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Keeping Trusts Out of Court: Toward Arbitrating Trust Disputes in Singapore

Huai Yuan Chia*

"Oh, East is East, and West is West, and never the twain shall meet."

Rudyard Kipling, "The Ballad of East and West," *A Victorian Anthology, 1837–1895*

This article puts forward a law reform proposal to allow for the arbitration of trust disputes in Singapore. Legally, arbitration clauses in trust deeds are unenforceable because a trust is not a contractual undertaking; rather, a trust is borne out of a unilateral act of a person disposing of his or her assets. The article first highlights why it is important for Singapore to consider allowing trust disputes to be arbitrated. The article then deals with the stumbling blocks to enforcing an arbitration clause in a trust deed. Thereafter, it examines the various extra-statutory approaches put forth by academics and practitioners for the enforcement of arbitration clauses in trust deeds. None of these approaches is entirely satisfactory, and this highlights the need to pursue statutory change. A comparison of various legislations allowing for arbitration of trust disputes is then made for the purpose of crafting a piece of legislation for Singapore.

I. Introduction

The often-quoted first line of Kipling's "The Ballad of East and West" speaks of an unbridgeable gap between East and West. There may be a similar divide between the world of contract law and that of trusts. While the former implies the pursuit of competing goals through a common effort regulated by contract, the latter evokes a world of solitary contemplation of a life beyond death as the settlor seeks to dispose of his assets in a manner he feels is best, ensuring that the affairs of his progeny are regulated well beyond the grave for years, if not generations to come. The difference does not stop there; it manifests in the realm of dispute resolution. Trust disputes between beneficiaries and trustees are not amenable to arbitration. This is because, amongst other reasons, a trust is not legally regarded as a contract. An arbitration clause found in a trust deed, otherwise known as a trust arbitration clause, cannot be enforced. As a result, arbitration, whose jurisdiction is dependent on an arbitration clause in a contract, cannot be invoked.

The goal of this article is fourfold. First, it seeks to examine whether it is desirable for Singapore to allow for internal trust disputes to be arbitrated, and the potential problems that it would face with regard to the enforcement of trust arbitral awards overseas. Second, it explores the disjunct between arbitration and its use in resolving trust disputes that arise between beneficiaries and trustees. Such disputes are known as internal trust disputes.[1] The article is not con-

1. Alsop Wilkinson v. Neary [1996] 1 WLR 1220 at 1223–1224.

* **LLB (Hons), National University of Singapore; Justices' Law Clerk, Supreme Court of Singapore.** **The author would like to thank an anonymous referee for his comments. The views expressed are the author's own, and do not represent those of the Supreme Court of Singapore.**

cerned with external trust disputes, that is, disputes about matters relating to a trust with non-beneficiaries.[2] This is because Singapore already confers a statutory power on the part of trustees to resolve matters by way of alternative dispute resolution (ADR) such as arbitration.[3] Third, it scrutinises the various extra-statutory approaches put forth by academics and practitioners for the enforcement of arbitration clauses in trust deeds. None of these approaches is entirely satisfactory, and this highlights the need to pursue statutory change. Fourth, it surveys the legislative reform undertaken overseas to allow for internal trust disputes to be resolved. In this regard, the article examines the approach taken in various jurisdictions such as Guernsey,[4] Malta,[5] the Bahamas,[6] Florida[7] and Arizona.[8] Singapore could consider the adoption of similar legislation, to reap the benefits of arbitration over resolving trust disputes in open court.

II. Why Arbitrate Trust Disputes in Singapore?

There are compelling arguments for allowing internal trust disputes to be arbitrated in Singapore. Arbitration is private and confidential. In contrast, court proceedings bring with them the risk of personal and potentially embarrassing details of the settlor. In addition, there are limited avenues for appeal against an arbitration award.[9] This ensures finality, and potentially saves time and cost. Second, arbitration accords procedural flexibility. Singapore, should it wish to remain at the forefront of global wealth management, should allow trust disputes to be arbitrated due to these benefits.

However, there is a price to be paid as well. Beneficiaries, should they be compelled to arbitrate, could be said to be forced to forfeit their right to litigate. In addition, even if it is desirous to allow internal trust disputes to be arbitrated, there are problems with the enforcement of trust arbitral awards overseas under the New York Convention. At the end of the day, a policy decision has to be made taking into account the benefits as well as the drawbacks of allowing trust disputes to be arbitrated.

A. Benefits of Arbitrating Trust Disputes

Speaking to the recently concluded International Council of Commercial Arbitration Congress, held in Singapore on 11 June 2012, the then Attorney-General, Sundaresh Menon S.C., said that this was the "glorious, golden age of arbitration" and counselled that "we must make the most of these opportunities to actively consider where we have come from and where

2. *Id*.
3. Trustees Act § 16(1)(f) (Cap. 337, 2005 Rev. Ed. Sing.).
4. The Trusts Law 2007, § 63 (Guernsey).
5. Arbitration Act, XIII of 2004, art. 15A (Malta).
6. Trustee (Amendment) Act, (2011); at No. 54, 91A, 91C (Bah.).
7. Arbitration of disputes, Fla. Stat. Ann. § 731.401 (West 2013).
8. Alternative dispute resolution, Ariz. Rev. Stat. Ann. § 14-10205 (West 2009).
9. Arbitration Act, § 49 (Cap. 10, 2002 Rev. Ed. Sing.); Andrew Schriever, *Building Litigation Prevention Into Your Transaction*, 36 WESTCHESTER B.J. 10 at 12–13 (2009); Mitsui Eng'g & Shipbuilding Co. Ltd. v. Easton Graham Rush & Another [2004] 2 SLR 14.

we must now head."[10] Indeed, the growth of Singapore in recent times as a major arbitration centre in the world has been phenomenal.[11] A potential area for the further development of Singapore as an arbitration centre is to tap into the wealth management industry. In the past ten years, Singapore has become one of the leading preferred places of residence for high net worth individuals in Asia.[12] The Monetary Authority of Singapore (MAS) reports that assets under management in Singapore have grown from $373 billion in 2004 to $1.34 trillion in 2011.[13] Although the MAS report does not give a precise breakdown of the proportion of these assets which fall within the ambit of private client business, these figures certainly suggest the emergence of Singapore as a major wealth management centre. With increasing political and economic uncertainty in some parts of the world (such as the Arab Spring and the Euro Crisis), Singapore has become an attractive centre of private wealth because it is seen as a place of safety.[14]

Typically, private wealth coming into Singapore has been settled into trust structures with banks or licensed trust companies.[15] The drivers for the setting of such trust structures are: (a) to facilitate inter-generation wealth transmission,[16] (b) to minimise the impact of divorce in the estate,[17] (c) asset protection,[18] (d) to further family philanthropy,[19] and (e) to avoid foreign forced heirship rules.[20] While there are clear advantages in settling trusts, what happens when disputes pertaining to such trust structures occur? Such disputes may happen between a trustee and beneficiaries with regard to issues such as the quantum of the trustee's fees,[21] a challenge to a trustee's exercise of discretion,[22] the trustee's breach of duty of care in investments,[23] or the

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10. Keynote Address, ICCA Congress Series No. 17: International Arbitration: the Coming of a New Age for Asia (and Elsewhere) 6 (2013).
11. Queen Mary University of London, 2010 International Arbitration Survey: Choices in International Arbitration, p. 20.
12. Shibani Mahtani, *The World's Richest Country*, WALL ST. J., Aug. 15, 2012, http://blogs.wsj.com/searealtime/2012/08/15/singapore-home-to-the-worlds-richest-people/.
13. Monetary Authority of Singapore, 2011 Singapore Asset Management Industry Survey, p. 1.
14. McKinsey & Company, McKinsey Private Banking Survey 2012: Finding a New Footing (July 2012); Hilary May & Graham Huelin, *The Rise of Singapore as a Trust Jurisdiction*, RBC WEALTH MANAGEMENT (Aug. 2011).
15. Jek Aun Long & Danny Tan, *The Growth of the Private Wealth Management Industry in Singapore and Hong Kong*, 6 CAP. MKT. L.J. 104, 107–08 (2011).
16. *Id.* at 106.
17. Leong Wai Kum, *The Laws in Singapore and England Affecting Spouses' Property on Divorce*, SING. J.L.S. 19, 20 (2011).
18. Tey Tsun Hang, Trusts and Asset Protection (Singapore: Centre for Commercial Law Studies, Faculty of Law, National University of Singapore, 2010), at 15. (This source has been cite checked by the National University of Singapore Faculty of Law.)
19. USB & INSEAD, Study on Family Philanthropy in Asia, (2011) at 42–45, http://www.insead.edu/facultyresearch/centres/social_entrepreneurship/documents/insead_study_family_philantropy_asia.pdf.
20. Anthony Duckworth, *Forced Heirship and the Trust in* THE INTERNATIONAL TRUST (John Glasson & Geraint Thomas (eds.), Oxford: Oxford University Press, 2006).
21. Re Duke of Norfolk's Settlement Trusts [1982] Ch. 61.
22. Re Hastings-Bass, Hastings v. Inland Revenue, [1974] EWCA (Civ) 13; Green v. Cobham, [2000] EWHC (Ch) 1564, WTLR 1101; Abacus Trust Co. (Isle of Man Ltd) v. Nat'l Soc'y for Prevention of Cruelty to Children, EWHC (Ch) B2, [2001] STC 1344.
23. Nestlé v. Nat'l Westminster Bank plc, [1993] EWCA (Civ) 12, 1 WLR 1260.

entitlement of the beneficiaries under the trust.[24] Traditionally, the forum for hearing such disputes has been the courts. While the Singapore courts have an enviable international reputation for being able to resolve complicated disputes swiftly and fairly,[25] the drawback of having trust disputes heard in the courts is that the trial is often concluded in open court. This means that extremely private matters of wealthy individuals may enter the public domain. For example, the trust litigation involving the Rinehart family, one of Australia's wealthiest families, has been reported in the newspapers and tabloids all over the world, revealing the extremely personal details of the relationship between Gina Rinehart and her children.[26] Needless to say, wealthy private individuals do not relish the prospect of being fodder for gossip. Further, in the case of a particularly wealthy settlors or a high-value trust fund, proceedings can give rise to security concerns—few settlors would want to advertise the true extent of their wealth, its location, and the identity of those benefitting from it.[27]

This is because, in some countries, revelations of the extent of a family's private wealth may expose the family to syndicated criminals who may kidnap family members.[28] Although courts are usually amenable to granting privacy measures such as having hearings take place in camera or that the court file be sealed, an express application will be required for such an order, and there is no guarantee that the court will grant the application.[29]

One possibility for providing wealthy families with a degree of privacy would be to refer matters to ADR.[30] The optional nature of most ADR-procedures, however, makes it difficult for the settlor to ensure that the disputes will not end up in the courtroom.[31] Where a trustee or beneficiary believes that another trustee or beneficiary has acted inappropriately or offen-

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24. Re Manisty's Settlement [1974] 1 Ch. 17.

25. In 2011, Singapore continued to do well in international surveys conducted by the International Institute for Management Development (IMD) and the Political and Economic Risk Consultancy (PERC). In the 2011 IMD World Competitiveness Yearbook, Singapore once again topped the rankings for the category Legal and Regulatory Framework. Hong Kong and Australia were ranked second and third respectively. Singapore also came in 12th out of 59 countries under the category of "Justice," which looks at whether justice is fairly administered in a country. In the latest PERC report published in 2011, Singapore ranked second out of the 12 Asian countries that were surveyed, behind Hong Kong but ahead of Japan. This ranking was based on a survey of expatriates' perceptions of different judicial systems in Asia (see Supreme Court of Singapore, Annual Report 2011).

26. Nicola Berkovic, *Gina Rinehart's Family Legal Stoush Takes New Turn*, THE AUSTRALIAN, May 9, 2012, http://www.theaustralian.com.au/news/nation/gina-rineharts-family-legal-stoush-takes-new-turn/story-e6frg6nf-1226350996468.

27. Lawrence Cohen QC & Joanna Poole, *Trust Arbitration—Is It Desirable and Does It Work?*, 18(4) T. & T. 324, 324 (2012).

28. *Id.*

29. *Id.*

30. Dominic J. Campisi, *Using ADR in Property and Probate Disputes*, 9 PROB. & PROP. 48 at 53 (1995); Arnold M. Zack, *Arbitration: Step-Child of Wills and Estates*, 11 ARB. J. 179 (1956); Henry S. Zieger, *Introduction to Part I: Settlement of Disputes in Estate and Trust Matters Through Arbitration and Alternative Dispute Resolution in* PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW (Rosalind F. Atherton ed., The Netherlands: Kluwer International, 2001); Robert Whitman, *Resolution Procedures to Resolve Trust Beneficiary Complaints*, 39 REAL PROP. PROB. & TR. J. 829 (2005); Blaine Covington Janin, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CAL. L. REV. 521 (1967).

31. Bridget A. Logstrom, *Arbitration in Estate and Trust Disputes: Friend or Foe?*, 30 ACTEC J. 266, 267–68 (2005).

sively, the conciliatory attitude necessary for parties to participate voluntarily in mediation may not prevail.[32] One solution to this problem is for a settlor to implement a mandatory arbitration clause, to ensure that disputes are referred to arbitration.[33]

It is a well-known principle that arbitration is a private matter, and third parties are usually excluded from obtaining information pertaining to arbitration.[34] Thus, arbitration appears to be an ideal dispute resolution mechanism for trust disputes because it shields familial relationships from public scrutiny.

Besides safeguarding privacy and confidentiality, there are other benefits that could be reaped from arbitrating trust disputes. First, there are very limited avenues for appeal against an arbitration award.[35] This ensures finality, and potentially saves time and cost. Second, arbitration accords procedural flexibility. Many settlors choose the trust for wealth management precisely because of its structural flexibility.[36] They are likely to desire having a similar flexibility over the procedures used to resolve disputes associated with the trusts they have created.[37]

As will be seen, however, there are major stumbling blocks to enforcing an arbitration clause in a trust deed. A trust is not legally regarded as a contract, whereas the arbitral process is primarily targeted at resolving contractual disputes. Another barrier to the use of arbitration is the multipartite nature of trusts. Trusts commonly involve a number of beneficiaries with different interests.[38] Some beneficiaries may be minors, incapacitated, unborn or unascertained, who are unable to take part in the arbitration proceedings.[39] This can make it difficult, or even impossible, to achieve universal agreement, which is necessary for settlement.[40] These legal difficulties are not insurmountable if legislative amendments are made. In this regard, jurisdictions such as Guernsey,[41] Malta,[42] the Bahamas,[43] Florida[44] and Arizona[45] have already amended their legislation to make possible the arbitration of trust disputes. England has convened a high-powered Trust Law Committee comprising distinguished trust practitioners and

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32. Tony Molloy Q.C. & Toby Graham, *Arbitration of Trust and Estate Disputes*, 18 T. & T. 279, 279 (2012).

33. Bridget A. Logstrom, et al., *Resolving Disputes with Ease and Grace*, 31 ACTEC J. 31, 31 (2005).

34. LESLIE CHEW, INTRODUCTION TO THE LAW AND PRACTICE OF ARBITRATION IN SINGAPORE (Singapore: Lexis Nexis, 2010) at 3; MAGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (New York: Cambridge University Press, 2008) at 3.

35. Arbitration Act, § 49 (Cap. 10, 2002 Rev. Ed. Sing.).

36. Tina Wüstemann, *Arbitration of Trust Disputes*, NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2007, 33 at 41–42 (Christoph Müller, ed., 2007).

37. *Id.*

38. Paul Buckle, *Trust Disputes and ADR*, 14 T. & T. 649, 649 (2008).

39. *Id.*

40. *Id.*

41. The Trusts Law 2007, § 63 (Guernsey).

42. Arbitration Act, XIII of 2004, art. 15A (Malta).

43. Trustee (Amendment) Act, (2011); at No. 54, 91A, 91C (Bah.).

44. Arbitration of disputes, Fla. Stat. Ann. § 731.401 (West 2013).

45. Alternative dispute resolution, Ariz. Rev. Stat. Ann. § 14-10205 (West 2009).

academicians to consider this issue,[46] and New Zealand's Law Reform Commission is looking into the matter.[47] The International Chamber of Commerce in Paris has also been active, establishing a committee to look at the issue, which went on to produce a model arbitration clause for inclusion in trust instruments.[48] In order to stay at the forefronts of arbitration and the global race for private wealth, policy makers in Singapore ought to effect the necessary changes to its legislation; otherwise, there is a real danger that major trust jurisdictions may make such legislative changes before Singapore does. This, of course, would erode the standing of Singapore as one of Asia's major wealth management centres.

B. Forfeiting the Right to Litigate

Even though there are tangible benefits to arbitrating trust disputes, it should not be forgotten that the benefits have to be weighed against the costs. Enforcing trust arbitration clauses, and compelling beneficiaries to arbitrate could be said to infringe on their right to litigate, and have their grievances aired in open court.[49] That is why consent is required before arbitration clauses are enforced—parties need to consent to having their right to litigate revoked.[50]

C. Problems With Enforcing Trust Arbitral Awards Under the New York Convention

The New York Convention has been a major factor contributing to the success of international commercial arbitration.[51] It has created an international regime for the enforcement of awards, which makes it easier to enforce an arbitral award internationally.[52] However, there are considerable difficulties with the use of the convention to enforce trust arbitral awards in foreign countries. First, the enforcement of a foreign arbitral award is predicated on an agreement to arbitrate under Article V of the Convention. However, as will be elaborated on later, there is no such agreement between the beneficiary and trustee. Second, a considerable number of jurisdictions have made reservations to the convention pursuant to Articles I(3) and X(1) to limit its effect to commercial matters,[53] which does not deal with trust matters in some instances.[54] It remains to be seen, however, if Articles I(3) and X(1) purport to exclude the applicability of the convention to commercial trusts for reserving states. Third, even if a jurisdiction has not made a reservation, there is the additional hurdle of arbitrability under Article

46. Trust Law Committee, *Arbitration of Trust Disputes* (England: Trust Law Committee, 2011).

47. New Zealand Law Commission, Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper (Wellington: New Zealand Law Commission, 2011) at 57–64.

48. Bruno W. Boesch, *The ICC Initiative,* T. & T. 316 (2012).

49. Jaime Dodge Bymes & Elizabeth Pollman, *Arbitration, Consent and Contractual Theory,* 8 HARV. NEGOT. L. REV. 289 (2003).

50. *Id.*

51. United Nations, Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects (New York: United Nations, 1999).

52. Id.

53. UNCITRAL, "Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (2012), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

54. Particularly if one is dealing with familial trusts, where there is hardly any commercial element.

V(2)(a). Arbitrability concerns the question of whether a given type of dispute may be legally referred to arbitration or whether it must remain in the exclusive purview of the courts.[55] Questions of personal status, such as whether a person is married, competent, or a legal heir are usually not arbitrable.[56] Granted, arbitration-friendly jurisdictions have defined arbitrability in the broadest way.[57] Thus, Switzerland, Germany and Austria consider that any dispute involving a financial or economic interest is arbitrable.[58] Other jurisdictions have defined arbitrability in terms of the rights which the parties can freely dispose of.[59] However, in the more personal world of trust disputes, issues of personal status, such as marital status or mental capacity as well as the protection of minors, incapacitated or unascertained beneficiaries, are likely to crop up.[60] These issues may not be regarded as monetary or economic in nature and may raise questions about whether such issues may be decided by private adjudication.

In spite of these difficulties, however, arbitration is still useful if there is no need to enforce an arbitral award against foreign assets or in cases where there is no need for enforcement against trust assets, such as cases involving disputes over the administration or the interpretation of trust. There does not seem to be any available data on whether most trust assets managed in Singapore are held locally or overseas, though this piece of information would have to be taken into account before a decision is made as to whether it is worthwhile to embark on any law reform initiative.

III. The Unenforceability of Trust Arbitration Clauses

Trust arbitration clauses are probably not enforceable for three reasons. First, there are statutory restrictions. Arbitration statutes around the world, including Singapore's, make it clear that there must be an agreement to arbitrate. This is lacking between a trustee and beneficiary. Second, and related to the first, a trust is not legally regarded as a contract. As a result, arbitration, whose jurisdiction is dependent on an arbitration clause in contract, cannot be invoked. Indeed, for this reason, the courts have stridently rejected the enforcement of trust arbitration clauses. Third, there is the problem of binding potential unborn, unascertained minor and incapacitated beneficiaries who are unable to take part in the arbitration proceedings, and ensuring that their interests are properly represented in arbitration.

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55. GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER (Paris: ICC Publishing S.A., Gerald Aksen et al. (eds.)), L. YVES FORTIER, ARBITRABILITY OF DISPUTES, 269, 270 (2005).

56. Christopher P. Koch, *A Tale of Two Cities!—Arbitrating Trust Disputes and the ICC's Arbitration Clause for Trust Disputes in* 2 YEARBOOK ON INTERNATIONAL ARBITRATION, 187 (Marianne Roth & Michael Geistlinger eds., 2012).

57. *Id.*

58. Swiss Private International Law Act, art. 177 (1987); ZIVILPROZESSORDNUNG [CODE OF CIVIL PROCEDURE], § 1030 (Ger.); ZIVILPROZESSORDNUNG [CIVIL PROCEDURE STATUTE] § 582 (Austria).

59. Code Civil [Civil Code] art. 2059 (Fr.); Codice di procedura civile [Code of Civil Procedure] art. 806 (It.); Codice civile [Civil Code] art. 1966 (It.); Wetboek van Burgerlijke Rechtsvordering [Code of Civil Procedure] art. 1020(3) (Neth.); Arbitration Act, art. 1 (Swed.); Arbitration Act, art. 2 (Spain).

60. To illustrate, the Superior Court of Pennsylvania found that the question whether the settlor was competent to revoke the trust was not arbitrable: In re Revocation of Revocable Trust of Harold & Marie Fellman, dated December 13, 1989, 412 Pa. Super. 577 (Pa. Super. Mar. 3, 1992).

A. Statutory Restrictions in Arbitration Statutes

Arbitration clauses were not favoured under the common law because they required parties to give up access to the courts.[61] It was perhaps not surprising that the courts did not look kindly upon such clauses.[62] Courts generally believed that arbitration clauses ousted their jurisdiction and, thus substantially impaired an individual's ability to seek redress for a wrong.[63] In response to the reluctance by courts to enforce arbitration clauses in contracts, legislatures from around the world passed statutes expressly authorising them.[64] Singapore is no exception, for it has an Arbitration Act[65]and the International Arbitration Act[66] that allows for the enforcement of arbitration clauses.

Under Singapore's Arbitration Act and International Arbitration Act, an arbitration clause is enforceable only if the parties to a dispute have entered into an arbitration agreement.[67] This is, however, lacking between a trustee and beneficiary, with the result that internal trust disputes cannot be submitted for arbitration. In contrast to disputes under ordinary commercial agreements, the relationship between trustees and beneficiaries is not founded on contractual provisions.[68] Even if the settlor and the trustee were to enter into an arbitration agreement in the trust deed, the beneficiaries will rarely be parties to it, let alone will they have entered into any written contract.[69]

In the absence of an agreement between the trustee and beneficiary, can the Arbitration Act and the International Arbitration Act nonetheless bind beneficiaries to an arbitration agreement to which they are not direct parties? The answer is no, even though there has been academic commentary to the contrary. In this regard, it is instructive to refer to the views of

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61. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 35–36 (2009). The phrase "oust the jurisdiction [of the court]" is attributed to Kill v. Hollister, 1 Wils. K.B. 129 (1799). (This source has been cite checked by the National University of Singapore Faculty of Law.)

62. *Id.*

63. *Id.*

64. An example would be the English Arbitration Act of 1889, which can be regarded as the first modern arbitration statute in the common law world, which was in turn widely adopted throughout the Commonwealth. Adam Samuel, *Arbitration Statutes in England and the US*, 8 ARB. & DISP. RESOL. L.J. 2, 6 (1999).

65. Arbitration Act, Cap. 10, Rev. Ed. (2002) (Sing.).

66. Arbitration Act, Cap. 143A, Rev. Ed. (2002) (Sing.).

67. *See* § 4(1) Arbitration Act (Cap. 10, 2002 Rev. Ed. Sing.); §§ 5, 6, International Arbitration Act (Cap. 143A, 2002 Rev. Ed. Sing.).

68. Lawrence Cohen QC & Joanna Poole, *Trust Arbitration—Is It Desirable and Does It Work?*, 18(4) T. & T. 324, 326–28 (2012).

69. *Id.*

Lawrence Cohen and Marcus Staff[70] as well as David Hayton.[71] They have argued that Section 82(2) of the English Arbitration Act 1996 includes as party to an arbitration agreement "any person claiming under or through a party to the agreement." Section 82(2) is worded similarly to Section 6(5) of Singapore's Arbitration Act. Section 6(5)(a) of Singapore's International Arbitration Act is in turn, modelled after Section 6(5) of Singapore's Arbitration Act.[72] At first sight, a beneficiary appears to be a person claiming under or through either the settlor or trustee in relation to the trust and the duties imposed by it.[73] It is difficult to explain where the beneficiary gets his interest from if it is not derived either from the settlor or the trustee, the two parties to the arbitration agreement.[74] This seems to point firmly to the beneficiary being bound.[75] The real question is whether a beneficiary is truly such a person. It is likely that he is not, because the phrase "any person claiming under or through a party to the agreement" was not written specifically with trust beneficiaries in mind but are meant to cover an assignee of a party to an arbitration agreement, personal representatives of a deceased party, and a trustee of a bankrupt.[76]

B. The Lack of Enforcement of Trust Arbitration Clauses by the Courts

Most courts that have considered the enforcement of trust arbitration clauses have held that trust are not contracts and, in so doing, stridently rejected their enforcement. To these courts, trusts are not "contracts" or "agreements" and therefore arbitration clauses in trust instruments fall outside arbitration statutes. The courts that have had the opportunity to do consider this matter are those from the United States and Switzerland.

1. The Approach in the United States

The majority of courts in the United States have refused to enforce trust arbitration clauses. The only court that has upheld such a clause is the Supreme Court of Texas in *Rachal v. Reitz*.[77]

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70. Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7(4) J. INT'L TR. & CORP. PLAN. 203, 207 (1999); *see also* Charles Lloyd & Jonathan Pratt, *Trust in Arbitration*, 12 T. & T. 18 (2006), quoting a judgment of Dankwerts J in *Re Wynn's Will Trust* [1952] Ch. 271 that held, "Beneficiaries under a will take what they take purely by bound of the testator, and it might be said that, as they are not entitled to anything of right apart from provisions of the will, they must take their benefits subject to the conditions which are contained in the will." Lloyd and Pratt argue that "[t]here is no reason why the same rationale would not apply equally to a trust." *Id.*

71. David Hayton, *Problems in Attaining Binding Determinations of Trust Issues by Alternative Dispute Resolution*, http://gmjones.org/pdfs/hayton-adr-paper.pdf; David Hayton, *Future Trends in International Trust Planning*, 13 J. INT'L TR. & CORP. PLAN. 55, 72 (2006).

72. LAWRENCE BOO, HALSBURY'S LAWS OF SINGAPORE, VOLUME 2: ARBITRATION (2003 Reissue) at [20.038]. (This source has been cite checked by the National University of Singapore Faculty of Law.)

73. *See* Hayton, *supra* note 71.

74. *Id.*

75. *Id.*

76. DAVID SUTTON ET AL., 18TH EDS., RUSSELL ON ARBITRATION at 143–44 (London: Sweet & Maxwell, 1997). (This source has been cite checked by the National University of Singapore Faculty of Law.)

77. Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013).

a. Position Taken by the Majority of Courts in the United States

The issue was first taken up by the Arizona Court of Appeals in *Schoneberger v. Oelze*.[78] The court held that a trust is not a contract, and therefore arbitration provisions in the trust could not be enforced against beneficiaries. In that case, the beneficiaries sued the trustee, and the trustee moved to compel arbitration under the trust's arbitration clause. The trustee conceded that the trust was not technically a contract between the beneficiaries and the trustee, but he argued that the arbitration provision could nevertheless be binding on third-party beneficiaries of a contract. The court rejected the argument, holding that while a contract "may end up binding (or benefitting) non-signatories," a trust is not a contract to begin with, for it "does not rest on an exchange of promises."[79] Rather, a trust "merely requires a [settlor] to transfer a beneficial interest in property to a trustee who, under the trust instrument . . . holds that interest for the beneficiary."[80]

The court in *Schoneberger* based its holding on an earlier case, *In re Naarden Trust*,[81] in which the same Arizona court held that a trust was not a contract. In *Naarden Trust*, a woman brought a claim against her ex-husband and a trustee. The trustee tried to establish that the trust was contractual in nature, because he could receive attorney's fees only if the claim was contractual in nature. The court held that a trust was not a contract, and in reaching that conclusion relied on both the *Restatement (Second) of Contracts (1981)*[82] and *Restatement (Second) of Trusts (1959).*[83] In principle, the court noted, different interests are created by a trust and a contract. "[T]he beneficiary of a trust gains a beneficial interest in the trust property," the court reasoned, "while the beneficiary of a contract gains a personal claim against the promissor."[84] The court noted other more specific legal differences between the law of trusts and the law of contracts, which provided different answers to the questions of who may enforce the agreement, what statute of limitation applies, and what consideration and manifestation of intent are required to establish the interest.[85]

In May 2011, the California Court of Appeal (Second District) in *Diaz v. Bukey*,[86] refused a trustee's motion to compel arbitration. The beneficiary had sued her sister as trustee of the Diaz family trust for an accounting of the trust assets. The trustee sought to compel arbitration, but the probate court of first instance refused the motion for want of an arbitration agreement. The court noted that, under California law, there had to be a written arbitration agreement for the trustee to be able to compel the beneficiary to arbitration. Extensively quoting the *Schoneberger* decision, the court also found that an arbitration provision in a testamentary trust deed does not amount to an agreement to arbitrate.

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78. Schoneberger v. Oelze, 96 P.3d 1078 (Ariz. Ct. App. 2004).

79. *Id.* at 1083.

80. *Id.*

81. In re Naarden Trust, 990 P.2d 1085 (Ariz. Ct. App. 2000).

82. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. F. (1981).

83. RESTATEMENT (SECOND) OF TRUSTS § 14 cmt. a, § 13 & cmt. a (1959).

84. *Id.*, § 14 cmt. a.

85. *Id.*, § 14 cmts. c, d, f.

86. Diaz v. Bukey, 195 Cal. App. 4th 315 (2011) at **611, *vacated*, 2012 Cal. LEXIS 9597 (Cal. 2012).

b. *Rachal v. Reitz*

In May 2013, the Texas Supreme Court, in *Rachal v. Reitz,* held that an arbitration clause in an *inter vivos* trust instrument is valid and enforceable against trust beneficiaries. In so doing, the court overruled the decision of the Courts of Appeals. In its analysis, the Texas Supreme Court considered the settlor's intent for the enforceability of the provision, the relevant portions of the applicable statute, and the doctrine of estoppel.

The court held that the settlor's intent is to be enforced to the greatest extent possible if it is expressed unambiguously through the provisions of the trust instrument, notwithstanding the objections of the beneficiaries. In *Rachal v. Reitz*, the arbitration clause provided that '[d]espite anything herein to the contrary,' arbitration would be the 'sole and exclusive' remedy' for 'any dispute of any kind involving this Trust or any of the parties or persons connected herewith (e.g. the beneficiaries, Trustees) . . .'[87] The court concluded that, because this provision unambiguously required that all disputes be arbitrated, the settlor's intent to compel arbitration must be enforced if the arbitration provision is valid under Texas law, and the underlying dispute is within the provision's scope.

The court went on to analyse whether the arbitration clause would be valid and enforceable under state law. In Texas, a "written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement."[88] Parties to an agreement may revoke it "only on a ground that exists at law or in equity for the revocation of a contract."[89] Although the Texas statute does not define "agreement," the court found it clear that the legislature intended to enforce arbitration provisions in contracts as well as in "agreements." Indeed, by using the term "agreement" in one section of the statute and "contract" in another, the court reasoned that the Texas legislature understood there was a difference in meaning.

The court defined the term "agreement" using the generally accepted definition, as a "manifestation of mutual assent by two or more persons."[90] The court noted that, although the term "agreement" is often used interchangeably with "contract," agreements are broader than contracts because an agreement need not meet all of the formal requirements of a contract.

To determine if the arbitration clause in *Rachal* was an "agreement," the court required a showing of "mutual assent" by the parties. Although parties typically manifest mutual assent by signing an agreement, non-signatories also can manifest assent to the provisions through the doctrine of direct benefits estoppel, which provides for an implied manifestation of assent if a party has obtained or seeks to obtain substantial benefits under an agreement.

The court in *Rachal* likened the doctrine of direct benefits estoppel to promissory estoppel and stated that a formal contract is not required for the doctrine of direct benefits estoppel to

87. Rachal v. Reitz, 403 S.W.3d 840, 842 (Tex. 2013).

88. *Id.* at 844–45.

89. *Id.*

90. *Id.*

apply. Indeed, the presupposition for the application of the theory of promissory estoppel is that no contract exists.

The court relied on its prior ruling in *In re Kellogg Brown & Root, Inc.*,[91] and determined that, under a theory of direct benefits estoppel, a nonsignatory to an agreement is estopped from attempting to enforce the benefits due him while simultaneously seeking to avoid provisions of the agreement, such as the obligation to arbitrate disputes. The court in *Rachal* noted that, under the doctrine of direct benefits estoppel, if a beneficiary contests the trust's validity in its entirety without having accepted any benefits from the trust, the beneficiary cannot be compelled to arbitrate. But once a beneficiary attempts to enforce rights that would not exist but for the trust, he manifests his assent to a trust's arbitration clause.

In *Rachal*, the beneficiaries of the trust attempted both to seek benefits from the trust and to enforce the provisions of the trust against the trustee. The beneficiaries neither disclaimed their interest in the trust nor challenged the trust's validity. Instead, they accepted certain benefits of the trust. Thus, when the beneficiaries ultimately brought a claim for breach of trust against the trustee, the court held that the doctrine of direct benefits estoppel applied to bar the claim that the arbitration provision in the Trust was invalid.

After concluding that the arbitration provision in the trust was enforceable against Reitz, the court considered whether or not the dispute between Reitz and Rachal fell within the scope of the arbitration clause. The arbitration clause provided that arbitration would be the "sole and exclusive remedy" for "any dispute of any kind involving this Trust or any of the parties or persons connected herewith (e.g., the beneficiaries, Trustees). . . ."[92] The court determined that the claim against the trustee fell within the scope of the arbitration provision.

Reitz, however, maintained that a separate provision of the Trust that called for trustee exoneration in the case of any proceedings brought by a beneficiary without good faith and allowed the trustee to fund costs of claims brought against him from the Trust was evidence of the settlor's intent to allow for the litigation of disputes with the trustee. The court found Reitz's argument did not defeat the arbitration provision for two main reasons. First, the arbitration provision contained the language "[d]espite anything herein to the contrary," and therefore it necessarily prevailed over the exoneration provision by its own terms. Second, the court determined that the two provisions are not necessarily in conflict. If, for example, the doctrine of direct benefits estoppel had not applied, and a claim was brought in, and stayed in, court, the provision for payment of trustee expenses would stand on its own to dictate the source of payment for the costs of defending such a claim.

In sum, the court held that the Texas law provides that written "agreements" to arbitrate such as the one contained in the Trust are valid and enforceable when a beneficiary assents to the agreement by accepting benefits from the trust and attempts to sue the trustee for breach of the trust's terms. We will see below in Part IV, however, that the basis for the court's reasoning is untenable, as both intent theory and benefit theory are problematic.

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91. In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 740 (Tex. 2005).

92. 403 S.W.3d at 842.

2. The Approach in Switzerland

The Swiss courts have also refused to enforce trust arbitration agreements. The Swiss Supreme Court case of SCD 4C. 94/2005[93] involved a Lichtenstein trust (*Treuhänderschaft*). One of the beneficiaries sued the trustees for restitution of the trust property—a house in the south of France—after the trust was dissolved by the trustees. The suit was brought in the canton of Basel in Switzerland because the one share representing the trust property was deposited there. The defendant trustees argued that the Basel court had no jurisdiction because the trust deed contained an arbitration clause. This argument was rejected by the court. The court held that it had the jurisdiction on the basis that the trust deed was not a contract. The decision was upheld on appeal by the Basel Court of Appeals[94] and the Swiss Federal Supreme Court.[95]

Interestingly, the reasoning of the Swiss courts is similar to that of majority of American cases. What we find in all of these cases seems a judicial recognition that trusts and arbitration are incompatible. Particularly the *Schoneberger* and *Diaz* courts very firmly resisted any attempt to treat trust deeds as contracts and to recognize the arbitration provision in the deed as a contractual undertaking.

C. Unborn, Unascertained, Minor and Incapacitated Beneficiaries

Another barrier to the use of arbitration for internal trust disputes is the multipartite nature of trusts.[96] Trusts commonly involve a number of beneficiaries with different interests.[97] Some beneficiaries may be minors, incapacitated, unborn or unascertained.[98] Because an award may frequently impact the proprietary rights of such beneficiaries, the questions arise: (1) how such (classes of) beneficiaries can be bound by a trust arbitration agreement; and (2) how their interests can be properly represented in arbitration. Both are closely related, and conflicts of law issues may need to be considered.[99] The fact that multipartite interests are involved makes it difficult, or even impossible, to achieve universal agreement necessary for settlement.[100] In addition, an objection frequently advanced against trust arbitration is that there is no mecha-

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93. Christopher P. Koch, *A Tale of Two Cities!—Arbitrating Trust Disputes and the ICC's Arbitration Clause for Trust Disputes in* 2 YEARBOOK ON INTERNATIONAL ARBITRATION, 190–91 (Marianne Roth & Michael Geistlinger eds., 2012).

94. *Id.* at 191.

95. *Id.*

96. Mark S. Poker & Any S. Kiiskila, *Prevention and Resolution of Trust and Estate Controversies*, 33 AM. C. TR. EST. COUNS. L J. 262, 266 (2008).

97. *Id.*

98. *Id.*

99. Emmanuel Gaillard & Donald Trautman, *Trusts in Non-Trust Countries: Conflict of Law and the Hague Convention on Trust*, 35 AM. J. INT'L L. 357 (1997); David Hayton, *Major Trends in the Trust World: Part 2*, 2 PCB 122, 126 (2007).

100. New Zealand Law Commission, Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper (Wellington: New Zealand Law Commission, 2011) at 58.

nism as in litigation that allows for unborn, minor and incapacitated beneficiaries to be represented for the safeguarding of their interests.[101]

IV. Extra-Statutory Arguments for the Enforcement of Arbitration Clauses in Trust Deeds

Notwithstanding the difficulties in enforcing trust arbitration clauses highlighted above, proponents of trust arbitration clauses have argued that the courts should enforce these clauses, even without statutory revision. Their proposals rely on one of three different justifications: (1) contract theory,[102] (2) benefit theory,[103] and (3) intent theory.[104] In addition, some commentators suggest using two other ways to compel arbitration: (1) a form of "no contest in court" clause[105] and (2) separate contracts with each party that each contain an arbitration provision.[106] These proposals might seem compelling, but ultimately, none provides a properly tailored and workable means to enforce trust arbitration clauses. This part will deal with each in turn.

A. Contract Theory

Contract theory is propounded by American commentators such as Michael P. Bruyere and Meghan D. Marino.[107] This theory stands in opposition to the cases alluded to earlier. In sum, the commentators that advocate this theory argue that courts should abandon the out-

101. *See, e.g.,* O15 r13 of the Rules of Court (Sing.). In England, Rule 21 of the Civil Procedure Rules 1998 requires that a minor or incapacitated party have a "litigation friend" either appointed by the court or otherwise. No proceedings may continue beyond the filing of the claim form until this has happened, and no settlement may be entered into without the court's sanction. Similarly, Section 305 of the Uniform Trust Code allows the court to appoint a representative for minor or incapacitated beneficiaries if no other form of representation is possible (parental representation, representation by a member of a class with substantially similar interests) because of a conflict of interest.

102. Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Litigation, But Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351 (2007); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995); Frank H. Easterbrook & Daniel H. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

103. Teresa R. Peacocke, "Arbitration and mediation of trust and probate disputes: Obstacles removed (or non-existent)" (July 1, 2008) www.3stonebuildings.com.

104. Garry Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999); Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It Anyway?*, 38 AKRON L. REV. 649, 705 (2005).

105. Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629 (1994); Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 S.M.U.L. REV. 225 (1998); Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 239, 261 (2008); Martin D. Begleiter, *Are In Terrorem Clauses No Longer Terrifying?: If So, Can You Avoid Post Death Litigation With Pre-Death Procedures?*, 2 NAT'L ACAD. ELDER L.J. 349 (2006); Jo Ann Englehardt, *In Terrorem Inter Vivos: Terra Incognita*, 26 REAL PROP. PROB. & TR. J. 535 (1991).

106. Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, OHIO ST. J. ON DISP. RESOL. 627, 658 (2011).

107. Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Litigation, but Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351 (2007).

dated and "ill-advised distinction" between a trust and a contract.[108] If a trust is considered a contract, then an arbitration clause in a trust deed would be enforceable.[109]

In particular, Bruyere and Marino argue that the courts in *Naarden Trust* and *Schoneberger* have uncritically relied on the Restatement of Trusts and Restatement of Contracts. These Restatements distinguish between a trust and a contract. For example, according to the Restatement of Trusts, a trust is "conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract."[110] In addition, they charge that the courts in *Naarden Trust* and *Schoneberger* have "made little attempt to look beyond the Restatement definition to discover the underlying similarities between a trust and a contract or the original foundation for the Restatement view."[111]

The courts may have reason to be suspicious of the distinction between trusts and contracts made by the Restatement of Trusts and Restatement of Contracts. This distinction was based on the scholarship of one man: Austin W. Scott,[112] who wrote an influential article in 1917 which laid out fundamental differences between the law of trusts and the law of contracts.[113] Scott noted the general distinctions between a trust and a contract; for example, in his time, trustees were generally not compensated, and thus, different rules applied to them than those that applied to parties to a contract. Moreover, Scott noted that the common law of contracts could not account for a trust in two important respects. First, if a trust was to be compared to a contract, it seemed most analogous to a third-party contract, because a trustee and a settlor agree to an arrangement for the benefit of a third party, the beneficiary.[114] Yet, under contract law, courts did not recognise a third-party beneficiary contract.[115] Second, Scott noted that contract law was unable to enforce trust agreements;[116] for example, contract law could not account for the two-party trust, in which one party serves as both grantor and trustee, because a party cannot make a contract with himself. [117] However, Bruyere and Marino have argued that the law of trusts has changed to the extent that these underlying distinctions between a trust and a contract no longer exist, and the courts should therefore dispense with the distinction between the two.[118] After all, the landscape of the law of trusts is quite different

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108. *Id.*

109. *Id.*

110. *Id.* at 361 (citing RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. B (1959)) (continuing the language of Comment b of the FIRST RESTATEMENT OF TRUSTS § 197(1935)).

111. *Id.*

112. S.I. Strong, *Arbitration of Trust Law Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157, 1174 (2012).

113. Austin W. Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 270 (1917).

114. *Id.*

115. Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7(4) J. INT'L TR. & CORP. PLAN. 203, 362 (1999).

116. Scott, *supra* note 113.

117. *Id.*

118. Cohen & Staff, *supra* note 115, at 362.

from that in Scott's time.[119] Today, trustees are compensated.[120] Moreover, third-party beneficiary contracts are now enforceable;[121] in fact, the Arizona court in *Schoneberger* conceded that it would have enforced an arbitration clause in a third-party beneficiary contract.[122] Certainly, it remains true that under current contract law, a party cannot contract with itself.[123] Bruyere and Marino admit that the contract approach may be "unsuitable" for the two-party declaration of unsuitability of this particular type of trust in which one party serves as both grantor and trustee.[124] However, they maintain that the unsuitability of this particular type of trust "in no way invalidates the contract approach to the more traditional three-party trust where the grantor does not act as the trustee."[125]

Indeed, Bruyere and Marino argue that the law of trusts has changed so radically, it can be subsumed within the law of contracts. In responding to Scott's earlier scholarship, they rely on John H. Langbein, who concluded that a modern trust fits nicely within contract law.[126] Langbein argued that "the three-cornered relation of settlor, trustee and [beneficiary] . . . is easily explained in the modern law in terms of a contract for the benefit of a third party."[127] For Langbein, the basic elements of a trust and a contract are the same: a consensual formation, because no individual is forced to act as a trustee; and party autonomy, because trust law applies only where the trust does not supply contrary terms.[128] Furthermore, more recent developments in contract law have brought that body closer to trust law: courts have been willing to accept specific performance in contract law, and a "good faith" requirement has spread into contracts, which "shadows trust law's fiduciary duty requirements."[129]

In a similar vein, Easterbrooke and Fischel too have adopted a contractarian perspective to trust law.[130] They opine that fiduciary law, which undergirds trust law, is prevailingly contractarian because it simply embodies the default regime that parties would choose as the criteria for appraising trustees' behaviour where it would be impracticable to foresee potential problems and to spell out obligations in more exact terms.[131]

At first pass, contract theory is indeed compelling; if the fundamental differences between trusts and contracts have indeed failed, then it seems wholly formalistic to recognise arbitration clauses in contracts but not in trusts. However, contract theory suffers from serious flaws. First,

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119. *Id.*

120. *Id.*

121. *See, e.g.*, CONTRACTS (RIGHTS OF THIRD PARTIES) ACT (2002); CONTRACTS (RIGHTS OF THIRD PARTIES) ACT (1999).

