under the treaty and 42 U.S.C. § 1983, which creates individual rights that can be enforced through civil actions.[22] The court noted that under the express language of article 36 of the VCCR,[23] if the national so requests, the receiving State is required to notify the consular post of the sending State when a national of that State is arrested, imprisoned, held in custody pending trial, or detained in any manner within its consular district.[24]

Although the VCCR affords some protection to the nationals of a sending State, the Supreme Court has found that the purpose of the treaty is to promote friendly relations among the signing nations.[25] However, the Court did not address whether article 36 of the VCCR creates judicially enforceable individual rights.[26]

On the other hand, the Optional Protocol Concerning the Compulsory Settlement of Disputes was designed to implement the terms of the VCCR but does not make any mention of private actions by detained individuals.[27] Instead, it allows for disputes that arise out of the VCCR to be "brought before the ICJ by a State-party."[28]

The Second Circuit in *Mora v. New York* discussed the question of whether the incarcerated national, who was not informed of his consular rights, could state a damages claim under the VCCR or through section 1983.[29] The court, in determining whether a damages claim may be brought for an alleged violation of the VCCR, looked to the Supreme Court's finding that a plaintiff must show that the federal law under which the claim arises confers an individual right to bring suit.[30]

The *Mora* court began by examining the VCCR. The court found that it did not contain an express provision to overcome the presumption that treaties do not create individual rights to damages unless there is express language to the contrary.[31] The court noted that had the

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22. *Id.* at *13.

23. VCCR, Art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

24. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *8–9 (citing VCCR, art. 36).

25. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *8 (citing *Medellin v. Texas*, 552 U.S. 491 (2007)).

26. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *10 (citing *Medellin*, 552 U.S. at 506; *Sanchez–Llamas v. Oregon*, 548 U.S. 331, 343 (2006)).

27. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *14. The VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes entered into force in the United States on November 24, 1969. By a letter dated March 7, 2005, Secretary of State Condoleezza Rice notified U.N. Secretary General Kofi Annan that the United States "hereby withdraws" from the Optional Protocol.

28. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *14.

29. Mora v. New York, 524 F.3d 183, 188 (2d Cir. 2008).

30. Gordon v. City of New York Police Dep't 84th Precinct, 2012 U.S. Dist. LEXIS 44154, at *10 (E.D.N.Y. Mar. 29, 2012) (citing *Gonzaga v. Doe*, 536 U.S. 273, 283–85 (2002)).

31. *Mora*, 524 F.3d at 188.

drafters of the Vienna Convention intended to provide for an individual right to damages, they would have signaled their intentions to do so.[32]

Although article 36 refers to the "rights" of a detained national, the *Mora* court recognized that the Supreme Court has often rejected the argument that mere references to the "rights" of an individual support the view that the legislation creates a private right of action.[33] Further, the court cited the preamble of the VCCR, which stated that the purpose of the consular privileges is "to ensure the efficient performance of functions by consular posts on behalf of their respective States," and not to benefit individuals.[34]

Finally, the *Mora* court looked to "the interpretation offered by the Executive branch of the United States, 'that the Vienna convention does not create domestically enforceable federal law.'"[35] Instead, when there is a failure to notify nationals of their consular rights, the only remedies available under the VCCR are diplomatic, political, or those established between states under international law.[36]

Despite the fact that the *Mora* court declined to decide whether a denial of a request for consular notification would allow for an individual right of action, the *Gordon* court held that the reasoning set out in *Mora* supports the proposition that no such right exists.[37] Moreover, other circuits have concluded that article 36 does not create an individual right to damages.[38]

The Eleventh Circuit in *Gandara v. Bennett* used the reasoning in *Mora* to deal with a claim similar to the one Christopher Gordon brought before the court.[39] In that case, the court cited the context and text of the VCCR, as well as the Executive Branch's interpretation, to determine that the VCCR does not create an individual right to damages when a national's request to contact his consulate is denied.[40]

The Ninth Circuit also concluded that the right to protect nationals belongs to States party to the Convention.[41] As a result, the Ninth Circuit found that article 36 does not clearly confer an individual right actionable in a damages claim.[42]

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32. *Id*. at 203.

33. *Id.* at 195.

34. *Mora*, 524 F.3d at 197 (quoting VCCR, 21 U.S.T. at 79); *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *13.

35. *Id.* at 204 (quoting *Medellin*, 552 U.S. at 513).

36. Cornejo v. County of San Diego, 504 F.3d 853, 862 (9th Cir. 2007); *Gordon* at *15.

37. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *10-11.

38. *Id.* at *16.

39. Gandara v. Bennett, 528 F.3d 823 (11th Cir. 2008); *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *16.

40. *Gandara*, 528 F.3d at 825, 829; Gordon v. City of New York Police Dep't 84th Precinct, 2012 U.S. Dist. LEXIS 44154, at *16 (E.D.N.Y. Mar. 29, 2012).

41. *Cornejo*, 504 F.3d at 855; *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *16.

42. *Id.*

The Fifth and Sixth Circuits similarly found that the VCCR does not create a judicially enforceable right for a detained foreign national to consult his consulate.[43] In particular, the Sixth Circuit has relied on the Supreme Court's rulings[44] to find that an individual foreign national is unable to bring an individual damages claim under the VCCR.[45]

In *Gordon*, the EDNY also considered the contrary opinions of the Seventh Circuit and the International Court of Justice.[46] Notably, the Seventh Circuit in *Jogi v. Voges* concluded that article 36 of the Vienna Convention confers individual rights on detained nationals.[47] The court found these opinions neither controlling nor persuasive due to the fact that they directly conflict with *Mora*.[48]

C. Alien Tort Statute

Gordon also asserted a cause of action under the Alien Tort Statute (ATS).[49] The "ATS is a jurisdictional statute that also grants the power to recognize private causes of action for certain torts in violation of the law of nations."[50] However, the ATS does not create new causes of action.[51] Rather, the ATS grants district courts original jurisdiction for such torts.

The court found that Gordon failed to state a claim under the ATS. In order to satisfy the requirements of the ATS, the plaintiff must show that the customary international law tort met the high standard of establishing a new cause of action.[52] For such an action to be recognized, it must be specific and well accepted in the international community.[53]

Because Gordon could not establish that the denial of a request to notify the consulate was a well-accepted tort, his ATS claim was dismissed.[54]

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43. United States v. Emuegbunam, 268 F.3d 377, 394 (6th Cir. 2001); United States v. Jimenez-Nava, 243 F.3d 192, 196–98 (5th Cir. 2001); *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *17.

44. *See* Federal Republic of Germany v. United States, 526 U.S. 111 (1999); Breard v. Greene, 523 U.S. 371 (1998) (finding that since a foreign sovereign cannot seek a judicial remedy even though the Vienna Convention bestows benefits on it, it is not logical to permit an individual foreign national to do so).

45. *Emuegbunam*, 268 F.3d at 394 (citing *Federal Republic of Germany*, 526 U.S. 111); *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *18.

46. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *18.

47. Jodi v. Voges, 480 F3d. 822, 834–35 (7th Cir. 2007); *see also* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 21) (finding that article 36 does convey individual rights).

48. *Id.* at *15.

49. *Id.* at *20.

50. 28 U.S.C. § 1350; Gordon v. City of New York Police Dep't 84th Precinct, 2012 U.S. Dist. LEXIS 44154, at *20 (E.D.N.Y. Mar. 29, 2012) (quoting *Mora*, 524 F.3d at 208).

51. Houston Putnam Lowry & Peter W. Schroth, *Survey of 2004–2005 Developments in International Law in Connecticut*, 79 CONN. B.J. 131, 163 (2005)

52. *Id.* at *20.

53. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *20 (citing *Mora*, 524 F.3d at 208).

54. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *21, *22.

D. 42 U.S.C. § 1985(3)

Gordon claimed that his rights were infringed upon in violation of section 1985(3).[55] A section 1985(3) claim requires four elements to be established: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States."[56] Additionally, Gordon was required to show that the alleged conspiracy was motivated by a class-based discriminatory animosity.[57]

Gordon simply made unsupported conclusory claims. In particular, he made only "unsupported suppositions that a conspiracy among the defendants took place," with the assertion that he is an alien of a minority race as his only evidence to support this claim.[58] Therefore, the court granted the defendants' motion to dismiss.[59]

E. Section 1983 Conspiracy to Interfere with Civil Rights Claim Against the Agencies

Gordon also filed suit against the individual agencies: the NYPD and ICE. The court found that under New York law, mere administrative departments of a municipality do not have a legal identity separate from the municipality.[60] Thus, the NYPD was not a suable entity.[61] But even so, Gordon's claims against the NYPD failed to state a sufficient claim of liability. For the court to find that the claim against the City of New York was properly brought, Gordon would have been required to show the existence of an officially adopted policy or custom, a direct causal connection between that policy or custom and the deprivation of a federal right.[62]

In determining whether there is a causal connection between the policy and the alleged injury, the plaintiff must show a clear nexus between the injury and some officially adopted policy or custom.[63] In the absence of a showing that the incident was caused by an existing, unconstitutional municipal policy, "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability."[64] In this case, Gordon's claim boiled down to mere speculation that the injury would have been prevented if the NYPD had educated the arresting officer

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55. 42 U.S.C. § 1985 (Conspiracy to Interfere with Civil Rights); *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *23.

56. Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087–88 (2d Cir. 1993); *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *22.

57. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *23.

58. *Id.* at *23.

59. *Id.* at *24.

60. Gordon v. City of New York Police Dep't 84th Precinct, 2012 U.S. Dist. LEXIS 44154, at *24 (E.D.N.Y. Mar. 29, 2012).

61. *Id.*

62. *Id.* at *25.