122. Schoneberger v. Oelze, 208 Ariz. 591 (Ariz. Ct. App. 2004).

123. Clydesdale Bank Plc v. Davidson (A.P.) and Others, [1998] S.C. 359 (H.L.).

124. Cohen & Staff, *supra* note 115, at 362.

125. *Id.*

126. *Id.* (quoting John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 628 (1995)).

127. *Id.*

128. *Id.*

129. *Id.*

130. Frank H. Easterbrook & Daniel H. Fischel, *Contract and Fiduciary Duty*, 36 J.L & ECON. 425, 426 (1993).

131. *Id.*

the theory has been squarely rejected by the courts. Besides the cases that have refused the enforcement of trust arbitration clauses,[132] there is a strong current of authority in other areas of trust law that have held that a trust is not a contract. For example, in the realm of trustee exemption clauses, the English Court of Appeal, in *Baker v. J.E. Clarke & Co.*,[133] has made it clear that a trust is not a contract. In that case, the beneficiary argued that the trustee exemption clause should be subject to the reasonableness test under the Unfair Contracts Terms Act 1977 (UCTA), but the court opined that there were insuperable difficulties in applying the UCTA to trustee exemption clauses.[134] Tucker LJ in that case noted that the UK Law Commission had concluded that it is extremely unlikely that an English court would consider the trust instrument to be a contract because contracts derive their enforceability from agreement and consideration but trusts are based firmly on the grant of property.[135] Similarly, the English Court of Appeal, in *Re Duke of Norfolk's Settlement Trusts*,[136] ridiculed the proposition that the trustees' right to remuneration had a contractual basis.[137] The duties owed by a trustee to a beneficiary are of an equitable rather than a contractual nature.[138]

Second, the theory goes too far and is over-inclusive in its application. If a court were to equate a trust with a contract, then arbitration clauses in trusts would be enforceable, but all of trust law would potentially be displaced by contract law.[139] As *Naarden Trust* recognised, there are many ways in which trust law still differs from contract law: under trust law, the settlor generally does not have standing to enforce the trust, whereas a party to a contract can enforce the contract; the statute limitations effect often differs under contract law and trust law.[140] Sarah Worthington has espoused a proprietary view in opposition to the contractarian thesis.[141] According to her, trusts are materially different from contracts.[142] To illustrate, trusts do not come to an end merely because of death or mental incapacity on the part of the settlor or trustee, though these same grounds may end a contract.[143] So too, neither will a breach, nor agreement between the settlor and trustee to treat the trust as terminated, be sufficient grounds

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132. *See, e.g.*, Schoneberger v. Oelze, 96 P.3d 1078, 1079 (Ariz. Ct. App. 2004); Diaz v. Bukey, 125 Cal. Rptr.3d 610, 613 (Cal. Ct. App. 2011), *petition granted*, 129 Cal. Rptr. 3d 324, 257 P.3d 1129 (2011), *remanded with directions*, 148 Cal. Rptr. 3d 495, 287 P.3d 67 (2012); In re Naarden Trust, 195 Ariz. 526, 990 P.2d 1085 (Ariz. Ct. App. 1999).

133. Baker v. JE Clark & Co.,[2006] EWCA Civ. 464, ¶ 19.

134. *Id.* at ¶ 17, 21.

135. *Id.* ¶ 21.

136. Re Duke of Norfolk's Settlement Trust, [1982] Ch 61 (U.K.).

137. Gerald McCormack, *The Liability of Trustees for Gross Negligence* [1998] Conv. 100 at 111.

138. *Id.*

139. Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQUETTE L. REV. 303 (1999).

140. For example, in Singapore, the Limitation Act (Cap. 163, 1996 Rev. Ed. Sing.) provides that the limitation period for contractual claims is six years (Section 6), but there is no limitation of actions in respect of trust property (Section 22).

141. Sarah Worthington, *The Commercial Utility of the Trust Vehicle in* EXTENDING THE BOUNDARIES OF TRUST AND SIMILAR RING-FENCED FUNDS 151 (D. Hayton (ed.), Kluwer Law International, 2002). (This source has been cite checked by the National University of Singapore Faculty of Law.)

142. *Id.*

143. G.L. Greeton, *Trusts Without Equity* (2000) 49 ICLQ 599 at 617–18.

to end a trust.[144] Worthington's views are in concert with Penner's, who opines that a trust continues to exist even though a trustee is no longer personally liable.[145] A trustee's duties flow not from a contract in the form of the trust instrument because he takes legal title to property.[146]

B. Benefit Theory

Commentators have argued that the courts should enforce a trust arbitration clause based on the principles of benefit theory,[147] which is also known as conditional transfer theory[148] or deemed acquiescence theory.[149] This theory stands for the broad rule that a beneficiary who accepts the benefits from a trust is deemed to have agreed to be bound by its terms (thus rendering the donative arbitration clause an "agreement" under state arbitration statutes), or is estopped from challenging the validity of the terms of the will or trust (thus preventing the beneficiary from challenging the donative arbitration clause in the first place).[150] To put it another way, the benefit of a trust cannot be subject to partial acceptance, where only the advantages are reaped.[151] The beneficiary must accept the trust warts and all. As Lawrence Cohen and Marcus Staff put it:

> A beneficiary takes what he takes under the trust property purely by the bounty of the settlor; he is not entitled to anything as of right apart from the provisions of the trust; he must take the benefits subject to the conditions which are in the trust and abide by them.[152]

Cohen and Staff,[153] as well as David Hayton,[154] find additional support for benefit theory in Section 82(2) of the English Arbitration Act 1996, which is worded similarly to Section 6(5) of Singapore's Arbitration Act. As mentioned in Part III(A) of this article, the provision includes as a party to an arbitration agreement "any person claiming under or through a party to the agreement." A beneficiary could be said to be a party to the arbitration agreement

144. McCormack *supra* note 137.

145. J.E. Penner, *Exemptions in* BREACH OF TRUST (P. Birks and A. Pretto (eds.), Oxford: Hart Publishing, 2002).

146. *Id.*

147. Gerardo J. Bosquez-Hernández, "*Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*," IN DRET: REVISTA PARA EL ANALISIS DEL DERECHO (Barcelona, July 2008), at 12.

148. Mark S. Poker & Any S. Kiiskila, *Prevention and Resolution of Trust and Estate Controversies*, 33 AM. C. TR. EST. COUNS. L J. 262, 266 (2008).

149. Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT'L TR. & CORP. PLAN. 203 (1999). (This source has been cite checked by the National University of Singapore Faculty of Law.)

150. Robert W. Goldman, *Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment*, 41st Annual Heckerling Institute on Estate Planning, Chapter 16 (Miami: LexisNexis, University of Miami School of Law, 2007).

151. Tennant v. Sattefield, 216 S.E.2d 229, 232 (W. Va. 1975) ("The general rule with regard to acceptance of benefits under a will is that a beneficiary who accepts such benefits is bound to adopt the whole contents of that will and is estopped to challenge its validity.").

152. Greeton, *supra* note 143, at 221.

153. *Id.*

154. David Hayton, *Problems in Attaining Binding Determinations of Trust Issues by Alternative Dispute Resolution*, http://gmjones.org/pdfs/hayton-adr-paper.pdf; David Hayton, *Future Trends in International Trust Planning*, 13 J. INT'L TR. & CORP. PLAN. 55, 72 (2006).

because his interest is derived either from the settlor or the trustee, the two parties to the arbitration agreement.

There are however, several problems with benefit theory. For starters, besides the fact that words of the Act were not written specifically with trust beneficiaries in mind,[155] the theory is under-inclusive in two ways. First, benefit theory would apply only to beneficiaries who have accepted the benefits from a trust.[156] If the arbitration clause is enforced based on benefit theory, but a beneficiary chose to contest the trust, then he could still bring that action in court, outside the arbitration clause.[157] Second, the theory might not apply to trustees. Trustees are not considered to benefit from a trust; instead, they receive compensation for services rendered.[158] Therefore, benefit theory could justify a court's enforcement of an arbitration clause against a beneficiary, but a trustee would be able to litigate if he chooses to do so.[159] Moreover, benefit theory may have limits that would prevent a court from using it to enforce a trust arbitration clause. A settlor may only attach lawful conditions to the receipt of a gift from a trust.[160] There is a real prospect that a court may still refuse the enforcement of a trust arbitration clause if the court saw it as an unlawful restriction on the party, especially since the beneficiary has not expressly and voluntarily agreed to it.[161]

C. Intent Theory

Intent theory is a further justification to enforce donative arbitration clauses, which seeks to avoid the problems presented by contract theory and benefit theory.[162] Whereas benefit theory focuses on the actions of beneficiaries in accepting benefits under an instrument, Intent theory advocates a back-to-basics approach.[163] It propounds a return to the core value of trusts and estates law and focuses instead on the rights of the settlor.[164] This justification would enforce a trust arbitration clause because it resulted from a clear manifestation of the settlor's intent.[165]

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155. LAWRENCE BOO, HALSBURY'S LAWS OF SINGAPORE, VOLUME 2: ARBITRATION (2003 Reissue) at [20.038]. (This source has been cite checked by the National University of Singapore Faculty of Law.)

156. Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, OHIO ST. J. ON DISP. RESOL. 627, 649 (2011).

157. *Id.*

158. *Id.*

159. *Id.*

160. Gerardo J. Bosquez-Hernández, "*Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*," IN DRET: REVISTA PARA EL ANALISIS DEL DERECHO (Barcelona, July 2008), at 12.

161. Murphy, *supra* note 156 at 650.

162. *Id.*

163. *Id.*

164. Bosquez-Hernández, *supra* note 160, at 10.

165. *Id.*

However, intent theory may be founded upon a flawed proposition, even if one accepts the fact that, generally, trust law uses the intent of the settlor as its lodestar.[166] Trust law does not blindly adhere to the intent of the settlor; there are restrictions on the settlor's intent. Langbein has argued that trust law provides for "intent-defeating rules that restrict the settlor's autonomy,"[167] which serve an anti-dead hand policy.[168] This concern is especially pertinent in the context of trust arbitration clauses because the settlor could be said to be restricting the rights of beneficiaries to seek legal redress from the courts for several generations to come.

Furthermore, another limitation is the forced heirship rules as restrictions of the disposition.[169] Forced heirship regimes are most prevalent amongst civil law jurisdictions and Islamic countries.[170] It has been pointed out that arbitration restricts the ordinary remedies of the courts, and an arbitration clause in a trust deed has the impact ". . . of restricting the heir's rights, and is thus not binding [on] the heirs with respect to their forced heirship portions."[171]

A counter-argument that can be made in favour of the intention approach is the importance of the settlor's intent in conflicts of law. For example, Article 6 of the Hague Convention on Trusts recognises that the trust shall be governed by the law chosen by the settlor.[172] By analogy, if the settlor can choose the governing law, he ought to be able to choose arbitration as the governing method.[173] Unfortunately, these conflicting views do not make for certainty in the law.

Last, if a court adopted intent theory but not contract theory, then there is a danger that the donative arbitration clause in question would still fall outside the protection of a jurisdiction's arbitration statute, and thus disfavoured by the courts. As a result, intent theory suffers from the same limitations as benefit theory: if a court found the donative arbitration clause to be an unlawful or unreasonable restriction on beneficiaries, a court could very well refuse to enforce it.

D. "No-Contest" Clause

Some commentators have suggested that arbitration provisions can be effectively enforced under current law through a form of the no-contest clause, called a "no-contest-in-court"

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166. Peter Luxton, *Variation of Trusts: Settlor's Intentions and the Consent Principle in Saundiers v. Vautier*, 60(5) MODERN L. REV. 719 (1997); Jeffrey A. Cooper, *Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U.L. REV. 1165 (2008).

167. John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1126 (2004).

168. Bosquez-Hernández, *supra* note 160, at 11.

169. *Id.*

170. Skandia International, *Forced Heirship Questions and Answers* (17 July 2008).

171. Georg von Segesser, *Arbitrability in Estate and Trust Litigation in* PAPERS OF THE INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW (Rosalind F. Atherton ed., 2000 Kluwer Trust International). (This source has been cite checked by the National University of Singapore Faculty of Law.)

172. Donald T. Trautman, *Party Autonomy in the Proposed Hague Conference Convention for Trusts,* 21 REV. JUR. UIPR 547.

173. Gerardo J. Bosquez-Hernández, "*Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*," IN DRET: REVISTA PARA EL ANALISIS DEL DERECHO (Barcelona, July 2008), at 12.

clause.[174] This clause would penalise a party who brings an unsuccessful suit in court, but it would allow a party to bring that suit in an alternative forum without fear of consequences.[175]

However, the proposition that a no contest clause can be a substitute for trust arbitration clause misconceives the reach of the former. A typical no contest clause does not apply to all trust disputes.[176] It restricts a party's ability to contest the validity of an instrument, but it does not restrict a party's ability to sue to determine their rights under that instrument, such as the administration or interpretation of that instrument.[177] A trust arbitration clause, by contrast, can apply to all trust disputes, and not only to contests.[178] Therefore, any species of no contest clause has a much narrower application than a trust arbitration clause.[179] A trust arbitration clause can apply to all trust disputes, not merely to those that challenge the validity of the underlying instrument.[180]

Even though it is still possible to draft a suitably worded no-contest clause, where forfeiture is triggered by a challenge to the use of arbitration to resolve a particular dispute, no-contest clauses are still problematic.[181] First, no-contest clauses are by no means universally embraced, even as a general matter.[182] Indeed, courts often refuse to enforce such provisions if a party has a probable cause to bring the claim.[183] Second, no-contest clauses operate like *in terrorem* clauses. Even though the proponents of the use of no-contest clauses suggest that the utilisation of such clauses would weed out frivolous claims where the intention is to harass others and to allow disputes to go on for decades,[184] no-contest clauses are particularly suspect in the context of mandatory arbitration, because threatening to revoke a benefit under the trust through a forfeiture provision could be seen as "vitiat[][ing] the freedom of will required to

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174. Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629 (1994); Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 S.M.U.L. REV. 225 (1998); Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 239, 261 (2008); Martin D. Begleiter, *Are In Terrorem Clauses No Longer Terrifying?: If So, Can You Avoid Post Death Litigation With Pre-Death Procedures?*, 2 NAT'L ACAD. ELDER L.J. 349 (2006); Jo Ann Englehardt, *In Terrorem Inter Vivos: Terra Incognita*, 26 REAL PROP. PROB. & TR. J. 535 (1991).

175. *Id.*

176. Bosquez-Hernández, *supra* note 173.

177. Womble v. Gunter, 95 S.E.2d 219 (1956) (stating that the contests prohibited by a no-contest clause depend on the wording of the clause and the facts and circumstances of the case, but that such a clause usually would not prohibit a suit for "construction" of the terms of a will).

178. Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, OHIO ST. J. ON DISP. RESOL. 627, 658 (2011).

179. *Id.*

180. *Id.*

181. Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L. J. 118, 118–19 (2011). (This source has been cite checked by the National University of Singapore Faculty of Law.) *See supra* note 174.

182. *Id.*

183. DAVID HAYTON ET AL., UNDERHILL AND HAYTON LAW RELATING TO TRUSTS AND TRUSTEES, at para. 11.86 (18th ed. 2010). (This source has been cite checked by the National University of Singapore Faculty of Law.)

184. Katzen, *supra* note 181.

contract, and so render[ing] the [arbitration] agreement voidable."[185] Indeed, the utilisation of such a provision that, essentially, says "you must arbitrate or lose everything" leaves beneficiaries without a choice and strong arms beneficiaries into decisions they may not agree with. Third, a no-contest clause could be considered an impermissible attempt to oust the jurisdiction of the court and hence be void *ab initio*.[186] Therefore, while some commentators take the view that requiring a legatee to "forfeit her interest should she decline to respect the testator's wishes with respect to arbitration of will [or trust] contests should not discourage any truly meritorious . . . contest[, since] [s]uch a contest may still be brought,"[187] the better view appears to be that settlors should avoid trying to force beneficiaries into arbitration through use of a forfeiture clause.[188]

E. Separate Contracts With Each Trustee and Each Beneficiary

As an alternative, trust arbitration clauses could be made enforceable not through the trust *qua* contract, but through a separate contract with those parties that includes an arbitration provision.[189] An arbitration clause in such a document would certainly fall within a jurisdiction's arbitration statute, and it would therefore be enforceable.[190]

However, the use of separate contracts provides only a short-term solution.[191] While the use of separate contracts may seem an expedient measure, this fix loses effect over time.[192] Present beneficiaries will pass away, either during the life of the settlor or after his death, and new beneficiaries will enter the picture.[193] It is unclear whether future beneficiaries can be bound by such a contract signed by earlier beneficiaries—even if there is a personal representative appointed to look after the concerns of unborn beneficiaries.[194] Moreover, if a trust required that a future beneficiary sign an arbitration clause before having his rights vest, then the Rule against Perpetuities might invalidate the trust.[195] Thus, while this option may provide for an expedient alternative to the uncertainties surrounding the enforcement of trust arbitration clauses, it ultimately falls prey to uncertainty over its enforceability.

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185. Lawrence Cohen & Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT'L TR. & CORP. PLAN. 203, 221 (1999). (This source has been cite checked by the National University of Singapore Faculty of Law.)

186. HAYTON ET AL., *supra* note 183, para. 11.1.

187. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 298 (1999).

188. Cohen & Staff, *supra*, note 185, at 221.

189. Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, OHIO ST. J. ON DISP. RESOL. 627, 658 (2011).

190. *Id.*

191. *Id*.

192. *Id.*

193. *Id.*

194. *Id.* at 659.

195. Under the Rule Against Perpetuities, an interest is void if it does not vest or fail within a certain period of time; an interest is vested if it is given to a presently ascertainable person and it is not subject to a condition precedent. If a future beneficiary (even an ascertainable one) would be required to sign a contract before his rights vest, then his interest would be contingent. Thus, the Rule Against Perpetuities may void that interest if it would not vest by a particular date. JESSE DUKEMINIER ET AL., WILLS, TRUSTS AND ESTATES (8th ed. 2008).

F. Incentive in Connection With a Pre-Dispute Arbitration Agreement

Another possibility to bring about arbitration of trust disputes that has not been explored in the literature is the use of an incentive in connection with a pre-dispute arbitration agreement concluded by the trustee after the creation of the trust but before the dispute arises. This sort of arbitration would be mandatory in that the trustee would be required to seek pre-dispute arbitration agreements with other potential parties to an internal trust dispute (i.e., any actual or potential beneficiaries as well as any current or successor trustees and protectors) by virtue of a direction in the trust. However, the arbitration provision could also authorize the trustee to make an immediate payment to these parties in consideration of the agreement. While this approach is not precisely the same as the type of mandatory trust arbitration, it does (1) effectuate the intent of the settlor, at least to some degree;[196] (2) create explicit bilateral contracts that would meet any necessary form requirements; and (3) avoid concerns about vitiating the beneficiaries' consent, since it acts as a positive, rather than a negative, incentive to arbitrate.

Although this is an interesting proposition, it is problematic in that it creates an additional, unnecessary and potentially expensive hurdle for settlors to overcome before their wishes vis-à-vis arbitration can be effectuated. It may very well be that a settlor does not want to make provisions for a beneficiary if that person does not want to resolve any disputes in arbitration, and it seems contrary to established principles of trust law to require the settlor to put that condition in a document other than the trust for that condition to be given effect. This approach would also give the trustee more power to initiate arbitration than the settlor, which is again contrary to basic principles of trust law.[197] As such, this option is problematic as both a practical and jurisprudential matter.

G. The Need for Legislation

Each theory for enforcing donative arbitration clauses under current law suffers from flaws. Contract theory would bring a donative arbitration clause under the state statute, but it is over-inclusive and goes too far. There are several differences between a trust and a contract, and if a court were to determine that a trust is a contract, it would be difficult to keep the two bodies of law distinct. Of benefit theory and intent theory, intent theory has the advantage in that it would apply to trustees as well as to beneficiaries. Yet both Benefit Theory and Intent Theory are still limited by the fact that the law of trusts only enforces lawful restrictions.

No-contest clauses and the use of separate contracts offer some limited means to require certain parties to submit certain disputes to arbitration. But neither provides a comprehensive means to require all beneficiaries and fiduciaries to submit all of their disputes to arbitration. A typical no-contest clause only applies to full contests of the trust, and separate contracts may not apply to future beneficiaries. In addition, there are several problems concerning the legiti-

196. Nevertheless, some actual or potential parties could decline to enter into the agreement, even with the incentive payment.

197. DAVID HAYTON ET AL., UNDERHILL AND HAYTON LAW RELATING TO TRUSTS AND TRUSTEES, at paras. 43.1–43.2 (18th ed. 2010). (This source has been cite checked by the National University of Singapore Faculty of Law.)

macy of no-contest clauses because they function like *in terrorem* clauses. The use of an incentive in connection with a pre-dispute arbitration agreement concluded by the trustee after the creation of the trust but before the dispute arises potentially gives a trustee more power to initiate arbitration than the settlor and creates an additional and potentially expensive hurdle for settlors to overcome before their wishes vis-à-vis arbitration can be effectuated.

Therefore, these proposals and justifications for the enforcement of trust arbitration clauses only highlight the fact that their enforcement entails the balancing of competing concerns, not the least of which is the balancing of the intent of the settlor against the rights and remedies of the beneficiaries. Instead of pushing courts to adopt these theories, a better means to properly enforce these clauses would be to act legislatively through a statutory amendment.

V. Legislative Reform Efforts: A Comparison of Various Jurisdictions

Thus far, the article has argued that trust arbitration clauses may only be properly enforced through statutory amendment. The article will now seek to compare various jurisdictions' legislation permitting the arbitration of trust disputes.

I will first deal with the approach taken by various states in the United States. There are considerable problems with the legislation from the U.S. permitting the arbitration of trust disputes, and they should not be followed. Besides various flaws in their drafting, they all fail to provide for the representation of minor, unascertained, unborn and incapacitated beneficiaries—which is fundamental. The legislative reforms undertaken by Malta, Guernsey, and the Bahamas are then discussed. The legislation from the Bahamas and Guernsey could be used as a basis for Singapore because the legislation is acknowledged to be the most comprehensive thus far.[198] This is because they are the only ones that provide for procedures ensuring the representation of minor, incapacitated, unborn and unascertained beneficiaries.[199] The United Kingdom, Australia, and New Zealand have not undertaken legislative amendments at the time of writing; however, the law reform commissions of the U.K. and New Zealand are currently looking into the matter.[200] The law reform commissions of the various states in Australia have not examined the issue as of yet.

A. United States

Trusts in the U.S. are primarily governed by individual states, rather than by federal law.[201] There have been arguments put forth by commentators that the Federal Arbitration Act should govern trust disputes to achieve uniformity in the area of arbitration of trust disputes.[202]

198. Paul Buckle, *Trust Disputes and ADR*, 14 T. & T. 649, 649 (2008); Nadia J. Taylor & David Brownbill Q.C., *Arbitration of Trust Disputes: The New Statutory Regime in the Bahamas*, 18 T. & T. 358 (2012).

199. *Id.*

200. Trust Law Committee, *Arbitration of Trust Disputes* (England: Trust Law Committee, 2011); New Zealand Law Commission, Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper (Wellington: New Zealand Law Commission, 2011) at 57–64.

201. S.I. Strong, *Trust Arbitration in the United States: Recent Developments Showing Increasing Diversity as a Matter of Statutory and Common Law*, 18 T. & T. 659 (2012).

202. David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027 (2012).

However, individual courts have split as to whether state or federal arbitration laws should apply to trust arbitration.[203]

In analysing the approach to legislative reform efforts undertaken in the U.S., it is useful to distinguish between (1) states with legislation explicitly permitting arbitration of trust disputes through the inclusion of a provision in the trust deed itself; and (2) states with legislation explicitly permitting arbitration of trust disputes but without reference to provisions found in the trust deed itself. Besides the fact that none of them contain provisions for the representation of minors, unascertained, unborn and incapacitated beneficiaries, the legislation suffers from serious flaws such as unclear wording, and exemptions from trust arbitration for disputes over the validity of the trust itself.

1. States With Legislation Explicitly Permitting Arbitration of Trust Disputes Through Inclusion of a Provision in the Trust Itself

Only two U.S. states have enacted statutes recognising the validity of an arbitration clause found in a trust deed: Arizona and Florida. The legislation enacted was in part due to the attention paid to the issue by a task force of the American College of Trust and Estate Counsel (ACTEC).[204] Furthermore, these states are retirement states, with a growing population of the elderly, and there seemed to be a demand for less contentious forms of dispute resolution.[205]

a. Florida

In 2007, Florida became the first state to enforce trust arbitration clauses by statute. In that year, as part of a bill that updated various probate matters, the legislature enacted section 731.401 of the Florida Probate Code, which was based on the ACTEC Model Act:

1. A provision in a will or trust requiring the arbitration of trust disputes, other than disputes of the validity of all or part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable.
2. Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under section 44.104.[206]

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203. A number of courts appear to apply state arbitration laws, typically without discussion about the potential applicability of the FAA: Diaz v. Buckey, 195 Cal. App. 4th 315 (2011); Rachal v. Reitz, 347 S.W.3d 305, 308 (Tex. Ct. App. 2011). However, other courts apply the FAA: New South Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636, 639 (S.D. Miss. 2005); In re Blumenkrantz, 14 Misc. 3d 462, 824 N.Y.S.2d 884, 887 (Sur. Ct., Nassau Co. 2006).

204. Robert W. Goldman, *Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment*, 41st Annual Heckerling Institute on Estate Planning, Chapter 16 (Miami: LexisNexis, University of Miami School of Law, 2007).

205. Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, OHIO ST. J. ON DISP. RESOL. 627, 669 (2011).

206. Goldman, *supra* note 204 at 13.

The Florida statute includes a carve-out to challenge the validity of the trust itself. More often than not, the validity of the trust is contested on the grounds of lack of capacity, undue influence and fraud.[207] It could be argued that the genuine consent of the settlor is uncertain, and the validity of the trust document, including that of the trust arbitration clause, becomes an issue.[208] As such, the arbitration clause should not be enforced.[209] The problem with this approach is that it could frustrate the arbitration regime by allowing parties to routinely challenge the validity of the trust in court. Furthermore, it would seem disputes over the validity of trusts are prime candidates for arbitration. This is because disputes concerning the validity of trusts often centre on the capacity of the settlor or on claims of undue influence. Those disputes could bring to light embarrassing episodes in the life of the settlor or might fixate on his odd behaviour. The settlor's personal life could become fodder for gossip. In addition, the carving out of challenges to the validity of the trust itself runs afoul of the *kompetenz-kompetenz* principle, which provides that the arbitral tribunal shall have the competence to decide on its jurisdiction to hear matters.[210]

b. Arizona

Arizona was the second state to act legislatively. Section 14-10205 of the Arizona Revised Statutes was specifically enacted in 2008 to overturn *Schoneberger*.[211] The statute indicates that "[a] trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust."

Like Florida, the Arizona provision does not allow the arbitration of the validity of the trust instrument itself; that determination must be made by the court, because the statute only provides for the resolution of disputes with regard to the "administration or distribution" of the trust concerned. As mentioned, this potentially allows the arbitration regime to be frustrated. Besides this problem, it is unclear what sort of procedure could be considered "reasonable." The origin of this particular phrasing is unclear, and it remains to be seen how that standard should be applied.[212] While there have been suggestions that arbitration clearly qualifies,[213] it remains to be seen what other procedures of dispute resolution satisfy the "reasonableness" standard. This uncertainty could very well fuel litigation as litigants seek to test the limits of the law.

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207. Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L. J. 118, 122–23 (2011). (This source has been cite checked by the National University of Singapore Faculty of Law.)

208. *Id.*

209. *Id.*

210. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 40 (2009).

211. As recognised by Jones v. Fink, No. CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011).

212. Murphy, *supra* note 205, at 669.

213. *Id.*

2. States With Legislation Explicitly Permitting Arbitration of Trust Disputes but Without Reference to Provisions Found in the Trust Itself

While only two U.S. states have enacted legislation specifically addressing arbitration provisions in trusts, a far greater number of states provide for trust arbitration without making reference to arbitration provisions found in the trust itself.

a. Uniform Trust Code

The Uniform Trust Code (UTC), a model enactment, has been adopted in whole or in part in 24 U.S. states. Section 111 of the UTC indicates that "interested persons may enter into a binding non-judicial settlement agreement with respect to any matter involving a trust" so long as doing so does "not violate a material purpose of the trust and include [. . .] terms and conditions that could be properly approved by the court under this [Code] or other applicable law."[214]

The scope of arbitrable matters is quite broad, including, among other things: (a) the interpretation or construction of the terms of the trust; (b) the approval of a trustee's report or accounting; (c) discretion to a trustee to refrain from performing a particular act or the grant to a trustee or any necessary or desirable power; (d) the resignation or appointment of a trustee and the determination of a trustee's compensation; (e) transfer of a trust's principal place of administration; and (f) liability of a trustee for an action relating to the trust.[215]

As useful as section 111 of the UTC is, it fails to make clear the manner in which trust arbitration can be invoked. Indeed, the drafters of the UTC were deliberately vague when it came to identifying who could enter into non-judicial agreements. [216] They chose to simply define the term "interested person" as "persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court."[217] Consequently, the UTC provides no definitive answer to the question of whether a settlor can require non-judicial resolution of disputes arising under the trust by including an arbitration provision in the trust or whether it is only the trustee who has the power to enter into arbitration agreements at some point after the trust has been created. To some extent, only allowing trustees to enter into arbitration agreements would seem somewhat in tension with the UTC's broad approach to arbitrability, since internal trust disputes are most effectively addressed through an arbitration provision in the trust itself rather than a post-dispute agreement concluded by the trustee. While trustees could attempt to enter into individual arbitration agreements with the beneficiaries after the creation of the trust but before a dispute rises, that approach is logistically and jurisprudentially difficult, as shown earlier in Part IV(E).

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214. S.I. Strong, *Trust Arbitration in the United States: Recent Developments Showing Increasing Diversity as a Matter of Statutory and Common Law*, 18 T. & T. 659, 663 (2012).

215. UTC § 111(d).

216. G.E. Mautner & Heidi L. G. Orr, *A Brave New World: Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust and Estate Dispute Resolution Acts*, 35 ACTEC J. 159 (2009).

217. UTC § 111(a).

Other provisions in the UTC are equally unhelpful in resolving the problem. For example, section 816(23) states that a trustee may "resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution." However, this provision is ambiguous, because it can be read as suggesting either that only a trustee has the power to enter into arbitration under section 111 (since the powers listed in section 816 as devolving to trustees are a compilation of specific powers listed elsewhere) or that persons other than the trustee (such as the settlor) may have the ability to enter compel arbitration under section 111 (since the powers listed in section 816 are not said to be exclusive to the trustee).[218] This issue does not seem to have been judicially considered yet, although one factor in favour of the settlor's ability to mandate arbitration of internal trust disputes is found in the commentary to section 816, which states that "[s]ettlors wishing to encourage the use of alternate dispute resolution may draft to provide it."[219]

b. Washington and Idaho

Although the UTC constitutes a significant step forward with regard to the arbitrability of internal trust disputes, some state statutes go even further.[220] For example, Washington[221] and Idaho[222] have both enacted provisions stating that

> [t]he "matters" that may be addressed and resolved through nonjudicial procedure are broadly defined and include any issue, question, or dispute involving: (i) the determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death; (ii) the direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity; (iii) the determination of any question arising in the administration of an estate or trust or with respect to nonprobate assets or any other asset or property interest passing at death, including, without limitation, questions relating to the construction of wills, trusts, community property agreements, or other writings, a change of personal representative or trustee, or the determination of fees for a personal representative or trustee; (iv) the grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law; and (v) the amendment, reformation, or conformation of a will or trust instrument to comply with statutes and regulations of the Internal Revenue Code in order to achieve qualifications for deductions, elections, and other tax requirements.[223]

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218. Anthony Duckworth, *Forced Heirship and the Trust in* THE INTERNATIONAL TRUST 662 (John Glasson & Geraint Thomas (eds.), Oxford: Oxford University Press, 2006).

219. Commentary to Section 816, Uniform Trust Code. UTC § 816.

220. Mautner & Orr, *supra* note 216.

221. Wash. Rev. Code §§ 11.96A.010, 11.96A.030 (2012).

222. Idaho Code Ann. §§15-8-101, 15-8-103 (2011).

223. *Supra* note 216.

These statutes go beyond what the *UTC* contemplates in terms of arbitrable concerns.[224] However, the statutes of both Washington and Idaho suffer from the same problem as the *UTC*, namely ambiguity with respect to who may invoke arbitration and how this may be done.[225] Although it would again seem incongruous to permit arbitration of such a wide range of internal matters without providing an appropriate mechanism by which to invoke such proceedings, such as by way of a mandatory arbitration clause in the trust itself, no court has considered whether these statutes permit arbitration based on a trust arbitration clause.[226]

B. Guernsey

Section 63 of the Trusts (Guernsey) Law 2007 (TGL 2007) was Guernsey's response to the perceived need to render arbitration agreements in trust deeds enforceable. Section 63 reads:

> (1) Where—(a) the terms of a trust direct or authorise, or the Court so orders, that any claim against a trustee founded on breach of trust may be referred to alternative dispute resolution ("ADR"), (b) such a claim arises and, in accordance with the terms of the trust or the Court's order, is referred to ADR, and (c) the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties, the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.
>
> (2) Subsection (1) applies in respect of a beneficiary only if—(a) he was represented in the ADR proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or (b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard, and only if, in the case of a beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law. "Notice" in paragraph (b) means 14 days' notice or such other period as the person conducting the ADR proceedings may direct.
>
> (3) A person who represents a beneficiary in the ADR proceedings for the purposes of subsection (2)(a) is under a duty of care to the beneficiary.
>
> (4) For the avoidance of doubt, the ADR proceedings need not be conducted in Guernsey or in accordance with the procedural law of Guernsey.
>
> (5) In this section—"ADR" includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and "proceedings" includes oral and written proceedings.[227]

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224. Strong, *supra* note 214, at 665.

225. *See* Idaho Code Ann.§ 15-8-101(2011); Wash. Rev. Code § 11.96A.010 (2012).

226. Strong, *supra* note 214, at 665.

227. Trusts (Guernsey) Law § 63 (2007).

At the outset, it has to be acknowledged that this legislation suffers from inelegant drafting that leaves doubts as to whether it covers arbitration as an ADR mechanism. Granted, Section 63(5) states that arbitration is covered. However, Section 63(1)(c) provides that the ADR must result in a "settlement of the claim," which is then "recorded in a document signed by or on behalf of all parties" for it to be binding on all beneficiaries of the trust, including minor, unborn, unascertained beneficiaries or those under legal disability. In arbitration proceedings, there is no resulting settlement that is signed by all parties. A binding settlement signed by all the parties is a product of a successful mediation; an arbitral award is not one that is signed by all parties. What could be done, to remove this ambiguity, would be to remove the phrase "signed by or on behalf of all parties" to make it clear that arbitration is covered.

Assuming that section 63 is meant to cover arbitration, the arbitral award would be binding on all beneficiaries, including those who are minor, incapacitated or unascertained, provided that they are independently represented (whether individually or as a member of a class, or otherwise), in the ADR proceedings by someone appointed for the purpose by the court, who is under a duty of care to the representee.[228] Others can appear personally.[229] That any such person was so represented must be certified by the person conducting the ADR.[230] So the role of the court can never be ousted altogether, save where the parties are all adults.[231] Presumably, it was felt by those drafting *TGL 2007* that it would be going too far to have a situation where a provision in the trust deed appointing representatives for incapacitated, minor or unascertained beneficiaries would be upheld without the court retaining some supervisory jurisdiction.[232]

Besides some doubt as to whether section 63 covers arbitration, there are other problems with the Guernsey legislation. First, it applies only to cases involving breach of trust. This unduly limits the applicability of the provision to resolve trust disputes in general, considering that a greater proportion of trust disputes are not straightforward claims for breach.[233] This is a rather surprising approach to take, considering that an earlier draft of the provision purported to apply to "any dispute between the trustee and a beneficiary or otherwise relating to the trust or the trust property."[234] Should Singapore wish to consider the adoption of Guernsey's legislation, it should broaden the applicability of arbitration to cover not only cases involving breach of trust. Second, there is no protection from liability afforded to those representing minors, etc.[235] In fact, it is quite the reverse—the law imposes a potential liability on them, and makes no provision for their costs.[236] The imposition of a duty of care may make non-professionals

228. Trusts (Guernsey) Law § 63(3) (2007).

229. Trusts (Guernsey) Law § 63(2) (2007).

230. Trusts (Guernsey) Law § 63(2)(b) (2007).

231. Paul Buckle, *Trust Disputes and ADR*, 14 T. & T. 649, 657 (2008).

232. *Id.*

233. A quick perusal of any standard Equity and Trust treatise will reveal this. *See* DAVID HAYTON ET AL., UNDERHILL AND HAYTON LAW RELATING TO TRUSTS AND TRUSTEES (18th ed. 2010). (This source has been cite checked by the National University of Singapore Faculty of Law.).

234. Buckle, *supra*, note 231, at 654.

235. *Id.*, at 657.

236. *Id.*

less inclined to act as representatives.[237] Professionals, who may be more willing to act, will want payment.[238] However, it is not entirely clear whether the ordinary rule of costs following the event will apply, or whether it may be possible to structure a settlement in such a way that the trust fund pays any such costs.[239] Parliament may wish to make provisions for representatives to be protected from liability and should make clear where the funding for the representation of minor, unascertained, incapacitated and unborn beneficiaries should come from.

C. Malta

Maltese law, in a bid toward dispelling any doubts as to the validity or otherwise of any provisions submitting trust disputes to arbitration, tackles the subject directly in the Maltese Arbitration Act[240] both in relation to wills and in relation to trusts. For the moment, disputes relating to foundations and, particularly, private foundations, do not appear to be covered, but it is reasonable to expect that these will soon catch up and the same principles that apply to trusts and wills will also be made to apply to foundations.[241]

As a result of a four-year legislative project leading to the incorporation of the trust into Malta, no fewer than 18 laws were consequently amended, and the Arbitration Act was one of them. The result was the introduction by the Trust Law Amending Act of a new Article 15A in the Arbitration Act. It reads as follows:

> (1) It shall be lawful for a testator to insert an arbitration clause in a will. In such event such clause shall be binding on all persons claiming under such will in relation to all disputes relating to the interpretation of such will, including any claim that such will is not valid.
>
> (2) It shall be lawful for a settlor of a trust to insert an arbitration clause in a deed of trust and such clause shall be binding on all trustees, protectors and any beneficiaries under the trust in relation to matters arising under or in relation to the trust.
>
> (3) In the cases referred to in the preceding subarticles, the right of a party to seek directions of the Court of voluntary jurisdiction in terms of the Trusts and Trustees Act shall not be limited by any such clause and notwithstanding the provisions of this Act, the said Court shall not be bound to stay proceedings in terms of article 15(3) [of the *Maltese Arbitration Act*] or otherwise, but shall enjoy a discretion to do so until such time as it determines that the matter is of a contentious nature, in which case it shall stay the proceedings and shall refer the parties to arbitration.[242]

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237. *Id.*

238. *Id.*

239. *Id.*

240. Laws of Malta CAP. 387.

241. Anthony Cremona, *Successful Arbitration of Internal Trust Disputes the Maltese Way*, 18 T. & T. 363, 367 (2012).

242. Introduced by Article 109 of Act XIII of 2004.

The above provision is aimed at dispelling any doubts about the possibility of the settlor requiring the mandatory subjection of all trust disputes that may arise to arbitration, even though the beneficiaries are not a party to such "agreement." In this way, concerns about whether or not beneficiaries can be bound by such a decision do not arise, because the law regulates this expressly. In fact, the provision specifically provides that "such clause shall be binding" on any beneficiaries, amongst others, in relation to matters arising under or in relation to the trust.

The fact that the legislature permitted arbitration of trust disputes while preserving the power of a party to seek directions from the competent court is also noteworthy. The idea behind arbitration was that it would serve as a means of dispute resolution, and therefore the non-contentious recourse to the courts for directions should not be affected. The court, nonetheless, still enjoys discretion to stay proceedings until such time as it determines that the matter is of a contentious nature, in which case it is then obliged to stay proceedings and must refer the parties to arbitration.

The main problem with this piece of legislation is that it fails to provide for a mechanism as in litigation that allows for unborn, minor and incapacitated beneficiaries to be represented for the safeguarding of their interests.

D. The Bahamas

The Bahamas' approach to legislative reform has been one of deeming a trust arbitration clause to be an arbitration agreement for the purposes of the Bahamas Arbitration Act 1999. Section 91A of its Trustees Act provides:

> (1) The object of this section is to enable any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument.
>
> (2) Where a written trust instrument provides that any dispute or administration question arising between any of the parties in relation to the trust shall be submitted to arbitration ('a trust arbitration') that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.[243]

243. Bahamas Trustees Act § 91A.

The legislation envisages that all trust disputes will be susceptible to arbitration. Like other arbitral awards, one disposing of a trust dispute will be enforceable under the Bahamas Arbitration Act, allowing a party to seek a stay in instances in which another party attempts to bring proceedings before the courts.[244] The legislation also foresees the arbitral tribunal being vested with all the powers of the court in administration proceedings.[245]

As regards the issue of representation of minors, incapacitated, unborn or unascertained beneficiaries; the legislation empowers the arbitral tribunal to appoint litigation friends to represent the interests of these parties.[246] The arbitral tribunal has the same powers to appoint persons to represent the interests if any person or class as the court has under the relevant Rules of the Supreme Court.[247] In this regard, the Guernsey legislation differs from that of the Bahamas because Guernsey reserves the appointment of representatives to the court. This has the advantages of tapping on the court's expertise in the appointment of representatives under the Rules of Court, but could it potentially increase costs.

The Bahamas legislation is of wider applicability compared to that of Guernsey, because the Bahamas allows for the arbitration of all trust disputes. However, it is not entirely clear from the wording of the Bahamas legislation whether a duty of care is owed by representatives, and who shall bear the cost of such representation. Should Parliament wish to adopt the legislation from the Bahamas, it should make provisions for the financing and consider whether representatives ought to be protected from liability.

VI. Conclusion

It will be difficult to overcome the fundamental dichotomy between the world of trusts based on unilateral action and that of arbitration which requires a contractual agreement. Given the precedents, I am doubtful whether the legal constructs employed to try to bridge the gap will effectively resist judicial scrutiny.[248] For arbitration to become an effective tool in the trust practitioner's dispute resolution toolbox, it will take legislative support admitting arbitration clauses in testamentary dispositions, like the ones found in jurisdictions such as Guernsey and the Bahamas. In order to stay at the forefront of arbitration and the global race for private wealth, policy makers in Singapore might wish to effect the necessary changes to its legislation.

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244. Bahamas Arbitration Act § 9(1):

> A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

See Nadia J. Taylor & David Brownbill QC, *Arbitration of Trust Disputes: The New Statutory Regime in the Bahamas*, 18 T. & T. 358, 360 (2012).

245. Bahamas Trustees Act § 91B(2).

246. Bahamas Trustees Act § 91B(7).

247. Bahamas Trustees Act § 91B(3).

248. Settlors and trustees who nevertheless wish to submit trust disputes to arbitration are well advised to have all known beneficiaries acknowledge in writing their consent to the terms of the trust and the arbitration provision contained in the deed, before any disputes regarding the trust have emerged.

There is of course, the associated cost—beneficiaries, who are compelled to arbitrate, would be forfeiting their right to litigate. In addition, there are problems with enforcing trust arbitral awards overseas under the New York Convention. There is a danger, however, that major trust jurisdictions may make such legislative changes before Singapore does. This, of course, would erode the standing of Singapore as one of Asia's major wealth management centres. In this regard, Singapore could potentially adopt the legislation from Malta, Guernsey, or the Bahamas with suitable modifications made as proposed in this article. Then we might see, contrary to all expectations, that East meets West or, as Kipling put it in the first and last stanza of his ballad:

> *OH, East is East, and West is West, and never the twain shall meet,*
>
> *Till Earth and Sky stand presently at God's great Judgment Seat;*
>
> *But there is neither East nor West, Border, nor Breed, nor Birth,*
>
> *When two strong men stand face to face, tho' they come from the ends of the earth!*

Landlocked Countries and the Law of the Sea: Economic and Human Development Concerns

Benjamin R. Hutchinson*

I. Introduction

The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries (LLDCs), and Small Island Developing States asserts that there are 31 LLDCs on the planet.[1] Though efforts have been made at an international level to secure maritime access for these states, notably through Part X (Arts. 124–132) of the current United Nations Convention on the Law of the Sea (UNCLOS),[2] the reality of implementing such measures still presents difficult problems.[3] Article 125(1) of UNCLOS provides that

> Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.[4]

Article 125(2) informs upon this principle by asserting that "[t]he terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements."[5]

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1. UNOHRLLS.ORG (2014), http://unohrlls.org/meetings-conferences-and-special-events/landlocked-developing-countries-facts-and-figures-unctad-2006/; *see also* Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries, Executive Summary, United Nations Development, Trade and Human Development Unit, at 3, UNOHRLLS.ORG (2007), http://www.unohrlls.org/UserFiles/File/LLDC%20Documents/MTR/Executive%20summary.pdf (Executive Summary) ("[L]andlocked developing countries are among the poorest countries in the world: out of 31 such countries, 16 are classified as least developed.").

2. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994). http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (UNCLOS). Note that the United States has not signed or ratified the Convention. *See* Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, at 8, UN.ORG (18 September 2013), http://www.un.org/depts/los/reference_files/status2010.pdf.

3. *See* Global Framework for Transit Transport Cooperation Between Land-Locked and Transit Developing Countries and the Donor Community, United Nations, TD/B/42(1)/11-TD/B/LDC/AC.1/7, ¶ 1, http://www.un.org/special-rep/ohrlls/lldc/Pages%20from%20G9552680.pdf (Global Framework) ("[The] particular needs and problems of land-locked and transit developing countries have been a subject of discussions in various international fora for many years now. In spite of several initiatives by these countries, both at the national and the international level, and by the international community to overcome these particular problems, the challenges that these countries still face continue to be formidable.").

4. UNCLOS, *supra* note 2, art. 125, ¶ 1.

5. *Id.*, ¶ 2.

* **B.A. in English from Reed College and J.D. from the University of Maine School of Law. Currently, the author manages a solo practice in Maine and is also licensed in New York State. He wishes to thank Professor Charles H. Norchi of the University of Maine School of Law for helping to facilitate this research.**

These localized bilateral, subregional, and regional agreements made between landlocked states and transit coastal states, while given theoretical support by UNCLOS, are on a practical level still subject to the predispositions and capacities of the states entering into contract.[6] While transit agreements between various individual land-locked countries and their adjacent coastal states may be similar to one another, there is no minimum standard for such agreements, although they are subject to "mutual accord."[7] Because the negotiating power of all states is dependent in part upon the degree of economic power exercisable by an effective government, some developing landlocked countries are at an even further disadvantage than that presented by mere geography.[8] The reality creates a difficult predicament[9] for many LLDCs: with only minimal or ineffective access to ports and maritime shipping routes, they may lack the economic capacity to negotiate agreements by which to make greater and effective access to coastal resources possible.[10] Though LLDCs had a distinct voice during the drafting of UNCLOS and made strides toward gaining an "equitable" stake in coastal resources,[11] there is still much to be done to establish and strengthen the means by which they are able to gain access to the sea. For instance, the United Nations comments:

> Land-locked and transit States have taken a number of initiatives to coordinate transit transport operations as an integral part of formal bilateral and subregional transit agreements or ad hoc consultative arrangements. The implementation of these coordination arrangements, however, remains generally weak because of the lack of effective monitoring and enforcement mechanisms.[12]

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6. *See* Kishor Uprety, *Right of Access to the Sea of Land-Locked States: Retrospect and Prospect for Development*, 1 J. INT'L LEGAL STUD. 21, 67 (1995) (Right of Access).

7. *Id.*

8. *See, e.g.*, UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA [UNECA], ASSESSING REGIONAL INTEGRATION IN AFRICA (IV), at 241, U.N. Sales No. E.10.II.K.2 (2010), http://www.uneca.org/sites/default/files/publications/aria4full.pdf (stating that for many of the least developed landlocked countries, "research finds that, on average, transport costs . . . are as high as 77 per cent of the value of exports").

9. *See, e.g.*, Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975, 987 (2000) ("[S]maller economies rely more heavily on external trade than do larger economies, in part to compensate for problems of scale, such as a narrow range of national resources and the absence of certain types of production owing to the small size of the market. The size and strength of the market thus both restrict the range of consumer choices which smaller economies can independently satisfy, and hamper their efforts to industrialize, expand, and compete in the global export marketplace.").

10. *See, e.g.,* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 18–19 (2004 Barnes and Noble, Inc.) (SMITH). Studies by the United Nations Conference on Trade and Development (UNCTAD) suggest that "more than 80% of the world freight is transported by sea." *See also* World Bank, Ports and Water Transport, WORLDBANK.ORG (2011), http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTTRANSPORT/EXTPRAL/0,,menuPK:338600~pagePK:149018~piPK:149093~theSitePK:338594,00. html.

11. S. C. VASCIANNIE, LAND-LOCKED AND GEOGRAPHICALLY DISADVANTAGED STATES IN THE INTERNATIONAL LAW OF THE SEA 218 (Professor Ian Brownlie ed. 1990) (VASCIANNIE); *see also* UNCLOS, *supra* note 2, art. 69 ("Land-locked States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region . . . [t]he terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements . . . "); *id.,* art. 70 ("The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account the relevant economic and geographical circumstances of all the States concerned . . .").

12. Global Framework, *supra* note 3, ¶ 4.

Scholarship also suggests that while "it must be admitted that with the signing of the UNCLOS III, an important phase of international negotiations has been completed," in the context of LLDCs, "the crucial phase—that of application of the few novel legal concepts introduced by the Convention—still remains."[13] By summarizing and analyzing the transit regimes and particular economic needs of selected landlocked countries, this article explores the options for creating a uniform minimum standard transit regime; thus ensuring that the principles behind Part X of UNCLOS are permitted to augment, without unnecessary restriction, the rights and capacities of all land-locked states. In Part II, this article gives a general background of the history and importance of sea access for landlocked states, and highlights some of the difficulties inherent to the geographic status of landlockedness. Part III examines the transit regimes and overall economic situations of selected LLDCs—namely, Mongolia, Paraguay and Bolivia, and landlocked countries in Africa. Part IV contains a critical analysis of the intersection between the international law of the sea and transit regimes for LLDCs. Part V concludes by contemplating the prospect of establishing more efficient and reliable transit mechanisms for LLDCs as the 21st century continues.

II. Historical Background: Economic Development and Human Development Concerns

Many scholars trace the origins of modern international law to the writings of Hugo Grotius and, more specifically, to his essay *Mare Liberum* (*Freedom of the Seas*) first published in 1608.[14] In many respects, the law of the sea predates the concept of human rights law. As stated by one scholar,

> [t]here are ancient foundations for human rights law, both international and municipal. The natural law environment in which Grotius worked was itself more hospitable to the idea of governmental obligations to individuals than the state-centered positivism that succeeded it. But for those who regard as seminal events the French Declaration of the Rights of Man and the American Bill of Rights, even municipal human rights law is "younger" than the modern law of the sea, and international human rights law younger still.[15]

In spite of rapid developments in other areas of law and science, the past 200 years have contributed relatively little to the development of some landlocked countries.[16] Many of the issues faced centuries ago by geographically challenged areas are still present today.[17] In *An Inquiry into the Nature and Causes of the Wealth of Nations*,[18] first published in 1776, Adam Smith iden-

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13. Right of Access, *supra* note 6, at 82.

14. Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 399, 399 (1997) (Oxman); *see* HUGO GROTIUS, THE FREEDOM OF THE SEAS (1608), http://files.libertyfund.org/files/552/Grotius_0049_EBk_v6.0.pdf.

15. Oxman, *supra* note 14, at 399; *see* Declaration of the Rights of Man and Citizen, French National Assembly, HRCR.ORG (27 August 1789), http://www.hrcr.org/docs/frenchdec.html; *see also* U.S. CONST. amend. I-X.

16. Michael J. Faye et al, *The Challenges Facing Landlocked Developing Countries*, 5 J. HUM. DEV. 31, 31–32 (2004) (Faye).

17. *Id.*

18. SMITH, *supra* note 10.

tified the difficulties inherent in transporting resources over great distances on land.[19] As restated by more recent scholarship, "[h]igh transportation costs typically place landlocked countries at a distinct disadvantage relative to their coastal neighbors when competing in global markets," in part because they must contend with "dependence on passage through a sovereign transit country [for] access [to] international shipping markets."[20] While this dependence often finds modern manifestation in roads and railways as well, rivers were the primary mode of transit when Smith was writing, and he addressed his concept of power politics accordingly:

> The commerce besides which any nation can carry on by means of a river which does not break itself into any great number of branches or canals, and which runs into another territory before it reaches the sea, can never be very considerable; because it is always in the power of the nations who possess that other territory to obstruct the communication between the upper country and the sea.[21]

Similarly, transport over any great distance on land, even within the territory of a single country, entails considerable rigors when compared to transport by sea. Smith stated:

> As by means of water carriage a more extensive market is opened to every sort of industry than what land carriage alone can afford it, so it is upon the sea coast, and along the banks of navigable rivers, that industry of every kind begins to subdivide and improve itself, and it is frequently not till a long time after that those improvements extend themselves to the inland part of the country. . . . Were there no other communication between . . . two places . . . but for land carriage. . . . There could be little or no commerce of any kind between the distant parts of the world.[22]

Grotius addressed similar and pertinent concepts in his work *De Jure Belli Ac Pacis* (*On the Law of War and Peace*), and notably, in that work, also mentioned the freedom of land transit (which is not thought of as a customary right under current international law):[23]

> Lands, rivers and any part of the sea that has become subject to the ownership of a people, ought to be open to those who, for legitimate reasons, have

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19. *Id.* at 18–19.

20. Faye, *supra* note 16, at 32.

21. SMITH, *supra* note 10, at 18–19.

22. *Id.* at 16–17. Though it is a bit dated, another passage by Smith still reveals fundamental truths about the differences between carriage of goods by land and by sea: "Six or eight men, therefore, by the help of water carriage, can carry and bring back in the same time the same quantity of goods between London and Edinburgh, as fifty broad wheeled wagons, attended by a hundred men, and drawn by four hundred horses." *Id.* at 16.

23. HUGO GROTIUS, DE JURE BELLI AC PACIS, BK. II, CH. II, S. III, TRANS. IN BROWN (ED.) CLASSICS OF INTERNATIONAL LAW (Francis W. Kelsey et al. eds., James Brown Scott trans., 1925) (DE JURE BELLI AC PACIS); *cf.* Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT'L L. 569, 582 (2010)(Posner & Sykes) (stating that modern international law does not recognize a right of free passage over land—presumably outside of the context of landlocked states and UNCLOS).

> need to cross over them; as, for instance, if a people . . . desires to carry out commerce with a distant people.[24]

Reflecting the great importance of sea carriage to all nations and peoples, historical efforts at codifying and developing the international law of the sea have been numerous:

> The International Maritime Conference to define the rules of the road at sea met at Washington in 1889. International conferences on maritime law were held in Brussels in 1905, 1909, 1910, 1922 and 1926, and on safety of life at sea at London in 1914 and 1929.[25]

Though ultimately insufficient, the Barcelona Convention[26] of 1921 also lays important groundwork for establishing a minimum standard for international freedom of transit,[27] and "[b]etween the two World Wars, a series of important agreements were added to the Barcelona Convention . . . [including] the Statute on the Free Navigation of International Waterways, . . . and the Geneva Convention on the International Regime of Maritime Ports."[28] A Committee of Experts for the Progressive Codification of International Law, appointed by the League of Nations, also met in Geneva in 1925 and 1926 to discuss such matters as "the law of the territorial sea . . . [the] legal status of Government ships . . . [the] suppression of piracy . . . [the] rules regarding the exploitation of the products of the sea . . . [and] [t]erritorial waters."[29] These efforts by the Committee were an indication of the trials ahead for members of the UN during the three Law of the Sea Conferences held between 1958 and 1982:[30] an initial report by the Committee to the League of Nations stated that "most Governments have not given any detailed expression of their views as to the provisions which might be inserted in an international convention to solve the various questions raised . . . "[31] The International Convention on Load Lines (pertaining to the subject of overloading vessels and the dangers therein) was

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24. DE JURE BELLI AC PACIS, at 196–97. *See also* EMMERICH DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LOI NATURELLE APPLIQUÉS À LA CONDUITE AUX AFFAIRES DE NATIONS ET DES SOUVERAINS, at 150–51, TRANS. IN BROWN (ED.) CLASSICS OF INTERNATIONAL LAW, 1916 (discussing the right of passage over foreign domain as falling within the category of "rights which remain to all nations.").

25. Historical Survey of the Development of International Law and its Codification, pt. I.A U.N. Doc. A/AC.10/5 (April 19, 1947), *reprinted in* 41 AM. J. INT'L L. 29, 34 (Supp. 1947) (AJIL Supplement).

26. International Convention Concerning the Regime of Navigable Waterways of International Concern, Apr. 20, 1921, H.K. DEP'T OF JUSTICE BILINGUAL LAWS INFO. SYS., http://www.legislation.gov.hk/doc/multi_904v1.pdf_(last visited February 14, 2014); *see* AJIL Supplement, *supra* note 25, at 56 ("The Convention and Statute on Freedom of Transit, the Convention and Statute on Waterways of International Concern, and the Declaration recognizing the Right to a Flag of States having no Seacoast, were adopted by the Barcelona Conference on 20 April 1921.").

27. Kishor Uprety, The World Bank, The Transit Regime for Landlocked States 49–50 (2006), http://www.scribd.com/WorldBankPublications/d/16059990-The-Transit-Regime-for-Landlocked-States-International-Law-and-Development-Perspectives.

28. Right of Access, *supra* note 6, at 28 n.29.

29. AJIL Supplement, *supra* note 25, at 68.

30. *See* Tulio Treves, *1958 Geneva Conventions on the Law of the Sea*, LEGAL.UN.ORG (2008), http://legal.un.org/avl/ha/gclos/gclos.html (Treves).

31. AJIL Supplement, *supra* note 25, at 74 (italics omitted).

also adopted at London in 1930, then revisited in 1966, when it was adopted by the International Maritime Organization (IMO).[32]

The first U.N. Convention on the Law of the Sea was held in Geneva in 1958, and the second was held in Geneva in 1960.[33] The Convention on Transit Trade of Land-Locked States (CTTLLS),[34] adopted by the U.N. Conference on Transit Trade of Land-locked Countries held at U.N. headquarters in New York in 1965, further worked to clarify the rights of land-locked countries under the Geneva Conventions.[35] It is of note that many, but not all of the rights of landlocked countries asserted in the 1965 CTTLLS are reflected in the third and current version of UNCLOS.[36]

International conventions pertaining to "the movement of goods, people and vehicles across international borders" are also numerous,[37] and more recently, the specific challenges

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32. International Maritime Organization [IMO], *International Convention on Load Lines*, IMO.ORG, (last visited February 14, 2014) (stating, "It has long been recognized that limitations on the draught to which a ship may be loaded make a significant contribution to her safety. These limits are given in the form of freeboards, which constitute, besides external weathertight and watertight integrity, the main objective of the Convention."); *see also* U.N. Conference on Trade and Development, New York, U.S., August 24–26, 1999, *Policies and Actions Taken By Individual Countries, and by International Organizations to Improve Transit Transport Systems*, ¶ 53, U.N. DOC. TD/B/LDC/AC.1/14 (June 23, 1999) (Policies), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/522/71/PDF/G9952271.pdf?OpenElement ("[The] IMO is fully aware of the difficulties of landlocked developing countries and strives to involve as many landlocked developing countries as possible in its technical cooperation activities.").

33. Treves, *supra* note 30. For an illustration of some of the progress on behalf of landlocked states in between the earlier versions of the convention and UNCLOS III, *see also* VASCIANNIE, *supra* note 11, at 187 (stating that the earlier versions of UNCLOS "failed to specify in definite terms whether . . . States Parties were legally bound to provide access for their land-locked neighbors, or whether they only had a moral obligation to do so").

34. Convention on Transit Trade for Landlocked States, July 8, 1965, 1967 U.N.T.S No. 8641, 42, http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=150100&file_id=200358 (CTTLLS) (indicating that signatories include Bolivia, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Lesotho, Malawi, Mali, Mongolia, Paraguay, Mali, Niger, Nigeria, Paraguay, Rwanda, Senegal, Sudan, Swaziland, Uganda, and Zambia).

35. *Id.* (commenting on how Principle I of the CTTLLS states that "[t]he recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development); *see also id*. at 44 (commenting how Principle IV states, "[i]n order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods. . . . Goods in transit should not be subject to any customs duty . . . [and] [m]eans of transport in transit should not be subject to special taxes or charges higher than those levied for the use of means of transport of the transit country; *see also id*. at 46 (discussing how Principle V states that, "[t]he State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind."); *see also id.* (discussing how Principle VI states that "[i]n order to accelerate . . . a universal approach to the solution of the . . . problems of trade and development of land-locked countries . . . the conclusion of regional and other international agreements . . . should be encouraged by all States").

36. *Compare* UNCLOS, *supra* note 2, art. 124, with CTTLLS, *supra* note 34, art. 1, at 47–48; *also compare* UNCLOS, *supra* note 2, art. 125, with CTTLLS, *supra* note 34, art. 2, at 49–50; *also compare* UNCLOS, *supra* note 2, art. 127, with CTTLLS, *supra* note 34, art. 3, at 50; *also compare* UNCLOS, *supra* note 2, art. 128, with CTTLLS Art. 8, at 54; *also compare* UNCLOS, *supra* note 2, art. 132, with CTTLLS, *supra* note 34, art. 9, at 54.

37. *See* Executive Summary, *supra* note 1, at 68 (listing all of the conventions from 1956 to 1982 that pertain to this movement); see *also* Posner & Sykes, *supra* note 23, at 594.

facing landlocked countries were addressed by an International Ministerial Conference on Transit Transport Cooperation, held at Almaty, Kazakhstan, from August 25 to 29 in 2003.[38] Perhaps preceding the Almaty Conference in some ways was a UN Resolution from 1998, which also addressed the problems facing landlocked states, and among other things, recognized that a "lack of territorial access to the sea, aggravated by remoteness and isolation from world markets, and prohibitive transit costs and risks impose[s] serious constraints on the overall socio-economic development efforts of the landlocked developing countries."[39] The gathering in Almaty was attended by representatives from 82 Member States of the U.N. as well as 24 international organizations.[40] At its conclusion, the conference adopted the Almaty Ministerial Declaration and the Almaty Programme of Action, the latter of which was created as a global framework to develop "efficient transit transport systems in landlocked and transit developing countries."[41] A ten-year comprehensive review of the Almaty Programme is scheduled for 2014,[42] and the potential outcomes of such are further discussed in Part IV of this article.

While UNCLOS is not typically thought of as a human rights proclamation, it is a widely ratified global agreement by which parties accept binding arbitration and adjudication of disputes that arise under its auspices.[43] As such, it does espouse certain minimum standards of equality among states and, by extension, the citizens of those states. Yet this is certainly not to say that the size and resource potential of the maritime zones acquired by some of the "richest industrial states and the most industrialized of the developing countries" is the equivalent of the

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38. *See The Development of Trade Transit Corridors in Africa's Landlocked Countries*, Africa Trade Policy Center, UNECA.ORG, 2 (2011), http://www.uneca.org/sites/default/files/page_attachments/atf2011_development_of_trade_transit_corridors_in_african_landlocked_countries.pdf (Africa Trade Forum); *see also United Nations General Assembly, Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries*, UN-DOCUMENTS.NET (2003) http://www.un-documents.net/almaty-p.htm (Almaty Programme).

39. *See* G.A. Res. 52/183, ¶ 2, U.N. Doc. A/RES/52/183 (Feb. 4, 1998) (discussing the importance of "[keeping] under constant review the evolution of transit transport infrastructure facilities, institutions and services [that] monitor the implementation of agreed measures.").

40. U.N. Secretary General, *Outcome of the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation: Rep. of the Secretary-General*, UNITED NATIONS, A/58/388, 2 (2003), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/531/02/PDF/N0353102.pdf?OpenElement (Almaty Outcome).

41. *Id.* (outlining how The Almaty Programme aims to: (1) secure access to and from the sea by all means of transport for landlocked developing countries according to applicable rules of international laws; (2) reduce costs and improve services so as to increase the comprehensiveness of their exports; (3) reduce the delivered costs of imports; (4) address problems of delay and uncertainties in trade routes; (5) develop adequate national networks; (6) reduce loss, damage and deterioration en route; (7) open the way for export expansion; and (8) improve safety of road transport and security of people along the transport corridors); *see also id.* at 2–3 (discussing how, to achieve its given objectives, the Almaty Programme highlighted five priority areas for landlocked and transit states, including: (1) review of transport regulatory frameworks and establishment of regional transport corridors; (2) development of multimodal networks (rail, road, air, and pipeline infrastructures); (3) implementation of international conventions and instruments that facilitate transit trade (including the WTO); (4) international community assistance in providing technical support, facilitating foreign direct investment (FDI), and increasing official development assistance; (5) improvement of the implementation of transit instruments and comprehensive review such implementation); *see generally* Almaty Programme, *supra* note 38.

42. *See* G.A. Res. 66/214, ¶ 22, U.N. Doc. A/RES/66/214 (2011) (Specific Actions).

43. Oxman, *supra* note 14, at 401.

zones acquired by some of the poorest landlocked countries.[44] In reality, a number of landlocked states do not have much of a right to coastal resources.[45] According to some scholars, UNCLOS "completely ignores issues of fairness."[46] Others take a similar approach, acknowledging that:

> the allocation of ocean resources resulting from extended coastal state jurisdiction cannot be squared with the rhetoric of distributive justice . . . . Landlocked countries, most of which are not prosperous, get no allocation. As among coastal states, both area and, more important, resources are very unevenly distributed.[47]

UNCLOS grants some access for landlocked states to the fisheries in the exclusive economic zones (EEZs) of adjacent coastal states, but arguably it "amounts to little more than an apparent priority over third states with regard to . . . access to an undetermined part of a surplus of changing size calculated by the coastal state."[48] As such, UNCLOS does not restrain the ability of the coastal state to distribute resources to its own fishermen or restrain the influx of foreign capital and labor from participating in what is considered the fishery of the coastal state.[49] As recent scholarship states,

> the particular bundles of jurisdictional rights in the different zones reflect a trade-off between the benefits of conferring regulatory authority on a single state—which thus incurs the costs and receives the residual benefits of regulation—and the risk that, by granting a monopoly to a coastal state, the state will exclude other states or otherwise interfere with their use of the sea.[50]

Though UNCLOS does try to redistribute coastal resources to poorer and landlocked nations, it has been argued that "it relies too much on inefficient restrictions on market activity and not enough on cash transfers; [and] where it does rely on cash transfers, it does little to ensure that the cash goes to the poorest nations."[51] Similarly, the position stated by the International Court of Justice in the *North Sea Continental Shelf Cases* in 1969, that landlocked states have "no interest" in the distribution of the continental shelf,[52] has not been derogated from by Part X of UNCLOS.[53]

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44. *Id*. at 411.

45. Posner & Sykes, *supra* note 23, at 587.

46. *Id*. at 596.

47. Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 A.J.I.L. 830, 834 n.22 (2006).

48. Oxman, *supra* note 14, at 413.

49. *Id.* at 414.

50. Posner & Sykes, *supra* note 23, at 596.

51. *Id*.

52. *See* North Sea Continental Shelf Cases (F.R. Ger. v. Den.; F.R. Ger. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20); *see also* Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and What Is to Be Done About It)*, 42 TEX. INT'L L.J. 241, 258 (2007).

53. *See* UNCLOS, *supra* note 2, pt. X (making no reference to the rights of landlocked states to the continental shelf).

Another factor which cannot be overlooked in any fairness analysis is that many current political boundaries in Africa were created by European powers during the Berlin Conference of 1884–1885, whereas trade between Africans had endured for centuries beforehand.[54] It need hardly be mentioned that the people living in landlocked areas in Africa were not consulted about their preferences or thoughts on rights of sea access during a Conference at which they were not present. On a similar note, in South America, for instance, some claim that Bolivia lost its coastline to Chile as the result of an "unjust war."[55]

As previously mentioned, many LLDCs face significant burdens in their efforts to reach the sea by means of land transit. International law does not recognize a customary right of innocent passage over land,[56] and as a result, certain types of illicit passage often emerge. Piecemeal smuggling is sometimes protected by illegal frontier agreements and garners the support of communal authorities in towns that depend upon the trafficking.[57] Smuggling also poses a threat to transit and to customs officials, who are often confronted and sometimes defeated by armed traffickers.[58] In general, even valid and politically supported international transit agreements are routinely undermined by the activities of frontier staff:

> [P]etty corruption involving illegal and undocumented payments is found among frontier staff at all levels. It is simple for officials to turn the regulations to their advantage, and if no payment is made they can deliberately delay operations or apply any measure to the letter, thus making any border crossing a challenge.[59]

In a broader sense:

> LLDCs are often at the mercy of the bureaucracy, customs procedures and the quality of the services and infrastructure of their neighbouring transit countries. Landlocked countries incur transit charges paid to transit countries for using their facilities and services. These include port charges, road tolls, forwarding fees, customs duties and transit quota restrictions. For example, on certain transport routes in Africa there are an unjustifiably high number of road blocks and check points, causing delays and inflating transport costs. These barriers are also a violation of existing international con-

54. Theophilus Fuseini Maranga, *The Colonial Legacy and the African Common Market: Problems and Challenges Facing the African Economic Community*, 10 HARV. BLACKLETTER J. 105, 113–14 (1993) (Maranga).

55. *See* MARTIN IRA GLASSNER, ACCESS TO THE SEA FOR DEVELOPING LAND-LOCKED STATES 105 (1970) (GLASSNER).

56. Posner & Sykes, *supra* note 23, at 582.

57. René Peña Castellón, *Improvement of Transit Systems in Latin America*, Trade and Development Board, UNCTAD/LDC/2003/6, UNCTAD.ORG, 31 (2003), http://unctad.org/en/docs/ldc20036_en.pdf (Improvement in Latin America).

58. *Id.*

59. *Id*. at 30.

> ventions as well as bilateral and regional cooperation agreements promoting the free flow of transit goods.[60]

As can be seen, the implementation of legitimate transit agreements is sometimes complicated by "various protectionist measures imposed by Governments, as well as overlapping customs and transit documents," and there is an "urgent need to harmonize and unify . . . [such] documents."[61] To summarize, "[l]andlocked countries are completely dependent on their transit neighbours' infrastructure to transport their goods to port. This infrastructure can be weak for many reasons, including lack of resources, mis-governance, conflict and natural disasters."[62] As each landlocked country has different coastal neighbors, each is impacted to a varying degree by the stability and relative development of its neighbors.

For instance, the position of landlocked countries in Europe is more fortunate (and for that reason, for purposes of this article, mentioned only to create a contrast with the LLDCs of Asia, South America, and Africa). In Europe,

> only Luxembourg and Liechtenstein are truly landlocked. Luxembourg borders on Belgium and access is through the Belgian port of Antwerp. Liechtenstein uses the Swiss highway system. Switzerland is only half landlocked. The Swiss transit rights are guaranteed through Italy and Germany. Basel, the major industrial city of Switzerland, is on the River Rhine and heavy cargo barges move straight through, via Germany, to Rotterdam, the Dutch port on the North Sea. Austria, Hungary and the former Czechoslovakia use the River Danube as their major arterial for heavy cargo. Armenia, because of hostilities between Russia and Georgia in August 2008, now uses the road link through Turkey.[63]

There are a number of guiding principles for transit agreements, but their application may be inconsistent. In general, transit agreements are carved by an economically stronger nation through the territory a relatively weaker nation,[64] but there are exceptions,[65] and prior colonial arrangements do play a factor in some cases.[66] Another rule of transit treaties, once signed, is that they are in perpetuity (unless otherwise indicated), and the "extra sovereign rights" of the transiting country, during national emergency in that country or political instability in the host country, can be invoked to seize the appropriate transit land, rivers and port infrastructure of

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60. Executive Summary, *supra* note 1, at 5; *Cf.* UNCLOS, *supra* note 2, art. 127(1) (stating that "[t]raffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic."); *see also id.* at 5 (revealing how the implication of some of the statements made in Executive Summary and quoted in the text, is that oftentimes the extraneous charges faced by LLDCs during transit may nullify the benefits conceded to them under UNCLOS art. 127(1)).

61. Policies, *supra* note 32, ¶ 12.

62. Faye, *supra* note 16, at 43.

63. *Snapshots of Some Transit Agreements*, DAILY STAR (Sept. 4, 2011) (Snapshots).

64. *Id.* (stating the examples of the U.S. over Panama, Singapore over Indonesia, and Ethiopia over Eritrea).

65. *Id.* (stating the exceptions of Bolivia over Peru, and Paraguay over Argentina).

66. *Id.* (stating that with the exception of Ethiopia, landlocked countries in Africa had their transit rights negotiated by former colonizing powers).

the host country, while the host country has no legal recourse.[67] This trend is in line with modern notions of necessity under international law,[68] although some argue that

> the transiting country can also use the threat of enlarging its rights under the original transit treaty, propose lowering of future transit fees under the guise of seeking efficiencies, streamlining, cutting red-tape and so on, and seek to portray any slow down or mild resistance in the negotiating process as mala-fide intent by the host country or negotiating in bad faith by the same.[69]

Under certain circumstances, the seizure of transit land, transiting rivers and port infrastructure can indeed be instigated under a claim of extra-sovereign rights.[70] Such claims by a transiting country can have a powerful impact on the territorial sovereignty of the host country, as it is left with little remedy under international law.[71] Non-emergency transit requests can also be refused, however, even in the face of great persistence by the transiting country.[72] Though the most notable example[73] of this phenomenon (Canada refusing transit rights to all countries through the Canadian arctic) does not impact LLDCs specifically, it is simply one more complicating factor that contributes difficult precedent to an already difficult equation.

The reality is that serious constraints on the economic development of LLDCs translate into serious constraints on the human development of such countries:

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67. *Id.*

68. *See, e.g.,* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 25 (Necessity) (United Nations 2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (ILC Draft Articles).

69. Snapshots, *supra* note 63 (internal quotations omitted).

70. *Id*.

71. *Id.* (detailing notable examples of this scenario, including: in 1939 when Poland refused transit rights between mainland Germany and the port of Dantzig in its province of East Prussia, and German insistence on transit rights through Polish territory (as well as the aggression of the Nazi party) instigated the beginnings of WWII; in 1946 when the rights of a British warship to navigate through the mine-laden waters of Albania's territorial sea in the Corfu Channel were asserted by the International Court of Justice; in 1956 when Britain and France invaded the Suez Canal zone and the Sinai peninsula after Egyptian President Nasser's nationalization of the canal, which affected British-held transit rights; in 1967 when Israel launched a preemptive air strike against Egypt after President Nasser closed the Straits of Tiran and denied Israeli transit rights to the port of Eilat; from 1979 to the present day the United States maintains a Navy base in Bahrain and exhaustively patrols the Persian Gulf to preempt any Iranian threat to transit shipping through the Strait of Hormuz; in the 1989 United States invaded Panama (among other reasons) to preserve US access to the Panama Canal).

72. *Id.*

> Canada refuses transit rights to all countries through the Canadian Arctic, but most particularly to Denmark and the US. . . . Canada is hugely dependent on the US for commercial trade. . . . However, the US government does not recognise Canadian sovereignty over the waterways that flow around the thousands of islands in the Canadian Arctic archipelago. In response, Canada routinely refuses US requests for transit from the east coast of US to the north slope of Alaska, with exceptions made for scientific exploration and study and US Coast Guard ice-breakers that need to get to their stations in northern Alaska. . . . No surface US naval ships have crossed Canadian waters in the Arctic, although US nuclear submarines as well as Russian (previously, Soviet), French and British nuclear submarines routinely cross Canadian waters, but only when submerged).

73. *Id.*

> Dismal economic growth has led in turn to acute resource constraints for the LLDCs, inhibiting their capacity to alleviate serious social difficulties. It is little wonder that LLDCs score poorly on many human development indicators. According to the 2004 *Human Development Index* (HDI) of the United Nations, nine of the world's 15 lowest-ranking countries are landlocked, with Burundi, Mali, Burkina Faso and the Niger among the bottom five.[74]

In short, the geographic feature of landlockedness "intensifies the extent of human poverty."[75] Lack of economic growth also greatly contributes to a general commodity dependence experienced by LLDCs.[76] As asserted in a study by the U.N. Conference on Trade and Development (UNCTAD) pertaining to the issue, development challenges are inextricably linked to the role of commodities, and especially to the extent of commodity dependence in the least developed countries.[77] Many of the trends that grow from chronic economic distress are similarly troubling:

> LLDCs showed little progress in human development between 1975 and 2001. Even though they have made some progress in improving their social indicators during the past two decades, the divergence between them and the coastal developing world appears to be widening rather than closing. Successful human development is critical, as it can promote economic growth, which in turn advances human development. But the opposing corollary holds true as well—poor human development contributes to economic decline, thus leading to further deterioration in human development.[78]

Needless to say, the rift between the economic and human development of coastal developed countries and LLDCs can be expressly linked to relative geographic advantage and disadvantage:

> The less-than-spectacular economic and social accomplishments of the LLDCs compared to those of coastal developing countries suggest a powerful linkage between geography and development. A lack of direct access to the sea, isolation from major economic centres, inadequate transport infra-

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74. Anwarul K. Chowdhury & Sandajdorj Erdenebileg, *Geography Against Development: A Case for Landlocked Developing Countries* 13 (2006), http://www.unohrlls.org/UserFiles/File/Publications/LLDC/05-33151_geography_sm.pdf (Geography Against Development).

75. Ben C. Arimah, *Poverty Reduction and Human Development in Africa*, 5 J. HUM. DEV. 399, 411 (2004), http://www.equinetafrica.org/bibl/docs/ARIpov.pdf.

76. *See generally* Fourth United Nations Conference on the Least Developed Countries, Special Event on Commodity Dependence and the Impact of the Multiple Global Crises on LDCs, Istanbul May 8, 2011, *Global Crises and the Commodity Dependence of the Least Developed Countries: Impacts, Challenges and the Way Forward*, UNCTAD/ALDC/MISC/2011/6 (Apr. 28, 2011), http://www.unctad.org/en/docs/aldcmisc2011d6_en.pdf (Global Crises).

77. *Id.* at 2 (stating that least developed countries generally have an inflated employment percentage concentrated in the agricultural sector combined with food deficit problems requiring external assistance for food needs).

78. Geography Against Development, *supra* note 74, at 15.

> structure and cumbersome transit procedures combine to hamper the ability of landlocked developing economies to grow successfully, especially through the well-worn path of international trade.[79]

Keeping in mind the discussion above, this article will examine in greater detail the particular circumstances of only a few of the many LLDCs.

III. Case Studies: Developing Countries

A. Mongolia

Mongolia is one of the world's largest landlocked countries.[80] With a territory containing over 1.6 million square kilometers, which is largely composed of steppe and semi-desert on a plateau 1,580 meters above sea level, it is bordered by China to the east, south and west, and by the Russian Federation to the north.[81] The Gobi Desert occupies much of the southeast of the country while mountains occupy the west and southwest.[82] The country is rich in mineral resources such as copper and gold, and though it ranks first in the world in per capita ownership of livestock, agricultural activity is hampered by the severe climate and the poor quality of the land.[83]

Mongolia is not widely populated, and many people in rural communities continue to live in "semi-nomadic conditions."[84] Infrastructure is not well developed, there are not many roads, the existing roads are not well maintained, and many Mongolians are largely dependent upon rail transport.[85] Though the construction of new infrastructure has been made a priority by the Mongolian government and by donors, economic growth has been difficult due to a lack of diversity in the economy.[86] Even though agriculture accounts for a third of total economic output, the country is still not self sufficient in food, and has to rely on imports to meet its overall economic needs, including food, textiles, machinery, equipment, spare parts, and oil.[87] Its main exports are copper, gold, cashmere, hides and skins, and meat and other animal products,[88] and it relies heavily on trade with Russia, China, South Korea, Japan, and the United States to keep

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79. *Id.* at 18.

80. Economic and Social Commission for Asia and the Pacific, *Transit Transport Issues In Landlocked and Transit Developing Countries*, at 65, ST/ESCAP/2270, (2003), http://www.unescap.org/ttdw/Publications/TFS_pubs/pub_2270/pub_2270_fulltext.pdf (LDC Series); *see generally* Issues and Problems of Landlocked Countries and Modalities for Addressing Them, Economic and Social Commission for Asia and the Pacific, 53rd Sess. Apr. 23–30, 1997, E/ESCAP/SB/LDC(3)/2, (18 Feb. 1997), http://www.unescap.org/EDC/English/Specialbodies/LDC3/E1064E.pdf.

81. *Id.*

82. *Id.*; *see also Mountains of Mongolia,* BLUEPEAK.NET (2009), http://www.bluepeak.net/mongolia/mountains.html.

83. *LDC Series*, *supra* note 80, at 65–66.

84. *Id.* at 65.

85. *Id.*

86. *Id.*

87. *Id.* at 65–66.

88. *Id.* at 66.

its economy in motion.[89] Despite continued development concerns, the country did accede to the World Trade Organization (WTO) in January of 1997, which informs upon its relative success at economic reform and the implementation of a trade regime attuned to international standards.[90] Similarly, its efforts at infrastructure development have been slow but steady; for instance, between 1996 and 1999, over 173 kilometers of roads and 1,208 meters of bridges were built in the country.[91]

Despite the size and proximity of China, the only Chinese seaport utilized for Mongolian transit traffic is Tianjin.[92] Mongolia can utilize at least six Russian seaports; however: Vladivostok, Nahodka, Vanino and Vostochny (on the Sea of Japan), St. Petersburg (on the Baltic Sea), and Novorossisk (on the Black Sea).[93] All the Russian ports are decently well connected by rail and have adequate facilities, whereas Tianjin is a large and well run port.[94] Mongolia does have bilateral transit agreements with Russia[95] and China, as well as road transport agreements with Russia and China.[96] The majority of Mongolian transit traffic is carried by rail between Ulaanbaatar and Tianjin.[97]

Mongolia is a party to the CTTLLS, as is Russia (both with reservations).[98] China is not a party and is not bound by CTTLLS principles.[99] Mongolia, China, and Russia are all parties to

89. *Id.*

90. *Id.*

91. Policies, *supra* note 32, ¶ 20.

92. A. ERDENEPUREV, *Current Status of Trade and Transport Facilitation and Problems Related to Border-Crossings, Policy Coordination Strategic Planning Department Ministry of Industry and Trade, Mongolia*, at 5 (Apr. 2006), http://www.unescap.org/tid/itt/mtg/mong06_ae2.pdf; *see also Waterway Systems,* WORLDPORTSOURCE.COM (2012), http://www.worldportsource.com/waterways/systems/index.php (Last visited Feb. 12, 2014) (A useful resource for locating and/or identifying ports around the world, including those on navigable rivers and inland waterway systems) (ERDENEPUREV).

93. *Id.*; *see also* Snapshots, *supra* note 63 (noting that Mongolia at one point had "transit rights negotiated on its behalf by Stalin's Soviet Union").

94. ERDENEPUREV, *supra* note 92 at 5.

95. Agreement concerning access to the sea and transit transport for Mongolia across the territory of the Russian Federation, Mong.-Russian Federation, October 19, 1992, http://treaties.un.org/doc/Publication/UNTS/Volume%201763/volume-1763-I-30672-English.pdf (Mong.-Russian Federation Treaty) (providing in Article 2 that Russia, among other considerations, shall "in accordance with the generally recognized principles of international law and in conformity with the rules established by the transit State, . . . accord the following rights to [Mongolia]: *(a)* Freely to engage in transit transport across the territory of the transit State to or from the sea in accordance with the provisions of this Agreement; *(b)* To use the seaports and, for vessels sailing under the flag of the State lacking access to the sea, to pass freely through the internal and territorial waters of the transit State . . .").

96. B. ALTANGEREL, *Presentation on Transit Transport Issues of Mongolia,* THE TREATY AND LAW DEPARTMENT MINISTRY OF FOREIGN AFFAIRS, at 23 (January 2001), http://www.unctad.org/sections/wcmu/docs/c3em26p29_en.pdf (ALTANGEREL).

97. ERDENEPUREV, *supra* note 92 at 6.

98. *See* CTTLLS, *supra* note 34.

99. *Id.*

UNCLOS.[100] Important to this discussion, and with the purposes of facilitating "adequate transit traffic arrangements for regional and international trade and for acceleration of economic development," the three countries, with the help of UNCTAD, created a Draft Transit Traffic Framework Agreement in early 2003.[101] The goal of the agreement was to "guarantee freedom of transit by all modes of transport and promote simplification, harmonization and standardization of customs, administrative procedures and documentations."[102] The document makes explicit its incorporation of the relevant terms of UNCLOS.[103] Though the Agreement provides a solid basis upon which the three countries can move forward, it has been in draft form since 2003.[104] The text of the Mongolia-Russia bilateral transit agreement can be found on the United Nations website.[105]

In sum, although, as do some other LLDCs:

> Mongolia does not face severe ethnic and cross-border tensions. . . . It does . . . share the challenge of remoteness . . . with the capital city, Ulaanbaatar, lying nearly 1700 km from the nearest port. Mongolia also still grapples with its extremely low population density . . . which further complicates transport. The country has only one main highway and relies primarily on rail for shipping. Railway infrastructure is in fair condition but problematic for trading with neighbouring China, the world's fastest growing economy, since the two countries use different rail gauges and shipments need to be unloaded and reloaded at Zamyn Uud.[106]

B. Paraguay and Bolivia

There are a number of regional agreements of importance to the transit regimes and development potential of Paraguay and Bolivia. In April 1969, Argentina, Bolivia, Brazil, Paraguay

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100. Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at October 29, 2013, United Nations, Division for Ocean Affairs and the Law of the Sea (2013) (last visited Mar. 11, 2014) http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (UNCLOS Ratifications).

101. Draft Transit Traffic Framework Agreement Between the Governments of the People's Republic of China, Mongolia and the Russian Federation, U.N., Jan. 8, 2003, http://unctad.org/en/Docs/ldcmisc47add4_en.pdf (Draft Transit Framework).

102. ALTANGEREL, *supra* note 96, at 26.

103. Draft Transit Framework, *supra* note 100, at 4, art. 4(3) ("[L]and-locked States shall have the right of access to and from the sea through the territories of Transit States for the purpose of exercising the freedom of transit traffic provided for in Paragraph 1 of this Article as stipulated in the United Nations Convention on the Law of the Sea.").

104. Report of the Fourth Negotiating Meeting on the Draft Transit Traffic Framework Agreement between the People's Republic of China, Mongolia, and the Russian Federation, UNCTAD, UNCTAD/LDC/Misc.87, UNCTAD.ORG (Feb. 5, 2003), http://unctad.org/en/Docs/ldcmisc87_en.pdf.

105. *See* Mong.-Russian Federation Treaty, *supra* note 95; *see also* Afghanistan-Pakistan Transit Trade Agreement 2010, NTTFC.ORG (2010), http://www.nttfc.org/reports/APTTA-Final-Signed%2028102010.pdf (APTTA) (containing information in Article 7 relating Maritime Ports and information in Article 8 pertaining to Other Ports of Entry/Exit).

106. Faye, *supra* note 16, at 64.

and Uruguay agreed in the Treaty on the River Plate Basin[107] to coordinate the development of the region and its outlying territories.[108] Objectives were to find common interests, conduct studies, install infrastructures, and create operational agreements or legislation for pursuing further cooperation regarding navigation, road, rail, air travel, electricity supplies and communications, and regional industrial links.[109] Under the Treaty, the Financial Fund for the Development of the River Plate Basin (FONPLATA) was created in 1976 to further integrate the region,[110] and the Hidrovia Project also was created in 1996, concerning agreements about free navigation and transit on the Paraguay and Paraná rivers.[111] The Hidrovia Project is of particular importance to the issue of sea access for Paraguay and Bolivia:

> If and when it is completed Hidrovia will allow ocean going vessels to make the 2,000 mile trip from Argentine and Uruguayan ports of the Atlantic to currently landlocked areas in Paraguay and Bolivia. The proposed route would begin at Caceres in western Brazil, run through the center of Paraguay (including the capital Asuncion), through portions of Argentina and finish at Nueva Palmira in Uruguay. The project would essentially expand navigation of the Paraguay and Parana river system, which is the second largest in South America. The result, say proponents, would be a massive economic boom for the region, drastically reducing transportation costs and providing the resource rich but landlocked areas of Argentina, Paraguay, Bolivia and Brazil with direct access to the Atlantic Ocean and thus the entire world.[112]

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107. Treaty on the River Plate Basin, Apr. 23, 1969, 8 I.L.M. 905 (Treaty on the River Plate Basin) (outlining how the Treaty is designed mostly as a development initiative, and though it does mention "facilitating and assisting navigation . . . rational utilization of water resources, in particular by the regulation of watercourses and their multipurpose and equitable development . . . [and] improvement of road, rail, river, air, electrical and telecommunications Interconnexions" as objectives, it in no way addresses the specific needs of Bolivia and Paraguay as landlocked states).