63. *Id.*

64. City of Oklahoma v. Turtle, 471 U.S. 808, 823–24 (1985); *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *25.

about his requirements under the VCCR. He provided no additional evidence other than the facts of his case, which has rarely been recognized by a State-party to the VCCR as a tort cause of action.[65] As a result, the court deemed this insufficient and dismissed his claim.[66]

As for the claims against the U.S. Department of Homeland Security Immigration and Customs Enforcement, the court held that it lacked subject matter jurisdiction over the claims against federal defendants.[67] Any suit against the Federal Government and its agencies requires an explicit showing of a waiver of sovereign immunity.[68] Because Gordon had not alleged any explicit waiver of sovereign immunity for damage claims of the sort he sought to bring here, the claims were dismissed.[69]

IV. Conclusion

The U.S. District Court for the Eastern District of New York held that the VCCR does not create a judicially enforceable individual right.[70] Previous courts have held that failure to notify a detained foreign national of his consular rights does not permit an individual damages claim. These courts have relied on the text and context of the treaty, in addition to executive interpretation, which emphasized that the VCCR's purpose is to ensure the efficient performance of functions by consular posts, not to create domestically enforceable federal law.[71] Absent a showing that the VCCR contains an unambiguous provision providing for individual damages when a violation of the treaty occurs, courts are reluctant to allow otherwise.[72]

In line with this reasoning, the *Gordon* court found that even the denial of a foreign national's specific request for consulate notification does not trigger an individual damages claim under article 36 of the Vienna Convention.[73]

Erik Snipas

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65. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *21–*22.
66. *Id.* at *25–*26.
67. *Id.* at *26.
68. *Id.*
69. *Id.*
70. *Gordon*, 2012 U.S. Dist. LEXIS 44154 at *2.
71. *Id.* at *13.
72. *Id.* at *11.
73. *Id.* at *19.

NML Capital, Ltd. v. Republic of Argentina

680 F.3d 254 (2d Cir. 2012)

The U.S. Court of Appeals for the Second Circuit held that an entity falls under the Foreign Sovereign Immunities Act commercial activity exception when it makes purchases in the market in the same manner as a private actor.

I. Holding

The U.S. Court of Appeals for the Second Circuit held that by paying a seller the purchase price of commercial goods on behalf of a third party, the Republic of Argentina engaged in a commercial activity as defined by the Foreign Sovereign Immunities Act (FSIA).[1] Accordingly, certain funds in a bank account owned by the Republic of Argentina were exposed to attachment under the FSIA, because the account was used in the United States for commercial activity.[2]

II. Facts and Procedural History

On the secondary market, NML Capital, Ltd. (NML) and EM Ltd. (EM) (jointly, the plaintiffs) acquired hundreds of millions of dollars of non-performing bonds issued by the Republic of Argentina.[3] Consistent with a genre of cases that have occurred since Argentina's economic collapse in 2001,[4] the plaintiffs began to bring suit in U.S. courts to collect on the debt.[5] In eleven consolidated appeals, plaintiffs moved to attach an account held at the New York branch of the Banco de la Nación Argentina and owned by Agencia Nacional de Promoción Científica y Tecnológica (ANPCT Account)."[6] However, ANPCT alleged that it used this particular account solely to purchase scientific equipment for use by grant beneficiaries.[7] ANPCT asserted that because the grant beneficiaries contracted directly with the scientific equipment sellers and directly received the purchased goods, its involvement was limited solely to the forwarding of approved payments to the sellers.[8]

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1. 680 F.3d 254, 255 (2d Cir. 2012) (citing 28 U.S.C. § 1610(a)).
2. *Id.* at 255.
3. *Id.* at 256.
4. See Jonathan I. Blackman & Rahul Mukhi, *A Modern Legal History of Sovereign Debt: The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna*, 73 LAW & CONTEMP. PROB. 47, 50 (2010) (discussing the vulnerability of certain Latin American and African states to such litigation and the legal strategies employed by the professional plaintiffs who bring such litigation); *see also* Joshua Alter, Recent Decision, NML Capital, Ltd. v. Banco Central de la República Argentina, N.Y. INT'L L. REV., Winter 2012, 147 (discussing a Second Circuit case in which the court applied a functions test to find that Argentine funds were immune from attachment).
5. 680 F.3d at 256.
6. *Id.* The mission of the ANPCT, which is usually called La Agencia, is promotion of scientific and technological research. *See* AGENCIA (last visited Nov. 27, 2012), http://www.agencia.gov.ar/.
7. *Id.*
8. 680 F.3d at 256.

On September 12, 2008, the U.S. District Court for the Southern District of New York granted "attachment and restraining orders against the bank account owned by ANPCT."[9] At that time, the account contained more than $3.26 million.[10] On September 30, 2009, the district court confirmed the restraining orders under the FSIA[11] to the extent that the orders related to the ANPCT Account, but it did not confirm the attachment orders.[12] According to the district court's reasoning, because ANPCT funds were used to buy scientific equipment, the Republic of Argentina used the account for commercial activity.[13] In further explanation of its decision, the district court noted that by using the ANPCT Account to buy the scientific equipment, the Republic acted the same as any private player engaging in commerce in the marketplace.[14] Subsequently, the plaintiffs moved for reconsideration regarding the pre-judgment attachment of the ANPCT Account.[15] On September 30, 2010, the district court acknowledged its mistake and confirmed the attachments.[16]

The Second Circuit addressed the Republic's appeal of the underlying attachment, the restraining orders against the ANPCT Account, and the subsequent confirmation orders.[17] The Republic argued that the district court, pursuant to the FSIA, should have granted it immunity from execution.[18]

III. Discussion

A. Standard of Review

Decisions that deny immunity to a foreign sovereign or its property under the FSIA are reviewed de novo.[19] On a request for an attachment order, a court of appeals reviews a district court's ruling for abuse of discretion.[20] "A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions."[21]

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9. *Id*. at 255–56.
10. 680 F.3d 254, 256 (2d Cir. 2012).
11. In relevant part, 28 U.S.C. § 1610(a) provides that a foreign state's property in the United States is used "for a commercial activity in the United States, shall not be immune from attachment . . . or from execution . . . if (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication. . . ." 28 U.S.C. § 1610(a).
12. *See* NML Capital Ltd. v. Republic of Argentina, No. 08 Civ. 3302, 2009 WL 3149601, at *16 (S.D.N.Y. Sept. 30, 2009).
13. *Id*.
14. *Id*.
15. 680 F.3d at 256.
16. *Id*.
17. *Id*.
18. *Id*.
19. 680 F.3d at 256–57.
20. 680 F.3d 254, 257 (2d Cir. 2012).
21. Sims v. Blot, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks and citation omitted).

B. The ANPCT Account Was Used for "Commercial Activity"

The FSIA "provides the sole basis for achieving jurisdiction over a foreign state" in U.S. courts.[22] Generally, a foreign state's property in the United States is protected from execution in order to satisfy a debt.[23] The property of a foreign state may be attached and executed upon only when an FSIA exception applies.[24]

In this case, the applicable exceptions provide that when a foreign state waives its immunity, a court may attach property that has been used for a commercial activity in the United States.[25] Here, the Republic waived immunity.[26] It also did not challenge that ANPCT was accountable for the Republic's debts.[27] Therefore, the sole question on appeal was whether the Republic used the ANPCT Account for commercial activity.[28] The Second Circuit held that the Republic used the ANPCT Account for commercial activity when it sent the agreed purchase price for the goods to the seller, who then transferred it directly to a third party.[29]

1. Commercial Activity

Commercial activity is defined by the FSIA as "a regular course of commercial conduct or a particular commercial transaction or act."[30] Courts determine whether an activity has commercial character based on the nature of the conduct or act, not by its purpose.[31] The FSIA's legislative history indicates that Congress intended to give courts "a great deal of latitude in determining what is a commercial activity" under the FSIA.[32]

In order to determine the nature of a foreign state's act, the relevant question to ask is whether the particular actions are of the type that a private party employs in the course of trade or commerce.[33] In this case, the supposed commercial act is the purchase of scientific equipment.[34] The Supreme Court held in *Weltover*[35] that a foreign state engages in a commercial

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22. *Id*. (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989)).
23. 680 F.3d at 257.
24. *Id*.
25. 28 U.S.C. § 1610(a).
26. 680 F.3d at 257.
27. *Id*.
28. *Id*. (quoting 28 U.S.C. § 1610).
29. 680 F.3d at 257.
30. 28 U.S.C. § 1603(d).
31. 28 U.S.C. § 1603(d).
32. 680 F.3d at 257-258 (quoting H.R.Rep. No. 94-1487, at 16 (1976), 1976 U.S.C.C.A.N. 6604, 6615) (ellipses and alteration in original)); *but see* Joshua Alter, Recent Decision, *NML Capital, Ltd. v. Banco Central de la República Argentina*, N.Y. INT'L L. REV., Winter 2012 at 149 (noting Congress's fear of possible foreign relations issues should a foreign sovereign's funds "be attached without an explicit waiver").
33. Republic of Argentina v. Weltover, 504 U.S. 607, 614 (1992).
34. 680 F.3d at 258.
35. *Weltover*, 504 U.S. at 614.

activity when it purchases goods in the marketplace, because this is a similar kind of act "by which a private party engages in trade and traffic or commerce."[36]

2. The Governmental Purpose of the Commercial Activity Is Irrelevant

The Republic alleged that the payments were sovereign in nature, because the ANPCT funds purchased the equipment to implement a national scientific research and development program.[37] The Republic argued that ANPCT did not engage in commercial activity, because it did not negotiate contracts with the sellers, nor did it receive delivery of the equipment.[38] Rather, the Republic argued, ANPCT's delivery of the purchase price to the sellers on behalf of the beneficiaries was merely a grant-making function.[39]

The Second Circuit found the Republic's argument unavailing.[40] The Republic's argument rests on the "governmental purpose of the purchases and the absence of profit motive in the program."[41] However, this is not relevant to the analysis of commercial activity, because the analysis depends on the nature of the act, not its purpose.[42] The Supreme Court has held that a state engages in commercial activity only when it uses "powers that can also be exercised by private citizens."[43]

The Second Circuit also found the Republic's contention that it was not performing in the market as a merchant unavailing.[44] A party does not have to be a merchant to engage in a commercial activity.[45] A party can engage in commercial activity even if it is the last recipient of goods, not the merchant engaging in the trade.[46]

The court made it clear that the commercial activity's governmental purpose does not make the ANPCT Account exempt from attachment and execution if it is considered a commercial activity under the FSIA.[47]

Finally, the Second Circuit found the Republic's lack of profit motive immaterial.[48] If a foreign sovereign engages in conduct in a way that a private party would normally engage in for

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36. 680 F.3d at 258 (quoting *Weltover*, 504 U.S. at 614).
37. *Id*. at 258.
38. *Id*.
39. *Id*.
40. 680 F.3d at 259.
41. *Id*.
42. 28 U.S.C. § 1603(d).
43. Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993) (quoting *Weltover*, 504 U.S. at 614).
44. 680 F.3d at 259 n.10.
45. *Id*.
46. *Id*. at 259 (referencing Texas Trading & Mill. Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 310 (2d Cir. 1981).
47. 680 F.3d at 259.
48. *Id*. at 260.

profit, that activity is still considered commercial.[49] This holds true even if the foreign sovereign has not acted with a profit motive.[50]

IV. Conclusion

The use of the ANPCT funds fell under the commercial activity exception to foreign sovereign immunity, so the Republic cannot claim sovereign immunity over the funds in the ANPCT Account.[51] The Second Circuit affirmed the district court's attachment and restraining orders against the ANPCT Account.[52] In succeeding on this argument, the plaintiffs accomplish a rare victory for foreign-sovereign creditors[53] and can proceed to collect on the bonds issued by the Republic of Argentina.[54]

Pamela Albanese

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49. Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 150 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

50. *Id*. at 150.

51. 680 F.3d at 260.

52. *Id*.

53. *See generally* Jonathan I. Blackman & Rahul Mukhi, *A Modern Legal History of Sovereign Debt: The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna*, 73 LAW & CONTEMP. PROB. at 59–61 (acknowledging that granting of attachments is rare but stating that the plaintiff in such cases often has a diverse portfolio such that "it only needs the occasional big win to recoup its costs of carrying-and-litigation expense"); *see also* Daniel Schilling, Recent Decision, *NML Capital, Ltd. v. Argentina*, N.Y. INT'L L. REV., Winter 2012, 159 (summarizing a district court's finding that an Argentine company could not be held jointly and severally liable for Argentina's debt despite Argentina's "broad control" over the company).

54. *Id.* at 256.

In re Extradition of Kapoor

2012 U.S. Dist. LEXIS 54026 (E.D.N.Y. April 17, 2012)

The U.S. District Court for the Eastern District of New York granted a certificate of extraditability for an Indian National accused of fraud, forgery, and conspiracy.

I. Introduction

In 1997, the United States signed the Extradition Treaty between the government of the United States of America and the government of the Republic of India in order to provide for more effective cooperation between the two states in the suppression of crime.[1] The treaty allows the states to extradite persons who are accused of, or charged with, certain extraditable offenses.[2] Extraditable offenses are categorized as those punishable in both India and the United States by imprisonment of one year or more.[3]

II. Holding

In *In re Extradition of Kapoor*,[4] the U.S. District Court for the Eastern District of New York granted the United States, acting on behalf of the government of India, a certificate of extraditability for Monika Kapoor. Kapoor is an Indian citizen who was accused of five crimes in India: (1) cheating and dishonestly inducing delivery of property; (2) forgery of valuable security, will, etc.; (3) forgery for the purpose of cheating; (4) using as genuine a forged document; and (5) criminal conspiracy in violation of the Indian Penal Code.[5] The court held that the U.S. government provided sufficient evidence for a finding of probable cause that Kapoor defrauded the Indian government of $679,000 in potential tax revenue.[6]

III. Facts and Procedural History

On May 2, 2011, the U.S. government, acting on behalf of the Indian government, filed a complaint in the U.S. District Court, seeking an arrest warrant and the extradition of Monika Kapoor. Kapoor resided in New York on a B-1 Visa and was arrested pursuant to 18 U.S.C. § 3184, Fugitives from Foreign Country to United States.[7] The District Court granted Kapoor's

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1. Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, U.S.-India, at 2, June 25, 1997, entered into force July 21, 1999, T.I.A.S. No. 12873.
2. *Id.*
3. *Id.*
4. In re Extradition of Kapoor, 2012 U.S. Dist. LEXIS 54026 (E.D.N.Y. Apr. 17, 2012).
5. *Id.* at *1–3.
6. *Id.* at *23.
7. In the Matter of the Extradition of Monika Kapoor, 2011 U.S. Dist. WL 2296535, at *1 (E.D.N.Y. June 7, 2011).

request for bail, pending the resolution of the extradition proceedings.[8] The Indian government alleged that Kapoor, along with her two brothers, defrauded the Indian government of nearly $679,000. Kapoor and her brothers allegedly used forged export documents to obtain 16 replenishment licenses to import gold duty-free. The replenishment licenses, which are issued by various Indian trade authorities,[9] allow for exporters in India to import duty-free gold under certain conditions.[10] Kapoor and her brothers allegedly sold the licenses to Deep Sea Exports, which used them to import duty-free gold.[11]

Kapoor allegedly partook in the scheme by establishing the company Monika Overseas, applying for replenishment licenses, forging documents, and receiving the licenses at her residential address in India.[12] The Indian government accused Kapoor of five crimes, including one count of cheating, three counts of forgery, and one count of conspiracy.[13]

IV. Requirements for Extradition and Standard for Probable Cause

Extradition hearings are narrow in scope. Their purpose is limited to determining whether the requesting country has presented sufficient evidence to justify holding the extraditee to answer the charges pending against her.[14] India must provide evidence sufficient to support a *reasonable belief* that the extraditee is guilty of the charges. However, the purpose of the extradition proceeding is not to determine whether the extraditee is *guilty* of those charges.[15] In order to issue a certificate of extraditability in an extradition proceeding, the court must find the evidence sufficient to sustain the charges under the provisions of the proper treaty or convention,[16] in this case the 1997 Extradition Treaty between the United States and India. The rules of evidence that govern at trial are not applicable in the extradition proceeding.[17] An extradition court has the authority and discretion to go beyond the face of the government's affidavits for the purpose of determining credibility or reliability.[18] At the extradition hearing, the government's inquiry is confined to whether a valid treaty exists, whether the crime charged is covered by the relevant treaty, and whether the evidence marshaled in support of the complaint for

8. In re Extradition of Kapoor, 2012 U.S. Dist. LEXIS 54026, at *2. (Pursuant to 18 U.S.C. § 3184, the government's motion for revocation of Kapoor's bond was denied due to her compliance with conditions of release and lack of evidence of flight risk).

9. *Id.*

10. Under the Export/Import Policy 1997–2002, the Indian government permitted companies that exported gold to replenish their gold supply using government-approved replenishment licenses. The licenses allowed those companies to import into India, duty free, an amount of gold commensurate with the amount of gold that had been exported. *See* Memorandum of Law in Support of Application for Extradition, dated July 21, 2011, at 3.; *see* 4 RAJ KAPILA & UMA KAPILA, UNDERSTANDING INDIA'S ECONOMIC REFORMS,132 (1996).

11. In re Extradition of Kapoor, 2012 U.S. Dist. LEXIS 54026, at *2

12. *Id.*

13. *Id.* at *19.

14. *Id.* at *12.

15. *Id.*

16. *Id.* at *3.

17. *Id*.

18. *Id.* at *13.

extradition is sufficient under the applicable standard of proof.[19] Kapoor conceded that a valid treaty exists that covers the charges but argued that the Indian government did not have enough evidence to establish probable cause.[20]

V. Discussion

A. Kapoor's Proposed Evidence

Kapoor attempted to introduce two pieces of evidence: an affidavit asserting that statements made to the Indian government in 1999 were made under duress[21] and an expert's report on her handwriting.[22] The court stated that an extraditee is not permitted to introduce evidence on the issue of guilt or innocence. [23] An extraditee may offer only evidence that tends to explain the government's case of probable cause.[24] If the court allowed Kapoor to provide evidence contradicting India's proof, it would have raised an issue of credibility, which is a question best left for trial.[25] The court went on to separately analyze both potential pieces of evidence, holding that the expert's report concluding that Kapoor did not sign certain documents would fall squarely in the category of contradictory evidence; therefore, it would be inappropriate for the court to consider.[26]

Further, the court held that it would be inappropriate to consider the affidavit recanting statements claiming to be made to the Indian government under duress, for three reasons.[27] First, the affidavit would not completely obliterate probable cause, as it was not the only evidence against her;[28] second, the affidavit had no indicia of reliability, because she created it in her own interest;[29] third, an affidavit is a document that should be presented at trial. Therefore, the court refused to consider the affidavit or the expert report.[30]

B. Charges and Evidence Against Kapoor

The Indian government presented evidence implicating Kapoor in the fraudulent scheme.[31] The evidence included a written statement, allegedly by Kapoor, admitting to establishing Monika Overseas and giving her brother power of attorney and pre-signed letterheads.

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19. *Id*. at *4; *see also* Cheung v. United States, 213 F.3d 82, 88 (2d Cir. 2000).
20. In re Extradition of Kapoor, 2012 U.S. Dist. LEXIS 54026, at *5 (E.D.N.Y. Apr. 17, 2012).
21. *Id*. at *10. (Kapoor argued that her entire statement should be disregarded, because it was made under torture.)
22. *Id.* at *5.
23. *Id.* at *6.
24. *Id.*
25. *Id.* at *6.
26. *Id.* at *8.
27. *Id.* at *11.
28. *Id.*
29. *Id.*
30. In re Extradition of Kapoor, 2012 U.S. Dist. LEXIS 54026, at *11 (E.D.N.Y. Apr. 17, 2012).
31. *Id.* at *14.

In the alleged statement, she also admitted to receiving 8,000 to 10,000 rupees[32] per month as consideration.[33] Further, Kapoor's name and signature allegedly appeared on the Indian bank account for Monika Overseas and on documents transferring replenishment licenses from Monika Overseas to Deep Sea Exports, an Indian company. Deep Sea Exports allegedly used the licenses to import gold.[34] The Indian government also presented three affidavits. The first affidavit was by a bank officer who verified Kapoor's signature on a bank-issued certificate of export and realization.[35] The Indian government also presented two other affidavits. In the second, a foreign-trade development officer stated that he prepared six Monika Overseas Replenishment Licenses and sent them to Kapoor's residential address.[36] In the final affidavit, an employee of the Directorate General of Foreign Trade stated that he processed fourteen of the sixteen Replenishment Licenses.[37]

The court addressed the crimes individually, ultimately holding that the government provided sufficient evidence for a finding of probable cause for all the charges.[38] In regard to the charge of "cheating and dishonestly inducing delivery of property," the court found that there was enough evidence that Kapoor cheated the Indian government by using forged documents to induce foreign trade authorities to issue and deliver replenishment licenses.[39] Furthermore, there was sufficient documentary evidence of the "forgery" charges, encompassing "forgery of a valuable security, forgery for the purpose of cheating, and using as genuine a forged document."[40] The "conspiracy" charge, requiring that two or more persons agree to do, or cause to be done, an illegal act, also met the probable cause threshold, because Kapoor's alleged statement to the government described several actions that she took at the request of one or both of her brothers, including establishing Monika Overseas.[41] Kapoor raised several questions regarding the reliability of the government's evidence due to a lack of direct evidence that she signed any of the forged documents.[42] However, the court stated that the concerns about the government's case did not overcome the government's showing of probable cause or defeat India's extradition request.[43]

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32. Approximately US $200–250.