108. Improvement in Latin America, *supra* note 57, at 10.

109. *Id.*

110. *See, e.g.*, *Fonplata to Greenlight US$120mn for San Pedro-Amambay Paving Project*, BNAMERICAS.COM, Oct. 25, 2011, http://www.bnamericas.com/news/infrastructure/fonplata-to-greenlight-us120mn-for-san-pedro-amambay-paving-project (stating that FONPLATA recently approved a $120 million USD loan to pave a highway connecting the administrative districts of San Pedro and Amambay in Paraguay).

111. *See* Improvement in Latin America, *supra* note 57, at 10–11; *see also* Maria Silveira, *The South American Hidrovia Parana-Paraguay: Environment v. Trade?*, CHASQUE.NET http://www.chasque.net/rmartine/hidrovia/Envxtrad.html (last accessed Feb. 12, 2014) (discussing the potential environmental impacts of the development initiative); *see also* Hidrovia Canal and Environment, AMERICAN.EDU, http://www1.american.edu/TED/hidrovia.htm (last accessed Feb. 12, 2014) (Hidrovia Canal) (stating that "[i]t is the environmental aspects of the project that present the greatest difficulty to its full implementation. . . . The project would be beneficial to 17 million people living in the region but it will affect the rich environmental setting of the Pantanal and its unique biological richness."); *see also* James Brooke, *Asuncion Journal; A 2,000-Mile Highway for Commerce*, N.Y. TIMES, May 27, 1995, http://www.nytimes.com/1995/05/27/world/asuncion-journal-a-2000-mile-highway-of-water-for-commerce.html?src=pm (stating that the Inter-American Development Bank was "directing the project and would finance a major part of it with matching funds from the five countries involved if environmental approval is received").

112. Hidrovia Canal, *supra* note 111.

The economic benefits to the heartland of South America stemming from the completion of this project would clearly be considerable. For instance: "Instead of $60-$90 a ton for truck hauling, river transport would cut the costs to perhaps half of that, from $30-$50 a ton, combined with expected lower costs for river upkeep than road maintenance."[113] Despite the potential benefits of the Hidrovia that are relevant to this discussion, the Project continues to face serious resistance due to its adverse environmental impact, and "as originally proposed, is no longer seen as viable"[114] (though its ultimate fate, perhaps in lesser or cumulative forms, is uncertain).[115]

The Latin American Integration Association (LAIA) is also an intergovernmental body that advocates for regional integration to achieve economic and social development, with the objective of creating a common market.[116] The Treaty of Montevideo of 1980[117] established the overall legal and regulatory framework for LAIA and was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.[118] Paraguay and Bolivia have also signed bilateral agreements under LAIA with other South American countries in an effort to facilitate trade, namely by reducing or eliminating tariffs on a limited number of products.[119] Further economic and development initiatives in the region

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113. Pantanal: Value of the Pantanal, PANTANAL.ORG (2000), http://www.pantanal.org/pantvalu.htm (Pantanal) (excerpted from Frederick Swarts, *The Pantanal in the 21st Century: For the Planet's Largest Wetland, an Uncertain Future*, in THE PANTANAL OF BRAZIL, BOLIVIA AND PARAGUAY (Hudson MacArthur 2000)).

114. *Id.*

115. *Id.*, stating that the discontinuance of the original project

> does not mean that hydrological projects on the Paraguay River and its tributaries will not occur piecemeal and still impact the Pantanal in a major way. Although governmental support for the Hidrovia itself has waned, principally among the Brazilian government, various smaller hydrological initiatives remain of interest. These proposed and actual structural interventions include various actions of dredging and channel straightening of the Paraguay River and its tributaries, some in the Upper Paraguay River Basin and others further south, where their hydrological impact could still affect the upper stretches and thus the Pantanal [and the] cumulative negative impact can actually be worse than a larger, more comprehensively planned project. Furthermore, various interests continue to advocate a commercial waterway into the heart of the continent, even if implemented piecemeal. Thus the Hidrovia project, or its various formulations, remains a vital concern to the Pantanal.

116. Improvement in Latin America, *supra* note 57, at 10.

117. Treaty of Montevideo Establishing the Latin American Integration Association (ALADI), Aug. 1980, 20 I.L.M. 672, www.worldtradelaw.net/fta/agreements/laiafta/pdf (LAIA Treaty) (mentioning in Article 18 that "member countries shall endeavour to set up effective compensation mechanisms to take care of negative effects which might influence intraregional trade of the relatively less developed land-locked countries"; in Article 21 that "[i]n order to facilitate utilization of tariff cuts, member countries may set up cooperation programs . . . directed towards supporting the relatively less developed countries, with special regard, among them, to land-locked countries"; in Article 22 that, "treatments in favour of relatively less developed countries may include collective and partial cooperation actions calling for effective mechanisms meant to compensate the disadvantageous situation faced by Bolivia and Paraguay due to their land-locked location" and that "within the regional tariff preference referred . . . attempts shall be made to preserve the margins granted in favour of land-locked countries by means of cumulative tariff cuts"; and in Article 23 that "[m]ember countries shall endeavour to grant land-locked countries facilities to establish free zones, warehouses or ports and other administrative international transit facilities in their territories").

118. Improvement in Latin America, *supra* note 57, at 10.

119. *Id.*; *cf.* UNCLOS, *supra* note 2, art. 127(1).

include the Southern Common Market (Mercosur)[120] created in 1991, which is aimed at promoting industrial growth and investment, and the Free Trade Area of the Americas (FTAA) (which began as an idea in 1994 and has struggled to gain support since then),[121] aimed at uniting the economies of the whole Western Hemisphere under a single free trade agreement.[122] The general public in Paraguay and Bolivia is against the idea of the FTAA.[123]

Both countries have poor domestic infrastructure, and although they are "surrounded by relatively extensive and well-maintained transport corridors . . . [t]he poor state of maintenance and operation of domestic corridors . . . have prevented [the] countries from benefiting from such strong external transit corridors."[124] Other troubles also prevail. Paraguay's railroad, which links to Argentina, Uruguay and Brazil, has fallen into disuse, and political tensions are an issue for both Paraguay and Bolivia.[125] For example, the age-old struggle between Bolivia and Chile has recently impacted "an ambitious Bolivian plan that could double exports by exporting natural gas via Chilean ports," as the plan "has been delayed by ongoing domestic protest in Bolivia against the use of Chilean corridors."[126]

On a positive note, the central location of both countries:

> could allow them to serve as regional hubs for new technologies less dependent on transport costs, such as telecommunications. Bolivia and Paraguay also hold the potential to be major regional energy hubs since they both possess significant reserves. Bolivia recently discovered expansive reserves of natural gas and oil, and Paraguay has the potential to be a major exporter of hydroelectric power. Since these sectors are not primarily dependent on road and rail infrastructure, it will be possible to develop and benefit from them even before domestic transport infrastructure is improved to a significantly higher level.[127]

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120. Mercosur Free Trade Agreement, Braz.-Para.-Uru. (1991), http://idatd.eclac.cl/controversias/Normativas/MERCOSUR/Ingles/Treaty_of_Asuncion.pdf (Mercosur) (outlining how Mercosur is arranged as a general free trade agreement amongst states parties, and similarly to the Treaty on the River Plate Basin, in no way addresses the specific needs of Paraguay and Bolivia as landlocked states); s*ee also* Thomas Andrew O'Keefe, *An Analysis of the Mercosur Economic Integration Project From a Legal Perspective*, 28 INT'L L. 439 (1994).

121. *See, e.g.*, Free Trade Area of the Americas, CITIZEN.ORG (2012), http://www.citizen.org/trade/ftaa/ (stating that "[t]he FTAA is currently in a long coma with no signs of life whatsoever for the past several years").

122. Improvement in Latin America, *supra* note 57, at 11.

123. *Id.*

124. Faye, *supra* note 16, at 67.

125. *Id.*

126. *Id.*

127. *Id.* at 67–68.

Similarly, there are ongoing efforts by the international community, especially by UNCTAD, to address trade facilitation issues in Latin America and Central America, including a recent forum held in Chile.[128] Both countries have ratified and acceded to the CTTLLS[129] and UNCLOS.[130]

1. Paraguay

Paraguay is connected to the Atlantic Ocean by the Paraguay and Paranà rivers, but it does not have sovereignty over the full lengths of river reaching to the ocean.[131] It is bordered by Bolivia, Argentina, and Brazil.[132] The hot and arid Gran Chaco region covers the majority of Paraguayan territory, though in the east there is a fertile area which includes fields, pastureland, lakes and woods, and, where there is stockbreeding and the widespread cultivation of cotton, soya, rice, tobacco, sugar, maté, wood, vegetable oils, coffee, tung oil, meat products, and fruit.[133] The export of these products, however, has at times been hindered by insufficient road infrastructure.[134] The country has significant hydroelectric resources resulting from its shared ownership of the Itaipu Dam with Brazil, the Yacíreta Dam with Argentina, and full ownership of the Acaray Dam, but it still relies heavily on its fellow Mercosur countries for trade.[135] The Paraguay and Paranà rivers give Paraguay 3,100 kilometers of navigable waterway, the navigation of which is governed by law;[136] and the management and operation of all ports to which Paraguay has access are controlled by the National Navigation and Ports Authority (ANNP), established by Law No. 1066 of 23 August 1965.[137]

The country has conducted studies on possible trade corridors, including, on the Pacific Coast, corridors between La Patria and Garay, La Patria and Infante Rivarola, Estigarribia and Pozo Honda, and on the Atlantic Coast, between Asuncion and Ciudad del Este, and Pozo Colorado and Pedro Juan Caballero.[138] Yet it "faces severe financial constraints in its efforts to develop its ports and infrastructure."[139] As a result, more than a decade ago it reached an agreement with the Inter-American Development Bank for a loan of $82,300,000 U.S. currency, which was to be directed toward the development of road networks.[140] Similarly, for some

128. *See, e.g.*, UNCTAD Regional Forums on Trade Facilitation Implementation Plans in Latin and Central America (Chile, March 2012), Global Facilitation Partnership for Transport and Trade, gfptt.org (Feb. 8, 2012), http://www.gfptt.org/node/2948.

129. CTTLLS, *supra* note 34.

130. UNCLOS Ratifications, *supra* note 2, art. 305–306.

131. Improvement in Latin America, *supra* note 57, at 5.

132. *Id.*

133. *Id.* at 6.

134. *Id.*

135. *Id.*

136. *See id.* at 35–36; *see also* CODE CIVIL [C. CIV.] LEY Nº 476/57 (Para.) (establishing regulations regarding rights and obligations of vessels, and with respect to documentation, crews, passengers and owners).

137. Improvement in Latin America, *supra* note 57, at 36.

138. Policies, *supra* note 32, ¶ 22.

139. *Id.* ¶ 23.

140. *Id.* ¶ 24.

time, Paraguay has made clear its intention to privatize its railways, but the "high investment necessary to modernize its century old [equipment] is [of] little interest to the private sector."[141]

The country has access to a number of ports on the Atlantic Ocean in Argentina,[142] Brazil,[143] and Uruguay. At Buenos Aires, Argentina, Paraguay has been granted a small section of wharf and priority over the adjacent area. It has a storehouse for exports and imports adjoining the port of Matadero, and it has access to a "free zone" at the port of Rosario,[144] which contains specialized equipment for handling bulk goods brought in by sea. At the port of Paranagua in Brazil, it has a 4,000-square-meter storehouse and a 9,000-square-meter container store including modern facilities. The port of Santos has a terminal managed by ANNP, which handles container imports, transit, and bulk exports; it has access to Rio Grande do Sul, which is connected by rail to Encarnación in Paraguay, and which it uses to export soya in bulk. At Nueva Palmira, in Uruguay, it has a wharf and other facilities, including industrial conveyor belts, large silos, a cold store, warehouses and container yards; and it has access to the well-sheltered port of Montevideo at the mouth of the Hidrovia, which is in close proximity to an international airport.[145] Paraguay also maintains a number of inland ports of importance, namely, Asunción, Concepción, Villeta, and Pilar on the Paraguay River, and Saltos del Guayra and Presidente Franco on the Paraná River.[146]

2. Bolivia

Bolivia is a sparsely populated[147] landlocked country in the center of South America, and though it has battled political instability for most of its history, it has been a relatively stable democracy for the past 30 years.[148] Difficult climatic conditions and resultant financial problems have at times caused a decrease in the vitality of Bolivia's main industries, such as petroleum and natural gas production, telecommunications, silver and zinc mining, and agricul-

141. *Id.* ¶ 25; *see also* Exchange of Notes Constituting an Agreement Concerning Approval by the Bolivia Government of the Agreements Concluded Between the Bolivia National Railway and the Argentina Railway and Duly Authorized by the Procurement Board of the Argentina-Bolivia Mixed Railway Commission Concerning the Delivery of Rolling Stock and Traction Equipment for the Yacuiba-Santa Cruz De La Sierra Railway, Arg.–Bol., Oct. 26, 1967, 671 U.N.T.S 138.

142. *See* European Agreement on Main Inland Waterways of International Importance, Eng.–Fr.–Russ., Jan. 19, 1996, 2072 U.N.T.S. 313; *see also* Agreement Concerning the Construction of an International Bridge Over the River Pilcomayo Between Clorinda and Puerto Elsa, Arg.–Para., Oct. 21, 1964, 635 U.N.T.S 182.

143. *See* Exchange of Notes Constituting an Agreement for Exemption from the Port Improvement Tax for Goods Bound for or Originating from Paraguay, and in Transit through Brazil Territory, Braz.–Para, Aug. 9, 1985, 1406 U.N.T.S.16; *see also* Exchange of Notes Constituting an Agreement on Railroad Connections, Braz.–Para., Sept. 17, 1979, 1242 U.N.T.S. 174.

144. Exchange of Notes Constituting an Agreement Concerning a Free-Trade Zone in the Port of Rosario, Arg.–Bol., Dec. 11, 1968, 671 U.N.T.S 165.

145. Improvement in Latin America, *supra* note 57, at 39.

146. *Id.* at 36–37.

147. Background Note, U.S. Dep't of State, Background Note: Bolivia, (August 1, 2011), http://www.state.gov/outofdate/bgn/bolivia/185872.htm ("[P]opulation density ranges from less than one person per square kilometer in the southeastern plains to about 10 per square kilometer (25 per square mile) in the central highlands.") (Background Note: Bolivia).

148. Improvement in Latin America, *supra* note 57, at 4.

ture.[149] Even at points since the emergence of the current democracy, the government has struggled (despite international assistance) with debt, general political and social unrest, and smuggling,[150] and "almost two-thirds of its people, many of whom are subsistence farmers, live in poverty."[151]

As noted briefly in Part II, Bolivia has not always been a landlocked country: it granted Chile permanent possession of more than 150,000 square kilometers of its coastline in the Treaty of Peace, Friendship and Commerce signed between the two countries in 1904, after a period of war.[152] As compensation, Chile endeavored to construct a railway from Arica, on the Chilean coast, to La Paz, the capital of Bolivia, and gave Bolivia, "in perpetuity, the most extensive and unrestricted right of commercial transit across its territory to its Pacific ports."[153] Under the treaty, Bolivia was also permitted to maintain customs offices in Arica and Antofagasta, and in other ports as it may appoint.[154] Under a later agreement, in 1912, the rights of free transit across Bolivia were further described, and regulation and authority over traffic and customs were granted to Bolivian authorities located in Chilean ports.[155] Bolivian transit rights were further guaranteed for all types of merchandise at all times by the Convention of 16 August 1937 (after such rights survived challenge during the Chaco War); the Convention also provided for more refined procedures regarding the receipt, handling and subsequent transportation of goods.[156] The procedure utilized at Arica and Antofagasta was again altered, in 1975, by the Integrated Transport System (SIT), which granted Bolivia exclusive administrative power over the transfer of goods from vessels.[157]

The loss of its coastline has not gone unremembered by the people of Bolivia:

> The Bolivian Navy still trains its naval force of 5,000 strong in Lake Titicaca in the hope that the country [will] one day be able to recover its coastline. Successive governments of Bolivia have always made the return of their sea coast one of their top priorities. The Bolivian people annually celebrate a patriotic day, the "Dia del Mar" (Day of the Sea), to remember their country's territorial loss, which included the coastal city of Antofagasta. What is written on one of the murals depicting a national hero pointing towards the

149. *Id.* at 4–5.

150. *Id.*

151. *See* Background Note: Bolivia, *supra* note 147.

152. *See* GLASSNER, *supra* note 55, at 105.

153. Improvement in Latin America, *supra* note 57, at 7.

154. *Id.*

155. *See id.*; *see also* Uprety, *supra* note 27, at 124.

156. Improvement in Latin America, *supra* note 57, at 7.

157. *Id.*

> Pacific reads: "what once was ours will be ours once again." This issue has become a matter of cultural phenomenon for all Bolivians.[158]

Yet, on a positive note, Bolivia made both symbolic and practical progress in its efforts to regain access to the sea when in October 2010, it negotiated an agreement to build a small port on a 1.38-square-mile parcel of the Peruvian coastline.[159]

By rail, Bolivia is connected to the ports of Matarani in Peru, Arica and Antofagasta in Chile, Rosario and Buenos Aires in Argentina,[160] San Pablo and Santos in Brazil, and inland river ports Aguirre and Quijarro (in Bolivia) and Corumba in Brazil.[161] By road, there are four corridors linking Bolivia to the ocean, and they have been described by the government as "Plan Bolivia," in reference to further development.[162] To facilitate these connections, Bolivia has bilateral transit agreements[163] with Argentina, Brazil, Chile, and Peru.[164]

Lake Titicaca, belonging to both Bolivia and Peru, has been the site of an import and export cargo service between Guaqui and Chaguaya in Bolivia and Puno in Peru since 1903, but the water transport of most importance to Bolivia takes place on the Hidrovia.[165] Still, only half of the 10,000 kilometers of rivers in Bolivia is navigable, as the rivers run through sparsely populated, undeveloped regions lacking sufficient facilities for the loading and unloading of cargo.[166]

The main navigable waters of the Amazon River basin link Bolivia to Brazil and Peru, with the basin itself covering almost 68% of Bolivian territory.[167] Transport upon the Beni, Madre de Dios and Orthon rivers can run from Manaos in Brazil to Iquitos on the Peruvian coast, and the Ichilo, Mamore and Itenes rivers link the port of Villaroel in central Bolivia with Guayaramerin on the Brazilian border.[168] The port of Villaroel facilitates the loading of goods bound for the northern towns, as well as the unloading of chestnuts, farm produce and live-

158. *See* Getachew Begashaw, *Port of Assab as a Factor for Economic Development and Regional Conflict*, ADDISVOICE.COM (2010), http://addisvoice.com/Land%20Locked%20Ethiopia.pdf (comparing Bolivia's loss of its coastline to Ethiopia's loss of the Port of Assab to Eritrea after the border war between the countries in 1998–2000); *cf.* Bolivia-Argentina Agreement for the establishment of an Argentinian naval mission in Bolivia, Bol.–Arg., July 18, 1970, http://treaties.un.org/doc/Treaties/2010/04/20100421%2011-00%20AM/Other%20Documents/COR-Reg-47437-Sr-59532.pdf.

159. Daniel Hernandez, *Landlocked Bolivia to Get Gateway to Sea in Peru,* L.A. TIMES, (Oct. 26, 2010, 1:46 PM), http://latimesblogs.latimes.com/laplaza/2010/10/peru-bolivia-port-landlocked.htm (Hernandez).

160. *See* Improvement in Latin America, *supra* note 57, at 17.

161. *Id.*

162. *Id*. at 20.

163. Policies, *supra* note 32, ¶ 12.

164. *See* Bolivia-Peru: Framework Agreement on the "Grand Marshall Andrés de Santa Cruz" Binational Project for Friendship, Cooperation and Integration and Supplementary Agreements, Jan. 24, 1992, 32 I.L.M. 279 (stating in Article 2 of the Agreement that "Peru shall grant the free use of its port facilities and develop an industrial and a beach resort free zone at Ilo").

165. Improvement in Latin America, *supra* note 57, at 22.

166. *Id.*

167. *Id.*

168. *Id.*

stock, and it is composed of a concrete wharf, covered storage, an operations area with a five-ton crane, and an 80-ton weighing platform.[169] With help from the World Bank and others, the port of Central Aguirre on the border with Brazil, with facilities such as a 33,000-ton silo and a 2,500-ton oil tank, has been developed to allow the transfer of goods from port to storage and port to free-zone platform, the greater importation of goods into Bolivia, and the transshipment of goods.[170]

3. Landlocked Countries in Africa

Africa has 15 landlocked countries, and all face certain challenges.[171] Botswana, Burkina Faso, Burundi, Chad, Central African Republic, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia, and Zimbabwe are without coastline and without easy access to maritime trade.[172] On average, transport costs for these LLDCs can range as high as 77% of the value of exports.[173] The access of LLDCs in Africa to maritime trade depends heavily on the "good will" of transit countries: recorded trade between landlocked and transit developing countries in Africa is not significant, and the infrastructure in transit developing countries is generally insufficient.[174]

Though economic development is a major objective of nearly all governments in Africa, after decades of independence from colonial rule, Africa continues to struggle economically.[175] Physical infrastructure throughout the continent is not strong enough to support trade liberalization or a common market, and though infrastructure projects have been attempted, the pace is slow, and trade between African countries remains a challenge.[176] Moreover, some argue that the foreign values and lifestyles introduced by colonialism spawned a reliance on foreign goods which African economies cannot support, and that trade between African nations is further hindered because, even to its inhabitants, products from the region are often considered inferior to products originating outside of Africa.[177] In response to the collective challenges faced, there have been efforts among African nations to forge greater economic cooperation, and

169. *Id.* at 22.

170. *Id.* at 22–23.

171. *See* Africa Trade Forum, *supra* note 38, at 1.

172. *Id.*

173. *Id.*

174. *Id.*

175. *See* Maranga, *supra* note 54, at 106.

176. *See id.* at 112.

177. *See* Maranga, *supra* note 54, at 114–15 (detailing how this predicament led the late Captain Thomas Sankara to comment at an Economic Community of West African States (ECOWAS) Summit in Abidjan, Ivory Coast, "[w]hy import products when we have all we need? We are economic colonies even if we have national flags. . . we should produce, transform and consume." (quoting *The Sankara Affair*, West Africa, July 20 1987, at 1381–82)); *see generally* Global Crises, *supra* note 76.

examples[178] of regional organizations dedicated to economic growth, the fight against poverty, and the improvement of transport and transit systems and facilities include the East African Community (EAC),[179] the Common Market for Eastern and Southern Africa (COMESA)[180] and the Southern African Development Community (SADC).[181] The governments of Burundi, Kenya, Rwanda, Uganda, and Zaire also endeavored, in 1985, to create the Northern Corridor Transit Agreement (NCTA), which provides for improvements in port facilities, transit routes and facilities, and customs control among other things.[182] Similarly, the governments of some countries, such as Zimbabwe, pursue "a policy that encourages private-sector investment in the construction and maintenance of roads, bridges and railway lines as well as the commercialization and privatization of state owned enterprises in the transport sector."[183] The

178. *See* REVIEW OF PROGRESS IN THE DEVELOPMENT OF TRANSIT TRANSPORT SYSTEMS IN EASTERN AND SOUTHERN AFRICA, ¶¶ 1, 21 (20 July 2001), http://unctad.org/en/Docs/poldcd115.en.pdf (REVIEW OF PROGRESS) (explaining how the "[East African Community] emphasises co-operation in infrastructure to evolve co-ordinated, harmonized, and complementary transport and communication. . . . [including] improving the existing transport and communication links and establishing new ones as a means of furthering the physical cohesion of the Partner States and facilitating and promote the movement of traffic within the community." The Common Market for Eastern and Southern Africa (COMESA) aims at: "[f]acilitation of both road and air transport . . . efficient movement of goods and people . . . maximizing the use of existing infrastructure . . . [and] creat[ing] stable, competitive and cost-efficient transit systems"; and the Southern African Development Community (SADC) works toward "[i]ntegration of transport, communications and meteorology networks . . . implementation of compatible policies, legislation, rules, standards and procedures; elimination or reduction of hindrances and impediments to the movement of persons, goods, equipment and services . . . the right of freedom of transit for persons and goods; the right of land-locked Member States to unimpeded access to and from the sea . . . the development of simplified and harmonized documentation which supports the movement of cargoes along the length of the logistical chain, including the use of a harmonized nomenclature").

179. *See* East African Community Treaty (1999), http://www.eac.int/index.php?option=com_docman&task=doc_download&gid=1&1temid=163 (EAC); *see also* EAC art. 93 (Maritime Transport and Ports) (providing that coastal partner states shall "co-operate with the landlocked Partner States and grant them easy access to port facilities and opportunities to participate in provision of port and maritime services").

180. *See* COMESA, *Ministry of Trade and Industry: Trade Agreements Sector* (2005), http://www.tas.gov.eg/NR/rdonlyres/4AF5E263-75D7-407E-85B8-3C2A1E9FA427/1200/comesa1.pdf (COMESA); *see also* COMESA art. 84 (Common Transport and Communication Policies) (granting "special treatment" to landlocked and island member states); *see also* COMESA art. 88 (Maritime Transport and Ports) (mandating cooperation with landlocked member states to facilitate maritime transport).

181. *See* Treaty of the Southern African Development Community, Aug. 17, 1992, http://www.sadc.int/files/9113/5292/9434/SADCTreaty.pdf (SADC) (including information regarding an additional Protocol on Transport, Communications, and Meteorology which specifically addresses Maritime and Inland Waterway Transport (in Chapter 8), and Integrated Transport Policy (in Chapter 3.2)); *see also* SADC, Protocol on Transport, Communications, and Meteorology (Maseru, Lesotho, 24 August 1996), http://www.sadc.int/files/7613/5292/8370/Protocol_on_Transport_Communications_and_Meteorology_1996.pdf (SADC Protocol] (stating in Chapter 3.2 that Member States shall follow the principles of "the right of freedom of transit for persons and goods, the right of land-locked Member States to unimpeded access to and from the sea, [and] the right of coastal Member States to unimpeded access to and from land-locked Member States"); *see also* Statement from the SADC Private Sector on Regional Economic Integration (Johannesburg, South Africa, 17 August 2008), http://www.sadcemployers.org/resources/Projects/SEG_SADC_FTA_Project/SADC%20SUMMIT%20SPEECH-MR%20%20NKOSI.pdf (SADC Private Sector] (calling for "urgent liberalisation [sic] of the transport and logistics sector in the region in order to reduce the costs of doing business, especially for land-locked countries").

182. *See* 1985 Northern Corridor Transit Agreement (1985), http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal_review/Annexes/Annexes%20V/Annexe%20V-01.pdf (NCTA); *see* NCTA § 4 (Maritime Port Facilities) (stating that the government of Kenya shall provide, within its capabilities, the "necessary maritime port facilities" in Mombasa for the use of NCTA states); *see also* NCTA § 5 (Transit Routes and Facilities); § 6 (Frontier Services and Facilities); § 7 (Customs Control); § 8 (Documentation and Procedures); § 9 (Transport).

183. *See* Policies, *supra* note 32, ¶ 28.

COMESA, the EAC, the NCTA and the SADC have been heralded by the Global Facilitation Partnership for Transportation and Trade as establishing and successfully implementing various measures to address transit facilitation.[184] There is a probability that in Africa, regional arrangements for transit transport are utilized more widely than, or in favor of, bilateral treaties. Yet the encompassing nature of these regional arrangements, while providing structural integrity for the area concerned, may not adequately address the unique needs of the individual LLDCs located within the region.[185]

The LLDCs of East Africa and Southern Africa have access to "adequate" transit corridors for regional and international trade, but the condition of infrastructure, the quality of operations and management, and the condition and operation of cross-border facilities still need improvement.[186] Cooperative arrangements between LLDCs and maritime neighbors do exist, in practice, but with limited effectiveness, due to "slow implementation, unilateral actions and policy reversals by countries."[187]

East Africa has two major ports, Dar-Es-Salaam, Tanzania, and Mombasa, Kenya, which serve Uganda, Rwanda, Burundi and eastern Democratic Republic of Congo (DRC).[188] Mombasa provides many East African landlocked countries with maritime access (gained through the framework of the NCTA)[189] and provides combined transport over road, rail, lake and oil pipeline accounting for "annual cargo volumes in excess of [ten] million tonnes and combined transit and transshipment traffic of more than two million tonnes."[190] In Southern Africa, there are three ports in Mozambique, one in Namibia, and five in South Africa (including major ports for transit traffic: Beira and Maputo in Mozambique; Durban, Cape Town and Port Elizabeth in South Africa; and Walvis Bay in Namibia).[191]

The SADC has a system of 15 ports which serve landlocked SADC members nearly exclusively: eight ports are on the Indian Ocean, including the ports of Beira, Maputo, and Nacala in Mozambique; Richards Bay, Durban, East London and Port Elizabeth in South Africa; Dar-Es-Salaam in Tanzania; and six are on the Atlantic coast, including Cape Town and Saldanha Bay in South Africa, Walvis Bay in Namibia, and Luanda, Lobito and Namibe in Angola.[192]

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184. Global Facilitation Partnership for Transport and Trade, Bilateral and Regional Transit Agreements, *supra* note 128.

185. While the EAC, COMESA, SADC, and NCTA all make worthy efforts to address the problems of landlocked states as a group, the regional nature of the arrangements, to a certain extent, obscures the unique problems of the group's individual landlocked states, whose needs may require particular and special attention in order to thus achieve the most optimal sea access for all the states. *See, e.g.,* EAC Art. 93; COMESA Art. 84 & 88; SADC Protocol Ch. 3.2; SADC Private Sector; NCTA §§ 4–9.

186. Review of Progress, *supra* note 177, ¶ 23.

187. *Id.* ¶ 24.

188. *Id.* ¶¶ 20, 25.

189. *Id.*

190. THE EAST AFRICAN, *Shippers Complain of High Cost of Transport in East Africa* (Aug. 4, 2012), http://www.theeastafrican.co.ke/Rwanda/Business/Shippers-complain-of-high-cost-of-transport-in-East-Africa--/-/1433224/1470890/-/7qcbx7/-/index.html.

191. REVIEW OF PROGRESS, *supra* note 178, ¶¶ 25–30 (discussing how the container terminal at Mombasa is also linked to inland container terminals or "dry ports" in Nairobi, Kisumu and Eldoret).

192. *Id.* ¶¶ 27–28.

Though the DRC is not technically landlocked, it is often considered among Africa's LLDCs because of its very minimal coastline in comparison to its vast inland territory.[193] It has many ports along the Congo River that are used for both domestic and foreign trade,[194] and that can serve as examples to represent many of the challenges facing all African shipping ports. For instance, many Congolese maritime ports are products of Belgian colonialism and there has been little renewal or development of their infrastructures since the 1930s.[195] As a result, the ports are not able to fulfill the requirements of modern international commerce and lack the capability to successfully compete in the world market.[196] The functionality of the ports is hindered by an inability to process containerized vessels, address dredging and navigational problems or increases in freight rates,[197] and cope with the ongoing presence of war, general mismanagement and corruption. [198]

Some argue that the potential for expansion of trade activities in Africa puts many African countries in a position to play major roles in the future of international trade, but that many maritime ports in Africa are not currently equipped to contend with the demands of modern commerce.[199] Management issues, port access issues, and security and cost issues have also lead to further marginalization.[200]

Yet, on a positive note,

> [i]n southern Africa, the landlocked countries that border South Africa are performing significantly better than those that do not. This underscores the potential benefits of a relatively wealthy neighbour. The two countries that are the best performers in the region, Swaziland and Botswana, are exceptional cases. Botswana benefits enormously from its diamond trade, which utilizes air transport and thus overcomes many possible burdens of landlockedness, and Swaziland benefits from its close location to ports in both Mozambique and South Africa.[201]

Such examples help to further illustrate the high level of dependence that LLDCs have on the development of their coastal neighbors. "[T]he variation in the east Africa region is particularly illuminating. [Human Development Index] levels decrease as one moves inland along the

193. *See* Landlocked (May 20, 2010), http://world-geography.org/378-landlocked.html (Landlocked) ("[W]hen the Democratic Republic of Congo was created, the country negotiated for a thin strip of land on the north end of Angola, providing the country with just 23 mi (37 km) of access to the Atlantic Ocean—enough to cut transportation costs by half of what they would have been without the ocean access.").

194. *See* Kirongozi Ichalanga, *Congolese Maritime Ports: Suggestions for Reform*, 14 OCEAN & COASTAL L.J. 241, 241 (2009).

195. *Id.* at 243.

196. *Id.*

197. *Id.*

198. *Id.* at 250–51.

199. *Id.* at 242.

200. *Id.* at 242–43.

201. Faye, *supra* note 16, at 39.

major transit route through Kenya used by Burundi, Rwanda and Uganda."[202] Despite pronounced difficulties, positive steps in African transit and transport development include the Intermodal Africa Conference (the 11th and most recent conference was held in March 2014), which addresses "topical issues and challenges on global transportation and logistics" and is attended by leading members of the shipping community from all around the world;[203] as well as the African Maritime Transport Charter (created by the member states of the Organization of African Unity), which addresses the priority of economic development, the importance of maritime transport in the promotion of free trade and development, and the importance of maritime transport as a factor in regional and continental economic integration.[204]

IV. Critical Analysis

The improvement of transit transport is often hindered by a lack of reliable data on the costs of alternative routes, including the potential for uncertainty and delay on such routes.[205] A dearth of internationally available data that relates the value of goods imported into and exported from a country and differentiates the associated freight and insurance charges makes it difficult to compare the total transit costs for individual landlocked countries and their maritime transit partners, though customs services for some countries have attempted to provide such reports.[206] Some studies even indicate that freight and insurance margins, compared between LLDCs and developed coastal countries, tend to work so as to penalize LLDCs "both for distance from the core economies and for being landlocked."[207]

Even so, the bare figures for transit cost may not adequately reflect a number of other factors effecting transport, including inland transport time, transport infrastructure, risk level in the country, distance from inland trade centers to seaports, and geographic conditions.[208] Due to these "special constraints that inhibit [LLDCs'] full participation in the globalization process," mere "problems of distance are . . . compounded by the need to cross international borders and by the inability to regulate the . . . transport process. As a result, the delivered costs of imports are higher, exports less competitive and attraction for foreign direct investment reduced."[209] Restated,

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202. *Id.* at 39.

203. *12th Intermodal Africa North 2014*, TRANSPORTEVENTS.COM (2014), http://www.transportevents.com/EventsDetails.aspx?EventID=EVE107.

204. African Maritime Transport Charter, *Republic of South Africa Department of International Relations and Cooperation,* DFA.GOV.ZA (2004), http://www.dfa.gov.za/foreign/Multilateral/africa/treaties/maritime.htm.

205. Jack I. Stone, UNCTAD (consultant), *Infrastructure Development in Landlocked and Transit Developing Countries: Foreign Aid, Private Investment and the Transport Cost Burden of Landlocked Developing Countries*, ¶ 12, UNCTAD/LDC/112, UNCTAD.ORG (June 28, 2001).

206. *Id.*

207. *See Geography Against Development*, *supra* note 74, at 20; s*ee generally* John Luke Gallup, Jeffrey Sachs & Andrew D. Mellinger, *Geography and Economic Development*, Harvard Center for International Development Working Paper No. 1, HARVARD.EDU (March 1999), http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor /file/pdfs/centers-programs/centers/cid/publications/faculty/wp/001.pdf.

208. *See* Hironori Kawai, Shinya Hanaoka & Tomoya Kawasaki, *Characteristics of International Freight Transport in Landlocked Countries*, http://www.ide.titech.ac.jp/~hanaoka/139.pdf.

209. *See generally* Executive Summary, *supra* note 1.

> [o]ne of the few robust findings in the international cross-sectional analysis of economic growth rates is that the share of trade in GDP [gross domestic product], mediated through its impact on the investment share, is positively associated with the rate of economic growth. This suggests that, whatever causal mechanisms are at work, the effects of geographical disadvantage are most likely to work through reductions in the volume of trade.[210]

The UN has addressed the issue with similar frankness, stating that

> [l]ack of territorial access to the sea, isolation, remoteness from world markets, and high transport and transit costs experienced by . . . [LLDCs] impose serious constraints on their overall socio-economic development, including their trade competitiveness. . . . Unless the structural problems facing LLDCs are adequately addressed, there is a real risk of relative lack of integration in the world economy, especially for those LLDCs whose neighbouring export and transit markets are similarly poor.[211]

So how does UNCLOS help or hinder the lot of LLDCs? Are the principles contained in Part X sufficient to protect LLDCs from ineffective, or even oppressive, bilateral or subregional arrangements? Does UNCLOS afford LLDCs any "special protection from the international community against unfair exploitation by their . . . lucky coastal neighbors"?[212] Given the notion that the "availability of good transport infrastructure enhances the productivity of all other inputs and enhances the rate of return to formation of both physical and human capital,"[213] and a general recognition that "[t]he dependence of LLDCs on neighbouring transit countries for access to seaports . . . requires a multilateral system of international trade rules that ensures the quick and safe passage of goods and services at competitive prices,"[214] Part X of UNCLOS only vaguely prescribes a remedy for the concerns faced by LLDCs. As stated by scholarship,

> [u]nder general principles of international law, it is erroneous to make the status of a country subject to and conditional upon, the voluntary benevolence or malevolence of another state. Access to the sea, and its multiple economic consequences, constitute a rule of international public order, the content of which should not be infringed by bilateral treaties.[215]

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210. Landis MacKellar, Andreas Wörgötter & Julia Wörz, *Economic Development Problems of Landlocked Countries*, at 2, Institute for Advanced Studies, Transition Economics Series No. 14, (Vienna, January 2000), http://www.ihs.ac.at/publications/tec/te-14.pdf (Mackellar).

211. Executive Summary, *supra* note 1, at 3–4 (stating that, "[a]ccording to the 2006 Human Development Report, LLDCs score poorly on many human development indicators, with 10 of the world's 20 lowest-ranking countries being landlocked. Collectively, LLDCs accounted for only 2 percent of the developing world's total gross domestic product (GDP) in 2005. External debt is [also] a serious constraint on the ability of these poor countries to pursue economic development and reduce poverty.").

212. *See* Mackellar, *supra* note 210, at 9.

213. *Id.* at 4.

214. Executive Summary, *supra* note 1, at 7.

215. Right of Access, *supra* note 6, at 67.

Moreover, UNCLOS does make distributive choices that prejudice landlocked countries (among others): for example, pertaining to the EEZ, it favors countries with long coastlines on the open sea.[216] Some scholars suggest that all states, including LLDCs, could have been granted identically sized portions of EEZ, or that states could have been given an EEZ proportionate in size to their population or their general economic need, and that similar principles are evidenced elsewhere in international law.[217] Similarly, what of the "extra sovereign rights" (as mentioned in Part II) of transiting countries through war torn host countries, especially in Africa?[218] Such rights are of little consolation when the transiting state lacks the capacity to assert them.

While the CTTLLS "is the first multilateral agreement to address exclusively the specific problems of transit trade, it does not contain any radical innovations. Diverging evaluations of its effectiveness demonstrate the Convention's lack of success in confronting the problem of free access to the sea."[219] Given such criticism, and as stated briefly in Part II,[220] given the fact that UNCLOS only partially incorporates the CTTLLS, UNCLOS may be even less successful in confronting the problems of free access to the sea for LLDCs. Yet considering the 24-year process that engendered the current version of UNCLOS,[221] it seems unlikely that a formal revision is destined to occur anytime soon. What more can be done?[222]

A ten-year review of the Almaty Programme of Action, as provided for and given support by the original Almaty Programme from 2003,[223] will be held in 2014.[224] The purpose of the original Almaty conference, as stated by the UN, was "to galvanize international recognition and support for the efforts to develop a win-win solution for both landlocked and transit developing countries with the support of their development partners."[225] Will the review in 2014 be an opportunity for progress toward a flexible uniform transit regime or a "new global agenda

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216. Posner & Sykes, *supra* note 23, at 594.

217. *Id*. (suggesting that provisions for sharing revenues from seabed mining appear to reflect such principles, as does the norm of common but differentiated responsibilities, which holds that poorer nations ought to be given less burdensome obligations than rich nations in trade and environmental treaties, and also stating that "economic principles do not shed light on distributive issues other than recommending that redistribution should occur through taxes and transfers rather than through distortion of rules").

218. *See, e.g.,* Faye, *supra* note 16, at 46 (stating that "[t]he landlocked countries of western Africa have been particularly affected by neighbours' internal conflicts").

219. Right of Access, *supra* note 6, at 43.

220. *See supra* note 36 (comparing provisions of CTTLLS and UNCLOS).

221. *See, e.g.,* Treves, *supra* note 30.

222. On an immediate level, it does not seem that it would be too difficult for any one of the concerned subsidiary organizations of the U.N. to collect and maintain an online database of all the existing bilateral, sub-regional, and regional transit treaties that LLDCS have participated in under the auspices of UNCLOS Art. 125(2). This database would allow a facial comparison of at least the legal frameworks governing similar arrangements, if not for a practical comparison of the actual conditions of ports, border facilities, and transport infrastructures (which could also be included by means of photographs, blueprints, operating schedules, and operating budgets).

223. *See* Almaty Programme, *supra* note 38, ¶ 49 (providing for the potential of review).

224. *See* Specific Actions, *supra* note 42, ¶ 21; *see also* United Nations, Thematic Meeting on Transit Transport Infrastructure Development: As Part of the Preparatory Process for the Midterm Review of the Almaty Programme of Action (2008).

225. *See* Almaty Outcome, *supra* note 40, at 2.

for a triangular transit transport cooperation," as recommended by the U.N. in its Global Framework for Transit Transport Cooperation?[226] The U.N. also suggests that

> prohibitive transport costs have a greater impact on reducing LLDC's participation in international trade than tariffs or other trade barriers. Transport costs can be three times more than the tariffs imposed by developed countries on goods from LLDCs. Port and inland transportation costs can represent as much as two-thirds of the total door-to-door costs for landlocked countries. In many LLDCs, multimodal transportation, an important source of improved shipping efficiency, is not widely available due to the infrequent use of containers for inland transport. . . . *A way around these costs is for landlocked countries and their coastal neighbours to enter into transit agreements that define the conditions, obligations and rights under which the parties will use the transit facilities*, including transit corridors, roads, inland waterways and rail transport to facilitate trade with the least amount of problems. Regional integration, through cooperative endeavours such as transport and development corridors, is also another way for countries to address obstacles arising from transit transport difficulties.[227]

Many of the regional and bilateral agreements governing transit transport for LLDCs do not go so far, as suggested by the U.N., as to specifically "define the conditions, obligations and rights under which the parties will use the transit facilities,"[228] but are usually more general in nature. For instance, the EAC merely provides for "cooperation" between landlocked states and coastal states,[229] COMESA similarly proposes "cooperation" and provides for "special treatment" for landlocked states,[230] and the SADC provides for "unimpeded access" to the sea for landlocked states,[231] while the Treaty of Montevideo of 1980 proposes "collective and partial cooperation actions," "support," "effective compensation mechanisms," and the establishment of "free zones, warehouses or ports" for the benefit of landlocked states in the territory of member

226. Global Framework, *supra* note 3, ¶ 1.

227. *See* Executive Summary, *supra* note 1, at 5–6 (emphasis added).

228. *See*, *e.g.*, Mong.–Russian Federation Treaty, *supra* note 95, at art. 2; *see also* EAC art. 93; *see also* COMESA arts. 84, 88; *see also* SADC Protocol Ch. 3.2; *see also* SADC Private Sector; *see also* NCTA §§ 4–9; *see also* Mercosur art. 1, Treaty on the River Plate Basin art. 1, LAIA Treaty arts. 18, 21, 22, 23; *see also* Bolivia–Peru Agreement art. 2; *cf.* APTTA, *supra* note 105 (which is fairly comprehensive in comparison to most of the other agreements referenced in this footnote).