33. *Id.* at *15.

34. *Id.*

35. *Id.* (Exporters must submit a BCR to the Indian government to obtain a replenishment license. BCRs are issued by a bank at the request of an exporter.)

36. *Id.* at *16.

37. *Id.*

38. *Id.* at *23.

39. *Id.* at *19–20.

40. In re Extradition of Kapoor, 2012 U.S. Dist. LEXIS 54026, at *20 (E.D.N.Y. Apr. 17, 2012).

41. *Id.* at *23.

42. *Id.*

43. *Id.* at *24.

VI. Conclusion

The U.S. District Court for the Eastern District of New York granted the request for a certificate of extraditability of Monika Kapoor on the basis of the sufficiency of evidence put forth by the Indian government, satisfying the threshold needed to support her extradition.[44] Kapoor was unable to introduce her evidence, which was best suited for trial, and was unable to overcome the government's showing of probable cause or defeat India's extradition request.[45] The certificate of extraditability was then issued to the secretary of state, who maintains the final authority and discretion to extradite Kapoor.[46]

Michael J. Molina

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44. *Id.* at *23.
45. *Id.* at *24.
46. *Id.* at *4.

Velez v. Sanchez

693 F.3d 308 (2d Cir. 2012)

The Second Circuit affirmed the district court's conversion to and later dismissal of the plaintiff-appellant's claim under the Trafficking Victims Protection Reauthorization Act but remanded her Fair Labor Standards Act claim.

I. Holding

In *Velez v. Sanchez*,[1] the U.S. Court of Appeals for the Second Circuit affirmed the district court's conversion from an Alien Tort Statute (ATS)[2] claim into a claim for a civil remedy under the Trafficking Victims Protection Reauthorization Act (TVPRA).[3] While the district court decided that the ATS does not provide jurisdiction over claims of this type, the Second Circuit instead decided that the plaintiff-appellant did not demonstrate a violation of the law of nations.[4] The appellate court also held that the district court should not have considered Velez's claims under the TVPRA, because it could not be applied retroactively to her claim.[5] Furthermore, the court affirmed the dismissal of the appellant's breach of contract claim, which was barred by the New York Statute of Frauds, because the alleged contract to pay college tuition could not be fully performed within one year.[6]

The court, however, held that the appellees were not entitled to summary judgment on the Fair Labor Standards Act (FLSA)[7] claim, because genuine issues of material fact remained as to whether Velez was an employee.[8] Factual issues existed regarding the economic reality of the relationship between Velez and Sanchez[9] and the degree of control the defendants had over Velez.[10] The Second Circuit also remanded, instructing the district court to reconsider supplemental jurisdiction[11] over the plaintiff's state law claims.[12]

II. Facts and Procedural History

In 2001, the plaintiff-appellant Linda Velez (Velez) allegedly moved from Ecuador to the United States at the age of 16 to help care for the daughter of her stepsister, the defendant-

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1. 693 F.3d 308 (2d Cir. 2012).
2. 28 U.S.C. § 1350.
3. *Velez*, 693 F.3d at 323–24. The TVPRA is codified at 18 U.S.C. § 1595.
4. *Id.* at 324.
5. *Id.*
6. *Id.* at 332. *See* N.Y. Gen. Oblig. Law § 5-701(a)(1).
7. 29 U.S.C. §§ 201 *et seq*. In particular, § 206(f) extends minimum-wage protection to domestic workers.
8. *Velez*, 693 F.3d at 331.
9. *Id.*; *see also* Zheng v. Liberty Apparel Co., 355 F.3d 61, 66 (2d Cir. 2003) (stating that the nature of a relationship depends on its economic realities).
10. 693 F.3d 308, 332 (2d Cir. 2012).
11. *See* 28 U.S.C. § 1367(c).
12. *Velez*, 693 F.3d at 332.

appellee Betsy Sanchez (Sanchez).[13] Sanchez lived in New York with her sister, Shari Muñoz, and her mother, Yolanda Muñoz.[14] Velez was to babysit Sanchez's daughter and, in exchange, Sanchez allegedly promised to pay Velez $80 a week, enroll her in high school and, eventually, pay for her college tuition.[15] While living at the Sanchez home, Velez allegedly also provided household services, including cleaning, doing laundry, and vacuuming.[16] Velez, however, allegedly worked 11 to 12 hours a day, thus hindering her ability to attend high school on a regular basis.[17] Velez admitted that Sanchez paid for her membership at the local YMCA and for her English classes.[18] Sanchez also took Velez to movies and performances, and allowed her to attend holiday celebrations in the Sanchez home.[19] Velez attended a General Educational Development (GED) program, opened her own bank account, and even held a part-time job.[20]

Allegedly, Velez repeatedly requested compensation from Sanchez, who failed to pay Velez her weekly wages.[21] A few months before Velez left the Sanchez household, Sanchez allegedly signed a document promising to pay Velez her promised salary and allowing her to do what she wished once she returned home from work, although Velez was unable to provide a copy of the document.[22] Their relationship began to break down and ultimately resulted in a confrontation.[23] On November 8, 2003, Velez was visiting a friend when Shari Muñoz grabbed her arm and threw her into a car.[24] After Velez refused to obey Sanchez's instructions, Sanchez grabbed her arm and told her that she would not be allowed to leave her room without permission.[25] Velez eventually left the Sanchez household on November 11, 2003.[26] She obtained a T-visa, allowing her to remain in New York legally.[27] She also sought psychiatric help for depression and post-traumatic stress disorder.[28]

In November 2004, Velez brought this action against Sanchez, Shari Muñoz, and Yolanda Muñoz, alleging claims under the ATS,[29] the FLSA,[30] New York's wage laws, and New York

13. *Id.* at 314.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Velez*, 693 F.3d at 314.
18. *Id.* at 314–15.
19. *Id.* at 314.
20. 693 F.3d 308, 314 (2d Cir. 2012).
21. *Id.* at 315.
22. *Id.* at 315, 315 n.1.
23. *Velez*, 693 F.3d at 315.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* T-1 designates a non-immigrant visa for victims of human trafficking. *See* Visas for Victims of Human Trafficking, http://travel.state.gov/visa/temp/types/types_5186.html#status (last visited Nov. 11, 2012).
28. *Velez*, 693 F.3d at 315 (stating that Velez claimed she resided at the Sanchez household for so long because she loved the children, considered Sanchez a sister, and wanted to remain in the United States).
29. 28 U.S.C. § 1350.
30. 29 U.S.C. §§ 201–219.

common law for intentional infliction of emotional distress, negligent infliction of emotional distress, fraudulent inducement, unjust enrichment, assault and battery.[31] The district court granted the defendants' rule 12(b)(6) motion to dismiss, *inter alia*, Velez's breach of contract claim under state law and converted the motion into a summary judgment motion.[32] After discovery, the district court found, sua sponte, that it lacked subject matter jurisdiction over the ATS claim and converted it into a claim for a civil remedy under the TVPRA.[33] The district court granted summary judgment to the defendants on both the TVPRA and FLSA claims and declined to exercise supplemental jurisdiction over the state law claims.[34] The plaintiff appeals the district court's grant of summary judgment and the prior motion to dismiss, *inter alia,* plaintiff's breach of contract claim.[35]

III. Discussion

A. Standard of Review

In light of the procedural posture prior to appeal, the Second Circuit determined that each of Velez's claims warranted a different standard of review.[36] The dismissal of Velez's breach of contract claim was reviewed de novo, requiring the court to "accept[] all factual allegations in the complaint as true, and [to draw] all reasonable inferences in the plaintiff's favor."[37] The district court's grant of summary judgment was also reviewed de novo, but the court applied the same standard applied by the district court.[38] Lastly, the issue of subject-matter jurisdiction was also reviewed de novo,[39] except the Second Circuit, sua sponte, could choose to evaluate whether there was a factual basis to support subject matter jurisdiction.[40]

B. Jurisdiction Under the ATS

The ATS was enacted in 1789 and established federal jurisdiction over claims brought by aliens for a limited number of "violations of the law of nations or [ ] treat[ies] of the United States."[41] At that time, a violation of the law of nations was limited to acts of piracy, violations of safe conduct, and offenses against ambassadors; such violations have since been expanded,

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31. *Velez*, 754 F. Supp. 2d 488, 500 n.9 (E.D.N.Y. 2010) (Block, J.).
32. *Velez*, 693 F.3d at 313.
33. *Id.*
34. *Id.* (citing *Velez*, 754 F. Supp. 2d at 495–500).
35. *Id.*
36. *Id.*
37. *Velez*, 693 F.3d at 313 (citing City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 173 (2d Cir. 2011) (internal quotation marks omitted)).
38. *Id.* at 313–14 (citing Kaytor v. Electric Boat Corp., 609 F.3d 537, 546 (2d Cir. 2010)). Summary judgment is granted only when a genuine issue of material fact exists and when the undisputed facts warrant an entry of judgment as a matter or law. *Id.*
39. *Id.* at 314 (citing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011)).
40. 693 F.3d 308, 314 (2d Cir. 2012).
41. *Id.* at 316.

but still must constitute a violation of the law of nations.[42] In this case, although the Second Circuit affirmed the dismissal of Velez's ATS claim, it did so for failure to establish a genuine issue of material fact that the defendants violated the law of nations rather than for lack of jurisdiction under the ATS.[43]

In reaching its decision, the court relied heavily on two prior cases: *Filartiga v. Pena-Irala*[44] and *Sosa v. Alvarez-Machain*.[45] In *Filartiga*, the Second Circuit held that torture constitutes a violation of the law of nations and, more generally, that the ATS does not create new rights for aliens but creates only a cause of action for already existing rights.[46] In *Sosa*, the Supreme Court stated that a federal court must first determine whether the defendant violated a universally accepted norm under international law before addressing the claim.[47] Here, the court emphasized that its holding in *Sosa*, demanding a more thorough review of the merits to determine whether a plaintiff has set forth a violation of the law of nations, is consistent with the Second Circuit's precedent.[48]

Moreover, a complaint must adequately establish a violation of the law of nations for a federal court to exercise its subject-matter jurisdiction.[49] To determine whether conduct violates the law of nations, the court must first determine whether such a violation is a "universally recognized norm of international law."[50] A plaintiff must prove a violation that is (1) "[a] norm of international character that nations abide by," (2) "defined with a specificity" like the historical paradigms, and (3) "[be] of mutual concern to nations."[51] The Second Circuit then analyzed whether Velez's forced labor and human trafficking claims constituted a violation of the law of nations.[52]

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42. *Id.* at 317 (quoting 28 U.S.C. § 1350); *see also id.* at 316 n. 2 (indicating that appellate review has been sparse, and only one Supreme Court decision on the matter exists).