229. EAC, *supra* note 179, at art. 93.

230. COMESA, *supra* note 180, at arts. 84, 88.

231. SADC Protocol, *supra* note 181, at ch. 3.2.

coastal states.[232] The terms of the Mongolia-Russia transit treaty[233] and the NCTA,[234] on the contrary, are a bit more specific as to the rights of the landlocked state(s). Perhaps with an awareness of such discrepancies, the U.N. further suggests that

> [l]egal and regulatory reforms are sometimes necessary to harmonise conflicting laws and regulations of landlocked and transit countries that inhibit trade. Examples include hours of business, restrictions on the operation of commercial transport vehicles by foreigners, monopolies, and privatisation to promote competition by encouraging participation of the private sector, both foreign and local, in certain industries such as logistics, railroads and port operations. Institutional reform is also necessary to create or strengthen institutions, including national legislation, to enforce international conventions or agreements. These agreements, such as the UN Convention on the Law of the Sea and others, permit access to the sea for landlocked countries, equal treatment of transit transport operators, freedom of navigation on inland waterways and other trade facilitating initiatives.[235]

Critical suggestions for improvement also include the sustainable development of tourism in effected countries,[236] as well as development aid, contingency finance, and debt relief.[237] UNCTAD also asserts that

> [t]he logical corollary of . . . commodity dependence is that natural resources play a crucial role in [the least developed countries'] economic growth, poverty reduction and food security. . . . This significant role of commodities is also reflected in the UNCTAD proposal for a new interna-

232. LAIA Treaty, *supra* note 117, at arts. 18, 21, 22, 23.

233. *See* Mong.–Russia Federation Treaty, *supra* note 95, at arts. 2, 5–8 (providing for freedom of transit and use of seaports, freedom of navigation, storage, and reloading of Mongolian shipments, shortest possible transit routes, delay prevention protocol, customs liberalization, storage and reloading zones, and Mongolian transport offices located in the transit state); s*ee also* APTTA, *supra* note 105 (providing for the efficient movement of goods and avoidance of delay, promotion of intermodal transport, minimization of customs fraud and avoidance, simplification and harmonization of customs documentation and procedure, monitoring for the traffic of illicit substances, freedom of transit, grievance and dispute resolution procedure, designation of transit transport corridors (including specific ports), safety of transit traffic, maintenance of infrastructure, assurances of adequate staffing, coordination of working hours, parking space for containers and trucks, assurances of rapid and reliable telecommunications services, licensing of transport operators, exchange of road traffic rights, provisions on railway rules and regulations, reciprocal commercial presence (including offices), motor vehicle and licensing regulations, liability insurance, etc.).

234. *See* 1985 Northern Corridor Transit Agreement, art. 4–9, Nov. 1985 (providing for rights of transit, nondiscrimination, port access, transit route protocol, stopover facilities for loading and unloading, safety of transit traffic, expedient clearance of transit traffic, the establishment of frontier posts, assurance of adequate staffing, warehousing facilities, coordination of working hours, parking space for containers and trucks, assurances of rapid and reliable mail and telecommunications, customs control, harmonization of documentation and procedure, periodic review of documentation and procedure mechanisms, streamlining of documentation, freedom of transit and harmonization of transit services, and liability insurance).

235. Executive Summary, *supra* note 1, at 6–7.

236. Compilation of Documents of Pre-conference Events Organized by UNTCAD in Preparation for the Fourth United Nations Conference on the Least Developed Countries, *Key Development Challenges Facing the Least Developed Countries*, UNCTAD AT 1, 38–42 (2011), http://www.unctad.org/en/docs/aldc2011d1_en.pdf.

237. *Id.* at 10–11.

> tional development architecture, which highlights commodities as . . . [one of the] key pillars in a forward-looking agenda to shape international economic relations.[238]

Given the amount of attention[239] and resources[240] that have been dedicated to this problem, guaranteeing a minimum standard of access to coastal resources for landlocked states seems within the theoretical power of the international community, though the practical reality of implementing any such guarantees may continue to plague LLDCs for decades to come.

Will modern politics and an increasingly globalized economy allow for the possibility of a world without LLDCs?[241] What about a world without landlocked states in general? Similar to the recent arrangement reached by Bolivia and Peru[242] or the arrangement reached by the DRC and Angola,[243] it seems theoretically possible that all landlocked states could be granted small parcels on the coastline of one or more of their coastal neighbors. Transit swathes, similar to the "sea lanes" used to navigate through territorial seas, straits, and archipelagic waters (as provided for in UNCLOS)[244] could be carved in lanes no more than miles wide along the landlocked

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238. United Nations Conference on Trade and Development, Istanbul, Turkey, May 9–11, 2011, Key Development Challenges Facing the Least Developed Countries.

239. *See, e.g.,* Executive Summary, *supra* note 1, at 7, stating that

> LLDCs have been very successful in establishing a coordinating forum—the Geneva Group—at the WTO. While there is reluctance among certain WTO member states to formally recognise LLDCs as a separate grouping of countries requiring special consideration, there is a growing recognition among the member states of the special needs of LLDCs. In addition, the WTO accession process for some LLDCs has been particularly burdensome, prompting requests for a delay in the implementation or a relaxation of the obligations associated with WTO accession.

See also United Nations Millennium Declaration, G.A. Res. 55/2 U.N. Doc. A/RES/55/2 (Sept. 8, 2000) (stating that "[w]e recognize the special needs and problems of the landlocked developing countries, and urge both bilateral and multilateral donors to increase financial and technical assistance to this group of countries to meet their special development needs and to help them overcome the impediments of geography by improving their transit transport systems").

240. *See, e.g.,* Policies, *supra* note 32, ¶ 74:

> [L]andlocked and transit developing countries have continued to make significant investments in their infrastructure development, subject to the availability of financial resources. The major sources of such investment, in the form of grant aid or soft loans have been their development partners with regional development banks, the World Bank, the European Union and Japan prominent among them. Member states and relevant international organizations have made progress in improving sectoral aspects of transit transport, in particular in the development of sea and inland ports and air safety measures. Efforts have also been made to build up a broader consensus on and a better understanding of various aspects of transit trade at the national and subregional levels through a wide range of workshops for both government officials and the business community, mainly organized by international organizations.

241. *Cf.*, VASCIANNIE, *supra* note 11, at 217 (stating that "there is ample evidence that up to the time of UNCLOS III, transit states had consistently refused to regard access over their territory as a right recognized by international law.").

242. *See* Hernandez, *supra* note 159.

243. *See* Landlocked, *supra* note 193.

244. UNCLOS, *supra* note 2, arts. 22, 41, 53.

borders of transit states and out to the sea, and even included in official maps.[245] Though such a great endeavor would have to be undertaken on an individualized level for each LLDC, and might not provide many benefits in reducing transit costs for inland states, it would reduce the (often mismanaged, even corrupt) formalities that accompany many border crossings and regional arrangements, improve territorial access to the sea for the LLDC and also provide a psychological boost for its citizens and government.

Does the international community have the power to mandate the availability of such transit routes upon application by landlocked states to an international tribunal? Perhaps, but only under certain circumstances. Could LLDCs achieve small territorial cessions through an adaptation of the right of self-determination?[246] The principle may never have been asserted to such ends, but that is not to say that it could not and may never be. Is it unreasonable to think that an international court or arbitral tribunal could grant to a landlocked state a narrow strip of sovereign territory that follows along the border of its transit neighbor and out to the sea? If circumstances so dictated, it seems a possibility. Could such a decision be reached under principles of equity, or public necessity, or super-national notions of eminent domain?[247] Perhaps, and again, it would depend upon the severity of the circumstances.[248] Could adequate financing for such enormous projects be obtained or raised by the landlocked state or with the help of the international community, and the World Bank in particular? It seems probable, especially if fiscal sacrifices were made in other areas of concern. Would transit coastal states rigidly resist such notions, regardless of the potential to trade small areas of territory for high prices? It may depend upon the correlative values of land and money at any point in time. UNCLOS Article 129 (Co-operation in the construction and improvement of means of transport) does provide that

> [w]here there are no means of transport in transit States to give effect to the freedom of transit or where the existing means, including the port installations and equipment, are inadequate in any respect, the transit States and land-locked States concerned may co-operate in constructing or improving them.[249]

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245. A visual example of inland transit routes running along transit state borders is helpful in describing this principle. *See* Annex 1, at the end of this article.

246. *See* International Covenant on Civil and Political Rights, arts. 1 & 16, Dec. 16, 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; *see also* International Covenant on Economic, Social and Cultural Rights, arts. 1 & 16, Dec. 16, 6 I.L.M. 360, 993 U.N.T.S. 3; *see also* U.N. Charter art. 1.2.

247. *Cf.* VASCIANNIE, *supra* note 11, at 210 (stating that it should "not be assumed that the existence of a long line of treaties on transit raises any presumption in favour of a customary right [under international law] in this area.").

248. *See Responsibility of State for Internationally Wrong Acts*, 2001 Y.B. International Law Commission, art. 25 (Necessity), stating that

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. . . . 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity.

249. UNCLOS, *supra* note 2, art. 129.

Article 130 also provides that "[s]hould such delays or difficulties [in transit traffic] occur, the competent authorities of the transit States and land-locked States concerned shall co-operate towards their expeditious elimination."[250] Given the equitable and humanitarian principles at stake, as well as the theoretical support provided by applicable international law, it is not absurd to think that under pressure from the international community, transit coastal states may not be able to resist either ceding or selling small "lanes" along the borders (or elsewhere, if more practicable) of their own territory to their landlocked neighbor(s).

To reiterate, UNCLOS Article 125(1) states that

> [l]and-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.[251]

If subsection (1) to Article 125 were left as the sole subsection, without subsections (2) and (3),[252] would landlocked states be better off, or worse off?[253] Article 125(3) in particular, which expressly protects the sovereign rights of transit states,[254] may partially impede the rights granted to landlocked states in Article 125(1). As a whole, Article 125 seems to balance the rights of landlocked states and coastal states, but what is the practical effect? Because it leaves the right of sea access for landlocked states subject to negotiation and at the same time expressly protects the sovereign rights of transit states, Article 125 falls well short of providing a blanket enforcement mechanism by which landlocked states are guaranteed a minimum standard of access. Article 282 (Obligations under general, regional or bilateral agreements) in Part XV of UNCLOS (Settlement of Disputes) offers partial consolation, however, suggesting that:

> *If* the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree (emphasis added).[255]

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250. *Id.* art. 130.

251. *Id.* art. 125(1).

252. *Id.* art. 125(2) states that "[t]he terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements," and art. 125(3) asserts that "[t]ransit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests."

253. *See* VASCIANNIE, *supra* note 11, at 188–90 (discussing subjects touching upon whether or not landlocked states would be better or worse off under different interpretations of UNCLOS art. 125).

254. *See* UNCLOS, *supra* note 2, art. 125(3).

255. *Id.* art. 282.

Other provisions of Part XV go further to reinforce the rights of all states parties to UNCLOS. Article 287 details how parties may obtain binding resolution of a dispute through application to a judicial or quasi-judicial body, including the International Tribunal for the Law of the Sea, the International Court of Justice, or an arbitral tribunal.[256] Though it might be difficult to apply UNCLOS Part XV to a dispute arising under Part X in the context of a particularly successful transit agreement, a situation may well arise where the arrangement between landlocked and coastal state has ceased to function, even to bare minimum standards, and has placed the landlocked country in a state of necessity.[257] In that circumstance, and given the unfortunate situations of many LLDCs as well as the need for innovative solutions, a test case brought under the dispute resolution mechanisms of UNCLOS seems entirely warranted.

V. Conclusion

The problems faced by LLDCs lead to "underdevelopment, backwardness, and in most cases, acute poverty."[258] Although "successive legal innovations . . . acknowledge the sovereign rights of each . . . to economic security, in practice, their truly independent economic status has at no time been clearly established . . . [and] [t]he real acquired rights of these countries, theoretical as well as practical, still remain unclear."[259] Despite international awareness of the problems that they face,[260] LLDCs still "suffer systematically from the unilateral decisions made by . . . transit states,"[261] and are generally marginalized in the world economy.[262]

Despite the relative success of landlocked countries in Europe, "considerable problems still remain" for the LLDCs of Asia, South America, and Africa.[263] This article has attempted to describe the legal and economic background giving rise to some of the problems faced by such nations and to summarize the particular circumstances of some of the countries most affected.

The international law of the sea does not provide for the rights of LLDCs in such a way as to clarify and concretize those rights on a practical level. While bilateral, subregional, and regional arrangements may consist of notable efforts to provide for the unique needs of LLCDs,[264] there seems to be an insufficient international surveillance and enforcement system to guarantee that state-state or regional agreements actually work in practice. Member states of the United Nations, at least in principle, adhere to the concept of the "sovereign equality" of

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256. *Id.* art. 287.

257. *See* ILC Draft Articles, *supra* note 68, art. 25.

258. Right of Access, *supra* note 6, at 81.

259. *Id.*

260. *See, e.g.,* MARTIN IRA GLASSNER, BIBLIOGRAPHY ON LAND-LOCKED STATES, ECONOMIC DEVELOPMENT AND INTERNATIONAL LAW (2000) (listing hundreds of sources on the topic).

261. Right of Access, *supra* note 6, at 82.

262. *Geography Against Development*, *supra* note 74, at 3.

263. *Id.*

264. *See*, *e.g.,* Mong.–Russian Federation Treaty; APTTA; EAC; COMESA; NCTA; SADC Protocol; LAIA Treaty, etc. Also consider the status of the Hidrovia Project or its subsidiary manifestations in South America. Pantanal, *supra* note 113.

fellow members.[265] Sovereign equality in this context is undoubtedly a political and not an economic or distributive concept, but is the ability and desire to access the sea not such a basic human compulsion[266] that it cannot be overlooked as a fundamental norm (*jus cogens*) of international law? UNCLOS certainly suggests that it cannot, but further efforts may be needed to transform the suggestion into accepted practice.

"Today's reality of interdependence between States means that the disadvantages of landlockedness can only be mitigated through the efforts of the international community as a whole."[267] The abundance of source material, both academic and organizational, pertaining to this issue indicates a high level of awareness and commitment at an international level. At the same point, the abundance of material on the subject also reflects the depth of the problem. LLDCs can only hope that with sustained attention to the particular challenges they face, continued or increased aid from international donors, and the positive impacts of legal reform, the dire nature of many such challenges will over time begin to subside, or even improve.

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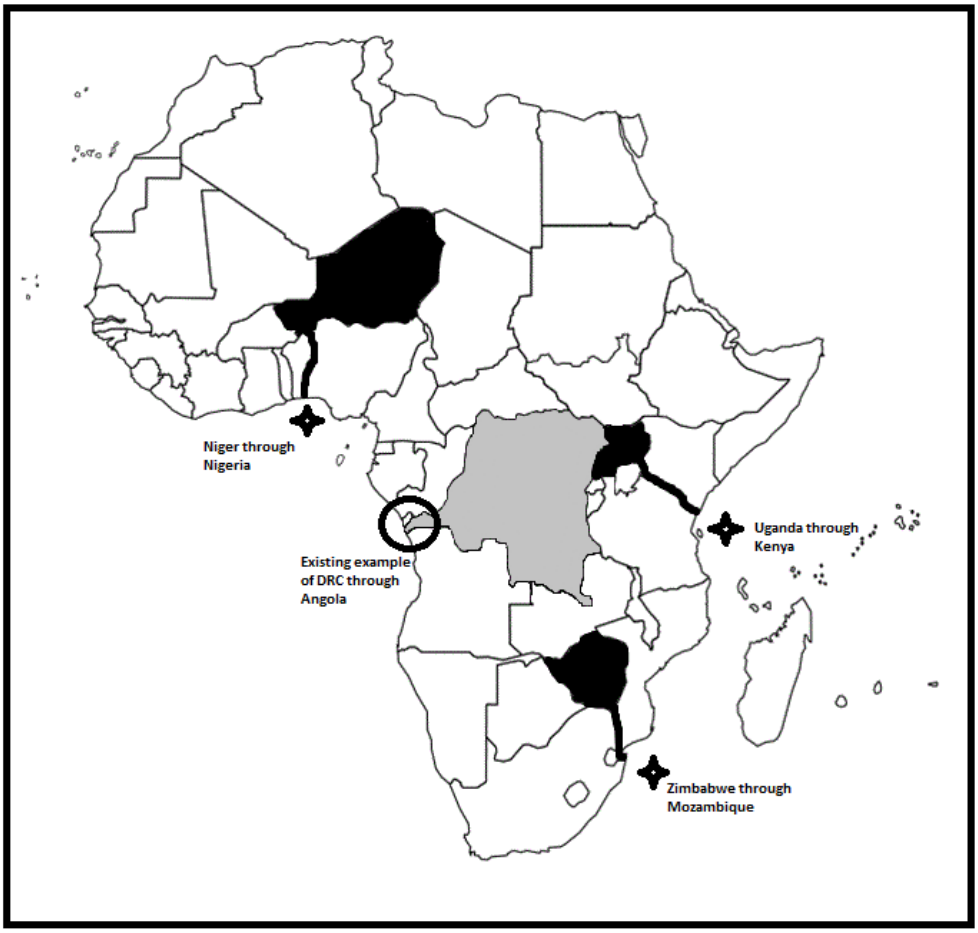
265. U.N. Charter, art. 2, ¶ 1.

266. *See* John F. Kennedy, America's Cup Speech, Newport, Rhode Island (September 14, 1962):

> I really don't know why it is that all of us are so committed to the sea, except I think it is because in addition to the fact that the sea changes and the light changes, and ships change, it is because we all came from the sea. And it is an interesting biological fact that all of us have, in our veins the exact same percentage of salt in our blood that exists in the ocean, and, therefore, we have salt in our blood, in our sweat, in our tears. We are tied to the ocean. And when we go back to the sea, whether it is to sail or to watch it we are going back from whence we came.

267. *See Geography Against Development*, *supra* note 74, at 145; *see generally* Jean François Arvis, Robin Carruthers, Graham Smith & Christopher Willoughby, *Connecting Landlocked Developing Countries to Markets: Trade Corridors in the 21st Century (2011)*, The World Bank (2011), http://issuu.com/world.bank.publications/docs/9780821384169.

ANNEX I



This map shows theoretical territorial extensions for three selected landlocked states in Africa. It also highlights the existing coastal territory of the Democratic Republic of Congo (DRC) and Angola. (*See* Landlocked, *supra* note 193 (stating that "[w]hen the Democratic Republic of Congo was created, the country negotiated for a thin strip of land on the north end of Angola, providing the country with just 23 mi (37 km) of access to the Atlantic Ocean—enough to cut transportation costs by half of what they would have been without the ocean access.").)

The case of the DRC and Angola illustrates that territorial negotiations can help ease the burden of landlockedness. As shown in the three cartographical adjustments above, territorial extensions could run in narrow "lanes" along the existing borders of (or through) transit coastal states, effectively providing neighboring landlocked states with unimpeded access to the sea. Though the geographical possibility of creating such transit lanes in the cases of all landlocked states may prove challenging, the concept stands for itself: through marginal territorial sacrifices by transit coastal states, the unfortunate phenomenon of the completely landlocked state could become a mere artifact from the past.

No Longer the Sleeping Dog, the FCPA Is Awake and Ready to Bite: Analysis of the Increased FCPA Enforcements, the Implications, and Recommendations for Reform

Rouzhna Nayeri*

I. Introduction

The days of the "legal sleeping dog," a nickname given to the Foreign Corrupt Practices Act (FCPA), are long gone. As this article demonstrates, however, the *current* FCPA enforcement actions are not effective, because they are too harsh, broadly interpreted, and ambiguous; they provide companies with no guidance but, instead, a much higher risk of liability. These issues and the overzealous enforcements result in tremendous costs for U.S. companies and a decrease in foreign investments due to higher risk-averseness.[1] Such implications also place U.S. companies at a large disadvantage compared to their foreign competitors. The FCPA prohibits companies from bribing foreign officials to gain or sustain business, and it is one of the most feared statutes for those operating a business abroad. In the past ten years, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have tremendously increased FCPA enforcements. Fines, penalties, and enforcement actions are at an all-time high. The settlement fines have now surpassed the billion-dollar mark.[2] Even more, individual defendants are now more likely to receive jail time,[3] and there are currently more open and pending FCPA investigations than ever.[4] The SEC and the DOJ are now using wiretaps, informants, and surveillance, tactics usually used in drug or organized crime investigations. Also, the SEC now has a stand-alone FCPA enforcement unit.[5] In addition, the United States is currently leading the Organization of Economic Cooperation and Development

1. *See* Press Release, "Dow Jones, Dow Jones Survey: Confusion About Anti-Corruption Laws Leads Companies to Abandon Expansion Initiatives" (Dec. 9, 2009), http://fis.dowjones.com/risk/09survey.html (Dow Jones Survey).

2. *E.g.*, Press Release, U.S. Dep't of Justice, "Parker Drilling Company Resolves FCPA Investigation and Agrees to Pay $11.76 Million Penalty" (April 16, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-431.html (Parker Drilling); Press Release, Sec. and Exch. Comm'n, "China-Based Company and Former CFO to Pay Penalties for Disclosure and Accounting Violations" (Feb. 28, 2013), http://www.sec.gov/news/press/2013/2013-30.htm (Keyuan settled the FCPA violation for $1 million); Press Release, U.S. Dep't of Justice, "Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty" (July 7, 2010), http://www.justice.gov/opa/pr/2010/July/10-crm-780.html.

3. *E.g.*, Press Release, U.S. Dep't of Justice, Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery (April 5, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-388.html; Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-048.html; Press Release, U.S. Dep't of Justice, Fact Sheet: The Department of Justice Public Corruption Efforts (Mar. 27, 2008), http://www.usdoj.gov/opa/pr/2008/March/08_ag_246.html (DOJ Fact Sheet).

4. *Restoring Balance*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Oct. 2010), http://openairblog.files.wordpress.com/2011/10/us-chamber-of-comm-amending-the-fcpa.pdf.

5. *See* Robert Khuzami, Director, Division of Enforcement, SEC, Remarks Before the New York City Bar (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm; *Corporate Corruption: A Historic Takedown*, FBI (Jan. 26, 2010), http://www.fbi.gov/news/stories/2010/january/fcpa_012610.

* **J.D., *Summa Cum Laude*, SMU Dedman School of Law, 2014; B.B.A. in Finance 2011, *Summa Cum Laude*, University of Texas at Austin.** **The author would like to thank her family, friends, and professors for their constant support.**

(OECD) nations in bribery enforcement policing and there is no sign of slowing down.[6] Current Assistant Attorney General Mythili Raman stated in April 2013 that the DOJ is "determined to continue [its] *vigorous* enforcement" of the FCPA.[7] Finally, the aggressive enforcement is furthered through expansive statute interpretations, increased settlement costs, and higher individual punishments.

While enforcement actions have increased, certain FCPA provisions remain ambiguous or are broadly interpreted. Additionally, most FCPA actions are privately settled, rather than developed through judicial precedent. Lack of judicial precedent results in increased uncertainty, and it leads to more leverage for the SEC and DOJ. The enforcement agencies have and continue to broadly interpret the FCPA provisions with almost no judicial oversight. Even more, with the enactment of the Dodd-Frank Act, whistleblowers are almost incentivized to report FCPA violations.[8] Although this article details the profound issues and implications of the current FCPA enforcement, it must be noted that the FCPA, if properly enforced, is actually an effective tool to sustain competition in the global marketplace and even help U.S. companies play on a fair playing field. Also, the FCPA was and continues to be an inspiration for many countries to enact or take anti-corruption enforcement actions.[9] However, as this article demonstrates, the *current* enforcement policies are not effective and hurt U.S. businesses.

Specifically, this article argues that although the FCPA is necessary and has been an effective tool against bribery and corruption, the SEC and DOJ's *current* aggressive enforcement as well as ambiguous terms in the FCPA (1) threaten the competitive advantage of U.S. businesses, (2) unnecessarily increase U.S. companies' costs, (3) result in overt risk-averseness, and (4) do not effectively deter corporations because penalties are mostly unforeseen and thus corporations are unable to effectively comply. This article, in Part II, details the history of the FCPA and the FCPA's anti-bribery and accounting provisions. Part III portrays the current expansion and aggressive application of the FCPA, along with the development of the Dodd-Frank Act, OECD Convention, and other international enactments. In Part IV, this article will thoroughly explain the current issues with the FCPA enforcement. It first points out the current broad and, at times, novel statutory interpretations and identifies and analyzes certain unclear and ambiguous provisions and lack of guidance. This article will then, in Part V, list certain implications of the current ambiguous and over-zealous enforcement. Finally, to alleviate the current issues, this article recommends that Congress, enforcement agencies or courts (1) apply the OECD Convention terms as well as congressional intention in ratifying the OECD Convention to the FCPA's ambiguous and broadly interpreted terms; (2) implement two additional defenses, including lack of knowledge defense and compliance defense; and (3)

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6. *Working Group on Bribery: 2010 Data on Enforcement of the Anti-Bribery Convention*, OECD (March 2013), http://www.oecd.org/dataoecd/47/39/47637707.pdf.

7. Press Release, U.S. Dep't of Justice, Foreign Bribery Charges Unsealed Against Current and Former Executives of French Power Company (April 16, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-434.html.

8. The whistleblower can receive 10%-30% of the penalties imposed on a company that has been found to have violated the FCPA. 15 U.S.C. § 78u-6 (2006 & Supp. IV 2010).

9. *E.g.*, Bribery Act, 2010, c. 23, §§ 1, 2 (Eng.), http://www.legislation.gov.uk/ukpga/2010/23/data.pdf (Bribery Act); 2003 United Nations Convention Against Corruption art. 15, Dec. 11, 2003, 43 I.L.M. 37, 45–46 (UN Convention); Press Release, MDBs Agree on Common Framework Against Corruption, The World Bank (Sept. 17, 2006), http://go.worldbank.org/TASFROPQA0.

provide clearer provisions and guidance and amend and improve the process for DOJ Opinion Procedure Releases.

II. Background and the FCPA Provisions

A. Background

The U.S. Congress enacted the FCPA in 1977 after a series of scandals. These scandals included the Lockheed Corporation's multimillion dollar bribes to officials in various countries and the discovery of about 400 American firms' questionable payments to foreign officials, mostly discovered during the Watergate scandal. Thus, to "restore public confidence in the integrity of the American business system," Congress passed the FCPA.[10] Although before the FCPA the United States had various anti-bribery laws, the FCPA was the first legislation in the world that prohibited the enacting country's own persons from bribing foreign officials.[11]

In its 36 years of existence, the FCPA has been amended twice. First, in 1988, Congress narrowed the knowledge requirement, imposed liability for third parties' acts, added two affirmative defenses to FCPA liability, and raised the fines for companies and individuals found liable.[12] In accordance with the change, a corporation may defend against an FCPA violation (1) if the foreign country permits such payments "under their written laws and regulations" or (2) if the payment "was a reasonable and bona fide expenditure . . . directly related to promotion, demonstration, or explanation of products or service . . . [or] the execution or performance of a contract with a foreign government."[13] Congress also added the corporations' ability to make "grease," or facilitating, payments to expedite governmental administrative issues. As this article will argue in Part V, however, such defenses are necessary but not sufficient. Although the *mens rea* requirement was increased from recklessness to knowledge, those who consciously disregard FCPA violations are not protected. The second change occurred in 1998 when Congress expanded the FCPA's jurisdiction to include conduct outside the United States, enlarged liability by including foreign natural persons and corporations who, while in the United States, violated the FCPA, and enhanced the FCPA's clarity regarding "improper advantages."[14] In addition to these two changes, Congress recently added certain revisions and language to better comport with the ratification of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention).[15] Yet, though there were two amendments and certain revisions, the FCPA, in general, has "not been implemented

10. S. Rep. No. 95-114 (1977); H.R. Rep. No. 95-640 (1977); H.R. Rep. No. 95-831(1977).

11. Arvind K. Jain, *Power, Politics and Corruption*, THE POLITICAL ECONOMY OF CORRUPTION 3, 9 (Arvind K. Jain ed., 2001).

12. Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78-ff (2006)).

13. 15 U.S.C. §§ 78dd-1(b)–(c)(2), 78dd-2(b)–(c)(2), 78dd-3(b)–(c)(2) (2006).

14. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78-ff (2006)).

15. Allen R. Brooks, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 141 (2010).

through specific, clear regulation."[16] Although there is enhanced enforcement, there is a lack of enhanced articulation and since the FCPA's wording remains vague, companies are unable to effectively comply.

B. FCPA Provisions

To better understand the current issues with the FCPA, this article will first give a brief description of the FCPA's two main provisions and their elements. The FCPA, structurally, has two parts: the anti-bribery provisions and the recordkeeping or accounting provisions. Although the provisions are described clearly, their application and enforcement have been anything but clear. The FCPA is enforced through a criminal and civil sanction combination.[17] The DOJ is responsible for all criminal enforcements as well as civil enforcements only for non-"issuer" entities. The SEC, on the other hand, is only responsible for civil enforcements of "issuers" and their directors, officers, employees, and agents.[18]

1. Anti-bribery Provisions

The anti-bribery provisions, in sum, prohibit businesses from bribing any foreign official to obtain business.[19] The provisions apply to "issuers," "domestic concerns," and "any person" who violates the FCPA while on U.S. territory. An "issuer" is a publicly traded corporation which is registered with the SEC or is required to file reports with the SEC, including the issuer's officers, directors, employees, agents, or even stockholders that act on its behalf. "Domestic concerns" are any companies with a principal place of business in the United States or a company that is organized under the laws of the United States, which includes non-public companies such as partnerships.[20] Further, the "domestic concerns" include U.S. natural persons regardless of their location. The 1998 amendment additionally added non-U.S. individuals and companies who violate the FCPA while on U.S. territory. Although the FCPA also applies to natural persons,[21] this article will focus specifically on companies.

Any "issuer" or "domestic concerns" and its employees or agents are specifically prohibited from using "interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or . . . the giving of anything of value . . . to any foreign official"[22] so as to influence "any act or decision of such foreign official in his official capacity" to obtain or retain business.[23] To violate the anti-bribery provisions of the FCPA, there must be a corrupt intent, which is interpreted to

16. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 503 (2011).

17. U.S. Dep't of Justice and Sec. and Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 19 (Nov. 14, 2012), http://www.justice.gov/criminal/fraud/fcpa/guide.pdf (Resource Guide).

18. 15 U.S.C. § 78m(b)(2) (2006).

19. 15 U.S.C. §§ 78dd-1, 78dd-2.

20. 15 U.S.C. § 78dd(a).

21. 15 U.S.C. § 78dd-2(h)(1)(B) (2006).

22. 15 U.S.C. § 78dd(a).

23. 15 U.S.C. § 78dd-1(a).

mean "voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."[24]

There are two affirmative defenses and one exception to an FCPA violation. Under the FCPA exception, commonly known as the "grease" payment exception, the FCPA allows for "facilitating or expediting payment[s] . . . to expedite or to secure the performance of a routine governmental action" and includes "only an action which is ordinarily and commonly performed by a foreign official" but does not include a decision "by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party."[25] The Act's examples include providing phone service, power, or water supply or obtaining a permit to do business in another country.[26] Although there are no monetary restrictions, so far the payments allowed have all been less than $1,000.[27] Thus, this exception has and continues to be narrowly interpreted.

The two affirmative defenses under the FCPA involve the lawfulness of the payment under foreign law and the payment's "reasonable and bona fide expenditure." The first affirmative defense applies only if "the payment, gift, offer, or promise . . . was lawful under" the foreign country's law.[28] However, the foreign country's law must be expressly "stated and written," and "negative implication, custom, or tacit approval" are not sufficient.[29] The second affirmative defense permits "the payment, gift, offer, or promise" if it is a "reasonable and bona fide expenditure" that is directly related to the "promotion, demonstration, or explanation of products or services; or the execution or performance of a contract."[30] The Act's examples include expenses such as travel and lodging. Thus, the defenses are also narrow and very specific.

2. Accounting Provisions

Furthermore, there are certain accounting provisions that act to prohibit slush funds that lead to improper foreign payments. Such provisions only apply to issuers, which, as explained above, are publicly traded companies or those registered with the SEC.[31] The accounting provisions require the issuers to keep accurate records and sustain an internal accounting system to provide for the "reasonable assurance" that the transactions and records are properly maintained. First, the issuer's records must be "in reasonable detail," or one that would satisfy prudent officials. Because the standard is one of reasonableness, not materiality like other federal securities laws, small mistakes could lead to a violation of the FCPA. Second, the "reasonable assurance" of the internal accounting system is a prudent official standard.[32] Although the

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24. United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).
25. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
26. 15 U.S.C. § 78dd-1(f)(3)(A).
27. David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 684 (2009).
28. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).
29. Westbrook, *supra* note 16, at 506.
30. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2006).
31. *Id.*
32. 15 U.S.C. § 78m(b)(2)–(7).

FCPA does not specify the kind of required internal system, the SEC has given a list of factors to consider, including the board of directors' roles, communication of policies and procedures, authority and responsibility assignments, personnel's competence, and accountability for compliances and performances.

III. FCPA Development and Recent Increased Enforcement

In the past few years, the FCPA has increased the enforcement activity tremendously and placed a significant focus on individual conduct. This heavy enforcement has only begun in the last ten years.[33] In fact, in the first 20 years of the FCPA's enactment, neither the DOJ nor SEC heavily enforced the FCPA, and the Act was accordingly coined the "legal sleeping dog."[34] This section will review the FCPA's developments and evolutions in enforcement, along with other international anti-bribery expansions.

A. Increased Expansion and Application

The amount of current FCPA actions brought by both the DOJ and the SEC are unprecedented. After its enactment, for at least the first 20 years, the number of FCPA actions brought each year was very limited. In fact, from 1978 to 2004, the SEC had about one case a year and the DOJ had about two cases a year.[35] However, during 2007 and 2009, that number jumped to about 64 cases brought by the DOJ and 47 brought by the SEC. The trend seems to be only growing. In 2010, in only one year, the SEC brought 21 actions and the DOJ brought 28.[36] Some of the hardest hit industries include oil and gas, banking, insurance, manufacturing, pharmaceuticals, and telecommunications.[37] The price of settlements and fines, and the costs of investigations, are also increasing. For example, in 2013 alone, Uriel Sharef of Siemens AG agreed to pay $275,000, Houston-based Parker Drilling agreed to pay $11.76 million, and oil company Total disclosed that $398 million may be spent for possible FCPA settlements.[38] Plus, while enforcement is increasing, the officials show no signs of slowing down.[39]

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33. *See* DOJ Fact Sheet, *supra* note 3 (noting the current expansion of DOJ's FCPA enforcement); Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.

34. Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUB. POL'Y & MARKETING 108, 108 (1998).

35. Westbrook, *supra* note 16, at 522.

36. *See 2009 Year-End FCPA Update*, GIBSON DUNN (Jan. 4, 2010), http://www.gibsondunn.com/publications/pages/2009Year-EndFCPAUpdate.aspx.

37. Thomas O. Gorman & William P. McGrath, Jr., *The New Era of FCPA Enforcement: Moving Toward a New Era of Compliance*, 40 No. SEC. REGULATION L.J. 4 ART 1 (Winter 2012), http://www.dorsey.com/files/Publication/6f20c42a-c7a7-405d-8732-956a9faa6f9b/Presentation/PublicationAttachment/1e8e0329-19e4-4ae1-839a-fbf4ccfe4cfc/Gorman_McGrath_FCPA.pdf.

38. *In re Koninklijke Philips Elecs. N.V.*, Litigation Release No. 22676, 2013 WL 1646921, at * 1 (S.D.N.Y. April 16, 2013); Parker Drilling, *supra* note 2; Richard L. Cassin, *Total Carries Forward $398 million for possible FCPA settlement*, THE FCPA BLOG (Apr. 29, 2013, 1:28 PM), http://www.fcpablog.com/blog/2013/4/29/total-carries-forward-398-million-for-possible-fcpa-settleme.html.

39. Dionne Searcey, *Watergate-Era Law Revitalized in Pursuit of Corporate Corruption*, WALL ST. J., Oct. 15, 2010, at B2 (noting that after record fines and prosecutions in recent years, the government crackdown on FCPA violations shows no signs of slowing down).

Furthermore, for almost all of FCPA's life, fines were primarily imposed on companies. However, there is a current rise in individual liability. Since 2009, about 70% of the actions were against individuals.[40] These individual actions are further perpetuated by the view that in order to effectively deter corrupt actions, individuals have to actually go to jail. For example, Charles Jumet, employee of Ports Engineering Consultants Corporation, was sentenced to 87 months in jail for bribing Panamanian officials.[41] As the number of cases against companies increased, charges against individuals also significantly impact the enforcement environment. In 2011, Assistant Attorney General Lanny Breuer stated that the DOJ did not plan to "weaken the FCPA."[42] As previously stated, there is no sign of slowing down, and there has been, and continues to be, an increased cooperation between the United States and foreign authorities. Therefore, in an attempt to adapt to the new environment, companies are increasing compliance costs.

To complicate matters, FCPA litigations are very rare, so there are a limited number of FCPA judicial opinions. The lack of reported judicial opinions perpetuates ambiguity. Further, instead of the visible judicial process, the law has developed through private settlement negotiations in which the terms of settlements are not subject to judicial oversight, which may give enforcement agencies even more leverage. Additionally, U.S. businesses and individuals, out of fear of damage to their reputations, settle with the DOJ and SEC. For individuals this involves accepting a guilty plea, and for U.S. businesses it results in either a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA).[43]

B. OECD Convention and Other International Developments

Another factor influencing the high FCPA enforcements is the international community's change in perspective. During at least the first 20 years of the FCPA's enactment, the United States was one of the only countries to prohibit bribery of foreign officials. However, this changed in 1977, when the OECD drafted the Anti-Bribery Convention. The OECD Convention requires all 38 signatories to follow provisions that are somewhat similar to the FCPA. For example, bribery of foreign officials is prohibited, and there are requirements for accounting records and controls. In 2009, the OECD Council further expanded by adding tax-related and reporting provisions.[44] As shown in Part V, the clear language of the OECD Convention may help alleviate the vague characteristics of the FCPA. Furthermore, the United Nations, African Union, multilateral development banks, company associations, several countries, and

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40. MICHAEL R. PACE, *Understanding the Foreign Corruption Dragnet*, *in* INVESTIGATIONS 2010: HOW TO PROTECT YOUR CLIENTS OR COMPANY 73, 75 (2010).

41. Press Release, U.S. Dep't of Justice, Virginia Resident Pleads Guilty to Bribing Panamanian Officials for Maritime Contract (Nov. 13, 2008), http://www.justice.gov/opa/pr/2009/November/09-crm-1229.html.

42. Mike Scarcella, *DOJ Plans New Guidance on Foreign Bribery Enforcement*, BLT: BLOG OF LEGAL TIMES (Nov. 8, 2011), http://legaltimes.typepad.com/blt/2011/11/doj-plans-new-guidance-on-foreign-bribery-enforcement.html.

43. DOJ, U.S. Attorney's Manual §9-28.1000 (2008), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.200; Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909 (2010).

44. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, http://www.oecd.org/dataoeca74/18/38028044.pdf (OECD Convention).

certain other organizations have adopted anti-corruption conventions or have increased efforts in lessening corruption.[45] Finally, in 2010, the United Kingdom enacted the United Kingdom Bribery Act, which requires a compliance system for companies and prohibits both the offer and acceptance of bribes.[46] Although there is an almost universal acceptance of anti-bribery efforts, some of the most influential countries, such as China and India, do not have any statutes similar to the FCPA.[47] Overall, however, there is a wide enforcement of anti-bribery and corruption acts by the international community.

C. The Sarbanes-Oxley Act and the Dodd-Frank Act

Finally, the Sarbanes-Oxley Act (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) perpetuate the increased enforcement of the FCPA. First, FCPA enforcement is growing due to SOX holding the CEO and CFO responsible for any errors in the filings with the SEC.[48] SOX is increasing the voluntary disclosures of FCPA violations because since the passage of SOX in 2002, the accounting provisions now have greater importance. Further, with the enactment of the Dodd-Frank Act in July 2010, the enforcement of the FCPA is only catalyzed, primarily due to the addition of the whistleblower provision since the FCPA did not have a whistleblower protection beforehand. The whistleblower provision allows for both monetary incentives as well as protections for individuals who report violations to the SEC. In fact, the whistleblower can receive 10% to 30% of the penalties imposed on a company found to have violated the FCPA.[49] However, there are several criticisms regarding the whistleblower provision, one of which is that the incentives are too strong and the protections too flexible, which may facilitate false claims.[50]

IV. Current Problems

As noted above, the DOJ and SEC are aggressively policing possible corruption under the FCPA. This section argues that the three current issues with the FCPA compliance and enforcement include (1) recent broad statutory interpretations, (2) ambiguity of essential terms, and (3) lack of guidance by enforcement agencies or judicial opinions. The essential phrases used in the FCPA that will be analyzed in this section include: "to obtain and retain business," "anything of value," "foreign official," and "corrupt."

A. Broad Statutory Interpretations

Although in the past the FCPA was applied broadly, recently, the enforcement agencies and courts are further expanding that broad view.[51] The interpretations are more expansive

45. U.N. Convention, *supra* note 9, at 45–46; PACI 2008 Highlighting Achievers Survey, World Economic Forum (2008), http://www.weforum.org/en/initiatives/paci/HighlightingAchieversSurvey/2008Survey/index.htm.

46. Bribery Act, *supra* note 9, at c. 23, §§ 1, 2.

47. Westbrook, *supra* note 16, at 514.

48. 15 U.S.C. § 7241 (2006).

49. *Id.* § 78u-6.

50. *See, e.g.*, Heidi L. Hansberry, *In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster*, 102 J. CRIM. L. & CRIMINOLOGY 195, 197 (2012).

51. *See* Part I.

than ever, and most scholars agree that enforcement agencies are applying the "existing laws in 'novel and creative ways.'" This expansive and "novel" way of applying the law is causing companies to have to "expect the unexpected,"[52] and also implement unnecessary and costly precautions.

1. Improper Payment "to Obtain or Retain Business"

Many scholars argue that the definition of "to obtain or retain business" was and continues to be so broadly interpreted by the DOJ and the SEC that there is no chance for an accused company to argue that a payment was not for the corrupt purpose of obtaining or retaining of business.[53] The most prominent case analyzing this phrase is *United States v. Kay*, where the Fifth Circuit held that "to obtain or retain business" does not simply include payments for government contracts.[54] The court further expanded what constituted payments to include customs duties and tax liability. Currently, the payment for any improper business advantage, even if not for a specific business opportunity, may fall under FCPA liability. Other examples include permits, licenses, certifications, or even tax rebates. Also, many times, in vague pleadings, the enforcement agencies, either intentionally or unintentionally, lump clear "to obtain or retain business" bribes with facilitation payments.[55] Thus, the meaning of the phrase is so expanded that it is almost impossible to determine what payments may fall within the provision and what may fall under the "grease" payment exception.

2. "Anything of Value"

"Anything of value," similar to "to obtain or retain business," is also interpreted far too broadly. The FCPA prohibits "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value."[56] However, the DOJ and SEC are broadly interpreting "anything of value," without considering the amount, materiality, or even definite possibility of it incurring. The "anything of value" is interpreted to include charity contributions to local foreign charities, promises for future considerations, or an interest in something that has not yet even occurred.[57] For example, in 2009, "executive training programs at U.S. universities" given to Chinese "foreign officials" by UTStarcom Inc. were deemed to be "things of value." Other examples include sport outings, discounts, college scholarships, future employment promises, and transportation of household goods. These interpretations indicate a broad understanding of "anything of value."[58]

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52. *See* Yin Wilczek, G*overnment Actions in Economic Turmoil Will Create FCPA Issues, DOJ Official Says*, 41 SEC. REG. & L. REP. 1667, 1667 (2009).

53. *See*, *e.g.*, Westbrook, *supra* note 16, at 541.

54. United States v. Kay, 359 F.3d 738, 743 (5th Cir. 2004).

55. *E.g.*, United States v. Panalpina, Inc., No: 10-CR-765 (S.D. Tex. Nov. 4, 2010); Carolyn Lindsey, *More Than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices A*ct, 35 OHIO N.U. L. REV. 959, 963 (2009).

56. 15 U.S.C. § 78dd-1(a) (2006).

57. SEC v. Schering-Plough Corp., Litigation Release No. 18740, 2004 WL 1268036, at *1 (June 9, 2004).

58. SEC v. UTStarcom, Inc., SEC Release No. 3093, 2009 WL 5171952, at *1 (Dec. 31, 2009); *e.g.*, United States. v. Sawyer, 85 F.3d 713, 721 (1st Cir. 1996).

B. Ambiguity

The FCPA also has several provisions that create ambiguity for companies that actually attempt to comply with its provisions. Companies, since they are faced with unclear prohibited conduct, are forced to spend large amounts on prevention but then end up still being exposed to FCPA liability. The ambiguity decreases fair enforcement and the FCPA's effectiveness.

1. "Foreign Official"

The first ambiguous phrase, and the most debated one, is "foreign official." As noted above, "foreign official" is integral to the possible liability of a company, but it is also one of the most difficult phrases to limit or define. In fact, about 66% of actions brought by the DOJ and SEC involved the interpretation of the individual and whether he or she falls under the "foreign official" provision.[59] The statutory definition of "foreign official" in the FCPA is

> [a]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[60]

In interpreting this phrase, the first explanation one would desire is just what an "officer" or "employee" is; however, the FCPA does not provide a definition. There is also no guidance on the meaning of such terms. However, the DOJ and SEC have basically interpreted all employees, no matter the position, as a "foreign official."[61] This broad interpretation complicates predictability of liability for companies because any payment, even to a member of the purchasing staff, can ultimately lead to FCPA liability.

Furthermore, the concept of "agency or instrumentality" of foreign government is not clearly articulated and broadly interpreted. Even though two DOJ Opinion Procedures Releases were intended to clarify "foreign official,"[62] the sufficient extent of the individual's proximity to the government and the extent of government control is still not clear. Case law, guidance by the agencies, and even legislative history are obscure.[63] The DOJ, for example, has interpreted employees of state-owned or controlled enterprises to be "foreign officials."[64] How-

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59. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 412 (2010).

60. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2006).