43. *Velez*, 693 F.3d at 316 (emphasizing that the court can affirm on any grounds appearing within the record).

44. 630 F.2d 876 (2d Cir. 1980).

45. 542 U.S. 692 (2004).

46. *Velez*, 693 F.3d at 316 (citing *Filartiga*, 630 F.2d at 878, 887).

47. *Id.* at 317 (internal quotation marks omitted) (citing *Sosa*, 542 U.S. at 732, which explains that historical paradigms included such crimes as piracy, violations of safe conduct, and offenses against ambassadors).

48. *Id.* at 317.

49. *Id.* (citing Kadic v. Karadzic, 630 F.2d 232, 238 (2d Cir. 1995)). In Kadic v. Karadzic, the Second Circuit indicated that under the Alien Tort Act, a "district court has subject-matter jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nation or a treaty of the United States." Doreen Cronin, Recent Decision, *Kadic v. Karadzic*, 10 N.Y. INT'L L. REV. 215, 215 (1997). Nevertheless, the Second Circuit acknowledges that this claim is in juxtaposition to what the Ninth Circuit has stated in Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) that "an arguable violation of the law" is all that must be provided within the complaint.

50. *Id.* at 316 (citing *Filartiga*, 630 F.2d at 888 (internal quotation marks omitted)).

51. *Id.* at 319 (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174 (2d Cir. 2009) (internal quotation marks omitted)).

52. *Velez*, 693 F.3d at 319–24.

C. Slavery, Forced Labor, and Involuntary Servitude

Although this court recognized that threats of slavery, forced labor, and involuntary servitude[53] are universally accepted violations of the law of nations, the court held that Velez had not established a valid claim.[54] The International Labour Organization's Convention No. 29 defines forced labor as "work or service[,] which is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily."[55] The International Labour Organization specifically noted that poor working conditions and low wages were not covered by this provision.[56] U.S. courts have adopted a similar approach, requiring that an ATS claim grounded on a forced labor violation alleges more than substandard working conditions and inadequate wages.[57]

Having considered all inferences in Velez's favor, the court could not recognize a forced labor violation.[58] Velez provided no evidence of actual physical abuse, confinement, or fear of violence. Furthermore, even assuming that Sanchez exerted physical force in grabbing Velez's arm, the force was not severe.[59] Velez was not deprived of food or basic living conditions, nor was she constrained in any way. These factors were insufficient to establish a menace of penalty to maintain a forced-labor violation.[60] Finally, disparaging statements made toward Velez were insufficient to constitute the psychological compulsion needed, alternatively, to constitute forced labor.[61]

D. Human Trafficking

The Second Circuit also affirmed the district court's dismissal of Velez's ATS claim, because she failed to establish that her move from Ecuador to the United States constituted

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53. Today, slavery encompasses modern variants, such as forced labor and involuntary servitude. *Id.* at 319. One hundred seventy-six countries, excluding the United States, have ratified a provision defining forced labor as a distinct international violation. Since the claim fails to demonstrate any violation of the law of nations, the Second Circuit did not evaluate whether the International Labor Organization's Convention No. 29 constitutes part of the law of nations. *Id.* at 320, n.9 (citing Int'l Labour Org. Convention No. 29 Concerning Forced or Compulsory Labour, art. 2, June 28, 1930, 39 U.N.T.S. 55).

54. *Id.* at 323.

55. 693 F.3d 308, 320 (2d Cir. 2012).

56. *Id.* at 321.

57. *Id.*; *see also* John Roe I v. Bridgestone, 492 F. Supp. 2d 988, 1012 (S.D. Ind. 2012) (dismissing a forced-labor claim where the plaintiffs did not allege any universally accepted prohibition against forced labor). Usually, ATS claims grounded in forced labor violations are allowed to proceed where egregious violations of human dignity are involved. *See* Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (emphasizing that the plaintiffs were held in captivity, severely injured, and risked death and imprisonment by escaping); *see also* Manliguez v. Joseph, 226 F. Supp. 2d 377 (E.D.N.Y. 2002) (describing how the plaintiff was locked in the apartment, prohibited from interacting with friends, and given one meal per day while providing domestic labor).

58. *Velez*, 693 F.3d at 321.

59. *Id.* at 322.

60. *Id.*

61. Although the Court sympathized with Velez, the harm that was allegedly inflicted on her was not the type contemplated by the international community. *Id.*

human trafficking.[62] Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, requires trafficking to be treated as a crime in domestic legislation.[63] Velez's conduct, however, failed to satisfy even the modicum of exploitation established in Article 5, which includes sexual exploitation, slavery, forced labor, servitude, or the removal of organs.[64]

E. Claims Under the Trafficking Victims Protection Act

The Second Circuit affirmed the district court's conversion of the ATS claim into a claim for a remedy under the TVPRA.[65] The TVPRA was enacted in 2000 and the amendment creating a civil cause of action under the TVPRA was added in December 2003.[66] The December 2003 amendment eliminated the mention of specific crimes and, therefore, expanded it to include such crimes as forced labor.[67] Without addressing the issue of whether the TVPRA preempted the ATS's jurisdiction over these types of claims, the Second Circuit affirmed the dismissal of the ATS claim for failure to demonstrate that a violation of the law of nations existed.[68] The Second Circuit noted that the TVPRA cannot be applied retroactively.[69] In this case, Velez left Sanchez's home in November 2003, and the TVPRA was amended to include forced labor only in December 2003.

In dismissing the plaintiff's TVPRA claim, the court employed the two-part *Landgraf v. USI Film Products*[70] test to determine whether retroactivity was warranted.[71] The *Landgraf* test requires (1) that the court "determine whether Congress has expressly prescribed the statute's proper reach," and (2) "whether [the statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[72] The Second Circuit quickly discounted the first prong, because there is no express language within the TVPRA or any legislative history indicating Congress's desire for it to apply retroactively.[73] The TVPRA increased the defendant's liability for previ-

62. *Id.* at 324.

63. Article 5, commonly known as one of the Palermo Protocols, is the most recent effort to combat human trafficking. More than 100 countries, including the United States, have adopted it. G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001). Moreover, the Palermo Protocols were enacted on December 25, 2003, while the United States became a signatory on November 3, 2005. *See id.*

64. *Velez*, 693 F.3d at 324 (citing Article 3 of the Palermo Protocol).

65. 693 F.3d 308, 324 (2d Cir. 2012).

66. *Id.* The amendment was amended again in December 2008. *Id.*

67. *Id.*

68. *Id.* The Second Circuit, however, noted that nowhere within the "plain language or the legislative history of the TVPRA [does it] reference the ATS." *Id.* (citing Hui v. Castaneda, 130 S. Ct. 1845, 1953 (2010) (stating that the court refrains from changing the application of a law by mere implication without a clear and manifest intention from the legislature)).

69. *Id.*

70. 511 U.S. 244 (1994).

71. *Velez*, 693 F.3d at 325.

72. *Id.* (citing *Landgraf*, 511 U.S. at 280 (1994), where the Court held that amendments providing a new cause of action under the Civil Rights Act of 1964 cannot be applied retroactively).

73. *Id.*

ously occurring conduct, however, so the second prong was satisfied, and, therefore, the TVPRA could not be applied retroactively.[74]

F. Minimum Wage Under the FLSA

The Second Circuit reversed and remanded the plaintiff's FLSA claim, finding genuine issues of material fact as to whether Velez was an employee.[75] The FLSA is construed "liberally to apply to the furthest reaches consistent with congressional direction."[76] In 1974, it was amended to provide minimum wage protection to domestic service employees.[77] In determining whether the relationship between Velez and Sanchez constitutes an employee-employer relationship, however, the court focused on its economic reality.[78]

The court held that the factors assessed by the district court failed to evaluate adequately the totality of the circumstances faced by a domestic worker.[79] Instead, the court set out seven factors that may provide guidance when evaluating a minimum-wage claim under the FLSA's domestic-worker provision.[80] They are: (1) the employer's ability to hire and fire the employee; (2) the method used to recruit the employee; (3) the employer's ability to control the terms and conditions of employment; (4) "the presence of employment records"; (5) "the expectations or promises of compensation"; (6) the flow of benefits from the relationship; and (7) the relationship between the parties aside from the domestic labor.[81]

Applying these factors in a light most favorable to the appellant, the court found genuine issues of material fact as to the economic reality of Velez's status.[82] Velez introduced sufficient evidence demonstrating that Sanchez promised her a weekly salary if she would leave Ecuador to care for Sanchez's daughter.[83] Furthermore, Sanchez allegedly claimed to "own" Velez and

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74. *Id.* (relying on the fact that the Ninth Circuit in *Ditullio v. Boehm*, 662 F.3d 1092 (9th Cir. 2011), held similarly despite the possibility that a criminal cause of action may have existed prior to the enactment of the TVPRA amendment).

75. *Id*. at 325.

76. *Velez*, 693 F.3d at 325 (citing Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985)) (stating that "the FLSA was intended to protect workers from substandard conditions and the fair minded employer from unfair competition" (internal quotation marks omitted)).

77. *Id.* at 326. The court also noted that Velez performed many tasks that would designate her as a domestic worker, but that the central issue on appeal is whether she was an employee. *Id.*

78. *Id*. (citing *Zheng,* 355 F.3d at 66, which explains that the Second Circuit has historically applied two different tests to determine the economic realities in a given situation).

79. *Id.* at 329. Although the district court relied on the factors established in Carter v. Duchess Community College, 735 F.2d 8 (2d Cir. 1984), the appellate court held those factors underinclusive in distinguishing between independent contractors and employees. *Id.* For this purpose, the court preferred the factors identified in Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988). *Id.* at 327. However, the court found even the *Brock* principles "less useful" in the instant case, because the main issue in this case is not whether Velez relied on Sanchez for employment, but whether she was an employee. *Id.*

80. 693 F.3d 308, 330 (2d Cir. 2012).