61. Resource Guide, *supra* note 17, at 19.

62. U.S. Dep't of Justice, Foreign Corrupt Practices Act Opinion Procedure Release No. 10-01 (Apr. 19, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1001.pdf; U.S. Dep't of Justice, Foreign Corrupt Practices Act Opinion Procedure Release No. 10-03 (Sept. 1, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf.

63. *See* Brooks, *supra* note 15, 143.

64. SEC v. Baker Hughes, Inc., SEC Release 2602, 2007 WL 12386668, at *2 (Apr. 26, 2007); Press Release, U.S. Dep't of Justice, Former Alcatel Executive Pleads Guilty to Participation in Payment of $2.5 Million in Bribes to Senior Costa Rican Officials to Obtain a Mobile Telephone Contract (June 6, 2007), http://www.justice.gov/opa/pr/2007/June/07_com_411.html.

ever, this interpretation does not necessarily comply with any case precedent or even the legislative history, which has caused some scholars to question the accuracy of the interpretation.[65] Even more, the DOJ articulated that even "employees" or "officers" of minority government owned organizations are under the definition of "foreign official."[66] Quasi-governmental bodies are also included in the definition. Further, mere governmental influence, without share ownership, can lead to an individual falling under this provision.[67] It is, therefore, unclear the extent to which the government's control will push the employee into the "foreign official" definition.

The applicability of "foreign official" is further complicated by the recent economic downturns and the governmental "stimulus plans" around the world because such plans increase government ownership. Further, since foreign governments are much more likely to be involved in businesses, a company's decision is further complicated. For example, in China, the government's influence on economic institutions is extensive.[68] Still, investment in China is attractive because it is one of the fastest growing countries. However, the lack of clear directions by enforcement agencies may result in liability or even refusal to invest abroad out of fear of liability. The term "foreign official," even though an integral component of the majority of the SEC and DOJ actions, is unclear. In fact, then-Assistant Attorney General Lanny Breuer noted that "foreign official" can involve "nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country."[69] A public announcement such as this perpetuates the broad application of "foreign official" and exemplifies the complexity of the term for U.S. businesses.

Even worse, courts have interpreted the "instrumentality" component of the "foreign official" definition differently than the DOJ and SEC. They, rather than the expansive enforcement afforded by enforcement agencies, have taken a narrower approach. For example, in *United States v. Aguilar*, the court actually looked at the more common definition of "instrumentality," and the court in *United States v. Carson* focused on objective factors other than mere monetary investments and held that "instrumentality" should be given its ordinary meaning while citing to dictionary definitions.[70] This narrow approach by courts but broad approach by the DOJ and SEC create not only the questioning authority of the DOJ and SEC, but also perpetuate the increasingly difficult task of defining "foreign official."

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65. *See*, *e.g.*, Brooks, *supra* note 15, at 143.

66. U.S. Dep't of Justice, Foreign Corrupt Practices Act, Opinion Procedure Release No. 94-1 (May 13, 1994).

67. SEC v. Siemens AG, No. 1:08-CV-02167 (D.C. Dec. 12, 2008).

68. Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13, 14 (2008).

69. Lanny A. Breuer, Assistant Att'y Gen., DOJ, Prepared Keynote Address to the 10th Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf. (Breuer left the DOJ in 2013).

70. United States v. Carson, 2011 WL 5101701, *4-5 (C.D. Cal. May 18, 2011); United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

2. Corrupt Payment

"Corrupt" is the second most ambiguous term. As mentioned above, corporations are prohibited from giving corrupt payments to foreign official to retain or obtain business.[71] Although the FCPA does not define "corrupt," legislatures have released reports that define "corrupt" as an act with intention to induce an official, with focus on the intent rather than the outcome.[72] For example, the Eighth Circuit, in *United States v. Liebo*, held that an airline ticket provided to a Nigerian Air Force official so as to receive an approval for a military contract fell under the "corrupt" payment definition.[73] However, first, it is unclear the amount of time required in between the payment or gift and the foreign official's act. Second, although *Liebo* may be an "easy" case, the Act is not clear about when the culture *requires* gift giving and when it is merely part of the social decency. Further, in 2011, the Second Circuit, in *United States v. Kozeny*, held that under the FCPA, an individual could be deemed to have acted "corruptly" by merely having a general intent to "corrupt."[74] Therefore, as evidenced by recent cases, "corruptly" may apply to an individual with the *general* intent to "accomplish an unlawful result or by acting with an intent to achieve a lawful result through unlawful means like a secret payment."[75] However, in 2003, the Second Circuit noted that a person would not be held liable under the FCPA if there is no *specific* intention present; thus, it applied a narrower view.[76]

Further, uncertainty arises in regard to gift-giving cultures. Take, for example, companies doing business in China. First, as noted above, in China, government involvement in economic transactions is prevalent, since most of the companies are state-owned or at least state-controlled. This creates an issue where a perceived private transaction may actually be deemed to involve "foreign officials." Second, China has a "gift-giving" culture. The term "guanxi" refers to such practice. The purpose of guanxi is to show development of relationship and friendship.[77] Under the FCPA, there is an exception for reasonable and bona fide business expenditures that are directly related to execution of a contract or promotion of products or services.[78] However, it is not clear what may count as direct promotion or execution and what may count as "corrupt" payments. Thus, social customs may complicate the matter for companies doing business in countries with certain social and cultural norms.

Although it is easy for a DOJ official to say, "Just don't pay bribes," this simple suggestion overlooks the complexity of sustaining a business that also follows social and business norms in a foreign country. This broad interpretation, with no helpful guidance, forces a company to lose business, or spend an immense amount of time on auditing for things like birthday gifts

71. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006).

72. S. Rep. No. 95-114, at 10 (1977); H.R. Rep. No. 95-640, at 7 (1977).

73. United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991).

74. United States v. Kozeny, 667 F.3d 122, 135 (2d Cir. 2011).

75. Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 331 (2012).

76. Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 327 F.3d 173, 183 (2d Cir. 2003).

77. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 37 (2010).

78. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2006).

and enormous resources in attempting to determine whether its acts fall under the "corrupt" definition.

C. Lack of Guidance by Enforcement Agencies

Lack of guidance is the third issue. As mentioned above, many U.S. companies tend to agree to DPAs or NPAs.[79] These agreements have several short-term benefits for the companies, because they avoid the collateral costs such as loss of share value or decreased reputation. However, such DPAs and NPAs do not allow precedent to grow. Judicial precedent would lead to clearing up ambiguity, limiting overreach or broad interpretations, and suggesting to legislatures where there may be issues in the law.[80] However, DPAs and NPAs block this development.

Furthermore, there is very little guidance given by the DOJ and the SEC. The FCPA requires DOJ Opinion Procedure Releases, but such guidance is usually too narrow.[81] Also, unlike judicial opinions, they have no binding precedent. In 2012, the DOJ only issued two opinions, whereas in 2011 and 2013 there were only one each year.[82] The FCPA Opinion Procedure Releases do not provide much guidance because they are rarely issued and are too fact-specific to alleviate the current uncertainty. Although there have been a few other types of releases,[83] none of these provide the legal clarifications required today.

V. Implications and Potential Reform

The results of the ambiguous, broad, and aggressive interpretations and enforcements are higher costs for U.S. companies, higher risk-averseness for investing in foreign operations, and lower competitive advantage in the global market. This section details such implications, and then gives some suggestions for change. This article does not suggest that the FCPA should be struck down, but it does call for more clarity as well as understanding of the current global business environment. Other than more SEC and DOJ guidance, and clearer and explicit statutory interpretations, this article calls for the (1) alignment of the interpretation of certain FCPA provisions with the OECD Convention's terms and Congress's intention in ratifying the Convention; (2) enactment of a lack of knowledge defense as well as a compliance defense; and (3) increase and improvement in the advisory opinions and guidance from the DOJ and SEC.

A. Implications for U.S. Businesses

The ambiguous, zealous, and broad interpretations of the FCPA's provisions has and continues to lead to either U.S. companies' higher costs for auditing and monitoring or overt risk-averseness. First, companies attempting to comply with the FCPA are faced with confusing and

79. Koehler, *supra* note 43, at 909.

80. *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 805 (2009).

81. 15 U.S.C. §§ 78dd-1(e), 78dd-2(f).

82. Opinion Procedure Releases, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last visited April 11, 2014).

83. *See* Resource Guide, *supra* note 17, at 14–19.

unclear standards. To comply, companies are implementing very time-intensive, costly, and resource-heavy policies. For example, a firm spent $3.2 million to investigate $50,000 in "potential" improper payments, and in 2008, Siemens AG spent $1 billion on audits conducted by 1,500 attorneys and accountants who billed about 1.5 million hours.[84] In 2012, Wal-Mart spent $157 million on investigations as well as litigation filed by its shareholders.[85] Even with such increased costs, the enforcement agencies, through such ambiguous and sometimes novel interpretations, can still hold a company liable. Further, once there is an allegation of wrongdoing, the company is responsible for the internal investigation's extensive costs. Second, there may be over-deterrence for U.S. companies to invest in foreign companies, even though such investments would benefit not only the company but also the U.S. economy. Interestingly enough, the Dow Jones risk and compliance survey found that 14% of companies have cancelled and 51% have delayed business ventures abroad because of the FCPA's unclear and broad enforcements.[86] For example, as noted above, in China, a highly attractive country for investment, businesses are primarily state-owned, so the concept of "foreign official" or "instrumentality" may not be clearly portrayed, thus deterring U.S. corporations from investing in China. Also, because their foreign competitors are not subject to such broad and unclear regulations, this leads to a competitive disadvantage for U.S. companies. Further, following an FCPA action, there may be a secondary civil litigation by shareholders against directors and officers, alleging the FCPA action was a result of mismanagement and poor internal control.[87]

B. Recommendation: Align FCPA Interpretations With the OECD Anti-Bribery Convention Terms and Congressional Intention in Ratifying the OECD Convention

The FCPA's broad and ambiguous standards place an unnecessary impediment on American businesses. Compliance is difficult, while enforcement is only increasing. However, since Congress already ratified the OECD Convention and amended the FCPA to bring it into compliance with the OECD Convention, some of the ambiguous terms of the FCPA should be interpreted under the Convention's clearer standards.[88] Second, the SEC and DOJ along with courts should follow and comply with the initial intention of Congress in ratifying the OECD Convention, which was to lessen the competitive disadvantage for U.S. businesses. Thus, FCPA interpretation, if more aligned with the OECD Convention, will result in clearer guidance for U.S. companies as well as meeting Congress's initial intentions.

As noted above, under the FCPA, ambiguity underlies the definition of "foreign official" as well as to whom it applies and to what extent it applies. On the other hand, the OECD Convention has clearer definitions. The Convention defines a "foreign official" as "any person

84. Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES, May 24, 2010, at 72, http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html; Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 786 (2011).

85. Press Release, Wal-Mart, Walmart reports Q4 EPS of $1.67, full year EPS of $5.02 (Feb. 21, 2013), http://media.corporate-ir.net/media_files/irol/11/112761/release/FY%2013%20Q4%20earnings%20FINAL.pdf.

86. Dow Jones Survey, *supra* note 1.

87. *Restoring Balance*, *supra* note 4, at 4.

88. 15 U.S.C. §§ 78dd-1(g), 78dd-2(d) (2006); Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the FCPA*, 62 DUKE L.J. 445, 457 (2012).

holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization."[89] The OECD Convention, similar to the FCPA, prohibits bribery of government elected officials. On the other hand, OECD's prohibition is restricted to officials or those who exercise a public function. This is dissimilar to the FCPA's application to "any officer or employee" of any instrumentality or government. Further, the OECD Convention, unlike the FCPA, defines the "public enterprise" as an enterprise in which "the government holds a majority stake" or "the government may exercise a dominant influence either directly or indirectly."[90] However, the "instrumentality" under the FCPA, as noted above, is unclear, and the FCPA does not provide a definition. The OECD Convention's narrower and clearer standards stand as a contrast to the ambiguous and broad application of the FCPA. The SEC, DOJ, and the courts should align the interpretation of the problematic FCPA provisions with those in the OECD Convention.[91]

Further, one of Congress's intentions in ratifying the OECD Convention was to promote an equal competitive advantage for U.S. businesses. In 1998, Congress ratified the OECD Convention and enacted implementing legislation, as a reaction to the FCPA's hindrance on American businesses.[92] As stated above, the FCPA is currently broadly and ambiguously applied to U.S. businesses, so they are once again at a competitive disadvantage. The current zealous enforcement agencies along with courts should interpret the FCPA with an understanding of Congress's intention in ratifying the Convention. Thus, the enforcement should be alleviated and interpreted with Congress's intention in lessening U.S. companies' competitive disadvantage.

C. Recommendation: Enact Two Additional Defenses to FCPA Liability

Since the enforcement agencies are harshly and broadly applying the FCPA against U.S. companies, this article also suggests the enactment of two additional defenses so as to level the playing field. The two suggested defenses are lack of knowledge defense and compliance program defense. Under the current FCPA enforcements, through respondeat superior, a company can be held strictly liable for conduct that it did not know about, approve, or encourage. However, this sort of lack of knowledge should be considered a defense or at least be considered during the sentencing phase. This protects a company from being fined millions of dollars for conduct that the company had no knowledge of, and it avoids situations where the act was committed by one individual without the knowledge of the rest of the personnel. It will allow the enforcement agencies to allocate their resources to the actual individuals that are engaged in the corrupt conduct. Furthermore, it complies with the DOJ's statement that "prosecution of

89. OECD Convention, *supra* note 44, at art. 1.

90. OECD, *Corruption: A Glossary of International Criminal Standards*, 29–32 (2008), http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/41194428.pdf.

91. *See* United States v. Kay, 359 F.3d 738, 755 n.68 (5th Cir. 2004) (noting that interpretation of the FCPA provision in question should align with the "ratification and implementation of the Convention," otherwise it would "create a conflict with our international treaty obligation, with which we presume Congress meant to comply fully").

92. S. Rep. No. 105-277, at 2 (1998); International Anti-Bribery and Fair Competition Act of 1998, *supra* note 14.

individuals is a cornerstone of [the DOJ's] enforcement strategy."[93] Also, currently, a U.S. company may be wary of reporting wrongdoings by its employees, but if the company will not be held liable if it did not know of the wrongdoing, it is more likely to report it. This will assist the enforcement agencies in honing in on the responsible individuals rather than punishing the entire business, which could negatively affect its stockholders, other stakeholders, and the community.

Currently, although compliance programs are considered during the sentencing,[94] the FCPA does not provide a defense if the company has a reasonably adequate program and policy against improper conduct. In contrast, the United Kingdom's Bribery Act specifies a defense if the company shows that it has an "adequate procedure" for detection and deterrence of bribery.[95] Similarly, an Italian anti-bribery statute allows a company to raise a compliance defense if there was an effectively designed policy and model in place.[96] The United States should also adopt a compliance defense similar to that of Italy and the United Kingdom. Since this concept is already applied at the sentencing phase, the application to the liability phase would still comply with the goals and intentions of the FCPA. Also, a compliance defense would incentivize businesses to implement better programs and remain active in control and due diligence.

D. Recommendation: Increase and Improve the Advisory Opinions and Guidance From the DOJ and the SEC

Since enforcement is increasing, FCPA compliance is now more important than ever; therefore, guidance is needed more than ever. However, as noted above, there is a lack of judicial precedent since DPAs and NPAs are more common, and much of the DOJ's and SEC's advisory guidance is either too rare or too fact-specific to be helpful. In 2012, the SEC and the DOJ issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act*.[97] Although it gives some guidance, the main content of the document is a mere compilation of cases and information that is already in the public domain. Even more, although the document is 120 pages long, its introductory material and the table of contents account for 30 pages and the summary of already issued guidance or other laws, such as the Dodd-Frank Act, accounts for 20 pages. Many scholars agree that the "guidance" portion presents very little new information.[98]

The DOJ and SEC may have been too general in the *Resource Guide* to continue the tough enforcements. Therefore, this article calls for frequent, expedited, and clearer DOJ opinions and SEC releases. For example, currently, the Attorney General has 30 days to answer a business's query on whether the company's conduct conforms to the enforcement agency's poli-

93. Lanny A. Breuer, Assistant Att'y Gen., DOJ, Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 19, 2009), http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

94. U.S. Sentencing Guidelines Manual § 8B2.1 (2013).

95. Bribery Act, *supra* note 9, at ch. 23, § 7(2).

96. Decreto Legge 8 June 2001, n. 231 (It.).

97. *See* Resource Guide, *supra* note 17.

98. *E.g.*, *Say What?*, FCPA PROFESSOR (March 14, 2013), http://www.fcpaprofessor.com/category/guidance.

cies.[99] However, aside from the fact that the procedure is burdensome, the 30-day period may be too long for a company attempting to negotiate and implement a transaction. Also, in 2012, only two Opinion Procedure Releases were announced.[100] Further, although a favorable opinion gives the company a rebuttable presumption, the fear of future negative opinions held by enforcement agencies is real. Thus, the Opinion Procedure Release is hardly used. This article asks not only for specific guidance from the SEC and the DOJ but also asks Congress to enact an amended procedure for the DOJ opinions. The time period should be shortened and the process made less burdensome, so that companies are able to comply with confidence. Further, U.S. business will not be placed in a disadvantage in the fast-paced transactions. An expedited and less burdensome process will not only help companies, it will also lower the enforcement agencies' costs, as violations will decrease with better guidance for companies to follow.

VI. Conclusion

This article argues that the current rise in the FCPA activity—as many of its provisions remain ambiguous and the Act is aggressively enforced and expansively interpreted—imposes a possible threat to U.S. companies' competitive advantage in the global market, unreasonably increases businesses' costs, fails to properly deter U.S. companies, and leads to decreased foreign investment due to high risk-averseness. Although the Act was enacted in 1977, the current enforcement has radically transformed the substance and scope of the law. The three current issues are (1) broad statutory interpretations, (2) ambiguous statutory terms and provisions, and (3) scarcity of guidance from the enforcement agencies or the judiciary. There is no doubt that the FCPA, as a tool against bribery and corruption, enhances international business, but the current law still remains vague and is aggressively enforced against U.S. companies.

The FCPA grew out of scandals in the 1970s. It was amended twice, but for years it was dubbed the "legal sleeping dog."[101] However, current enforcement is increasing tremendously, while at the same time certain FCPA provisions lack clear articulation and continue to remain vague.[102] Structurally, the FCPA contains two provisions: anti-bribery provisions and record-keeping or accounting provisions. Under the anti-bribery provisions, businesses are prohibited from bribing foreign officials to obtain business, and they are required to keep and sustain certain records and accounting systems under the accounting provisions.[103] Primarily through the anti-bribery provisions, the DOJ and SEC are increasingly enforcing the FCPA, especially through individual liability. Further, although the enforcement is increasing, there are few reported judicial opinions, because most businesses and individuals tend to settle through a guilty plea, NPAs, or DPAs. Therefore, the law is developing, vaguely, through private settlement negotiations instead of public judicial opinions.

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99. 28 C.F.R. § 80.1 (2013).

100. Opinion Procedure Releases, *supra* note 82.

101. *See* S. Rep. No. 95-114, at 4 (1977).

102. DOJ Fact Sheet, *supra* note 3 (noting the current expansion of the DOJ's FCPA enforcement); Khuzami, *supra* note 5; *Corporate Corruption: A Historic Takedown*, *supra* note 5.

103. 15 U.S.C. §§ 78dd-1,78dd-2, 78m(b)(2) (2006).

In addition to the SEC's and DOJ's increased enforcement of the FCPA, other countries have also recognized the importance of lessening corruption. The OECD Anti-Bribery Convention, the United Kingdom Bribery Act, and enactments by other countries, associations, and organizations are some of the several anti-bribery developments in the international arena.[104] Further, with the enactment of the SOX and the Dodd-Frank Act, the FCPA enforcement will continue to rise due to the increased importance of accounting provisions and the addition of a whistleblower provision.[105] These anti-bribery and anti-corruption global expansions are beneficial to U.S. businesses because they allow for the leveling of the playing field. However, as this article portrayed in Part IV, there are three current issues with the increased FCPA enforcement. First, certain statutory provisions, such as "to obtain or retain business" and "anything of value" are being interpreted too broadly;[106] in fact, so broadly that companies are unable to differentiate between such phrases and the exceptions or defenses described above. Second, for companies who try to comply with the FCPA, certain provisions, specifically "foreign official" and "corrupt," are so ambiguous that they cause a decrease in the effectiveness of the FCPA and may result in unjust enforcement.[107] Third, since so many businesses and individuals choose, or are almost forced, to settle through DPAs or NPAs, there is a lack of judicial precedent. Also, the DOJ and the SEC have failed to issue sufficient guidance through opinions or releases.[108]

The outcomes of the problems detailed above have and will continue to lead to higher auditing and monitoring costs and over-deterrence in investing in foreign economies.[109] The overt risk-averse reaction and increased costs, as a result of the unclear but aggressive FCPA enforcement, leads to U.S. companies' decreased competitive advantage. Thus, this article offers three recommendations so as to improve the current environment.

First, since the Congress has already ratified the OECD Anti-Bribery Convention, some of the ambiguous terms under the FCPA should be interpreted under the more clear and direct language of the Convention. Further, the initial intention of Congress in ratifying the Convention (i.e., decrease the competitive disadvantage and level the global playing field for U.S. companies) should be taken into consideration by the enforcement agencies and courts.

Second, two defenses, the lack of knowledge defense and the compliance program defense, should be added to the FCPA. The lack of knowledge defense allows for more efficient allocation of the enforcement agencies' resources, aligns with the DOJ's increased prosecution of individuals, and promotes businesses to report employees if the company will not be held liable as well. Further, it will avoid harm to stakeholders and the community. The compliance defense, if applied at the liability phase, would not only induce businesses to institute enhanced programs and policies against improper conduct but also sustain such programs through due diligence and active control. This result aligns with the ultimate goal of the FCPA.

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104. OECD Convention, *supra* note 44.

105. 15 U.S.C. §78u-6(b)(1) (2006 & Supp. IV 2010).

106. *See* SEC v. UTStarcom, Inc., SEC Release No. 3093, 2009 WL 5171952, at *1 (Dec. 31, 2009).

107. *See* United States v. Kozeny, 667 F.3d 122, 135 (2d Cir. 2011).

108. *See* Opinion Procedure Releases, *supra* note 82.

109. Vardi, *supra* note 84, at 72; Dow Jones Survey, *supra* note 1.

Third, with such increased and harsh enforcements, U.S. businesses deserve better guidance from the enforcement agencies. Thus, not only does this article ask for increased and improved guidance by both the SEC and the DOJ, it also asks for more frequent, clearer, and expedited DOJ opinions. Congress can achieve this by amending the procedure for DOJ Opinion Procedure Releases. The amended procedure should specifically contain a shorter response period of time and a less burdensome process, which can help level the playing field for U.S. companies engaging in international transactions. Further, such developments would lead to a decrease in violations, as guidance improves. It is important to note that this article does not suggest the full abandonment of FCPA enforcement. With these recommendations, however, the FCPA's goals can be reached efficiently, without the increased costs of the ineffective audits and programs, secondary litigation by the shareholders, and the delay in or overt risk-averseness toward foreign investments, all of which result in decreased competitive advantage for U.S. companies compared to their global counterparts.

Troma Entertainment, Inc. v. Centennial Pictures Inc.

729 F.3d 215 (2d Cir. 2013)

New York's long-arm statute did not confer jurisdiction over two defendants for misappropriating plaintiff's copyrighted films and selling them to a German company that broadcast them.

I. Holding

In *Troma Entertainment, Inc. v. Centennial Pictures Inc.*, the U.S. Court of Appeals for the Second Circuit considered whether Troma Entertainment, Inc. (Troma), a New York-based producer of motion pictures, suffered an injury sufficient to confer personal jurisdiction over the defendants, which distributed Troma's films internationally.[1] The Second Circuit affirmed the U.S. District Court for the Eastern District of New York's judgment that New York lacked personal jurisdiction over the defendants, because the injury they caused occurred in Germany. As such, the Second Circuit held that the appellant did not suffer a sufficient injury "within the state" to satisfy N.Y. Civil Practice Law & Rules 302(a)(3)(ii) (CPLR).[2]

II. Facts and Procedural History

This case concerns an appeal with respect to the reach of New York State's long-arm statute in relation to alleged infringement of intellectual property.[3] In October 2009, Troma, a New York-based corporation in the business of producing and distributing "controlled budget motion pictures," authorized Lance Robbins to represent it in negotiations concerning the licensing of distribution rights of the parody films *Citizen Toxie: Toxic Avenger IV* and *Poultrygeist: Night of the Chicken Dead* to a German distributor.[4] The authorization was supposed to terminate after 30 days if no agreement was reached. Subsequently, Robbins was unable to negotiate a deal with a German distributor within the 30-day window.[5]

However, a week prior to Troma's authorization, Robbins and codefendant King Brett Lauter, both California residents, conspired to negotiate a deal.[6] Robbins and Lauter entered into a distribution license in Germany with Intravest Beteiligungs GmbH (Intravest).[7] Troma alleged that Robbins and Lauter falsely assured Intravest that they owned the rights to the films. However, Robbins and Lauter had actually purchased German language DVD copies of the films from Amazon.com's German website (Amazon.de); they then delivered those DVDs to Intravest.[8] Robbins and Lauter kept the subsequent proceeds from the transactions and

1. Troma Entm't, Inc. v. Centennial Pictures Inc., 729 F.3d 215, 216 (2d Cir. 2013).
2. *Id.*
3. *Id.* at 216.
4. *Id.*
5. *Id.* at 216–17.
6. *Id.* at 217.
7. *Id.*
8. *Id.*

never notified Troma that the agreement even existed.[9] The actions of the defendants were not alleged to have taken place in New York;[10] rather, they were carried out and put into effect solely in Germany.

In August 2010, Troma learned that Intravest had been broadcasting *Citizen Toxie, Toxic Avenger IV* and *Poultrygeist: Night of the Chicken Dead* in Germany when they saw them on Silverline AG's Movie Channels.[11] On March 7, 2011, Troma filed suit against Robbins, Lauter and two other entities that are no longer parties to this litigation in the Eastern District of New York.[12] The complaint alleged copyright infringement under federal law and state-law claims of common-law fraud and tortious interference with prospective economic advantage.[13]

Robbins and Lauter, proceeding *pro se* but with the help of a pro bono *amicus curiae*, filed motions to dismiss for lack of personal jurisdiction.[14] The District Court found that New York State's long-arm statute did not permit the exercise of personal jurisdiction.[15] The court focused on whether the defendants caused the plaintiff's injury "within the state," as required by CPLR 302(a)(3)(ii).[16] The court noted that, to suffer an injury in New York, there must be something more than mere presence and some form of a "plus factor."[17] The court said that this "plus factor" could be sales a plaintiff might have made to New York customers that have been diverted to a non-domiciliary.[18]

In this case, the District Court stated that the only basis for personal jurisdiction was residency, which is not sufficient to satisfy New York's long-arm statute.[19] However, the plaintiff argued, on the basis of the *Penguin Group* cases,[20] that the injury caused by copyright infringement occurs where the copyright holder resides.[21] Nevertheless, the court disagreed that copyright infringement that occurred solely on foreign soil could satisfy New York's statute.[22]

The District Court distinguished the *Penguin Group* cases from this case. In the *Penguin Group* cases, the defendant obtained copies of the plaintiff's copyrighted works and uploaded

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Troma Entm't, Inc. v. Centennial Pictures, Inc., 853 F. Supp. 2d 326, 327 (E.D.N.Y. 2012).
17. *Id.* at 328.
18. *Id.*
19. *Id.*
20. Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30 (2d Cir. 2010) (*Penguin I*); Penguin Grp. (USA) Inc. v. Am. Buddha, 16 N.Y.3d 295 (2011) (*Penguin II*). *Penguin I* and *Penguin II* are referred to collectively as the *Penguin Group* cases.
21. *Id.*
22. *Id.*

them to the Internet, making them available to anyone with an Internet connection.[23] The court also quoted *Penguin II,* stating that "our decision today does not open a Pandora's box allowing any nondomiciliary accused of digital copyright infringement to be haled into a New York court when the plaintiff is a New York copy-right owner of a printed literary work."[24] The court further noted that this statement contradicted the plaintiff's argument.[25]

In addition, the District Court reasoned that the ability of New York residents to access the uploaded work was grounds for personal jurisdiction, and that if residents had not had access to the uploaded work, personal jurisdiction would have been lacking.[26] The court then concluded that it lacked personal jurisdiction, because Troma's complaint did not make out a prima facie case showing that Robbins and Lauter's conduct "caus[ed] injury within [New York]," as required by New York's long-arm statute.[27] The court further stated that the loss of "one actual German customer is not the same as some potential or actual New York customers who use the Internet."[28] As a result, the District Court dismissed Troma's lawsuit for lack of jurisdiction and improper venue.[29] Troma then appealed the judgment.[30]

III. Discussion—Court's Analysis

A. Standard of Review

A district court's legal conclusions regarding the exercise of personal jurisdiction are reviewed de novo and its factual findings are reviewed for clear error by the Court of Appeals for the Second Circuit.[31]

B. Burden of Proof

In this case, the plaintiff need only make a *prima facie* showing that personal jurisdiction existed. In addition, for the plaintiff's complaint to survive the motion to dismiss for lack of personal jurisdiction, the plaintiff must present "legally sufficient allegations of jurisdiction."[32]

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23. *Id.*
24. *Id.* at 329 (quoting *Penguin II*, 16 N.Y.3d at 306–07).
25. *Id.*
26. *Id.*
27. *Troma Entm't, Inc.*, 729 F.3d at 217.
28. *Troma Entm't, Inc.*, 853 F. Supp. 2d at 329–31.
29. *Troma Entm't, Inc.*, 729 F.3d at 217.
30. *Id.*
31. *Id.*
32. *Id.*

C. Court's Rationale

The Second Circuit first recognized that "residence or domicile of the injured party within New York is not sufficient predicate for jurisdiction" under section 302(a)(3).[33] The court stated that "the suffering of economic damages in New York is insufficient alone to establish a direct injury in New York for section 302(a)(3) purposes."[34]

1. Distinguishing *Penguin II*

Relying on *Penguin II*, Troma argued that its allegations amounted to more than the assertion of mere economic injury within the state.[35] In that case, the New York Court of Appeals accepted certification from the federal district court of the question, "in copyright infringement cases, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302(a)(3)(ii) the location of the infringing action or the residence or location of the principal place of business of the copyright holder?"[36] The state court concluded that the situs of the injury was the location of the copyright owner.[37]

In *Penguin II*, the court reached its conclusion based on two factors. The first factor was the nature of the alleged infringement, which was uploading Penguin Group's copyrighted works over the Internet.[38] The court reasoned that the jurisdictional inquiry carried less weight, because the injury committed through uploading was so widely dispersed.[39] The second factor was the effect of the decision on the rights granted to copyright owners.[40] The court then found that the location of the relevance had diminished relevance.[41]

Troma appeared to acknowledge that the *Penguin II* decision was too narrow to control the case.[42] The Second Circuit stated that nowhere in Troma's complaint did it allege that Robbins and Lauter's conduct could not be "circumscribed" to a certain area.[43] The court further reasoned that "the place where [the plaintiff's] business is lost or threatened exerts a significant gravitational influence on the jurisdictional analysis"; here, whether that injury occurred in Germany or California did not matter, because neither location had any bearing on New York in this instance.[44]

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33. *Id.* at 218 (quoting Fantis Foods, Inc. v. Standard Importing Co., 49 N.Y.2d 317, 326 (1980)).

34. *Id.* (quoting *Penguin I*, 609 F.3d at 38).

35. *Id.*

36. *Id.* at 219.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 220.

43. *Id.* In *Penguin II*, the court distinguished *American Eutectic v. Dytron Alloys*, 439 F.2d 428 (2d Cir. 1971), where the locus of injury was circumscribed to two other states. The court then concluded that was no single location like *American Eutectic*, because the infringement took place online and was dispersed throughout the country and maybe the world. *Penguin II*, 16 N.Y.3d at 305.

44. *Id.*

2. Harmful Effects on Copyright Owners' Rights Argument as a Justification for Personal Jurisdiction

Troma further argued that out-of-state infringement may harm the bundle of rights held by New York-based copyright owners.[45] Yet the Second Circuit reasoned that this argument still does not relieve intellectual property owners of their obligation to allege facts demonstrating non-speculative and direct New York-based injury.[46] Troma further alleged that the defendants usurped two potential licensing agreements in Germany, which caused a "generalized harm to its exclusive distribution right," but the court found that Troma's assertion was too speculative to support a finding of an injury suffered in New York.[47] The court then went on to say that, because the injury occurred in Germany, it cannot "be said to diminish incentives to engage in creative enterprise, or to harm, beyond the immediate loss of profits, the continuing value of . . . a copyright holder's bundle of rights."[48] The court also stated that the infringement alleged by Troma, the theft of the opportunity for two potential licensing agreements in Germany, is not a sufficient injury.[49]

3. Court's Conclusion

The court finally stated that Troma did not articulate a non-speculative and direct injury to person or property in New York that goes beyond the simple economic losses that its New York-based business suffered.[50] As such, the licensing of Troma's copyrighted material by Robbins and Lauter to German distributors was not sufficient to confer personal jurisdiction upon a New York court.[51]

IV. Conclusion

The Second Circuit affirmed the lack of personal jurisdiction over Robbins and Lauter, who infringed Troma's works by distributing them internationally.[52] However, Troma still has recourse by suing the defendants in California, where personal jurisdiction can be properly exercised.[53] In essence, because the court held that the defendants' distribution caused an injury in Germany, the ruling could potentially make it easier for international distributors to commit copyright and trademark infringement without penalty. This rule states that for U.S. residents to have legal recourse in the U.S. they have to bring the action where the defendants have minimal contacts or where a traditional notion of personal jurisdiction could be exercised.

William H. Hargett, Jr.

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45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 221.
53. *Id.* at 217.

In re Application of Kreke Immobilien KG

No. 13 Misc. 110 (NRB), 2013 WL 5966916 (S.D.N.Y. Nov. 8, 2013)

The U.S.D.C. for the S.D.N.Y. held that foreign litigants could not rely on U.S. courts to preempt discovery procedures of foreign tribunals with clear jurisdictional authority where the applicant's request is for documents located overseas.

I. Holding

In *In re Kreke Immobilien KG*,[1] the U.S. District Court for the Southern District of New York held that 28 U.S.C. § 1782, which authorizes U.S. district courts to compel parties to produce documents located in the United States to be used in foreign proceedings, does not extend to documents that can be accessed by foreign tribunals. The District Court held that, where documents are located outside of the United States, the request is an attempt to circumvent the foreign tribunal's discovery proceedings. Further, in the particular case, the "unquestionably extensive" request is an undue burden on the respondent.[2] Thus, it is inappropriate for a district court to grant the application.[3]

II. Facts and Procedure

The petitioner, Kreke Immobilien KG (Kreke), is a German limited partnership that manages the real estate assets of the Kreke family.[4] The general partners of Kreke are Dr. Henning Kreke and Dr. Jörn Kreke, who are both German citizens. Kreke's limited partners are Dr. Henning's four children, all of whom have U.S. citizenship.[5] In 2000, Kreke decided to invest in Oppenheim-Esch funds.[6] Since 1990, Oppenheim-Esch funds have been owned and operated by Oppenheim, a German private bank.[7] The Oppenheim-Esch funds are a collection of real estate investments that purchase, manage, and develop land.[8]

According to Kreke, Oppenheim solicited its investments by representing that the funds were mainly open to its bank partners and shareholders.[9] By only secondarily offering the funds to outside investors, Oppenheim would substantially decrease the investment's risk while creating positive tax results.[10] However, Oppenheim solicited outside investors more extensively

1. No. 13 Misc. 110 (NRB), 2013 WL 5966916 (S.D.N.Y. Nov. 8 2013).
2. *Id*. at *7.
3. *Id*. at * 3, 5.
4. *Id*. at *1.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.

than was advertised,[11] subjecting Kreke to more risk than anticipated,[12] and misrepresented the safety of the investment in other ways.[13] Allegedly because of this fraudulent conduct, the investments have a present value of 35%–70% less than the amount of capital Oppenheim raised from its investors.[14]

In March 2010, Deutsche Bank acquired Oppenheim and made Oppenheim one of its wholly owned subsidiaries. On December 26, 2011, Kreke entered into a formal mediation with Oppenheim in Germany. The mediation was unsuccessful, and it terminated on January 10, 2013. On March 27, 2013, Kreke applied to the U.S. District Court for the Southern District of New York for an order pursuant to 28 U.S.C. § 1782. A section 1782 order would authorize Kreke's attorneys to serve subpoenas upon respondent Deutsche Bank for the production of discovery in aid of a foreign proceeding. Kreke argued that it needed to subpoena Deutsche Bank, because Deutsche Bank had come into control of all the documents related to the Oppenheim funds when it acquired Oppenheim. On May 21, 2013, Kreke filed suit in the District Court of Cologne, Germany, naming Oppenheim as a party. Deutsche Bank was not named as a party in the suit.

III. Court's Discussion

A. Legal Standard

The District Court reviewed the application for an order authorizing the applicant to issue subpoenas for the production of discovery in aid of a foreign proceeding under 28 U.S.C. § 1782.[15] A district court is authorized to grant a section 1782 application request when the petitioner has satisfied the following statutory requirements:

> (1) that the person from whom the discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) that the discovery [is] for use in a proceeding before a foreign tribunal, and (3) that the application [is] made by a foreign or international tribunal or "any interested person."[16]

However, even when the statutory requirements have been met, a district court may exercise its own discretion and deny the petitioner's application.[17] A district court's discretion is constrained by the purpose of section 1782, which is to "provi[de] efficient means of assistance to participants in international litigation in our federal courts and encourag[e] foreign countries by example to provide similar means of assistance to our courts."[18] The U.S. Supreme Court

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at *2 (quoting Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 83 (2d Cir. 2004)).
17. *In re Kreke*, 2013 WL 5966916 at *2.
18. *Id.* (quoting In re Metallgesellschaft, 121 F.3d 77, 79 (2d Cir. 1997)).

has also held that district courts are to rely on the guidelines set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*[19] when exercising their discretion in response to a section 1782 request.

In *Intel*, the Supreme Court went beyond the statutory requirements and listed four factors that district courts are to take into consideration when ruling on a foreign discovery application.[20] First, district courts should be less inclined to grant applications against a party that is a participant in the foreign proceeding.[21] Second, district courts should take into account the nature of the proceedings and specifically consider whether the foreign tribunal would be receptive to U.S. federal court assistance.[22] Third, the district court should consider whether the request is an attempt to evade foreign discovery proceedings or policies either of the foreign country or of the United States.[23] Fourth, the district court should scale down or deny "unduly intrusive or burdensome" requests.[24] These guidelines have been continuously used by the Second Circuit to evaluate district courts' use of discretion in response to section 1782 applications.[25]

B. Legal Analysis

The court denied Kreke's application for discovery in aid of a foreign proceeding under section 1782.[26] In the Southern District of New York, two tests have been used to determine whether an applicant's petition satisfies the requirements of a section 1782 application.[27] In *In re Gemeinschaftspraxis Dr. Med. Schottdorf*,[28] the court relied on *Intel* when it held there are two inquiries in a section 1782 application.[29] The court should first determine whether it is statutorily authorized to grant the request. If the court is authorized to grant the request, then it should determine whether to grant the request in its discretion.[30] In a subsequent case, *In re Godfrey*,[31] the court departed from the *Gemeinschaftspraxis* method.[32] The court in *Godfrey* held that the bulk of the authority in the Second Circuit holds that a section 1782 respondent cannot be compelled to produce documents located abroad.[33] Therefore, the *Intel* method was incorrectly interpreted to treat the location of documents as a discretionary consideration.[34] In

19. 542 U.S. 241 (2004).
20. *Id.* at 264.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id* at 264–65.
25. *Id.* at *3; *See, e.g.*, Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80–81 (2d Cir. 2012); *Schmitz*, 376 F.3d at 84.
26. *Id.*
27. *Id.*
28. CIV.M19-88 BSJ, 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006).
29. *In re Kreke*, 2013 WL 5966916 at *3.
30. 2006 WL 3844464 at *4.
31. 526 F. Supp. 2d 417, 424–25 (S.D.N.Y. 2006).
32. *In re Kreke*, 2013 WL 5966916 at *3.
33. *Id.*
34. *Id.*

Kreke's case, the district court analyzed the case under both tests.[35] Under *Godfrey*, the court denied the application, because "'the connection to the United States [was] slight at best and the likelihood of interfering with [foreign] discovery policy [was] substantial.'"[36] Under *Gemeinschaftspraxis* and the *Intel* factors, the application was denied, because, in the court's discretion, Kreke's application was an attempt to circumvent German discovery proceedings and because the request was unduly burdensome on Deutsche Bank.[37]

1. Statutory Factors: *Gemeinschaftspraxis-Intel* versus *Godfrey*

Kreke's application for discovery in aid of a foreign proceeding fulfilled the statutory requirements of section 1782 laid out in *Intel*.[38] First, Kreke was seeking discovery from Deutsche Bank, which operates in the Southern District of New York, where Kreke's application was filed.[39] Second, Kreke was seeking discovery of documents for a German proceeding.[40] And third, Kreke was an interested person in the German proceeding.[41] Therefore, the court was authorized to grant Kreke's section 1782 application.[42] However, it was still within the District Court's discretion whether to grant the application.[43]

Under *Godfrey*, the court held that the application failed the statutory requirements for a section 1782 application.[44] In *Godfrey*, the court concluded that the statute did not apply extraterritorially.[45] While the statute does not explicitly bar a court from granting discovery proceedings for documents located abroad, "'there is reason to think that Congress intended [§ 1782] to reach only evidence located within the United States.'"[46] In Kreke's matter, all of the parties were located in Germany: all of the physical evidence and all of the electronic documents could be accessed in Germany.[47] It would be inappropriate, the District Court reasoned, for a U.S. federal court to compel Deutsche Bank to produce documents located in Germany to a U.S. court only to be turned over to a German court in a German proceeding. Thus, Kreke's section 1782 application was denied.[48]

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35. *Id.* at *3–6.
36. *Id.* (quoting *In re Godfrey*, 526 F. Supp. 2d at 423).
37. *Id.* at *3–6.
38. *Id.* at *3.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. 526 F. Supp. 2d at 423–24.
46. *In re Kreke*, 2013 WL 5966916 at *3 (quoting In re Sarrio, S.A., 119 F.3d 142, 147 (2d Cir. 1997)).
47. *Id.* at *3.
48. *Id.*

2. Discretionary Factors

The courts in the Second Circuit have failed to reach a consensus on whether Congress's intent was to apply the statute extraterritorially.[49] Therefore, for the sake of completeness, the District Court decided to analyze the case under the *Intel* discretionary factors.[50] As a result, the court ruled that the discretionary factors did not weigh in favor of Kreke and denied the application.[51]

C. Respondent's Role in the Foreign Proceedings

A district court should be less inclined to grant a section 1782 application if the party to which the request is being made is a participant in the foreign proceeding.[52] Courts are inclined to deny an application against a participant, because the party is under the jurisdiction of the foreign tribunal.[53] In contrast, an application is more likely to be granted for a third party non-participant, because the foreign tribunal may not be able to reach the third party in the foreign proceeding.[54] The District Court concluded that Deutsche Bank was not a third party, but a true participant in the German proceeding.[55] Deutsche Bank and all of its documents are subject to the jurisdiction of the German court, because Oppenheim is a wholly owned subsidiary of Deutsche Bank.[56] Additionally, Deutsche Bank is headquartered in Germany, which places it within the German tribunal's jurisdictional reach.[57] Because Deutsche Bank is the parent corporation of Oppenheim, a party in the German proceeding, the court held that Deutsche Bank was also a party to the proceeding. Consequently, the first factor weighed against granting Kreke's application.[58]

D. Nature of the Foreign Tribunal, Character of the Suit, and Receptivity of the Foreign Government

Short of authoritative proof that the foreign tribunal would reject the evidence obtained by a section 1782 discovery, a district court should err on the side of discovery.[59] The court noted that, historically, German courts have made it clear when they intend to reject evidence obtained through a section 1782 discovery.[60] Here, the German court has given no indication that it would reject any evidence obtained in a section 1782 discovery.[61] The mere chance that

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49. *Id.*
50. *Id.*
51. *Id.* at *3–6.
52. *Id.* at *3.
53. *Id.*
54. *Id.*
55. *Id.* at *3–4.
56. *Id.* at *3.
57. *Id.* at *4.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

the German court would reject the evidence obtained by a section 1782 discovery is not enough to deny an application.[62] Therefore, this discretionary factor weighs in favor of granting Kreke's section 1782 discovery application.[63]

E. Circumvention of Foreign Proof-Gathering Restrictions or Other Policies

When a section 1782 application is made in order to avoid the discovery proceedings of a foreign tribunal, a district court should be more inclined to deny the petitioner's discovery request.[64] Unfortunately, there is no test to determine whether the party is attempting to circumvent the proceedings of a foreign tribunal. Relying on *Intel*, the court held that circumvention is not an application for documents that are located in a foreign tribunal and are not discoverable there.[65] Because of this consideration, courts should be careful not to substitute U.S. court decisions for the decisions of a foreign tribunal.[66]

The court held that this discretionary factor weighed against Kreke, because the overwhelmingly German characteristic of the suit made Kreke's request an attempt to avoid the proceedings of the German tribunal. Kreke argued that its application was not an attempt to circumvent the foreign tribunal's discovery proceedings, because German courts do not have the legal authority to order document production of this type.[67] The District Court disagreed.[68] The court reasoned that Kreke does not fall outside of the German tribunal's jurisdiction just because it did not file for discovery in the German tribunal.[69] Furthermore, Kreke could not use section 1782 to forum-shop.[70] Kreke assented to foreign authority by signing a contract with Oppenheim that contained a forum-selection clause.[71] The court concluded that, because the nature of the case was German, all parties were German, and the case was located in Germany, the discovery request was an attempt to avoid the German tribunal's discovery proceedings.