81. *Id.*

82. *Velez*, 693 F.3d at 331.

83. *Id.*

repeatedly threatened to send her back to Ecuador.[84] Factual issues also still existed as to the alleged document that Velez had Sanchez sign.[85]

G. Breach of Contract

Relying on the New York Statute of Frauds, the Second Circuit affirmed the district court's dismissal of the plaintiff's breach of contract claim, because an oral contract is void if its terms do not possibly permit full completion within one year.[86] Although at-will employment contracts survive the one-year requirement, because they can be terminated at any time,[87] an at-will contract with fixed compensation survives the statute of frauds only if the fixed compensation "has become fixed and earned within one year."[88]

The court distinguished Velez's claim from the claim alleged in *Cron v. Hargro Fabrics, Inc.*, noting that Sanchez's promise to pay Velez's college tuition is not equivalent to an annual bonus.[89] Rather, Velez's college tuition was part of the "bargained-for-exchange," and given that Sanchez's obligation to pay tuition was not fixed within a year, the contract was void.[90]

H. Supplemental Jurisdiction Over the Remaining State Law Claims

Finally the Second Circuit considered the appellant's various New York wage and common law claims. The district court had refused to exercise its discretionary jurisdiction[91] over these claims based on 28 U.S.C. § 1367, which allows for a court to decline its exercise of supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction.[92] The Second Circuit vacated the district court's dismissal of the state law claims and remanded them for reconsideration of the court's supplemental jurisdiction over those claims.[93] Because the court remanded Velez's FLSA claim, the district court would now have original jurisdiction and was instructed to reconsider supplemental jurisdiction over Velez's state law claims.[94]

IV. Conclusion

The Second Circuit affirmed the district court's adjustment of the plaintiff's ATS claim into a TVPRA claim and its subsequent dismissal of that claim. The Court did not rule on

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84. *Id.*

85. *Id.*

86. *Id.*; N.Y. GEN. OBLIG. LAW § 5-701(a)(1) (McKinney's 2002).

87. *Id.* at 331–32.

88. *Velez*, 693 F.3d at 331–32 (citing Cron v. Hargro Fabrics, Inc., 91 N.E.2d 56, 60 (N.Y. 1998)).

89. *Id.* at 332.

90. 693 F.3d 308, 332 (2d Cir. 2012).

91. Adams v. Suozzi, 517 F.3d 124, 129 (2d Cir. 2008) (stating that "[o]n remand, we leave it to the District Court to decide whether to invoke its discretion to exercise supplemental jurisdiction over plaintiff's state law claims").

92. *See Velez*, 754 F. Supp. 2d at 500.

93. *Velez*, 693 F.3d at 332.

94. *Id.* The district court had refused to exercise supplemental jurisdiction over Velez's state law claims, the defendant's counterclaims, and Sanchez's third-party claims. *Velez*, 754 F. Supp. 2d at 500.

whether human trafficking or forced labor are violations of the law of nations because the plaintiff failed to present genuine issues of material fact. In so doing, the Second Circuit also implied that the TVPRA does not preempt the ATS claim since nowhere within the plain language or legislative history of the TVPRA is the ATS referenced.[95]

Moreover, the Second Circuit vacated the district court's holding regarding the FLSA claim, remanding because it found genuine issues of material fact as to whether Velez was an employee of the Sanchez household. The court established seven factors that may be used in evaluating her minimum-wage claim under the FLSA's domestic-worker provision expanding the prior tests used to evaluate economic realities. The Second Circuit also affirmed the dismissal of Velez's breach-of-contract claim, because the contract could not have been performed within one year and, therefore, was void. Last, the court also remanded the state-law claims, instructing the district court to reconsider its supplemental jurisdiction.

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95. *Velez*, 693 F.3d at 324.

ESAB Group, Inc. v. Zurich Insurance PLC

685 F.3d 376 (4th Cir. 2012)

The U.S. Court of Appeals for the Fourth Circuit held that the McCarran-Ferguson Act's reverse preemption rule did not apply to a South Carolina law invalidating arbitration agreements.

I. Holding

In *ESAB Group, Inc. v. Zurich Insurance PLC*,[1] the Fourth Circuit affirmed that chapter 2 of the Federal Arbitration Act (Convention Act)[2] is not subject to reverse preemption by a South Carolina statute invalidating arbitration agreements in insurance policies in a case for product liability damages between a foreign-owned South Carolina–based welding manufacturer and its Swedish insurer.[3] The Fourth Circuit further held that the district court had personal jurisdiction over the Swedish insurer[4] and thus had authority to decline to exercise jurisdiction over the Swedish insurer's nonarbitrable claims and to remand those claims to state court.[5]

II. Facts and Procedural History

The plaintiff-appellee, ESAB Group, is a South Carolina–based manufacturer of welding materials and equipment.[6] From 1989 to 1994, ESAB Group was a subsidiary of ESAB AB, a Swedish company.[7] Between 1989 and 1996, a Swedish insurer, Trygg-Hansa, issued seven global liability policies to ESAB Group's parent company, ESAB AB (Policies).[8] The Policies provided worldwide insurance coverage to ESAB AB and its subsidiaries.[9] Five of the seven liability Policies (1989–1993 Policies) include arbitration agreements, which call for the resolution of disputes in Swedish arbitral tribunals.[10] The other Policies (1994–1995 Policies) omit arbitration clauses.[11] In 1998, Trygg-Hansa transferred its obligation to provide coverage under the Policies to Zurich Insurance Company.[12] Zurich Insurance Company then transferred those obligations to Zurich Insurance PLC (ZIP), an Irish insurer, in 2005.[13] ESAB Group became involved in multiple product liability suits concerning personal injuries resulting from

1. 685 F.3d 376 (4th Cir. 2012).
2. 9 U.S.C. §§ 201 ff.
3. *ESAB Grp.*, 685 F.3d at 390.
4. *Id.* at 393.
5. *Id.* at 393–96.
6. *Id.* at 383.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

exposure to its welding consumables.[14] ESAB Group asked its insurers to defend and indemnify ESAB Group in the product liability actions, but several insurers, including ZIP, refused coverage.[15] ESAB Group then brought this action against its insurers in South Carolina state court.[16]

The defendant insurers removed the case to the U.S. District Court for the District of South Carolina pursuant to the Convention on the Recognition and Enforcement on Foreign Arbitral Awards (New York Convention)[17] and the Convention Act.[18] ESAB Group argued that (1) the district court did not have subject-matter jurisdiction; (2) the New York Convention is judicially enforceable only as incorporated in the Convention Act; (3) the McCarran-Ferguson Act[19] allows state law to reverse preempt the Convention Act (reverse preemption rule), and, thus, South Carolina state law invalidates the arbitration clauses in the 1989–1993 Policies; and (4) because of the reverse preemption rule, the Policies did not contain valid arbitration agreements, did not fall under the New York Convention, and they were non-removable.[20]

ZIP contended that the district court did not have personal jurisdiction over it, because it had no offices or property in South Carolina, was not licensed there, and did not regularly conduct business there.[21] Additionally, the contracts concerning insurance coverage were executed in Sweden, thus ZIP was not subject to personal jurisdiction in South Carolina.[22]

The district court rejected both parties' arguments.[23] On the issue of subject-matter jurisdiction, the court held that the McCarran-Ferguson Act did not authorize a state to reverse preempt the New York Convention and therefore the court had subject-matter jurisdiction.[24] On the issue of personal jurisdiction, the district court held that ZIP met the minimum contacts requirement, permitting the exercise of personal jurisdiction in South Carolina.[25] As a result,

14. *ESAB Grp.*, 685 F.3d at 383.

15. *Id.* ESAB AB's insurers included ZIP, Liberty Mutual Insurance Company, Trygg-Hansa Forsakrings AB, Zurich Insurance Company, and Arrowood Indemnity Company. *Id.*

16. *Id.*

17. *Id. See* Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958, entered into force on June 7, 1959, entered into force for the United States on Dec. 29, 1970, 21 U.S.T. 2517 (the New York Convention) (confirming that as a signatory of the New York Convention, the United States must (1) recognize and enforce written agreements to submit disputes to foreign arbitration and (2) enforce arbitral awards issued in foreign nations); *see also* 9 U.S.C. § 205 (stating that a defendant may remove any action or proceeding that falls under the New York Convention to federal district court).

18. *See* 9 U.S.C. § 201 (affirming that Congress enacted the Convention Act, under which foreign arbitration agreements that arise out of commercial relationships fall under the New York Convention).

19. 15 U.S.C. §§ 1011–1015.

20. *ESAB Grp.*, 685 F.3d at 383–84.

21. *Id.* at 384.

22. *Id*.

23. *Id.*

24. *Id. See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 718 (5th Cir. 2009) (holding that the McCarran-Ferguson Act reverse-preemption rule applies only to federal statutes and not to treaties).

25. *ESAB Grp.*, 685 F.3d at 384.

the district court enforced the arbitration agreements by referring the 1989–1993 Policies to arbitration and declined to exercise supplemental jurisdiction over the remaining Policies.[26]

ESAB Group appealed the district court's exercise of subject-matter jurisdiction. ZIP cross-appealed, contesting the district court's exercise of personal jurisdiction and its authority to remand the remaining nonarbitrable claims to state court.[27]

Upon de novo review, the Fourth Circuit considered whether the federal courts have jurisdiction over the present action and whether South Carolina state law reverse preempts federal law.[28]

III. Discussion

A. The McCarran-Ferguson Reverse Preemption Rule Does Not Apply

In 1944, the Supreme Court held that insurance was subject to federal regulation under the interstate commerce clause.[29] One year later, in 1945, Congress enacted the McCarran-Ferguson Act in order to restore the states' power over insurance regulation.[30] The Circuit Courts, namely the Second and Fifth Circuits, disagree on whether a state law may preempt the Convention Act pursuant to the McCarran-Ferguson Act.[31]

In this case, the Fourth Circuit rejected ZIP's argument that the South Carolina statute is not subject to the McCarran-Ferguson Act because it was not a law purposefully enacted to regulate insurance.[32] The Fourth Circuit followed the Supreme Court's instruction that the category of laws concerning insurance is "broad" and includes "laws that possess the end, intention, or aim of adjusting, managing or controlling the business of insurance."[33] Next, the court dismissed ZIP's stance that article II of the New York Convention is a self-executing treaty that does not require domestic legislation to have legal effect in domestic courts.[34] The court held

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26. *Id.*

27. *Id.*

28. *Id*.