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62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*. (relying on *Intel*, 542 U.S. at 260).

66. *Id.* at *4. *See also* In re Microsoft Corp., 428 F. Supp. 2d 188, 195–96 (S.D.N.Y. 2006) (holding that an improper grant of a § 1782 application may "either preempt or contradict a decision by the [foreign tribunal and consequently] render the [foreign tribunal's] proceedings meaningless and undermine the [foreign tribunal's] rules," eradicate defendant's rights, and "violate established principles of comity" under which the U.S. courts generally refuse to review the acts of foreign countries).

67. *In re Kreke*, 2013 WL 5966916 at *5.

68. *Id.*

69. *Id.* at *4.

70. *Id.* at *5.

71. *Id. See also* Aventis Pharma v. Wyeth, No. M-19-70, 2009 WL 3754191, at *1 (S.D.N.Y. Nov. 9, 2009) (holding that where sophisticated parties freely entered into a contract that provided a forum clause for all requisite procedural rules, a § 1782 application was a clear attempt to circumvent foreign proof-gathering restrictions).

F. Extent of the Burden on Respondents

A district court should deny a request for discovery in aid of a foreign proceeding when the request is "unduly intrusive or burdensome."[72] The court held that the sheer volume and difficulty of implementing the request was burdensome, especially considering that recent cases had continued to deny application requests unless the request was for a single document or the requested documents all relate to a particular event.[73] Kreke's request was for all of Deutsche Bank's documents relating to the acquisition of Oppenheim.[74] While many of the documents were electronic, all of the paper documents were located in Germany.[75] In order to comply with the discovery request, Deutsche Bank would have had to mail all of its documents from Germany to the United States and deliver them to Kreke, who would then have to ship the documents back to Germany.[76] The court concluded that foreign discovery would contradict section 1782's intent of efficiency.[77] Consequently, the court held that this factor weighed in favor of denying the application request.[78]

IV. Conclusion

The U.S. District Court for the Southern District of New York denied the applicant's request for section 1782 discovery in aid of a foreign proceeding.[79] The court properly denied the application relying on both *Godfrey* and *Gemeinschaftspraxis-Intel*, which is significant because the court analyzed the application under two different tests that reached the same result. Not only was it proper for the court to apply both tests, because the courts in the Second Circuit are divided on which test to apply, but it also provides the Court of Appeals with a relevant precedent that should be taken into consideration if this application, or any section 1782 application, is appealed to the U.S. Court of Appeals. Last, this holding is proper, because it continues to provide a means for discovery in foreign proceedings without violating the Act of State doctrine. In *Underhill v. Hernandez,*[80] the Supreme Court held that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[81] Relying on *Kreke*, a court can be assured that it will grant a section 1782 application within the intended scope of provision and without violating the sovereignty of foreign States.

Chelsea Marmor

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72. *In re Kreke*, 2013 WL 5966916.
73. *Id.* at *5; *see also Gemeinschaftspraxis*, 2006 WL 3844464, at *8.
74. *In re Kreke*, 2013 WL 5966916 at *5.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at *3–6.
80. 168 U.S. 250 (1897).
81. *Id*. at 252.

No Longer the Sleeping Dog, the FCPA Is Awake and Ready to Bite: Analysis of the Increased FCPA Enforcements, the Implications, and Recommendations for Reform

Rouzhna Nayeri*

I. Introduction

The days of the "legal sleeping dog," a nickname given to the Foreign Corrupt Practices Act (FCPA), are long gone. As this article demonstrates, however, the *current* FCPA enforcement actions are not effective, because they are too harsh, broadly interpreted, and ambiguous; they provide companies with no guidance but, instead, a much higher risk of liability. These issues and the overzealous enforcements result in tremendous costs for U.S. companies and a decrease in foreign investments due to higher risk-averseness.[1] Such implications also place U.S. companies at a large disadvantage compared to their foreign competitors. The FCPA prohibits companies from bribing foreign officials to gain or sustain business, and it is one of the most feared statutes for those operating a business abroad. In the past ten years, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have tremendously increased FCPA enforcements. Fines, penalties, and enforcement actions are at an all-time high. The settlement fines have now surpassed the billion-dollar mark.[2] Even more, individual defendants are now more likely to receive jail time,[3] and there are currently more open and pending FCPA investigations than ever.[4] The SEC and the DOJ are now using wiretaps, informants, and surveillance, tactics usually used in drug or organized crime investigations. Also, the SEC now has a stand-alone FCPA enforcement unit.[5] In addition, the United States is currently leading the Organization of Economic Cooperation and Development

1. *See* Press Release, "Dow Jones, Dow Jones Survey: Confusion About Anti-Corruption Laws Leads Companies to Abandon Expansion Initiatives" (Dec. 9, 2009), http://fis.dowjones.com/risk/09survey.html (Dow Jones Survey).

2. *E.g.*, Press Release, U.S. Dep't of Justice, "Parker Drilling Company Resolves FCPA Investigation and Agrees to Pay $11.76 Million Penalty" (April 16, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-431.html (Parker Drilling); Press Release, Sec. and Exch. Comm'n, "China-Based Company and Former CFO to Pay Penalties for Disclosure and Accounting Violations" (Feb. 28, 2013), http://www.sec.gov/news/press/2013/2013-30.htm (Keyuan settled the FCPA violation for $1 million); Press Release, U.S. Dep't of Justice, "Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty" (July 7, 2010), http://www.justice.gov/opa/pr/2010/July/10-crm-780.html.

3. *E.g.*, Press Release, U.S. Dep't of Justice, Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery (April 5, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-388.html; Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-048.html; Press Release, U.S. Dep't of Justice, Fact Sheet: The Department of Justice Public Corruption Efforts (Mar. 27, 2008), http://www.usdoj.gov/opa/pr/2008/March/08_ag_246.html (DOJ Fact Sheet).

4. *Restoring Balance*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Oct. 2010), http://openairblog.files.wordpress.com/2011/10/us-chamber-of-comm-amending-the-fcpa.pdf.

5. *See* Robert Khuzami, Director, Division of Enforcement, SEC, Remarks Before the New York City Bar (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm; *Corporate Corruption: A Historic Takedown*, FBI (Jan. 26, 2010), http://www.fbi.gov/news/stories/2010/january/fcpa_012610.

* **J.D., *Summa Cum Laude*, SMU Dedman School of Law, 2014; B.B.A. in Finance 2011, *Summa Cum Laude*, University of Texas at Austin.** **The author would like to thank her family, friends, and professors for their constant support.**

(OECD) nations in bribery enforcement policing and there is no sign of slowing down.[6] Current Assistant Attorney General Mythili Raman stated in April 2013 that the DOJ is "determined to continue [its] *vigorous* enforcement" of the FCPA.[7] Finally, the aggressive enforcement is furthered through expansive statute interpretations, increased settlement costs, and higher individual punishments.

While enforcement actions have increased, certain FCPA provisions remain ambiguous or are broadly interpreted. Additionally, most FCPA actions are privately settled, rather than developed through judicial precedent. Lack of judicial precedent results in increased uncertainty, and it leads to more leverage for the SEC and DOJ. The enforcement agencies have and continue to broadly interpret the FCPA provisions with almost no judicial oversight. Even more, with the enactment of the Dodd-Frank Act, whistleblowers are almost incentivized to report FCPA violations.[8] Although this article details the profound issues and implications of the current FCPA enforcement, it must be noted that the FCPA, if properly enforced, is actually an effective tool to sustain competition in the global marketplace and even help U.S. companies play on a fair playing field. Also, the FCPA was and continues to be an inspiration for many countries to enact or take anti-corruption enforcement actions.[9] However, as this article demonstrates, the *current* enforcement policies are not effective and hurt U.S. businesses.

Specifically, this article argues that although the FCPA is necessary and has been an effective tool against bribery and corruption, the SEC and DOJ's *current* aggressive enforcement as well as ambiguous terms in the FCPA (1) threaten the competitive advantage of U.S. businesses, (2) unnecessarily increase U.S. companies' costs, (3) result in overt risk-averseness, and (4) do not effectively deter corporations because penalties are mostly unforeseen and thus corporations are unable to effectively comply. This article, in Part II, details the history of the FCPA and the FCPA's anti-bribery and accounting provisions. Part III portrays the current expansion and aggressive application of the FCPA, along with the development of the Dodd-Frank Act, OECD Convention, and other international enactments. In Part IV, this article will thoroughly explain the current issues with the FCPA enforcement. It first points out the current broad and, at times, novel statutory interpretations and identifies and analyzes certain unclear and ambiguous provisions and lack of guidance. This article will then, in Part V, list certain implications of the current ambiguous and over-zealous enforcement. Finally, to alleviate the current issues, this article recommends that Congress, enforcement agencies or courts (1) apply the OECD Convention terms as well as congressional intention in ratifying the OECD Convention to the FCPA's ambiguous and broadly interpreted terms; (2) implement two additional defenses, including lack of knowledge defense and compliance defense; and (3)

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6. *Working Group on Bribery: 2010 Data on Enforcement of the Anti-Bribery Convention*, OECD (March 2013), http://www.oecd.org/dataoecd/47/39/47637707.pdf.

7. Press Release, U.S. Dep't of Justice, Foreign Bribery Charges Unsealed Against Current and Former Executives of French Power Company (April 16, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-434.html.

8. The whistleblower can receive 10%-30% of the penalties imposed on a company that has been found to have violated the FCPA. 15 U.S.C. § 78u-6 (2006 & Supp. IV 2010).

9. *E.g.*, Bribery Act, 2010, c. 23, §§ 1, 2 (Eng.), http://www.legislation.gov.uk/ukpga/2010/23/data.pdf (Bribery Act); 2003 United Nations Convention Against Corruption art. 15, Dec. 11, 2003, 43 I.L.M. 37, 45–46 (UN Convention); Press Release, MDBs Agree on Common Framework Against Corruption, The World Bank (Sept. 17, 2006), http://go.worldbank.org/TASFROPQA0.

provide clearer provisions and guidance and amend and improve the process for DOJ Opinion Procedure Releases.

II. Background and the FCPA Provisions

A. Background

The U.S. Congress enacted the FCPA in 1977 after a series of scandals. These scandals included the Lockheed Corporation's multimillion dollar bribes to officials in various countries and the discovery of about 400 American firms' questionable payments to foreign officials, mostly discovered during the Watergate scandal. Thus, to "restore public confidence in the integrity of the American business system," Congress passed the FCPA.[10] Although before the FCPA the United States had various anti-bribery laws, the FCPA was the first legislation in the world that prohibited the enacting country's own persons from bribing foreign officials.[11]

In its 36 years of existence, the FCPA has been amended twice. First, in 1988, Congress narrowed the knowledge requirement, imposed liability for third parties' acts, added two affirmative defenses to FCPA liability, and raised the fines for companies and individuals found liable.[12] In accordance with the change, a corporation may defend against an FCPA violation (1) if the foreign country permits such payments "under their written laws and regulations" or (2) if the payment "was a reasonable and bona fide expenditure . . . directly related to promotion, demonstration, or explanation of products or service . . . [or] the execution or performance of a contract with a foreign government."[13] Congress also added the corporations' ability to make "grease," or facilitating, payments to expedite governmental administrative issues. As this article will argue in Part V, however, such defenses are necessary but not sufficient. Although the *mens rea* requirement was increased from recklessness to knowledge, those who consciously disregard FCPA violations are not protected. The second change occurred in 1998 when Congress expanded the FCPA's jurisdiction to include conduct outside the United States, enlarged liability by including foreign natural persons and corporations who, while in the United States, violated the FCPA, and enhanced the FCPA's clarity regarding "improper advantages."[14] In addition to these two changes, Congress recently added certain revisions and language to better comport with the ratification of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention).[15] Yet, though there were two amendments and certain revisions, the FCPA, in general, has "not been implemented

10. S. Rep. No. 95-114 (1977); H.R. Rep. No. 95-640 (1977); H.R. Rep. No. 95-831(1977).

11. Arvind K. Jain, *Power, Politics and Corruption*, THE POLITICAL ECONOMY OF CORRUPTION 3, 9 (Arvind K. Jain ed., 2001).

12. Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78-ff (2006)).

13. 15 U.S.C. §§ 78dd-1(b)–(c)(2), 78dd-2(b)–(c)(2), 78dd-3(b)–(c)(2) (2006).

14. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78-ff (2006)).

15. Allen R. Brooks, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 141 (2010).

through specific, clear regulation."[16] Although there is enhanced enforcement, there is a lack of enhanced articulation and since the FCPA's wording remains vague, companies are unable to effectively comply.

B. FCPA Provisions

To better understand the current issues with the FCPA, this article will first give a brief description of the FCPA's two main provisions and their elements. The FCPA, structurally, has two parts: the anti-bribery provisions and the recordkeeping or accounting provisions. Although the provisions are described clearly, their application and enforcement have been anything but clear. The FCPA is enforced through a criminal and civil sanction combination.[17] The DOJ is responsible for all criminal enforcements as well as civil enforcements only for non-"issuer" entities. The SEC, on the other hand, is only responsible for civil enforcements of "issuers" and their directors, officers, employees, and agents.[18]

1. Anti-bribery Provisions

The anti-bribery provisions, in sum, prohibit businesses from bribing any foreign official to obtain business.[19] The provisions apply to "issuers," "domestic concerns," and "any person" who violates the FCPA while on U.S. territory. An "issuer" is a publicly traded corporation which is registered with the SEC or is required to file reports with the SEC, including the issuer's officers, directors, employees, agents, or even stockholders that act on its behalf. "Domestic concerns" are any companies with a principal place of business in the United States or a company that is organized under the laws of the United States, which includes non-public companies such as partnerships.[20] Further, the "domestic concerns" include U.S. natural persons regardless of their location. The 1998 amendment additionally added non-U.S. individuals and companies who violate the FCPA while on U.S. territory. Although the FCPA also applies to natural persons,[21] this article will focus specifically on companies.

Any "issuer" or "domestic concerns" and its employees or agents are specifically prohibited from using "interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or . . . the giving of anything of value . . . to any foreign official"[22] so as to influence "any act or decision of such foreign official in his official capacity" to obtain or retain business.[23] To violate the anti-bribery provisions of the FCPA, there must be a corrupt intent, which is interpreted to

16. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 503 (2011).

17. U.S. Dep't of Justice and Sec. and Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 19 (Nov. 14, 2012), http://www.justice.gov/criminal/fraud/fcpa/guide.pdf (Resource Guide).

18. 15 U.S.C. § 78m(b)(2) (2006).

19. 15 U.S.C. §§ 78dd-1, 78dd-2.

20. 15 U.S.C. § 78dd(a).

21. 15 U.S.C. § 78dd-2(h)(1)(B) (2006).

22. 15 U.S.C. § 78dd(a).

23. 15 U.S.C. § 78dd-1(a).

mean "voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."[24]

There are two affirmative defenses and one exception to an FCPA violation. Under the FCPA exception, commonly known as the "grease" payment exception, the FCPA allows for "facilitating or expediting payment[s] . . . to expedite or to secure the performance of a routine governmental action" and includes "only an action which is ordinarily and commonly performed by a foreign official" but does not include a decision "by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party."[25] The Act's examples include providing phone service, power, or water supply or obtaining a permit to do business in another country.[26] Although there are no monetary restrictions, so far the payments allowed have all been less than $1,000.[27] Thus, this exception has and continues to be narrowly interpreted.

The two affirmative defenses under the FCPA involve the lawfulness of the payment under foreign law and the payment's "reasonable and bona fide expenditure." The first affirmative defense applies only if "the payment, gift, offer, or promise . . . was lawful under" the foreign country's law.[28] However, the foreign country's law must be expressly "stated and written," and "negative implication, custom, or tacit approval" are not sufficient.[29] The second affirmative defense permits "the payment, gift, offer, or promise" if it is a "reasonable and bona fide expenditure" that is directly related to the "promotion, demonstration, or explanation of products or services; or the execution or performance of a contract."[30] The Act's examples include expenses such as travel and lodging. Thus, the defenses are also narrow and very specific.

2. Accounting Provisions

Furthermore, there are certain accounting provisions that act to prohibit slush funds that lead to improper foreign payments. Such provisions only apply to issuers, which, as explained above, are publicly traded companies or those registered with the SEC.[31] The accounting provisions require the issuers to keep accurate records and sustain an internal accounting system to provide for the "reasonable assurance" that the transactions and records are properly maintained. First, the issuer's records must be "in reasonable detail," or one that would satisfy prudent officials. Because the standard is one of reasonableness, not materiality like other federal securities laws, small mistakes could lead to a violation of the FCPA. Second, the "reasonable assurance" of the internal accounting system is a prudent official standard.[32] Although the

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24. United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).
25. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
26. 15 U.S.C. § 78dd-1(f)(3)(A).
27. David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 684 (2009).
28. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).
29. Westbrook, *supra* note 16, at 506.
30. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2006).
31. *Id.*
32. 15 U.S.C. § 78m(b)(2)–(7).

FCPA does not specify the kind of required internal system, the SEC has given a list of factors to consider, including the board of directors' roles, communication of policies and procedures, authority and responsibility assignments, personnel's competence, and accountability for compliances and performances.

III. FCPA Development and Recent Increased Enforcement

In the past few years, the FCPA has increased the enforcement activity tremendously and placed a significant focus on individual conduct. This heavy enforcement has only begun in the last ten years.[33] In fact, in the first 20 years of the FCPA's enactment, neither the DOJ nor SEC heavily enforced the FCPA, and the Act was accordingly coined the "legal sleeping dog."[34] This section will review the FCPA's developments and evolutions in enforcement, along with other international anti-bribery expansions.

A. Increased Expansion and Application

The amount of current FCPA actions brought by both the DOJ and the SEC are unprecedented. After its enactment, for at least the first 20 years, the number of FCPA actions brought each year was very limited. In fact, from 1978 to 2004, the SEC had about one case a year and the DOJ had about two cases a year.[35] However, during 2007 and 2009, that number jumped to about 64 cases brought by the DOJ and 47 brought by the SEC. The trend seems to be only growing. In 2010, in only one year, the SEC brought 21 actions and the DOJ brought 28.[36] Some of the hardest hit industries include oil and gas, banking, insurance, manufacturing, pharmaceuticals, and telecommunications.[37] The price of settlements and fines, and the costs of investigations, are also increasing. For example, in 2013 alone, Uriel Sharef of Siemens AG agreed to pay $275,000, Houston-based Parker Drilling agreed to pay $11.76 million, and oil company Total disclosed that $398 million may be spent for possible FCPA settlements.[38] Plus, while enforcement is increasing, the officials show no signs of slowing down.[39]

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33. *See* DOJ Fact Sheet, *supra* note 3 (noting the current expansion of DOJ's FCPA enforcement); Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.

34. Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUB. POL'Y & MARKETING 108, 108 (1998).

35. Westbrook, *supra* note 16, at 522.

36. *See 2009 Year-End FCPA Update*, GIBSON DUNN (Jan. 4, 2010), http://www.gibsondunn.com/publications/pages/2009Year-EndFCPAUpdate.aspx.

37. Thomas O. Gorman & William P. McGrath, Jr., *The New Era of FCPA Enforcement: Moving Toward a New Era of Compliance*, 40 No. SEC. REGULATION L.J. 4 ART 1 (Winter 2012), http://www.dorsey.com/files/Publication/6f20c42a-c7a7-405d-8732-956a9faa6f9b/Presentation/PublicationAttachment/1e8e0329-19e4-4ae1-839a-fbf4ccfe4cfc/Gorman_McGrath_FCPA.pdf.

38. *In re Koninklijke Philips Elecs. N.V.*, Litigation Release No. 22676, 2013 WL 1646921, at * 1 (S.D.N.Y. April 16, 2013); Parker Drilling, *supra* note 2; Richard L. Cassin, *Total Carries Forward $398 million for possible FCPA settlement*, THE FCPA BLOG (Apr. 29, 2013, 1:28 PM), http://www.fcpablog.com/blog/2013/4/29/total-carries-forward-398-million-for-possible-fcpa-settleme.html.

39. Dionne Searcey, *Watergate-Era Law Revitalized in Pursuit of Corporate Corruption*, WALL ST. J., Oct. 15, 2010, at B2 (noting that after record fines and prosecutions in recent years, the government crackdown on FCPA violations shows no signs of slowing down).

Furthermore, for almost all of FCPA's life, fines were primarily imposed on companies. However, there is a current rise in individual liability. Since 2009, about 70% of the actions were against individuals.[40] These individual actions are further perpetuated by the view that in order to effectively deter corrupt actions, individuals have to actually go to jail. For example, Charles Jumet, employee of Ports Engineering Consultants Corporation, was sentenced to 87 months in jail for bribing Panamanian officials.[41] As the number of cases against companies increased, charges against individuals also significantly impact the enforcement environment. In 2011, Assistant Attorney General Lanny Breuer stated that the DOJ did not plan to "weaken the FCPA."[42] As previously stated, there is no sign of slowing down, and there has been, and continues to be, an increased cooperation between the United States and foreign authorities. Therefore, in an attempt to adapt to the new environment, companies are increasing compliance costs.

To complicate matters, FCPA litigations are very rare, so there are a limited number of FCPA judicial opinions. The lack of reported judicial opinions perpetuates ambiguity. Further, instead of the visible judicial process, the law has developed through private settlement negotiations in which the terms of settlements are not subject to judicial oversight, which may give enforcement agencies even more leverage. Additionally, U.S. businesses and individuals, out of fear of damage to their reputations, settle with the DOJ and SEC. For individuals this involves accepting a guilty plea, and for U.S. businesses it results in either a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA).[43]

B. OECD Convention and Other International Developments

Another factor influencing the high FCPA enforcements is the international community's change in perspective. During at least the first 20 years of the FCPA's enactment, the United States was one of the only countries to prohibit bribery of foreign officials. However, this changed in 1977, when the OECD drafted the Anti-Bribery Convention. The OECD Convention requires all 38 signatories to follow provisions that are somewhat similar to the FCPA. For example, bribery of foreign officials is prohibited, and there are requirements for accounting records and controls. In 2009, the OECD Council further expanded by adding tax-related and reporting provisions.[44] As shown in Part V, the clear language of the OECD Convention may help alleviate the vague characteristics of the FCPA. Furthermore, the United Nations, African Union, multilateral development banks, company associations, several countries, and

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40. MICHAEL R. PACE, *Understanding the Foreign Corruption Dragnet*, *in* INVESTIGATIONS 2010: HOW TO PROTECT YOUR CLIENTS OR COMPANY 73, 75 (2010).

41. Press Release, U.S. Dep't of Justice, Virginia Resident Pleads Guilty to Bribing Panamanian Officials for Maritime Contract (Nov. 13, 2008), http://www.justice.gov/opa/pr/2009/November/09-crm-1229.html.

42. Mike Scarcella, *DOJ Plans New Guidance on Foreign Bribery Enforcement*, BLT: BLOG OF LEGAL TIMES (Nov. 8, 2011), http://legaltimes.typepad.com/blt/2011/11/doj-plans-new-guidance-on-foreign-bribery-enforcement.html.

43. DOJ, U.S. Attorney's Manual §9-28.1000 (2008), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.200; Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909 (2010).

44. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, http://www.oecd.org/dataoeca74/18/38028044.pdf (OECD Convention).

certain other organizations have adopted anti-corruption conventions or have increased efforts in lessening corruption.[45] Finally, in 2010, the United Kingdom enacted the United Kingdom Bribery Act, which requires a compliance system for companies and prohibits both the offer and acceptance of bribes.[46] Although there is an almost universal acceptance of anti-bribery efforts, some of the most influential countries, such as China and India, do not have any statutes similar to the FCPA.[47] Overall, however, there is a wide enforcement of anti-bribery and corruption acts by the international community.

C. The Sarbanes-Oxley Act and the Dodd-Frank Act

Finally, the Sarbanes-Oxley Act (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) perpetuate the increased enforcement of the FCPA. First, FCPA enforcement is growing due to SOX holding the CEO and CFO responsible for any errors in the filings with the SEC.[48] SOX is increasing the voluntary disclosures of FCPA violations because since the passage of SOX in 2002, the accounting provisions now have greater importance. Further, with the enactment of the Dodd-Frank Act in July 2010, the enforcement of the FCPA is only catalyzed, primarily due to the addition of the whistleblower provision since the FCPA did not have a whistleblower protection beforehand. The whistleblower provision allows for both monetary incentives as well as protections for individuals who report violations to the SEC. In fact, the whistleblower can receive 10% to 30% of the penalties imposed on a company found to have violated the FCPA.[49] However, there are several criticisms regarding the whistleblower provision, one of which is that the incentives are too strong and the protections too flexible, which may facilitate false claims.[50]

IV. Current Problems

As noted above, the DOJ and SEC are aggressively policing possible corruption under the FCPA. This section argues that the three current issues with the FCPA compliance and enforcement include (1) recent broad statutory interpretations, (2) ambiguity of essential terms, and (3) lack of guidance by enforcement agencies or judicial opinions. The essential phrases used in the FCPA that will be analyzed in this section include: "to obtain and retain business," "anything of value," "foreign official," and "corrupt."

A. Broad Statutory Interpretations

Although in the past the FCPA was applied broadly, recently, the enforcement agencies and courts are further expanding that broad view.[51] The interpretations are more expansive

45. U.N. Convention, *supra* note 9, at 45–46; PACI 2008 Highlighting Achievers Survey, World Economic Forum (2008), http://www.weforum.org/en/initiatives/paci/HighlightingAchieversSurvey/2008Survey/index.htm.

46. Bribery Act, *supra* note 9, at c. 23, §§ 1, 2.

47. Westbrook, *supra* note 16, at 514.

48. 15 U.S.C. § 7241 (2006).

49. *Id.* § 78u-6.

50. *See, e.g.*, Heidi L. Hansberry, *In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster*, 102 J. CRIM. L. & CRIMINOLOGY 195, 197 (2012).

51. *See* Part I.

than ever, and most scholars agree that enforcement agencies are applying the "existing laws in 'novel and creative ways.'" This expansive and "novel" way of applying the law is causing companies to have to "expect the unexpected,"[52] and also implement unnecessary and costly precautions.

1. Improper Payment "to Obtain or Retain Business"

Many scholars argue that the definition of "to obtain or retain business" was and continues to be so broadly interpreted by the DOJ and the SEC that there is no chance for an accused company to argue that a payment was not for the corrupt purpose of obtaining or retaining of business.[53] The most prominent case analyzing this phrase is *United States v. Kay*, where the Fifth Circuit held that "to obtain or retain business" does not simply include payments for government contracts.[54] The court further expanded what constituted payments to include customs duties and tax liability. Currently, the payment for any improper business advantage, even if not for a specific business opportunity, may fall under FCPA liability. Other examples include permits, licenses, certifications, or even tax rebates. Also, many times, in vague pleadings, the enforcement agencies, either intentionally or unintentionally, lump clear "to obtain or retain business" bribes with facilitation payments.[55] Thus, the meaning of the phrase is so expanded that it is almost impossible to determine what payments may fall within the provision and what may fall under the "grease" payment exception.

2. "Anything of Value"

"Anything of value," similar to "to obtain or retain business," is also interpreted far too broadly. The FCPA prohibits "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value."[56] However, the DOJ and SEC are broadly interpreting "anything of value," without considering the amount, materiality, or even definite possibility of it incurring. The "anything of value" is interpreted to include charity contributions to local foreign charities, promises for future considerations, or an interest in something that has not yet even occurred.[57] For example, in 2009, "executive training programs at U.S. universities" given to Chinese "foreign officials" by UTStarcom Inc. were deemed to be "things of value." Other examples include sport outings, discounts, college scholarships, future employment promises, and transportation of household goods. These interpretations indicate a broad understanding of "anything of value."[58]

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52. *See* Yin Wilczek, G*overnment Actions in Economic Turmoil Will Create FCPA Issues, DOJ Official Says*, 41 SEC. REG. & L. REP. 1667, 1667 (2009).

53. *See*, *e.g.*, Westbrook, *supra* note 16, at 541.

54. United States v. Kay, 359 F.3d 738, 743 (5th Cir. 2004).

55. *E.g.*, United States v. Panalpina, Inc., No: 10-CR-765 (S.D. Tex. Nov. 4, 2010); Carolyn Lindsey, *More Than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices A*ct, 35 OHIO N.U. L. REV. 959, 963 (2009).

56. 15 U.S.C. § 78dd-1(a) (2006).

57. SEC v. Schering-Plough Corp., Litigation Release No. 18740, 2004 WL 1268036, at *1 (June 9, 2004).

58. SEC v. UTStarcom, Inc., SEC Release No. 3093, 2009 WL 5171952, at *1 (Dec. 31, 2009); *e.g.*, United States. v. Sawyer, 85 F.3d 713, 721 (1st Cir. 1996).

B. Ambiguity

The FCPA also has several provisions that create ambiguity for companies that actually attempt to comply with its provisions. Companies, since they are faced with unclear prohibited conduct, are forced to spend large amounts on prevention but then end up still being exposed to FCPA liability. The ambiguity decreases fair enforcement and the FCPA's effectiveness.

1. "Foreign Official"

The first ambiguous phrase, and the most debated one, is "foreign official." As noted above, "foreign official" is integral to the possible liability of a company, but it is also one of the most difficult phrases to limit or define. In fact, about 66% of actions brought by the DOJ and SEC involved the interpretation of the individual and whether he or she falls under the "foreign official" provision.[59] The statutory definition of "foreign official" in the FCPA is

> [a]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[60]

In interpreting this phrase, the first explanation one would desire is just what an "officer" or "employee" is; however, the FCPA does not provide a definition. There is also no guidance on the meaning of such terms. However, the DOJ and SEC have basically interpreted all employees, no matter the position, as a "foreign official."[61] This broad interpretation complicates predictability of liability for companies because any payment, even to a member of the purchasing staff, can ultimately lead to FCPA liability.

Furthermore, the concept of "agency or instrumentality" of foreign government is not clearly articulated and broadly interpreted. Even though two DOJ Opinion Procedures Releases were intended to clarify "foreign official,"[62] the sufficient extent of the individual's proximity to the government and the extent of government control is still not clear. Case law, guidance by the agencies, and even legislative history are obscure.[63] The DOJ, for example, has interpreted employees of state-owned or controlled enterprises to be "foreign officials."[64] How-

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59. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 412 (2010).

60. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2006).

61. Resource Guide, *supra* note 17, at 19.

62. U.S. Dep't of Justice, Foreign Corrupt Practices Act Opinion Procedure Release No. 10-01 (Apr. 19, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1001.pdf; U.S. Dep't of Justice, Foreign Corrupt Practices Act Opinion Procedure Release No. 10-03 (Sept. 1, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf.

63. *See* Brooks, *supra* note 15, 143.

64. SEC v. Baker Hughes, Inc., SEC Release 2602, 2007 WL 12386668, at *2 (Apr. 26, 2007); Press Release, U.S. Dep't of Justice, Former Alcatel Executive Pleads Guilty to Participation in Payment of $2.5 Million in Bribes to Senior Costa Rican Officials to Obtain a Mobile Telephone Contract (June 6, 2007), http://www.justice.gov/opa/pr/2007/June/07_com_411.html.

ever, this interpretation does not necessarily comply with any case precedent or even the legislative history, which has caused some scholars to question the accuracy of the interpretation.[65] Even more, the DOJ articulated that even "employees" or "officers" of minority government owned organizations are under the definition of "foreign official."[66] Quasi-governmental bodies are also included in the definition. Further, mere governmental influence, without share ownership, can lead to an individual falling under this provision.[67] It is, therefore, unclear the extent to which the government's control will push the employee into the "foreign official" definition.

The applicability of "foreign official" is further complicated by the recent economic downturns and the governmental "stimulus plans" around the world because such plans increase government ownership. Further, since foreign governments are much more likely to be involved in businesses, a company's decision is further complicated. For example, in China, the government's influence on economic institutions is extensive.[68] Still, investment in China is attractive because it is one of the fastest growing countries. However, the lack of clear directions by enforcement agencies may result in liability or even refusal to invest abroad out of fear of liability. The term "foreign official," even though an integral component of the majority of the SEC and DOJ actions, is unclear. In fact, then-Assistant Attorney General Lanny Breuer noted that "foreign official" can involve "nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country."[69] A public announcement such as this perpetuates the broad application of "foreign official" and exemplifies the complexity of the term for U.S. businesses.

Even worse, courts have interpreted the "instrumentality" component of the "foreign official" definition differently than the DOJ and SEC. They, rather than the expansive enforcement afforded by enforcement agencies, have taken a narrower approach. For example, in *United States v. Aguilar*, the court actually looked at the more common definition of "instrumentality," and the court in *United States v. Carson* focused on objective factors other than mere monetary investments and held that "instrumentality" should be given its ordinary meaning while citing to dictionary definitions.[70] This narrow approach by courts but broad approach by the DOJ and SEC create not only the questioning authority of the DOJ and SEC, but also perpetuate the increasingly difficult task of defining "foreign official."

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65. *See*, *e.g.*, Brooks, *supra* note 15, at 143.

66. U.S. Dep't of Justice, Foreign Corrupt Practices Act, Opinion Procedure Release No. 94-1 (May 13, 1994).

67. SEC v. Siemens AG, No. 1:08-CV-02167 (D.C. Dec. 12, 2008).

68. Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13, 14 (2008).

69. Lanny A. Breuer, Assistant Att'y Gen., DOJ, Prepared Keynote Address to the 10th Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf. (Breuer left the DOJ in 2013).

70. United States v. Carson, 2011 WL 5101701, *4-5 (C.D. Cal. May 18, 2011); United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

2. Corrupt Payment

"Corrupt" is the second most ambiguous term. As mentioned above, corporations are prohibited from giving corrupt payments to foreign official to retain or obtain business.[71] Although the FCPA does not define "corrupt," legislatures have released reports that define "corrupt" as an act with intention to induce an official, with focus on the intent rather than the outcome.[72] For example, the Eighth Circuit, in *United States v. Liebo*, held that an airline ticket provided to a Nigerian Air Force official so as to receive an approval for a military contract fell under the "corrupt" payment definition.[73] However, first, it is unclear the amount of time required in between the payment or gift and the foreign official's act. Second, although *Liebo* may be an "easy" case, the Act is not clear about when the culture *requires* gift giving and when it is merely part of the social decency. Further, in 2011, the Second Circuit, in *United States v. Kozeny*, held that under the FCPA, an individual could be deemed to have acted "corruptly" by merely having a general intent to "corrupt."[74] Therefore, as evidenced by recent cases, "corruptly" may apply to an individual with the *general* intent to "accomplish an unlawful result or by acting with an intent to achieve a lawful result through unlawful means like a secret payment."[75] However, in 2003, the Second Circuit noted that a person would not be held liable under the FCPA if there is no *specific* intention present; thus, it applied a narrower view.[76]

Further, uncertainty arises in regard to gift-giving cultures. Take, for example, companies doing business in China. First, as noted above, in China, government involvement in economic transactions is prevalent, since most of the companies are state-owned or at least state-controlled. This creates an issue where a perceived private transaction may actually be deemed to involve "foreign officials." Second, China has a "gift-giving" culture. The term "guanxi" refers to such practice. The purpose of guanxi is to show development of relationship and friendship.[77] Under the FCPA, there is an exception for reasonable and bona fide business expenditures that are directly related to execution of a contract or promotion of products or services.[78] However, it is not clear what may count as direct promotion or execution and what may count as "corrupt" payments. Thus, social customs may complicate the matter for companies doing business in countries with certain social and cultural norms.

Although it is easy for a DOJ official to say, "Just don't pay bribes," this simple suggestion overlooks the complexity of sustaining a business that also follows social and business norms in a foreign country. This broad interpretation, with no helpful guidance, forces a company to lose business, or spend an immense amount of time on auditing for things like birthday gifts

71. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006).

72. S. Rep. No. 95-114, at 10 (1977); H.R. Rep. No. 95-640, at 7 (1977).

73. United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991).

74. United States v. Kozeny, 667 F.3d 122, 135 (2d Cir. 2011).

75. Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 331 (2012).

76. Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 327 F.3d 173, 183 (2d Cir. 2003).

77. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 37 (2010).

78. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2006).

and enormous resources in attempting to determine whether its acts fall under the "corrupt" definition.

C. Lack of Guidance by Enforcement Agencies

Lack of guidance is the third issue. As mentioned above, many U.S. companies tend to agree to DPAs or NPAs.[79] These agreements have several short-term benefits for the companies, because they avoid the collateral costs such as loss of share value or decreased reputation. However, such DPAs and NPAs do not allow precedent to grow. Judicial precedent would lead to clearing up ambiguity, limiting overreach or broad interpretations, and suggesting to legislatures where there may be issues in the law.[80] However, DPAs and NPAs block this development.

Furthermore, there is very little guidance given by the DOJ and the SEC. The FCPA requires DOJ Opinion Procedure Releases, but such guidance is usually too narrow.[81] Also, unlike judicial opinions, they have no binding precedent. In 2012, the DOJ only issued two opinions, whereas in 2011 and 2013 there were only one each year.[82] The FCPA Opinion Procedure Releases do not provide much guidance because they are rarely issued and are too fact-specific to alleviate the current uncertainty. Although there have been a few other types of releases,[83] none of these provide the legal clarifications required today.

V. Implications and Potential Reform

The results of the ambiguous, broad, and aggressive interpretations and enforcements are higher costs for U.S. companies, higher risk-averseness for investing in foreign operations, and lower competitive advantage in the global market. This section details such implications, and then gives some suggestions for change. This article does not suggest that the FCPA should be struck down, but it does call for more clarity as well as understanding of the current global business environment. Other than more SEC and DOJ guidance, and clearer and explicit statutory interpretations, this article calls for the (1) alignment of the interpretation of certain FCPA provisions with the OECD Convention's terms and Congress's intention in ratifying the Convention; (2) enactment of a lack of knowledge defense as well as a compliance defense; and (3) increase and improvement in the advisory opinions and guidance from the DOJ and SEC.

A. Implications for U.S. Businesses

The ambiguous, zealous, and broad interpretations of the FCPA's provisions has and continues to lead to either U.S. companies' higher costs for auditing and monitoring or overt risk-averseness. First, companies attempting to comply with the FCPA are faced with confusing and

79. Koehler, *supra* note 43, at 909.

80. *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 805 (2009).

81. 15 U.S.C. §§ 78dd-1(e), 78dd-2(f).

82. Opinion Procedure Releases, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last visited April 11, 2014).

83. *See* Resource Guide, *supra* note 17, at 14–19.

unclear standards. To comply, companies are implementing very time-intensive, costly, and resource-heavy policies. For example, a firm spent $3.2 million to investigate $50,000 in "potential" improper payments, and in 2008, Siemens AG spent $1 billion on audits conducted by 1,500 attorneys and accountants who billed about 1.5 million hours.[84] In 2012, Wal-Mart spent $157 million on investigations as well as litigation filed by its shareholders.[85] Even with such increased costs, the enforcement agencies, through such ambiguous and sometimes novel interpretations, can still hold a company liable. Further, once there is an allegation of wrongdoing, the company is responsible for the internal investigation's extensive costs. Second, there may be over-deterrence for U.S. companies to invest in foreign companies, even though such investments would benefit not only the company but also the U.S. economy. Interestingly enough, the Dow Jones risk and compliance survey found that 14% of companies have cancelled and 51% have delayed business ventures abroad because of the FCPA's unclear and broad enforcements.[86] For example, as noted above, in China, a highly attractive country for investment, businesses are primarily state-owned, so the concept of "foreign official" or "instrumentality" may not be clearly portrayed, thus deterring U.S. corporations from investing in China. Also, because their foreign competitors are not subject to such broad and unclear regulations, this leads to a competitive disadvantage for U.S. companies. Further, following an FCPA action, there may be a secondary civil litigation by shareholders against directors and officers, alleging the FCPA action was a result of mismanagement and poor internal control.[87]

B. Recommendation: Align FCPA Interpretations With the OECD Anti-Bribery Convention Terms and Congressional Intention in Ratifying the OECD Convention

The FCPA's broad and ambiguous standards place an unnecessary impediment on American businesses. Compliance is difficult, while enforcement is only increasing. However, since Congress already ratified the OECD Convention and amended the FCPA to bring it into compliance with the OECD Convention, some of the ambiguous terms of the FCPA should be interpreted under the Convention's clearer standards.[88] Second, the SEC and DOJ along with courts should follow and comply with the initial intention of Congress in ratifying the OECD Convention, which was to lessen the competitive disadvantage for U.S. businesses. Thus, FCPA interpretation, if more aligned with the OECD Convention, will result in clearer guidance for U.S. companies as well as meeting Congress's initial intentions.

As noted above, under the FCPA, ambiguity underlies the definition of "foreign official" as well as to whom it applies and to what extent it applies. On the other hand, the OECD Convention has clearer definitions. The Convention defines a "foreign official" as "any person

84. Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES, May 24, 2010, at 72, http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html; Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 786 (2011).

85. Press Release, Wal-Mart, Walmart reports Q4 EPS of $1.67, full year EPS of $5.02 (Feb. 21, 2013), http://media.corporate-ir.net/media_files/irol/11/112761/release/FY%2013%20Q4%20earnings%20FINAL.pdf.

86. Dow Jones Survey, *supra* note 1.

87. *Restoring Balance*, *supra* note 4, at 4.

88. 15 U.S.C. §§ 78dd-1(g), 78dd-2(d) (2006); Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the FCPA*, 62 DUKE L.J. 445, 457 (2012).

holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization."[89] The OECD Convention, similar to the FCPA, prohibits bribery of government elected officials. On the other hand, OECD's prohibition is restricted to officials or those who exercise a public function. This is dissimilar to the FCPA's application to "any officer or employee" of any instrumentality or government. Further, the OECD Convention, unlike the FCPA, defines the "public enterprise" as an enterprise in which "the government holds a majority stake" or "the government may exercise a dominant influence either directly or indirectly."[90] However, the "instrumentality" under the FCPA, as noted above, is unclear, and the FCPA does not provide a definition. The OECD Convention's narrower and clearer standards stand as a contrast to the ambiguous and broad application of the FCPA. The SEC, DOJ, and the courts should align the interpretation of the problematic FCPA provisions with those in the OECD Convention.[91]

Further, one of Congress's intentions in ratifying the OECD Convention was to promote an equal competitive advantage for U.S. businesses. In 1998, Congress ratified the OECD Convention and enacted implementing legislation, as a reaction to the FCPA's hindrance on American businesses.[92] As stated above, the FCPA is currently broadly and ambiguously applied to U.S. businesses, so they are once again at a competitive disadvantage. The current zealous enforcement agencies along with courts should interpret the FCPA with an understanding of Congress's intention in ratifying the Convention. Thus, the enforcement should be alleviated and interpreted with Congress's intention in lessening U.S. companies' competitive disadvantage.

C. Recommendation: Enact Two Additional Defenses to FCPA Liability

Since the enforcement agencies are harshly and broadly applying the FCPA against U.S. companies, this article also suggests the enactment of two additional defenses so as to level the playing field. The two suggested defenses are lack of knowledge defense and compliance program defense. Under the current FCPA enforcements, through respondeat superior, a company can be held strictly liable for conduct that it did not know about, approve, or encourage. However, this sort of lack of knowledge should be considered a defense or at least be considered during the sentencing phase. This protects a company from being fined millions of dollars for conduct that the company had no knowledge of, and it avoids situations where the act was committed by one individual without the knowledge of the rest of the personnel. It will allow the enforcement agencies to allocate their resources to the actual individuals that are engaged in the corrupt conduct. Furthermore, it complies with the DOJ's statement that "prosecution of

89. OECD Convention, *supra* note 44, at art. 1.

90. OECD, *Corruption: A Glossary of International Criminal Standards*, 29–32 (2008), http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/41194428.pdf.

91. *See* United States v. Kay, 359 F.3d 738, 755 n.68 (5th Cir. 2004) (noting that interpretation of the FCPA provision in question should align with the "ratification and implementation of the Convention," otherwise it would "create a conflict with our international treaty obligation, with which we presume Congress meant to comply fully").