29. United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 552–53 (1944).

30. *Id.* The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), states in part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

31. *Id.* at 385. *Compare* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir.1995) (holding that state laws preventing the arbitration of disputes with a delinquent insurer reverse preempt the Convention Act); *with Safety Nat'l*, 587 F.3d at 718, 732 (holding that Congress did not intend to include a treaty (the New York Convention) within the scope of "an Act of Congress" when it used those words in the McCarran-Ferguson Act; thus, the act could not reverse preempt the New York Convention).

32. *ESAB Grp.*, 685 F.3d at 386.

33. *Id*.

34. *Id.* at 387.

that even if article II of the New York Convention is non-self-executing, the Convention Act, as implementation of a treaty, does not fall within the scope of the McCarran-Ferguson Act.[35] Using a plain meaning interpretation of the McCarran-Ferguson Act's language, the court reasoned that it was not Congress's intention to allow a state to "regulate activities carried on beyond its own borders."[36] Rather, Congress intended the McCarran-Ferguson Act to address only domestic commerce litigation.[37] Because the Convention Act is legislation implementing a treaty, it falls outside the scope of domestic commerce litigation; therefore, it is not subject to the reverse preemption rule under the McCarran-Ferguson Act.[38]

B. Defendant/Cross-Appellants Fulfill the Specific Jurisdiction Test

ZIP argued that the district court lacked personal jurisdiction over it because it did not maintain property, an office, employees, or agents in South Carolina.[39] Upon de novo review, the Fourth Circuit applied a three-part specific jurisdiction test to evaluate whether the exercise of personal jurisdiction in this action complied with due process.[40] The test addresses the following: (1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the state; (2) whether the plaintiff's claim arises out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.[41] The court concluded that ZIP fulfilled each prong of the three-part test, subjecting ZIP to personal jurisdiction in South Carolina.[42] First, ZIP earned higher premiums by agreeing to cover ESAB Group in the United States, thereby gaining a financial benefit from South Carolina, and purposefully availing itself of the privilege of conducting activities in South Carolina. The second prong is fulfilled because this action arises out of the contacts made by its activities in South Carolina.[43] Finally, under the third prong, the burden on ZIP of litigating in South Carolina was not constitutionally unreasonable, because ZIP had agreed to defend ESAB Group worldwide.[44]

C. The District Court Properly Remanded Nonarbitrable Claims

The Fourth Circuit affirmed the district court's authority to decline to exercise jurisdiction over the remaining nonarbitrable claims and to remand those claims to state court.[45] ZIP con-

35. *Id.* at 338.

36. *Id*. at 389 (holding that the McCarran-Ferguson Act was not intended to allow a state to regulate foreign activities). *See also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 428 (2003).

37. *See Garamendi*, 539 U.S. at 428.

38. *ESAB Grp.*, 685 F.3d at 391.

39. *Id.*

40. *Id.*

41. *Id.* at 391–92. *See* ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 712 (4th Cir. 2002) (demonstrating that the court uses a three-part test to determine whether specific jurisdiction exists). *See also* Consulting Eng'rs Corp. v. Geometric Ltd., 561 F.3d 273, 278 (4th Cir. 2009) (confirming that the court has created a three-part test to assess specific jurisdiction).

42. *ESAB Grp.*, 685 F.3d at 392.

43. *Id.*

44. *Id.* at 393.

45. *Id.*

tended that the district court had original jurisdiction over all the claims involved in this action, and that the court erred when it remanded only the nonarbitrable claims to state court.[46] However, the Fourth Circuit maintained that the district court had the authority to remand certain claims under 28 U.S.C. § 1367(c)(3), which states: "[T]he district courts may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction."[47] Here, the claims falling within the court's original jurisdiction were considered dismissed because they were referred to arbitration.[48] Further, the court confirmed that 9 U.S.C. § 203, part of the Convention Act, grants federal district courts "original jurisdiction over such an action or proceeding."[49] In this case, the remaining claims not subject to arbitration did not fall under the New York Convention, and the district court had the option to exercise supplemental jurisdiction over them or to remand them to state court.[50] Last, despite ZIP's argument that the district court was obligated by 9 U.S.C. § 3 to stay the remaining claims pending arbitration, the Fourth Circuit affirmed that the district court was not obligated to exercise supplemental jurisdiction over nonarbitrable claims[51] because the decision to stay under 9 U.S.C. § 3 is discretionary.[52]

In his concurring opinion, Judge Wilkinson emphasized the McCarran-Ferguson Act's inability to supersede the New York Convention.[53] He noted that allowing the McCarran-Ferguson Act to rule would ignore both the express statement of the New York Convention instructing states to recognize written arbitration agreements and the implementation of the Convention Act in the United States.[54] He further noted that giving priority to the McCarran-Ferguson Act over the federal statute implementing the New York Convention would cause the court to interpret the phrase "Act of Congress" to include a treaty and thereby diminish the nature of a treaty.[55] Moreover, giving priority to the McCarran-Ferguson Act would contradict the court's decision in *American Insurance Ass'n v. Garamendi*, where the court stressed that the McCarran-Ferguson Act was not intended to regulate commerce that extended "beyond its borders."[56] Judge Wilkinson reiterated Congress's intent when it adopted the Federal Arbitration Act to establish a "liberal federal policy favoring arbitration agreements."[57] Last, from a diplomatic standpoint, Judge Wilkinson encouraged the court to help the nation "speak with one voice in a matter of international commercial trade," rather than causing other nations to

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46. *Id.*
47. *Id.* at 394. *See also* 28 U.S.C. § 1367(c)(3).
48. *ESAB Grp.*, 685 F.3d at 394.
49. *Id.* at 393.
50. *Id.* at 394.
51. *Id. See also* Am. Recovery Corp. v. Computerized Thermal Imaging Inc., 96 F.3d 88, 97 (4th Cir. 1996) (holding that the decision to stay the litigation of nonarbitrable claims or issues is a matter within the district court's discretion).
52. *ESAB Grp.*, 685 F.3d at 394.
53. *Id.* at 395.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

doubt the United States' commitment to international arbitration agreements or provoke retaliation against American insurers and other American companies involved in foreign commercial transactions.[58]

IV. Conclusion

The Fourth Circuit held that the McCarran-Ferguson Act was not intended to regulate commerce between the United States and foreign states.[59] With this decision, the Fourth Circuit underscored the Convention Act as legislation implementing a treaty, which demands that the United States recognize and enforce written agreements that require arbitration abroad.[60]

In addition to upholding the Convention Act, the Fourth Circuit could likely have upheld the arbitration clause under the Inter-American Convention on International Commercial Arbitration (Panama Convention).[61] Article 5 of the Panama Convention specifies grounds for refusing to recognize or enforce an arbitral award, including (1) incapacity of other parties under the applicable law; (2) failure to notify the party against whom the arbitral decision has been made of the appointment of the arbitrator or the arbitration procedure to be followed; (3) the decision concerns a dispute not envisioned in the agreement between the parties to submit to arbitration, (4) failure to carry out the constitution of the arbitral tribunal or the arbitration procedure in accordance of the terms of the agreement signed by the parties; and (5) the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State.[62]

In this case, the parties subject to the arbitration agreement, namely ESAB Group and its insurers, were aware that the 1989–1993 Policies were subject to arbitration in Swedish tribunals.[63] Moreover, the existence of a written arbitration agreement was not in dispute; the only issue was whether the United States allowed state law to ignore the agreement. Given the relevance of article 5 in this case, the arbitration clause would likely have been upheld under the Panama Convention as well.

Quinn Rowan

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58. *Id.* at 395–96.

59. *Id*. at 389.

60. *Id.* at 381.

61. Organization of American States, Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245 (Panama Convention). The Panama Convention entered into force in the United States on October 27, 1990, and is implemented by chapter 3 of the Federal Arbitration Act (FAA). *See* Am. Life Ins. Co. v. Parra, 269 F. Supp. 2d 519, 524 (confirming that the Panama Convention went into effect in the United States on October 27, 1990). *See also* 9 U.S.C. §§ 301–307.

62. *See* 9 U.S.C.A. § 301.

63. 685 F.3d at 383.

Fain v. Islamic Republic of Iran

856 F. Supp. 2d 109 (D.D.C. 2012)

The District Court for the District of Columbia held that the defendants waived their sovereign immunity under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act.

I. Holding

In *Fain v. Islamic Republic of Iran*,[1] the District Court for the District of Columbia held that Iran waived its sovereign immunity under the Foreign Sovereign Immunities Act (FSIA)[2] state-sponsored terrorism exception.[3] The district court determined that the FSIA state-sponsored terrorism exception applied because the Iranian government funded and directed a terrorist organization to attack U.S. Marines in Lebanon.[4] The court concluded that the defendants were liable for damages for assault, battery and intentional infliction of emotional distress, including potential punitive damages, and appointed a special master to determine those damages.[5]

II. Facts and Procedural History

Plaintiff Evan Fain III (Fain) was injured during the 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon. Two hundred forty-one Marines were killed during the attack.[6] For two days after the attack, Fain's wife and children, who are also plaintiffs in this action, did not know whether he was alive or dead.[7] The attack was perpetrated by Hezbollah, a terrorist group, acting at the direction of the defendants, the Islamic Republic of Iran (Iran) and the Iranian Ministry of Information and Security (MOIS).

The plaintiffs filed suit against Iran and MOIS in the District Court for the District of Columbia, alleging assault, battery, and intentional infliction of emotional distress against the defendants and requesting punitive damages.[8] The plaintiffs pled the same facts that were established by sufficient evidence in *Peterson v. Islamic Republic of Iran*.[9] In *Peterson*, the court determined that Iran was designated a state sponsor of terrorism pursuant to section 69(j) of

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1. 856 F. Supp. 2d 109 (D.D.C. 2012).
2. 28 U.S.C. §§ 1330, 1602 *et seq*.
3. *Fain,* 856 F. Supp. 2d at 113–14. The exception, codified at 28 U.S.C. § 1605A, was added by the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44 (2008).
4. *Id.* at 122–25.
5. *Id.*
6. *Id.* at 109.
7. *Id.*at 118–19.
8. *Id.* at 114–15.
9. *Id.* at 114 (citing Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46 (D.D.C. 2003); *see also* Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 VILL. L. REV. 479, 499–502 (2008) (discussing *Peterson*.).

the Export Administration Act of 1979.[10] It additionally concluded that MOIS acted as a conduit for Iran to supply funds to Hezbollah.[11] Experts in *Peterson* testified that in 1983, Hezbollah was under the control of the government of Iran.[12]

In this case, the plaintiffs served copies of the relevant documents, with translations, on the defendants through the U.S. Department of State, as required by 28 U.S.C. § 1608(a)(4), on August 3, 2011.[13] After the defendants failed to respond within 60 days, the clerk of the court entered default judgment for the plaintiffs.[14] The plaintiffs then moved for the court to take judicial notice of the proceedings in *Peterson* and for default judgment.[15]

III. Discussion

A. Original Jurisdiction

The FSIA requires that before entering default judgment, the court must determine whether the plaintiffs' evidence has established their right to relief "by evidence that is satisfactory to the court."[16] Generally, the FSIA "provides immunity to foreign states from suit and denies all U.S. federal and state courts jurisdiction over such actions."[17] However, there are certain statutory exceptions, by which courts obtain jurisdiction for suits against foreign states.[18] One exception is FSIA § 1605A(c), which creates a federal private right of action for victims of state-sponsored terrorism.[19]

The district court held that the defendants fell under the FSIA state-sponsored terrorism exception and therefore jurisdiction over the suit was proper.[20] The state-sponsored terrorism exception applies only if "(1) 'money damages are sought,' (2) 'against a foreign state' for (3) 'personal injury or death' that (4) 'was caused' (5) 'by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act.'"[21]

The district court held that the plaintiffs sufficiently established all five elements.[22] First, the plaintiffs sought only monetary remedies in their complaint. Second, Iran is a foreign state

10. *Fain,* 856 F. Supp. 2d at 116–17, citing 50 U.S.C. § 2405(j).
11. *Id.* at 116–17.
12. *Id*. at 117.
13. *Id.* at 115–16, citing 28 U.S.C. § 1608(a)(4).
14. *Id.* at 115–16.
15. *Id.*
16. *Id.* at 115–16, quoting 28 U.S.C. § 1608(e).
17. *Id.* at 119, citing 28 U.S.C. § 1604.
18. *Id.* at 119.
19. *Id.* at 120–21, citing 28 U.S.C. § 1605A(c).
20. *Id.* at 119.
21. *Id.* at 119–20, citing 28 U.S.C. § 1605A(a).
22. *Id.* at 119–20.

and MOIS is a political subdivision of the Iranian government.[23] Third, the amended complaint alleged claims for assault, battery, and intentional infliction of emotional distress.[24] Fourth, the evidence established that the defendants had founded Hezbollah for the purpose of carrying out terrorist activity and the defendants played an important role in planning and supporting the attack.[25] Finally, the defendants' conduct constituted an extrajudicial killing that occurred as a direct and proximate result of their involvement with Hezbollah.[26]

1. Waiver of Sovereign Immunity

Foreign states are immune from suit absent a waiver of sovereign immunity.[27] However, sovereign immunity can be waived either by a state's own action or by operation of statute.[28] Waiver occurs under the state-sponsored terrorism exception to FSIA when (1) "the foreign state was designated as a state sponsor of terrorism at the time of the act . . . or was designated as a result of such act," (2) "the claimant or victim was, at the time of the act . . . a national of the United States [or] a member of the armed forces [or] otherwise an employee of the Government of the United States . . . acting with in the scope of the employee's employment," and (3) "in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim."[29]

The district court held that the foreign defendants had waived their sovereign immunity by operation of the statute.[30] The Department of State designated Iran a state sponsor of terrorism.[31] In addition, Fain was serving in the Marines at the time of the attack.[32] Finally, because the attack occurred in Lebanon as opposed to Iran, the requirement that the defendants be given an opportunity to arbitrate this claim was inapplicable.[33] For these reasons, the defendants' immunity was waived and they could be held liable for the Beirut bombing.[34]

B. Liability

In order for the plaintiffs to recover against the defendants, the plaintiffs must have alleged a theory of liability showing that it was the defendants who were the actors who committed the

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23. *Id.*
24. *Id.*
25. *Id.* In addition to funding Hezbollah, it is estimated that during the 1980s, Iran spent $50 to $150 million financing terrorism. *Id.* at 118.
26. *Id.* at 119–20.
27. *Id.* at 120-21.
28. *Id.*
29. *Id.*
30. *Fain,* 856 F. Supp. 2d at 120.
31. *Id.* at 120 (citing *Determination* Pursuant to Section 6(i) of the Export Administration Act of 1979—Iran, 49 Fed. Reg. 2836 (Jan. 23, 1984)).
32. *Id.* at 120.
33. *Id.* at 120–21.
34. *Id.*

act that caused harm.[35] The plaintiffs alleged that Iran acted by materially supporting Hezbollah.[36] While Hezbollah executed the attack, it did so as an agent of Iran.[37] The plaintiffs alleged three theories of recovery, including assault, battery, and intentional infliction of emotional distress.[38] Based on the evidence in *Peterson*, the plaintiffs showed that the defendants were responsible for the attack.[39]

1. Assault and Battery

The district court determined that the defendants were liable to Fain for assault.[40] Generally, persons are liable for assault if their act was intended to cause a harmful contact with or an immediate apprehension of such conduct by those attacked.[41] Here, the court found that the defendants were liable for assault, because acts of terrorism are by their very nature intended to harm and to create fear of further harm.[42] The court also accepted Fain's uncontroverted assertion that he feared harm because of the attack.[43]

The court additionally found the defendants liable to Fain for battery.[44] Defendants are liable for battery if they act "intending to cause a harmful or offensive contact with . . . , or an imminent apprehension of such a contact" by, those attacked and (2) "a harmful contact with" those attacked "directly or indirectly result[ed]."[45] The Restatement (Second) of Torts § 15 defines harmful conduct as any conduct that results in "any physical impairment of the condition of another's body or physical pain or illness."[46] Here, the court concluded that the defendants were liable for battery, because it was clear from the terrorist nature of their acts that they intended to cause harm and that Fain suffered severe pain as a result.[47]

2. Intentional Infliction of Emotional Distress

The court also held the defendants liable to Fain, his wife, and children for intentional infliction of emotional distress.[48] The court stated, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily

35. *Id.* at 121–22.
36. *Id.* at 122.
37. *Id.*
38. *Id.*
39. *Id.* at 121.
40. *Fain,* 856 F. Supp. 2d at 122–23.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 123–24.
45. *Id.* at 122–23 (citing Restatement (Second) of Torts § 13).
46. *Id.* at 122–23.
47. *Id.* at 123–24.
48. *Id.* at 124.

harm."[49] Courts have imposed two additional requirements: The person alleging intentional infliction of emotional distress (1) must be a member of the injured person's immediate family and (2) must be present at the time of the injury.[50] The Restatement gives no opinion on circumstances where there might be liability without presence.[51]

While the additional requirements may seem to bar recovery for Fain's wife and children, as none of them were present at the time of the bombing at the Marine barracks, the district court acknowledged a caveat to the rule from *Heiser v. Islamic Republic of Iran*.[52] In *Heiser*, the court recognized that a plaintiff "need not be present at the place of the outrageous conduct, but must be a member of the victim's immediate family."[53] Subsequent to *Heiser*, the court in *Valore v. Islamic Republic of Iran* determined that the Beirut bombing "qualified as an extreme and outrageous act sufficient to invoke this theory of recovery for non-present plaintiffs."[54] The court concluded from this that the defendants were liable to the plaintiffs for intentional infliction of emotional distress.[55] While Fain's wife and children were not present in Beirut during the attacks, they are nonetheless members of his immediate family and therefore are entitled to recover for emotional distress caused.[56]

3. Punitive Damages

The plaintiffs sought $600 million in punitive damages, alleging that the defendants' actions "were intentional and malicious and in willful, wanton and reckless disregard of [plaintiffs'] . . . emotional well-being."[57] The district court determined that the plaintiffs' punitive damages count in their complaint was insufficient.[58] Punitive damages are not an independent cause of action except under strict liability.[59] Although it dismissed the count as an independent cause of action, the court decided to treat the count as a request for relief.[60]

C. Special Master

Although the district court determined that the defendants are liable to the plaintiffs, it conceded it did not have enough evidence to make an appropriate measure of damages.[61] The

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49. *Id.* at 123–24 (quoting Heiser v. Islamic Republic of Iran, 659 F. Supp. 2d 20, 26 (D.D.C. 2009)).
50. *Fain,* 856 F. Supp. 2d at 123–24 (citing Restatement (Second) of Torts § 46(1)).
51. *Id*. (citing Restatement (Second) of Torts § 46(1)).
52. *Id.* (citing *Heiser,* 659 F. Supp. 2d at 26).
53. *Heiser,* 659 F. Supp. 2d at 32.
54. *Id*. at 32 (citing Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 79 (D.D.C. 2010)).
55. *Fain,* 856 F. Supp. 2d at 124.
56. *Id.* at 123–24.
57. *Id.* at 124.
58. *Id.*
59. *Id.*
60. *Id.* at 124–25.
61. *Id.* at 125.

court decided to appoint a special master, as authorized by the state-sponsored terrorism exception to FSIA, to determine the damages.[62]

IV. Conclusion

The District of Columbia District Court ultimately held that Iran and MOIS waived their sovereign immunity by operation of law under the state-sponsored terrorism exception to the FSIA. The court further concluded that Iran was liable to Fain and his family for damages, potentially including punitive damages, for assault, battery, and intentional infliction of emotional distress

The state-sponsored terrorism exception to the FSIA accomplishes two goals: (1) giving victims of a terrorist attack an avenue to make claims against those who were responsible for the terrorist attack; and (2) discouraging states from supporting terrorist organizations. The state–sponsored terrorism exception to the FSIA allows victims like Fain to bring legal action against states that support terrorist organizations. Without this exception to the FSIA, sovereign immunity would prohibit victims of terrorist attacks from bringing legal action against states that support terrorist organizations. Moreover, this provision effectively discourages states from supporting terrorist organizations, because they may be held liable for the damages caused by those terrorist organizations. The state-sponsored terrorism exception to the FSIA is an important part of making victims whole in the aftermath of an attack and helping to prevent an attack in the first place.

Michael Valente

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62. *Id.* at 125 (citing 28 U.S.C. § 1605A(e)(1)).