92. S. Rep. No. 105-277, at 2 (1998); International Anti-Bribery and Fair Competition Act of 1998, *supra* note 14.

individuals is a cornerstone of [the DOJ's] enforcement strategy."[93] Also, currently, a U.S. company may be wary of reporting wrongdoings by its employees, but if the company will not be held liable if it did not know of the wrongdoing, it is more likely to report it. This will assist the enforcement agencies in honing in on the responsible individuals rather than punishing the entire business, which could negatively affect its stockholders, other stakeholders, and the community.

Currently, although compliance programs are considered during the sentencing,[94] the FCPA does not provide a defense if the company has a reasonably adequate program and policy against improper conduct. In contrast, the United Kingdom's Bribery Act specifies a defense if the company shows that it has an "adequate procedure" for detection and deterrence of bribery.[95] Similarly, an Italian anti-bribery statute allows a company to raise a compliance defense if there was an effectively designed policy and model in place.[96] The United States should also adopt a compliance defense similar to that of Italy and the United Kingdom. Since this concept is already applied at the sentencing phase, the application to the liability phase would still comply with the goals and intentions of the FCPA. Also, a compliance defense would incentivize businesses to implement better programs and remain active in control and due diligence.

D. Recommendation: Increase and Improve the Advisory Opinions and Guidance From the DOJ and the SEC

Since enforcement is increasing, FCPA compliance is now more important than ever; therefore, guidance is needed more than ever. However, as noted above, there is a lack of judicial precedent since DPAs and NPAs are more common, and much of the DOJ's and SEC's advisory guidance is either too rare or too fact-specific to be helpful. In 2012, the SEC and the DOJ issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act*.[97] Although it gives some guidance, the main content of the document is a mere compilation of cases and information that is already in the public domain. Even more, although the document is 120 pages long, its introductory material and the table of contents account for 30 pages and the summary of already issued guidance or other laws, such as the Dodd-Frank Act, accounts for 20 pages. Many scholars agree that the "guidance" portion presents very little new information.[98]

The DOJ and SEC may have been too general in the *Resource Guide* to continue the tough enforcements. Therefore, this article calls for frequent, expedited, and clearer DOJ opinions and SEC releases. For example, currently, the Attorney General has 30 days to answer a business's query on whether the company's conduct conforms to the enforcement agency's poli-

93. Lanny A. Breuer, Assistant Att'y Gen., DOJ, Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 19, 2009), http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

94. U.S. Sentencing Guidelines Manual § 8B2.1 (2013).

95. Bribery Act, *supra* note 9, at ch. 23, § 7(2).

96. Decreto Legge 8 June 2001, n. 231 (It.).

97. *See* Resource Guide, *supra* note 17.

98. *E.g.*, *Say What?*, FCPA PROFESSOR (March 14, 2013), http://www.fcpaprofessor.com/category/guidance.

cies.[99] However, aside from the fact that the procedure is burdensome, the 30-day period may be too long for a company attempting to negotiate and implement a transaction. Also, in 2012, only two Opinion Procedure Releases were announced.[100] Further, although a favorable opinion gives the company a rebuttable presumption, the fear of future negative opinions held by enforcement agencies is real. Thus, the Opinion Procedure Release is hardly used. This article asks not only for specific guidance from the SEC and the DOJ but also asks Congress to enact an amended procedure for the DOJ opinions. The time period should be shortened and the process made less burdensome, so that companies are able to comply with confidence. Further, U.S. business will not be placed in a disadvantage in the fast-paced transactions. An expedited and less burdensome process will not only help companies, it will also lower the enforcement agencies' costs, as violations will decrease with better guidance for companies to follow.

VI. Conclusion

This article argues that the current rise in the FCPA activity—as many of its provisions remain ambiguous and the Act is aggressively enforced and expansively interpreted—imposes a possible threat to U.S. companies' competitive advantage in the global market, unreasonably increases businesses' costs, fails to properly deter U.S. companies, and leads to decreased foreign investment due to high risk-averseness. Although the Act was enacted in 1977, the current enforcement has radically transformed the substance and scope of the law. The three current issues are (1) broad statutory interpretations, (2) ambiguous statutory terms and provisions, and (3) scarcity of guidance from the enforcement agencies or the judiciary. There is no doubt that the FCPA, as a tool against bribery and corruption, enhances international business, but the current law still remains vague and is aggressively enforced against U.S. companies.

The FCPA grew out of scandals in the 1970s. It was amended twice, but for years it was dubbed the "legal sleeping dog."[101] However, current enforcement is increasing tremendously, while at the same time certain FCPA provisions lack clear articulation and continue to remain vague.[102] Structurally, the FCPA contains two provisions: anti-bribery provisions and record-keeping or accounting provisions. Under the anti-bribery provisions, businesses are prohibited from bribing foreign officials to obtain business, and they are required to keep and sustain certain records and accounting systems under the accounting provisions.[103] Primarily through the anti-bribery provisions, the DOJ and SEC are increasingly enforcing the FCPA, especially through individual liability. Further, although the enforcement is increasing, there are few reported judicial opinions, because most businesses and individuals tend to settle through a guilty plea, NPAs, or DPAs. Therefore, the law is developing, vaguely, through private settlement negotiations instead of public judicial opinions.

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99. 28 C.F.R. § 80.1 (2013).

100. Opinion Procedure Releases, *supra* note 82.

101. *See* S. Rep. No. 95-114, at 4 (1977).

102. DOJ Fact Sheet, *supra* note 3 (noting the current expansion of the DOJ's FCPA enforcement); Khuzami, *supra* note 5; *Corporate Corruption: A Historic Takedown*, *supra* note 5.

103. 15 U.S.C. §§ 78dd-1,78dd-2, 78m(b)(2) (2006).

In addition to the SEC's and DOJ's increased enforcement of the FCPA, other countries have also recognized the importance of lessening corruption. The OECD Anti-Bribery Convention, the United Kingdom Bribery Act, and enactments by other countries, associations, and organizations are some of the several anti-bribery developments in the international arena.[104] Further, with the enactment of the SOX and the Dodd-Frank Act, the FCPA enforcement will continue to rise due to the increased importance of accounting provisions and the addition of a whistleblower provision.[105] These anti-bribery and anti-corruption global expansions are beneficial to U.S. businesses because they allow for the leveling of the playing field. However, as this article portrayed in Part IV, there are three current issues with the increased FCPA enforcement. First, certain statutory provisions, such as "to obtain or retain business" and "anything of value" are being interpreted too broadly;[106] in fact, so broadly that companies are unable to differentiate between such phrases and the exceptions or defenses described above. Second, for companies who try to comply with the FCPA, certain provisions, specifically "foreign official" and "corrupt," are so ambiguous that they cause a decrease in the effectiveness of the FCPA and may result in unjust enforcement.[107] Third, since so many businesses and individuals choose, or are almost forced, to settle through DPAs or NPAs, there is a lack of judicial precedent. Also, the DOJ and the SEC have failed to issue sufficient guidance through opinions or releases.[108]

The outcomes of the problems detailed above have and will continue to lead to higher auditing and monitoring costs and over-deterrence in investing in foreign economies.[109] The overt risk-averse reaction and increased costs, as a result of the unclear but aggressive FCPA enforcement, leads to U.S. companies' decreased competitive advantage. Thus, this article offers three recommendations so as to improve the current environment.

First, since the Congress has already ratified the OECD Anti-Bribery Convention, some of the ambiguous terms under the FCPA should be interpreted under the more clear and direct language of the Convention. Further, the initial intention of Congress in ratifying the Convention (i.e., decrease the competitive disadvantage and level the global playing field for U.S. companies) should be taken into consideration by the enforcement agencies and courts.

Second, two defenses, the lack of knowledge defense and the compliance program defense, should be added to the FCPA. The lack of knowledge defense allows for more efficient allocation of the enforcement agencies' resources, aligns with the DOJ's increased prosecution of individuals, and promotes businesses to report employees if the company will not be held liable as well. Further, it will avoid harm to stakeholders and the community. The compliance defense, if applied at the liability phase, would not only induce businesses to institute enhanced programs and policies against improper conduct but also sustain such programs through due diligence and active control. This result aligns with the ultimate goal of the FCPA.

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104. OECD Convention, *supra* note 44.

105. 15 U.S.C. §78u-6(b)(1) (2006 & Supp. IV 2010).

106. *See* SEC v. UTStarcom, Inc., SEC Release No. 3093, 2009 WL 5171952, at *1 (Dec. 31, 2009).

107. *See* United States v. Kozeny, 667 F.3d 122, 135 (2d Cir. 2011).

108. *See* Opinion Procedure Releases, *supra* note 82.

109. Vardi, *supra* note 84, at 72; Dow Jones Survey, *supra* note 1.

Third, with such increased and harsh enforcements, U.S. businesses deserve better guidance from the enforcement agencies. Thus, not only does this article ask for increased and improved guidance by both the SEC and the DOJ, it also asks for more frequent, clearer, and expedited DOJ opinions. Congress can achieve this by amending the procedure for DOJ Opinion Procedure Releases. The amended procedure should specifically contain a shorter response period of time and a less burdensome process, which can help level the playing field for U.S. companies engaging in international transactions. Further, such developments would lead to a decrease in violations, as guidance improves. It is important to note that this article does not suggest the full abandonment of FCPA enforcement. With these recommendations, however, the FCPA's goals can be reached efficiently, without the increased costs of the ineffective audits and programs, secondary litigation by the shareholders, and the delay in or overt risk-averseness toward foreign investments, all of which result in decreased competitive advantage for U.S. companies compared to their global counterparts.

D.T.J. v. Schmirer

2013 U.S. Dist. LEXIS 105323 (S.D.N.Y.)

The U.S.D.C. for the S.D.N.Y. denied petitioner's petition for the return of his daughter to Hungary from the United States, because the daughter and respondent Schmirer established three affirmative defenses provided by the Hague Convention on the Civil Aspects of International Child Abduction.

I. Holding

The Child Abduction Convention,[1] and its implementing legislation, ICARA,[2] were established in order "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence."[3] Courts have dealt with the application of the Child Abduction Convention in cases such as *Blondin v. Dubois*.[4] *Blondin* analyzed the Child Abduction Convention's main commitments, as well as its defenses.[5] In *D.T.J. v. Schmirer*,[6] petitioner Gyula Janos Jakubik's (Jakubik) petition for repatriation of his 14-year-old abducted daughter to Hungary from the United States was denied, because D.T.J. and respondent Eva Schmirer (Schmirer) established the "settled," "age and maturity," and "grave risk" defenses provided by the Hague Child Abduction Convention (Child Abduction Convention)[7] and the International Child Abduction Remedies Act (ICARA).[8]

II. Facts and Procedural History

Jakubik and Schmirer met and became cohabitants and life partners in 1996.[9] Two years later, D.T.J. was born to the couple in Hungary.[10] For the next six years, D.T.J. lived with her parents in Valko, Hungary.[11] During those years, Jakubik was physically and verbally abusive to Schmirer, including in the presence of D.T.J.[12] When the couple separated in 2004, D.T.J.

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1. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 19 I.L.M. 1501–05 (1980).
2. International Child Abduction Remedies Act, Pub. L. No. 100-300, § 2, 102 Stat. 437 (1988) (codified at 42 U.S.C. § 11601); *see also* Exec. Order No. 12,648, 22 C.F.R. §§ 94.1–94.8 (1988) (naming State Department as U.S. Central Authority).
3. CHILD ABDUCTION CONVENTION, preamble.
4. 189 F.3d 240, 246 (2d Cir.1999) (*Blondin II*).
5. *Id.*
6. 2013 U.S. Dist. LEXIS 105323 (S.D.N.Y.).
7. *Supra* note 1.
8. *Supra* note 2.
9. *D.T.J.*, 2013 U.S. Dist. LEXIS 105323 at *11.
10. *Id.*
11. *Id.*
12. *Id.*

went with Schmirer to live in Karancsaija, Hungary.[13] On D.T.J.'s seventh birthday, Jakubik came to pick up D.T.J. from Schmirer's home to take her to McDonald's.[14] Upon returning to Schmirer's home where Schmirer was standing outside, Jakubik refused to let D.T.J. leave the car and drove off. For the next ten months, D.T.J. lived with Jakubik.[15] Schmirer brought a proceeding in the Municipal Court of Salgotarjan, Hungary, to have D.T.J. returned to her.[16] On January 22, 2006, the court granted custody to Schmirer and visitation rights to Jakubik on every other weekend from Saturday to Sunday and half of any multi-day holidays.[17] D.T.J. alleged that, during one stay at her father's household, he touched her undergarments in the area of her crotch while the two were sharing a bed.[18] Around the summer of 2011, Schmirer and D.T.J. decided to move to America to live in Haverstraw, New York, with Schmirer's mother, Katalin O'Toole, and her husband, John O'Toole.[19] Neither Schmirer nor D.T.J. informed Jakubik of their plans. D.T.J. went to her father's house and asked him for money on September 5, 2011; she departed with her mother for the United States the next day.[20]

Under the Child Abduction Convention, removal is wrongful when

> (1) the child was habitually resident in one State and has been removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner's custody rights under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal or retention.[21]

On January 14, 2013, Jakubik filed a petition for the return of D.T.J. along with an application for emergency relief in the form of an Order to Show Cause.[22] Pursuant to the Order, which was granted that day, the court set a hearing for June 24, 2013.[23] On June 24, 2013, the court discussed with the parties and their counsel that a voluntary resolution of the case was possible and ordered them to meet in an attempt to reach such a resolution.[24] On June 26, 2013, the court received a letter from counsel for the petitioner, which explained that a voluntary resolution could not be reached between the parties during their meeting.[25] Subsequently, Jennifer Baum, Esq., was appointed as counsel for D.T.J. and the court granted D.T.J.'s motion

13. *Id.* at *12.
14. *Id.*
15. *Id.* at *13.
16. *Id.*
17. *Id.* at *13–14.
18. *Id.* at *15.
19. *Id.*
20. *Id.* at *16.
21. Gitter v. Gitter, 396 F.3d 124, 130–31 (2d Cir. 2005); *see* Child Abduction Convention, art. 3.
22. *D.T.J.*, 2013 U.S. Dist. LEXIS 105323 at *2.
23. *Id.*
24. *Id.*
25. *Id.*

to intervene as a party to the case.[26] A bench trial was held from July 22 to July 25, 2013. At that trial, various witnesses, including D.T.J., gave testimony.[27]

III. Discussion

A. Prima Facie Case

Wrongful removal proven by a preponderance of the evidence establishes a prima facie case, which the court found that Jakubik had established under ICARA.[28] It was conceded by both parties that D.T.J. was a habitual resident of Hungary, because she was born there and lived there until the age of 13.[29] It was also conceded that Jakubik had visitation rights; therefore, the removal of D.T.J. was in violation of his custody rights under the Child Abduction Convention.[30] Regarding the third factor, D.T.J. argued that Jakubik was not exercising his custody rights at the time of removal.[31] The court disagreed, primarily because Jakubik visited D.T.J. about 30 times during her last two years in Hungary.[32]

B. Affirmative Defenses

Once a prima facie case is established, the child must be repatriated for custody proceedings unless the respondent establishes one of the four affirmative defenses, which include

> (1) the proceeding was commenced more than a year after the child's removal and the child has become settled in his or her new environment, [Child Abduction] Convention art. 12; (2) the person seeking the child's return was not exercising his or her custody rights at the time of removal or retention, or he or she consented to—or subsequently acquiesced in—the child's removal or retention, [Child Abduction] Convention, art. 13(a); (3) returning the child poses a "grave risk" to his or her physical or psychological well-being or would place him or her "in an intolerable situation," [Child Abduction] Convention art. 13(b); or (4) the return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms, [Child Abduction] Convention art. 20."[33]

The burden of proof for the first and second defenses is preponderance of the evidence, while for the third and fourth it is clear and convincing evidence.[34] Additionally, there is a fifth dis-

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26. *Id.* at *3.
27. *Id.*
28. 42 U.S.C. §§ 11601(a)(4), 11603(e)(2).
29. *D.T.J.*, 2013 U.S. Dist. LEXIS 105323 at *19.
30. *Id.*
31. *Id.* at *20.
32. *Id.*
33. *Id.* at *3; *see* Child Abduction Convention art. 12, 13(a), 13(b), 20.
34. *See* 42 U.S.C. §§ 11601(e)(2)(b),11603(e)(2)(A).

cretionary defense under Article 13, which provides "[t]he judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."[35] However, even when an affirmative defense is established, courts still have the discretion to order repatriation of the child.[36]

Schmirer and D.T.J. both argued that Jakubik did not commence the proceeding until a year after her removal and D.T.J. was well-settled in the United States.[37] When the "settled" defense is asserted, courts analyze a number of factors, including age, the stability of the child's new environment, school attendance, whether the child has friends and relatives in the new environment, the status of the respondent's employment, and the child's immigration status.[38] Regarding the first factor, the court found that, because D.T.J. was in the middle of her high school years, which is "a critical period of academic development and social maturation," D.T.J's age supports her "settled" defense.[39] D.T.J. had remained in the same residence, with various caring family members, since her arrival in the United States; therefore, the second factor was also in favor of D.T.J.'s "settled" defense. D.T.J.'s school reports indicated strong attendance and academic performance; therefore, the third factor was also in favor of her "settled" defense.[40]

Schmirer was not employed at the time of the proceeding.[41] However, she and D.T.J. were financially supported by John and Katalin O'Toole, who received a pension and had saved a significant amount of money; therefore, the fourth factor was conflicting in regard to the "settled" defense.[42] Schmirer and D.T.J. were both undocumented persons in the United States, which weighed against a finding that D.T.J. was "settled"; however, according to an expert witness, the likelihood of either of them being deported was low.[43] Therefore, the sixth factor favored D.T.J.'s "settled" defense.[44] The court held that Schmirer and D.T.J. met the "settled" defense based on the evidence, which overall indicated D.T.J.'s acclimation and assimilation to the United States.[45]

The court also assessed D.T.J's age and maturity, in order to determine whether her objection to being repatriated should be considered.[46] The court found that D.T.J. was a reasonably

35. Child Abduction Convention, art 13.

36. *See* Souratgar v. Lee, 720 F.3d 96 (2d Cir. 2013).

37. *D.T.J.*, 2013 U.S. Dist. LEXIS 105323 at *22.

38. *See* In re Koc, 181 F. Supp. 2d 136 (E.D.N.Y. 2001).

39. *D.T.J.*, 2013 U.S. Dist. LEXIS 105323 at *26.

40. *Id.* at *29.

41. *Id.* at *11.

42. *Id.*

43. *Id.* at *12–13.

44. *Id.* at *40.

45. *Id.* at *40–41.

46. *Id.* at *42.

mature 15-year-old, based on her analytic skills and assessments of reality as well as her emotional maturity.[47] Therefore, D.T.J. met the requirements of the "age and maturity" defense.

D.T.J. and Schmirer also attempted to assert the "grave risk" defense. They argued that D.T.J., if returned to Hungary, would "incur psychological damage, occasioned by her proximity to a violent and abusive father; and be at risk of sexual abuse at the hands of her father."[48] D.T.J. pointed to a number of incidents that demonstrated her father's abusive behavior, emphasizing various Facebook messages and wall postings from Jakubik to D.T.J., which included vulgar language and an intention to behave violently toward Schmirer.[49] D.T.J. expressed fear that, if she returned to Hungary, Jakubik would hurt her mother.[50] D.T.J. also offered evidence about the alleged incident of sexual abuse by Jakubik; however, the court did not find that D.T.J's allegations of sexual abuse, which arose after Jakubik's petition was filed, supported a finding of "grave risk."[51] Based on the culmination of evidence, the court found that repatriating D.T.J. to Hungary would pose a "grave risk," because of her proximity to a violent and abusive father; therefore, the requirements of the "grave risk" defense were met.[52]

IV. Conclusion

The court held that Schmirer and D.T.J. established three affirmative defenses provided by the Child Abduction Convention and ICARA, including the "settled," "age and maturity," and "grave risk" defenses, each of which independently justified denial of Jakubik's petition for the return of his daughter.[53] Although in this case, D.T.J. and Schmirer were able to strongly establish three of the affirmative defenses, the Child Abduction Convention requires the satisfaction of only one. Because of decisions in which a claim of wrongful removal is defeated by the establishment of one affirmative defense, parents will be aware that they can easily circumvent a finding of wrongful removal. I believe courts should consider construing the affirmative defenses more narrowly or making it mandatory that parties fighting a finding of wrongful removal satisfy three affirmative defenses, as in *D.T.J. v. Schmirer*. If courts continue to allow a finding of wrongful removal to be defeated by satisfying only one affirmative defense, I believe parents will become too comfortable abducting children across international borders.

Amanda Kurtti

47. *Id.*
48. *Id.* at *50.
49. *Id.* at *53.
50. *Id.* at *62–63.
51. *Id.* at *51–52.
52. *Id.*
53. *Id.* at *1.

Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ

919 F. Supp. 2d 411 (S.D.N.Y. 2013).

Petitioners sought to enforce a judgment against entities that the U.S.D.C. for D.C. had found to be instrumentalities of the Islamic Republic of Iran. The U.S.D.C. for N.Y. held that the assets identified by the petitioners could be attached in satisfaction of a judgment and that no OFAC license was required.

I. Holding

In *Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ*,[1] the District Court for the Southern District of New York held that the victims of the 1996 terrorist attack on the Khobar Towers in Saudi Arabia were entitled to an order attaching Islamic Republic of Iran instrumentalities' funds.[2] The petitioners were family members and the estates of 17 U.S. Air Force personnel killed in the attack.[3] Section 1610(g) of the Foreign Sovereign Immunities Act[4] allows "the property of a foreign state against which a judgment is entered under section 1605A" to be subject to attachment in support of execution.[5] The Office of Foreign Assets Control (OFAC), an agency of the U.S. Department of Treasury, and Presidential Executive Orders[6] blocked these funds.[7] OFAC has construed the entities that hold these funds as Specially Designated Nationals (SDNs).[8] SDNs are individuals and companies who are acting for or on behalf of targeted countries.[9]

II. Facts and Procedural History

A. Facts

On June 25, 1996, terrorist attacks in Saudi Arabia killed 19 U.S. Air Force personnel.[10] Their family members and estates are bringing this suit against the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and the Iranian Islamic Revolution Guard Corps (the defendants).[11] The petitioners are seeking a judgment requiring the respondent, Bank of Tokyo Mitsubishi UFJ, to provide them with funds from Iranian entities that are instrumental-

1. 919 F. Supp. 2d 411 (S.D.N.Y. 2013).
2. *Id.* at 412.
3. *Id.*
4. 28 U.S.C. § 1610(g).
5. *Estate of Heiser*, 919 F. Supp. 2d at 417.
6. Executive Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995), Executive Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001), Executive Order No. 13382, 70 Fed. Reg. 38567 (June 28, 2005), and Executive Order No. 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012).
7. *Estate of Heiser*, 919 F. Supp. 2d at 414.
8. *Id.*
9. *Id.*
10. *Id.* at 412; AMANDA FERGUSON, THE ATTACK ON U.S. SERVICEMEN IN SAUDI ARABIA ON JUNE 25, 1996 4–7 (Rosen Publ'g Grp., Inc., 2003).
11. *Estate of Heiser*, 919 F. Supp. 2d at 412.

ities of the Islamic Republic of Iran.[12] In an effort to demonstrate evidence that the Iran Entities are instrumentalities of Iran, the petitioners submitted a chart that was produced by the respondent.[13] The chart displayed the electronic fund transfer (EFT) transactions, "with the transactions' dates, the sending banks, and the transactions' originators and beneficiaries."[14] Additionally, the chart showed that the Iranian entities, which were designated as SDNs, were the intended beneficiaries of the EFT transactions.[15]

B. Procedural History

The petitioners filed two claims for both intentional infliction of emotional distress and wrongful death, in the U.S. District Court for the District of Columbia (D.C. Court).[16] Some of the petitioners brought the action on September 29, 2000, pursuant to the Foreign Sovereign Immunities Act (FSIA).[17] The D.C. Court held that the FSIA provided jurisdiction against Iran, because it grants district courts original jurisdiction over actions against foreign states.[18] Other petitioners brought similar claims against the exact same defendants on October 9, 2001.[19] The D.C. Court consolidated the two actions.[20] On December 22, 2006, the D.C. Court entered default judgment against Iran, the Iranian Ministry of Information and Security, and the Iranian Revolutionary Guard Corps.[21] The D.C. Court held that, pursuant to section 1605(a)(7), the defendants were jointly and severally liable for $254,431,903 in damages.[22]

After section 1605(a)(7) was repealed, numerous terms from that section were incorporated into section 1605A.[23] For example, section 1605A continued to revoke immunity for foreign states that are officially named as sponsors of terrorism by the Department of State.[24] Section 1605(a)(7) served as a terrorism exception to allow federal courts to have jurisdiction over foreign state sponsors of terrorism.[25] However, section 1605A provides a "federal cause of action against foreign state sponsors of terrorism."[26] Section 1605A is a much broader statute and makes it easier for the petitioner to bring the claim in federal court. Under section 1605A, a foreign state, from which money damages are sought for death caused by an act of terrorism,

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12. *Id.*
13. *Id.* at 421.
14. *Id.*
15. *Id.*
16. *Id.* at 413.
17. 28 U.S.C. § 1330.
18. *Estate of Heiser*, 919 F. Supp. 2d at 413.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 416.
24. *Id.*
25. Inae Yang, Weinstein v. Islamic Republic of Iran*: The Second Circuit Pierces the Corporate Veil Against Instrumentality of the Terrorist Party*, N.Y. ST. B.J. (Sept. 2011) p. 42, 43.
26. *Id.*

is under the jurisdiction of the U.S. courts.[27] On January 13, 2009, petitioners were entitled to proceed under the newly enacted statute, section 1605A.[28] Subsequently, on September 30, 2009, the D.C. court entered an additional judgment under section 1605A of the FSIA, awarding additional damages for lost wages and future earnings totaling $336,658,063.[29]

Iran has been classified a sponsor of terrorism since 1984.[30] The D.C. Court held that the defendants were subject to jurisdiction under section 1605A of the FSIA.[31] Thus, on September 30, 2009, that court held that, under section 1605A, the plaintiffs were entitled to lost wages and future earnings totaling $336,658,063, because a state is not immune to money damages claims in the United States if it is determined to be a terrorist state.[32]

Additionally, the Terrorism Risk Insurance Act of 2002 (TRIA)[33] provides that the blocked assets of a terrorist organization shall be "subject to execution of attachment in aid of execution."[34] This statute provides courts with subject-matter jurisdiction against property to fulfill the judgment to the level of compensatory damages.[35] The D.C. Court concluded that a sufficient period had elapsed following entry of the judgments to authorize an attachment in aid and execution of its December 2006 and September 2009 judgments.[36] Attachment is permitted only after the court issues the attachment and determines that a reasonable time has passed following the entry of the judgment.[37]

III. Discussion

A. Standard for Summary Judgment

In a summary judgment motion, the burden is on the movant to present evidence of each material element of a claim or defense that is sufficient to demonstrate that he or she is entitled to relief as a matter of law.[38] In raising a triable issue of fact, the non-movant has a "limited burden of production." However, the non-movant must still demonstrate more than some metaphysical doubt as to the specific material facts, showing there is a genuine issue for trial.[39]

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27. 28 U.S.C. § 1605A (2008).
28. *Estate of Heiser*, 919 F. Supp. 2d at 413.
29. *Id.*
30. *Id.* at 416; *see also* State Sponsors of Terrorism, U.S. STATE DEPARTMENT, http://www.state.gov/j/ct/list/c14151.htm.
31. *Id.*
32. *Id.* at 413.
33. TRIA, § 201(a), Pub. L. No. 107-297, 116 Stat. 2322, 2337, codified at 28 U.S.C. § 1610 note.
34. *Estate of Heiser*, 919 F. Supp. 2d at 416.
35. *Id.*
36. *Id.* at 413.
37. 28 U.S.C. §1610(c) (2012).
38. *Estate of Heiser*, 919 F. Supp. 2d at 415; Fed. R. Civ. P. 56(a).
39. *Estate of Heiser*, 919 F. Supp. 2d at 415; Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004).

B. The FSIA Framework for Sovereign Liability and the Execution of Judgment

Because Iran has been considered a state sponsor of terrorism since 1984,[40] it is subject to jurisdiction under section 1605A.[41] Section 1605A "abrogates immunity for those foreign states officially designated as state sponsors of terrorism."[42] TRIA allows for courts to attach the assets of a terrorist party, including blocked assets of any instrumentality of that terrorist, to satisfy the judgment in the amount the terrorist party has been held liable.[43] In order to help execute the judgment, section 1610(g) of the FSIA permits the attachment, providing that "the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state" is subject to attachment.[44] The attachment helps in the execution of that judgment "regardless of the level of economic control over the property by the government of the foreign state."[45]

C. Executive Branch Authority over Foreign Transactions and the Office of Foreign Assets Control

The International Emergency Economic Powers Act (IEEPA)[46] allows the President to regulate international economic transactions.[47] Under IEEPA, presidents can use their authority to block property of weapons of mass destruction.[48] Additionally, they have blocked property of the Government of Iran and Iranian Financial Institutions.[49]

The Bank of Tokyo has acknowledged that it is in possession of bank accounts that hold the blocked assets of the SDNs.[50] The Bank of Tokyo is not resisting the motion to turn over the blocked assets.[51] IEEPA gives the President authority to prohibit transfers of credit or payment by any banking institution if the transfer involves a foreign country.[52] Thus, the Bank of Tokyo froze the assets of the Iranian instrumentalities with bank accounts there.[53]

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40. Weinstein v. Islamic Republic of Iran, 609 F.3d 43, 48 (2d Cir. 2010); *see also* State Sponsors of Terrorism, U.S. STATE DEPARTMENT, http://www.state.gov/j/ct/list/c14151.htm.
41. *Estate of Heiser*, 919 F. Supp. 2d at 416.
42. *Weinstein*, 609 F.3d at 48.
43. TRIA, § 201(a), Pub. L. No. 107-297, 116 Stat. 2322, 2337, codified at 28 U.S.C. § 1610 note.
44. *Estate of Heiser*, 919 F. Supp. 2d at 417; 28 U.S.C. § 1610(g) (2012).
45. 28 U.S.C. § 1610(g)(1)(A) (2012).
46. 50 U.S.C. §§ 1701 *et seq.*
47. *Estate of Heiser*, 919 F. Supp. 2d at 417.
48. *Id.*; Executive Order No. 13382, 70 Fed. Reg. 38567 (June 28, 2005).
49. *Estate of Heiser*, 919 F. Supp. 2d at 417; Executive Order No. 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012).
50. *Estate of Heiser*, 919 F. Supp. 2d at 422.
51. *Id.* at 412.
52. *Id.* at 417.
53. *Id.*

D. The Petitioners Have Come Forward With Evidence That the Eight Non-Party Iranian Entities Are Instrumentalities of Iran

Patrick L. Clawson, Ph.D., is the Director of Research of the Washington Institute for Near East Policy and has specialized knowledge of "financial accounts, wire transfers and other transactions involving assets blocked by OFAC directives."[54] Mr. Clawson has researched Iran's political system and claims to be knowledgeable about Iran's national and state-owned banks.[55] Petitioners submitted Mr. Clawson's affidavit in support of their motion.[56]

E. The Petitioners Are Entitled to Attach the Requested Funds

OFAC listed the entities, which are "individuals or companies owned or controlled by, or acting for or on behalf of,"[57] as SDNs and the petitioners have produced evidence that the entities are instrumentalities of Iran.[58] Thus, these entities could be attached to help execute the judgment pursuant to the FSIA.[59] New York law governs the enforcement of this execution.[60] Petitioners established that they are entitled to attach the Iran Entities' funds and that they satisfied section 5225(b) of the New York Civil Practice Law and Rules (CPLR).[61] Under CPLR 5225(b), in a proceeding that is started by a judgment creditor against a judgment debtor who has an interest in that property, the judgment creditor's rights are "superior to those of the transferee, and the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment."[62]

F. The Court and the Parties Accept the Representations of the United States That No OFAC License Is Required to Authorize Release of the Blocked Assets

The respondent does not oppose the motion but is concerned that OFAC did not issue a license specific to the blocked assets.[63] The United States submitted a Statement of Interest pursuant to 28 U.S.C. § 517 that concludes, "in the event a court determines that blocked assets are subject to TRIA, those funds may be distributed without a license from the OFAC."[64] The court is not aware of any contrary authority that would require an OFAC license in this instance.[65]

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54. *Id.* at 418.
55. *Id.*
56. *Id.*
57. *Id.* at 414.
58. *Id.* at 421.
59. *Id.*
60. CPLR 5225(b).
61. *Estate of Heiser*, 919 F. Supp. 2d at 421.
62. *Id.* at 421–22.
63. *Id.* at 422.
64. *Id.*
65. *Id.*

IV. Conclusion

The District Court granted the petitioners' motion for summary judgment. The court determined that the petitioners provided sufficient evidence to show that the entities were instrumentalities of Iran's government.[66] Thus, the court held that the entities were "controlled by, or acting for or on behalf of" Iran.[67] Moreover, the court determined that no OFAC license was required to release the blocked assets.[68]

Viktoriya Kruglyak

66. *Id.* at 421.

67. *Id.* at 414.

68. *Id.* at 422.

Bridas International S.A. v. Repsol, S.A.

2013 WL 4437189 (Sup. Ct., N.Y. Co. Aug. 19, 2013)

The Supreme Court, New York County, dismissed claims of Bridas International S.A. against Repsol S.A., Spain's largest oil company, because the Noerr-Pennington doctrine insulated the defendant from liability for threatening the commencement of a lawsuit.

I. Holding

In *Bridas International S.A. v. Repsol, S.A.*,[1] the Supreme Court, New York County, dismissed claims against Repsol by Bridas International, which alleged tortious interference with business relations and sought a declaratory judgment. At the outset, the court declined to decide whether Bridas's conduct merited dismissal on venue grounds, despite the *forum non conveniens* factors mostly weighing in their favor, because the action was dismissed on other grounds.[2] First, with respect to the two requests for declaratory judgment, the court held that it did not possess the jurisdiction or power to dictate to courts of concomitant jurisdiction.[3] Next, in examining the claim for tortious interference with business relations, the court applied the *Noerr-Pennington* doctrine, which protects the plaintiff from liability for petitioning the court on a claim of tortious interference based on the commencement of litigation.[4]

II. Facts and Procedure

The case involves a lawsuit between Repsol S.A., Spain's largest oil company, and Bridas Group, an Argentine company that bought the rights to a $1.5 billion project to develop oil shale fields.[5] Repsol claims the Republic of Argentina illegally confiscated or expropriated Repsol's majority interest in YPF S.A. (YPF), Argentina's formerly state-run public energy company, without compensation.[6] During the 1990s, Argentina privatized YPF by selling its shares on the New York Stock Exchange.[7] In 1999, Repsol purchased the majority of YPF's shares and acquired control of the company.[8] In May 2012, the Argentine government expropriated Repsol's controlling stake of YPF by seizing 51% of its shares.[9] Repsol asserted that the expropriation violated YPF's bylaws, which required Argentina to make a tender offer for the shares, and

1. 2013 WL 4437189 (Sup. Ct., N.Y. Co. Aug. 19, 2013).
2. *Id.* at *4.
3. *Id.* at *5–6.
4. *Id.* at *6.
5. Patricia Laya, *Repsol Sues Argentina's Bridas Over Shale Development With YPF*, BLOOMBERG (May 7, 2013 2:23 PM), http://www.bloomberg.com/news/2013-03-07/repsol-sues-argentina-s-bridas-over-shale-development-with-ypf.html.
6. *Bridas Int'l*, 2013 WL 4437189 at *6.
7. *Id.*
8. *Id.*
9. *Id.*

was illegal under Argentine, United States and international law. Repsol commenced at least five other lawsuits seeking redress in New York state and federal courts.[10]

On August 29, 2012, YPF and Chevron, an affiliate of the plaintiff, entered into a confidential Memorandum of Understanding (MOU) concerning a plan to develop YPF's energy assets in Argentina.[11] On December 28, 2012, Bridas agreed to a term sheet with YPF to execute the transaction proposed in the MOU.[12] Repsol learned of the term sheet the same day and on January 2, 2013, sent letters to Bridas, demanding that Bridas cease and desist from negotiating or doing business with YPF.[13] The letter also stated that Repsol was "a victim of the unlawful seizure of its controlling interest in YPF by the Argentine government" and that if plaintiffs did not immediately discontinue their dealings with YPF, Repsol would commence litigation within 48 hours.[14]

On January 3, 2013, Bridas initiated this action against Repsol, seeking a declaratory judgment and asserting tortious interference with business relations.[15] Bridas asked the court to declare that (1) the question of who are the legal owners of YPF be left to the Argentine legal system for determination and not to non-Argentine courts and (2) "unless and until the Argentine legal system determines that YPF's current owners are not its actual legal owners, business entities such as [Bridas] and their affiliates are entitled to enter into ordinary course business transactions with YPF through its current management and to rely on the validity and binding effect of such transactions."[16]

Repsol then commenced an action against Bridas in Commercial Court No.1 of Madrid, Spain.[17] The basis for the Spanish action is that Bridas allegedly violated Spain's Unfair Competition Law by attempting to do business with YPF after Repsol's control over YPF was expropriated by the Argentine government.[18] Bridas does not do business in Spain, so it moved to dismiss the complaint, arguing the court lacked both personal jurisdiction over Bridas and subject matter jurisdiction over the dispute.[19] The Spanish court ruled that Bridas was subject to personal jurisdiction in Spain, and that it had subject-matter jurisdiction over the action.[20]

Repsol moved to dismiss the New York action on three grounds: (1) that this court should give deference to the Spanish court and allow the parties' dispute to be resolved in the Spanish

10. *Id.*
11. Complaint at 8, *Bridas Int'l S.A.*, WL 4437189.
12. *Bridas Int'l*, 2013 WL 4437189, at *1.
13. *Id.*
14. *Id.*
15. *Id.* at *2.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

action; (2) that this court cannot grant Bridas's requested declaratory judgment; and (3) that Bridas failed to properly plead a claim for tortious interference with business relations.[21]

III. Discussion

A. Venue

In evaluating Repsol's motion to dismiss, the court first addressed venue and whether Bridas's first-to-file action in this court was "the product of procedural gamesmanship."[22] The court noted that, under CPLR 3211(a)(4), a court *need not* dismiss an action simply because there are duplicate causes of action pending between the same parties in a court of any state or the United States.[23] Rather, a court "may make such order as justice requires."[24]

The standard on a motion to dismiss under CPLR 3211(a)(4) is analogous in applying the doctrine of *forum non conveniens*, where it is within the court's discretion to determine "whether the litigation and parties have sufficient contact with this State to justify the burdens imposed on our judicial system."[25] The court applied New York's *forum non conveniens* statute, CPLR 327(a), which places the burden on the party challenging the forum to demonstrate that the forum is inconvenient.[26] Factors traditionally considered in making this determination are the hardship faced by the defendant in defending in New York, availability of an alternative forum, and the residence of the parties and jurisdiction where the transaction occurred. This must be balanced with the goal of fairness, justice and convenience.[27] Lastly, the forum in which the litigation was first commenced is not a dispositive factor in deciding a motion for *forum non conveniens*.[28]

Here, the court recognized that Bridas had no connection to Spain and acknowledged the disadvantage posed by being sued in Spanish court by a "Spanish oil company whose home country is outraged over Argentina's expropriation."[29] Moreover, the court conceded that *forum non conveniens* factors weigh heavily in favor of Bridas, since evidence, witnesses, documents and individuals are located in New York or will be in New York due to other actions commenced by Repsol in New York.[30] However, the court declined to decide whether Bridas's conduct merited dismissal on venue grounds, because this action was dismissed for other reasons.[31]

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21. *Id.*
22. *Id.* at *3.
23. *See* In re NYSE Euronext Shareholders/ICE Litig., 965 N.Y.S.2d 278 (N.Y. Sup. Ct. 2013).
24. *Bridas Int'l*, 2013 WL 4437189, at *3.
25. *Id.* (quoting Flintkote Co. v. Am. Mut. Liab. Ins. Co., 480 N.Y.S.2d 742, 745 (2d Dep't 1984)).
26. *See* Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 478–79 (1984).
27. *Bridas Int'l*, 2013 WL 4437189, at *3.
28. The rationale underlying this is that the "first-to-file" rule would "create disincentives to responsible litigation by discouraging settlement negotiations out of apprehension that an adversary might take advantage of the opportunity to file a preemptive suit in an advantageous forum" (quoting Don King Prods., Inc. v. Douglas, 735 F. Supp. 522, 532 (S.D.N.Y. 1990)).
29. *Bridas Int'l*, 2013 WL 4437189, at *3.
30. *Id.* at *4.
31. *Id.*

B. Declaratory Judgment

A declaratory judgment is used to establish the legal rights of the parties to a justiciable controversy.[32] Its purpose is to serve a practical end by settling an uncertain dispute relating to present or future obligations.[33] Accordingly, in a civil dispute, courts are asked to conclusively affirm the rights, duties, or obligations of one or more parties rather than grant a monetary or equitable remedy.

The court began by addressing the first requested declaration, which asked the court to determine which of the numerous courts dealing with issues relating to the legal ownership of YPF should decide the issue.[34] In denying this declaration, the court stated that it did not have the jurisdiction to dictate to courts of attendant jurisdiction whether they can or cannot adjudicate the issue of YPF's legal ownership.[35]

In analyzing Bridas's second requested declaration, the court concluded that it actually conflated and sought adjudication of a number of legal issues, and the declaration was vague and ambiguous.[36] If the first half of the request were read broadly, Bridas's declaration that it is "entitled" to do business would mean doing so would not violate any law of a jurisdiction.[37] The court refused to make this declaration. However, if the first half were read narrowly, Bridas being "entitled" would mean that any law applicable to business relations between Bridas and YPF would not be violated.[38] The court also refused to make this declaration, because even if the court were able to conduct a choice-of-law analysis, deduce the appropriate law and make the declaration, there could still potentially be a duplicate action in Spain.[39] This would be a waste of judicial resources and could result in inconsistent rulings.[40]

Second, the court stated it did not have the jurisdiction to decide whether the Spanish court maintains jurisdiction.[41] Even if the court issued a declaratory judgment, it would not "serve [a] practical end" in resolving the parties' disputes, because a judgment in this court would not be binding on foreign courts, nor would it absolve Bridas of liability in the Spanish action.[42] Thus, the court dismissed Bridas's declaratory judgment cause of action without leave to amend.[43]

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32. *See* Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 99 (1st Dep't 2009).

33. *Bridas Int'l*, 2013 WL 4437189, at *5.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at *6 (quoting *Thome*, 70 A.D.3d 88, at 99).

43. *Id.*

C. Tortious Interference with Business Relations

In order to prove tortious interference with business relations, a plaintiff must show (1) it had a business relationship with a third party, (2) the defendant knew of that relationship and intentionally interfered with it, (3) the defendant acted solely out of malice or used improper or illegal means that amount to a crime or independent tort, and (4) the defendant's interference caused injury to the relationship with the third party.[44]

The court applied the *Noerr-Pennington* doctrine,[45] which shields a party that threatens the commencement of litigation from liability for tortious interference.[46] To overcome this doctrine the plaintiff must show the threatened litigation is a "sham" or "objectively baseless."[47]

Here, the court found Repsol's litigation threat was not "objectively baseless" or a "sham."[48] Moreover, the Spanish action is not before this court and even if the record were, this court is still precluded by principles of comity from "casting aspersions" with respect to the Spanish law claims.[49]

IV. Conclusion

The Supreme Court, New York County, was correct to dismiss this action brought by Bridas. To allow Bridas to file suit in another forum in response to the lawsuit filed by Repsol in Spain would encourage other parties to file lawsuits in more favorable fora and engage in forum-shopping. Despite these concerns, the court still acknowledged the inherent unfairness in allowing Repsol, a Spanish company, to proceed in a Spanish forum, where the people of Spain are outraged over the expropriation by Argentina. Nonetheless, the effect of this decision in this lawsuit will proceed in another forum without the risk of a simultaneous lawsuit and conflicting decisions.

Christina Bello

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44. *Id.*; *see* Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 47 (1st Dep't 2009).

45. *Bridas Int'l*, 2013 WL 4437189, at 6; *see* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *see also* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

46. The *Noerr-Pennington* doctrine originally concerned the application of federal antitrust statutes in light of the right to petition, but was expanded to federal and state law claims, including common-law tortious interference with contractual relations claims. *See* Video Int'l Prod. v. Warner-Amex Cable Commc'n, 853 F.2d 1075, 1084 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989) (citing Evers v. Cnty. of Custer, 745 F.2d 1196, 1204 (9th Cir. 1984); Gorman Towers v. Bogoslavsky, 626 F.2d 607, 614 (8th Cir. 1980)). The Fifth Circuit explained that there was "no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust right." *Video Int'l*, 858 F.2d at 1084. Thus, "liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petition is a 'sham,' and the real purpose is not to obtain governmental action, but to otherwise injure the plaintiff." Sierra Club v. Butz, 349 F. Supp. 939 (N.D. Cal. 1972).

47. *Bridas Int'l*, 2013 WL 4437189, at 6.

48. *Id.*

49. *Id.*